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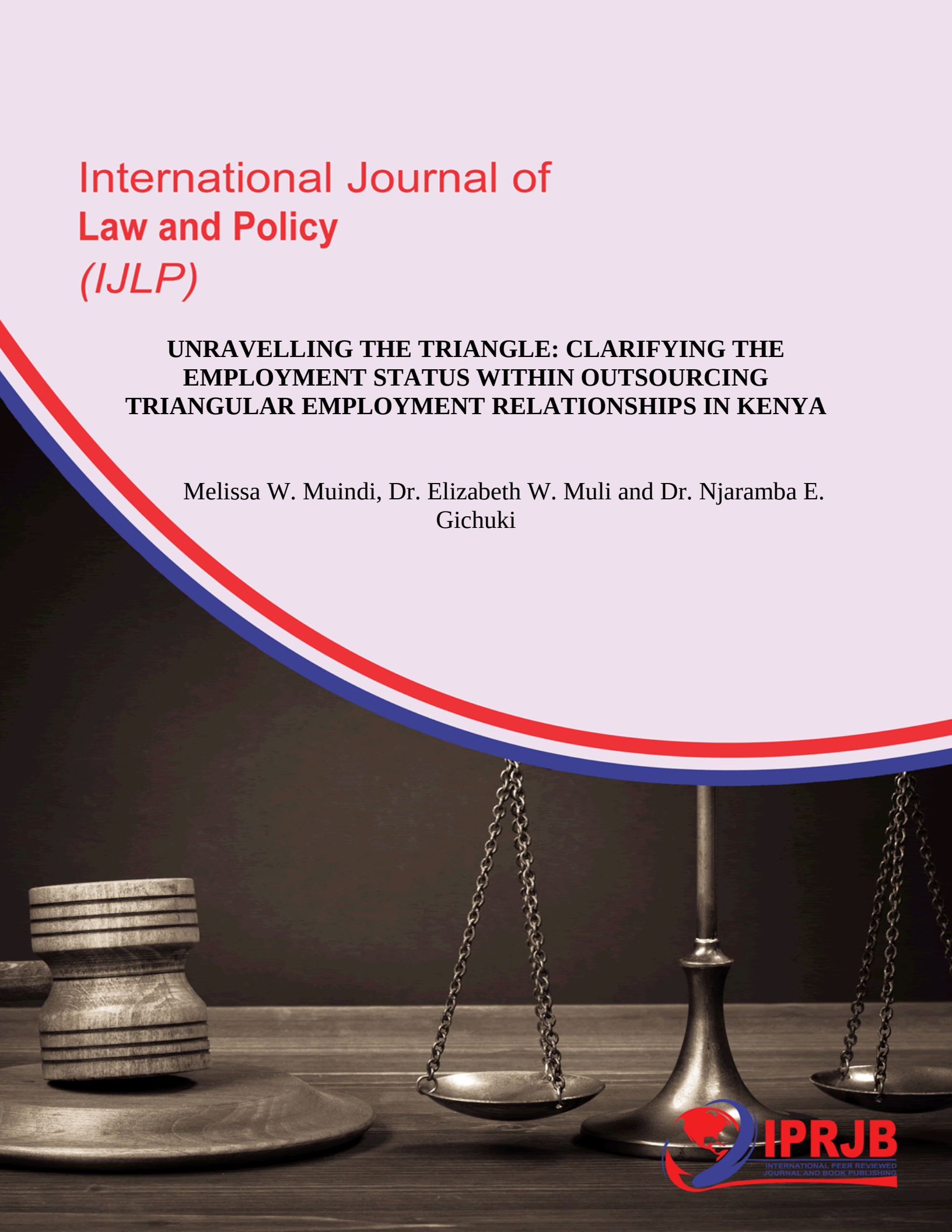

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UNRAVELLING THE TRIANGLE: CLARIFYING THE EMPLOYMENT STATUS WITHIN OUTSOURCING TRIANGULAR EMPLOYMENT RELATIONSHIPS IN KENYA

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Abstract

Purpose: This paper aimed at unravelling the triangle by assessing the employment status of outsourced workers within outsourcing triangular employment relationships (TERs) in Kenya.

Methodology: The study adopted desk research in which data was collected from relevant books, journal articles, government reports, legal commentaries, periodicals, relevant statutes, treaties and conventions on the current Kenyan legal framework and its underlying assumptions that pose challenges to outsourced workers. This paper is divided into three main sections. The first discussed the attribution of employment status under Kenya's labour laws. Due regard was given to the statutory definitions and key judicial tests. The second part focused on the employment status of outsourced workers in outsourcing TERs. Though outsourced workers relate with two authority figures, namely the outsourcing company and the client enterprise, the law classifies the outsourcing company as the outsourced workers' employer. The law does not define the relationship between the client enterprise and the outsourced workers which poses unique challenges to the workers. These are compounded when outsourcing TERs arise from the conversion of employees to outsourced workers. The third part identified measures to clarify employment status within outsourcing TERs. The paper underscores the importance of clarifying the employment status within outsourcing TERs.

Findings: It was found that current law on employment status envisages standard employment relationships (SERs) but does not adequately cater for outsourcing TERs. It classifies the outsourcing company as the outsourced workers' employer, and does not factor in that the client enterprise usually exercises day-to-day control over their outsourced workers' activities. It was found that this poses unique challenges when there is transfer of employment from SERs to outsourcing, which may lead to employee misclassification.

Unique Contribution to Theory, Practice and Policy: Adopting joint employee status in Kenya's legal framework would enable placing some employer obligations on the client enterprise, even though it does not formally attach employer status on it. In addition, the express prohibition of sham arrangements and the limitation of outsourcing arrangements to non-core business activities would curb the use of outsourcing TERs to evade employment responsibilities through employee misclassification.

Key words: *Employment Status, Outsourced Workers, Triangular Employment Relationships*

1.0 INTRODUCTION

Outsourcing is a non-standard forms of work (NSW) because it involves a labour intermediary: an outsourcing company. This deviates from the standard employment relationship (SER) because the latter involves direct employment arrangements between two entities: an employer and an employee. The outsourcing company hires outsourced workers and avails them to a client enterprise, pursuant to a service contract with the client enterprise. This creates a triangular employment relationship (TER).[1]

An SER is generally understood to refer to an open-ended contractual relationship, in which there is a vertical power relationship between a single employer and employee, and also a mutuality of obligations that sustains the relationship for a long duration of time.[2] Employment arrangements that deviate from and SER in one way or another are classified as NSWs.[3] It is argued that the existing binary classification is rigid and often excludes NSWs from employment protections.[4]

The problem that this paper investigates is that the current legal framework on employment status in Kenya focuses on SERs and does not adequately cater for NSWs. It is thus unable to deal with the unique challenges outsourced workers face in the determination of their employment status. The employment laws are framed with the SER in mind and envisage direct employment relationships with a single employer. For outsourcing arrangements, the splitting and sharing of employment functions between the outsourcing company and the client enterprise creates a lacuna that affects the enforcement of the outsourced workers' rights.

The objective of this paper is to unravel the triangle by assessing the employment status of outsourced workers within outsourcing TERs in Kenya. It first discusses the attribution of employment status under Kenya's labour laws by considering both the statutory definitions and judicial tests. It then assesses the peculiarities relating to the employment status in outsourcing TERs. Thereafter, it identifies measures to clarify employment status within outsourcing TERs.

2.0 ATTRIBUTION OF EMPLOYMENT STATUS

Employment status essentially relates to being in an employer-employee relationship. An employee is defined under the Kenyan labour laws as a person employed for wages or a salary and this includes an apprentice and an indentured learner.[5] This definition is somehow tautological because it defines an employee as someone who is employed, without defining what it means to be employed. It may, therefore, be difficult to apply with certainty. A second

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[1] BPS Van Eck, 'Temporary Employment Services (Labour Brokers) in South Africa and Namibia' (2010) 13 PER: Potchefstroomse Elektroniese Regsblad 107.

[2] Günther Schmid, 'Non-Standard Employment and Labour Force Participation: A Comparative View of the Recent Development in Europe' [2010] IZA Discussion Paper No. 5087.

[3] ILO, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (PRODOC 2016) 7.

[4] Brendan Burchell, Simon Deakin and Sheila Honey, *The Employment Status of Individuals in Non-Standard Employment* (Citeseer 1999) 1.

[5] Employment Act 2007 s 2; Employment and Labour Relations Court Act 2011 s 2; Labour Relations Act 2007 s 2; Labour Institutions Act 2007 s 2.

statutory definition of an employee is a person who works under a contract of employment, otherwise known as a contract of service.[6] The term contract of service refers to an agreement to employ an employee or to serve as an employee for a certain period of time.[7] The agreement may be oral or written; it may also be expressed or implied.

Though the statutory definitions are a useful guide in determining employment status, they are not conclusive. The courts have therefore stepped in to determine the particularities of a contract of service and how it is different from a contract for services. The oldest judicial test on employment status is the control test. It is premised on the expectation that in a contract of service a master tells the servant what to do as well as how to do it, whereas in a contract for services the master only tells the servant what to do but not how to do it.[8] The control test is useful when the work involved is basic and the worker is relatively unskilled, but it may inaccurately exclude workers with specialist skills.[9] In strictly applying the control test, professionals such as surgeons, pilots and engineers would be placed outside the employment framework because, bearing in mind their high levels of expertise, their masters may not guide them in how to execute their tasks. Yet, it is a fact that professional workers are employable on contracts of service, notwithstanding the lack of control over their skills.[10]

In outsourcing arrangements, the client enterprise usually exercises day-to-day control over their outsourced workers' activities. If the control test is applied to outsourcing arrangements, the outsourced workers would be classified as employees of the client enterprise. What then would the relationship between the outsourcing company and the outsourced worker be termed as? If it is an employment relationship, then would the outsourced worker then have two employers despite a lack of control of one of the entities? Applying the control test to outsourcing TERs potentially leads to absurd results, as depicted in *Jonathan Karanja Thuo v Bata Shoe Company Ltd.*

The case involved workers who were stationed at Bata Shoe Company's premises but whose salaries were paid by Fast Track Company, an outsourcing company.[11] The dustcoats that they wore were labelled Fast Track, but the workers did not regard Fast Track as their employer because they were supervised by Bata Shoe Company itself, and not by Fast Track. They considered that Fast Track simply paid their salaries. When the workers' employment was terminated, they sued both companies for unfair termination. The Employment and Labour Relations Court had to determine if they were employees of either of the respondents, and if so, which one. Though the case failed because the workers did not provide evidence to support their relationship to either of the parties, the case raises important questions that are worth deliberation. If the control test had been applied, then this situation would have led to the

[6] Occupational Safety and Health Act 2007 s 2.

[7] Employment Act s 2.

[8] *Yewens v Noakes* (1880) 6 QBD 530 (Court of Appeal); *Christine Adot Lopeyio v Wycliffe Mwathi Pere* [2013] eKLR (Industrial Court).

[9] *Cassidy v Ministry of Health* [1951] 1 All ER 574.

[10] *Everret Aviation Limited v Kenya Revenue Authority (Through The Commissioner of Domestic Taxes)* [2013] eKLR (High Court).

[11] *Jonathan Karanja Thuo & 6 others v Bata Shoe Company Ltd & another* [2014] eKLR (ELRC).

classification of Bata as the employer and would have ignored the relationship between the workers and Fast Track.

To cure the inherent flaws in the control test, courts have developed additional tests, namely, the integration tests, the test of mutuality of obligations, the economic reality test and ultimately the multi-factor test.[12] The integration test accommodates professional employees such as managerial employees and middle-class employees instead of focusing primarily on lower cadre jobs. Under the integration test, a worker is considered an employee if the activities they perform are an integral part of the business enterprise, and not merely peripheral.[13]

Applying the integration test to outsourcing TERs, outsourced functions are usually peripheral rather than the core functions of the client enterprise.[14] With that in mind, outsourced workers would not be considered employees of the client enterprise. On the other hand, the tasks that they perform may also not be core activities of the outsourcing company, as was the case in *Jonathan Karanja Thuo v Bata Shoe Company Ltd*.[15] Fast Track had minimal involvement with the outsourced workers. Their role entailed the provision of dustcoats and processing the outsourced workers' remuneration. On the face of it, the outsourced workers' tasks may not be considered core within the outsourcing company. The integration test may fail to classify the outsourced workers as employees of either the outsourcing company or the client enterprise. Due to the inconclusiveness of this test, it is important to consider other judicial tests.

The economic reality test is a test of economic dependence which focuses on identifying which party bears the chance of profit or risk of loss.[16] The test assesses whether the worker performs work on their own account as part of their own business or alternatively on behalf of another person. An independent contractor runs their own business, is a registered taxpayer who manages their own work schedule, and is usually free to perform services for several persons simultaneously and invoice each person accordingly.[17] The payments for the services rendered are not subject to income tax and the independent contractor does not benefit from employment protections such as leave entitlements.

The economic reality test poses special challenges for NSWs especially dependent self-employment, otherwise known as disguised employment.[18] Disguised employment refers to work arrangements in which a dependent worker is misclassified as a self-employed person to by-pass employment liabilities.[19] Disguised employment can be achieved by concealing the employer's identity, by for example, engaging workers as consultants but at the same time maintaining a

[12] *Christine Lopeiyo v Pere* (n 8).

[13] *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101.

[14] John Atkinson, 'Manpower Strategies for Flexible Organisations' (1984) 16 Personnel Management 28.

[15] *Jonathan Thuo v Bata* (n 11).

[16] *Christine Lopeiyo v Pere* (n 8).

[17] *Kenya Hotels and Allied Workers Union v Alfajiri Villas (Magufa Ltd)* [2014] eKLR (Industrial Court).

[18] ILO (n 3) 34.

[19] ibid 9.

level of control and economic dominance that would be incompatible with them truly being independent contractors. [20]

Turning now to the mutuality of obligations test, this test embodies the doctrine of consideration, which is an essential element in contracts. Under this test, an employment contract exists where the parties to the contract make commitments to each other to maintain their employment relationship for an extended duration.[21] The test focuses on the fact that an employment contract entails an exchange of services for wages. Consideration is central to employment because an employment contract is not a yoke of slavery or servitude.[22] One limitation of the mutuality of obligations test is that, applied strictly, it sets casual employees outside the employment framework due to the lack of mutual promises for future performance.[23] In addition, the mutuality of obligations test may lead to mixed results when applied to outsourcing TERs. The obligation to pay wages lies with the outsourcing company. However, the outsourced worker performs services for the client enterprise.

The most comprehensive test is the multi-factor test, which involves the application of a range of factors.[24] The first is whether the worker agrees to provide services for the master in exchange for remuneration. The second is whether the worker agrees to be subject to the other party's control to a degree sufficient enough to categorize the other party as master. The third involves an evaluation of the other elements of the contract and determining if they are consistent with the classification as a contract of service. Additional elements may include who provides the tools of trade, who pays the worker's national insurance and pension, the possibility of delegation of work assignments, the regularity and method of payment, and the terms used by the parties themselves to describe their relationship.[25] Applying this test to outsourcing TERs, the second element of the test is often downplayed and outsourced workers are classified as employees of the outsourcing company.[26]

The foregoing depicts that there is no 'one size fits all' test.[27] Nonetheless, the body of judicial jurisprudence seems better suited for the classification of 'typical' workers, that is, workers engaged under SERs. The statutory definitions and judicial tests do not seem to adequately cater for NSWs which sometimes leads to misclassification. The effects of misclassification vary, and

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[20] ibid.

[21] *Christine Lopeiyo v Pere* (n 8); *Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 6 others* [2014] eKLR (Industrial Court).

[22] *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR (Court of Appeal).

[23] *Bakari Ali Mbega v Kwale International Sugar Company* [2019] eKLR (ELRC).

[24] *Stanley Ominde Khainga v Nairobi Hospital* [2018] eKLR (ELRC); *KHAWU v Alfajiri* (n 17); *Bernard Wanjohi Muriuki v Kirinyaga Water And Sanitation Company Limited & another* [2012] eKLR (Industrial Court); This test was originally developed in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433.

[25] *Bernard Wanjohi v KIRIWASCO* (n 24).

[26] *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union* [2016] eKLR (Court of Appeal).

[27] See e.g. *Bakari v KISCOL* (n 23); *Geoffrey Asanyo v NAWASSCO* (n 21); *Kenya Plantation and Agricultural Workers Union v Kenya Agricultural and Livestock Research Organization* [2014] eKLR (Industrial Court); *Christine Lopeiyo v Pere* (n 8).

include the underpayment of wages, loss of benefits and exposure to risks they would not have faced if they were classified as employees.[28] This study examines some of the challenges related to classification of the employment status in outsourcing TERs in Kenya. Thereafter, it considers innovative measures to bridge the gaps in clarifying the employment status of outsourced workers in Kenya.

3.0 EMPLOYMENT STATUS IN OUTSOURCING TRIANGULAR EMPLOYMENT RELATIONSHIPS

The law in Kenya generally upholds the practice of outsourcing.[29] Under outsourcing TERs, the outsourced worker is classified as the outsourcing company's employee.[30] This applies even though the outsourced workers are based at the client enterprise's premises. This was depicted in *Abyssinia v Kenya Engineering Workers Union* (KEWU). The case involved a trade dispute in which the respondent trade union alleged that Abyssinia had failed to enter into a recognition agreement through which KEWU would represent Abyssinia's unionizable employees.[31] Abyssinia countered this by claiming it had outsourced all its employees to Jokali Handling Services Limited, an outsourcing company, and thus did not have any unionizable employees over whom to sign a recognition agreement.

The evidence showed that Abyssinia's employees who performed functions such as twisting, bending, carrying and loading of the metals had been voluntarily transferred to Jokali, as Abyssinia considered these to be non-core functions. The workers in question had signed discharge agreements and entered into six-month employment contracts with Jokali, which took up *inter alia* payment of their daily wages, statutory dues, provision of protective clothing and insurance. Under the arrangement, Abyssinia made payments to Jokali, which would then remunerate the workers and supervise their work at Abyssinia's premises.

The Industrial Court, which was the court of first instance, opined that Abyssinia used outsourcing to circumvent the recognition of the trade union.[32] However, quoting Murgor J. in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya*, the Court of Appeal emphasized that "outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs".[33] Given the validity of the discharge agreements and the new contracts of employment, the Court of Appeal held that the workers had ceased to be employees of Abyssinia. A new

[28] Thomas Prosser, 'Dualization or Liberalization? Investigating Precarious Work in Eight European Countries' (2016) 30 Work, Employment and Society 949; Claudia Weinkopf, 'Precarious Employment and the Rise of Minijobs' in Leah F Vosko, Martha MacDonald and Iain Campbell (eds), *Gender and the Contours of Precarious Employment* (Routledge 2009).

[29] *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR (Court of Appeal).

[30] *Abyssinia v KEWU* (n 26).

[31] ibid.

[32] *Kenya Engineering Workers Union v Abyssinia Iron And Steel Ltd* [2014] eKLR (Industrial Court).

[33] *Kenya Airways v AAWU* (n 29) 46.

employer-employee relationship had been formed between them and Jokali. This emphasized the fact that outsourced workers are employees of the outsourcing company.

This classification of employment status poses unique challenges when employees under the SER are converted into outsourced workers and are still based at the same premises. In Kenya, there are no statutory provisions that regulate the transfer of employment or employees.[34] Nonetheless, judicial interpretations relying on the United Kingdom and South African laws have provided guidance. An example is *Aviation and Allied Workers Union v Kenya Airways Limited*, in which Kenya Airways declared 447 of its unionizable employees redundant and offered most of them to Career Directions Limited, an outsourcing firm.[35] The roles targeted for outsourcing were cabin crew, cabin groomers and ground staff. These roles, though important, were considered ancillary to Kenya Airways' core functions. The outsourced workers continued to perform the same or similar tasks at Kenya Airways, except that they had contracts of employment with Career Directions.

Kenya Airways rationalized its decision to outsource as a cost-reduction strategy aimed at redressing its loss-making trend. It was hoped that outsourcing would reduce the company's burdens in terms of the roles it needed to manage. By bringing another entity on board, Kenya Airways could focus on its core functions and increase its efficiency. The Aviation and Allied Workers Union challenged the redundancies and outsourcing arrangements. Though the Industrial Court opined that the restructuring exercise had led to unfair termination of employment, this was overturned on appeal.[36] The key point that came across in the appeal was the affirmation that the law upholds the practice of outsourcing to enable companies focus on their core functions.[37]

When a company transfers its existing workforce to an outsourcing company, the transferred workers cease to be employees of their original companies and move to become employees of the outsourcing company.[38] In *Harrison Karani v Insight Management Consultants* some employees from Pwani Oils Limited were converted into outsourced workers. Pwani Oils entered into an outsourcing service contract with Insight Management Consultants Limited, which took up the management of Pwani Oil's existing workforce and offered them six months renewable contracts. The workers continued to work at Pwani Oil's premises and reported to their managers at Pwani Oils in the same way. However, legally under the service contract Pwani Oils had converted from the position of employer to a client enterprise.

The Industrial Court questioned why a company would convert permanent employees to outsourced workers on short term contracts which included a probationary period. In doing so, one of the workers had been employed directly by Pwani Oils for a period of seven years and was then placed on probation for the same job he had been doing. The Industrial Court decried

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[34] Unlike for example the United Kingdom's Transfer of Undertakings (Protection of Employment) Regulations 2006; and the South Africa Basic Conditions of Employment Act 1997.

[35] *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others* [2012] eKLR (Industrial Court).

[36] *Kenya Airways v AAWU* (n 29).

[37] ibid.

[38] *AAWU v Kenya Airways* (n 35); *Harrison Karani & 19 others v Insight Management Consultants Limited* [2016] eKLR (Industrial Court).

the way in which the service contract between Pwani Oils and the outsourcing company had been used to alter the nature of the workers' conditions of employment, especially since the TER resulted in short-term contracts. Since the attribution of employment status by Kenya's labour laws primarily envisages direct employment relationships under SERs, it poses unique challenges for outsourced workers because they are engaged through outsourcing TERs. This paper, therefore, considers some key measures that would offer greater clarity to the employment status within outsourcing TERs.

4.0 MEASURES TO CLARIFY EMPLOYMENT STATUS IN OUTSOURCING TRIANGULAR EMPLOYMENT RELATIONSHIPS

The nature of outsourcing TERs brought into question the construction of the employment relationship, since the TER involves two authority figures, namely the outsourcing company and the client enterprise.[39] Kenyan case law classifies the outsourcing company as the employer and holds that an employment relationship exists between the outsourcing company and the outsourced worker.[40] However, in certain cases such a construction may be impractical or it may be to the detriment of the outsourced workers. The enforceability of certain employer obligations against the outsourcing company may be questionable. To redress this, this paper proposes that the law in Kenya adequately addresses employee misclassification and also proposes the introduction of joint employer status. This would be beneficial in clarifying the employment status within outsourcing TERs.

4.1 Addressing employee misclassification

Though the parties to a contract may label their relationship as either employment or independent contracting, the determination of employment status goes beyond these labels that the parties give themselves and is actually construed as a matter of law.[41] This is important because the parties, especially employers, may intentionally misclassify the employment relationship so as to evade employment obligations. To curb the practice of employee misclassification, the International Labour Organization (ILO) developed the Employment Relationship Recommendation (No. 198), 2006. The Recommendation recognizes that it is sometimes difficult to establish employment relationships because of employee misclassification and workers may be deprived of employment rights where they are indeed due. It urges member states to formulate national policies that, *inter alia*¸ ensure that workers engaged in TERs are adequately protected.[42] Though this is a useful instrument, it is argued that it does not conclusively address employee misclassification within outsourcing TERs.[43]

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[39] Van Eck (n 1).

[40] *Abyssinia v KEWU* (n 26); *Kenya Airways v AAWU* (n 29).

[41] *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014] eKLR (Industrial Court).

[42] Employment Relationship Recommendation (ILO R198) 2006 art. 4(c).

[43] Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Routledge 2016) 161.

Despite the client enterprise's day-to-day control, there is no employment relationship found to exist between it and the outsourced workers.[44] Consequently, employers sometimes make use of outsourcing TERs to transfer employees to outsourcing companies and in doing so alter their employment status, despite maintaining control over the workers.[45] Such situations are not regulated by the employment laws in Kenya, which may leave the workers without adequate redress. In Australia, these are referred to as 'sham arrangements' and are prohibited through the Fair Work Act, 2009. The Act also prohibits the dismissal of employees for the purpose of reengaging them under alternate contractual arrangements to perform essentially the same work.[46] Adopting such an approach in Kenya would be useful towards curbing the use of outsourcing TERs to evade employment responsibilities through employee misclassification.

An additional measure is the express limitation of outsourcing arrangements to non-core business activities. For example, Ecuador's Constitution provides that "all forms of job insecurity and instability are forbidden, such as labor brokerage and outsourcing for the company's or employer's core and usual activities…"[47] Similarly, the Indonesian Labour Code provides that companies should not use outsourced workers "to carry out their enterprises' main activities or activities that are directly related to production process except for auxiliary service activities or activities that are indirectly related to production process."[48] Though the Indonesian laws attribute employer status to the outsourcing company, they provide that outsourced workers are entitled to reclassification as employees of the client enterprise where outsourcing is adopted for core business activities.[49] Adopting such measures in Kenya's laws would be useful in redressing employee misclassification and ultimately providing greater clarity on the employment status within outsourcing TERs.

In Nigeria, the guidelines that regulate staffing in the oil and gas sector restrict outsourcing to non-core activities of the business, with the exception of proven short-term projects.[50] The express prohibition of the outsourcing of core activities would be a useful measure that Kenya could adopt to regulate companies that engage outsourced workers to provide services related to the company's essential business activities so as to circumvent requirements to hire its own personnel. This would also avert situations similar to that in *Harrison Karani v Insight Management Consultants* in which employees from Pwani Oils Limited were converted into outsourced workers on short-term contracts.[51]

4.2 Joint employer status

[44] *Abyssinia v KEWU* (n 26).

[45] *Harrison Karani v Insight Management* (n 38).

[46] Australian Fair Work Act 2009 ss 357 and 358.

[47] Constitution of the Republic of Ecuador 2008 art. 327.

[48] Act of the Republic of Indonesia Concerning Manpower 2003 art. 66.

[49] ibid art. 66(2) and 66(4).

[50] Bimbo Atilola, 'Federal Ministry of Labour Guidelines on Contract Staffing and Outsourcing in the Oil and Gas Sector' (2014) 8 Nigerian Journal of Labour Law and Industrial Relations 21, 10.

[51] *Harrison Karani v Insight Management* (n 38).

Within outsourcing TERs, the outsourced workers relate with two authority figures, namely the outsourcing company and the client enterprise. The evaluation of these relationships using the statutory definitions and judicial tests on employment status depicted inconsistencies. For instance, the outsourcing company often exercises minimal or no day-to-day control over the outsourced workers, yet despite not meeting this dominant test, an employment relationship is deemed to exist between the outsourced worker and the outsourcing company.[52] The law in Kenya categorically classifies the outsourcing company as the legal employer since, within the TER, the outsourcing company is seen as the entity that can offer the outsourced workers a sense of stability. However, this attribution of employer status may potentially open up the door for abuse especially where outsourcing TERs may be used as a means to alter employees' terms and conditions of employment.

To address these shortfalls, some countries such as the United States allow a joint employer approach in which there are joint employer responsibilities between the two authority figures.[53] This approach places some employer obligations on the client enterprise, even though it does not formally attach employer status on it. For example, the overall responsibility for working conditions may be placed on the client enterprise.[54] This may relate to health and safety provisions, but it may also extend to provisions such as hours of work, holidays and rest periods. These approaches are useful measures towards protecting outsourced workers in that they ensure that employer responsibilities are not evaded.

In Nigeria, when outsourced workers sign employment contracts with the outsourcing company yet they perform their services as though they were employees of the client enterprise, the two authority figures are deemed co-employers.[55] Creating an employment relationship between the outsourced workers and the client enterprise curbs the practice of fictitious outsourcing. Though the South African Labour Relations Act does not create joint employment, it allows for joint responsibility in TERs to ensure adherence to collective agreements, arbitration awards and basic employment rights.[56] In such instances, the worker may institute proceedings against either authority figure or both jointly, and labour inspectors may enforce compliance against both authority figures.[57] This approach limits differential treatment between outsourced and the client's direct employees and thus reduces their precariousness.

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[52] *Abyssinia v KEWU* (n 26).

[53] South Africa Labour Relations Act 1995 s 198(4); *Browning-Ferris Industries of California Inc v NLRB* [2018] USCA (US Court of Appeals for the District of Columbia Circuit); *Miller & Anderson Inc v Tradesmen International and Sheet Metal Workers International Association* [2016] National Labor Relations Board.

[54] Guy Davidov, 'Joint Employer Status in Triangular Employment Relationships' (2004) 42 British Journal of Industrial Relations 727, 733.

[55] *Anthony Agum v United Cement Company Ltd (UNICEM)* [2017] unreported judgment of Hon Justice E N Agbakoba (National Industrial Court of Nigeria).

[56] South Africa Labour Relations Act s 198(4); *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 (Constitutional Court of South Africa).

[57] South Africa Labour Relations Act s 198(4A).

In Kenya, the outsourcing company is classified as the outsourced workers' employer.[58] One possible challenge relates to the degree of risk borne by the outsourcing company. Despite being deemed the legal employer, the outsourcing company does not fully take on all roles of a traditional employer. The client enterprise plays a great part of this role through its day-to-day control over the outsourced workers, and thus it should bear a portion of the risks of an employer. Depending on the roles played by the two authority figures, this paper suggests that the attribution of nominal employer be recognized. And depending on the situation, the nominal employer could be either the outsourcing company or the client enterprise.

The Kenyan labour laws do not have provisions for joint employer status, and this would be an important addition to the employment framework to enhance the protections of outsourced workers within outsourcing TERs. Joint employer status would require the two authority figures to cooperate in ensuring the outsourced workers' access to employment rights. This is because the two authority figures could be deemed jointly and severally liable for failure to grant to outsourced workers employment rights such as leave entitlements, fair working hours and adequate remuneration.

5.0 SUMMARY OF FINDINGS AND CONCLUSIONS

Summary

This study assessed the attribution of employment status within outsourcing TERs. It was found that the current legal framework on employment status does not adequately cater for outsourcing TERs. The statutory definition of an employee makes reference to being employed without defining what it means to be employed. Outsourced workers relate with two authority figures, namely the outsourcing company and the client enterprise. It is unclear to what extent each would fit into the statutory definition so as to be considered the employer. In addition, the judicial tests also do not seem to offer certainty as to the employment status within outsourcing TERs.

In a bid to remedy this, the Court of Appeal categorically classified outsourced workers as employees of the outsourcing company.[59] Though this classification is useful, it does not address the relationship that the outsourced workers have with the client enterprise. It also poses unique challenges when employees under the SER are converted into outsourced workers and are still based at the same premises. When a company transfers its existing workforce to an outsourcing company, the workers cease to be employees of their original companies and become employees of the outsourcing company.[60] The original company, therefore, becomes a client enterprise within the outsourcing TER, which may cause confusion to the workers especially if they continue to perform the same roles. This depicts how outsourcing TERs may be used to intentionally misclassify employees by altering their employment status and thus avoiding employer responsibilities. To ensure that the work performed by outsourced workers under

[58] *Abyssinia v KEWU* (n 26).

[59] ibid.

[60] *AAWU v Kenya Airways* (n 35); *Harrison Karani v Insight Management* (n 38).

outsourcing TERs is decent, this paper stresses the need for increased clarity on the employment status of outsourced workers.[61]

Conclusion

This paper has discussed some of the challenges relating to the attribution of employer status in outsourcing TER which arise because outsourced workers relate with two authority figures. In addition, so as to avoid employer obligations in their entirety, sometimes the authority figures go as far as designating the outsourced workers as independent contractors.[62] When both the outsourcing company and the client enterprise evade employer obligations, the outsourced workers are excluded from employment protections. Doing so is in conflict with the ILO Employment Relationship Recommendation, 2006 which requires member states to protect the rights of workers who are in some form of employment relationship.[63]

In evaluating the definition of an employee, the courts generally consider outsourced workers to be employees of the outsourcing company.[64] Nonetheless, the employment framework does not conclusively address the employment status within outsourcing TERs because it does not deal with the relationship between the outsourced worker and the client enterprise. Since outsourced workers relate with two different authority figures, this is a matter that deserves consideration.

This study recommends that both the outsourcing company and the client enterprises should bear employment status, which would enhance outsourced workers access to employment rights. In addition, courts and other judicial bodies may offer additional support to outsourced workers by going beyond the contractual labels that the parties give themselves within outsourcing TERs, especially where it the labels are used to disguise the employment relationship.[65] In doing so, the courts can prevent employee misclassification.

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[61] Decent work is defined in ILO (n 3) 247 as 'work that is productive and delivers a fair income, with a safe workplace and social protection, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men'.

[62] David Bensman, 'Misclassification: Workers in the Borderland' (2014) 2 Journal of Self-Governance and Management Economics 7, 16.

[63] Employment Relationship Recommendation art. 2.

[64] *Abyssinia v KEWU* (n 26).

[65] *Kenneth Kimani v Kibe Muigai* (n 41).

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