

MOI UNIVERSITY
SCHOOL OF BIOLOGICAL AND PHYSICAL
Department of statistics and Computer Science
COM 421: ENGINEERING AND SOFTWARE LAW

Course Purpose

This course provides the students with the basic understanding of law and explanations of the various classifications of law. It also highlights the importance of law in the society and in the business world.

Course Objectives

1. Equip students with the knowledge on the nature, functions and sources of law.
2. Provide the students with the understanding of the types of law and its implication to business.
3. Enable students understand and apply the law of contract, law of tort, law of succession and arbitration and contracts of employment.

Expected Learning Outcomes

By the end of the course, students should be able to:

1. Explain the nature, functions and sources of law.
2. Describe the various types of law and its implication to business.
3. Illustrate the law of contract, law of tort, law of succession and arbitration and contracts of employment.

COURSE CONTENT**1.0 INTRODUCTION TO LAW**

- Definitions and Nature of Law
- Purposes of Law
- Classifications of Law
- Sources of Law

2.0 STRUCTURE OF KENYAN COURTS, PRINCIPLES AND CONCEPTS

- Structure of Kenyan courts
- Rule of Law
- Separation of Powers and Fundamental Rights

3.0 LAW OF PERSONS

- Legal Personality
- Unincorporated Associations
- Ultra Vires Rule

4.0 LAW OF CONTRACT

- Nature of Contracts
- Essentials of a valid contract
- Classifications of Contracts
- Formation of a Contract

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- Terms of a contract
- Vitiating factors of a Contract
- Privity and Assignment of Contractual Rights and Liabilities
- Discharge of a Contract
- Remedies for Breach of Contract

5.0 LAW OF TORTS

- Nature of a Torts and Tortious Liability
- Functions of the Law of Torts
- General Defences in Torts
- Capacity in Torts
- Vicarious and Strict Liability
- Specific Torts

6.0 LAW OF SUCCESSION

- History of law of succession
- Definition and characteristics of a Will
- Intestacy
- Testate Succession
- Legacy and Grants of Representation of Estates

7.0 ARBITRATION

- Nature of arbitration
- Arbitration Agreement
- Advantages and disadvantages of arbitration
- Appointment and Removal of an Arbitrator

8.0 CONTRACT OF EMPLOYMENT AND TRADE UNION LAW

Learning and Teaching Methodologies

Lectures, Tutorials and Case Law Readings

EVALUATION

CATS and ASSIGNMENTS	-	30%
FINAL EXAMINATION	-	<u>70%</u>
TOTAL	-	<u>100%</u>

REFERENCES

1. Ashiq, Hussein (1982), *General Principles and Commercial Law of Kenya*.
2. Salemi N.A & Ateenyi T.K, (1992), *General Principles of Law*, N.A. Saleemi Publishers
3. Ogola, John Joseph (2011), *Business Law*, 2nd Edition, Focus Publishers Ltd.
4. Laws of Kenya: *Law of Contract Act Cap 23, The Constitution of Kenya (2010), Law of Succession Cap 160, Judicature Act Cap 8, Arbitration Act Cap 49*.
5. Cooke, J. (2009), *Law of Tort*, Pearson Education Ltd, England.

6. Kelly, D, Ann, H, & Ruth, H., (2002), *Business Law*, Cavendish Publishers, London.

CHAPTER 1

INTRODUCTION TO BUSINESS LAW

The Nature of Law

There are laws of physical sciences, laws of social sciences, moral laws and laws of state.

Laws of physical sciences

Laws of physical sciences are those facts which have been proved correct and do not change over a period of time. Such as law of motion, law of gravity among others

Laws of social sciences

The laws of social sciences establishes the relationship between the cause and effect of certain facts but these laws are true under certain given conditions only such as law of economics, law of sociology among others

Moral laws

Refers to laws of human conduct as members of a society, these laws guide us on how we should live in society. For examples 'Do not tell a lie' or 'Treat your fellow men with courtesy

Laws of state

Refers to those laws which are made or enforced by a state, It is the duty of the citizens of a country to obey these laws. If they disobey them, they are punished e.g. theft is a crime and whoever breaks this law will be punished by the state

NB: In this course the concern is with the laws of state only

Definition of the word 'law

Law refers to a set of rules or principles that govern the conduct of affairs in a given community at a given time, whereby machinery is provided for an aggrieved party to enforce his rights in case any of these rules or principle is broken

Law and Morality

- i) Rules of law may be enforced by an action of courts while in morality there is no enforcement or sanctions

- ii) It is a requirement that a person should respect his elders is a rule of morality, not of law
- iii) No one can be sued for failing to respect the elders but one can be sued if not respect the law
- iv) Rules of morality are defined by morality itself and vary from community to community while rules of law are always defined by the law itself and do not change

Classification of Law/ kinds of law

- i) Public Law and Private Law
- ii) Civil Law and Criminal Law
- iii) Procedural Law and Substantive Law
- iv) International Law

Private law

Private law is also called as civil law

Private law is that part of the law which is primarily concerned with rights and duties of persons towards persons.

Public law

Public law is that part of the law in which the state has an interest

Public law consists of constitutional Law, Administrative Law and Criminal Law

Constitutional law - Consists of those rules which regulate the relationship between different organs of state. These organs of state are, Legislature, judiciary and executive

Administrative law - is the law which relates to the actual functioning of the executive instruments of the Government

Criminal law - consists of wrongs committed against the state e.g. killing, drug trafficking etc

Civil Law and Criminal Law

Civil law (private law)

Is that law which governs the relations of individuals amongst themselves as opposed to the relations between the individual and the state.

Divisions of Civil Law

- i) Law of Contract
- ii) Law of torts
- iii) Law of property
- iv) Law of Succession
- v) Law of Trusts

Criminal law (public law)

It is a law that protects citizens from any public wrong (crime) committed against any citizen. The state prosecutes the criminal on behalf of the citizens as a whole

Differences between criminal and civil wrongs

Crime

- i) It is a public wrong against the state
- ii) The parties are the prosecution and the accused. The prosecution represents of the state, while the accused is the offender who is being prosecuted
- iii) Punishment is usually by imprisonment or fine, or the death penalty in the case of capital offences
- iv) The prosecution must prove its case against the accused beyond reasonable doubt. Any slight doubt must be resolved in favor of the accused.(Note: Every person is presumed to be innocent until proved guilty)
- v) Since this is a public wrong the action cannot be compromised by the parties. It is only in exceptional circumstances that the public prosecutor may withdraw a prosecution against a particular accused

Civil Wrong

- i) It is a private wrong against an individual
- ii) The parties are the plaintiff and the defendant. The plaintiff is the aggrieved party who is suing, while the defendant is the wrong doer who is being sued
- iii) Punishment is usually payment of damages (i.e. monetary compensation): or some other civil remedy may be granted to the plaintiff

- iv) The plaintiff needs only to prove his case on a balance of probabilities, not beyond reasonable doubt, i.e. the evidence must be such that it is more probable than not that his case merits success compared to that of the defendant
- v) This being a private wrong, the parties are free to compromise any action brought by one of them and the plaintiff may at any time choose to withdraw his action against the defendant

Procedural Law and Substantive Law

Procedural law

Consists of the rules which determine the manner in which the court proceedings are required to be conducted in civil and criminal cases. This law guides how a right is enforced under civil law or a crime is prosecuted under the criminal law

Substantive law

Consists of actual rules regarding the civil, criminal or other fields of law, Mainly, this law defines civil and criminal wrongs and provides remedies for each type of offence

International Law

There are two types of international law

Public International Law and Private International law

i. Public international law

Consists of those rules which regulate the relations between states, this law is based on treaties, conventions and rules of wars. For example disputes between states can be

Settled by the International Court of Justice (Palestine & Israel)

ii. Private international law

Concerned with determining which national law governs a case in which there is foreign element for example, a Kenyan signs a contract with a Ugandan in Uganda to construct one dam in Sudan and if there is breach of contract then Kenyan wants to sue the other party in Kenya. In this case, the Kenya Court will decide which national law to apply

The Sources of Kenyan Law

1. The constitution of Kenya
2. Acts of Parliament of Kenya

3. Subsidiary (Delegated) Legislation
4. Specific Acts of the Parliament of the United Kingdom
5. African Customary Law
6. Case Law or Judicial Precedent
7. Islamic Law

PURPOSE OF LAW

Each society or community has its laws which regulate the mutual relations and conduct of its members. The laws are enforced to ensure that the members of the society may live or work together in an orderly and peaceful manner

The main purposes of law are as follows:-

- i)** To regulate the conduct or behaviour of the persons
- ii)** To provide justice to the members of the society
- iii)** To maintain the political and economic stability
- iv)** To protect the fundamental rights and freedoms of the individuals
- v)** To establish the procedures and regulations regarding the dealing among the individuals
- vi)** To maintain peace and security in the country

CHAPTER TWO

STRUCTURE OF KENYAN COURTS, PRINCIPLES AND CONCEPTS

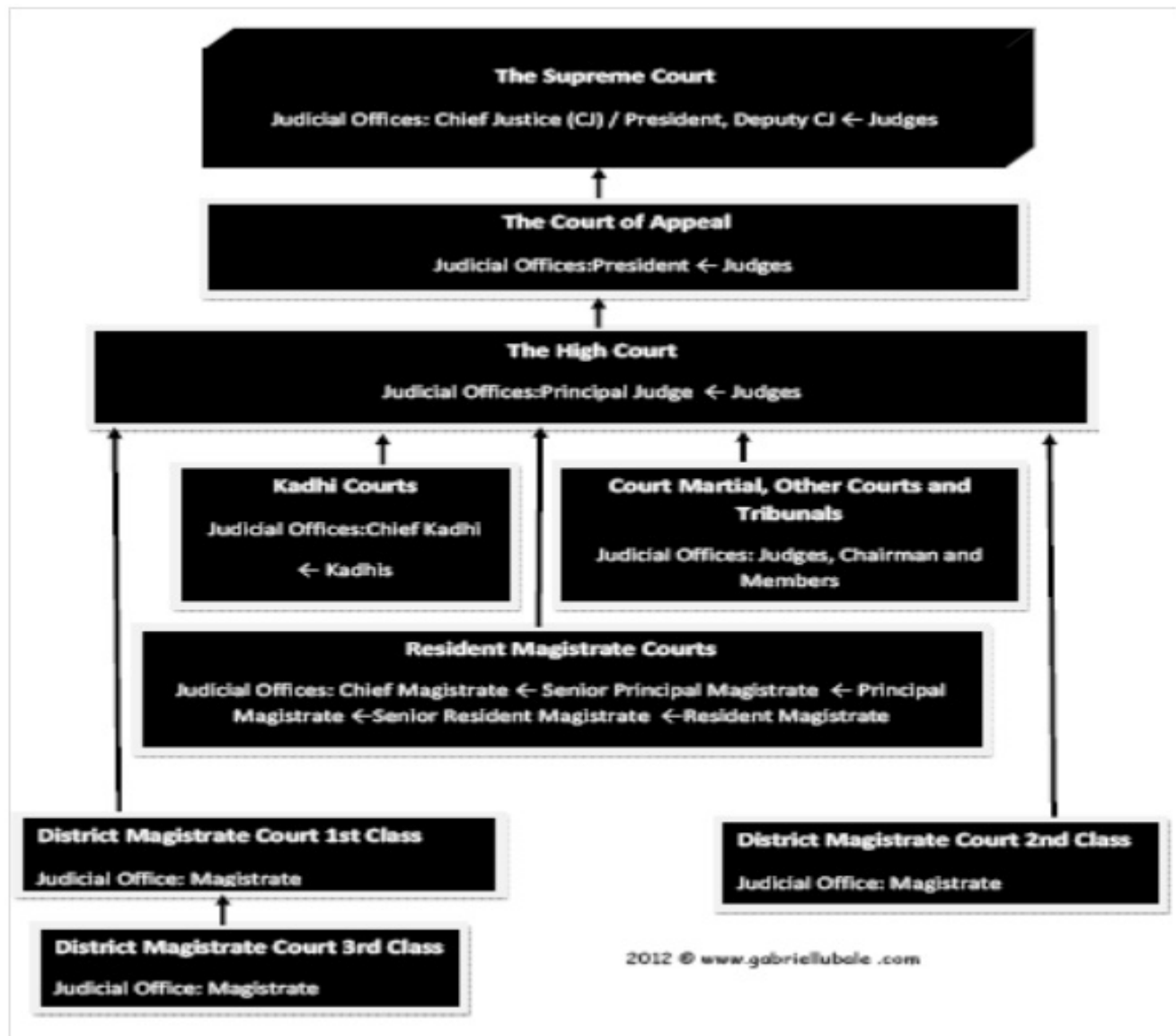
STRUCTURE OF KENYAN COURTS

In Kenya like other Nations in the Continent of Africa before the European Imperialists established (colonized) the African territories, the African Traditional Communities (ATC) used the fora of justice at family, shrines, churches, mosques. ATC also applied other alternative dispute resolution mechanisms that included reconciliation, mediation and arbitration. However, they instituted the Courts Actions as the last resort, because the people since time immemorial were aware of the fact that the Court proceedings were naturally adversarial.

The Courts operate two levels: Superior Courts and Subordinate Courts. The important aspects in the Structure of Courts are:

- i. The structure – The hierarchy or levels of Courts.
- ii. Establishment – The composition or who presides in that Court.
- iii. Jurisdiction – The powers of different Courts to hear and determine disputes. Jurisdictions are either Geographical / territorial limits of their powers or Functional powers (to hear Original matter, Appellate matter or both matters or subject matter (whether it is civil or criminal justice) or Pecuniary (the range of monetary or financial value of subject matter).

The figure illustrates the structure and explains the hierarchy of the Courts as it is today in Kenya.



THE SUPREME COURT

The Supreme Court of Kenya is established under Article 163 of the Constitution of Kenya. It comprises of 7 (Seven) Judges: the Chief Justice, who is the president of the Court, the Deputy Chief Justice, who is the deputy to the Chief Justice and the vice-president of the court and five other judges.

The Supreme Court is properly constituted for purposes of its proceedings when it has a composition of five judges and has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140 and

subject to clause (4) and (5) of Article 163 of the Constitution, appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation.

Appeals from the Court of Appeal to the Supreme Court are as a matter of right in any case involving the interpretation or application of this Constitution and in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5). The Supreme Court may review a certification by the Court of Appeal and either affirms, vary or overturn it.

The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

THE COURT OF APPEAL

Establishment: The Court of Appeal is established under Article 164 of the Constitution of Kenya 2010.

Composition: The Court of Appeal consists of a number of judges, being not fewer than 12 (twelve), as may be prescribed by an Act of Parliament and the Court is to be organized and administered in the manner prescribed by an Act of Parliament. The Court comprises of a President of the Court of Appeal who is elected by the judges of the Court of Appeal from among themselves. The Court of Appeal Judges retire at the age of 74 years.

Jurisdiction: The Court of Appeal is a superior court of record therefore it sets precedents. It has limited original jurisdiction. It was created to hear appeals from the High court.

The only moment the Court Appeal can have original jurisdiction is in punishment for contempt of court, and when stating execution of orders of the High Court. Procedure: The practice and procedure of the court of appeal are regulated by the rules of court made by the Rules Committee constituted under the Appellate Jurisdiction Act (Cap. 9). The Act provides that an uneven number of at least three judges shall sit for the determination of any matter by

the court. The decision of the court shall be according to the opinion of a majority of the judges who sat for the purposes of determining that matter.

The court has powers to:

- i. Determine a case finally.
- ii. Order for a trial.
- iii. Order for a re-trial.
- iv. Frame issues for the determination of the High Court.
- v. Receive additional evidence or order that it be taken by another court.

THE HIGH COURT

Establishment: The High Court is established under Article 165 and it consists of a number of judges to be prescribed by an Act of Parliament. The Court is organized and administered in the manner prescribed by an Act of Parliament. The Court has a Principal Judge, who is elected by the judges of the High Court from among themselves.

Composition: Ordinarily, the High Court is duly constituted by one Judge sitting alone. However there are instances where two or more High Court Judges may be required to determine certain kinds of cases.

Appointment of Judges: Are appointed by the President in accordance with the advice of Judicial Service Commission. They are laid down special qualifications required of a person to be eligible for appointment as a Judge, namely:

He / she is or has been a Judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or a court having jurisdiction in appeals from such a Court or;

He /she is an Advocate of the High Court of not less than seven years standing or;

He /she holds and has held for a period of or periods amounting in aggregate to not less than seven years, one or other of the qualifications specified in Section 12 of the Advocates Act.

Jurisdiction:

- i The High Court has unlimited original jurisdiction in criminal and civil matters.

ii The High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

iii The High Court has jurisdiction to hear an appeal from a decision of a tribunal appointed under the Constitution or national legislation to consider the removal of a person from office, other than a tribunal appointed under Article 144.

iv The High Court has jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of: the question whether any law is inconsistent with or in contravention of the Constitution, the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution, any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government, and a question relating to conflict of laws under Article 191; any other jurisdiction, original or appellate, conferred on it by legislation.

v The High Court does not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under this Constitution or falling within the jurisdiction of the courts contemplated in Article 162 (2).

vi The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Also being a Superior court of record means that the decisions of the High Court as precedents, are binding on the subordinate courts by the doctrine of stare decisis.

vii Although High Court has unlimited original jurisdiction in civil and criminal cases in actual practice, it will hear those criminal cases which cannot be tried by the subordinate courts i.e. murder and treason whereas in civil cases, it has jurisdiction where the value of the subject matter, in dispute exceeds Kshs. 500,000.00. The High Court has power to pass any sentence authorized by law.

viii In addition to the ordinary civil and criminal jurisdiction of the High Court, there are other matters, which can only be heard by the High Court. Thus, the High Court enjoys special powers and jurisdiction in the following matters as conferred to it by the constitution and other legislations some of which are given hereinafter:-

High Court Special Powers

1. Supervisory Jurisdiction

The Constitution confers specific powers on the High Court to exercise supervisory jurisdiction in any civil and criminal proceedings before subordinate courts and may make such orders, issue such writs and give such directions as may consider appropriate for the purpose of ensuring that justice is duly administered by such courts. This includes the power of the High Court to transfer proceedings from one court to the other.

To invoke the supervisory jurisdiction of the High Court a person must have exhausted all other available remedies and right of appeal. In exercise of its supervisory powers under judicial review, the high court may issue any of the prerogative orders of:

- Mandamus – The literal meaning of mandamus is “we command”. This is an Order issued by the High Court to any person or body commanding him or them to perform a public duty imposed by law or state. The order is available to compel administrative tribunals to do their duty e.g. to compel a licensing board to issue a license on application of him who has met the prescribed criteria.
- Certiorari – The term means to “be informed”. This is an Order issued by the High Court directed at an inferior court body exercising judicial or quasi-judicial functions to have the records of the proceedings presented to the High Court for the purposes: To Secure an impartial trial, To review an excess of jurisdiction, To challenge an ultra vires act, To correct errors of law on the face of the record. To quash a judicial decision made against the rules of natural justice. An order of certiorari will be wherever anybody of persons having legal authority to determine questions affecting the rights and having a duty to act judicially, acts in excess of their legal authority. It therefore serves to quash what has been done irregularly.
- Prohibition – This is an order issued by the High Court to prevent an inferior court or tribunal from hearing or continuing to hear a case either In excess of its jurisdiction or in violation of the rules of natural justice.
- Writ of Habeas corpus – Habeas corpus means „produce the body“, dead or alive. This order is issued where the personal liberty of a person is curtailed by arrest and confinement without legal justification. By issuing this order, the High Court calls upon the person holding the body to answer by what authority is they continuing to withhold the individual and with the aims at securing release of such persons held apparently without legal justification.

Establishment of the Industrial Court

Constitution of Kenya (CoK) at Art. 162 provides for the establishment of the industrial court (ICK) by legislation

The ICK deals with employment matters exclusively. The court has the status of High Court

Court Composition

- Comprises judges appointed by President on advice of Judicial Service Commission
- They retire at 70
- They elect one of their own to be Principal Judge who serves for 5 years and may serve for a final further 5 years, and reverts to judge position if s/he has not attained 70

Jurisdictions of the Industrial Court

- Dispute between employer and employee.
- Dispute between employer and Trade Unions.
- Registration of CBAs (Collective Bargaining Agreement).
- All disputes concerning terms and conditions of employment.
- Appellate jurisdiction, etc

The Environment and Land Court

The Environment and Land Court as one of the Courts contemplated by article 162(2) is a Superior Court just like its counterpart, the Industrial Court. Both have the same status as the High Court.

The court is established under section 4 of the Environment and Land Court Act No. 19 of 2011. It has jurisdiction to hear any other dispute relating to environment and land.

The jurisdiction of the court is provided under section 13 of the Act. The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of Act or any other written law relating to environment and land.

The court has powers to deal with disputes relating to land administration and management. The court is also empowered to hear cases relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land

CHAPTER THREE

LAW OF PERSONS LEGAL

The concept of Person or legal Personality

A person is defined as an entity or being which is recognized by law as having certain defined rights and obligations. Such an entity or being is said to be a legal person. Legal persons are divided into two namely;

- a) Artificial person
- b) Natural person

An entity which is recognized as a person is said to have a legal personality. I.e. it has attributes which are recognized by law as constituting a person. Examples include human beings (natural persons) and corporations (artificial persons). Legal personality of a natural person starts at birth and ends at death whereas legal personality of an artificial person (Corporation) is distinct from the person who controls the corporation.

Artificial Persons

Artificial persons may be corporations or unincorporated associations.

Corporations

A corporation may be defined as an association of persons bound together for some particular object, usually to carry on business with a view to profit. In other words, a corporation is an artificial person created by law with capital divided into transferable shares and with limited or unlimited liability, possessing a common seal and perpetual succession. The corporation has, therefore, legal personality of its own, distinct from that of its members. The individual members have rights and liabilities of their own apart from those of the corporation. The corporate body is different in that it has perpetual succession, it never dies and has a common seal by which to authenticate its acts. The members may change, but the corporate body does not.

Types of Corporations

There are four types of corporation which are recognized by the Kenya Law.

(a) Corporation Sole

This is a legal office that is occupied by one human being only at any one time. If the person ceases to occupy the office, he is succeeded by another person who will then discharge the duties and exercise the powers of the office. It is a legal person with perpetual succession capacity to sue or be sued. Examples are: The Public Trustee, the Permanent Secretary to the Treasury of Kenya.

(b) Corporation Aggregate

This is a legal entity formed by at least two people and whose membership at any one time legally consists of at least two people. Examples are private and public companies registered under the Companies Act, and co-operative societies registered under the co-operative societies Act 1966 (cap.490). It has a legal personality with perpetual succession, capacity to enter into contract, own property and sue or be sued.

The company acquires legal personality from the date of its registration by the registrar of companies. The Companies Act, S. 16 (2) provides that "which the date of incorporation ... the subscribers to the memorandum ... Shall be a body corporate by the name contained in the memorandum". S.28 of the Co-operative Societies Act provides that "a society, on registration, shall be a body corporate".

(c) Statutory Corporation

This is created by an Act of Parliament and comes into existence from the date of commencement of the Act. An example of a statutory corporation is the Agricultural Finance Corporation, KPA, KAA, KRA, KVDA, KMC etc.

(d) Chartered Corporation

A chartered corporation may be created under Section 14 of the Universities Act, 1985. Section

12 of the Act empowers the President of Kenya to grant a charter to any private university intended to be set up in Kenya if, in his opinion, the grant of the charter to the Institution concerned may be of benefit to the future development of university education in Kenya. Examples are: Baraton University and Catholic University of Eastern Africa.

Creation of Corporations

A corporation can be created in the following two ways:

(a) By act of parliament

The corporations can be created by the Act of Parliament in Kenya. The state corporations are created by this method. The main examples of such corporations are: Kenya railways, Kenya airways, Kenya Meat Commission, Pyrethrum Board of Kenya, Coffee Board of Kenya e.g. such corporations owe their legal existence to a statute.

Characteristics of a corporation created by an act of parliament

- i) A statute creating the corporation gives it a name, stipulates its composition, and prescribes its powers and duties.
- ii) The powers of these corporations are limited to those which are expressly conferred by the acts.
- iii) The powers of statutory corporation can be extended or limited by statutes.
- iv) These can be also dissolved by statutes. The statutory corporations are legal persons.
- v) They can sue and be sued.
- vi) They can buy and sell property.

(b) By registration under companies act

The registered companies are created by registration under the companies act. These are also known as limited company comes into existence by complying with the provision of the companies act (cap 486) a limited company may either be private or public limited company. A private limited company can be registered by two or more persons but it is not allowed to call upon the public for funds in the form of shares or debentures. A public limited company can be registered by seven or more persons and it can offer its shares to the general public freely.

In Kenya, the limited companies are formed according to the companies act (Chapter 486). This act is based on company's act 1948 of UK.

Formation of a company

For a company to be formed there must be some people who bring out the ideas of forming one and setting it in operational. Such founder people are known as Promoters. To be a private company, it requires two and a public company seven promoters

The promoters are required to submit the registrar of companies the following documents:-

- i)** Memorandum of association
- ii)** Article of association
- iii)** List of directors
- iv)** Declaration form that all the requirements have been dully compiled

When the required documents are presented to the registrar of companies and everything is satisfactory, a certificate of incorporation or trading is issued.

NB: public company cannot commence without certificate of incorporation whereas a private can do.

Winding up of a company

If a company is wound up, it discontinues its business. The winding up of a company brings the existence of a company to an end. The winding up of a company is either voluntary or compulsory. A voluntary winding up is initiated by the members of a company. In this case, a liquidator is appointed to realize all the assets and discharge all the liabilities. A compulsory winding up takes place by an order of the court. In this case a liquidator is appointed by the court. The liquidator disposes of the assets and discharges the liabilities of the company.

The ultra vires rule

The doctrine “ultra vires” applies to the corporations. This means “beyond the powers “. The powers of corporation are limited. These powers are defined in the statute in respect of statutory corporation and in the memorandum of association in respect to registered companies. If these corporations exceed their respective powers then any contract made beyond the powers laid down is considered void

Memorandum of association

The promoters have to make an application to the registry of companies that they need to be formed into a company. The purpose of MOA is to define the company's objectives, powers, and serve as a guideline to the outside public

The document contains

- i) Name of the company with the word limited
- ii) The country and town which the registered office is situated
- iii) Objectives of the company
- iv) The statement that the liability of the company is limited
- v) The nominal authorized capital of the company

Articles of association

The article of association serves as a guideline to the internal management of the company

- i) Classes and rights of shareholders
- ii) The issue and transfer of shares
- iii) Procedures of general meeting
- iv) Voting rights
- v) Borrowing dividends and reserve policies
- vi) Auditing of the books

Unincorporated Associations

An incorporated association is one which has no corporate status i.e. it has no legal personality and cannot, therefore, own property or enter or enter into contracts or sue or be sued in its own name and liable for their debts. Such associations include clubs, societies, trade unions, partnerships e.t.c. These associations consist of groups of individuals. The property owned by such associations is regarded as the joint property of all members although this property is held on the behalf of all members by trustees. Any contract entered into by a member on behalf of the association is regarded as the contract of that member. If a committee has committed a tort then the committee members are responsible.

(a) Partnerships

Partnerships are incorporated associations. In Kenya all partnerships are formed in accordance with the Partnership Act (Cap 29). Section 3(1) of this act defines partnership as *the relationship which subsists between in common with a view of profit*. In a partnership business, two or more persons jointly run a business. The liability of the individual partner is unlimited unless the partnership agreement provides for any limitation. A partnership consists of not more than twenty persons except in certain cases e.g. practicing solicitors, professions accountants and members of the stock exchange where this figure may be exceeded. Normally, the number of partners in a partnership business varies from two to five. In the case of banking business, the number of partners is limited to ten.

The name of a partnership must be registered first under the Registration of Business Names Act (Cap. 499). The formation of a partnership is not very complicated. The partners may sue and be sued in the name of their firm, but if they sue in the firm's name they can be compelled to disclose the name and address of every member of the firm. If sued in the firm's name they must enter an appearance in their own name individually but subsequently proceedings continue in the name of the firm.

(b) Trade Unions

A trade union is the association of laborers. It has been defined by Prof. Web in the words, *"A trade union is a continuous association of wage earners for the purpose of maintaining and improving the conditions of their employment."*

Trade unions are also unincorporated associations. All the trade unions in Kenya are established according to the provisions of the Trade Unions Act (Cap 233). This Act defines a trade union as *"an association or combination, whether temporary or permanent, of more than six persons, the principal objects of which are under its constitution the regulation of the relations between employees and employers, or between employers and employees."*

Although a trade union is an unincorporated association but it may sue and be sued and be prosecuted under its registered name. This gives the trade union a form of corporate personality.

It is done so as to facilitate any criminal and civil proceedings. Section 27 of the Act provides that:

(1) A registered trade union may sue and be sued and be prosecuted under its registered name.

(2) An unregistered trade union may sue and be sued and be prosecuted under the name by which it has been operating or its generally known.

Section 25 of the Act provides that every trade union shall be liable on any contract entered into by it or by an agent acting on its behalf.

This discussion proves that the trade unions have been given certain rights and privileges which are not given to other unincorporated associations. In spite of this fact, they are not separate legal entities of their own and cannot be treated as corporations.

Natural Persons

Discussed below are the provisions of the law of persons on various natural persons.

(a) Minors

A minor is also known as an infant. He is a person who is below the age of majority. A person who has attained the age of majority is a major or an adult. The Age of Majority Act (Cap 33) provides that a person shall be of full age and cease to be under any disability by reason of age on attaining the age of eighteen years.

The infants can sue and be sued in tort. The age of criminal responsibility is at the age of eight years. An infant is not eligible to vote until he has attained the age of eighteen years and whose name appears on the register of voters (Section 43(1). Constitution of Kenya). An infant can own personal property. As regards the immovable property, an infant's name can be entered in the register as the owner of registered land (Section 113(1) of the registered Land Act (Cap 300). With exception of this right, an infant cannot own immovable property.

Minority is a disability in the sense that there are certain things which a minor cannot do or be made liable for e.g. a minor cannot get a driving license.

Special rules governing the minors in respect of contracts, property, succession, liability in torts and other areas of law, will be dealt with in their respective places in the chapters that follow.

Legitimation

A legitimate child is a child who is born within the wedlock (lawfully married) of the parents. On the other hand, an illegitimate child is a child who is born outside wedlock. Legitimation is the process by which an illegitimate child becomes legitimated. It is brought by the subsequent marriage of the parents of a child who was born illegitimate. Thus, if A and B, being unmarried, beget a child C, C is an illegitimate child; but if A and B subsequently get married, C is said to be legitimated and he thereby becomes a legitimate child.

The Legitimacy Act (Cap 145) provides that an illegitimate child can be legitimated by the subsequent marriage of his parents. Section 5 of this Act provides that an illegitimate person after becoming legitimate is entitled to take any interest:

- (a) In the state of an intestate dying after the date of Legitimation, or
- (b) Under any disposition coming into operation after the date of Legitimation; or
- (c) By descent under an entailed interest created after the date of Legitimation

He is treated as legitimate person as he had been legitimate. There is only one limit to this right i.e., when property devolves on children and the question of seniority arises, a legitimated person is deemed to have been born on the date of his Legitimation.

Under the Law of Succession (Cap 160), the term child also includes an illegitimate child. This in effect gives an illegitimate child the same claim on his father's estate as a legitimate child. Under the customary law, an illegitimate child has the same rights as a legitimate child.

Adoption

Adoption is the process by which parental rights are transferred from the natural parents of a child to other persons authorized by law. An infant can be adopted so that the relationship between the child and the adopter is similar to that of the parent and child. The adoption is governed in Kenya by the Adoption Act (Cap 143)

An adoption order has the effect of vesting in the adopter all rights, duties, obligations and liabilities which were previously vested in the parent(s) or guardian(s) of the adopted child. And After adoption, the adopter becomes responsible for the custody, maintenance and

education of the adopted child, and he has a right to consent or dissent to the marriage of the adopted child. Indeed, the adopted child is much in the same position as a child born to the adopter in lawful wedlock even in matters of family settlements and inheritance. The infant who is adopted will have also the same rights to the adopter's property as if he were his real child.

A resident magistrate's Court has the jurisdiction to hear and issue adoption orders where all the consents required, have been given and where the adoption case is straight-forward. In other cases, the High Court makes Adoption Orders. Any person aggrieved by the making or refusal of an adoption order can appeal to the Court of Appeal.

Guardianship

An infant's interests are normally protected by his parents. Where an infant has no parent there is need for a guardian to play this role. An infant whose interests are looked after by a guardian is known as a ward. The law relating to the guardianship and custody of infants is contained in the Guardianship of Infants Act (Cap 144).

Section 3 of the Act provides that:

- (1) On the death of the father of an infant, the mother shall be the guardian of the infant, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed, the court may appoint a guardian to act jointly with the mother.
- (2) On the death of the mother of an infant, the father shall be the guardian of the infant, either alone or jointly with any guardian appointed by the mother. When no guardian has been appointed, the court may appoint a guardian to act jointly with the father.
- (3) Where an infant has no parent, no guardian of the person and no other person having parental rights with respect to it, the court, on the application of any person may appoint the applicant to be the guardian of the infant.

The court may remove guardians, if it is deemed to be in the welfare of the infants. The court has the supervisory powers of control over a guardian.

A guardian exercises control over an infant and is responsible for his education,

maintenance and welfare. For example, before an infant between the ages of sixteen and eighteen years can marry, the consent of the guardian is required. A guardian has power over the estate and the person. The guardian must have regard to the welfare of his ward.

(b) Mentally Disordered Persons

A mentally disordered person is also known as a person of unsound mind. Like a minor, he lacks capacity to do certain things. The insanity affects a person's legal capacity on many ways. The law recognizes that such persons may be exploited or taken advantage of and that some measure of protection is required.

The mental Treatment Act (Cap 248) provides some measure of protection, treatment, care of mentally disordered persons and the custody and the management of the property of such persons.

A mentally disordered person is subject to certain disabilities. These are as under:

- (a) He does not have the right to vote.
- (b) A marriage contracted by any person of unsound mind is not valid [Matrimonial Causes Act Chapter 152, Section 14(1) (f)].
- (c) Insanity is a defense to a prosecution for any crime, although the accused must prove that he was insane at the time the crime was committed.
- (d) The contracts of mentally disordered persons are voidable at the option of the mentally disordered persons.

The mental Treatment Act (Cap 248) requires that a person of unsound mind must be admitted to a mental hospital. Any such person may be received as a voluntary patient into a mental hospital if he has attained the age of sixteen years. Any person under that age can be received as a voluntary patient if a parent or guardian is so desirous. A magistrate can also make a reception order to admit a person of unsound mind into a mental hospital. This order is made if it is proved that the person is of unsound mind. It also requires the report of a medical practitioner. Under this Act, the court may also make orders for the management of the estate of any mentally disordered person and for the guardianship of such person by any near relative or by any other suitable person.

Provisions of the law of persons on Marriage

Marriage is said to be a contractual relationship. It is viewed as a contract between a man and his wife. It gives rise to certain rights and duties.

The Law of Kenya recognizes the following four systems of marriage:

- i)** Statutory Marriage
- ii)** Customary marriage.
- iii)** Hindu marriage
- iv)** Islamic marriage

The parties to a statutory marriage must each have capacity to marry. This capacity is determined by their age, sex and marital status. Except in the case of a widower or a widow, marriage age is generally 21 years. A person below this age can only contract a marriage with the consent of his father, or the mother in case the father is dead or of unsound mind or absent from Kenya. As regards sex, the parties to the marriage must be male and female. The persons of same sex have no capacity to marry. Regarding marital status, each of the parties to the intended marriage must be single. A marriage is null and void if it is celebrated while the former husband or wife of either party is still alive and the previous marriage is still in force. It makes no difference that the previous marriage was celebrated under customary law. Finally, a marriage is null and void if the parties to it are within the prohibited degrees of consanguinity or affinity. This means that the close relatives, such as brothers and sisters have no capacity to marry each other. The persons of unsound mind, i.e. lunatics and idiots, have no capacity to marry.

Citizen or Nationality

Nationality or citizenship refers to a person's political allegiances to some state in return for which he is afforded protection by the state. Each independent state has right who are the nationals or citizen.

The law relating to citizenship and the nationality of Kenya is contained in the constitution of Kenya and the Kenya citizenship Act (Cap. 170)

Provisions of the law of persons on Acquisition of Citizenship

Citizen of Kenya may be acquired in four different ways.

1. By birth
2. By descent
3. By registration
4. By nationalization

These are explained below

By Birth

Citizen by birth is determined by the fact of being born in Kenya and also by citizenship of a person's parents or grandparents. All persons born in Kenya who on 11th December 1963 were either citizens of the United Kingdom or British protected persons automatically became Kenyan citizens on Independence Day (12th December 1963) if either of their parents had been born in Kenya. A person born in Kenya after 11th December 1963 shall become citizens of Kenya.

1) By descent

A person born outside Kenya after 11th December 1963 becomes a citizen of Kenya on the day of his birth if on that day his father is a Kenya citizen. This citizenship is by descent only if at that time of his birth his father was Kenya citizens other than a citizen by descent born outside Kenya do not acquire the country's citizenship from him or his father. Thus paternity is given prominence in the determination of citizenship by descent.

2) By registration

Any woman who marries a citizen of Kenya may apply for registration and be granted citizenship. Similarly, a person of full age who is a citizen of a commonwealth country or a specified African country who has been ordinarily resident in Kenya for five years may be registered as a Kenya citizen upon making an application for this purpose.

3) By naturalization

Section 93 of the Kenya constitution Act provides that an alien may apply to be a citizen and he may be granted with a certificate of naturalization if:

- i) He is of full age
- ii) He has resided in Kenya for one year before the application
- iii) He has resided in Kenya for a total of four years during the seven years before the one year in paragraph
- iv) He is of good character;
- v) He has an adequate knowledge of the Swahili language
- vi) He intends to remain a resident, if naturalized

Note: The grant of citizenship by naturalization is purely discretionary

Loss of Citizenship

There are two ways in which citizenship can be lost. These are explained under

1. By Renunciation

A citizen of Kenya who is also a citizen of some other country, is free to renounce his Kenya citizenship but he may do so only if he is of full age and capacity. For renunciation of citizenship, he is required to make a declaration in prescribed manner. He ceases to be a citizen of Kenya upon registration of the declaration. A person who is a citizen of Kenya and also some other countries at the age of twenty one ceases to be a citizen of Kenya at the age of twenty three unless he has renounced the citizenship of that country.

2. By deprivation

The Kenyan citizenship also may be lost by deprivation. But the deprivation applies only to those citizens who acquire Kenya citizenship by registration or naturalization. A person may be deprived from citizenships in following cases:

- i) Has shown himself to be disloyal towards or disaffected towards Kenya;
- ii) Has during the war in which the country was engaged, traded with or otherwise assisted the enemy.
- iii) Has, within five years of registration or naturalization been sentenced for more

than twelve months imprisonment.

- iv) Has resided continuously abroad for seven years and has neither been in service of Kenya or an international organization which country is a member, nor registered annually at a Kenya consulate his intention to retain the citizenship or
- v) Has obtained his registration or naturalization by fraud, false representation or concealment of a material fact.

Provisions of the law of persons on Domicile and Residence

A person's domicile is the place where he permanently resides with an intention to remain. Mere residence is not sufficient. *Animus manendi* i.e. an intention to permanently remain must be established.

In order to establish the domicile of a person, the following two elements are taken to consideration.

i) Actual residence

- ii) 'Animus Manendi' i.e. the intention to remain in that place or country

Where these two elements co-exist, a person is said to have a domicile in that country. For example, a Ugandan citizen may decide to live permanently in Kenya. In that case Ugandans acquire a domicile in Kenya.

The law relating to domicile in Kenya is contained in the "*The laws of Domicile Act (cap. 37)*."

There are three types of domicile: origin, choice and dependence. These are explained as under:

i) Domicile of Origin

A person acquires his domicile of origin at birth. A legitimate child inherits its father's domicile (S.3), an illegitimate child inherits its mother's (S.3) and under common law a foundling (i.e. an abandoned child) has its domicile of origin continuous until he acquires a new one (S.4)

ii) Domicile of Choice

'A man acquires a new domicile by taking up his fixed habitation in a country which is

not that of his domicile of origin.' (S.8) He is then said to have acquired a domicile of choice, where upon the domicile of origin is relinquished. He may however later resume his domicile of origin. A domicile of choice continuous until the former domicile is resumed or until another domicile is acquired. It is important to note that the only person of full age and capacity may acquire the domicile of choice. For example a Kenyan may decide to live in Tanzania permanently. In this case, he acquires Tanzania domicile though he remains a Kenyan citizen.

iii) Domicile of Dependence

Domicile of dependence is also sometimes described as dependent domicile. A person is said to have this kind of domicile if his domicile necessarily changes with that of another person on whom he is dependant. A woman acquires the domicile of the husband on marriage. An infant acquires the domicile of the father.

Domicile and Residence

A place where a person lives, whether permanently or temporarily, is his residence. A person's residence determines his liability of taxation, i.e. he is subject to the place where he resides; it also determined his status in war time-a person who is resident in a country with Kenya is engaged in war is automatically an enemy.

Residence as such must be distinguished from domicile. A mere temporary stay is sufficient to constitute one a resident of a particular area but to be domiciled in a place one must intend to permanently remain there; residence is just one of the two elements required to prove domicile. There are two reasons which make it important to draw a distinction between the two; first to determine the law applicable and secondly to determine whether the court has jurisdiction in a particular case. As already seen, a person's family relations and movable property are determined by the law of his domicile; they are not determined by the law of the place where he might be temporarily resident. Thus, if a domiciled Englishman takes up residence in Kenya dies in Kenya living movable property succession to the property will be governed by the government of England and not the law of Kenya. Regarding jurisdiction, courts usually have jurisdiction over persons who are resident within their territorial jurisdiction.

Domicile and Nationality

Domicile must be distinguished from nationality. While nationality is referable to as political system in the sense that a person owes his allegiance to the state that he is a national domicile on the other hand is referable to as a legal system: a person's family relations in these matters like marriage and divorce, legitimacy etc, and also his movable property are governed by the laws of his domicile. Secondly, it is possible for a person to have a no nationality at all e.g. where he is rendered stateless upon being deprived of his citizenship; but every person must have a domicile at any one time. Thirdly, it is possible for a person to have dual citizenship, i.e. to be a citizen of more than one country at the same time but no one can have more than one domicile at the same time.

Provisions of the law of persons on proceedings against the State

The government may commit a civil wrong, just like an ordinary individual. The law relating to proceedings against the state is governed by the Kenya Government proceedings act (Cap.40).

An aggrieved person has a right to sue the government for the act and defaults of its servants and agents. The government is liable for its own wrongful acts as well as those committed by its servants if the servant himself would have been liable in the first place.

Section 4(1) of this Act provides that the state may be sued in tort in the following cases:

- i) In respect of the torts committed by its servants or agent.
- ii) In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
- iii) In respect of any breach of the duties attaching at common law of the ownership, occupation, possession and control of property:

Summary for the topic

- ❖ Definition of legal personality
- ❖ Natural and artificial persons
- ❖ Rights and obligations of artificial and natural persons as provided by the law of persons
- ❖ Acquisition and loss of citizenship

Possible questions

- i) Difference between a private company and a public company
- ii) What is prospectus as used in a company
- iii) Discuss types of shares in a company
- iv) The ultra vires rule
- v) Legitimation
- vi) Provision of law on marriage, and nationality
- vii) How to acquire and to loss citizenship
- viii) Domicile and nationality

CHAPTER FOUR

LAW OF TORT

Introduction

The word tort has been derived from the Latin tortus which means crooked or twisted. In French, tort means a wrong. In law a tort is a civil wrong

Sir F. Pollock has defined tort as "An act which causes harm to a person, whether intentionally or not, not being a breach of duty arising out of personal relation or contract, and which is either contrary to law, or an omission of a specific legal duty, or a violation of an absolute right

A person who commits a tort is called a - **Tortfeasor**

Where two or more persons commit a tort, they are known as **joint tortfeasors**. They may be sued jointly, or any one of them may be sued for the whole of the damage. In case of the joint tortfeasors, there is a right of contribution, under which the court may apportion the damages between them in such a way as is just, having regard to their respective degrees of blames

NB: Every tort results from the breach of a certain duty which is primarily fixed by law unlike other civil wrongs such as breach of contract

A duty in question that result into injure or damage the property of any person is fixed by the law whereas the duty to supply goods under a contract of sale is a duty created by the parties themselves in their contract

Function of the Law of Torts

The primary function of the law of torts is to compensate persons injured by the civil wrongs of others, by compelling the tortfeasor to pay for the damage occasioned by his tort

- i) **To Determine Rights Between Parties to a Dispute.** A party to a dispute may bring an action for a declaration of his rights; and once the court makes a declaration, the rights of the parties are determined
- ii) **To Prevent a Continuance or Repetition of Harm.** When the injury complained of is of a continuous nature or likely to be repeated by the tortfeasor, the injured party may be granted an injunction to prevent its continuance or repetition, e.g. in cases of trespass to land
- iii) **To Protect Certain Rights Recognized by Law.** There are certain rights which every individual is entitled to land which are recognized by law. These rights are

protected by the law of torts e.g. a person's reputation or right to good name is protected by the tort for negligence which imposes a duty of care on every other person

- iv) **To Restore Property to its Rightful Owner.** Where property is wrongly taken away from its rightful owner or otherwise dealt with contrary to his rights, he may seek a restitution of the property or its value since the wrongful act amounts to the tort of trespass to goods (or land)

Nature of tortious liability

A tort is a civil wrong which is usually remedied by a award of un-liquidated damages

Tortious liability arises from the breach of a duty primarily fixed by law; such duty is towards person generally, and its breach is redressible by an action for un-liquidated damages

Every person is under a duty to compensate for his wrongful acts which have resulted in injury to another person. It is this duty to compensate that determines his liability in tort.

Generally, the plaintiff must prove that he has suffered harm and that there has in consequence been a violation of his legal right. Some civil wrongs are actionable even if no damage is suffered e.g. trespass to land

Whether the plaintiff has any remedy in some cases of tort depends on the following two principles of general application:-

Damnum Sine Injuria

Refers to harm without legal injury

Refers to a circumstance where a person has suffered actual harm without any violation of his legal right

Mogul Steamship Co. v. McGregor, Gow & Co. (1882) (case)

Certain ship-owners reduced their freight charges for the sole purpose of driving their rival out of business. The plaintiff, who had thus been driven out of business, brought an action against the ship-owners. Held: a trader ruined by the legitimate competition of his rivals could have no redress in tort

Injuria Sine Damno

This refers to a situation where a person suffers a violation of his right without any actual loss or damage sustained by him e.g. trespass to land, libel among others

Ashby v. White, (1703)

A returning officer wrongfully refused to register a properly tendered vote of the plaintiff who was a legally qualified voter. In spite of this, the candidate for whom the vote was tendered was elected, and no loss was suffered by the rejection of the vote. It was held that the defendant was liable because he deprived the plaintiff of his legal right of registering his vote

Determination of tortious liability

Tortious liability can be also determined on the basis of the following principle:-

The Fault principle

Most torts are based on the fault principle. Under this principle, it is necessary to establish some fault on the part of the wrongdoer before he can be made liable in tort. A person is said to be at fault where he fails to give up to some ideal standard of conduct set by law.

Three elements are relevant in the determination of fault, and any one of them may be relied upon:-

i) Intention

Where a person does a wrongful act desiring that its consequences should follow, he is said to have intended it; and to that extent there is some amount of fault on his part

ii) Recklessness

An act is said to be done recklessly where it is done without caring whatever its consequences might occur. Recklessness, constitutes fault on the part of the wrongdoer

iii) Negligence

A person is also at fault where he does a wrongful act negligently i.e. where the circumstances are such that he ought to have foreseen the consequences of his act and avoided it altogether

Distinction between Tort, Crime and Breach of Contract

Tort and Crime

A crime is a breach of public rights whereas a tort is a civil wrong. The main object of criminal proceeding is the punishment to the criminal persons but the object of proceedings in tort is not punishment (Damages). Its main aim is the compensation to the plaintiff for the loss or injury caused by the defendant i.e. damages

Tort and Breach of Contract

In contract, the duties are fixed by the parties to a contract. But in tort, the duties are fixed by law (common law or statute). In some cases, a breach of contract and tort may take place simultaneously. We assume 'X' employs a private surgeon to operate his wife. If 'Y' fails to perform his duty properly then 'X' has a cause of action against 'Y' for (i) breach of the contractual duty of care, and (ii) the tort of negligence

Malice

Malice means ill-will or desire to cause damage to someone. In legal sense, malice means a wrongful act which is done purposely without having a lawful excuse. In tort, the intention or motive for an action is generally irrelevant.

The general rule is that a bad intention does not make a lawful action as unlawful and similarly an innocent or good intention is not a defense to a tort

Wilkinson v. Downton (1897)

A, as a practical joke, told Mrs. B that her husband had met with an accident. Mrs. B suffered a nervous shock and was ill as a result. Mrs. B brought an action against A for false and malicious representation. The fact that A passed the information as a joke was irrelevant, and Mrs. B was entitled to damages

General defences

A person sued in tort has at his disposal certain defences, some of which are restricted to particular torts (e.g. contributory negligence is a defence only to the tort of negligence), while others are of a general nature.

The following general defences are available to a defendant in every action for tort:-

- i) Volenti non Fit Injuria
- ii) Inevitable Accident
- iii) Act of God
- iv) Necessity
- v) Self-defense
- vi) Mistake
- vii) Statutory Authority

Volenti Non Fit Injuria

Volenti non fit injuria is also known as the voluntary assumption of risk

Volenti non fit injuria - means no injury can be done to a willing person, it is assumed that the defendant was not aware of the nature and extent of the risk

For example, a football player cannot complain for being injured while playing the game

Khimji v. Tanga Mombasa Transport Co. Ltd. (1962)

The plaintiffs were the personal representatives of a deceased who met his death while traveling as a passenger in the defendant's bus. The bus reached a place where the road was flooded and it was risky to cross. The driver was reluctant to continue the journey but some of the passengers, including the deceased, insisted that the journey should be continued. The driver eventually yielded and continued with some of the passenger, including the deceased. The bus got drowned together with all those aboard it. The deceased's dead body was found the following day. Held: The plaintiffs' action against the defendants could not be maintained because the deceased knew the risk involved and assumed it voluntarily and so the defense of volenti non fit injuria rightly applied

Inevitable Accident

An inevitable accident is one which cannot be prevented by the exercise of ordinary care, caution and skill. It therefore occurs only where there is no negligence on the part of the person whose act is complained against. Since the law of torts is generally based on the fault principle, and since an inevitable accident does not impose fault on the part of the alleged wrongdoer, it follows that an injury which has resulted from an inevitable accident is not actionable in tort

Stanley v. Powell, (1891)

The plaintiff was employed to carry cartridges for a shooting party. A member of the party fired at a pheasant but the bullet, after hitting a tree, rebounded into the plaintiff's eye. The plaintiff sued. Held: the defendant was not liable as the plaintiff's injury resulted from an inevitable accident

Act of God

An act of God (or vis major) is also an inevitable accident caused by natural forces unconnected with human beings e.g. storm. In this case also, any resultant injury is not attributable to anyone's thunder among others

Nichols v. Marsland, (1876)

The defendant had a number of artificial lakes on his land. An unprecedented rain such as had never been witnessed in living memory caused the banks of the lakes to burst and the escaping water carried away four bridges belonging to the plaintiff's bridges were swept by act of God and the defendant was not liable.

Necessity

A person may sometimes find himself in a position whereby he is forced to interfere with rights of another person so as to prevent harm to himself or his property. For instance, if he is about to be shot he may feel constrained to use the person next to him as a shield against the gunman.

Cope v. Sharpe (1912)

The defendant committed certain acts of trespass on the plaintiff's land in order to prevent fire from spreading to his master's land. The fire never in fact caused the damage and would not have done so even if the defendant had not taken the precautions he took. But the danger of the fire spreading to the master's land was real and imminent. Held: The defendant was not liable as the risk to his master's property was real and imminent and a reasonable person in his position would have done what the defendant did.

Self Defence

This occurs when a person defences himself from being attacked or harmed

Cresswell v. Sirl, (1948)

A dog owned by plaintiff, C, attacked during the night some ewes lambs owned by S. The dog had just stopped worrying the sheep and started towards S, who shot it when it was 40 yards away. C sued for trespass to goods (dog). Held: S was justified in shooting the dog if (i) it was actually attacking the sheep; or (ii) if left the dog would renew the attack on them, and shooting was the only practicable and reasonable means of preventing revival. The onus on justifying the trespass lay on the defendant

Mistake

The general rule is that a mistake is no defence in tort, whether it is a mistake of law or of fact. Mistake of fact may be relevant as a defence to any tort in some exceptional cases. This could arise in cases of malicious prosecution, false imprisonment and deceit.

For example, where a police officer arrests a person about to commit a crime but the person arrested is innocent then the police officer is not liable. In this case, the mistake is reasonable ground for the defence in the tort. Mistake cannot be a defence in actions for conversion or defamation. Mistaken identity: this is always used by policemen to defend themselves when they shoot a wrong person instead of that who has actually done a serious crime.

Statutory Authority

Where a statute authorizes a particular act, a person who does it is not liable in tort. The authorisation of an act is also an authorisation of its natural consequences. But the person acting must do so in good faith and within the scope of the powers conferred by the statute; or else he will not be protected. Where the person acting exceeds the powers conferred by the statute, the compensation payable by him to the injured party cannot be more than what is provided by the statute itself. The statute may stipulate a definite sum, or it may give powers to certain officials to assess the loss suffered by the injured party. Thus, where a person has acted in pursuance of the provisions of a statute, he may plead statutory authority in his defence; and where the statute does not protect him from liability (e.g. where he has exceeded his powers)

Voughan v. Taff Vale Railway Co. (1860)

A railway Company was authorized by statute to run a railway which traversed the plaintiff's land. Sparks from the engine set fire to the plaintiff & woods. Held: that the railway company was not liable. It had taken all known care to prevent emission of sparks. The ruling of locomotives was statutorily

Capacity to sue or be sued in Tort

The general rule is that any person may sue or be sued in tort

NB: All persons are subject to the same laws

Capacity - Means the capacity of parties or persons to sue or to be sued in law of torts

Persons with capacity to sue or be sued

- i) The Government
- ii) Infants and Minors
- iii) Husband and Wife
- iv) The President
- v) Heads of State and Diplomats
- vi) Corporations
- vii) Trade Unions
- viii) Persons of Unsound Mind
- ix) Aliens or Non-Citizens
- x) Judicial officers

The Government

Under the Government Proceedings Act (Cap 40) makes the Government subject to be liable in:-

- i) Respect of torts committed by its servants or agents
- ii) Respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer
- iii) Respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property e.g. Increment in teachers' salaries

Infants and Minors

At a general rule minority is no defence in tort. Infants can sue and be sued in the same way as any other person. A child may be also guilty of negligence if old enough to take precautions for his own safety

Burnard v. Haggis, (1863)

A minor hired a horse for riding and was told by the owner not to jump over it. But he jumped the horse and injured it. Held: The minor was liable for his tort which was of independent of the contract

Generally, a parent or guardian is not liable for the torts of his children unless he authorizes the tort. But a parent or guardian is liable for torts committed by children in negligence

Bebee v. Sales, (1916)

A parent permitted his son aged 15 to remain in possession of a shotgun, with which the son had already caused harm and in respect of which complaints had been made. Held: the father was liable for injury to another boy's eye

Husband and Wife

A married woman is liable in tort and may sue or be sued in tort in the same way as though she were a female sole (i.e. a single or unmarried woman). A wife can sue her husband in tort for the protection of her own property

The President

The Constitution of Kenya (Kenya 14) provides that the President of Kenya is not "liable to any proceedings whatsoever in any court." It means that no civil or criminal proceedings can be instituted against the President while he is in office

Heads of State and Diplomats

The Heads of foreign states, diplomats of foreign missions and certain other persons connected to them are immune from the jurisdiction of the local courts. Their immunity is provided by the Vienna Convention of Diplomatic Relations, signed in 1961, the relevant articles of which are given the force of law in Kenya by "The Privileges and Immunities Act (cap. 179)"

The accredited diplomats and their staff families enjoy immunity from the criminal and (subject to specified exceptions) from the civil and administrative jurisdiction of the local courts. The immunity does not extend to Kenyans who are employed by diplomatic missions. Representatives of the United Nations Organization and its specialized agencies can also claim diplomatic immunity. Although the diplomats and their staff cannot be sued under the law of tort but it is always open to the Ministry of Foreign Affairs to declare a diplomat 'persona non grata', thereby requiring his removal from Kenya

Corporations

The corporations can sue and be sued in their own names. They are liable to actions in tort.

A corporation is also liable for torts committed by its servants and agents. But if a servant of a corporation commits a tort which is 'ultra vires' (beyond powers) then the corporation is not

liable. Similarly, a corporation is not liable for some torts of personal nature e.g. personal defamation, battery

Trade Unions

The trade unions have capacity to sue in tort but actions against them in tort are limited. Section 23 of the Trade Unions Act (Cap. 233) provides that no action shall be brought against a trade union for torts committed by its members or officials in respect of any act done in contemplation or in furtherance of a trade dispute.

For example, if a trade union calls a strike, it cannot be sued by an employer for the tort of inducing a breach of contract

Persons of Unsound Mind

People of unsound mind cannot be sued for the crime committed (sometimes regarded as immaterial) *Morriss v. Marsden, (1952)*

Defendant took room at a Brighton hotel. While there he attacked the manager of the hotel (plaintiff). It was established that defendant was suffering from disease of the mind at the time of the attack; that he knew the nature and quality of his act, but he did not know that what he was doing was wrong. Held: That as defendant knew the nature and quality of his act he was liable in tort for the assault and battery. It was immaterial that he did not know that what he was doing was wrong

Aliens or Non-Citizens

An alien is under no disability and can sue and be sued. However an enemy alien cannot sue, but if sued can defend himself

Judicial officers

Judicial officers are protected from civil liability for any act done or ordered by them in the discharge of their judicial functions

Thus, where a judge or magistrate utters words which tend to reflect on a person's reputation, or orders a party's property to be attached in satisfaction of a judgment-debt, no action can respectively be brought against him for trespass

Specific Torts

The work tort refers to civil wrong committed by different Persons. Some specific torts are:-

- i) Trespass
- ii) Nuisance
- iii) Negligence
- iv) Defamation

Trespass

Trespass is **actionable per se** i.e. without proof of any damages once it is established that a trespass has been committed, the plaintiff is entitled to legal redress, whether or not he has suffered damage; the actual damage suffered (if any) merely gauges the extent of the redress or compensation which the plaintiff is entitled to.

There are three types of trespass:-

- i) Trespass to land
- ii) Trespass to persons
- iii) Trespass to goods

Trespass to land

Trespass to land is committed where the plaintiff's possession of land is wrongfully interfered with or wrongfully placing or projecting any material objects on it.

Trespass to land involves

Trespass by wrongfully entry

It includes acts like encroaching on the land or walking through it without authority, sitting on the plaintiff's fence or putting a hand through his window

Trespass by remaining on land

This type of trespass is committed by a person who, having been originally authorized to enter upon land, is subsequently asked to leave, when he fails to leave the land within a reasonable time: such a person becomes a trespasser

Trespass by placing things on land

Trespass by placing things on land or any material things on the plaintiff's land.

Kelsen v imperial tobacco co. ltd, (1957)

He defendant erected an advertising signpost which protruded by 8 inches in to air space above the plaintiff's land. Held: the defendant's act constituted a trespass but not a nuisance since the plaintiff had suffered any inconvenience continuing trespass

Trespass by relation

The plaintiff's possession of land relates Back to The time when he first acquired a right to posses the land and he is deemed to have been in possession of it from that time. Possessor of land may therefore sue any Person who committed an act of trespass on the land even before he himself took actual possession of it .since the plaintiff's right of action is based on a title which legally relates back to the earlier period, the trespass in question is known as trespass by relation

Example:

A own land which he sells off to B, a year passes before B took actual possession of the land; but in the meantime C has committed an act of trespass on the land. B may sue C for trespass not withstanding that he had not yet taken possession of the land when the act of trespass was committed.

Is trespass a crime?

Trespass to land is normally a civil wrong, but it may give rise to criminal preceding some cases

The trespass Act (cap.294) states that a trespasser can be criminal if one enters the land with intent (intention) to steal goods or commit any other offence

Otherwise, a trespass to land is a tort and it is actionable per se, i.e. without proof of special damage

Trespass to the Person

Trespass to the person consists of: -

- i. Assault
- ii. Battery
- iii. False imprisonment

Assault

An assault occurs when a person threatens to use force against another person or putting the other person in fear of immediate danger e.g. shaking or pointing a gun menacingly at the other another person. An assault is a tort as well as a crime

Battery

Battery is the application of force against the other person without lawful justification for example slapping a plaintiff

False imprisonment

There is said to be false imprisonment where a person is totally deprived of his freedom without lawful justification. For example locking up a person in his bedroom while he is asleep and then reopening the door before he has awoken. On being informed of these facts the plaintiff may sue the person who did the locking and reopening of his bedroom

NB: Habeas Corpus is a remedy to false imprisonment.

The court may order his release the accused if it appears that there are not sufficient grounds for detaining him

Trespass to Goods and Conversion

Trespass to Goods

A trespass to goods is committed by a person who directly and intentionally interferes with goods in the possession of another without lawful justification. The plaintiff may be a person either in possession or entitled to immediate possession of the goods. The wrongful interference may be constituted by removing the goods from one place to another (e.g. taking them away from the plaintiff's possession), using the goods (e.g. wearing the plaintiff's shirt) or destroying or damaging the goods

Conversion

Conversion is constituted by dealing with goods in a manner that is inconsistent with the rights of the person in possession of the goods or entitled to their immediate possession, e.g. where A intentionally sells B's goods to C without any authority from B, or where A intentionally delivers B's goods to some other person without justification at all

Moorgate Mercantile Co. Finch, (1962)

A borrowed a car from B. He used the car to smuggle contraband watches, and in the process he was arrested and the car confiscated. Held: A was liable for conversion of the car because he had intentionally acted in a manner that was most likely to lead to its confiscation

Nuisance

This tort is committed whenever a person is wrongfully disturbed in the use and enjoyment of his land. Generally, it arises from the duties owed by neighbouring occupiers of land: no one should use in property in a way which is likely to affect his neighbour's use of his own land. Thus, if A and B are neighbours, and A owns plot X while B owns plot Y, A may use plot X in any way he chooses but he must not in doing so affect B's of plot Y, or else he will be liable in nuisance

There are two types of nuisance:-

- i. Private nuisance
- ii. Public nuisance

Private nuisance

A private nuisance is committed where a person's private rights in his land are wrongfully disturbed, whether physically or by allowing noxious things to escape out of his land or allow smoke, noise, gas, fumes to escape unto the plaintiff's land thereby inconveniencing him

Hollywood Silver Foxes v. Emmett, (1936)

The plaintiff was a breeder of silver foxes, which were very sensitive to any disturbance during breeding seasons. The defendant was developing the neighbouring land as a housing estate and thought that the plaintiff's business might discourage his customers. He instructed his son to fire a gun near the fox cages. The son did so and after four days the plaintiff sued. Held: The act of the defendant through his son amounted to a nuisance

Public Nuisance (Common nuisance)

It affects the comfort and convenience of a class of persons but not necessarily every member of the public e.g. obstruction of a highway, a music festival accompanied by large scale noise

Indeed, a public nuisance is generally a criminal offence and only the Attorney General may bring an action against the wrongdoer *Soltan v. De Held*, (1851)

The plaintiff resided next to a Roman Catholic Chapel. the defendant, a priest, took it upon himself to ring the chapel bell throughout the day and night. The plaintiff brought an action to stop it. Held: The ringing of the bell was a public nuisance but since the plaintiff's house was next to the chapel he suffered more than the rest of the community and was therefore entitled to bring an action to stop it.

Continuing wrong

Generally, nuisance is actionable only when it is a continuing wrong. A disturbance or inconvenience on an isolated occasion will not ordinarily be treated as a nuisance

Bolton v. stone, (1951).

The plaintiff, while standing on the highway just outside her home, was injured by a cricket ball struck from the defendant's ground which adjoined the highway. The ground had been used for cricket for over 80 years and it was very rare for balls to be hit over the fence, which was 10 feet high above the highway and 17 above the pitch. The ball had travelled over 100 yards before hitting the plaintiff. Held: An isolated act of hitting the cricket ball onto the highway in circumstances like those of this case could not amount to a nuisance

Defamation

Refers to publication of a false statement, without justification, which tends to lower the plaintiff's reputation in the estimation of right-thinking members of society or to injure him in his office, trade or profession, or which causes him to be shunned or avoided.

No person should therefore publish a false statement which adversely affects the reputation of another, if such statement is without justification; or he may do so only at the risk of incurring liability for defamation

Elements of Defamation

- i. The defendant must have made a false statement
- ii. The statement must be defamatory e.g. where A makes false a statement that B has AIDS, or that B is a criminal or a crook, or untrustworthy

Function of the Law Defamation

The law of defamation protects a person reputation.

Every person has right to a good name and no one should unduly interfere with this right, it also protects a person's business interest

Types of Defamation

Slander

Slander refers to defamation in a transient or non-permanent form, including defamation by word of mouth.

Slander is actionable only upon proof of damage; the plaintiff's action can be sustained only if he proves that he has suffered some damages as a result of the defendant's defamatory statement

After a reporter from the defendant newspaper had visited the Lord's Bar a statement appeared in the paper alleging that all the ladies in that bar had V.D. (venereal disease) and that the manager of the bar employed only such ladies. The proprietor of the bar and one of the bar-maids sued. Held: The plaintiffs were entitled to damages and there was no need to prove damages

Libel

Libel refers to defamation in a permanent or a non-transient form, including written matter like a letter or an article, scandalous pictures (particularly where they are accompanied by a defamatory statement), film or news tapes

CHAPTER FIVE

THE LAW OF CONTRACT

The Nature of Contract

A contract is an agreement of promises which is legally binding or enforceable by law.

Sir William Anson define contract as , “A legally binding agreement between two or more parties, by which rights are acquire by one or more to acts to forbearances on the part of the other or others”.

The law of contract imposes an obligation on every person to honour his legally enforceable promises, failure to do which renders him liable to compensate the injured party. What is intended here is to promote commercial relations and since commerce generally entails individual or personal interactions, the obligation imposed by a contract is, in general, created by the parties themselves. The parties must, however, act within the ambit of the law.

Essential of Valid Contract

- i) Offer and acceptance
- ii) Intention to create legal relation
- iii) Lawful Consideration
- iv) Capacity of parties
- v) Free Consent
- vi) Lawful object
- vii) Possibility of Performance

Classification of Types of Contracts

i) Express and Implied Contract

An express contract is one in which the parties specifically agree about the nature and terms of their relationship. There is then said to be an express agreement. For example, if A agrees to sell his goods to B for KSH. 10,000/= and B agrees to buy the goods at that price, there is said to be an express contract for the sale of goods at an agreed price

On the other hand, there is no specific agreement in an implied contract. The conduct of the parties, as well as all the surrounding circumstances, must be taken into account in order to ascertain whether or not a contract exists. Thus where A hires a taxi and boards it there is an implied contract that the taxi man shall convey A up to his destination and that A shall pay

such fare is usually paid for that trip

ii) Unilateral and Bilateral contracts

A Unilateral Contract is one in which only one party is bound. It is a rare type of contract which arises, for instance, where there is an offer of a reward. Thus, if 'A' offers a reward to anyone who will recover his lost property, no one is bound to recover the lost property but 'A' he is bound to give the promised reward to anyone who might recover the property

A bilateral contract is one in which both parties are bound. Thus, if A agrees to sell his goods to B and B agrees to buy them at a stated price, both parties are bound. A is bound to deliver the goods to B and B is bound to accept them to pay the price

iii) Valid, Void and Voidable Contracts

A valid contract is an agreement which is binding or enforceable by law (lawful contract). An agreement becomes enforceable by law when all the essentials of a valid contract are present.

A void contract is an agreement which is not binding or enforceable by law. This is because it has no legal effect at all and is, therefore, not binding on any of parties. A contract is rendered void in certain cases where essentials of valid contract are absent or where it is prohibited by law because it is entered without consideration

A voidable contract is one which is enforceable by law of the option of one of the parties. Usually a contract becomes voidable when this consent of one of the parties to the contract is obtained by undue influence, or misrepresentation. Such a contract is voidable at the option of the aggrieved party of the party whose consent was caused.

Where there is a voidable contract, the party entitled to avoid it must do so within a reasonable time. This may be done by A notifying the other party, B, that he (A) does not intend to be bound by the contract. Where it is no feasible to give notice, e.g. where B is a rogue whose whereabouts are not known A can still effectively terminate the contract by doing everything possible to show that ho does not intend to be bound by the contract. It is sufficient, for instance, to make a report to the police

Newtons of Wembley, Ltd. V. Williams (1965)

X bought a car from the plaintiff and paid by cheque. He took the car with him. The cheque was dishonoured, but in the meantime X had disappeared. X subsequently resold the car to the defendant, who bought in good faith. The plaintiff sought to recover the car from the

defendant. Held: Title to the car had passed to the defendant; it could not therefore be recovered by the plaintiff

iv) Specialty Contracts and simple Contracts

A specialty contract is also known as a contract under seal. It is an instrument in writing signed and sealed by the party to be bound by it and delivered by him to the person for whose benefit it was made. Thus, writing, signature, sealing and delivery are the four essential characteristics of this type of contract, of which a Deed is the best example (e.g. a Deed of Conveyance under which property is transferred by one person to another).

The following contracts must be evidenced by writing

- a) Contracts of Guarantee
- b) Contracts for the Sale of Land
- c) Contracts for the Sale of Goods over Two Hundred shillings
- d) Employment Contracts over one month
- e) Hire Purchase Contracts
- f) Money Lending Contracts

v) Illegal Contracts and Unenforceable Contracts

An illegal contract is one which is prohibited by law or which contravenes a provision of law.

Where both parties are guilty of the illegality they are said to be in *pari delicto* and none of them can enforce the contract. But where only one of the parties is guilty of the illegality, the contract may in certain circumstances be enforced by the innocent party.

NB: Thus an agreement to commit murder or assault or robbery would be illegal

Void and illegal contracts, both cannot be enforced by law but the two differ in some respects. All illegal agreements are void but all void agreements are not necessarily illegal. For example, an agreement with a minor is void as against him but not illegal. Similarly, an agreement is illegal, when it contravene (violates the rule of law)

For example, 'A' engages 'B' to murder 'C' and borrows KSH. 5000 from 'D' to pay 'B'. We assume 'D' is aware of the purpose of the loan. Here the agreement between A and B is illegal and the agreement between A and D is collateral to an illegal agreement. As such the

loan transaction is illegal and void and D cannot recover the money. But the position will change if D is not aware of the purpose of the loan. In that case, the loan transaction is not collateral to the illegal agreement and is valid contract

vi) Contracts *Uberrimae Fidei*

A contract *uberrimae fidel* is one in which only one of the parties has full knowledge of all materials facts, which he is under a duty to disclose. The best example is an insurance contract. The insured is possessed of all facts which are material to the contract; but the insurer has no possession of these facts and the insured is under a duty to disclose them to him. Contracts *Uberrimae Fidei* are said to be contracts of *Utmost good faith*, particularly on the part of the party under a duty to disclose material fact. Any failure to exhibit good faith, or any show of outright bad faith, amounts to a breach of the contract entitling the other party to be relieved from his own obligation under the contract.

vii) Contracts of Record

A contract of record consists of the judgment of court. Such contracts are formed by an entry on the court records. The rights and obligations of the parties are put on court record and the resultant relationships between them are said to constitute a contract of record. **These contracts includes:-**

a) Judgment of a Court:-

The previous rights under a contract are merged in the judgment of a court. This judgment constitutes a contract of records between the parties of the contract. We assume 'R' owes 'T' Kshs. 2,000/= on a contract. 'T' sues 'R' and court issues a judgment that 'T' must be paid 'R' KSH. 1,500/= In this case, the previous rights become merged in the judgment of the court

b) Recognizance

In the criminal cases, the court may bind the accused to be of good behavior and keep peace. The person so bound acknowledges that a specified sum will be paid by him to the state if he fails to observe the terms of recognizance

NB: In the contracts of record, the element of consent of both parties is absent. For this reason, these contracts are not true contracts

viii) Executed contract

A contract is said to be executed when both the parties to a contract have completely performed their share of obligation and nothing remains to be done by either the party under the contract.

For example, when a bookseller sells a book on cash payment it is an executed contract because both the parties have done what they were to do under the contract

ix) Executory contract

A contract is said to be executory when either both the parties to a contract are still to perform their share of obligation or there remains something to be done under the contract on both sides

For example, T agrees to coach R, a C.P.A student, from first day of the next month and R in consideration promises to pay to T Kshs. 1,000 per month, the contract is executory because it is yet to be carried out

x) Quasi-Contracts

This type of contracts has little or no affinity with contract. Such a contract does not arise by virtue of any agreement, express or implied between the parties circumstances.

For example, obligation of finder of lost goods to return them to the true owner

FORMATION OF A CONTRACT

A contract is formed by an offer by one person and the acceptance of this offer by another person. The intention of both parties must be to create a legal relationship and they must have the legal capacity to make such a contract.

Formation of contract involves the following factors:-

- i) The offer and Acceptance**
- ii) Consideration**
- iii) Contractual capacity**
- iv) Intention To Create A Legal Relationship**

The Offer and acceptance

There must be a 'lawful offer' and a 'lawful acceptance' of the offer, or willingness to offer and the other party is also willing to take resulting in an agreement.

For example, if A writes to B stating his desire to sell his property to B at a specified price, A

is said to have made an offer to B. A is the offeror and B the offeree. An offer may be express (where the offeror specifically makes his intentions known to the offeree, whether in writing or by word of mouth), or it may be implied from the conduct of the parties, particularly the offeror. An offer is valid only if its terms are definite, but not where they are vague

Lawful Consideration

Consideration has been defined as the price paid by one party for the promise of the other. An agreement is legally enforceable only when each of the parties to it gives something and gets something. Something given or obtained is the price for the promise and is called **consideration**

Types of Consideration

i) Executory of Consideration

The word executory is used to denote that the promised act is yet to be done. Thus A promises to sell and deliver to B sacks of charcoal in return for a price to be paid by B. Before delivery of the charcoal, A's promise to B is in the nature of executory consideration for B's promise to pay the price. Similarly, before payment of the price, B's promise to A is in the nature of executory consideration for A's promise

ii) Executed Consideration

The word executed is used here to denote that the promised act has already been done. To take the example given above, after A has delivered the charcoal to B, A is said to have furnished executed consideration for B's promise to pay the price. Similarly, after B has paid the price he is said to have furnished executed consideration for A's promise to sell and deliver to him three sacks of charcoal

iii) Past Consideration

Once negotiations are over and the parties have struck a bargain, any subsequent or fresh promise made by either party in relation to that bargain is known as past consideration. The law is that for promise to constitute valid consideration it must have been made during the negotiations. Past consideration is not valid consideration it is in fact no consideration at all and the promises (promised party) cannot rely on it

iv) Sufficiency of Consideration

Consideration need not be adequate. Freedom of contract demands that the parties must be free to make their own bargain. No court of law will concern itself with the question whether the price agreed upon is worth the goods supplied. In short, the consideration furnished by one party need not be equal or proportionate to that furnished by the other party. Thus, a creditor's forbearance to sue (i.e. a promise not to sue) may be sufficient consideration for a promise given by the debtor relation to a particular debt

Intention to Create a Legal Relationship

There must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. Agreements of social or domestic nature do not contemplate legal relations, and as they do not give rise to a contract.

For example, X, promises to take out Y for lunch and Y accepts and patiently waits for X, there is no legally binding agreement and Y cannot sue X failure to honour his promise

Contractual Capacity

An essential ingredient of a valid contract is that the contracting parties must be 'competent to contract'. Every person is competent to contract who is of the age of majority and who is of sound mind, and is not qualified from contracting by any law. Only a person who has contractual capacity be a party to a contract

The general rule is that any person may enter into any kind of contract. But special rules supply to the following persons:-

- a) Minors
- b) Persons of Unsound Mind and Drunken Persons
- c) Married Women
- d) Aliens or Non Citizens
- e) Corporations
- f) Co-operative Societies
- g) Trade Unions

Minor

Minor's contracts are governed by common law rules as modified by the Infants Relief Act 1874

A contract made by minors may be binding, voidable or void

Binding Contracts

There are two types of contracts which are binding on minors

a) Contract for the Supply of Necessaries

Certain things are regarded as “*necessaries*”. These are things without which the minor could hardly live; are therefore things which are essential to his maintenance. Under the Sale of Goods Act “*necessaries*” are defined as “goods suitable to the condition in life of a particular infant or minor, and to his actual requirements at the time of the sale and delivery”. Included here are things like food, clothing, and medicine.

Nash v. Inman (1908)

A tailor supplied an infant with 11 fancy waistcoats, but the infant failed to pay. The infant was a university undergraduate. His father gave evidence that the infant was adequately supplied with proper clothes according to his station in life. Held: The clothes were not necessities and the infant was not liable to pay for them

b) Beneficial Contracts of Service

Clements v. London and N.W. Railway Co. (18940)

X, a minor, was employed by a railway company as a porter. He joined the company’s insurance scheme and agreed to relinquish his statutory right of suing for personal injury under the Employers Liability Act 1880. Though the Scheme fixed a lower scale of compensation, its terms were generally more favorable than those embodied in the Act; the Scheme covered more accidents in respect of which compensation was payable. Held: The agreement was generally for the benefit of X and it was therefore binding on him

Persons of Unsound Mind and Drunken Persons

A contract made with a person of unsound mind (PUM) is binding on him only if it was during a lucid interval, i.e. an interval during which he is sane. For this purpose, it is immaterial that the other party may have been aware of the PUM’s mental capacity. Apart from this, a contract that is entered into a PUM with a person who knows him to be mentally incapacitated is voidable at his instance of PUM. However, where the PUM has obtained necessities under the contract, he is, like a minor, liable to pay a reasonable price for the Sale of Goods Act

As for a drunken person, his contractual capacity is generally the same as that of a PUM.

If the drunkenness is, to the knowledge of the other party, such as to render him incapable of appreciating his acts, a contract entered into in these circumstances is voidable at the instance of the drunken person upon sobering up. But like a minor and PUM, he is liable to pay reasonable price for necessities: Sale of Goods Act

Married Women

At common law a married woman could not enter into a contract. But under the Law Reform (Married Women and Tortfeasors) Act, 1935, the married women can sue and be sued in contract in the same way as single women

Aliens or Non-Citizens

Alien, i.e. a person who is not citizen of Kenya, can sue and be sued. Any enemy alien, i.e. a person resident in a country which is at war with Kenya, cannot sue, but if sued can defend an action

Corporations

In the case of corporation, its contractual capacity is limited by the provisions of its Memorandum of Association. It can only enter into those contracts authorized by the Memorandum; any other contract is ultra vires and cannot be entered into by the corporation. In case of a statutory corporation, it can only do those things which are expressly or impliedly authorized by statute. Any contracts entered into those which are not authorized by statute are “ultra vires” and therefore, void

Co-operative Societies

A co-operative society registered under the Co-operative Societies Act (Cap 490) can enter into

Contracts, and be sued in accordance with the provisions of the Act

Trade Unions

Section 25 (1) of the Trade Unions Act (Cap. 233) provides

“Every trade union shall be liable on any contract entered into by it or by an agent acting on its behalf: provided that a trade union shall not be liable on any contract which is void or unenforceable at law”

A registered trade union may sue and be sued and be prosecuted under its registered name

Terms of Contract

Statements which form part of the contract are known as **terms of the contract**. Those which are made in the course of negotiations but are ultimately left out of the contract are called **representations**. A representation is a statement that is not within the contract. If it turns out to be a false representation, either fraudulently or innocently made, it is called a **misrepresentation**. If the statement is within the contract then there is a further problem of deciding whether it is classified as express and implied terms

Oscar Chess, Ltd. V. Williams (1957)

The defendant offered the plaintiffs a second-hand Morris as part of the consideration for a hire- purchase contract. The registration book of the Morris stated that the car was a 1948 model, and this was confirmed by the defendant in good faith. But it turned out later that the car was in fact a 1939 model, which should have been valued at lower figure. The plaintiffs who were car dealers sued the defendant for the difference in value. The court had to determine whether his statement as to the age of the car was a term of the contract or a mere representation.

Held: The statement as to the age of the car was not a term of the contract but a mere representation. The plaintiffs were not therefore entitled to recover the difference in value

Dick Bentley Productions, Ltd. V. Harold Smith Motors Ltd. (1965)

The defendants sold a Bentley car to the plaintiffs, stating that the car had done only 20,000 miles from the time it was fitted with a replacement engine and gearbox. This statement turned out to be false, the car proved unsatisfactory and the plaintiffs sued. The court had to determine whether the defendant's statement as to mileage was to term of the contract or a mere representation.

Held: The statement as to mileage was a term of the contract; and the plaintiffs were entitles to damages for breach of contract

Looking at the above decisions together, it is clear that it is not always easy to determine whether a particular statement is a term or a mere representation. Generally a statement made by a person possessed of special knowledge or skill is treated seriously, to the extent of being considered a term of the contract; while a statement made by a person not position and will usually be regard as a mere representation

Express and Implied Terms

Parties to a contract are free to make their own bargain under the banner of “freedom of contract” They may therefore agree on any terms, as long as these are covered by law. But standard form contracts are in exception. In this type of contract, one of the parties virtually dictates all the terms of the contract, which are contained in a special document presented to the other party for signature- e.g. insurance contracts

Express terms are those which are specifically (or expressly) agreed upon by the parties, whether orally, in writing, or partly orally and partly in writing

In the absence of specific (or express) agreement on my matter in a particular contract, certain terms may be treated by law as governing the matter in question. These are known as implied terms. Terms may be implied in a contract by statute (e.g. the Sale of Goods Act implied certain terms in every contract of sales of goods); by custom (e.g. trade customs); or by court (e.g. in contracts of employment in master/servant relationship). Sometimes, an implied term is excluded in the express terms of the contract

Conditions and Warranties

Not all terms of a contract carry the same weight. Some are important than the others. Those which are regarded as **major terms** of the contract are known as **conditions**, while those which are **minor** or of **less consequence** are called **warranties**. The distinction between conditions and warranties is best illustrated by the effect which a breach of each one of them has on the contract. In a contract of sale of goods, for example, a breach of condition by one party entitles the other (innocent) party to treat himself as discharged from his obligations under the contract, while a breach of warranty by one party only entitles the other (injured) party to damages, but not to as right to regard himself discharge from his obligations under the contract

Both conditions and warranties may be express or implied. But conditions are further sub- divided into condition precedent and condition subsequent

A condition precedent is one which must be satisfied before a contract can become effective or operational: until such condition is satisfied the existence or operation of the contract is suspended and none of the parties has any enforceable right in the meantime

Pym V. Campbell (1856)

The plaintiff and defendant entered into a written agreement under which the defendant

agreed to buy a share in the plaintiff's invention. But it was understood that the agreement was subject to an approval of the invention by X, an engineer. X later disapproved the invention and the defendant refused to proceed with the agreement. The plaintiff sued. Held: In the absence of X's approval there was no effective agreement and the plaintiff's action could not therefore be maintained

Again, if A enters into a contract with B is to construct a number of residential houses for A, and A is required to obtain permission from the City Council before the construction work can commence, out the obligation imposed on B by the contract

A condition subsequent, on the other hand, is a condition whose occurrence may affect the rights of the parties under a contract which is already in operation. For instance, where there is a provision that a contract is to remain valid until a stated event occurs, the occurrence of the event is a condition subsequent which terminates the contract

Is an illiterate person protected by law?

The answer is yes, and the relevant protection is to be found in the illiterates Protection Act. The Act defines an illiterate as "*a person who is unable to read and understand the script or language in which the document is written or printed as the case may be*". The document must be read over and explained to the illiterate in a language he understands; after this the illiterate, if he is satisfied, appends his mark to it in the presence of a witness whose true and full name and address must be stated; and after the illiterate has appended his mark his name must be written on the document by the witness. Similarly, any person who writes such document must give his true and full name and address. In either case, there is a presumption that the instructions of the illiterates have been complied with and that the document was read over and explained to him. The burden is on the illiterate to rebut this presumption. He should, for instance, insist on the document being read over to him, otherwise he will be bound by it.

Vitiating Elements or Factors

A vitiating factor (or element) is one which tends to affect the validity of the contract.

The vitiating elements consist of:-

- i) Mistake
- ii) Misrepresentation
- iii) Duress (or Coercion)
- iv) Undue Influence

v) Illegality

Mistake

Mistake may be defined as an erroneous belief concerning something. It may be of two kinds:-

- i) Mistake of law
- ii) Mistake of fact

Mistake of law

Mistake of law may be further classified as;

- i) Mistake of general law of the country
- ii) Mistake of foreign law
- iii) Mistake of private rights of a party relating to property and goods

Mistake of general law of the country

A mistake of law can never be pleaded as a defense. But mistake of foreign law and mistake of private rights may be treated as mistake of fact

Mistake of fact

A mistake of fact is also known as an operative mistake. Under common law an operative mistake renders a contract void ab initio, i.e. Where an operative mistake is proved the legal position is that the parties are in the same position as if the contract was never entered into; the contract was void, right from the beginning

The traditional approach is to divide mistakes into three distinct categories: common mistake, mutual, and unilateral mistake

Unilateral Mistake

If one of the parties to a contract, and the other parties aware of this fact, there is said to be a unilateral mistake (compare mutual mistake where one party's mistake is not known to the party). Instances of unilateral mistake is not common in fraud cases where one party misrepresents his identity to the other, thereby inducing the other party into contracting with him in the false belief that he is contracting the person whose identity has been given

Misrepresentation

At representation means a statement of fact made by one party to the other, either before or at the time of contract, relating to some matter essential to the formation of the contract, with an intention to induce the other party to enter into contract, with an intention to induce the other party to enter into the contract. It may be expressed by spoken or written or implied from the acts or conducts of the parties) e.g. non-disclosure of a fact)

A representation when wrongly made, either innocently or intentionally, is termed as a misrepresentation. To put in differently, misrepresentation may be either innocent or intentional or deliberate with intent to deceive the other party. In law, for the former kind, the term 'Misrepresentation' and for the latter the term "fraud" is used

Types of Misrepresentation

There are three types of misrepresentation. These are:-

Fraudulent Misrepresentation

A fraudulent misrepresentation is a statement made without honest belief in its truth or recklessly without caring whether it is true or not. This type of misrepresentation therefore requires proof of fraud or dishonest; and once proved it is actionable at common law

Negligent Misrepresentation

An innocent is one made honestly or without fault on the part of the representor. This type of misrepresentation is not actionable at common law and the representee has no remedy at all

Remedies for Misrepresentation

Misrepresentation renders a contract voidable at the instance of the representee (the innocent party). Consequently, the remedy of rescission is available to him. Besides, he is also entitled to damages for loss that may have been suffered by him as result of the misrepresentation

Duress

Duress refers to actual violence or threats violence calculated to produce fear in the mind of the person threatened. The requirement of agreement in the establishment of a contractual relationship presupposes that each of the parties is free contracting agent. But

the freedom of the party subjected to duress (or coercion) is obviously restricted. Duress as such, is a vitiating factor which is actionable at common law (and is sometimes referred to as legal duress)

The dominant view is that contract entered into under duress (or coercion) is voidable at the instance of the party coerced

Undue Influence

“A contract is said to be induced by undue influence where, (i) the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and ii) he uses the position to obtain an unfair advantage over the other”

Illegality

An illegality contract is one which is prohibited by law e.g. making a contract to break into a house to steal goods is an illegal contract

These are contracts which offend against public policy are:-

- i) Contracts to commit a crime, tort or fraud
- ii) Contracts that are prejudicial to the administration of justice
- iii) Contracts liable to corrupt public life
- iv) Contracts that are sexually immoral

Discharge of Contract

A contract is said to be discharged (or terminated) when the parties to it are freed from their mutual obligations

A contract may be discharged in any of the following ways:-

- i) Discharge by performance
- ii) Discharge by Agreement
- iii) Discharge by Frustration
- iv) Discharge by Breach
- v) Discharge by Operation of Law

Discharge by Performance

When a contract is duly performed by both the parties, the contract comes to a happy ending

and nothing more remains. The contract, such a case, is discharged or terminated by due performance

Discharge by Agreement

Where a contract is still executory, i.e. where each of the parties is yet to perform his contractual obligation, the parties may mutually agree to release each other from their contractual obligation: each party's promise to release the other is consideration for the other party's promise to release him

Discharge by Frustration

A contract is said to be frustrated if an event occurs which brings its further fulfillment to an abrupt end; and upon the occurrence of the frustrating event the contract is immediately terminated and the parties discharged. But the doctrine of frustration only relates to the future. This means that the parties are discharged from their future obligation under the contract but remain liable for whatever rights that may have accrued before the frustration. Thus, goods supplied or services rendered before the frustration must be paid for, although the parties are both excused from further performance of the contract

Some examples of frustrating events are given below:-

- i) Destruction of subject Matter
- ii) Death or Incapacity
- iii) Frustration of Common Venture

Discharge by Breach

Breach of contract by a party thereto is also a method of discharge of a contract, because "Breach" also brings to an end the obligations created by a contract on the part of each of the parties. Of course the aggrieved party i.e. the party not at fault can sue for damages for breach of contract as per law; but the contract as such stands terminated

A breach of contract may take place when a party

- i) Repudiates his liability before performance is due
- ii) Disables himself from performing his promise
- iii) Fails to perform his obligations

Discharge by Operation of Law

A contract may be discharged by operation of law in certain cases. Some important instances are as under:-

- i) Lapse of Time
- ii) Death
- iii) Substitution
- iv) Bankruptcy

Remedies for Breach of Contract

Whenever there is a breach of contract, the injured party becomes entitled for some remedies. These remedies are:-

- i) Damages
- ii) Quantum Meruit
- iii) Specific Performance
- iv) Injunction
- v) Rescission

CHAPTER SIX

LAW OF ARBITRATION

Nature and Introduction of arbitration

Arbitration refers to settlement of disputes related to civil matters between one party and another party in a quasi manner. E.g. disputes in money, property or breach of contract

Or Arbitration is a settlement of disputes through mediations

A person who make decision for the two parties is called – **Arbitrator (Umpire)**

Essentials of a valid arbitration

- i) The agreement must be in writing
- ii) There must be a dispute i.e. land dispute etc
- iii) It must have all the essentials of a valid contract i.e. free consent of the parties, capacity etc
- iv) Parties to arbitration should be present i.e. complainant and the defendant
- v) An arbitrator should be named in the arbitration process

Arbitration agreement

An arbitration agreement is a written contract in which two or more parties agree to settle a dispute outside of court.

An arbitration agreement can be as simple as a provision in a contract stating that by signing that contract you are agreeing to arbitration in the case of any future disputes. For example, a business owner can ensure that potential dispute costs remain low by requiring anyone doing business with them to sign an agreement to arbitrate instead of litigate to settle the matter out of court. In the case of more complicated business matters, a mandatory arbitration clause may be necessary.

Characteristics of arbitration agreement

- i) The agreement shows how arbitration will be conducted.
- ii) An arbitration is usually conducted in private
- iii) Arbitration is generally confidential
- iv) Arbitration is flexible since parties have a discretion in choosing an arbitrator and the procedure to be followed in resolving the dispute
- v) Parties have powers to control the process, timing , hearing as well as who else other than the parties should be present
- vi) It shows whether there will be one arbitrator or a panel of arbitrators.
- vii) The agreement may also specify how the arbitrator will be chosen.

Effects of arbitration

- i) One party cannot bring an action to court of law related to their disputes.
- ii) It is assumed that arbitrator must have resolved the dispute well in good faith
- iii) Results given by the arbitrator is deem correct and you cannot challenge in court

Advantages of arbitration

- i) Less costly
- ii) It saves time and quick settlement of disputes are made
- iii) The procedure is quite simple
- iv) Arbitrators have technical knowledge of the subject matter
- v) The award of arbitrator once approved is final and no appeal lies from it
- vi) Parties can select the arbitrators

Disadvantages of arbitration

- i) Arbitrators do not have sound knowledge of law in most cases

- ii) Arbitrators' decisions are not uniform in similar cases
- iii) Arbitrators may be biased in some cases
- iv) Time and cost can be significantly affected by lack of co-operation of the parties or poor process design.
- v) Success of arbitration largely depends on the experience of the arbitrators

Appoint arbitrator or umpire

Court has powers to appoint an umpire if:-

- i) Appointed arbitrator refuses to act or is incapable or dies
- ii) Where the two parties or two arbitrators are at liberty to appoint a third arbitrator and cannot appoint
- iii) Where an appointed umpire or a third arbitrator refuses to act or is not capable of acting or dies

Removal of arbitrator or umpire

The court may remove an arbitrator or umpire on the ground that he has misconduct (e.g. accepted bribes, or refuses to record oral evidence) during the proceedings

Award

Award – Refers to judgment or final decision of an arbitrator .Award is final and binding between parties and therefore, it should be in writing and signed by the arbitrator or umpire

CHAPTER SEVEN

LAW OF SUCCESSION

What is Succession

Refers to the transfer of title to property under the law of descent and distribution. The transfer of legal or official powers from an individual who formerly held them to another who undertakes current responsibilities to execute those powers

Will

A document in which a person specifies the method to be applied in the management and distribution of his estate after his death

Or a Will a legal document that clearly sets out your wishes for the distribution of your assets after your death. Having a clear, legally valid and up-to-date Will is the best way to help ensure that your assets are protected and distributed according to your wishes.

A will is the legal instrument that permits a person, the testator, to make decisions on how his estate will be managed and distributed after his death. At Common Law, an instrument disposing of Personal Property was called a "testament," whereas a will disposed of real property. Over time the distinction has disappeared so that a will, sometimes called a "last will and testament," disposes of both real and personal property.

If a person does not leave a will, or the will is declared invalid, the person will have died intestate, resulting in the distribution of the estate according to the laws of Descent and Distribution of the state in which the person resided.

Characteristics of a valid will

- i) It must be in writing
- ii) The testator making a Will must not be under the age of majority. i.e. less than 18 years of old
- iii) Testator has mental capacity to make a will (sound mind)
- iv) The will is signed by testator at the end of the document
- v) Testator's signature is witnessed by two witnesses

- vi) Will is public records, as opposed to private documents.

Functions of a will

- i) Used to leave instructions about what should happen to the deceased property or what should happen to the property if one dies
- ii) Used to instruct dependents on the proportions of the property or estate
- iii) Used to avoid conflicts among the dependents of the deceased
- iv) A will allows a person to decide which individual could best serve as the executor of his estate
- v) A will safeguards a person's rights to select an individual to serve as a guardian to raise his young children in the event of death
- vi) It enable a person to select real dependent instead of court of law

Types of a will

There are basically 3 different types of wills: (1) written formalized wills, (2) holographic wills, and (3) oral wills (also known as *non-cupative wills*). All states recognize written formalized wills, but not all states recognize holographic and oral wills.

1. Written Formalized Wills

A written formalized will is a written will, signed by the testator, witnessed by 2 to 3 witnesses, and attested to. These are the vast majority of all wills, and lawyers create these wills for testators.

2. Holographic Wills (not all states recognize these)

A holographic will is a *handwritten* will; it is not created on a word processor. A holographic will is defined as a (i) dated, (ii) signed, and (iii) handwritten will in the handwriting of the testator with donative intent. The BIG EXCEPTION of holographic wills is that they are *not* witnessed and attested to. Remember, this means that no witnesses are required for a holographic will.

3. Oral Wills

Only about 5 states recognize oral wills (at the time of this writing), and even for the states that do recognize oral wills, the requirements are very strict.

Requirements for an Oral Will:

1. Testator must have been in impending and immediate peril and fear for his or her life
2. Testator must die from the peril;
3. Statements of testator must be heard by 2 or more witnesses;
4. The 2 witnesses must reduce the oral statements into writing within 10 days; and
5. The writing (by the 2 witnesses) must be introduced to probate court within 6 months of testator's death

Intestacy

When a person dies without leaving a will, they are described as having died intestate, which means that their estate will be distributed according to the **rules of intestacy**.

The rules of intestacy

The rules will enforce the division of the deceased estate in a fixed order as below:

1. **Married couples and civil partners.** If you die intestate, your spouse or civil partner will only receive a certain amount of your estate (currently the first £250,000, plus half of everything above that amount). They may also inherit if you have informally separated, but not if you have divorced or legally ended your civil partnership.

If you're married or in a civil partnership and you die intestate, your spouse or civil partner will not automatically receive all of your estate. They will only receive your personal possessions, along with:

- All of the rest of your estate if you have no children, grandchildren or great grandchildren.
- The first £250,000 of your estate, if you have children, grandchildren or great grandchildren, plus half of the rest of the estate. The other half of the rest of the estate will go to your children.

Other considerations

- If you have joint bank accounts, the account passes automatically by survivorship to the other joint account holder.

- If you own land or property with another person (you're the co-owner), the way it is dealt with for inheritance depends on how you own it:
 - If you own the land or property as beneficial joint tenants when you die, your co-owner will automatically inherit your share.
 - If you own the property as tenants in common, your co-owner will not automatically inherit your share of the property but it will be dealt with by your will or by the rules of intestacy if you don't have a will.

The property and money that your partner has automatically inherited according to the joint ownership rules will not be part of the estate that is being shared according to the

2. **Children.** If you die intestate and are survived by children, birth or adopted, the rules of intestacy will divide the estate in one of two ways:

- ❖ If you have a surviving spouse or civil partner, part of it will pass to them (the first £250k plus personal possessions) and the rest will be distributed amongst your children. If your estate is worth less than £250,000 your spouse or civil partner will inherit the whole of your estate and your children will receive nothing.
- ❖ If you have no surviving spouse or civil partner your child or children will receive the whole of your estate.

In both of the above cases the part of the estate apportioned to your children will be shared equally amongst them.

Do remember that if you are separated but are still married or in a civil partnership, your spouse or civil partner may inherit, even though you no longer live together. This means that your children may not inherit any of your estate if you die intestate.

Children from another relationship and adopted children

When an estate is being divided under the rules of intestacy, all of your children are treated equally. Children from all relationships and legally adopted children will receive equal shares of your estate.

Step-children will receive nothing if there is no will providing for them, regardless of your relationship or how long you cared for them, unless you have legally adopted them.

When will my children receive their inheritance?

Under the rules of intestacy, your children will only receive their inheritance when they either:

- reach the age of 18; or
 - Marry or enter into a civil partnership before they become 18.
3. **Grandchildren/great-grandchildren.** If you die intestate, your grandchildren and great grandchildren will not inherit any of your estate unless one of the following criteria is met:
- The child's parent or grandparent died before you.
 - The child's parent is alive when you die, but dies before reaching the age of 18 and is not married or in a civil partnership.

If either of the cases above, the grandchildren and great grandchildren will inherit an equal share of the amount their parent/grandparent would have received.

In either of the cases above, the grandchildren and great grandchildren will inherit an equal share of the amount their parent/grandparent would have received.

4. **Other relatives.** Under the rules of intestacy relatives such as parents, siblings, uncles and aunties might inherit some of your estate where certain circumstances are met.

If you die intestate leaving no surviving spouse or civil partner, your estate will be distributed in a strict order, which is:

- If you have children, they will inherit all of your estate in equal shares. If a child has already died, his or her children will inherit their share of the estate.
- If there are no children, your surviving parents will inherit your estate in equal shares.
- If there is none of the above, your brothers and sisters will inherit in equal shares. If a brother or sister has already died, their children (your nieces and nephews) will inherit their share of the estate.
- If there is none of the above, your half-brothers and half-sisters will inherit your estate. If a half-brother or half-sister has died, their children will inherit their share of the estate.
- If there is none of the above, your grandparents will inherit your estate in equal shares.

- If there is none of the above, your aunties and uncles will inherit your estate. If an auntie or uncle has already died, their children (your cousins) will receive their share of the estate.
 - If there is none of the above, your half-aunties and half-uncles will inherit your estate. If a half-auntie or half-uncle has already died, their children will inherit their share of the estate.
5. If you have **no surviving blood relatives**, your estate is passed to the Crown (**any body who is mature**)

Testate succession

Distribution of the estate or property of a deceased in accordance with his or her will

LEGACY

An amount of money or property left to someone in a will

Legacies are generally classified as

- i) **Demonstrative**: paid out of specific funds, or portioned out of a specific property.
- ii) **General**: not clearly identified, such as, "a house."
- iii) **Pecuniary**: specified sum of money or an annuity.
- iv) **Residuary**: what is left out of a personal estate
- v) **Specific**: clearly identified, such as, "My beach-house"

Grants of representation

A grant of representation is a document granted under seal by the High Court which gives authority to a named person (or persons) to deal with a deceased's person's estate.

The three most common types of grants of representation are:

1. Grant of probate.

When a person dies leaving a valid will and appointing an executor, a grant of probate issues to the executor. The person's assets are dealt with by the executor, according to the terms of the will. The deceased is said to have died testate.

2. Grant of letters of administration.

When a person dies without having made a valid will, they are said to have died intestate. A grant of letters of administration issues to the person or persons who were the nearest next of kin at the date of death. Next of kin is determined by the Succession Act 1965.

3. Grant of letters of administration with will annexed.

When a person dies leaving a valid will and a person other than the executor applies, a grant of letters of administration with will annexed issues to the person entitled by law.

When the grant issues to the applicant, he or she is called the legal personal representative.

Is a grant always necessary?

No:

1. If a person dies leaving small amounts of money in a bank, building society etc in his/her own name that financial institution may agree to release the funds without the necessity for a grant. The financial institution's decision is final.
2. If a person dies leaving assets which were held by him/her jointly with another or other persons, those assets as a general rule become the sole property of the survivor/s on the death of the deceased. In cases of doubt, the intention of the deceased at the time the joint account was created is relevant.
3. If a person dies and leaves no assets, there is generally no need to extract a grant. However, where a grant becomes necessary in such circumstances you must contact the Probate Officer in advance of such application.

CHAPTER EIGHT

CONTRACT OF EMPLOYMENT AND TRADE UNIONS

An employment contract is the relationship employee and the employer that set out terms and conditions of employment. The contract can either be written or oral.

Characteristics of a written contract

- i) It must carry a signature or a fingerprint of the employee showing that she or he has agreed to its terms.
- ii) There must also be a witness who is not the employer.

NB: In Kenya, Parliament has passed laws specifically dealing with different aspects of the employer-employee relationship. These laws define the terms and conditions of employment, and consist mainly of four Acts of Parliament i.e.

- i) The Employment Act (Cap. 226) and the regulation of Wages and Conditions of Employment
- ii) Act (Cap. 229) make rules governing wages, housing, leave and rest, health and safety, the special position of juveniles and women and termination of employment. The latter Act, in addition, sets up a process through which wages and conditions of employment can be regulated by the Minister.
- iii) The Factories Act (Cap. 514) deals with the health, safety and welfare of an employee who works in a factory.
- iv) The Workmen's Compensation Act (Cap. 236) provides for ways through which an employee who is injured when on duty may be compensated by the employer.

NB: The Employment Act does not make any provisions for wages in general. The minimum wage is dealt with by the Regulations of Wages and Conditions of Employment Act.

Types of employment contracts

1) Fixed contract

Is an employment contract specifies a fixed period of employment; the contractual relationship is automatically terminated at the end of this period, without being considered a resignation or a dismissal.

2) Unlimited contract

Is an employment contract, which does not specify a fixed period of duration, this contract can be terminated by notice of either party

3) Casual Employment and Piecework employment

Both types of employment are defined under section 2 of the Employment Act. The “casual employee” is “an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”, and **Piece-rate** “means any work the pay for which is estimated by the amount of work irrespective of the time occupied in its performance”. Basically these categories of workers enjoy to a large extent the same rights as other employees, but may be excluded from many benefits, such as leave, medical cover or housing.

4) Apprenticeship Contracts

Apprenticeship contracts that primarily intend to train young people in a profession are considered contracts of employment. The apprentice therefore enjoys all the rights and suffers all the obligations of an employee, subject to the terms of the contract. The only distinction between an apprentice and an employee is that the ‘full’ employment of an apprentice depends on his or her successful completion of the training. Apprenticeships in the industrial sector are governed by the Industrial Training Act, which provides that the rules and principles governing the must be applied, unless the Act expressly states an exception, or when the application of labour law would not be compatible with the nature and aim of the vocational training being undertaken. The minimum period of an apprenticeship contract under the Industrial Training Act, section 2, is four years of service.

5) Probation

Kenyan statutes do not relate to trial periods for individual labour contracts. However, collective agreements generally establish a trial period, after which the worker receives tenure.

Trial periods range between 3 weeks (under the Regulation of Wages (Tailoring Garment Making and Associated Trades) Order) and 3 years (the latter in the civil service). Government workers receive tenure according to the requirements set out in the Civil Servants Law (Appointments) and the Civil Service Rules, which are determined by the

Civil Service Department of the Government.

An employer may dismiss the worker during the trial period or at its conclusion, depending on the contract terms. Nevertheless, this termination of contract must be done in good faith. When the dismissal is unfair or causes the worker unusual injury, the court may award him damages

Suspension of the contract of employment

Under the Trade Disputes Act the labour contract is suspended if a worker participates in a lawful strike or is affected by a lawful locked out.

When the labour contract is suspended by worker participation in a strike, the employer is not required to pay wages, since no work has been performed. Industrial Court judgments' have held that an employer is not required to pay wages when the labour contract is suspended because of a strike.

Termination of the Contract of Employment

Termination by Notice (full performance)

This occurs where the contract is to pay wages or salaries periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the given of notice in writing. But where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice

Resignation

Under the Employment Act, sections 14 (5) and 16, the conditions for termination by notice by the employer apply here. Employees who receive monthly payments must inform the employer one month before they intend to stop working. The contract may provide for a shorter or longer period. If employees do not give notice, they should pay to the employer the equivalent of the wages for the period of notice.

If, in addition, the workers' resignation violates a contractual obligation to work for a specified period they may be liable for damages that the resignation caused the employer. Such cases are few though, and difficult to prove. Courts will not grant the specific performance remedy to an employer, i.e., they will not compel an employee to work, the employers' only remedy being damages. In general, when an employee resigns he or she is

not entitled to severance pay.

Dismissal

This occurs when the employee is guilty of such misconduct “gross misconduct”, when a very serious wrong has been proved i.e.

- i) Is absent from work without permission or good excuse
- ii) Is so intoxicated that cannot do their work properly
- iii) Deliberately neglects or ignores the work, or carries it out improperly
- iv) Uses abusive or insulting language
- v) Disobeys orders from persons with authority
- vi) Is lawfully arrested for an offence punishable by imprisonment, and is not within 10 days either released on bail or otherwise lawfully set at liberty
- vii) Commits a criminal offence against the employer or his or her property.

Rules of the Industrial Court on dismissal

Certain procedures have to be followed when such dismissal is being contemplated. First, the employee has to be informed of the claims of gross misconduct. Secondly, the employee has to be called upon and given the opportunity to defend himself or herself against them. Finally, he or she must be informed in reasonable detail of the decision once it is made, and the grounds upon which this is done. The decision should be made honestly and in good faith. There should be no victimization or any unfair labour practices.

Remedies in case of unjustified dismissal

Under Kenyan legislation there are two basic rights of a dismissed employee where the dismissal is wrongful: the right to reinstatement and the right to compensation. These rights can be granted separately or together. Reinstatement can only be ordered by the Industrial Court under section

15 (1) of the Trade Disputes Act. In rectifying the jurisdiction of the Industrial Court, the power of reinstatement had been given to the Court in the amendment of the Act in 1971. The Court normally considers all the relevant circumstances applying the principles of good faith, to decide whether reinstatement is justified, such as the length of time since dismissal, whether an employee has been employed elsewhere since dismissal, and the willingness of both the employer and the employee to reinstate and to be reinstated.

Under the law of contract, the general remedy for breach of contract is compensation, but the Court may also grant specific performance or rescission. The amount paid will depend on the circumstances of the case, but is generally based on the monthly or annual earnings of the dismissed person. Under the Trade Disputes Act, section 15 (2), the amount awarded must not exceed the actual financial loss suffered by the employee as a result of the wrongful dismissal, or an amount equal to his or her wages for twelve months. In computing the amount of compensation any earning which the employee has received since the dismissal is being taken into account.

Benefits provided by the employment contracts to permanent employees

Working Time and Rest Time

Hours of work

The general working hours are 52 per week, but the normal working hours usually consist of 45 hours of work per week, Monday to Friday 8 hours each, 5 hours on Saturday under the special Orders for different sectors subsidiary to the Regulations of Wages and Conditions of Employment Act. Collective agreements may modify the working hours, but generally provide for weekly working hours of 40 up to 52 hours per week.

Under the Employment Act, section 8, every employee is entitled to at least one rest day in every period of seven days. In many sectors the regular rest-day may not be the Sunday, but another day of the week.

Overtime

Under these statutory regulations overtime shall be payable at the rates of one and one-half time hourly rate on weekdays, and at the rate of twice the basic hourly rate on Sundays and public holidays.

Annual paid leave

Under section 7 of the Employment Act, every employee shall be entitled to no less than twenty one working days of annual leave with full pay. Where the employee works for less than a year, the number of days will be reduced accordingly. This is a minimum and many contracts and collective agreements provide for annual leave of between thirty to forty-five days. In average Kenyan employees enjoy annual leave of 24 days.

For a woman who has taken maternity leave (2 months) in a given year, the maternity leave forfeits her annual leave under section 7 (2) of the Employment Act.

Public Holidays

Kenya has currently 10 public holidays – New Year’s Day, Good Friday, Easter Monday, Labour

Day, Madaraka Day, Mashujaa Day, Eid-ul-Fitr-Day, Christmas Day and Boxing Day - described by the Public Holidays Act. Where any of these holidays fall on a Sunday, the next working day will be a holiday.

Maternity Leave and Maternity Protection

Under section 7 (2) of the Employment Act, maternity leave is two months with full pay, provided that a women who has taken two months maternity leave forfeits her annual leave in that year.

Other Leave Entitlements

Sick Leave

Under the Employment Act, section 7 (3), an employee is entitled to paid sick leave after a period of two consecutive months of service. Thus, the Employment Act, provides the minimum period of entitlement while the Regulation of Wages Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, section 12, provides the longest period granted by law.

The minimum period of entitlement is seven days with full pay and seven days with half-pay for every twelve months. The longest period of entitlement is thirty days with full pay and fifteen days with half-pay. The employee is however expected to produce a certificate of incapacity to work signed by a duly qualified medical practitioner.

Compassionate Leave

Under the Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, compassionate leave is granted to allow an employee to attend to personal misfortunes such as death, accidents or sickness concerning relatives and friends. The number of days he or she gets are deducted from the annual leave entitlement for

the year.

Study Leave

Under the Civil Service Code of Regulations public employees are entitled to study leave. Neither the Employment Act, nor the Regulations of Wages and Conditions of Employment Act provide for an equivalent. But in practice, many companies and employers grant employees time off to go for courses, or to prepare for examinations.

Minimum Age and Protection of Young Workers

The Employment Act, in part IV, accords special protection to juveniles. Under section 2 “juveniles” is defined as a “child or young person”; and “child” means an individual who has not attained the age of sixteen years”, whereas “young person” means a person who has not attained the age of 18 years.

Equality

Gender Equality

The Constitution guarantees the right to equality in Art 82(3): “the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

Workers with disabilities and persons living with HIV/AIDS

Workers with disabilities are mentioned only in the Regulations of Wages and Conditions of Employment Act, section 18 (1), which allows employment below the minimum wage for persons with disabilities. Further regulations to prevent these groups from suffering discrimination do not exist. As the Anti-discriminatory clauses in the current Constitution are enumerative unlike many other constitutions, not prohibiting discrimination on “any other ground” in Art 82 (3) of the Constitution, these groups are not legally protected against discrimination.

Pay Issues

Minimum wage

The Employment Act does not make any provisions for wages in general. The Minimum Wage is dealt with by the Regulations of Wages and Conditions of Employment Act and in the Regulation of Wages Order subsidiary to Chapter 229. A tradition has been established according to which the Minister of Labour and Human Resource Development, in exercise of his or her powers conferred to by section 11 of the Regulation of Wages and Conditions of Employment Act, would order the increment of minimum wages to come into effect May 1st of every year.

Protection of wages

Under the Employment Act, section 4, wages should be paid in Kenyan currency to the employee or to an authorized person. The wages may be paid in kind but this must not be in the form of alcohol or drugs. Also, the Act requires that wages be paid in full, except authorized deductions, permitted by the law (under section 6 of the Employment Act).

Housing

Under the Employment Act, section 9, specified under the Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, section 4, an employee is either entitled to reasonable housing accommodation, or to housing allowances that enable the employee to obtain reasonable accommodation. The Employment Act does not say what reasonable housing accommodation is, but gives power to the labour officer to enter into any house in which an employee is living and inspect it.