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SCHOOL FOR ADVANCED LEGAL STUDIES

**DEVELOPMENT OF ADR MECHANISMS IN KENYA AND THE ROLE
OF ADR IN LABOUR RELATIONS AND DISPUTE RESOLUTION**

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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FREDA MORAA NYAKUNDI

DEDICATION

This dissertation is dedicated with love to my family who walked beside me and supported me each step of the way throughout the entire master's program.

To my wonderful children, Calvin, Sharon and Samantha, you have been my best cheerleaders.

To my husband Reuben, whose support, encouragement and constant love has sustained me all through and for encouraging me to go for my dreams. You are my rock and the love of my life.

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Above all, I wish to give glory to the almighty God for his infinite favour, and for incredibly grace-filled moments I could never have imagined.

ABSTRACT

Alternative Dispute Resolution (ADR) is a vastly growing enterprise in conflict management the world over. Its application in managing labour relations and the attendant disputes has been tested and is well settled. Kenya, in recognition of this phenomenon, has adopted a legal framework making provisions for both ADR and Labour rights in its most supreme law, the Constitution of Kenya, 2010. This informs the theme of the current study.

The disciplines that are ADR and labour relations are overwhelmingly extensive. Thus they cannot find conclusive commentary in a single book leave alone a thesis with a predicated word count. This paper is neither a one stop-shop treatise nor an integral text on either disciplines but a comprehensive commentary on the interplay between ADR and labour relations. Fair treatment has been accorded and care has been borne to neither starve one nor belabor the other.

It is a commentary spanning eons, reaching out to the past, tracking developments and addressing the prevailing circumstances in respect of ADR's application in labour dispute resolution in Kenya. The rich literature review (books, statutes, conventions, journals, articles) quoted is as informative as it is illuminating, and presents a wealth of knowledge. The overall aim is to assess the place of ADR in labour relations in Kenya and spur academic, intellectual and sector-wise debate on the foregoing.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
ADRASA	Alternative Dispute Resolution Association of South Africa
AFSA	Arbitration Federation of South Africa
CAMP	Court of Appeal Mediation Programme
CBA	Collective Bargaining Agreement
CCMA	Commission for Conciliation, Mediation and Arbitration
CDRT	Community Dispute Resolution Trust
COTU	Central Organization of Trade Unions
CPF	Community Peace Foundation
DAB	Dispute Adjudication Board
EATUC	East African Trade Union Congress
FKE	Federation of Kenyan Employers
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Information Communication Technology
ILO	International Labour Organization
KAWC	Kenya Africa Workers Congress
KFL	Kenya Federation of Labor
KFRTU	Kenya Federation of Registered Trade Unions
MDC	Multi- Door Court House
NGO	Non-Governmental Organizations
SDRC	School's Dispute Resolution Centre
UDHR	United Declaration of Human Rights
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

CHAPTER ONE

1.1 INTRODUCTION AND BACKGROUND TO THE STUDY

Conflict is a fundamental aspect of labour relations and any labour relations system should then provide adequate mechanisms for the prevention and speedy resolution of conflict.¹ It's against this background that this study traces the development of Alternative Dispute Resolution vis-a-vis labour relations in Kenya and assess its role in justice delivery in labour disputes, particularly in light of the fact that both the Constitution of Kenya² and the Industrial Court Act³ provide for resort to alternative forms of dispute resolution.

The expression, Alternative Dispute Resolution 'describes all those conflict resolution processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.'⁴ Commentators have widely faulted the expression 'alternative dispute resolution' proffering that it implies these mechanisms are second-best to litigation.⁵ ADR is a stand-alone enterprise whose functionality is not alternative to other dispute resolution mechanisms and whose existence predates litigation.⁶ ADR is not a completely novel idea world over.⁷ It is generally a restatement of customary jurisprudence which largely constituted traditional dispute resolution mechanisms.⁸ Accordingly, the Charter of the United Nations affirms ADR by exalting pacifism and peaceful resolution of disputes.⁹

¹ Budd John W *Employment with a Human Face: Balancing Efficiency, Equity, and Voice* (2004) Ch 2.

² The Constitution of Kenya, 2010, Article 41 & 159

³ Industrial Court Act, Section 15.

⁴ Kariuki Muigua 'Alternative Dispute Resolution and Article 159 of the Constitution' 2012 available at www.kmco.co.ke accessed on 20 May 2013; Kariuki Muigua *Resolving Conflicts through Mediation in Kenya* 2013 ch 1; and Jerome T Barrett and Joseph Barrett *A History of Alternative Dispute Resolution: The Story of a Political, Social and Cultural Movement* (2004) ch 1.

⁵ P Fenn 'Introduction to Civil and Commercial Mediation' *Chartered Institute of Arbitrators Workbook on Mediation* (2002) 50-52; Muigua *ibid*.

⁶ Henry B & Arthur M *ADR Principles and Practices* (1993) 12.

The authors define ADR as a process of resolving an issue susceptible to normal legal process by agreement rather than imposed binding decision. This infers ADR as an independent and equally competent method of solving disputes.

⁷ Barrett *op cit* note 4 at ch 1.

The authors say 'origins of ADR predate and spread beyond original geographic boundaries of western civilization.'

⁸ Muigua *op cit* note 4 at 27.

⁹ Charter of the United Nations, Article 33.

Additionally, emergence of international commerce brought with it the necessity to develop an expedient, just and cost effective method of dispute resolution.¹⁰ ADR is built on the principle of reciprocity and thus aims at restoring pre-dispute cordiality making it a natural choice for commercial dispute resolution and protection of business relations.¹¹

1.1.1 The Situation in Kenya

Kenya enacted a new Constitution in 2010 that recognizes and guarantees labour rights as entrenched in the Bill of rights,¹² bestowing fundamental labour rights on the actors in the labour sector who are employees, employers and regulators. The concept of ADR was also introduced into the Constitution elevating its status as a recognized judicial mechanism in dispute resolution.¹³

The new Constitution also established the industrial courts¹⁴ and facilitated the enactment of an Industrial Court Act¹⁵ with jurisdiction to not only enforce labour rights¹⁶ but also all fundamental rights ancillary and incidental to employment and labour relations. This is of particular significance as previously, there was no mention of the industrial court in the Constitution. Instead, it was established under the Trade Dispute Act (repealed).¹⁷ On the new developments a judge of the now re-constituted industrial Court stated, 'It has now become imperative to anchor the court in the Constitution; and to elevate the subjects of social dialogue to constitutional rights and freedoms.'¹⁸ This is the justification of this research.

¹⁰ Brenda Brainch 'The Climate of Arbitration and ADR in Kenya' (2003) *Commonwealth Lawyer* 3.

¹¹ Eileen Carroll & Karl Mackie *International Mediation-The Art of Business Diplomacy* (1999) ch 2. The author remarks that in the diverse arena of international commercial disputes, those who have experienced mediation attest to its effectiveness. Mediation does not pretend to be a panacea but it is true that arbitration and litigation are blunter and costlier in approach and outcome.

¹² Op cit note 2, Article 41.

¹³ Ibid, Article 159.

¹⁴ Ibid, 162 (2).

¹⁵ Op cit note 3.

¹⁶ Labour rights find provision in Article 41 of the Constitution, various labour law statutes and International Conventions.

¹⁷ The Trade Dispute Act, chap 234.

¹⁸ Hon Justice James Rika 'The re-constituted industrial court of Kenya and the role of the social partners' 28th September 2012 at Kisumu, available at <http://www.kenyalaw.org/Forum/?p=679> accessed on 20th July 2013.

Before 2007 Kenya operated labour laws which were not compliant with the international labour organization (ILO) convention¹⁹ prompting a review to provide reformed, updated laws to correspond to contemporary economic and social changes.

Conflict is a fundamental aspect of labour relations and any labour relations system should then provide adequate mechanisms for the prevention and speedy resolution of conflict.²⁰ It's against this background that this study wants to trace the development of alternative dispute resolution vis-a vis labour relations in Kenya and assess its role in justice delivery in labour disputes, particularly in light of the fact that both the Constitution of Kenya²¹ and the Industrial Court Act²² provide for resort to alternative forms of dispute resolution.

This paper evaluated the role and performance of alternative dispute resolution in labour disputes in Kenya and factors that ensure its success or otherwise. In order to assess these factors, an analysis of the alternative dispute resolution regime generally and then specifically in labour relations in Kenya was done. This is particularly in view of the new Constitution of Kenya, drafted along the same lines as the South African one, and which has been described as one of the most progressive documents in the world.²³

1.2 STATEMENT OF THE PROBLEM

The management of industrial disputes presents an intricate situation, if only due to the competing interests, to wit, the employer's interest at profits and employee's interest at benefits. Gwisai says industrial disputes are inevitable due to the conflicting interests between the privileged owners of the means of production and the less fortunate providers of labour.²⁴ The evolution of voluntary industrial relations in Kenya precedes a history of restive labour relations where struggle for labour rights was brutally suppressed by the authorities.²⁵ During the colonial

¹⁹International Labour Convention (1948).

²⁰ Op cit note 1, Ch 2.

²¹Op cit note 2, Article 159.

²²Op cit note 3, s 15.

²³Prof Ben Sihanya 'Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects' (2011) *FES Kenya Occasional Paper, No. 5*; Commission for the Implementation of the Constitution (CIC), Quarterly Report January – March 2011.

²⁴ Munyaradzi Gwisai 'Labour and employment law in Zimbabwe: Relations of work under neo-colonial capitalism' (2007) *Harare, Zimbabwe Labour Centre and Institute of Commercial Law, University of Zimbabwe*.

²⁵ L P A Aluchio *Trade Unions in Kenya, Development and the System of Industrial Relations* (1998) 60-70.

period in Kenya, worker militancy grew in strength at every act of intimidation by the authorities.²⁶ Fashoyin adds that the transition from the chaotic relations of the period was a dramatic reversal of acrimonious labour relations in favour of what is today arguably one of the best institutionalized labour market governance systems in Africa.²⁷ This tradition of voluntary evolution is what inspired the 2006 sector reforms introducing tri-partism, voluntary industrial relations and the concept of ADR in dispute resolution in labour disputes. It is this evolution of labour relations and infusion of ADR into dispute management in the labour realm that is the subject of this study. The study provides an account of development of labour relations in Kenya, noting the role of ADR and a legal framework that nurtures social dialogue. The research takes the view that progressively, voluntary labour relations through tripartite cooperation and social dialogue have played a significant role in Kenya's labour market. It will however evaluate the contribution of ADR in shaping labour relations and the impact of ADR in the modern state of industrial dispute management in Kenya. The research will interrogate international conventions, local statutes, literary opinions, other jurisdictions and local sector reforms in building up a comprehensive commentary.

The study will help build perspective as to the growth of these two concepts and in particular the utility of ADR in the growth of labour relations and the place of ADR in labour dispute resolution within the current legal framework in Kenya.

1.3 OBJECTIVES OF THE PAPER

1.3.1 General Objective

To study the development of ADR mechanisms in Kenya vis-a-vis labour disputes and assess its role in labour relations and dispute resolution.

1.3.2 Specific Objectives

- a. Examine the historical development and evolution of labour relations and ADR in Kenya.

²⁶ T Fashoyin 'Trends and development in employment relations in the developing countries' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 2 at 1.

²⁷ *Ibid* at.1.

- b. Examine the legal and institutional framework on ADR and labour dispute resolution in Kenya.
- c. Evaluate the performance of ADR and relevant institutions in labour dispute resolution.
- d. Assess and examine future prospects of ADR and make recommendations both in the short and long term.

1.4 RESEARCH QUESTIONS

- a. What is the historical development and evolution of labour relations and ADR in Kenya?
- b. How is the legal and institutional framework on ADR and labour dispute resolution in Kenya?
- c. How is the performance of ADR and relevant institutions in labour dispute resolution?
- d. What are the future prospects of ADR and recommendations, both in the short and long term?

1.5 SCOPE AND LIMITATION

The research will be an investigative evaluation of the systems and role of Alternative Dispute Resolution mechanisms in labour dispute adjudication in Kenya. This includes recommendations on how the capacity of the actors and the various institutions can be enhanced to effectively deal with labour conflict and disputes within the legal framework provided.

1.6 RESEARCH METHODOLOGY

This is predominantly a qualitative research that utilized mainly desktop methods to collect both primary and secondary information. Primary sources are legal instruments on labour relations, which include the Constitution of Kenya, various labour statutes and other relevant legislation passed by Parliament, together with international and regional conventions ratified by the government. Secondary sources of information were also used, the main sources being books, journal articles and electronic databases. The nature of this research requires a historical element in labour relations conflicts and ADR and thus, generally the methodological approach to this study is not only legal and theoretical but also historical to some extent.

1.7 LITERATURE REVIEW

Ghai & McAuslan²⁸ and Justice Saeed Cockar²⁹ explore the growth of labour relations in Kenya and trace the initial steps to the emergence of organized labour in the colonial period. They paint an image of vexed employment relations and a confrontational environment between employers and labour during that period. Justice Saeed Cockar further explains that the determination of employees to overcome servitude was key to the establishment of the Industrial Relations Charter of 1962 that established organizational rights for workers committed the parties to tripartite consultation, collective bargaining and peaceful settlement of trade disputes.³⁰ This history helps put into perspective the state of affairs before the emergence of social dialogue and after the emergence of structured labour relations.

The Ministry of Labour in Kenya however explains the rising trend as a direct outcome of more user friendly provisions in the new labour laws which motivate more aggrieved parties to ventilate their grievances in the revitalized institutional and legal machinery.³¹ The Industrial Court (statistics in Chapter 4) however seems to handle the bulk of labour disputes as opposed to use of the ADR methods. This begs the question whether there is confidence in the ADR mechanisms as an effective labour dispute management tool.

Kariuki Muigua has in his numerous writings decried the lack of character and independence of the ADR enterprise as reasons for its staggered growth.³² The Courts have jurisdiction to sit on appeal of decisions from ADR mechanisms and this deflates public confidence. He further argues that lack of a comprehensive legal framework is a major challenge.³³

Gakeri on his part says that the fact that from its inception, the legal framework disregarded local dispute resolution mechanisms, is discernible as the main exposition for poor utilization of ADR

²⁸ Y P Ghai & J P W B McAuslan *Public Law and Political Change in Kenya: A study of the legal framework of government from colonial times to the present* (2001) ch 4.

²⁹ Justice Saeed Cockar *Kenya Industrial Court: Origin, Development and Practice* (1981) 12-20.

³⁰ *Ibid* at 29.

³¹ Report of Ministry of Labour, Kenya 2011.

³² *Op cit* note 4.

³³ *Ibid*.

locally.³⁴ He agrees with Muigua that the lack of a decipherable policy and supportive legal framework are setbacks in entrenching ADR in the dispute management system. He further quips that the fact that ADR was introduced as an exotic concept without the necessary alterations to align it to the Kenyan setting forms a basis also for its poor performance.³⁵

The sentiments of Muigua and Gakeri may be a strong basis for arguing that such is the reason for the overwhelming reference of disputes to the Industrial Court rather than ADR. It must however be noted that all writers are in agreement that ADR is vastly growing as a central tool in dispute resolution. Fashoyin makes a case for ADR, a key driver of social dialogue, as the main factor in stabilizing industrial relations in Kenya.³⁶ The labour law regime and the Constitution of Kenya, 2010 made cognizance of this aspect by elevating the standing of ADR as a labour dispute management tool and dispute resolution mechanism generally.

³⁴ Jacob K Gakeri 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1 *International Journal of Humanities and Social Science* 222.

³⁵ Ibid.

³⁶ Op cit note 26.

CHAPTER TWO

HISTORICAL BACKGROUND, EVOLUTION AND DEVELOPMENT OF LABOUR RELATIONS AND DISPUTE RESOLUTION IN KENYA

2.1 PRE-COLONIAL PERIOD

2.1.1 Dispute Resolution and Labour Relations in Kenya

A conceptualization of historical perspectives in both labour relations and dispute resolution may not always be the most profitable approach but nevertheless it provides a fundamental insight in comprehending the contemporary dynamics in present day organized societies.³⁷ Africa has gone through key developmental stages³⁸ hence any scrutiny of the present day institutional arrangements bereft of past developments would be deficient and incomplete.

Labour in ancient African societies was not as organized and sophisticated as at present. In fact, wage labour and labour relations in the modern sense is traceable to the colonial era.³⁹ However, it has been argued that, as opposed to East and Central African regions, the West and North African regions had long traditions of organized labour in craft and tradesmen's guilds hence their welcome reception to trade unionism and labour relations.⁴⁰

In the pre-colonial period, African societies had well outlined indigenous techniques of settling conflicts. These techniques bordered on restorative approaches through use of mediation and arbitration to reestablish the pre-conflict geniality between the disputants. African culture affirmed methods that promoted its foundations on brotherliness and harmony.⁴¹

³⁷ Koçer R G and Hayter S *Comparative study of labour relations in African countries* (2011) 13-6.

³⁸ Geoffrey Wood and Chris Brewster *Industrial Relations in Africa* 2ed (2008) ch 1; Geoffrey Wood and Chris Brewster *Industrial Relations in Africa* (2007); Fashoyin T *Industrial Relations and African Development* (1992).

³⁹ Op cit note 37.

⁴⁰ Orr C A 'Trade Unionism in Colonial Africa' (1966) 4 *The Journal of Modern African Studies* 1 at 65-81; Kester G *Trade Unions and Workplace Democracy in Africa* (2007).

⁴¹ Andrew Chukwuemerie 'The Internationalization of African Customary Law of Arbitration' (2006) 14 *African Journal of International and Comparative Law* 143-175; Choudree R B G 'Traditions of Conflict Resolution in South Africa' 1999 *African Journal on Conflict Resolution*; Argyle W J 'The concept of African collectivism' (1968) 4 *Mawazo* 37-43; Deng F M & Zartman *Conflict Resolution in Africa* (1991); Osaghae E 'Applying Traditional Methods to Modern Conflict' in Zartman I W *Traditional Cures for Modern Conflicts* (2000).

During the pre-colonial period in Kenya, dispute resolution among Kenyan communities was basically traditionally initiated and controlled.⁴² It is noteworthy, from the onset that African customary law and jurisprudence did not distinguish between criminal and civil disputes and thus conflicts of whatever nature were solved using similar mechanisms. For instance among the Kamba people, when a dispute arose, the same would be forwarded to the council of elders for resolution.⁴³ Among the Kikuyu, the venue for resolution of a dispute depended on the magnitude of the dispute. Small disputes within a homestead were resolved by the head of the house. Other disputes were handled by the council of elders popularly referred to as *kiama*. For instance, if a dispute was very serious, a meeting by the heads of the families within the kinfolk would be convened by the head of the house within which the dispute arose. This meeting would be referred to as the *mbari*. The determination of the dispute by the *mbari* would be final and not subject to appeals⁴⁴.

This changed altogether with the advent of colonization as the British progressively dismantled existing structures. The customary institutions were denied legal recognition and almost rendered functionless. In some instances, there was partial recognition of customary practices such as marital rites but the same was largely undermined in preference to formal systems.⁴⁵ It has been argued that had these practices been recognized, legitimized and elevated as national approaches to dispute resolution, with necessary modifications, this would have placed ADR mechanisms on a different platform in the dispute resolution matrix in post-colonial Kenya.⁴⁶ For many years ADR has been viewed suspiciously and only a few had the temerity to go for it.

Since the inception of colonialism in Kenya, emphasis has exclusively been on litigation. It is therefore not surprising that utilization of ADR mechanisms remains inauspicious to this day.

⁴² Mohamud Adan & Ruto Pkalya *Conflict Management in Kenya: Towards Policy and Strategy Formulation* (2006) 8-10; Ruto Pkalya, Mohamud Adan & Isabella Masinde *Indigenous Democracy: Traditional Conflict Resolution Mechanisms. The Case of Pokot, Turkana, Samburu and Marakwet communities* (2004).

⁴³ Adelle Blackett, 'Mutual Promise: International Labour Law and B.C. Health Services' (2009) 48 *Supreme Court Law Review* 378; Penwill D J *Kamba Customary Law: Notes Taken in the Machakos District of Kenya Colony* (1951).

⁴⁴ Jomo Kenyatta *Facing Mount Kenya* (1938) 206-208.

⁴⁵ *Op cit* note 34 at 223.

⁴⁶ *Ibid.* Dr. Gakeri postulates that had the colonial masters embraced the existent local structures in African societies and especially dispute resolution mechanisms their application at present would be at par with the formal mechanism.

2.2 THE COLONIAL PERIOD

2.2.1 The Evolution of Labour Relations in Kenya

The evolution of Kenyan labour relations and practice can be traced back to the 19th Century. The creation of a new system of agrarian law and administration had an immense bearing on the development of labour relations in Kenya.⁴⁷

The introduction of white settlers in Kenya necessitated the formulation of provisions regulating conduct and labour issues. The Whites settled in the fertile highlands outside Nairobi, the 'White Highlands.' This resulted in displacement of the indigenous African communities from their once ancestral land, for instance, the Maasai and the Kikuyu tribes lost large amounts of land to these European settlers.⁴⁸ Their resentment grew deeper with each acre lost and the inevitable conflicts would not fully be resolved until independence.⁴⁹ A dual policy of administration was established in colonial Kenya.⁵⁰ The Crown's Land Ordinance 1915⁵¹ is significant to this effect. Under this legislation, Africans had no rights in land and were limited to mere occupation, a factor that had considerable significance on the issue of agricultural labour.

The dual policy was one of the ways amongst the many legislative, administrative and financial mechanisms the Europeans employed to induce Africans to work in their farms.⁵² At this time, the terms and conditions of employment were regulated by the English common law and statutes; the applicable statute was the law of contract Act 1872 of India, applicable in England and thus with force in Kenya.⁵³ It was however largely ignored in agricultural labour issues. The imposition of both Hut Tax and Poll tax in 1901 was a financial inducement for Africans to work. This marked the introduction of a cash economy into a land hitherto dominated by the

⁴⁷ Op cit note 28, ch 3.

⁴⁸ Ibid at ch 3. See also: Zeleza T 'The Colonial Labour System in Kenya' (1992) 5-29; and Ochieng W R & Maxon, R M 'An Economic History of Kenya' (1992) ch 1.

⁴⁹ Op cit note 28; See also www.nyulawglobal.org/globalex/kenya1.htm accessed on 27th May 2013.

⁵⁰ Op cit note 28 at 80-97.

⁵¹ The Crown Lands Ordinance No 21 of 1902 (obsolete).

⁵² Op cit note 28 at ch 3; C K Meek *Land Law and Custom in the Colonies* (1946) 92-96; and Hailey *Native Administration in the British African Territories* (1956) 196.

⁵³ Op cit note 29 at 12-20. See also John L Brown and J Douglas Muir 'Founding of the Kenyan Industrial Court' (1976) 14 *Journal of Modern African Studies*.

barter system.⁵⁴ This treatment of labour was objected to by the colonial office which set out to introduce changes. The resultant adverse effects drove settlers to adopt the practice of 'Kaffir farming.'⁵⁵ This practice allowed Africans to squat on land while providing their labour to the part under cultivation by the whites. The Native Labour Commission of 1913 condemned this practice and this led to the emergence of Resident Native (Squatters) Ordinance of 1914 which banned Kaffir farming and introduced a supervised contract of agricultural labour. This failed to attract increased labour as anticipated and thus the 'Ainsworth Circular' of 1919 was issued requiring administrative officers to use insistent advocacy to get African labour for the settler farms.⁵⁶ The dual system was hence aimed at, inter alia, gaining cheap labour which involved elements of involuntary servitude. This and many other techniques used by the settlers between the years of 1922-1939 in obtaining and suppression of the African laborers strengthened the clamor for labour relations⁵⁷. The White settlers in response introduced a curfew which restricted the movement of the African settlers from one farm to another.⁵⁸ With unending determination, the period towards the middle of the 20th century saw the establishment of an organized trade union movement. The first such unions were the Wage Earners associations dating back to the early 1940s immediately after the First World War.⁵⁹

The emergence of Unionism in the labour market was met with opposition and force from the colonial authorities who read political guise in their activities.⁶⁰ In a bid to ensure control of these labour organizations, the government introduced the Trade Union Labour Office in 1948. This office was disguised as a crusader for 'responsible' unionism.⁶¹ The government did not stop at that, and in 1952, legislation intended to foster effective operation of trade unions was introduced⁶². Conversely, the government encouraged formation of staff unions and works

⁵⁴ Op cit note 28 at 83; G Davidov 'Collective Bargaining Laws: Purpose and Scope' available at <http://www.ssrn.com/abstract> accessed on 30 May 2013.

⁵⁵ Ibid at 80-4.

⁵⁶ Ibid at 82-4.

⁵⁷ Op cit note 25 ch 2.

⁵⁸ Op cit note 26 at 1.

⁵⁹ G Hagglund 'The development of industrial relations in Kenya' in Wood G and Brewster C (ed) *Industrial Relations in Africa* (2008) 28-38.

⁶⁰ M K Bor 'The New Labour Laws: An Overview' Paper delivered at a seminar on Responding to the Challenges of Fair and Ethical Trade. Nairobi, on the 23rd November 2007 at 2-6.

⁶¹ W Ananaba *The Trade Union Movement in Africa: Promise and Performance* (1979) 3.

⁶² www.cotu-kenya.org, accessed on 27th May 2013: See also; Tiyaambe Zeleza *Labour Unionization and Women's Participation in Kenya-1963-1987* (1988).

committees, which were more acceptable since they fitted in the governments interests of confining workers' organizations to economic imperatives. In case of any dispute arising between the workers and the government, the workers could not strike as the staff associations and works committees lacked such powers.

Trade unionism weathered all these impediments and increasingly grew in both numerical strength and power. As at independence, trade unions included; East African Trade Union Congress (EATUC), Kenya Federation of Registered Trade Unions (KFRTU), Kenya Federation of Labor (KFL) and Kenya Africa Workers Congress (KAWC).⁶³

The impact and influence of the trade unions extended to confrontations which did not primarily arise from the union's activities but from the unions' role in the political struggle for independence. Such confrontations were also precipitated by the arrest and detention of the unions' leaders.⁶⁴

The year 1962 formed a historical period in the development of labour relations in Kenya due to the signing of the landmark industrial charter by the government of Kenya, the Federation of Kenya Employers, the Kenya Federation of Labour and the Central Organization of Trade Unions Kenya. The responsibilities of the management and unions and their respective obligations in the field of industrial relations was provided in the Charter. The Charter also set up a joint dispute commission which was meant to oversee the speedy and amicable resolution of labour disputes in the country.⁶⁵

The Trade Union Ordinance of 1962 provided for the settlement of trade disputes through conciliation and if necessary, an arbitration panel or board of inquiry. The Tripartite Agreement concluded by the Government, Employers and Employees on 10th February 1964 established an Industrial Court to which all disputes unresolved by the voluntary negotiating machinery would be referred for arbitration. The Industrial Court was founded on tripartism expressed, not in the

⁶³ Ibid (Cotu-Kenya).

⁶⁴ Op cit note 59 at 25-36; Brown and Muir op cit note 53; see also Brewster *Industrial Relations in Africa* 2008 ch 2.

⁶⁵ The 'Performance and Prospects: Ministry of Labour and Human Resource Development' (Government of Kenya report published in April 2000).

law or the constitution of the country; but by a social document concluded by the social partners.⁶⁶

The court entered into the law books later on in 1964, with the enactment of the Trade Disputes Act to hear and determine labour disputes in the country.⁶⁷ The Court metamorphosed with time owing to 1965 and 1971 amendments to the Act aimed at involving stakeholders like COTU and FKE in its operations.⁶⁸

2.2.2 Dualism in Dispute Resolution

Law was the main administrative device employed by Colonial Governments. By historical circumstances or reasons of limited capacity, Africa's post-colonial states had left certain domains of citizens' behaviour, like family and marriage relations, outside the reach of formal law⁶⁹. Similarly, in some parts of the country where state presence was minimal, traditional systems were permitted by default to exist side by side with a state run justice system in order to reduce operational costs. This is largely explicated by the fact that imported colonial laws were at such great variance with the norms of African communities that their imposition would lead to more conflict and would further increase the cost of enforcing compliance. Hence, dualism, a hybrid legal space, where more than one legal or quasi-legal regime occupied the same social field, was a key feature of dispute resolution mechanisms in the Kenyan labour relations process.⁷⁰

The East African Order in Council of 1897 and the Crown regulations made there under introduced a dual court system; one court for Europeans and the other for Africans. This system only lasted for 5 years.⁷¹

Upon the realization by the colonial authorities of the need to have dispute resolution organs, village elders, headmen and chiefs were empowered to settle disputes as they had done in the pre-colonial period.⁷² These traditional dispute settlement organs gradually evolved into quasi-

⁶⁶ Op cit note 18; Cockar op cit note 29 and Brown and Muir op cit note 53.

⁶⁷ Ibid.

⁶⁸ Op cit note 25 at 23-6 & 32.

⁶⁹ Fahnbulleh Miatta 'In Search of Economic Development in Kenya: Colonial Legacies & Post-independence Realities' (2006) 107 *Review of African Political Economy* at 33-43.

⁷⁰ Op cit note 25, ch 2.

⁷¹ Op cit note 28 ch 4; East African Protectorate Government 'Orders and Regulations' at 65.

⁷² Ibid at 132.

judicial tribunals.⁷³ Apart from provision through the tribunals, traditional dispute mechanisms were afforded limited application during this period. The genesis of ADR framework during colonialism can be traced back to the Arbitration Ordinance of 1914.⁷⁴ This has undergone metamorphosis over the years resulting in the current Arbitration Act 1995 as amended in 2009.⁷⁵ It is noteworthy that ADR in this period had no bearing on labour relations and was never called to use in labour disputes.⁷⁶

In dispensing justice under the relevant English and Indian laws where non-Africans were concerned, the administration of justice was entrusted to expatriate judges and magistrates. The segregated system of administering justice prevailed until 1962 when the African Courts were transferred from the provincial administration to the judiciary. Further, it was not until 1963 when the 'independence Constitution' was finally enacted that the beginning of a truly independent and impartial Judiciary came forth. The independence Constitution established a universal court system with jurisdiction over all persons, regardless of racial or ethnic considerations.⁷⁷

The Industrial Court of Kenya came later after independence and has been one of the country's pillars for the maintenance of industrial peace.⁷⁸

2.2.3 Trade Unionism in Kenya and its Role in Labour Relations

The trade union movement in Kenya is a child of economic, social and political strife. As noted above, it weathered colonial resistance in its formative years to evolve to an organized institution.⁷⁹ In 1937, after a change in British Labour Policy, the Trade Unions' Ordinance,

⁷³ See generally: Phillips *Report on Native Tribunals in Kenya* (1945).

⁷⁴ This legislation was a replica of the English Arbitration Act 1889 which principally placed Arbitration under the absolute control of courts vide S. 21 which gave courts plenary jurisdiction of arbitration.

⁷⁵ Arbitration Act chapter 49 & Arbitration Amendment Act (No 11 of 2009).

⁷⁶ Op cit note 28 ch 3 & 4.

⁷⁷ Op cit note 25.

⁷⁸ S M Kariuki & N J Smith *Building Effective Dispute Resolution Structures in Unionized and Non unionised Export Processing Zones: The Case of the Kenyan Garment Industry* (2003) at 1-24.

⁷⁹ Op cit note 26 at , Fashoyin remarks thus 'The transition from the chaotic relations of the period was a dramatic reversal of acrimonious labour relations in favour of what is today arguably one of the best institutionalized labour market governance systems in Africa.' This is in reference to the labored evolution of trade unionism, tri-partism in labour relations and voluntary industrial relations in Kenya. See also: Orr op cit note 40 at 61-9; Harcourt M and Geoffrey Wood G *Trade unions and democracy: strategies and perspectives* (2004) at ch 1 says that the history of organized industrial relations across Africa is closely intertwined with the struggle for independence; and Zelig L and Seddon D *Class Struggle and Resistance in Africa* (2002).

which stipulated conditions under which Africans could organize themselves into trade unions, was enacted.⁸⁰

This increased clamor for the formation of unions resulted in three notable creations, East African Standard Union, East African Standard Staff Union, and Labour Trade Union of East Africa.⁸¹ The rise of political tempo in the country also played a major role in changing the status quo. Kenya African Study Group formed to agitate for the return of African land, better wages and terms of service did not go unnoticed.⁸² The colonial period evidenced the emergence of many more workers unions⁸³ but trade unionism was greatly affected in 1952 with the arrest and detention of its leadership immediately after the state of emergency.⁸⁴

The Kenya federation of labour would later play a remarkable role in the fight for independence. However the subsequent period was marked by leadership rivalries in the trade movement necessitating the need for a central union.⁸⁵ This came in 1975 through a presidential committee appointed by the government.⁸⁶ This led to formation of a new organization; the 'Central Organization of Trade Unions' (COTU (K)).⁸⁷ Over time, the membership to COTU has grown tremendously and achieved significant strides in labour relations, key being uniting workers interests.⁸⁸

2.3 POST-COLONIAL PERIOD

2.3.1 The Labour Law and Labour Relations Reform Agenda in Kenya

The most important development in the Kenya labour relations came in May 2001, popularly known as the launch of the labour law reform agenda. This was commenced by the setup of the task force⁸⁹ mandated to spearhead the reform process vide gazette Notice number 3204.⁹⁰

⁸⁰ Trade Unions Ordinance, 1937.

⁸¹ Op cit note 62.

⁸² Kenya 'Annual Survey of Violations of Trade Union Rights' 2008 available at <http://www.itcu-csi.org>, accessed on 30th May 2013.

⁸³ Ibid.

⁸⁴ Op cit note 62.

⁸⁵ Op cit note 25.

⁸⁶ Sessional Paper No. 10 (African Socialism and its Application to Planning in Kenya of 1965) at 56

⁸⁷ Op cit note 78. See also Cotu Kenya op cit note 62.

⁸⁸ Op cit note 25 and op cit note 62.

⁸⁹ The tripartite taskforce comprised of the government, trade unions and employers representatives.

The reform agenda stemmed from several chief concerns, key being the need for consolidation of labour statutes into a single user friendly law on labour relations in Kenya.⁹¹ Additionally, the peripheral concern that the colonial heritage cloud was still hovering above all employment relations propelled the desire for change.⁹² A new labour regime was thus born and brought with it drastic changes to the labour relations in the country. A brief outline of the new legislation provides an insight in this regard.

The Labour Relations Act governs labour relations, collective bargaining, dispute settlement and related matters⁹³ whereas Labour Institutions Act was enacted for the establishment of Labor Institutions, provide for their functions, powers and duties.⁹⁴ The Employment Act was enacted to declare and define the fundamental rights of employees, provide basic conditions of employment of employees and to regulate employment of children.⁹⁵ The Occupational Health and Safety Act came into effect to provide for the safety, health and welfare of persons employed, and all persons lawfully present at workplaces and related matters.⁹⁶ The Work Injury Benefits Act was enacted to provide for compensation to employees for injuries suffered, occupational diseases contracted in the course of employment and for insurance of employees and related matters.⁹⁷ Other sources of labor laws in Kenya are the constitution, collective agreements and extension orders of collective agreements, and individual labour contracts.

Kenya adopted a new Constitution in August 2010.⁹⁸ Article 162 (2) (a) provides that '*...Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to employment and labour relations.*' Under this framework, Parliament enacted the Industrial Court Act which established the present Industrial Court.⁹⁹

⁹⁰ Brown & Muir op cit note 53.

⁹¹ 'ILO Declaration on Social Justice for a Fair Globalization, Article I A (ii)' (Adopted by the International Labour Conference at its 97th Session in Geneva on 10/06/2008).

⁹² M K Bor op cit note 60 at 6-17.

⁹³ Labour Relations Act, 2007.

⁹⁴ Labour Institutions Act No 12 of 2007.

⁹⁵ Employment Act No 11 of 2007. The Act has expressly domesticated ILO Forced Labor Convention, 1930 (No. 29) and the Abolition of Forced Labor Convention, 1957 (No. 105).

⁹⁶ The Occupational Safety and Health Act of 2007.

⁹⁷ Work Injury Benefits Act of 2007.

⁹⁸ Op cit note 2.

⁹⁹ Op cit note 3.

The Act has reduced the government's involvement in matters of the court and the judiciary independently controls the court.¹⁰⁰ This is a complete departure from the previous regime which was often prone to governmental interference as the ministry of labour was tasked with appointment of some officers to the court such as the registrar and his deputies.

The history of the development of labour dispute resolution and labour relations in Kenya which is rich with controversy, debate and tragedy has registered significant scores and the same will find extensive coverage in the two succeeding chapters.

¹⁰⁰ Ibid, Section 29(1).

CHAPTER THREE

THE LEGAL AND INSTITUTIONAL FRAMEWORK ON ADR AND LABOUR DISPUTE RESOLUTION IN KENYA

3.1 INTRODUCTION

In Kenya, the jurisprudential foundations of ADR are rooted in the different forms of traditional dispute resolution mechanisms. ADR mechanisms find more resonance in African systems which espoused the ideals of reconciliation and pacifism.¹⁰¹ However, over the years the traditional justice system which espoused these mechanisms has been ignored and courts have had less reference to it, leading to stagnation.¹⁰² This has generally been a restatement and carryover of the colonial mentality where African cultures were seen as backward, uncouth and uncivilized.¹⁰³ The Court system has however failed to deliver access to justice expeditiously and cost-effectively.

Accordingly, the need for access to justice has re-directed disputants to ADR and other forms of traditional justice systems which are viewed as accessible and affordable.¹⁰⁴ It is also incorruptible especially where parties are engaged in direct negotiations, proceedings and language are familiar, it's accessible at all times, affordable, utilizes local resources, decisions are based on consensus, and it seeks to heal and unite¹⁰⁵ disputing parties, unlike the formal system that is seen as breeding hatred.¹⁰⁶ The realization that Kenya's present legal system is lethargic¹⁰⁷ and cost-intensive has also led to a change of course in favour of ADR.¹⁰⁸

¹⁰¹ Op cit note 34.

¹⁰² Ibid. Dr Gakeri particularly notes at page 220 that 'Courts of Law have not been instrumental in the popularization and promotion of arbitration as a dispute resolution mechanism... judicial control of the arbitral process has been imperious hanging like the proverbial Sword of Damocles.'

¹⁰³ Op cit note 28; Gakeri op cit note 34; and Muigua op cit note 4.

¹⁰⁴ Patricia Kameri-Mbote 'Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention' (2005) *IELRC Working Paper 2005-1* at 3-8.

¹⁰⁵ Dr Kariuki Muigua *Settling Disputes through Arbitration in Kenya* 2012 at ch 1.

¹⁰⁶ Republic of Kenya: 'Final Taskforce Report on Judicial Reforms.'

¹⁰⁷ *George Njau Maichibu v. Mungai Maichibu & Joseph Kimani Waithima* (2007) eKLR. The suit was filed in 1981 but concluded more than 25 years later in 2008.

¹⁰⁸ Brenda Branch 'The Climate of Arbitration and ADR in Kenya' (2003) *Commonwealth Lawyer* 3.

3.2 ADR MECHANISMS IN KENYA

3.2.1 Arbitration

Arbitration is defined as an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards.¹⁰⁹ It has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for settlement.¹¹⁰

Arbitration is a process subject to statutory controls¹¹¹ and hence has elicited debate as to whether it is conventionally an ADR mechanism.¹¹² It has even been argued that it falls outside the range of ADR due to its process which involves consideration of oral and/or written submissions from the parties and then issuance of an arbitral award against which there is no appeal to the court.¹¹³ Arbitration is common in international disputes,¹¹⁴ employment disputes, consumer rights disputes and corporate cases. In Kenya, arbitration is mostly used in commercial disputes.

The operative statute governing arbitration is the Arbitration Act.¹¹⁵ It is largely a replica of UNCITRAL Model Law which introduced the concept of international commercial arbitration hitherto novel to Kenyan Law.¹¹⁶

¹⁰⁹ Op cit note 34 at 221; Muigua op cit note 4 where he defines Arbitration as voluntary private process in which a neutral third party resolves a dispute by listening to the disputing parties and giving a “ruling”.

¹¹⁰ Farooq Khan ‘Alternative Dispute Resolution’ (2007) *A paper presented in Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi*; Kariuki Muigua ‘Overview of Arbitration and Mediation in Kenya’ (2011) at 2 *A Paper Presented at a Stakeholder’s Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011.*

¹¹¹ Op cit note 4 at 3.

¹¹² Ibid at 3. Dr Muigua terms arbitration as a court process in essence. He further says “it is an adversarial process and in many ways resembles litigation.”

¹¹³ Brenda Brainch ‘Commercial ADR’ 2006 available at

<http://www.disputeresolutionkenya.org/pdf/Commercial%20ADR.pdf> accessed on 26th June 2013.

¹¹⁴ Op cit note 106.

¹¹⁵ The Arbitration Act, Act No. 4 of 1995 (as Amended in 2009).

¹¹⁶ Op cit note 34 at 221-5.

Arbitration in Kenya also finds expression in the Civil Procedure Act.¹¹⁷ The Act provides that ‘a suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.’¹¹⁸

Further, Order 46 of the Civil Procedure Rules provides inter alia, that ‘at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference to arbitration’.¹¹⁹ Additionally Section 59D (a recent inclusion) in the Act further demonstrates the courts’ supportive role to arbitration and ADR mechanisms.¹²⁰

Arbitration in Kenya is also governed by certain International Conventions.¹²¹ The UNCITRAL Model Law on International Commercial Arbitration (commonly referred to as “the Model Law”) was adopted by the United Nations Commission on International Trade Law in June 1985¹²² and amended in 2006 has been ratified by Kenya. It provides an accommodative and comprehensive regime covering all stages of the arbitral process in detail.¹²³ In appreciation of the comprehensiveness of UNCITRAL model, the Arbitration Act is largely its replica.¹²⁴ Kenya has also ratified the New York Convention, the WTO and WIPO Treaties relating to arbitration and is bound by the obligations under those international legal instruments.¹²⁵

The institutional framework under which Arbitration is conducted though not well entrenched¹²⁶ exists under specific legal frameworks. Worth noting is the failure by the Arbitration Act of 1995 to establish under its regime a sole Arbitral institution which is a grave omission.¹²⁷

¹¹⁷ Civil Procedure Act, Revised Ed 2010; Muigua op cit note 110 at 3.

¹¹⁸ Ibid at s 59(c) (1). The provision further insulates the process by providing that where an award is reached under the section and the same is entered as the court’s judgment, no appeal shall lie against it.

¹¹⁹ Civil Procedure Rules, 2010.

¹²⁰ Ibid s 59D also provides that all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.

¹²¹ Op cit note 34.

¹²² General Resolution 40/72, 11 December, 1985. In so doing, the General Assembly recognized the value of arbitration as a method of dispute resolution in international commercial transactions.

¹²³ Ibid.

¹²⁴ Op cit note 34 at 231.

¹²⁵ Attiya Warris ‘International Commercial Arbitration in Kenya’ in *Arbitration Law and Practice in Kenya* (2011) 61-7.

¹²⁶ Dispute Resolution Centre ‘A lawyer’s role in Alternative Dispute Resolution’ (2004) *a one-day workshop, held on 16th September 2004, at Nairobi, Kenya.*

¹²⁷ Op cit note 110 at 10.

3.2.2 Mediation

Mediation is a voluntary,¹²⁸ informal, consensual, strictly confidential and nonbinding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution. Bercovitch offers the most balanced description of mediation thus: 'mediation process arises where the parties to a conflict have attempted negotiations, but have reached a deadlock. In such circumstances, they agree to involve a third party to assist them continue with the negotiations and ultimately break the deadlock',¹²⁹ The neutral third party¹³⁰ is the go-between in the process and helps bring the parties to a round table and helps them reach a negotiated settlement.¹³¹ The neutral third party designated as the mediator actively participates in the mediation process but has no authority¹³² or power to adjudicate or impose a settlement though he can put forward suggestions for consideration by the disputants.¹³³ Accordingly this is the biggest divergent point with Arbitration.¹³⁴ It is argued that in a mediation process parties are assisted by a third party to agree as opposed to Arbitration where the third party adjudicates.¹³⁵ Mediators employ a range of techniques that facilitate effective communication between parties, enables them explore options for settlement and test the consequences of non-settlement in the event that they do not reach a consensus and proceed to other dispute resolution mechanisms.¹³⁶

Kenya is yet to constitute a comprehensive legal framework to govern administration of mediation.¹³⁷ The current framework is scantily supported by statutes and is adopted from international law and practice which has eventually been reduced into guidelines by institutions

¹²⁸ J G Merrills *International Dispute Settlement* 4 ed (2005) 28. Merrills says mediation seeks to encourage parties to find solutions that are agreeable to them without the need for anyone imposing agreements on them.

¹²⁹ J Bercovitch 'Mediation Success or Failure: A Search for the Elusive Criteria' 7 *Cardozo Journal of Conflict Resolution* at 290.

¹³⁰ Makumi Mwangi 'Conflict in Africa; Theory, Processes and Institutions of Management' (2006) *Centre for Conflict Research, Nairobi* 115-6.

¹³¹ Dr Kariuki Muigua *Resolving Conflicts through Mediation in Kenya* (2012) ch 1; Carol J Greenhouse 'Mediation; A Comparative Approach' (1985) *Man, New Series, Royal Anthropological Institute of Great Britain and Ireland* 1 at 90-114. At page 90 Greenhouse defines mediation thus 'Mediation is simple enough to describe: it is a triadic mode of dispute settlement, entailing the intervention of a neutral third party at the invitation of the disputants, the outcome of which is a bilateral agreement between the disputant'

¹³² Bolaji Owasanoye 'Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa' (2000) *UNITAR, Document Series No 14* at 17.

¹³³ Christopher Moore *The Mediation Process: Practical Strategies for Resolving Conflict* (1996) 14.

¹³⁴ Farooq Khan op cit note 110.

¹³⁵ Op cit note 4.

¹³⁶ Op cit note 113.

¹³⁷ Op cit note 4.

that offer mediation services.¹³⁸ The Constitutional provisions espoused in Article 159 arguably provide the most concrete provisions on mediation in Kenya in terms of legal framework.

The legal framework also embodies court-annexed mediation where parties in litigation can engage in mediation outside the court process, then move to court to record a consent judgment.¹³⁹ Additionally, parties in a dispute that is not before a court may undertake mediation and conclude the mediation agreement as a contract, *interpartes* enforceable and binding as between them, so long as it abides by the provisions of the Law of Contract Act.¹⁴⁰ Consequently this has given birth to the Mediation and Accreditation Committee, an institution established under the Civil Procedure Act to govern the practice of mediation.¹⁴¹ However the committee is yet to become fully operational.

3.2.3 Negotiation

Negotiation is an informal process permitting parties the maximum degree of control over both the process¹⁴² and the outcome through a mechanism which will not impose any settlement which is not mutually acceptable.¹⁴³ It has been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.¹⁴⁴ It involves the parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party.¹⁴⁵ This signifies the fundamental distinction between it and arbitration and mediation. It is a voluntary process conducted in an environment free from any interference, external control or outside directions. Negotiations are an unstructured mode of presenting one's interests, arguments and evidence and are used to help resolve preliminary issues such as *modus operandi*, programme of work, assigning responsibilities and any other incidental issues.¹⁴⁶ It has been

¹³⁸ Ibid.

¹³⁹ Op cit note 117, s 59B.

¹⁴⁰ Ibid s 59D, which confers on the court power to enforce private mediation agreements.

¹⁴¹ Ibid s 59A.

¹⁴² Op cit note 4.

¹⁴³ Brenda op cit note 108. Bolaji op cit note 132; Muigua op cit note 4.

¹⁴⁴ See generally, "*Negotiations in Debt and Financial Management*", United Nations Institute of Training and Research, (UNITAR), (December 1994).

¹⁴⁵ ICJ: 'A Report on Community Justice Systems Study in Kenya: Case Studies of Communities' 2003.

¹⁴⁶ Ibid at 18.

argued that negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.¹⁴⁷

Negotiation is an informal process which may not require codified legislations or the benefit of institutionalized application to survive. Kenya has no defined legal or institutional framework supporting negotiations but by dint of Article 159 of the Constitution as already outlined, negotiation has been legalized as an important mechanism of dispute resolution.

3.2.4 Conciliation

Conciliation is not a universally defined mechanism and bears different meanings in different jurisdictions.¹⁴⁸ Locally, it is described as a mechanism used to test the possibility of two disputing parties making up and assuming their prior cordial relations.¹⁴⁹ The Commission for Conciliation, Mediation and Arbitration (CCMA) South Africa, defines a conciliation hearing as a process where a commissioner meets with the parties in a dispute and explores ways to settle the dispute by agreement.¹⁵⁰ A third party, the conciliator, engages the parties separately, discusses the dispute with them and then prepares a solution based on what he/she considers to be a just or optimal compromise.¹⁵¹ The neutrality of the third party is not a major issue as long as the parties are presented with positions agreeable to their interests.¹⁵² Conciliation is used to restore the parties to pre-dispute relations after which other ADR techniques may be applied. Conciliations are usually unstructured and are used as a precursor to mediation or arbitration where the parties are reluctant, inept, or unready to come to the bargaining table. It differs with mediation in that in mediation the parties are aided and guided to design their own negotiated solution whereas in conciliation, the conciliator is the architect and designer of the solution.¹⁵³

¹⁴⁷ Makumi op cit note 130 at 115; Muigua op cit note 4 at 8; Brenda op cit note 113 at 2. She opines that with no third party intervention, negotiation may not be regarded strictly as an ADR technique but its reference as such is justified by the fact that it underlies ADR practice as negotiated outcomes are the objective of ADR.

¹⁴⁸ Op cit note 108. In South Africa and China conciliation has the same meaning as the definition of Mediation in Kenya. In other jurisdictions it implies a more interventionist approach by the Neutral who may suggest options for settlement.

¹⁴⁹ Op cit note 4 at 13; Bolaji op cit note 132 at 16.

¹⁵⁰ The CCMA is a dispute resolution body established in terms of the Labour Relations Act, 66 of 1995 (LRA) of the Republic of South Africa.

¹⁵¹ Op cit note 132 at 16.

¹⁵² Op cit note 4 at 13.

¹⁵³ Op cit note 132 at 16-7. Bolaji says the conciliator tries to satisfy both parties and in so doing he or she looks for a consensus and while not dictating a solution to the parties, nevertheless crafts one for them.

Conciliation is a common practice in resolution of labour disputes as it bears the advantage of extending the negotiation process and extends to restoration of a working relationship between the parties.¹⁵⁴ Conciliation mainly and heavily features under Employment laws in Kenya¹⁵⁵ and has certainly gained impetus by dint of Article 159 of the Kenya Constitution, 2010 as will be highlighted herein.

Institutions and Commissions established under the labour statutes are the major players in conciliation practice. The Chartered Institute of Arbitrators, Kenya Chapter is also engaged in conciliation practice as well as training conciliators.¹⁵⁶

3.2.5 Adjudication

Adjudication is an intermediate between expert determination and arbitration where a technically skilled neutral third party engages in dispute resolution in a particular project.¹⁵⁷ Adjudication is defined under the Chartered Institute of Arbitrators (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as an adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.¹⁵⁸ Adjudication is hence limited and only appropriate to the unique needs in the construction industry which normally entails civil and engineering contracts. It is a process that allows the power imbalance in relationships to be dealt with so that weaker subcontractors have a clear route to deal with more powerful contractors.¹⁵⁹ The process operates under strict schedules and it is usually predicated on a time frame, usually 28 days as provided for in the Adjudication Rules or the time indicated in the contract.¹⁶⁰ Lord Ackner best describes it thus; 'Adjudication is a highly satisfactory process. It comes under the rubric 'pay now, argue later' which is a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up important contracts.'¹⁶¹ The adjudicator's decision operates as a binding order unless the matter

¹⁵⁴ Op cit note 4 at 13. Conciliation is the dominant mechanism employed in settling industrial disputes in South Africa.

¹⁵⁵ The Employment Act, the Labour Relations Act and The Labour Institutions Act provide for conciliation.

¹⁵⁶ <http://www.ciarkkenya.org/> accessed on 10 February 2014.

¹⁵⁷ Paul Ngotho 'Pay Now Argue Later' available at www.academia.edu/4078609/Adjudication_-_Pay_Now_Argue_Later, accessed on 13 January 2014.

¹⁵⁸ The CI Arb (K) Adjudication Rules, Rule 2.1.

¹⁵⁹ Op cit note 4 at 16.

¹⁶⁰ Op cit note 158 at Rule 23.1.

¹⁶¹ Ibid.

is referred for arbitration or litigation.¹⁶² Adjudication is commonly handled by a 3-person board usually referred to as a Dispute Adjudication Board (DAB) which has become the popular way of undertaking adjudication.

Adjudication and DABs in Kenya are currently based on the contractual adoption of the rules prepared by the Chartered Institute of Arbitrators Kenya branch,¹⁶³ other privately-prepared rules and reference to English law.

3.2.6 Early Neutral Evaluation

This mechanism, as the name suggests, is used to evaluate the likely outcome of a case by a retired judge or senior lawyer.¹⁶⁴ Generally it involves an informal presentation by disputants to a neutral party with respected credentials for an oral or written evaluation of the parties' positions.¹⁶⁵ It is then advanced as an informed basis upon which negotiations between parties can proceed. It is a common practice amongst Courts to require Early Neutral Evaluation in cases that are highly technical in nature.¹⁶⁶ The evaluation may either be binding or non-binding.¹⁶⁷

This mechanism is not well entrenched in Kenya and has very limited application.

3.2.7 Expert Determination

This is a process characterized by parties' submission of issues and dispute to an expert knowledgeable in that particular field of dispute for determination.¹⁶⁸ The expert determinant evaluates the dispute and decides based on his expertise, accountants valuing shares in a company or a jeweler assessing the carat content of a gold bracelet.¹⁶⁹ It has gained currency in dispute management in the building and construction industry involving qualitative or quantitative issues, or issues that are of a specific technical nature or specialized kind, because it is generally quick, inexpensive, informal and confidential.¹⁷⁰ These merits have lent it credence

¹⁶² Ibid at Rule 29.

¹⁶³ Op cit note 34.

¹⁶⁴ Op cit note 113; Patrick M Sanders 'Alternative ADR Mechanisms' (2007) *American Bar Association Labour and Employment Section* available at apps.americanbar.org, accessed on 15 March 2014.

¹⁶⁵ Op cit note 4 at 16.

¹⁶⁶ Ibid at 16; Bolaji Owasanoye op cit note 132 says ENE method is particularly useful in resolving complex scientific, technical, sociological, business or economic issue.

¹⁶⁷ Ibid.

¹⁶⁸ Op cit note 4 at 19.

¹⁶⁹ Ibid at 16.

¹⁷⁰ Ibid at 19.

in the construction industry since it's devoid of the formalities and technicalities associated with litigation and arbitration and still results in a binding determination.¹⁷¹

3.2.8 Mini Trial

This is a relatively new device for dispute resolution and it is sometimes referred to as the 'exchange of information.'¹⁷² The American Arbitration Association's Mini-trial Procedures perhaps provide the best description, '...The mini trial is a structured disputes resolution method in which senior executives of the parties involved in legal dispute meet in the presence of a neutral adviser and after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement.'¹⁷³ Mini-trial thus provides an opportunity for a summary presentation of evidence by a lawyer or other fully informed representative for each side to decision makers, usually a senior executive from each side.¹⁷⁴ It is also a time bound process and is expected that under normal circumstances, the entire process of mini-trial should be completed within 90 days from the date of its commencement.¹⁷⁵ The mechanism, as already noted, is relatively novel in the Kenyan setting and hence its practice is yet to spread.

3.2.9 Ombudsperson (Ombudsman)

Ombudsman is an organizationally designated person who confidentially receives, investigates, and facilitates resolution of complaints.¹⁷⁶ The ombudsman may meet, discuss and advise the disputants or even review evidence and make recommendations but normally is not empowered to impose decisions.¹⁷⁷

The mechanism can also exist within government set-ups as is evident with Kenya's office of the Ombudsperson which handles complaints from the public and tries to resolve them outside the courts.¹⁷⁸

¹⁷¹ Ibid at 16-9.

¹⁷² Op cit note 4 at 11.

¹⁷³ Ibid.

¹⁷⁴ Dr Vinod Agarwal 'Alternative Dispute Resolution Methods' (2000).

¹⁷⁵ Op cit note 4 at 11.

¹⁷⁶ Ibid at 18.

¹⁷⁷ Op cit note 174.

¹⁷⁸ See www.ombudsman.go.ke.

3.3 INSTITUTIONS IN THE ADR REALM

3.3.1 Chartered Institute of Arbitrators

This is an acclaimed International Arbitral Institution based in London and with branches in fairly a good number of the world's states.¹⁷⁹ The Kenyan Chapter was established in 1984¹⁸⁰ as a branch of the London based institution and has grown over the years as an esteemed institution in the area of arbitration and other forms of ADR.¹⁸¹ The Kenya Chapter has published the Arbitration, Adjudication and Mediation Rules and the arbitrators are governed by the Chartered Institute of Arbitrators' Rules when conducting the arbitral proceedings. The institution has attained an important role in arbitration in Kenya boasting of a highly skilled pool of Arbitrators.¹⁸²

3.3.2 Nairobi Centre for International Arbitration

This institution is established under the Nairobi Centre for International Arbitration Act.¹⁸³ Its chief task is the general administration, development, and management of arbitration and other forms of ADR in the country.¹⁸⁴ Its functions include the promotion, facilitation and encouragement of the conduct of international commercial arbitration in accordance with the Act.

The Act also establishes the Arbitral Court¹⁸⁵ with exclusive original and appellate jurisdiction to hear matters that are referred to it under the Act. The institution is relatively new, having been established under the 2013 Act.

3.3.3 Dispute Resolution Centre

This institution is registered in Kenya for the purposes of enhancing settlement of disputes through ADR Mechanisms.¹⁸⁶ The centre offers an array of ADR solutions and its significance is expected to grow with the recognition of Alternative Dispute Resolution in the Constitution of

¹⁷⁹ Op cit note 4 at 7.

¹⁸⁰ Op cit note 156.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Nairobi Centre for International Arbitration Act No 26 of 2013 Laws of Kenya.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, Section 21.

¹⁸⁶ Accessed at, <http://www.disputeresolutionkenya.org>, on 10th January 2014. The Centre was established in 1997 and offers a wide range of ADR solutions.

Kenya 2010.¹⁸⁷ The Centre is however dominantly engaged in Mediation and connected activities.

3.4 USE OF ADR IN LABOUR DISPUTE RESOLUTION IN KENYA

Labour disputes can either be broadly classified as individual or collective disputes.¹⁸⁸ More specifically, collective disputes are either rights disputes or interest disputes. Rights dispute arise mainly where there is disagreement over the implementation or interpretation of statutory rights, or the rights set out in an existing collective agreement. By contrast, an interest dispute concerns cases where there is disagreement over the determination of rights and obligations, or the modification of those already in existence.¹⁸⁹

In Kenya, the term trade dispute is used in reference to labour or employment disputes.¹⁹⁰ Trade dispute means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union.¹⁹¹

The history of conflicts between master and servant dates back in antiquity and the advent of the industrial revolution only served to further strain the relationship.¹⁹² The discord and tensions between these two unequal parties led to the emergence of labour disputes. The owners of the means of production always enjoy a privileged status as opposed to the less opportune labourers who are susceptible to subjugation and exploitation of all kind.¹⁹³ The oppression of workers has some history in colonialism where the formal court system served the interests of owners of

¹⁸⁷ Op cit note 4 at 13.

¹⁸⁸ 'Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives' (report prepared by ILO after a High-level Tripartite seminar on the settlement of labour disputes through mediation, conciliation, arbitration and labour courts held in Nicosia, Cyprus on October 18th – 19th, 2007).

¹⁸⁹ Ibid.

¹⁹⁰ Labour Relations Act, Labour Institutions Act and the Industrial Court Act.

¹⁹¹ Op cit note 93 s 2.

¹⁹² Pharaoh Maitireyi and Richard Duve 'Labour arbitration effectiveness in Zimbabwe' (2011) 11 *AJCR* 3 at 136.

¹⁹³ Ibid at 136.

means of production who were largely white.¹⁹⁴ This led to a general clamor for workers' rights leading to the emergence of trade unions in the early 50's.¹⁹⁵ The unionization of the labour force coupled with international democratization of workplaces gave force to re-organization of labour relations. Due to their central role in fighting for independence, the labour movements acquired significant power over capital.¹⁹⁶ A new industrial order emerged and grew over time to embrace modern elements of efficiency, equity and voice in employment relationships.¹⁹⁷ On the other hand, the adjudicatory court system was proving not only inefficient, lengthy and expensive, but also inappropriate for reconciling shop floor disputes.¹⁹⁸

Accordingly, the case for ADR and other non-litigation mechanisms had crystallized. Labour disputes are normally potent with intricate underlying issues like the need to maintain a post-dispute workable relationship and the attendant urgency.¹⁹⁹ Alternative dispute resolution affords the best opportunity for the employer and employee to engage and end the dispute with minimal ill consequences.

Further, the recognition of labour rights as human rights has entrenched the aspect of labour relations at the workplace.²⁰⁰ This position emanates from the right of freedom of association which finds expression in various UN international conventions²⁰¹ and International Labour Organization Conventions.²⁰² The UN and affiliate bodies are chief proponents of pacifism and peaceful resolutions of disputes through non-combative methods like ADR.²⁰³ This has given ADR comfortable space to expand in all spheres including the labour relations realm. The ILO was created to adopt international standards to improve the situation of workers which

¹⁹⁴ Kocer, op cit note 30.

¹⁹⁵ Op cit note 28.

¹⁹⁶ Op cit note 192.

¹⁹⁷ Op cit note 1.

¹⁹⁸ Op cit note 192.

¹⁹⁹ Op cit note 1.

²⁰⁰ S.K. Hippensteele, 'Revisiting the Promise of Mediation for Employment Discrimination Claims' (2009) 9 *Pepp Dis Resol L J* at 220. The author suggests that after death and divorce, the loss of a job is considered the third most stressful life event an individual will experience.

²⁰¹ ICCPR and ICESCR.

²⁰² See <http://www.ilo.org/public/english/about/> Accessed on 10th June 2013.

²⁰³ Article 1 (3) of the Charter of the United Nations.

conventions are binding on the countries that ratify them.²⁰⁴ The ILO regime hence forms an important framework for administration of labour relations in Kenya.

The Constitution provides, inter alia, the right to fair labour practices and the right for every worker to go on strike.²⁰⁵ It further provides that every trade union, employers' organization and employer has the right to engage in collective bargaining which sets the ground for disputes and gives legal backing to strikes and withdrawal of labour. The Constitution is emphatic on the right of an employer to collective bargaining which by extension is one way of negotiating. Moreover, Article 159 of the Constitution has emphasizes on the resolution of disputes, including labour disputes, through Alternative Dispute Resolution mechanisms. Alternative Dispute Resolution also finds expression under the statutory regime of Kenyan labour laws as set out below.

3.4.1 The Employment Act

The Employment Act²⁰⁶ provides for various institutional frameworks within which labour disputes can be addressed. It refers to the Labour officer²⁰⁷ whose office provides critical institutional framework through which various labour matters are handled out of the court. Accordingly, it mandates the Labour officer to make determination on the application of ADR in resolution of any dispute under the Act.²⁰⁸

‘A labour officer who is presented with a claim under this section shall, after affording every opportunity to the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute.’

This provision though short of express indication, alludes to the practice of ADR, particularly conciliation.²⁰⁹ Other complaints that the Labour officer can determine include complaints for remuneration wrongfully withheld or deducted, termination on account of redundancy, unfair termination, summary dismissal and unfair termination.²¹⁰

²⁰⁴ K Panford *African Labour Relations and Workers Rights* (1994) 130-141.

²⁰⁵ Op cit note 2, Article 41. It thus sets the foundation and basis for labour relations and infers the need for mechanisms to handle such.

²⁰⁶ Op cit note 95.

²⁰⁷ Ibid at s 2.

²⁰⁸ Ibid s 47.

²⁰⁹ Op cit note 4 at 13.

²¹⁰ Op cit note 95, s 25, 40 & 47.

Other important institutions under this regime include the National Labour Board²¹¹ and the Minister whose office designation has changed to Cabinet Secretary under the Kenya Constitution, 2010.²¹² There are no clear and express provisions on their capacity to hear disputes but owing to their functions as provided under the Act, their offices draw mandate to take part in resolution of disputes. In the exercise of his authority, the cabinet secretary acts in consultation with or from the advice of the National Labour Board. As such, impliedly so, the two institutions can take part in resolution of disputes connected to the exercise of their powers and duties under the Act.²¹³ The Cabinet Secretary being the representative of the Government on matters labour also has an implied authority to resolve labour disputes involving the government and its employees.²¹⁴

3.4.2 The Industrial Court Act

The Constitution provides for establishment of Courts with the status of the High Court to hear and determine disputes relating to employment and labour relations.²¹⁵ Against this Constitutional background the Industrial Court of Kenya was established.²¹⁶ The Act in effect repealed Part 111 of the Labour Institutions Act²¹⁷ which established the Industrial Court as previously constituted. It has exclusive, wide, original and appellate jurisdiction on all employment, labour relations and connected purposes. The Industrial Court as constituted under the Industrial Court Act has given in no mean terms, Alternative Dispute Resolutions in labour disputes the strongest expression yet.²¹⁸ It thus provides that its principal objective is to enable the Court to facilitate the just, expeditious and proportionate resolution of disputes governed by this Act. This alludes to the overriding objective principle popularized under the Civil Procedure regime²¹⁹ where Courts are required to apply all mechanisms including ADR for speedy and just resolution of disputes.²²⁰

²¹¹ Ibid s 5.

²¹² Op cit note 2 at Article 152 (1) (d).

²¹³ Op cit note 95 s 91.

²¹⁴ Op cit note 18.

²¹⁵ Op cit note 2 Article 162 (2) (a).

²¹⁶ Op cit note 18.

²¹⁷ Op cit 190.

²¹⁸ Op cit note 3.

²¹⁹ Op cit note 117 s 2A.

²²⁰ Jacqueline Nolah-Haley 'Mediation: The 'New Arbitration' (2012) 17 *Harvard Negotiation Law Review*.

Moreover, the spirit of the Constitution 2010 has expressly provided for ADR within its framework and recognizes decisions made through ADR processes outside its institutional framework as well.²²¹ It provides the court with mandate to adopt and implement of its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.²²²

Further, the Court can refuse to determine a dispute if it is satisfied that there has been no attempt to settle the matter using ADR.²²³ The Act also provides that if at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.²²⁴

Consequently the Industrial Court now functions as an institution of social dialogue.²²⁵ Social Dialogue²²⁶ has been described by the International Labour Organization (ILO) to include all types of negotiation, consultation, exchange of information and collective bargaining. The Court acts as the facilitator in the social dialogue between the employer and the employee and other parties of interest in the dispute.²²⁷ This is in contrast to the adversarial Court system with emphasis on social debate as opposed to social dialogue.

3.4.3 Labour Relations Act

Another important statutory regime embodying resolution of labour disputes through ADR in Kenya is the Labour Relations Act.²²⁸ The Act has entrenched the position of Collective Bargaining Agreements (CBAs) as instruments detailing relations between an employer and an

²²¹ Op cit note 3 s 15 (1).

²²² Ibid.

²²³ Ibid s 15 (2).

²²⁴ Ibid s 15 (4).

²²⁵ Ibid.

²²⁶ Daniel Yankelovich *The Magic of Dialogue: Transforming Conflict into Cooperation* (1999) ch 1.

²²⁷ Op cit note 18. Justice Rika notes that the society has evolved and social dialogue cannot remain tripartite i.e employer, employee and government. He adds that Labour laws and policies have become a concern of a wider constituency than the traditional social partners and social dialogue should now be tripartite-plus.

²²⁸ Op cit note 93.

employee.²²⁹ An employer and a recognized trade union may effectively enter into negotiations leading to the conclusion of a collective agreement setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.²³⁰ This alludes to use of negotiations in establishing labour relations and the employment relationship at the workplace. Upon registration of the CBAs with the Industrial Court they assume legality and are binding and enforceable against the parties thereto.²³¹

Additionally, it provides for reference of disputes to the Minister for conciliation,²³² a further affirmation of the centrality of ADR in labour dispute resolution. Alternatively, the Act provides the basis for inclusion of preferable ADR methods between parties in the CBA. Parties may choose conciliation or arbitration wherefore the decision in any of those processes is final and binding.²³³ The Act provides timelines and procedure through which the different mechanisms and options are to proceed.²³⁴ The Conciliator has powers to mediate, conduct fact finding, make recommendations and proposals and even summon and question any person on a dispute in question.²³⁵

Upon a successful conciliation, the agreement is recorded, signed by the parties and a copy lodged with the Minister.²³⁶ However, the dispute could be deemed unresolved if the conciliator indicates so or it drags on for an inordinate time.²³⁷ To cushion the process from loopholes the Minister may initiate conciliation in the public interest and take necessary action.²³⁸

²²⁹ Fashoyin, T. 'Collective Bargaining and Employment Relations in Kenya' (2010) *Working Paper No 13 ILO* (2010).

²³⁰ *Op cit* note 93, s 57.

²³¹ *Ibid* s 59.

²³² *Ibid* s 57.

²³³ *Ibid* s 58.

²³⁴ *Ibid* s 58, 65 (1), 66 (1).

²³⁵ *Ibid* s 67(3).

²³⁶ *Ibid* s 68.

²³⁷ *Ibid* s 69.

²³⁸ *Ibid* s 70, 71.

3.5 CONSTITUTIONAL GAINS

The constitution of Kenya, 2010²³⁹ has been described as a legislative advance of the country's existence and even proclaimed in some quarters as one of the most progressive legislations world over.²⁴⁰ The Constitution has in many ways revolutionized the Kenyan legal system heralding major transformation in the administration of justice.²⁴¹ Further there have been drastic alterations to the governance and administrative structures resulting from provisions allowing application of international law in our jurisdiction without the need for domestication.²⁴² This has in effect entrenched international law in the Kenyan legal system and made it one of the sources of its laws.

The Constitution has also broadened its purview to incorporate international standards and universally emerging trends. For instance, labour relations have earned recognition as fundamental rights through their inclusion in the Bill of Rights.²⁴³ The constitution has also renewed the spirit and determination amongst Kenyans to overhaul governance and administrative structures including labour rights frameworks thus setting the stage for reforms.²⁴⁴

Labour law, and in general the labour realm, has drawn huge benefits from the Constitution with employment and labour rights being firmly enshrined therein. Kenya has arguably had a long history of preoccupation with labour and employment reforms.²⁴⁵ The watershed was the 2007 reforms which set out to domesticate the core ILO conventions ratified by Kenya in fulfillment

²³⁹ Op cit note 2.

²⁴⁰ Op cit note 23; Mugo Kibati 'Kenya: A vision of prosperity for the second republic' *The Daily Nation* (Nairobi) Thursday 26/8/2011.

²⁴¹ Article 159 of the Constitution states that judicial authority is derived from the people and vests in the courts. It signifies the foundation of the Judiciary on the ideals of the social contract, equality, fairness and justice.

²⁴² Op cit note 2 Articles 2 (5) and 2 (6).

²⁴³ Op cit note 2 Ch. IV.

²⁴⁴ Op cit note 23.

²⁴⁵ Taskforce to review the labour laws appointed in May 2001 through Gazette Notice No. 3204.

of its obligation as an ILO member state.²⁴⁶ The constitution augmented this by incorporating international law, including ILO Conventions into our legal regime.²⁴⁷

This move has allocated the Kenyan worker benefits such as the right to freedom of association which is a prominent feature in the ILO Conventions.²⁴⁸ The ILO conventions have led to immense gains and guaranteed workers' rights in a big way. For instance the ILO Convention No. 29 on Forced Labour is a source of protection of individual freedoms of workers. It was a reaction to coercive labour practices, sweatshop economics and increasing reprisals against workers for taking collective action to confront unconscionable labour repression.²⁴⁹ It guaranteed and still guarantees fundamental freedoms of a worker to willfully offer his/her services in employment. This Convention has been augmented by the Kenya Constitution, 2010 which provides for the right against slavery and servitude as a fundamental right which cannot be limited by any law including the Constitution itself.²⁵⁰ These ILO conventions which provide and set the minimum required standards for labour rights including freedom of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues are now part of Kenyan law.

Another important international convention whose benefits can be enjoyed pursuant to the Constitution is the International Covenant on Economic, Social and Cultural Rights (ICESCR) which embodies fundamental human rights related to labour rights.²⁵¹ These include equal remuneration for men and women,²⁵² occupational safety and health,²⁵³ weekly rest, limitation of hours of work and holidays with pay, the right to social security,²⁵⁴ maternity protection,²⁵⁵

²⁴⁶ ILO CON. 29 – Forced labour ratified on 13th January 1964, ILO CON. 98 – Freedom of Association and Collective Bargaining 13th January 1964, ILO CON. 100 – Equal remuneration for work of equal value 7th May 2001, ILO CON. 105 – Abolition of forced labour 13th May 2001, ILO CON 111 – Discrimination in employment 7th May 2001, ILO CON. 138 – Minimum age of employment 9th April 1979, ILO CON. 182 – Worst forms of child labour 7th May 2001.

²⁴⁷ Op cit note 2 Article 2 (5), 2 (6).

²⁴⁸ Nerida Nthamburi 'Analysis of Labour Rights' in 1 *Ahraj Casebook Series* (2007) at 117.

²⁴⁹ Ibid; Kocer op cit note 30 at 14-18.

²⁵⁰ Op cit note 2 Article 25.

²⁵¹ Op cit 248 at 118.

²⁵² ICESCR Article 7 and ILO Convention No 100.

²⁵³ Ibid ICESCR, Article 7.

²⁵⁴ Ibid A. 9 and ILO Conventions.

²⁵⁵ Ibid A.10.

protection and assistance for children and young persons.²⁵⁶ Of great significance also is the United Declaration of Human Rights (UDHR) which has espoused important international labour standards. Article 23 of the UDHR²⁵⁷ provides that everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. The enjoyment of these rights and freedoms can be attributed to the Constitution, 2010 which has allowed operation of those conventions in our jurisdiction.

The constitution has also, directly in its body, enhanced the position of the Kenyan worker in the labour market through embodying labour and employment rights within its framework.²⁵⁸ The protection of every individual and entrenchment of the rule of law is borne in the Constitution through Article 3 (1) which provides that every person has an obligation to respect, uphold and defend the Constitution. This binds the state, the employer and every other citizen in equal measure to respect the provisions of the constitution which extend to labour laws. This position is further affirmed under Article 20 (2) which provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The chapter on the Bill of rights is significant in that it encapsulates various labour rights, including labour relations. It provides for labour rights; inter alia, the right to fair remuneration, to strike, to reasonable working conditions and to participate in trade union activities.²⁵⁹ Workers' rights have thus found a safe haven through their expression in the supreme law of the country and no Statute or any other law can deprive them of these constitutional rights.²⁶⁰

The constitution has also, benefited the labour realm through provision of ADR and traditional dispute resolution mechanisms as a means of dispute resolution. The direct inclusion, rather than inference, of ADR in the Constitution of Kenya, 2010 heralds a paradigm shift from the peripheral role assigned to ADR in the justice system to a central function within the current justice system.²⁶¹ The constitution, has rescued the arbitral process and ADR mechanisms which

²⁵⁶ Ibid.

²⁵⁷ www.un.org/en/documents/udhr/ accessed on 27 July, 2013.

²⁵⁸ Op cit note 2, Article 21

²⁵⁹ Ibid.

²⁶⁰ Ibid Article 2.

²⁶¹ Op cit note 4.

erstwhile had been swallowed by the legal environment in Kenya through the court process where lawyers invoked technicalities and points of law to derail the process.²⁶² ADR and traditional dispute resolution mechanisms are predicated on the cardinal principles espoused in Articles 48 and 159 of the Constitution. These include access to justice for all and expeditious resolution of disputes without undue regard to procedural impediments and technicalities. These provisions extend to labour disputes which will definitely benefit both the workers and the employers to a great extent.

3.6 CONCLUSION

The ADR enterprise has primeval existence and spans many institutions, legal regimes, policy frameworks, cultural practices and the general social set up.²⁶³ Labour relations are of symbolic significance to the African modern states having played a central role in the clamour for independence. The constitution of Kenya, 2010 has reached to the past by embracing ADR mechanisms as an important feature in Kenya's judicial system and dispute resolution.

The legal and institutional framework both in ADR and labour relations is expected to reap huge benefits from the sound legal framework developed over time and augmented by the new constitution. Additionally, the informal handling of labour disputes still exists to compliment the statutory efforts. Accordingly, with ADR mechanisms now firmly enshrined in the Constitution under Article 159 it is no longer tenable for social partners to inundate the Industrial Court with all manner of trade disputes. There is every reason to invoke the Alternative dispute resolution mechanisms and other voluntary dispute resolution mechanisms more. Lawyers and the entire justice system also have a role to play in the promotion of ADR.²⁶⁴

²⁶² Ibid.

²⁶³ Op cit note 34.

CHAPTER FOUR

EVALUATION OF THE PERFORMANCE OF ADR AND RELEVANT INSTITUTIONS IN LABOUR DISPUTE RESOLUTION

4.1 INTRODUCTION

The Kenyan formal legal system has a history stretching way back to the 19th Century and can be traced to the advent of Colonialism.²⁶⁵ However the Informal Justice System and Traditional Justice systems had existed long before and have been practiced since antiquity in Kenya.²⁶⁶ They are representative of the Customary Jurisprudence which finds application in the Kenyan legal environment pursuant to the Judicature Act.²⁶⁷ The Constitution by inference also proffers recognition to existence of customary law in the country.²⁶⁸ The customary set up has principally been the conceptual framework upon which most ADR mechanisms have operated and found practice in Kenya as many of these mechanisms have no backing in statutory legislation. Noteworthy is the fact that despite the early inception of the legal framework on arbitral law in Kenya,²⁶⁹ its efficacy and utilization has been poor in the country.²⁷⁰ The core exposition to this points to the disregard the legal framework, upon inception and throughout its different phases of growth, had on the local dispute resolution mechanisms.²⁷¹

Arbitration is not so common in resolution of labour disputes in Kenya and there is scanty documentation of its practice. Mediation and conciliation however are popular and heavily present in resolution of labour disputes.²⁷² Many labour disputes in Kenya are however handled privately and with less publicity and acrimony save for those involving civil servants and Local Government servants (now County Government servants). The resolution mechanism in Kenya although well-structured in paper is still ineffective as it rides on the back of an ineffectual policy

²⁶⁵ Op cit note 28.

²⁶⁶ Op cit note 4 at 20; Op cit note 34 at 222.

²⁶⁷ The Judicature Act, Chapter 8 Laws of Kenya s 3 (2). It enlists customary law as one of the law regimes applicable in Kenya.

²⁶⁸ Op cit note 2 Article 2 (4).

²⁶⁹ The Arbitration Ordinance of 1914.

²⁷⁰ Op cit note 34. He says the level of utilization of arbitration and ADR in the country is disconcerting.

²⁷¹ Op cit note 28; Op cit note 34 at 219-221.

²⁷² Op cit note 4 at 4-24.

framework. Most of the labour disputes have been known to drag on for long periods, marked by public altercations and arm twisting that is uncharacteristic of ADR mode of dispute resolution.²⁷³ This is evidence of a deficient system whose outline in labour dispute resolution is frail. The most visible institutions in handling labour disputes in Kenya, as earlier noted, are the Industrial Court, the Labour officer and the Minister.

4.2 STRUCTURE OF TRADE DISPUTES SETTLEMENT IN KENYA

4.2.1 Structure under the Labour Relations Act

The Labour Relations Act is the principal statute profiling a detailed structure of labour dispute resolution in Kenya.²⁷⁴ In summary, the structured outline of settling trade dispute in Kenya entails the following process; first when a dispute arises, it is first reported by a trade union, employer or employers' organization that is party to the dispute to the Minister for Labour (now Cabinet Secretary for Labour).²⁷⁵ The Cabinet Secretary then proceeds to appoint a conciliator or committee of conciliators to try and resolve the dispute.²⁷⁶ If the conciliators fail to resolve the dispute, the minister appoints a board of inquiry to amicably settle the trade dispute.²⁷⁷ In case all these initiatives fail to resolve the dispute, the minister refers the dispute to the industrial court via a certificate of urgency.²⁷⁸ The dispute can also be referred to an arbitrator if provided for in the parties' collective agreement.²⁷⁹

In a more elaborate sense, the Labour Relations Act provides for reference of trade disputes to the Cabinet Secretary in charge of labour. The procedures have different timelines within which to act, depending on the nature of the dispute for example, dismissal, redundancy and others.²⁸⁰

Every party so involved in a trade dispute referred to the Cabinet Secretary is required to file a replying statement to the Cabinet Secretary within fourteen days of receiving a copy of the report

²⁷³ Labour strikes in Kenya are very rampant and have been known to drag on for long periods. Teacher strikes in 1997 and more recently in 2013 are good examples. See www.standardmedia.co.ke/?articleID=2000088672 accessed on 7th March 2014.

²⁷⁴ Op cit note 93 s 77.

²⁷⁵ Ibid at s 62.

²⁷⁶ Ibid at s 65.

²⁷⁷ Ibid at s 71.

²⁷⁸ Ibid at s 73 and 74.

²⁷⁹ Ibid at s 75.

²⁸⁰ Ibid at s 62 (3), 62 (4).

of the dispute²⁸¹ although failure by a party to file a replying statement does not affect the validity of a referral.²⁸² A similar period of 14 days is given to a third party who has registered interest in the dispute to file a statement with the minister to whom the referral was done.²⁸³

Consequently, the Cabinet Secretary has a window of opportunity of 21 days within which to appoint a conciliator or conciliation committee as would be appropriate. The conciliator maybe a public officer, or someone drawn from a panel of conciliators appointed by the Cabinet Secretary after consulting the National Labour Board or even an appointee of the Conciliation and Mediation Commission.²⁸⁴ However, appointment of a conciliator cannot be done if the conciliation procedures in an applicable collective agreement binding on the parties to the dispute have not been exhausted and also if a law or collective agreement binding upon the parties prohibits negotiation on the issue in dispute.²⁸⁵ The Act gives the Cabinet Secretary power to seek any additional information from the parties in the dispute or from the National Labour Board before appointing a conciliator.²⁸⁶

The Cabinet secretary is answerable to the prescriptions under the law and thus is required to supply written reasons to the parties if he fails to appoint a conciliator within the stipulated period of time.²⁸⁷ Appellate forum is open to a party dissatisfied with the cabinet secretary's decision whereby such party can proceed to the Industrial Court under a certificate of urgency.²⁸⁸

The conciliator or the conciliation committee is expected to try and resolve the dispute within the first thirty days of appointment. However the Cabinet Secretary retains discretionary powers to extend the duration for conciliation beyond the statutory limit. The dispute may be concluded in one of the ways as discussed in paragraph 3.4.3 above.

The referral of a dispute to the Industrial court as provided for above will not apply to disputes in respect of which a party may call a protected strike or lock-out.²⁸⁹ The dispute may only be referred to the Industrial Court by an aggrieved party that has made a demand in respect of an

²⁸¹ Ibid at s 63.

²⁸² Ibid.

²⁸³ Ibid at s 64.

²⁸⁴ Ibid at s 66.

²⁸⁵ Ibid at s 65.

²⁸⁶ Ibid at s 65 (5).

²⁸⁷ Ibid at s 65 (3).

²⁸⁸ Ibid.

²⁸⁹ Ibid.

employment matter or the recognition of a trade union which has not been assented to by the other party to the dispute or is an essential service. The Cabinet Secretary may, in addition, refer the dispute to the Industrial Court.²⁹⁰

A referral to the Industrial Court may be made as a matter of urgency by a trade union especially if the dispute concerns the recognition of a trade union, employers and employees engaged in an essential service and in cases of redundancy where the trade union has already referred the dispute for conciliation and where the employer has retrenched employees without giving notice.²⁹¹ In the subsequent proceedings in the Industrial Court the Arbitration Act doesn't apply at all.²⁹²

4.2.2 Structure under other Legal Regimes

There are also other legal regimes outlining dispute resolution procedures in Kenya. The Industrial Court is significant in this respect.²⁹³ It draws jurisdiction from the Industrial Court Act as discussed. Further, the Employment Act, 2007²⁹⁴ extends jurisdiction to the court providing that, no other court other than the Industrial Court shall determine any complaint or suit referred to therein.²⁹⁵ However, the Labour Institutions Act,²⁹⁶ 2007 provides for an exception to the exclusive jurisdiction of the court by granting the Chief Justice discretion to designate any Magistrate's court to hear matters relating to labour laws after consultation with the Cabinet Secretary and the Principal Judge and thereafter placing an order in the gazette.²⁹⁷

On the foregoing, magistrate's courts have been given jurisdiction to deal with labour matters in Kenya. In exercise of the powers conferred on him,²⁹⁸ the Chief Justice, designated all courts in the 47 counties presided over by magistrates of the rank of Senior Resident Magistrate and above

²⁹⁰ Ibid.

²⁹¹ Ibid at s 74.

²⁹² Ibid at s 75.

²⁹³ Op cit note 3 s 4. It provides thus: "the Industrial Court Act in pursuance of Article 162 (2) of the Constitution establishes the Industrial court with jurisdiction over all labour and employment matters in Kenya." The court is mandated to undertake the furtherance, securing and maintenance of good employment and labour relations in Kenya. The Act further gave the court exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to it.

²⁹⁴ Op cit note 95 s 87 (2).

²⁹⁵ Ibid.

²⁹⁶ Op cit note 94 s 16 (2).

²⁹⁷ Ibid.

²⁹⁸ Ibid.

as Special Courts²⁹⁹. These courts are mandated to hear and determine employment and labour relations cases within their respective areas of jurisdiction and specifically in respect of matters relating to work injury as well as offences under the Labour Institutions Act, the Employment Act, the Occupational Safety and Health Act and the Labour Relations Act.

Further, the Industrial Court Act,³⁰⁰ under the transitional provisions, provides that any regulation or other instrument made or issued under the Labour Institutions Act, 2007, shall continue to have effect as if such regulation or other instrument were made or issued under the Act.³⁰¹ This could as well be interpreted to mean that section 16 (2) of the Labour Institutions Act, 2007, among other provisions which confers on the Chief Justice the power to designate magistrate courts to handle matters touching on labour laws, continues to have effect and that consequently such magistrate's courts as designated in the gazette notice number 9243 of 2011 still do have jurisdiction to hear such matters as therein designated.³⁰² This could be further inferred from section 18 (b) of the Industrial Court Act, 2011 which provides that the court has jurisdiction to hear and determine appeals from any other court, local tribunal or commission as prescribed under any written law. In this case 'any other court' could mean any court handling matters of labour law and 'any written law' could be argued as including the law under the Labour Institutions Act which gives allowance for magistrate's courts to handle such matters as stated above. This law continues to have effect notwithstanding the enactment of the Industrial Court Act of 2011. This therefore mean that by gazetting the designated courts, the Chief Justice was acting Intra-vires and within the law.³⁰³

On the flip side, going by the Labour Institutions Act, 2007 which indicates that section 16 of the act was repealed by the Industrial Court Act, that could only mean that the powers of the Chief Justice under section 16 (2) of the act no longer exist hence his act of designating Special Magistrate's Courts to handle matters touching on labour laws has been overtaken by the law and

²⁹⁹ Gazette notice number 9243 dated 27 July 2011.

³⁰⁰ Op cit note 3, s 32 (1).

³⁰¹ Ibid.

³⁰² *Rwaken Investments Limited & another v The Ministry of Labour & 2 others* [2013] eKLR . In this 2012 decision, the Industrial Court was of the opinion that the Chief Justice still retained powers to designate courts and confer jurisdiction as indeed happened. The Court also held that sections 3 and 4 of the Industrial Court Act conferring exclusive jurisdiction to the Industrial Court on labour matters was meant to attain the overriding objective but not to overrule the provisions of the other labour laws.

³⁰³ Ibid.

consequently, the designated courts in gazette notice number 9243 no longer have jurisdiction to hear such matters as set out in the said notice.³⁰⁴ This is bolstered by the fact that his role under section 27 of the Industrial Court Act has been reduced to basically that of formulating rules for regulating the practice and procedure of the court and such is to be done in consultation with the Employment and Labour Relations Rules Committee established under section 23 of the Act.³⁰⁵

4.2.3 Conclusion

In conclusion, this is a contradiction which has not been well settled through judicial decisions yet and lacks ultimate certainty.³⁰⁶ However I am inclined towards the decision in *Rwaken*³⁰⁷ thus validating Magistrate's Courts' claim of jurisdiction in labour matters. Noteworthy, however is the fact that other labour laws especially the Work Injury Benefits Act, 2007 confers jurisdiction on Magistrates' Courts to determine matters there in.³⁰⁸

Trade dispute resolution in Kenya presents a rich ground for criticism due to its ineffectuality. An evaluation of the above outlined process will indicate a framework with frailties and loopholes. First, the process is opaque in that it fails to address the issue of accessibility to the Cabinet Secretary. A Cabinet Secretary is one of the high ranking officials to whom access is limited and whose inaccessibility can be artificially induced. This locks out many eligible trade disputants from registering their reports with the minister.

Secondly, the Act vests wide powers in the institution of the Cabinet Secretary, which powers are unchecked and hence open to abuse and misuse.³⁰⁹ The Cabinet Secretary is sometimes an interested party in the dispute and hence is not the right person to adequately oversee resolution of the dispute and appointment of conciliators. In this respect the process does not permit a

³⁰⁴ A repeal of the law is strictly construed to mean the provisions as repealed cease to exist and any construction or interpretation should give life to Parliament's intention to repeal the said law.

³⁰⁵ Op cit note 3.

³⁰⁶ In *Seven Seas Technologies Limited v Eric Chege* [2014] eKLR and an array of other decisions, the court has affirmed the position that it is only the Industrial Court with authority to hear labour matters in the country. This affirms the exclusivity of the Courts jurisdiction. The decision herein however starves the High Court of such jurisdiction and it is arguable whether such extends to Magistrates' Courts.

³⁰⁷ Op cit note 301

³⁰⁸ The upshot of this discussion is that the matter is not well settled on whether Magistrates Court have the legitimate claim of jurisdiction on labour matters. The contradiction in the whole issue is admissible given the court decisions quoted and the principles on interpretation of the law. The issue is sure to attract more judicial scrutiny in the succeeding period.

³⁰⁹ Op cit note 93, part VIII.

favourable avenue for exercise of the much required social dialogue in settlement of labour disputes.

Thirdly, the process as seen through the timelines and various phases, is long and laborious. This in effect translates to huge costs incurred in settling these disputes which may be inhibitory or injurious to business interests of the parties involved.

Fourthly, the policy framework is moribund and the institutional framework either absent or inadequate. For instance the Conciliation and Mediation Commission³¹⁰ provided for in the Act is inexistent and National Labour Board is poorly constituted and lacking in capacity. These challenges have slowed down streamlining of the labour industry through reforming settlement of trade disputes.

Another impairment existent in Kenya is incapacity.³¹¹ The Institution of the Labour officer is not evenly and sufficiently spread within the Kenyan labour market.³¹² This slows down the dispute resolution process and impedes expedient disposal of labour disputes. In addition, the shortage of skilled man power, particularly in the ADR discipline, has impacted strongly on the underperformance of the labour dispute resolution process in Kenya.

4.3 TRENDS OF ADR IN LABOUR RELATIONS IN KENYA

The following tables show the trends of ADR in labour relations conflicts in Nairobi. The tables show data from the industrial court and the labour office registries.

³¹⁰ Ibid s 66 (1) (c).

³¹¹ Op cit note 4 at 10.

³¹² Ibid.

4.3.1 Table A: Industrial court register

Year	Disputes Registered	Disputes Determined	Collective Bargaining Agreements Received	Collective Bargaining Agreements Registered
2012	1136	377	170	120
2011	2156	894	330	361
2010	1720	663	332	335
2009	851	392	319	324
2008	226	192	295	297
2007	159	147	317	317
2006	134	133	331	344
2005	163	147	310	275

Source: Industrial courts register Nairobi 2013

The data in Table A above shows that over the past eight years, the number of disputes registered at the industrial court has been increasing. There were 163 registered cases in the year 2005 compared to 1136 registered cases in the year 2012. Although this number has been increasing, the numbers of determined cases is still very low. For the 1136 registered cases in the year 2012, only 377 were recorded as determined. There were more cases determined in previous years than at the present. In the year 2005, out of 163 registered cases, 147 were determined. This disheartening trend is seen over the years as shown in the Table A.

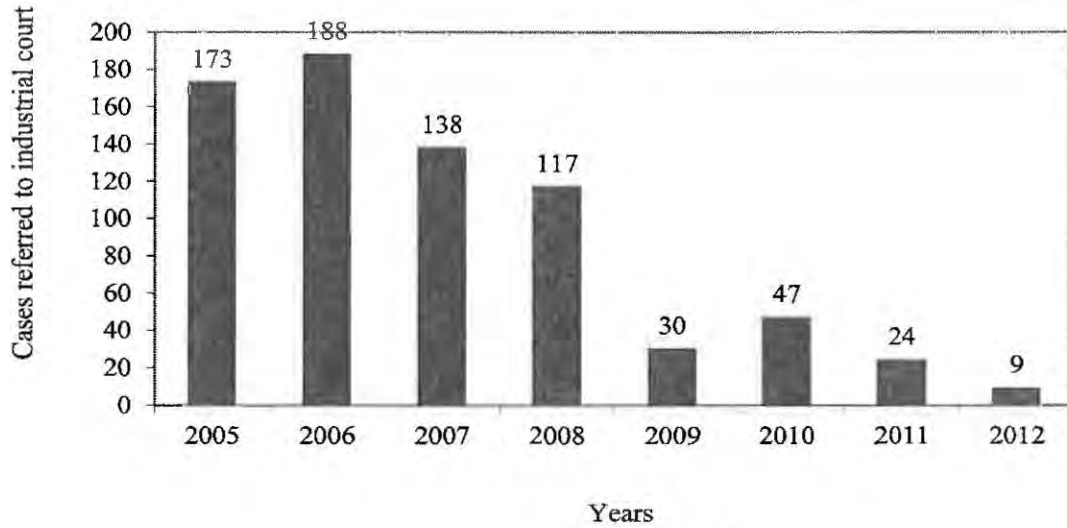
4.3.2 Table B: Conciliation Cases

	2005	2006	2007	2008	2009	2010	2011	2012
Termination	290	302	400	351	324	338	443	409
Recognition	215	171	109	100	117	146	93	123
Redundancy	44	50	25	29	35	45	60	73
Dismissal	216	310	218	214	234	240	249	267

Source: Labour office registry Nairobi 2013

The Table B shows that cases that were terminated through conciliation have been stable. The number has been ranging from 350 to 400 in the years 2008 to 2012. Recognition cases are less and range between 100 to 200 from the year 2005 to 2012. Redundancy cases are even fewer since they have been lower than 100 cases between the same period. The cases which have been dismissed through conciliation have been fairly consistent range generally in the 200's from the year 2007 to 2012. This shows that there has been no growth in the number of cases determined through conciliation in Kenya. This is seen in the cases filed in Nairobi, which is Kenya's capital city, and where many trade unions file their cases.

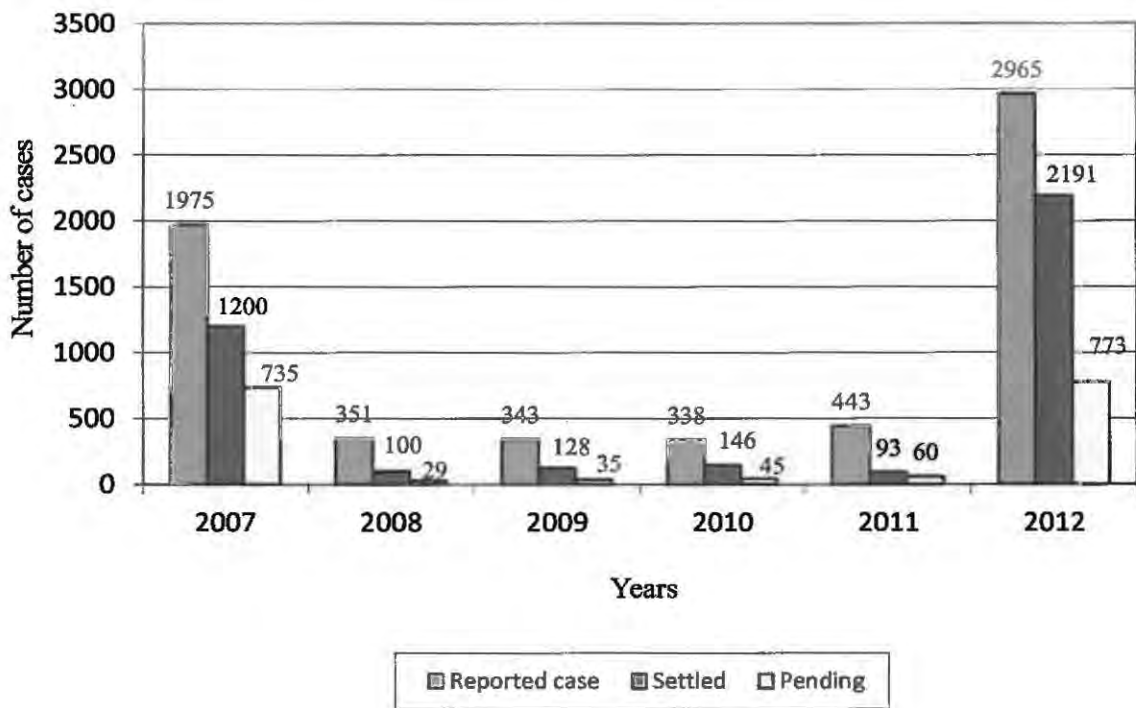
4.3.3 Figure A: Arbitration cases referred to industrial court



Source: Industrial court registry Nairobi 2013

Figure A shows the number of arbitration cases referred to the industrial court. The number has steadily decreased each year. In the year 2005, there were 173 cases referred. This number has decreased from 188 in 2006, 138 in 2007 and more recently in 2012, only 9 cases were referred to the industrial court.

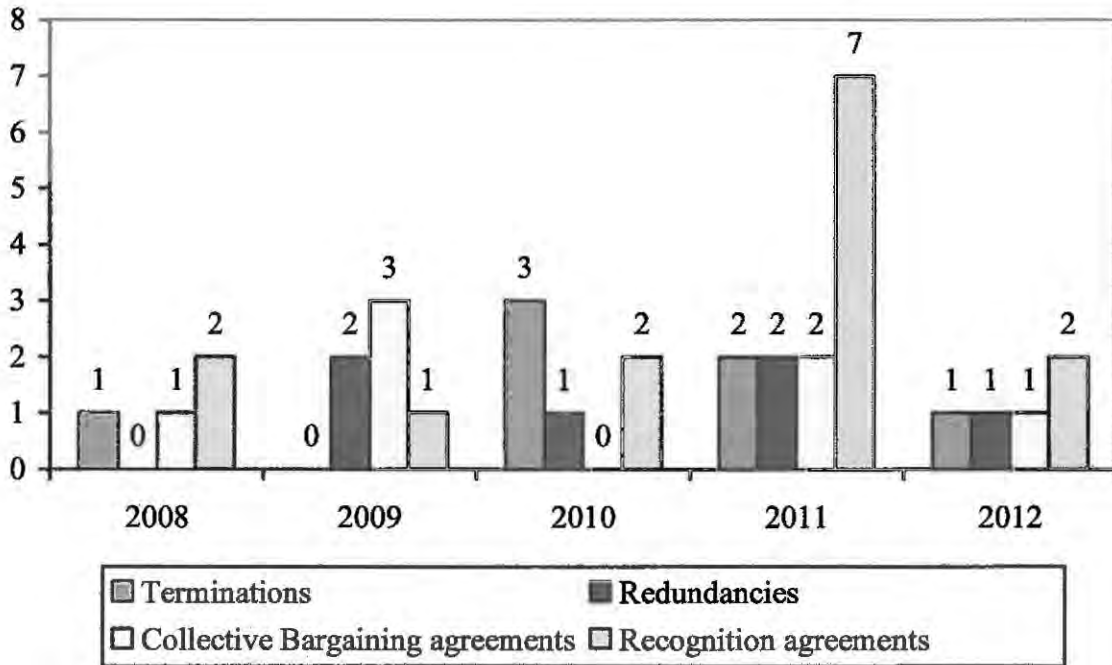
4.3.4 Figure B: Cases decided each Year at the Labour Office (Nairobi)



Source: Labour office registry Nairobi 2013

Generally the cases decided each year at the labour office in Nairobi has been decreasing from the year 2007 to 2010. However, the number increased steadily in the year 2011 from 443 to a high of 2965 cases in 2012. The number of cases settled also increased in 2012 to 2191, a remarkable improvement and an indication that the labour office is performing well in regard to case completion.

4.3.5 Figure C: Mediation cases referred to the labour office



Source: Labour office registry Nairobi 2013

As the Figure C shows, the number of mediation cases referred to the labour office is low. Only 4 cases were registered in the year 2008. This number increased to 6 in the years 2009 and 2010. The number increased to 7 cases in 2011 and back to 6 in 2012. These figures are too low and reflect that arbitration has still not gained sufficient recognition as an alternative method of dispute resolution in Kenya.

In conclusion the proposition that law is not an end in itself has actively gained notoriety as trite fact. The Constitution is by no means the cure to all issues affecting workers. A circumspective approach should be employed in implementing its provisions to ensure workers reap benefits envisaged and intended under the Constitution.

4.4 PRACTICES IN SELECT COUNTRIES

4.4.1 Nigeria

An exemplary case study is Nigeria. It embodies the will of the political establishment to carry out reforms. Nigeria is credited for initiating Africa's first Multi Door Courthouse in 2002.³¹³ The scheme has gained immense local and continental prominence over the years. The system advocates for restructured ways of dealing with cases and referral to ADR where the same is more appropriate. The MDC concept is modeled on the premise that litigation, as a single door, is inadequate in meeting the demands of modern commerce.³¹⁴ It presents parties with an option of three 'doors' to resolving disputes: Arbitration, Early Neutral Evaluation and Mediation.³¹⁵ The ADR judge will endorse the terms of settlement thereby giving full legal weight to a matter and such terms will be adopted as a decision of the court.

Lagos has one of the ideal models from which other states like Kano and Abuja have borrowed. It is governed by the Lagos Multi-Door Courthouse Act enacted in 2007. The statutory framework underpinning the Abuja MDC is the "The Multi-Door Courthouse Mediation and Arbitration Rules 2003" that was made pursuant to Article 259 of the Constitution of the Federal Republic of Nigeria. Under the Lagos Civil Procedure Rules, litigants fill a Pre-Trial Information sheet in which they indicate ways, if any, which the court can assist parties settle the matter other than through litigation. The implication of such procedures is that matters undeserving of litigation never end up in court.³¹⁶

Another archetypal project is the Nigerian Federal Court of Appeal Mediation Programme (CAMP). It is a programme aimed at decongesting the Appellate court and enhancing service delivery to attract international commerce.³¹⁷

The local industry has also taken cue in heeding adoption of ADR. The Nigerian Investment Securities Tribunal has an ADR Unit whereas the Nigerian Communications Commission has established conflict resolution centers in selected cities to handle disputes in the

³¹³ Op cit note 113.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Ibid. Brenda Branch says the purpose of the programme is to streamline service delivery in order to promote foreign investment.

telecommunications industry. These industry specific models encourage crash programmes and are normally predicated on strict deadlines. For instance the Securities Tribunal listens to disputes within 90 days. This efficiency and innovativeness has cast Nigeria as a model country in the practice of ADR.

4.4.2 South Africa

South Africa also offers another well-established jurisdiction in the practice of ADR. During the apartheid era many black South Africans saw the formal justice system; which is based on western legal systems as being a tool of oppression.³¹⁸ The system was ineffective leading many blacks to feel excluded and this led them to seek other ways to achieve justice which included ADR.³¹⁹ Consequently, a system of unofficial or folk institutions such as traditional and community courts evolved. These courts were non-authoritarian, sought to seek consensus over the matter being considered, were based on the structure of a specific community and applied the prevailing moral norms and social standards.³²⁰

In the foregoing and given that in South Africa, like in many other jurisdictions, the cost of litigation is prohibitive thus inhibiting access to justice;³²¹ there arose the need for ADR. Therefore to supplement the formal justice system ADR is widely used at different levels.³²² There have been varied efforts to integrate, control, acknowledge and formalize the traditional justice institutions. The government has tried to control these alternative institutions by establishing advisory boards, urban and community councils and town councils but this has proved unsuccessful. This is attributable to the traditional justice institutions' nature which includes their desire to operate independent of any external control as this is alien to them. To mainstream any form of formal rules and management would take a long time. Non-governmental organizations (NGOs) have tried to introduce more effective forms of dispute

³¹⁸ Van Niekerk G J 'People's Courts and People's Justice in South Africa - new developments in community dispute resolution' (1994) 1 *De Jure* 19.

³¹⁹ Carpenter G A 'Public Opinion, the Judiciary and Legitimacy' (1996) 11 *SAPL* 110.

³²⁰ Faris J 'ADR, Community Dispute Resolution and the Court System' *Community Mediation Update CDRT Newsletter* No 10 April 1996 at 7.

³²¹ Grant B & Schwikkard P 'People's Courts?' (1991) 7 *SAJHR* 304.

³²² Prof A A Okharedia 'The Emergence of Alternative Dispute Resolution in South Africa: A Lesson For Other African Countries' (A Paper Presented at the 6th IIRA African Regional Congress Of Industrial Relations, Lagos Nigeria, on 24-28 January 2011).

resolution like the Community Dispute Resolution Trust (CDRT) and the Community Peace Foundation.³²³

Commercial Arbitration is well established in South Africa and Alternative Dispute Resolution Association of South Africa (ADRASA) and the Arbitration Federation of South Africa (AFSA) have been significant attempts to institutionalize private commercial arbitration and to a limited extent, mediation. Arbitration is also common in industrial and engineering sectors.³²⁴ Conciliation in Labour is maybe the most articulate of all mechanisms.³²⁵ Its practice under the CCMA is well documented and has developed invaluable jurisprudence.

In conclusion, the practice of ADR is momentarily gaining currency and as seen, is very robust in some jurisdictions. It is anticipated that in time, this will extend to adequately cover other industries other than the world of commerce. This has been facilitated already through statutory enablement and all that is remaining is a sound policy and institutional framework to make the enterprise effective.

³²³ Ibid.

³²⁴ Ibid; South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997).

³²⁵ Op cit note 110.

CHAPTER FIVE

SUMMARY, RECOMMENDATIONS AND CONCLUSION

5.1 SUMMARY

This chapter sets out to condense succinctly the four chapters of the study and subsequent to that, draw conclusions and feasible recommendations in respect of Alternative Dispute Resolution Mechanisms in resolution of labour disputes in Kenya.

Chapter one sets out the foundation of the study and directs the mood and theme of the entire paper. It gives an outline of the discussion, framework of chapters and casts a fleeting glance on the entire paper. It is ideally a shrunken version of the research proposal.

The history of ADR in Kenya has been offered a luxurious discourse in the Second chapter stretching from pre-independent Kenya through the entire period of colonialism to independent Kenya. The use of dialogue or rather the informal justice system in dispute resolution cannot be sufficiently traced to a particular point in history and its history could even be as enriched in age as the history of mankind itself.³²⁶

Chapter two has established that ADR in Kenya has its foundations in customary jurisprudence and is in fact the principally existent way of handling disputes in ancient Kenyan societies.³²⁷ This culture suffers momentary interruption during the inceptive years of colonialism in Kenya but is introduced eventually albeit in a different form, character and reputation from the traditional dispute resolution mechanisms.³²⁸ Labour relations developed due to a myriad of factors, key being the agrarian system in which Africans were poor oppressed labourers.³²⁹ Unionism developed to address these grievances³³⁰ but little is evident of any available ADR mechanisms employed to solve the labour conflicts at that time. Colonialism and its way of

³²⁶ The Biblical accounts of dialogue date back to the Old Testament during the time of Moses and the era of priesthood. The priests served as neutrals and intermediaries and sometimes made rulings in respect of disputes. Dr Willy Mutunga, the Chief Justice of Kenya affirms this position thus: 'The story of Abraham's protracted negotiation with God over the destruction of Sodom is just one example. The Prophet Mohammed negotiated with Allah over the number of times the faithful would need to pray in a day, successfully bringing it down from 50 to five' available at www.judiciary.go.ke, accessed on 4th March 2014.

³²⁷ Op cit note 34; Op cit note 4.

³²⁸ Op cit note 130.

³²⁹ Op cit note 4.

³³⁰ Ibid.

administration placed more preference on the formal justice system.³³¹ This resulted in almost the total neglect of the Informal Justice System which encompasses ADR mechanisms. This state of affairs is evidently persistent for extended periods until the period of global clamour for ADR utility in commercial dispute resolution.³³² In conformity, Kenya thence set the stage for re-introduction of ADR in a larger and more structured scale. However, one cannot ignore the fact that Arbitral laws existed in statute books since 1914 but had long fallen into desuetude.³³³

Consequently, ADR never thrived as anticipated in those early formative days and the whole enterprise only found application in limited commercial disputes. The formulation of international conventions endorsing and advancing ADR as a benign and meritorious system of dispute resolution mechanism gave the ADR enterprise some impetus in the Country.³³⁴ The ILO treaties are of great significance in this regard in respect of labour matters as are the UNICTRAL Model Law, the New York Convention and the Washington Convention. The foundational framework of ADR as exists in Kenya at the moment owes much in form and substance to these international conventions.

The structure of the ADR network and labour relation in Kenya has been discussed fairly expansively and exhaustively in Chapter Three. The structure in Kenya has been established to be of hermaphroditic nature combining both formalized system and ad hoc arrangements.³³⁵ On a large scale most ADR mechanisms in Kenya are informally practiced and almost entirely on the instance of the parties involved. The more structured mechanism is Arbitration which has a statutory framework governing its application.³³⁶ However its legalistic approach has drawn criticism and even attracted demeaning labels of quasi litigation.³³⁷ The institutional framework is however growing in width and breadth to cover erstwhile unexploited areas of conflict management including family conflicts, community disagreements, simple civil matters etc.

³³¹ Op cit note 34.

³³² Op cit note 34; Op cit note 113.

³³³ Ibid note 34. Gakeri says there was discordance between the law and local practices in dispute resolution. The statutes had employed the use of undefined heavy legal terminology and convoluted sentences and this did not bespeak well for the arbitral process.

³³⁴ Op cit note 4. Adoption and ratification of UNCITRAL, New York Convention, WIPO treaties and a raft of other treaties offered renewed hope to the ADR enterprise.

³³⁵ Op cit note 145.

³³⁶ Op cit note 75.

³³⁷ Op cit note 113 ; Op cit note 4.

Chapter Four has presented a meticulous evaluation of the performance of ADR in labour dispute resolution in Kenya. The findings paint a bleak picture of the whole enterprise and signify a belaboured institutional and legal framework struggling with inefficiency, structural deficiency, inadequacy in capacity and desirous of reforms.³³⁸ The state of affairs is however improving and the institutions have assumed their mandate with zeal and gusto. The Constitution of Kenya, 2010 has re-energized the local scene and provided the spring board for these reforms.³³⁹ The statistical presentation is indicative of an underutilized system in need of restructuring and reorganization.³⁴⁰ The chapter also shows that on a large scale ADR has underperformed in comparison with the advanced judicial systems as shown with South Africa and Ghana. It is however on a brisk expansion and re-organization process owing to various legal amendments and the Constitution of Kenya, 2010. The legal framework is transforming from the erstwhile body of pious platitudes to a functional and operational regime.³⁴¹ This is however work in progress and hence desirous of collective input and a transformative approach.³⁴² This Chapter thus provides some of the recommendations and suggestions drawn from the conclusions derived from this discourse that can improve the ADR enterprise and labour conflict management and resolution in Kenya.

5.2 RECOMMENDATIONS

The Informal Justice System as represented by ADR is on a rapid growth path in Kenya.³⁴³ ADR has grown significantly as an alternative way in handling disputes due to the delay experienced in the Court system in Kenya which has led to an insurmountable back log.³⁴⁴ As a restatement of the extensively discussed new Constitutional dispensation, the legal and institutional set up in Kenya has been reborn and its elevation of ADR has made growth prospects positive. There are several recommended steps that can build ADR into a successful, expedient, efficient, beneficial

³³⁸ Refer to ch. 3 and 4.

³³⁹ Op cit note 23.

³⁴⁰ The trends as indicated in the tabulated information in Chapter four present disconcerting statistics.

³⁴¹ Op cit note 2.

³⁴² Op cit note 326. Dr Mutunga said thus: 'Every time the words, "See you in court" are uttered, we acknowledge that there is a total breakdown in relationships that can only be righted by an authoritarian decision favouring one side over another. Once in court, many people realise belatedly that their contests become irrevocably adversarial, and the zero-sum outcome – where one person emerges the winner and the other a loser. That is why I have sought to meet Council of Elders from different communities. My interest in the Councils of Elders is in driven by the desire to forge partnerships in resolving disputes using traditional mechanisms as decreed by the Constitution.'

³⁴³ Ibid.

³⁴⁴ Op cit note 113.

and proficient justice system in Kenya. This includes short term and long term proposals in effecting the reform agenda.

5.2.1 Short Term Agenda

5.2.1.1 Legislative Agenda

(i) Constitution

Legislative agenda³⁴⁵ is a top priority and entails the implementation of the letter and spirit of the Constitution of Kenya 2010 as a whole and particularly Article 159 (c) in respect of ADR.³⁴⁶ There is need for a well-coordinated labour legislative reform and institutional re-structuring to ensure conformity with the Constitution.³⁴⁷ A special Commission could benefit the situation through a keen study of the landscape in order to offer solutions in terms of statutory and institutional alignment to conform to the Constitution.³⁴⁸

A prompt implementation and application of Article 48 of the Constitution in respect of access to justice should be a priority. The labour institutions like labour officer, National Labour Board and the Industrial Court should be established all over the country. The governance set up in Kenya has been altered by the introduction of County governments and this should serve as a good background for expansion. The labour institutions should take advantage of the decentralization of administrative functions to expand their operations to these centers.³⁴⁹ This will ensure enhanced access to conciliation and mediation services for labour disputes of whatever nature at grass roots level.

(ii) Statutory framework

The Civil Procedure Act has initiated the reform agenda through introduction of s 59A (1) (2) and (3) and section 59B which have set the platform on which mediation will operate.³⁵⁰ The Chief Justice has now set the governance structure for the ADR uptake in Kenya by appointing

³⁴⁵ Op cit note 34 at 240: 'It is incontestable that there has never been a comprehensible policy on the place and role of arbitration and ADR mechanisms in dispute resolution. This evinces the absence of a robust legal framework on arbitration and ADR mechanisms and the inexcusable omissions in the legal regime.'

³⁴⁶ Op cit note 4.

³⁴⁷ Op cit note 328.

³⁴⁸ Ibid.

³⁴⁹ Op cit note 34 at 20.

³⁵⁰ Op cit note 117.

an acting registrar³⁵¹ and members of the mediation and accreditation committee.³⁵² The committee will be responsible for determining the criteria for certification of mediators, maintaining a register of qualified mediators, enforcing such code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.³⁵³ The Committee should enjoy some sense of autonomy in the conduct of its duties and extend its autonomy to determine low key labour disputes.³⁵⁴

The legislative agenda should also address the immediate set up of the Conciliation and Mediation Commission provided for under Section 66 (1) of the Labour Relations Act.³⁵⁵ This will, in part, serve to satisfy the provisions of Article 48 of the Constitution on access to Justice for all. This Commission is envisaged to regulate and administer the operation of ADR in labour dispute resolution in the Country. Its immediate set-up will diversify and offer a bigger stage for the conduct, operation and practice of ADR in the country.³⁵⁶ South Africa, an advanced jurisdiction, has a similar commission which has registered exemplary success.³⁵⁷ Justice systems which have greatly benefitted from similar commissions are the United Kingdom and Ghana.

(iii) International Conventions

Incorporation, integration and adoption of ADR specific International Instruments and Conventions into our legal system is also of great importance. Market confidence is quite dependent on the Justice system in any country. Kenya needs to streamline its labour dispute resolution mechanisms and ADR in general to promote an amiable business environment and efficient labour market.³⁵⁸ To this end, ADR has been identified as a more efficient mode of handling disputes due to its cost, time and efficiency implications.³⁵⁹ Corruption, inefficiency, delay and high costs involved in the Kenyan court system have gifted ADR with the preferable

³⁵¹ Gazette notice No 1087 of 11 Feb, 2015.

³⁵² Gazette notice No 1088 of 11 Feb, 2015.

³⁵³ Op cit note 117.

³⁵⁴ Ibid.

³⁵⁵ Op cit note 93.

³⁵⁶ Farooq Khan op cit note 110.

³⁵⁷ Ibid at 3.

³⁵⁸ Op cit note 108.

³⁵⁹ Ibid.

tag. It is hence imperative that the country needs to move with haste in building a functional legal and institutional framework.

5.2.1.2 Expansion of Institutional Framework

Secondly, there should be expansion of the institutional framework which is already in place.³⁶⁰ This includes a solution to the incapacity experienced within the Labour officer institutional set up through training of Para-legal mediators and arbitrators in those areas where the labour office is not situated. The amount in cost and time taken to access the labour officer will be reduced thereby enhancing dispute resolution.

The Industrial Court, as highlighted in Chapter Three also lacks the capacity and access to all locations. The Court is currently present in only five locations namely; Nairobi, Mombasa, Kisumu, Nyeri and Nakuru. This is a very poor statistic in terms of access as it leaves a huge lacuna in the rest of the 42 Counties, some of which extremely deserving. Locations like the Western part of Kenya with constant conflicts in the sugar industry, the flower farms in Naivasha and many other industrial towns have been left unaddressed. In this regard, there is need to amend the law to allow certain classes of disputes to be heard by sub-ordinate Courts.³⁶¹ This is more preferable in terms of costs and efficiency as opposed to, for example, circuit sitting of the Industrial Court which maybe arduous and inadequate.

Similarly, a system akin to the Small Claims Court for handling mediation and conciliation in small labour issues should be established. This will help decongest the Industrial court and expand avenues of access to ADR and thus justice.

A current initiative to popularize ADR in Kenya is the Strathmore Law School's Dispute Resolution Centre (SDRC) which focuses on the provision of mediation and related services to individuals, groups and organizations and whose key partner on a pilot basis is Kenya Bankers Association.³⁶²

³⁶⁰ Op cit note 4. Kariuki remarks thus: 'with a population of over 30 million and a labour force of about 17.94 million people, our alternative dispute resolvers are overwhelmed and cannot possibly deal with all the matters suggested by the labour laws to be handled using ADR mechanisms.'

³⁶¹ Refer to ch 4.

³⁶² <http://sdrc.or.ke/index.php/services>.

5.2.1.3 Expansion of ADR domain

Thirdly, there should be expansion of the ADR domain to involve a wider constituency in its formulation and functions.³⁶³ Key to this is the Federation of Kenyan Employees (FKE) and Umbrella trade unions like Central Organization of Trade Unions (COTU) amongst others. The level of awareness on ADR in the country is still very poor.³⁶⁴ The general populace is still suffering from the colonial bug that lay emphasis on a formal court system as opposed to ADR and hence many people result to litigation out of ignorance of the possibility of ADR. Civic education including legal aid and open forums should be undertaken at the instance of stakeholders and all interested bodies to create knowledge of this process.

FKE should also undertake multi-sectoral training of its members to improve on the comprehension and expertise on ADR. The managers, employers and employee supervisors should undergo short courses in conflict management and application of ADR. Established International bodies like the International Labour Organization should also be roped in to assist in capacity building and logistical advice.

5.2.1.4 Creation of Awareness

This enlists almost all the recommendations discussed as any publicity move creates awareness to a certain extent.³⁶⁵ Further to these measures booklets and pamphlets with ADR literature and information about ADR in Kenya and its potential achievements should be printed in the two official languages and placed in all work places and strategic places to promote awareness.

The Legal Bar which occupies a momentous constituency in dispute resolution in the country should also be brought on board. Lawyers should be encouraged to recommend use of ADR in suitable labour disputes by their clients.³⁶⁶ This is an important way of information dissemination and awareness creation.

³⁶³ Op cit note 18.

³⁶⁴ Op cit note 4. Dr. Muigua notes that the local community is still a believer in getting their day in court. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent of parties' goodwill.

³⁶⁵ Op cit note 130.

³⁶⁶ Op cit note 113.

5.2.2 Long Term Agenda

5.2.2.1 Legislative Agenda

The country should also embark on a long term agenda to enhance the entrenchment of ADR in Kenya. First, in the legislative agenda, is an amendment to the Labour laws and particularly the Labour Relations Act to remove Conciliatory and Mediation powers from the ambit of the Cabinet Secretary for Labour. The minister is at times an interested party in labour disputes and allowing him the liberty to facilitate adjudication on the same is tragic and against rules of natural justice.

Secondly, there should be provision for legal representation as a right for the employees, most of whom are underprivileged labourers.³⁶⁷

Labour rights should also be elevated to Constitutional status to protect the market from abuse and prevent unending conflicts some of which result from employer exploitation of the legal lacuna.

5.2.2.2 Academic training

Another recommendation is that Law schools and Institutions of higher Learning should introduce courses in ADR up to post-graduate level.³⁶⁸ This will shift focus from, and alter the imbalance in training which has more emphasis on, litigation and the court system. It will also ensure ample circulation of ADR skills within the market for more enhanced dispute resolution. Academic commentary in the form of theses, research papers, peer reviews, journalistic reporting and academic papers will result thereby refining the practice of ADR and offering a wide spectrum of knowledge.

Subsequently, opportunities for the practice of ADR will open up. Tbilisi State University in Georgia is a case example where through initiation of programs on ADR, education opportunities have emerged. The ADR Center in the University has developed an important resource center

³⁶⁷ South African Jurisprudence as developed around the practice of the CCMA has adopted legal representation as a right.

³⁶⁸ Op cit note 113.

and training facility on ADR in the country and other neighbouring states through partnerships and exchange programs.³⁶⁹

5.2.2.3 Baseline survey

Academic training will be augmented by extensive research on the whole ADR enterprise and hence improve on its operation. A baseline survey on traditional dispute resolution mechanisms should also be carried out with a view to structuring its operation and establishing capacity. This will cut twofold, in creating awareness and also expanding the ADR operation realm.³⁷⁰

This survey can be supplemented by pilot mediation schemes to test drive the possibility of adopting such a project. This can even take the shape of court-based mediation schemes as happened in Ontario, Canada where a 24-month pilot project for non-family civil cases managed excellent statistics and is now formally incorporated.³⁷¹

5.2.2.4 Introduction of e-ADR

Information Communication Technology (ICT) is an important means that cannot be disregarded in the modern society. ADR should also adopt the modern ways of communication in the interest of conformity and efficiency. Electronic conduct of ADR sessions (e-ADR) through such means as teleconferencing, use of video links and other electronic media will greatly enhance greatly the use of ADR in justice delivery. The Institution of the Labour Officer could immensely benefit from this, by setting up central facilities where labour disputes from all over the country can be handled at the click of an internet link. This will save on travelling costs, other expenses, logistics, and time and above all, ensure easy access and prompt resolution of disputes. This method is also advantageous in that it offers a permanent record and easily accessible references which will serve as valuable precedents for future dispute resolution. Electronic means has been employed successfully in some dispute resolution forums including the International Criminal Court (ICC) in the conduct of the Kenyan cases where video links have been used to conduct some proceedings.

³⁶⁹ Blechman M D 'Assessment of ADR in Georgia' (2011) *A USAID sponsored research* at 4.

³⁷⁰ *Op cit* note 34.

³⁷¹ Brenda Brainch 'ADR/ Customary Law' A presentation at Dispute Resolution Centre, Kenya on 6th November 2003 at 12.

5.2.2.5 Judicial Leadership

The Judiciary as a custodian of justice should be at the forefront in advocating for embrace of ADR in dispute resolution.³⁷² This may be through creation of a new litigation landscape through judicial activism in ADR thus setting the stage and precedence for the unrestrained operation of ADR.

The Judiciary can also consider the Multi-Door Court system as practiced in Nigeria.³⁷³ This system offers a Comprehensive approach to dispute resolution within the administrative structure of the court by offering various options to parties filing a suit other than litigation.³⁷⁴ It's facilitated by an ADR specialist being at hand to advice the disputants on the best process in settling the dispute.

The Judiciary can also adopt the *Lok Adalat* (Peoples' Court) concept practiced in India,³⁷⁵ as an additional and complementary arm in the existing judicial system. This is a special forum established by the government for settlement of disputes through the various ADR mechanisms at the pre-litigative and post-litigative stages.³⁷⁶ A similar approach in Kenya will help clear the back-log and inject confidence in ADR as a dispute resolution mechanism.

5.2.2.6 Advisory Forums

Legal Aid Centers should be put in place where more professional assistance can be offered with regard to ADR. This should be coupled with undertaking promotional activity through mass media to offer information on ADR to the general public.³⁷⁷ ADR has progressed at a slow pace partly due to ignorance of its workings and hence this could be beneficial.

Setting up help desks in all Judicial Settings in the country to pass information and even advice litigants on ADR and its processes will also go a long way in promoting ADR. This will help ingrain ADR into the system and establish it as a mainstream justice system.

³⁷² Op cit note 326; Op cit note 34 at 240.

³⁷³ Op cit note 108.

³⁷⁴ Op cit note 4.

³⁷⁵ Legal Services Authorities (Amendment) Act 1994 of India effective from 09-11-1995.

³⁷⁶ Lok Adalat Law and Judicial Approach' available at [shodhganga.inflibnet.ac.in/bitstream/10603/4937/.../11-chapter 5 % 205.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/4937/.../11-chapter%205.pdf).

³⁷⁷ Op cit note 130.

5.3 CONCLUSION

Alternative Dispute Resolution (ADR) has been touted as one of the greatest developments of the modern legal system. Instead of engaging in protracted and fraught-laden litigation, former litigants can simply take the more expedient, cheaper, creative, less complicated, less cumbersome, more participative and more effective route of dispute resolution — the “alternative” form.³⁷⁸ The ADR realm as earlier highlighted has benefited largely from a universal paradigm shift of combative litigation to pacifism and diplomacy in dispute resolution. The shortcomings of litigation have highlighted ADR as a more practicable method of dispute resolution. Kenya is on the list of the countries on this reform course and is continually embracing ADR on a larger scale. The Constitution of Kenya 2010 is a *tabula rasa* in this regard, injecting a sense of renewal in the need to offer justice. ADR is one of the principles provided for in the exercise of judicial authority and hence a clear indication of its significance.³⁷⁹ The growth is at a fair pace and it is hoped that with the implementation of the proposals and recommendations as set out above, ADR will occupy its rightful place in the justice system in Kenya. Abraham Lincoln’s remarks on ADR are quite illuminating.

‘Discourage litigation. Persuade your neighbours to compromise wherever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.’³⁸⁰

³⁷⁸ Carlo Osi ‘Cultivating Culturally Appropriate Methods in lieu of Litigation’ 10 *Cardozo Online Journal of Conflict Resolution* 1 2008.

³⁷⁹ *Op cit* note 2.

³⁸⁰ <http://www.dca.nic.in/cir/anr2gc1099.html>.

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