

**A CRITICAL ANALYSIS OF THE RIGHT TO STRIKE IN KENYA ;THE
BALANCING ACT BETWEEN THE CONSTITUTIONAL RIGHT TO STRIKE AND
THE CONSTITUTIONAL RIGHT TO ECONOMIC SOCIAL RIGHTS.**

BY

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DECLARATION

I, **KABIRU MARY WAMBUI**, of **AD100784** declare this proposal to be my original work both in style and substance, and as such it has never been presented, to the best of my belief, knowledge and information, before any panel or any other learning institution for an award of a degree or academic credit.

CANDIDATE

Signature.....

Date.....

SUPERVISOR

Signature.....

Date.....

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DEDICATION

I dedicate this paper to God Almighty my creator, my strong pillar, my source of inspiration, wisdom, knowledge and understanding. He has been my source of my strength throughout this program and on His wings only have I soared. I also dedicate this paper to all those who may have suffered in any way due to the strikes be it losing a loved one or otherwise.

STATUTES

Domestic Statutes.

1. Constitution of Kenya (2010).
2. The Labour Relations Act (2007).

International Statutes

1. International covenant on civil and political rights.
2. International Covenant on Economic, Social and Cultural Rights (1966).

TABLE OF CASES

1. Federation of Women Lawyers (FIDA) Kenya v Kenya National Union of Nurses & 4 others [2018] eKLR.
2. Okiya Omtatah Okoiti v The Hon. Attorney General and Others [2013] eKLR.
3. Kenya National Union of Nurses vs. Council of Governors, Employment and Labour Relations Court No.1141 of {2017} eKLR.
4. Republic –vs.- Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others [2013] eKLR.
5. Kenya National Union of Nurses v Moi Teaching and Referral Hospital Board & 2 others [2015]eKLR.
6. County Government of Kakamega & another v Kenya National Union of Nurses & another [2017] eKLR.
7. Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another [2017] eKLR

LIST OF ABBREVIATIONS

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

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CHAPTER ONE

1.0 INTRODUCTION

Strikes are one of the bargaining tools used by workers to advance their interests,¹ and historically, can be traced as far back as the industrial revolution of the late 18th and early 19th centuries.² They were born out of the need to address the power imbalance between employees and employers.³ Customarily, employers have had financial muscle to advance their interests, whereas the strength of workers lies in their collectivism.⁴ The purpose of a strike is to ensure that the employer's business remains at a standstill until the demands of workers are met.⁵ Workers know that employers rely on them for production and that embarking on a strike means a decrease or stoppage in production, which has an adverse consequence on business. Thus, the relationship between employer and employee is one of interdependence; employees depend on their employers for a living, and employers depend on their employees for labor.⁶

It is unfortunate that going on strike has come to be associated with violence and a lot of slowdowns.⁷ In a bid to curb the outbreak of violence that has consistently accompanied strikes, the legislature has devised ways to regulate strikes. These measures range from legislation to negotiated solutions. The passage of time has seen the effectiveness of each and every measure

¹A Levy 'Can Anybody Hear Me? The Audi Rule and the Dismissal of Strikers' (2010) 31 ILJ 825, 831.

² E Yavuz 'The Industrial Revolution and Consequences', <https://www.yeditepe.edu.tr/dotAsset/74101.pdf>, accessed on 20th November 2017.

³ J Brand 'Strikes in Essential Services' paper presented to the South African Society for Labor Law (SASLAW) (2010) <http://www.saslaw.org.za/papers/Strikes%20in%20Essential%20Services.doc>, Accessed on 20th November 2017.

⁴ E Manamela & M Budeli 'Employees' Right to Strike and Violence in South Africa' (2013) 46 CILSA 308,308.

⁵ A Landman 'Protected Industrial Action and Immunity from the Consequences of Economic Duress' (2001) 22 ILJ 509, 1509.

⁶ E Williams 'The Employment Relationship' (2010) 1 http://guidesandtrackers.co.za/human_resource_management/module_2.pdf, accessed on 20th November 2017.

⁷ C Mischke 'Strike Violence and Dismissal: when Misconduct cannot be proven is Dismissal for Operational Requirements a Viable Alternative?' (2012) 22 CLLJ 12, 12.

put to the test, and this study will evaluate those measures in the context of laws governing strikes in Kenya.

For a very long time, a price tag has been attached to the labor that a human being expends. An example of this commodification is slave trade from as early as the 17th century.⁸ Before beginning any discussion on the right to strike, it is essential for one to understand the meaning of a strike and commodification. A strike can be defined as “the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work, for the purpose of compelling their employer or an employers’ organization of which their employer is a member, to accede to any demand in respect of a trade dispute”.⁹ The right to engage in a lawful strike is provided for and guaranteed under Kenya’s Constitution.¹⁰ Article 41 of the 2010 Kenyan Constitution goes further to reaffirm a strike action as a fundamental right.

Commodification, on the other hand, can be defined as the treating of something that cannot be owned or that everyone has a right to, like a product that can be bought or sold.¹¹ It has been argued that the commodification of labor has led to the diminishment of human dignity which is inherent, universal and ought to be respected and protected.¹² Some authors such as Edmund Burke have argued that labour is a commodity like any other, merely being a function of the

⁸British Library, ‘The Slave Trade - A Historical Background’ www.bl.uk/learning/histcitizen/campaignforabolition/abolitionbackground/abolitionintro.html on 20 November 2017.

⁹ Section 2, Employment Act (CAP 226). The Employment Act (CAP 226) is the primary statute on employment law in Kenya as it succinctly defines the employer-employee relationship as well as the rights and duties of each of the parties.

¹⁰ Article 41(2) (d), Constitution of Kenya (2010).

¹¹ Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/commodification> on 20 November 2017.

¹² Article 28, Constitution of Kenya (2010). Every human being has dignity and worth. Men and women have equal rights. See United Nations Human Rights Office of the High Commissioner, ‘Vienna declaration and programme of action’, para 6 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> on 20 November 2017.

market where it is affected by the forces of supply and demand, therefore having economic value attached to it.¹³ Other authors at the other end of the spectrum such as Kell Ingram posit that labour is not to be commodified as the provision of a person's labour is the provision of oneself; the provision of one's very essence.¹⁴ Commodification would undermine the inherent dignity accorded to a human person.

The objectives of strike actions may be categorized as being 'occupational', 'trade union' or 'political'.¹⁵ The 'occupational' objective seeks to improve or guarantee workers' working or living conditions. The 'trade union' objective seeks to develop or guarantee the rights of trade union organizations and their leaders. The 'political' objective seeks to obtain solutions to social and economic policy questions.¹⁶ Some of the forms of industrial action include but are not limited to: complete cessation, sit-ins, go slows, wild cat strikes, sympathy strikes¹⁷ as well as picketing.¹⁸ Strikes can take different forms. There is the "cacanny strikes" where the workers remain on the job but work at a slower pace to reduce their output, wildcat strikes, jurisdictional strikes, quickie strikes and recognition strikes depending on the disputes.

With the new Constitution came a new era of strikes, the strikes were then became more rampant due to the fact that health was now devolved. Treating labor as a non-commodity gave some individuals the right to strike as they curtail other people's rights, vis-a-vis right to health.

¹³ Preece R, 'The Political Economy of Edmund Burke' Modern Age, (1980) 266
http://www.mmisi.org/ma/24_03/preece.pdf on 20 November 2017.

¹⁴ Ingram J, '*Work and the Workman*', first published in 1880, Ely R, Eason & Son Ltd, 1928.

¹⁵ Gernigon B, Odero A and Guido H, 'ILO principles concerning the right to strike' International Labour Office, Geneva (2000), 13-14.

¹⁶ Ibid

¹⁷ Committee of Experts on the Application of Conventions and Applications (Articles 19, 22 and 35 of the Constitution), 'Freedom of association and collective bargaining: General survey', International Labour Conference 69th session, 1983, para. 217.

¹⁸ Gernigon B, Odero A and Guido H, 'ILO principles concerning the right to strike', (2000) 14.

2.0 BACKGROUND INFORMATION.

The strike tactic has a very long history. Towards the end of 20th dynasty under Pharaoh Ramses III in ancient Egypt in 1152 BC the artisans of the Royal Necropolis organized the first known workers' uprising in recorded history giving Africa the distinction of introducing the concept of strikes. By 1768 English sailors had learnt the art by removing sails of merchant ships at port thus crippling the ships. Mexico was the first country to give its citizens the right to strike, as long ago as 1917, through their Constitution. The 1967 International Covenant on Economic Social and Cultural Rights to which Kenya is a signatory had ensured the right to strike but was hardly acknowledged in Kenya until enactment of the new Constitution. Legal prohibitions on strikes historically was made an ideological issue with, for example, the People's Republic of China and former Soviet Union viewing the right as counter-revolutionary.¹⁹

Colonial Kenya (Pre 1962)

From the mid-1930s through the 1950s, colonial Africa experienced a wave of strikes and nationalist protests. In Kenya, labour struggles can be traced back to the very first few years of colonial rule.²⁰ They mostly took the form of communal revolts and desertions. These labour struggles were both a product of and a challenge to, the coercive labour control system borne from colonial rule. A series of strikes took place from 1900. It began with the railway strike that started in the region of Mombasa and spread to other centers along the line.²¹ The strike was initiated by European subordinate staff who were later joined by some African and Indian workers. The strike had been triggered by the withdrawal of certain privileges that had been previously enjoyed by the staff. Shortly after in the year 1902, African policemen in Mombasa

¹⁹ Singh M, *History of Kenya's Trade Union Movement to 1952*, Nairobi, 1968, 7.

²⁰ Ochieng' W R and Maxon R M (Eds), *An economic history of Kenya*, East African Educational Publishers, 1992, 173-185.

²¹ Singh M, *History of Kenya's Trade Union Movement to 1952*, Nairobi, 1968, 7.

also went on strike. In 1908, there were strikes of government farm workers at Mazaras near Mombasa, as well as Indian dockworkers and African railway workers in Mombasa.

Post 2010 Constitution

Following the promulgation of the 2010 Constitution Kenya experienced a series of strikes in the health sector. The major strike happened in the year 2013 followed by the longest strikes by doctors in 2017 and a five month long strike by the nurses in the same year. The strike that was occasioned by stand-off between the government and health workers over devolution

3.0 STATEMENT OF THE PROBLEM

There is nothing wrong with embarking on a strike. In fact, the right to strike is granted by both the Constitution and the Labour Relations Act. However, what is of great concern is the relationship that exists between strikes and the rampant slowdowns and adverse effects strikes. Among the effects is the fact that the right to strike compromises the right to health. Despite the fact that the Constitution clearly provides for the right to strike in article 41, the Labour Relation Act creates limitations to the right to strike, the conflicting provisions have seen an increase in the number of strikes. The laws ought to be harmonized and sections such as health ought not to be devolved. Thus we need to strike a balance between the two Legislations or better yet we ought to rewrite article 41 of the Constitution in a more precise manner to give meaning that all those involved in essential services ought not to have a right to strike or have the right limited. Alternatively the Labour Relations Act ought to have providence that a limited number of staff are left behind.

4.0 RESEARCH QUESTIONS

This study seeks to analyze the following research questions:

1. The origins of the legality of the right to strike in Kenya?
2. To analyze the provisions for strike action in The Constitution of Kenya, and the Labour Relations Act No. 4 of 2007.
3. What the Constitution, international legal instruments and key Kenyan employment laws provide for as well as show how the instruments bring about challenges?
4. What loopholes have been created by these laws and how do we deal with the loop holes in the laws and contradictions?
5. Should there really be a right to strike based on the adverse effects it has? Is it morally ethical to have such a right based on the adverse effects?

5.0 HYPOTHESIS

This study is underpinned by the assumption that the employment relationship is inherently hostile because strikes are driven by the structural violence inherent in the employment relationship. This study also makes the assumption that article 41 on the right to strike in Constitution of Kenya and its provisions for devolution is the reason there has been an increased number of strikes.

Thus, this study does not promise to find solutions to the ever increasing strikes, but possible ways of managing it. The right to strike cannot operate in a vacuum and needs to be exercised in light of other rights. The right is not absolute. Devolution goes hand in hand with the enforcement of this right. There is a nexus between devolution and the rampant strikes.

6.0 THEORETICAL FRAMEWORK.

6.1 Labor is not a commodity

In support of the ‘labor is not a commodity’ school of thought, thinkers inclined towards a natural law theory point of view,²² attach some moral value to work and posit that work is good for man as it leads him to self-fulfillment and ultimately the proper end. This moral value includes but is not limited to man’s ability to have dominion over the earth. In 1997, Paul O’Higgins provided that the origins of the maxim ‘Labor is not a commodity’ can be traced back to Dr. John Kells Ingram²³, who was an Irish sociologist and economist. O’Higgins went ahead to refer to the address given by Ingram to the Trades Union Congress meeting in Dublin in September 1880. Ingram, being at one extreme of the spectrum, posited that labor is not to be commodified because when a person provides their labor, they provide their very own essence alongside it.²⁴

6.2 Labor is a commodity

At the other extreme, the concept of labor as a commodity was fathered by the economist Adam Smith and echoed by Edmund Burke⁴⁸. Smith fully endorsed Burke’s views on economics. Burke averred that labor is a commodity and an article of trade like any other, merely being a function of the market where it is affected by the forces of supply and demand, therefore having economic value attached to it. Karl Marx and Friedrich Engels also subscribed to the theory that labor is a commodity. Engels averred that because labor is a commodity, its price is determined

²² Roble Z, Lubeto O et al, ‘*Paternalism and the employment contract: A panacea or anathema?*’, 33

²³ O’Higgins P, ‘Labour is not a commodity - an Irish contribution to International Labour Law’ 26 *Industrial Law Journal* (1997), 225.

²⁴ Pope John Paul II, ‘*Laborem Exercens*’, Item 9: Work and Personal Dignity http://w2.vatican.va/content/johnpaul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html on 18 November 2017. Natural law theory posits that the law establishes reasons for actions as well as creates moral obligations that bind people as they act. See Stanford Encyclopaedia of Philosophy, ‘Natural Law Theories’, 4th November 2015 <http://plato.stanford.edu/entries/natural-law-theories/> on 18 November 2017.

by the exact same laws that apply to other commodities. In an economic regime, the price of a commodity is averagely always equal to its cost of production. Therefore, the price of labor is also equal to the cost of production of labor.

6.3 Difference in bargaining power

In law, economics and the social sciences, inequality of bargaining power is where one party to a "bargain", contract or agreement, has more and better alternatives than the other party. This results in one party having greater "power" than the other to choose not to take the deal and makes it more likely that this party will gain more favorable terms. Inequality of bargaining power is where freedom of contract ceases to be real freedom, or where some have more freedom than others, and markets fail. Thus the introduction of the right to strike to try and compromise that the employees have no bargaining power.

6.4 Utilitarianism

Utilitarianism is a theory stating that an act is right so long as it promotes happiness. It holds that an action is judged whether good or bad, in relation to the end result derived from it. Basically, the act has to achieve good. Further, it says that the greatest happiness of the greatest number was the true goal of society. Main profounder of this theory are; Bentham and Stuart Mill.

Bentham's perspective was that the greatest happiness of the greatest number was accepted as the true goal of society.²⁵ The moral quality of an action depended upon the amount of pleasure to be derived from it; an action which produced the greatest pleasure was 'morally right'; an action which produced pain was 'wrong'.²⁶ He conceptualizes on the principle of utility that allows man to approve or disapprove of an action according to its tendency to promote or oppose his

²⁵ L.B. Curzon, Jurisprudence, Cavendish Publishing Limited, 2nd Edition, 1995 Page 60- paragraph 6.1

²⁶ L.B. Curzon, Jurisprudence, Cavendish Publishing Limited, 2nd Edition, 1995 Page 59- paragraph 6.1.1

happiness.²⁷ He argues that it is possible to make a quantitative comparison of pleasure and pain which would be identified with the common good of the society which was pursuit of the greatest happiness of the greatest pleasure.²⁸

That said then using this theory it can be deduced that if we were to eliminate the right of one worker to go on strike over the right of tens of people to health. As preserving lives would ultimately produce greater happiness as opposed to allowing one worker to go on strike.

7.0 LITERATURE REVIEW.

There are a number of textbooks by legal scholars which deal with the basic concepts of the freedom of association and the right to strike. Of these, the work of B. Gernogon, A. Odero and H. Guido,²⁹ discussing the principles of the right to strike as formulated by the International Labour Organization, will be very important in laying the foundation of the arguments advanced in this study. These scholars discuss the concept of a strike, its objectives, who should enjoy this right, the notion of essential services and compensatory guarantees for those workers who do not enjoy the right to strike, as well as conditions for enjoying the right to strike. These arguments will be drawn on in the study in order to reach a conclusion as to whether the limitation on the public officers' right or freedom to strike in Kenya is justified or not.

Various works have been authored on treating labour as a commodity. Researchers are of the opinion that the question of whether there should be such a right as the right to strike should not be one in contention. Some are of the idea that labor should not commoditized in order to enjoy the right fully. However some researchers are of the idea that labor should be commoditized, that way there would not be such a right such as striking. For them human rights should not be at par

²⁷ L.B. Curzon, Jurisprudence, Cavendish Publishing Limited, 2nd Edition, 1995 Page 60- paragraph 6.2.1

²⁸ L.B. Curzon, Jurisprudence, Cavendish Publishing Limited, 2nd Edition, 1995 Page 60-paragraph 6.3

²⁹ B. Gernigon et al ILO Principles Concerning the Right to Strike (2000).

with labor rights. The conflicting laws is a main reason in the increased strikes. Devolution also contributes to rampant strikes, devolution has brought about mismanagement of funds that ultimately is the main reason public officers' result to striking. Most researchers ignore this fact, which I think should be at the center of this discussions.

8.0 JUSTIFICATION OF STUDY

This study is important because it brings out the importance of having a balance between labour rights (the right to strike) and economic social rights (the right to the highest attainable standards of health). The purpose behind guaranteeing the right to strike was quite genuine and important, however the drafters of the Constitution ought to have taken a keen eye on the effects the right would have to enjoyment of other rights. The justification of the study is also to ascertain the role of devolution whole new situation created by the two conflicting laws.

9.0 STATEMENT OF OBJECTIVES

The broad objective of this study is to explore the relationship between the strike action and the ensuing slowdowns and adverse effects as well as show how the enjoyment of the said right would have on the enjoyment of other rights. More specifically, the study aims to examine the legal mechanisms which have been put in place by the legislature which have catalyzed the amount of strikes, an example being devolution and guaranteeing the right without any limitations, especially in the delivery of essential services. The study also considers whether there is need for improvement in the legal mechanisms put in place, and provides some possible solutions that could assist in curbing the rampant strikes. It is significant to have a study that critically evaluates the Kenyan laws on strikes. The study not only explores the importance of the right to strike, but also discusses the challenges which have come with that right.

10.0 RESEARCH METHODOLOGY

This study will mainly be qualitative, that is, desk-based research, as opposed to empirical research. However, there are elements of empirical research. The empirical research shall not be conducted by the author of the dissertation, but by various persons who interviewed workers who participated in the increasing strikes both in the public service and private strikes. Interviews were also conducted to victims who lost their loved ones when the doctors went on early January 2017. The study will utilize both primary and secondary sources of information.

The primary sources will include the Constitution of Kenya and other Acts of Parliament. Important also were global and regional treaties, charters, conventions, protocols and declarations in the field of human rights especially touching on inheritance rights of women. Textbooks, journals and articles on the subject were also of primary importance as was the case laws of respective courts. In addition, Magazines, newspaper reports and journals were also used. Some of the materials used were in raw form, which is, being unpublished. I will employ all the above mentioned materials to extract information relevant to the study, compare and contrast the various legal positions therein and critique them. The constitution will be my guiding tool in the research, every legal position taken by authors in both the primary and secondary sources should conform to the constitutional in totality. As such, I intend to do an analytical study of the various authorities and publications to try and find out what the root cause of the rampant strikes bearing in mind the adverse effects that have not yet been remedied by the law.

The study will employ methods such as use of a case study, this study will use Kenya as a case study, exploring the origins of the right to strike in Kenya Archiving and secondary research.

This includes library research, reviewing books and dissertations, newspaper and journal research among other methods.³⁰

Desktop research, such as Internet searches will be employed at this stage. Precedents and International Labour Organization, Conventions will also be used as employers and employees are central to the discussion on the right to strike. The study seeks to portray how the above parties interact with each other in the context of the right to strike, each performing certain duties and enforcing certain rights.

11.0 CHAPTER BREAKDOWN

Chapter One

This chapter will introduce the study and incorporate the research proposal. Its contents will be the introduction, background information, statement of the problem, justification of the study, statement of objectives, research questions, literature review, theoretical framework, hypothesis, research design and methodology, scope of study and limitations, chapter breakdown and finally the timeline/duration of the study.

Chapter two

This chapter will discuss in length the right to strike, its domestic and international legal framework, its history in Kenya, mechanisms put in place to facilitate this right and give an analysis of gaps created by the law.

³⁰Qualitative methods of research include content or documentary analysis and archival research. Explorable, 'Quantitative and Qualitative Research' <https://explorable.com/quantitative-and-qualitative-research> on 11 November 2017.

Chapter three

This chapter shall deal with three main research questions. The implication of article 41 of the Kenyan Constitution? What loopholes have been created by these laws and how do we deal with the loop holes in the laws and contradictions? Should there really be a right to strike based on the adverse effects it has? Is it morally ethical to have such a right based on the adverse effects?

Chapter four

This chapter will finally conclude the dissertation as well as give recommendations on how the right to strike can best be enforced and show how to resolve or minimize the effects.

CHAPTER TWO

2.0 HISTORICAL BACKGROUND

This chapter shall deal with the historical background of the right to strike. The chapter shall analysis whether before the 2010 Constitution the right to strike was guaranteed in the previous Constitution. If the right was guaranteed, it shall then analysis why there has been an increase in the number of strikes since the promulgation of the 2010 Constitution. Also whether strikes in essential services was limited.

In much conventional labor history, there is a tendency to theorize strikes merely as episodic outbreaks of conflict between labor and capital. In the past strikes were much more than workplace struggles between labor and capital.³¹ The people who staged strikes were not only workers but also members of communities. So strikes were not simply struggles at the work place, but within and between communities.

Strikes were affirmations of working class culture and attempts to redefine hegemonic practices in society. From the mid-1930s through to the early 1960s Kenya was rocked by a wave of strikes that shook both the colonial state and the economy.³² It was more of a strike movement. This movement was conditioned by internal structural factors and the conjuncture of global economic and political forces. The movement forced changes in colonial labor policies and the organization of work. Labor struggles in Kenya can be traced to the very first few years of colonial rule.³³

³¹Virginia A Seitz, 'Legal, Legislative, and Managerial Responses to the Organization of Supervisory Employees in the 1940's' (1984) 28 The American Journal of Legal History 199.

³²Tiyambe Zeleza, 'THE STRIKE MOVEMENT IN COLONIAL KENYA: THE ERA OF THE GENERAL STRIKES' (1993) 22 Trans African Journal of History.

³³Joseph R Landry, 'FAIR RESPONSES TO UNFAIR LABOR PRACTICES: ENFORCING FEDERAL LABOR LAW THROUGH NONTRADITIONAL FORMS OF LABOR ACTION' (2016) 116 Columbia Law Review 147.

The first general strike in Kenya occurred in Nairobi, the colonial capital, in 1922 in the midst of a recession. Wages fell. To worsen the already pourable situation the state decided to raise taxes. The strike was triggered by the arrest of Harry Thuku, the chief leader of the EAA, on March 14 1922.³⁴ African workers in Nairobi immediately gathered to demonstrate against Thuku's arrest. The demonstration soon turned into a general strike. The strike was as much a labor protest as a political campaign against colonial rule in Kenya, for its demands included the abolition of kipande system and forced labor and the improvement of wages and working conditions, the reduction of taxes, return of African lands, provision of higher education and more social facilities for Africans. It was not until the 1930s, however, that the era of mass strikes in Kenya finally arrived. The depression had wreaked havoc on workers lives, as reflected in falling wages, increased deprivation and insecurity. The hardships of the early 1930s were the well from which the strike movement of the late 1930s sprang, which rolled through settler farms and the cities.³⁵

As a starting point it is important to note that a strike is one form of industrial action guaranteed in the labor laws of Kenya.³⁶ Employees strike for a couple of reasons from the right to fair remuneration and good working conditions.

Throughout history, work stoppages have been used for economic and political purposes, to alter the balance of power between labor and capital within single workplaces, entire industries, or nationwide. Industrial unrest is as old as labor and can be traced back to the end of the 18th century with the emergence of factory systems. At that time it took the form of Luddite

³⁴ Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 5.

³⁵ Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 7.

³⁶ Section 2, Employment Act (CAP 226). The Employment Act (CAP 226) is the primary statute on employment law in Kenya as it succinctly defines the employer-employee relationship as well as the rights and duties of each of the parties.

movement, whereby, workers organized themselves in secrecy and successfully destroyed machinery and sometimes wrecked factories because the management would not listen to their grievances. From 1966 to 1989 there was an average of 88 strikes per year.³⁷

2.1 TRADE DISPUTE ACT (Cap 234)

The Trade Dispute Act was last reviewed in 1991. The act attempts to help in the settlement of industrial dispute and creating a suitable environment for industrial relations. It encourages employers' and workers' representatives to first try to settle the dispute at their level through a machinery freely and voluntarily laid down by themselves; and if that fails, to take their problem to the government, which in turn tries to effect a settlement. The Act reinforces the government's desire, to which workers and employers subscribe, that rather than have a test of strength between workers and employers bringing about confrontation between them, with undesirable consequences to both sides, they should take their problems to a forum in which they will have confidence and which is expected to be objective in its deliberation and to hand out impartial awards.

The Act provides for the establishment of the industrial court, which is the final arbitrator in industrial disputes. Before any dispute is referred to the court, the trade dispute machinery outlined in the procedural agreement must be exhausted. Points out that the court continues to stress the importance of requiring the parties to stick to the provisions of all freely and voluntarily negotiated collective agreements. This means that the court can only handle cases that have been referred to it by trade unions on behalf of their members.³⁸

³⁷Maureen Kwiyo, 'The Nature, Process and Outcome of Industrial Strikes In Nairobi' 68.

³⁸Paul Weiler, 'Striking a New Balance: Freedom of Contract and the Prospects for Union Representation' (1984) 98 Harvard Law Review 351.

Since non - union members have no legal avenue for redressing their grievances, strike is the only option. Cases can only be referred to the court by the Minister for Labor after ensuring that all other channels have been exhausted. However, the aggrieved party has the right to appeal to the industrial court against the minister's refusal to accept the trade dispute .The Minister can recommend conciliation or investigation of a trade dispute before referring the matter to the court, but the nature of the dispute determines whether the minister can refer it directly to the industrial court.³⁹

2.3 THE INDUSTRIAL COURT

The current Constitution differs fundamentally from the Constitution adopted on 12 December 1963.Labor rights can be traced to have been in existence through the presence of industrial court as well as labor rights in the then constitution. Unlike the ordinary courts, the Industrial Court of Kenya is not mentioned in the previous Constitution, but was established in 1964 under the Trade Dispute Act (Cap. 234). The Industrial Court has found its current shape in 1971, when the Trade Dispute Act was amended in the light of the experience gained from 6 years of practical application.

The purpose of the Court was the settlement of trade disputes. Vide the provisions of section 14, Trade Dispute Act (Cap. 234), the President of the Republic could establish the court, and determine the number of judges (not less than two). Eight members were appointed by the Minister after consultation with the Central Organization of Trade Unions (CETU) and the Federation of Kenyan Employers (FKE). The jurisdiction of the Court was exercised by the judge and the two other members. Only in the case that they are not able to agree, the matter was

³⁹ Kenyalaw.org. (2018). [online] Available at: http://kenyalaw.org/ki/fileadmin/pdfdownloads/RepealedStatutes/Trade_Disputes_Cap_234_.doc accessed 15 Oct. 2018].

decided by the judge “with the full powers of an umpire” (section 14 (8) Trade Dispute Act (Cap. 234)). The industrial court could award compensation or make an order for reinstatement (Trade Dispute Act (Cap. 234), section 15).

The award become part of every contract of employment between the employers and employees to whom the award relates under the Trade Dispute Act (Cap. 234), section 33(4). The award and decision of the Industrial Court were final (Trade Dispute Act (Cap. 234), section 17). The status of the industrial court was very controversial, Firstly Applications for judicial review can be brought to challenge the procedural and substantive validity of the awards and decisions of the Industrial Court. In effect this transfers the jurisdiction over labor law cases to the High Court. Also the Trade Disputes Act could not exclude the right of litigants suing in open court.

On the contrary, section 14 (9) excludes trade disputes arising in the public sector from the jurisdiction of the Industrial court. In addition access to the Court was limited by the rule of practice that only unions and employers and their organizations have standing before the Industrial Court; and as management staff is excluded from membership in trade unions, the Industrial Court could not deal with white-collar workers’ concerns.⁴⁰

Thus, a significant number of labour cases in the broader sense were being handled by ordinary courts, i.e. the High Court, either from the first instance onwards, or – in a few cases - in appeal. Within the ongoing general Labor Law Reform, a taskforce to review the Labor Laws has adopted a draft act on Labor Institutions, introducing a National Labor Court, having the same prerogatives as the High Court, on labor law issues.⁴¹

⁴⁰ ‘National Labour Law Profile: Kenya’ <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm> accessed 15 October 2018.

⁴¹ ‘Labour Laws in Kenya | KENYA LAWS ONLINE’ <<http://kenyalawsonline.blogspot.com/2013/06/labour-laws-in-kenya.html>> accessed 15 October 2018.

2.4 THE CONSTITUTION 1963

Articles 70 to 86 of the current Constitution dealt with fundamental rights. Basically the Constitution guaranteed fundamental rights and freedoms of the individual. Among these fundamental rights, was a range of general principles underpinning labor rights were anchored in the Constitution itself. Freedom of Association is guaranteed in the Constitution under Art. 80. The Constitutional provision under Article 80 (2) (d) already regulated in detail procedures for the registration of trade unions and associations of trade unions.⁴²

The constitution then provide that all the freedom of association was open as long as it was not consistent with public morality or health and it was at this point that striking in essential services was hinted at, the freedom of association was guaranteed as long as it was not against protecting rights and freedoms of other persons. The right to strike was not mentioned explicitly, but section 80 (1) protected not only the right to organize, but explicitly activities serving the purpose of the union, such as all activities designed to protect the individuals' interests.

2.5 OTHER SOURCES OF LAW

Employment relations in Kenya were regulated by a number of sources: constitutional rights, as mentioned above; statutory rights, as set out in statutes and regulations; rights set by collective agreements and extension orders of collective agreements; and individual labor contracts. The following Acts of Parliament formed the labor legislation framework for the country: Employment Act (Cap. 226); Regulation of Wages and Conditions of Employment Act (Cap. 229), - Industrial Training Act (Cap. 237), - Workmen's Compensation Act (Cap. 236), - Shop Hours Act (Cap. 231), - Mombasa Shop Hours Act (Cap. 232), - Factories Act (Cap. 514), - Trade Unions Act (Cap. 233), - Trade Disputes Act (Cap. 234); Companies Act (Cap. 486);

⁴² Section 80, The Constitution Of Kenya, 1963.

Bankruptcy Act (Cap. 53); Merchant Shipping Act (Cap. 389); Export Processing Zone's Act (Cap. 547); Immigration Act (Cap. 172); Pension Act (Cap. 189); Retirement Benefits Act (No. 3 of 1997); National Social Security Fund Act (Cap. 258); National Hospital Insurance Act (Cap. 255); Provident Fund Act (Cap. 191); Public Health Act (Cap. 242).

2.6 POST 2010 CONSTITUTION

The passing of the new Constitution seems to have heralded an increase in the number of spontaneous strikes, threats of strikes and go-slows. These protests are apparently an offshoot of the interpretation of the right to strike provided for under the expanded Bill of Rights in Chapter 4 of the Constitution.

Some assert that the new Constitution gives workers an unrestricted “God given” right to strike. Article 41(2) (d) of the Constitution provides that every worker has the right to go on strike. Further, Article 24(1) provides for limitation of the rights and fundamental freedoms provided in the Bill of Rights. The limitation must be by law, meaning parliament may pass a legislation limiting the exercise of any of the rights and fundamental freedoms so long as the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. The 5th Schedule to the Constitution has no provision for any further legislation in relation to Article 41 in general or specifically on strikes.

The Constitution does not define a strike or provide how the right to strike will be exercised. Such details are contained in the Labor Relations Act. This means that Schedule 6 applies to the right to strike.

2.7 TRADE DISPUTE

Part 2 of Schedule 6 is titled Existing obligations, laws and rights. Paragraph 7 provides that all laws in force immediately before the effective date of the Constitution and any responsibility assigned by law to any organ of state or public officer remain in force so long as they are not in conflict with the Constitution. The issue to be addressed is whether the provisions of the Labor Relations Act are in conformity with the Constitution and whether the rights of workers to go on strike as enshrined in the Constitution is in conflict with the Act. The position is that the Constitution entrenches and reaffirms the right of workers to go on strike the terms of which have already been elaborately provided for in the Act.

The rights to strike have to be read in the context of the Constitution as a whole because it sets out the principles, limitations and national values we all must adhere to. These include equity, social justice, human rights, good governance, accountability and sustainable development. Conversely, the Constitution has not removed the employers' right to lock-out, which is elaborated in the Labor Relations Act. Since the Constitution does not provide for the circumstances when a worker can go on strike, it is the Labor Relations Act that gives the grounds for going on strike, what constitutes a lawful strike and what is not permitted by the law. The law explicitly prohibits strikes in essential services.⁴³

2.8 OTHER STATUTES

Kenya's industrial relation is based on a fairly elaborate institutional and legal framework anchored on a tripartite set up. The set up brings together the government, workers and employers. The legal framework is founded on relevant ILO Conventions ratified by the country,

⁴³Cristian Pérez Muñoz, 'Essential Services, Workers' Freedom, and Distributive Justice' (2014) 40 Social Theory and Practice 649.

the country's Constitution, and domestic labor legislation. On the other hand, the boundaries for trade union organization and recruitment, including guidelines on the categories of workers, who by nature of their work, qualify to join a trade union are defined by the Industrial Relations Charter of 1957 (revised in 1984).

Kenya has five sets of labor laws that govern industrial relations in Kenya. These are the Employment Act (2007); the Labor Relations Act (2007); the Labor Institutions Act (2007); the Work Injury Benefits Act (2007); and the Occupational Safety and Health Act (2007). The basic fundamental rights of workers are defined in the Employment Act. In a nutshell, the Employment Act (2007) provides the general principles that guide labor management; the intended employment relationship in the industry; the guidelines protecting wages and salaries of workers. The Act also provides guidelines on procedural termination of employment as well as the protection of the children against labor abuse and the safety management and upkeep of employment records.

Moreover, the Employment Act (2007) clearly lays down the legal dispute handling procedures and defines the role of the trade union, the employer and the in creating, maintaining and promoting industrial harmony. The Labor Relations Act (2007) defines the right to Freedom of Association; Establishment and Registration of Trade Unions and Employer organizations; Membership and Leadership of Trade Unions and Employer Organizations as well as the Financial Management systems of the Trade Unions and Employer Organizations.

The Labor Relations Act (2007) also defines Trade Union dues, Agency fees and Employer Organization fees as well as Recognition of Trade Unions and Collective Bargaining Agreements. Also important to note is that the Labor Relations Act (2007) lays out elaborate dispute resolution mechanisms as well as the basis for industrial strikes and lock outs.

The Labor Institutions Act (2007) governs the administration of labor while defining the institutional framework that exists to enhance effective and fair labor relations. The Act defines the establishment of the National Labor Board, the Industrial and Labor Relations Court and the Committee of Inquiry into an industrial outcome. The Labor Institutions Act (2007) also defines institutions that have express administration and Inspection of labor as well as the establishment and functions of the Wage Councils. Moreover, the Act also defines the operations of Employment Agencies. The Occupational Safety and Health Act (2007) lays out safety and health measures that should be undertaken at work places to secure the safety, health and welfare of the workers as well as other persons who are at risk of the activities the workers engage in.

The Act stipulates that every work place should undergo a safety and health audit annually. It also defines the duties of the workers and the employer in ensuring that safety and health is maintained at the work places. Moreover, the Occupational Safety and Health Act (2007) provides as well the role of Occupational Safety and Health Officers in ensuring and promoting occupational safety and health at the work places. Finally, the Act gives the Director of Occupational Safety and Health the overall responsibility of administering occupational safety and health by establishing and promoting OSH standards and codes of practice in any given work place.

2.9 THE DIFFERENCE BETWEEN THE TWO REGIMES

From the analysis above it clear that since the past there has been regulations to regulate the relations between the employer and the employer. The laws were put in place to regulate the power imbalances between the two sectors. Since this paper takes a keen interest in the industrial actions specifically the strike action and essential services. In the previous constitution the right to strike was not expressly provided for in the constitution , however it can be said to have been

hinted on as the constitution provide that there would be the freedom of assembly and association that acted as the right to strike. The previous Constitution provides that the freedom shall be limited to activities that shall be in contravention with public policy and health. From that notion it can be derived that the essential services caveat was already at place from as early as then. The previous Constitution also held that health services shall be controlled by the national government.

The new Constitution on the other hand expressly provides for the right to strike. However this new Constitution does not expressly restrict the right to strike in essential services. However in article 24 it provides for limitations for rights guaranteed in the bill of rights, the limitations however have to be within the rule of law. The labor relations act provides for this limitation as in section 78 provides that strikes shall be limited in essential services. Section 81 further goes on to clarify that essential services are those that would endanger the life of a person or health of a population or part. The fourth schedule of the labor relations act goes ahead and stipulates what essential services shall entail, Water Supply Services, Hospital Services, Air Traffic Control Services and Civil Aviation Telecommunications Services, Fire Services of the Government or Public Institutions, Posts Authority and Local Government Authorities and Ferry Services.⁴⁴ The new Constitution provides for devolution that was put in place with the vision of making health services more accessible by devolving the health sector to the counties.

3.0 THE REASON BEHIND THE INCREASED NUMBER OF STRIKES

The labor market has been hit by increasing trends of industrial strikes over the past one year. The latest and the longest strike ever witnessed in Kenya's history in the health sector was that of

⁴⁴ Fourth Schedule Part 2, The Constitution Of Kenya, 2010.

the Doctors' union. The doctors were on strike for an average of 100 days. This strike led to the imprisonment of the Doctors' union officials.

The increase in the number of strikes could be due to various reasons, among these reasons include an indication that conflict resolution mechanisms are either weakening or ineffective in solving industrial problems. The time taken to resolve these industrial disputes show non-commitment by the parties involved. These include the Government, the employers (or employer organization) and the trade union.

Another reason could be even with the existence of legislations on the settlement of trade disputes, there has been a problem in interpreting the legislations thus making strike a social phenomenon. This shows that there is a flaw in the legislation in terms of its implementation or interpretation. The Constitution provides that there shall be a right to strike however it does not necessarily limit but provides that article 24 limits this right within the rule of law. Unlike the previous constitution that provided for the right to assemble and in a way provided for the distinction in essential services as it limited assembly that was against public policy and health.

In my opinion this is among the main reasons there has been an increase in the amount in strikes as despite there being legislations such as the labor relations act attempting to conceptualize Article 41 of the constitution and as elaborated in the constitution that it is the supreme law of the land. Thus in my opinion to remedy this situation the law the constitution ought to be framed in a language that explicitly prohibits restricts in essential services more so the health sector to avoid all this conflict of laws.

Another reason that I think that has greatly contributed is the fact that the right and procedure to result into striking has been made more lenient. In the past the strike action had to be through a

trade union and a 28 day notice had to be given before they went on strike. It was up to the minister to determine whether the right was lawful and only he could make such a decision. Unlike the current situation where also willing to go on a strike have to do so through a union and the time limit is only seven days. The fact that only the minister could refer the matter to the courts contributed greatly to the amount of strikes then.⁴⁵

Lastly the fact that the health sector is now devolved to the county government has greatly increased the number of strikes. The new constitution brought was this utopian fallacy that devolving some sectors such as health would bring about the much awaited change. The legislators had in mind the notion that moving some functions from the national government to county governments would bring about more efficient providence of services.⁴⁶

Decentralization is argued to promote community participation, accountability, technical efficiency, and equity in the management of resources, and has been a recurring theme in health system reforms for several decades.⁴⁷ In 2010, Kenya passed a new constitution that introduced 47 semi-autonomous county governments, with substantial transfer of responsibility for health service delivery from the central government to these counties. Focusing on two key elements of the health system, Human Resources for Health (HRH) and Essential Medicines and Medical Supplies (EMMS) management.⁴⁸

The sad reality is that devolution was done to first without having proper management functions put in place as it was all unfolding rapidly before appropriate county-level structures and adequate capacity to undertake these functions were in place. For human resource for health, this

⁴⁵David Goldsworthy, *Tom Mboya: The Man Kenya Wanted to Forget* (East African Publishers 1982).

⁴⁶ Article titled 'Devolution causes a storm in the Health Sector' in Kenya reported in the Business Daily of December 2014.

⁴⁷Stephen Olubulyera, 'Resolving Challenges of Devolving Healthcare Delivery for the Attainment of Better and Equitable Healthcare Services for the People of Kenya'' (10th September 2018).

⁴⁸ Dr Humphrey Karamagi, 'KENYA HEALTH STRATEGIC PLAN' 112.

led to major disruptions in staff salary payments, political interference with human resource for health management functions and confusion over human resource management roles. There was also lack of clarity over specific roles and responsibilities at county and national government, and of key players at each level. Subsequently health worker strikes and mass resignations were witnessed With Essential Medicines and Medical Supplies, significant delays in procurement led to long stock-outs of essential drugs in health facilities.⁴⁹

⁴⁹Business Daily. (2018). *Devolution causes a storm in Kenya's health sector*. [online] Available at: <https://www.businessdailyafrica.com/news/Devolution-causes-a-storm-in-health-sector/539546-2568794-mwlxxsz/index.html> [Accessed 13 Jun. 2018].

CHAPTER THREE

THE BALANCING ACT BETWEEN THE CONSTITUTIONAL RIGHT TO STRIKE AND THE CONSTITUTIONAL RIGHT TO ECONOMIC SOCIAL RIGHTS.

3.0 INTRODUCTION

This chapter shall deal with three main research questions. The implication of article 41 of the Kenyan Constitution? What loopholes have been created by laws regulating labour relations and how to deal with the loop holes in the laws? Should there really be a right to strike based on the adverse effects it has? Is it morally ethical to have such a right based on the adverse effects?

In August 2010 a new Constitution was promulgated in Kenya replacing the one adopted when the country gained independence from the United Kingdom in 1963.⁵⁰This was the culmination of almost 20 years of political and human rights activism to revise The Constitution.⁵¹

Kenyan's went to the ballot in a very heated race to vote in the new constitution in a campaign dubbed orange for those who wanted the constitution not to be changed and a banana for those who wanted change. The banana team took the day and we got our new constitution. What the ordinary wanjiku did not know is that the constitution did not bring with it good things in its entirety. The drafters of the new constitution in my opinion when asked about the new constitution only sold the good parts of it and choose to disclose the parts that are really going to bite the Kenyan's in the long run.

For instance Article 41 of the constitution that deals with labour relations is totally flawed in my view. The Constitution provides for the rights of workers it even goes ahead to give the right to

⁵⁰ 'The New Kenya Constitution Enacted in 2010' <http://www.kenya-information-guide.com/kenya-constitution.html> accessed 15 October 2018.

⁵¹ 'Did the Constitution Betray the Revolution? | Jeffrey Rogers Hummel' (The Independent Institute) <http://www.independent.org/news/article.asp?id=1400> accessed 15 October 2018.

go on strike. Someone may ask why I find this article problematic. Well in my opinion the drafters of the question ought to have added more to the statement that every worker has the right to go on strike, something more like having a limitations to the right would have been a good idea. Given that the law has many ways in which it can be interpreted such as the literal meaning rule that would mean such an article would mean that the workers in any field could go on strike. That would include even the personnel that are involved in essential services such as doctors and nurses.

Essential services are services that ought to be protected in the constitution given that they are the determining factors of the existence of a society. The fact that the drafters of the 2010 constitution left this out in their drafting was fairly wrong given the consequences Kenyans would suffer.

In the year 2016 to 2017 Kenyans began to feel the bite were the doctors went on a one hundred days strike that led to several deaths of so many people. This deaths could not have been occasioned if the drafters of the constitution had been keen enough to ensure that such services were protected by the constitution. After the doctors strike we had the five month long strike by the nurses that also caused havoc in the public health sector given that people could not access medical assistance. People who suffered from disease that on a normal day with doctors and nurses on duty would not have died occasionally died and all this was because the workers and the trade union interpreted Article 41 to give them a God given right to strike.

God-given in the sense that the new Constitution was the supreme law of the land that meant that no piece of legislation would have more bearing on any matter if it was in contradiction with the law. The labour Relations act provides in section 78(1) of the act that no person should take part in a strike or lockout if the employee and employer were engaged in an essential service, the act

further goes on to defines an essential service as, “A service the interruption of which would endanger the life of a person or health of the population or any part of the population”.

Despite the fact that we have an act of parliament that restricts industrial actions such as strikes in the essential services we have seen the number of strikes in the public sector almost triple since 2010. This is has continued despite the fact that Kenya has ratified various international instruments such as the International covenant on civil and political rights as well as the international covenant on economic social and cultural rights.

3.1 AN ANALYSIS OF THE LAWS THAT CATER FOR THE RIGHT TO STRIKE.

Article 22 of the International Covenant on Civil and Political Rights.

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.⁵²

The International Covenant on Economic, Social and Cultural Rights Article 12 provides as follows:-

⁵²‘OHCHR | International Covenant on Civil and Political Rights’
<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 12 October 2018.

1. The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.⁵³

Internationally recognized core labour Standards

Workers have the right to strike but this right is subject to major restrictions. All disputes must be submitted to the Ministry of Labour 21 days prior to calling a strike, or 28 days for services such as education, health and air traffic control or water utilities. The Ministry of Labour may then act as an arbitrator or submit the dispute to the industrial court, but no strikes are permitted during the cooling-off period. The Ministry of Labour has the discretionary right to decide whether a strike is legal or not.

The committee of experts on the application of conventions and recommendations of the International Labour Organization (“ILO”) recommends that the right to strike should only be restricted in relation to public servants exercising authority in the name of the State and in relation to genuinely essential services.

The labour Relations Act

The labour Relations Act section 81 provides:-

(1) Essential services to mean a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.

(2) There shall be no strike or lockout in an essential service.

The Constitution of Kenya

Article 43 provides:-

⁵³ ‘OHCHR | International Covenant on Economic, Social and Cultural Rights’
<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> accessed 12 October 2018.

(1) Every person has the right to the highest attainable standard of health, which includes the right to health care services including reproductive health care;

(2) A person shall not be denied emergency medical treatment.

Article 259 of the Constitution requires that the Constitution of the Republic of Kenya is interpreted in a manner that:

(a) Promotes its purposes, values and principles;

(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) Permits the development of the law; and

(d) Contributes to good governance.

From the above it can be drawn that most of the international instruments that Kenya has ratified put into consideration the fact that the right to strike ought to have limitations. Despite most of them not explicitly having limitations clearly spelt out most of them have a hint as to the limitation.

In Kenya the Labour relations Act, that is an act of parliament provides for the limitation to the right to strike. It restricts persons engaged in essential services not go on strike. My interpretation of the Article 259 of the constitution is that what the Constitution envisioned was that the Constitution would be interpreted using the purposive rule. To mean that Article 41 of the Constitution ought to bring about that which would bring more purpose. Utilitarianisms also connotes that in application of a law the effect of such interpretation of the law should have the

effect that it stands to benefit the larger population as opposed to an individual. In this instance the right to the highest attainable standard of health ought to outweigh the labour right to strike.

3.2 ARGUMENTS BROUGHT ABOUT BY DOCTORS AND NURSES THAT GO ON STRIKE.

Kenyan Doctors and Nurses tend to have a selective way in which they interpret the constitution.

Doctors, nurses as well as the trade unions that they belong to are well aware of the limitations to the right to strike set out to them by the Labour Relations Act as well as the limitation set out in Article 24 of the constitution that they turn a blind eye to. However in their defense as provide for in Article 2 of the Constitution the Constitution is the supreme law of Kenya and that no law be it an act of parliament or an international instrument that contradicts any provision of the Constitution can apply. The judicature act goes ahead in to propose a hierarchy of the laws of Kenya that supposes that the Constitution is supreme.⁵⁴With this kind of argument doctors and nurses are of the opinion that the right to strike then cannot be limited by an act of parliament which is inferior to the Constitution. They choose to ignore the fact that Article 24 creates limitations. Doctors and Nurses ought to interpret Article 24 that provides that rights guaranteed in the Constitution may be limited and therefore in my preserving a life or saving one is reason enough to limit the right to strike.

3.3 CASE LAW

Federation of Women Lawyers (FIDA) Kenya v Kenya National Union of Nurses & 4 others [2018] eKLR-

The Petitioner instituted these proceedings in their own interest as the Petitioner and on behalf of all other women, children and the general citizens of Kenya as provided for under Article 22 of

⁵⁴CAP. 8' <http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%208> accessed 12 October 2018.

the Constitution. The Petitioner is claiming that rights and fundamental freedoms of the citizens in the Constitution and more specifically the Bill of Rights have been denied, violated, infringed and are threatened. The 1st Respondent called an impromptu strike of its members on the 5th June, 2017 without issuing the mandatory notice of the strike and the members of the public majority of whom are users of public health facilities were caught unawares. That the strike went on for many days without a solution at hand. most of the users of the public health institutions are poor citizens who cannot afford to access services in private health sector causing them immense suffering, indignity and loss of life in some cases. That the health sector was still recovering from the 100 days strike by the Doctors which was called off in March, when the 1st Respondent impromptu called on the Nurses to proceed on strike. The poor citizens have endured too much pain and suffering as a consequence of these prolonged strikes in the public health sector. This has violated and threatened their right to life and health which are necessary for the enjoyment of all other rights. The learned judge ruled in favor of the petitioner and the respondents were asked to call off the strike.

Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another [2017] eKLR

In this case the petitioners argument was that the quality of health care services is deteriorating steadily following frequent strikes by doctors and nurses due to various grievances and that this has resulted in several deaths attributable to the strikes. He states that although workers in Kenya including Doctors, Dentists, Pharmacists and Nurses represented by the Respondents have a right to call or go on strike under the Constitution, there are other provisions in the same Constitution which are obviously infringed by the strikes. He argued that there appears to be inconsistencies in the Constitution which are to blame, being Article 37 and 41(2) (d) on the one

hand and Article 25(a), Article 26(1) and (3) and Article 43(1) (a) and (2). In this case despite the case being overruled for sub judice the learned judge seemed to resonate with the petitioner that by allowing for the right to strike to be in effect it threatened the enjoyment of other rights.

3.4 CONCLUSION

To bring my argument home let me create a picture to show what the 100 day doctor's strike meant to the ordinary Wanjiku. Fredrick Otieno was suffering from Leukaemia and had been referred to Moi Teaching and Referral Hospital (MTRH) in Eldoret from Kijabe Hospital, which could not handle the case. The little boy died, surrounded by his distraught, helpless family, and away from the much-needed medical care that would have eased his pain as life ebbed out of his little body. Each day of the cumulative 100 days has resulted to days of psychological torture as they cling onto hope.⁵⁵

Pregnant women and mental health patients suffered the most during the 2017 strike.⁵⁶ A 15-year-old pupil gave birth outside a private hospital in Mombasa after being turned away from public hospitals. Mr. Joshua Ouma, a car crash survivor remains unattended to at the Jaramogi Teaching and Referral Hospital, Kisumu County as health workers strike. A health worker had nothing but tears as he watched his mother die at a sub-county hospital in Busia. In many hospitals, the wards were nothing more than halls of despair, with patients left to their own devices and others at the mercy of relatives and hospital support staff, such as security guards.⁵⁷

THE WAY FORWARD IN BALANCING THE RIGHT STRIKE AND SOCIAL ECONOMIC RIGHTS.

⁵⁵ Admin, 'KENYA: Doctors' Strike Is over! But the Pain, Deaths and Costs Will Be Felt for Many Years' (Universal Health 2030, 15 March 2017) <http://universalhealth2030.org/2017/03/15/kenya-doctors-strike-pain-deaths-costs-will-be-felt-many-years/> accessed 15 October 2018.

⁵⁶ 'Mental Health Services Hard Hit by Nurses' Strike' (Daily Nation) <<https://www.nation.co.ke/news/Mental-health-services-hard-hit-by-nurses--strike--/1056-4135328-a4nfqtz/index.html>> accessed 10 October 2018.

⁵⁷ 'Health Crisis: Death Toll Rises to 19' (Daily Nation) <https://www.nation.co.ke/news/Death-toll-rises-as-doctors--strike/1056-3477550-x41pdn/index.html> accessed 15 October 2018.

The fact Section 80 of the Labour Relations Act on essential services creates a limitation to the right to strike for nurses is in an indication the parliamentary Act aims to protect a higher right of life of the patients and to safeguard against suffering and death during strikes and lockouts by medical sectors employees.⁵⁸ Health services are essential service and nurses and Doctors have a right to strike however the right to life is sacred and therefore the trade unions in the health sector must put in measures for continued provision of medical services by a percentage of its membership before issuance of a strike notice.

It is my opinion that the limitations under section 81 of the Labour Relations Act meets the test set under Article 24(1). Withdrawal of Hospital Services derogate on the right to life under Article 26, the right to the highest attainable standard of health under Article 43(1) (a) and the right to emergency medical treatment under article 43(2).

I think it is not a disputed fact that the withdrawal of medical services is very likely to, and in fact does, lead to loss of life to people who need medical services. The right to life is in a wider sense part of the right to human dignity under Article 28. The withdrawal of health services may therefore lead to cruel, inhuman or degrading treatment of patients and their relatives who do not have the resources to get treatment at private medical facilities and who have to suffer death or watch their loved ones die without medical attention.⁵⁹ Freedom from cruelty, inhuman or degrading treatment are part of the rights under Article 25 that cannot be limited or derogated.

From the foregoing the right to strike is inferior to the rights and freedoms that would be denied or derogated by the exercise thereof by workers in the health services sector. To this extent, the limitation thereof is justifiable under Article 24.

⁵⁸Wardah Achmat, 'THE RIGHT TO STRIKE AND ITS LIMITATIONS' 70.

⁵⁹Federation of Women Lawyers (FIDA) Kenya v Kenya National Union of Nurses & 4 others [2018] eKLR.

Despite the fact that health is devolved as per the Fourth Schedule, Part 1 No.28 to the Constitution it is clear that the Health Policy remains a function of the National Government.⁶⁰ The inadequacies of provision of health services in this country is a matter of national concern and it is the obligation of the National Government to ensure that every person's right to the highest attainable standard of health as stipulated under Article 43 of the Constitution is attained despite having the provision of Article 41 on labour relations on the right to strike.

The fact that Health services are devolved does not discharge the National Government from its obligation to ensure that its Constitutional obligations are fulfilled. Since it is clear that the counties are not yet fully able to handle the matters such as health in this devolved system the national government could step in as a watchdog until counties are properly able to run their affairs.

In the past Governors have resorted to short term solutions to the strike such as hiring unemployed nurse but this should not be a way in which they choose to resolve the issues. Mombasa governor Hassan Joho said that they are recruiting 100 nurses, 24 clinical officers and seven doctors at a cost of Sh1,000 per patient per day. The group shall consist of retired medical officers and the unemployed. They will be hired by the end of the day, he said. Interim county chief officer Esther Gitambo reiterated that they were forced to discharge some patients prematurely due to the strike.⁶¹

⁶⁰ Vivian Nyansarora, 'Devolution of Health Services in Kenya: What You Need to Know of Devolved Healthcare' (KenyaVote, 18 December 2017) <https://kenyavote.com/devolution-health-services-kenya-need-know-devolved-healthcare/> accessed 10 October 2018.

⁶¹ 'The Ugly Side of Doctors, Nurses' Strikes' (Daily Nation) <https://www.nation.co.ke/news/High-premature-birth-rate-blamed-on-nurses-strike/1056-4150274-fvy4mn/index.html> accessed 10 October 2018.

There need to be a balance in the laws governing labour relations to ensure that the citizens of Kenya do not suffer any kind of loss.⁶²

⁶² ‘Balancing Economic Freedoms & Fundamental Rights’ <https://www.lawteacher.net/example-essays/balancing-eu-objectives-economic-freedom-v-fundamental-rights.php> accessed 11 October 2018.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

This last chapter of my paper intends to show ways in which the law can be changed or harmonized to decrease the amount of strikes given the gruesome effects they have. As it can be seen from my previous chapter there is great need to reform our laws to change the situation surrounding strikes in the essential services.

As it can be drawn their various reasons as to why the strikes have rampantly increased and various parties are to be blamed. Starting with the government, law and law makers and the personnel involved in the essential services particularly nurses and doctors.

As seen through out my paper it is clear that the strike action has been used for a long time by workers against their employers as a bargaining tool. The right to go on strike only began to bite in the year 2010 with the promulgation of the new Constitution. With the new Constitution brought about new challenges.

The Constitution become the supreme law of the land and what that meant was that no law including subsidiary law such as Acts of parliament or international instruments would override any article of the Constitution, Article 2 of the Constitution states that any law that is inconsistent with the Constitution is void to the extent of the inconsistency.

Article 41 of the Constitution on labour relations goes on to stipulate that, every worker has the right to go on strike. Acts of parliament are normally written so as to add more flesh to the Constitution to bring out more meaning. The labour relation Act 2007, Section 78(1) of the act states that no person should take part in a strike or lockout if the employee and employer were

engaged in an essential service. Section 81(1) of the same act defines an essential service as, “A service the interruption of which would endanger the life of a person or health of the population or any part of the population.”

This contradiction in the law is among the main reason that doctors and nurses go on strike. To them the right to strike is somewhat God given that the constitution is the supreme law and the labour relations act cannot be used against them as it is a subsidiary of the law. The drafters of the Constitution clearly erred or miscalculated the effect that Article 41(d) of the Constitution would have given that it was left so open ended. Given that in law you could use various rule to interpret the law leaving a crucial law that open ended would only create havoc. Using the literal rule of interpretation what that article means is that any worker from any section of the economy whether offering an essential service or not can go on strike.⁶³

Clearly the drafters of the Constitution did not take into account that enjoyment of such a right could ultimately infringe on other rights. The right to life guaranteed in the Bill of Rights Article 26, Article 28 on human dignity and 43(a) that includes the right to the highest attainable standard of health ,which includes the right to health care services.

The drafters of the Constitution clearly ought to have written the constitution in a way that, there would be a balancing act between the Constitutional right to strike and the Constitutional right to economic social rights.⁶⁴

In the Year 2017 Kenya experienced the worst public health crisis that was caused by the lack of the two laws the Constitution and the Labour Relations Act being harmonized. Doctors went on

⁶³Okiya Omtatah Okiiti & another –vs- Attorney General & 6 others [2014] eKLR.

⁶⁴‘Balancing Economic Freedoms & Fundamental Rights’ <<https://www.lawteacher.net/example-essays/balancing-eu-objectives-economic-freedom-v-fundamental-rights.php>> accessed 11 October 2018.

strike for hundred days and the nurses for five months that saw many people die.⁶⁵ The number of mothers who died in childbirth doubled to 857 in the first half of this year, driven by prolonged doctors and nurses' strikes that have left most women without medical attention during critical hours of delivery.⁶⁶

This paper also brings out the issue that the lack of homogeneity in the law is not the only problem for the increased number of strikes. Doctors and Nurses go on strike for various reason in the year 2017 among the reason was that the county government that had taken over the health docket from the national government was unable to meet their pay demands. The nurses and doctors felt that they were under paid, lacked a risk allowance among other problems.

In 2010, Kenyans overwhelmingly voted in the new Constitution. One of the major changes that came with this was the change in the form of governance from the central governance system to the devolved system. Healthcare was one of the major sectors that was devolved. Devolution of health services meant that county governments are entrusted with all functions related to health care while the national government is responsible for health policy and national referral health facilities.⁶⁷ Devolution of health services was generally hoped to benefit all citizens especially those in the marginalized communities by increasing accessibility to health care services.

However, the devolution of health services has not come easy for the healthcare workers who have expressed extreme dissatisfaction on how the health sector in the county governments is managed. This has led to frequent strikes at county level and national level and many of them

⁶⁵ 'Why Nurses' Strike Is Taking Too Long to End' (Daily Nation) <https://www.nation.co.ke/news/-setbacks-bedevels-efforts-to-end-nurses--strike/1056-4151302-5nvyb/index.html> accessed 1st October 2018.

⁶⁶ 'Maternal Deaths Double in Six Months' (Daily Nation) <https://www.nation.co.ke/news/Maternal-deaths-double-in-six-months/1056-4144270-138tikb/index.html> accessed 1st October 2018.

⁶⁷Vivian Nyansarora, 'Devolution of Health Services in Kenya: What You Need to Know of Devolved Healthcare' (Keynote, 18 December 2017) <https://kenyayote.com/devolution-health-services-kenya-need-know-devolved-healthcare/> accessed 1st October 2018.

openly suggesting that the health sector should be returned to the national government.⁶⁸ Among the main challenges brought about by devolution included; Salaries: inter-county disparities, Lack of job security as most counties are now employing on contract basis, Lack of medical supplies and other resources required to effectively deliver their services, Inadequate staff in health facilities and delaying of salaries and poor pay.

These issues have mainly been caused by the complexity of Kenya's devolution framework that has generated concern that has seen services being disrupted as the transition from the central to the county government has been managed poorly. Strikes that lead to disruption of services are largely linked to the counties' readiness to deliver services in the now devolved framework.⁶⁹ The doctors and nurses strike in 2017 was as a result of devolving the health care system in Kenya.⁷⁰

The sad reality is that devolution was done to first without having proper management functions put in place as it was all unfolding rapidly before appropriate county-level structures and adequate capacity to undertake these functions were in place. For human resource for health, this led to major disruptions in staff salary payments, political interference with human resource for health management functions and confusion over human resource management roles, a lot of restructuring ought to be done if devolution of health services is to work.⁷¹

⁶⁸ Benjamin Tsofa and others, 'Devolution and Its Effects on Health Workforce and Commodities Management – Early Implementation Experiences in Kilifi County, Kenya' (2017) 16 International Journal for Equity in Health <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5599882/> accessed 1st October 2018.

⁶⁹ '479_KenyaPETSCountyReadinessFINAL.Pdf' https://www.healthpolicyproject.com/pubs/479_KenyaPETSCountyReadinessFINAL.pdf accessed 1st October 2018.

⁷⁰ Truphena Makonjo Gimoi, 'THE IMPACT OF DEVOLUTION ON HEALTH CARE SYSTEMS: A CASE STUDY OF NAIROBI COUNTY HEALTH FACILITIES' 95.

⁷¹ Stephen Olubulyera, 'Resolving Challenges of Devolving Healthcare Delivery for the Attainment of Better and Equitable Healthcare Services for the People of Kenya' (29 September 2015) <https://www.linkedin.com/pulse/resolving-challenges-devolving-healthcare-delivery-kenya-olubulyera> accessed 8th October 2018.

4.0 RECOMMENDATIONS

The way forward would be to have a referendum to change or delete Article 41 of the Constitution to give more meaning to the article, such as to elaborate clearly who can go on strikes. The Constitution should state clearly that persons engaged in essential services shall not be allowed to go on strikes. The Constitution should further elaborate what entails essential services. However since having a referendum that will go through may take a longer period of time the Labour Relations Act 2007 could be amended in a way that it has provisions that a minimal amount of doctors and nurses shall be left on duty while the others go on strike to avoid the havoc and multiple deaths.⁷² Better yet create a Bill geared towards balancing the right to strike and preventing the potential lack of essential services during a workers strike by ensuring all workers engaged in essential services enter into collective bargaining agreements with their employers and such an agreement shall be accompanied by a minimum services agreement. This minimum services agreement shall specify the minimum number of workers that will be at work during a strike to provide essential services.

Devolution of healthcare system is another thing that should be looked at keenly. For starters counties should put in proper infrastructure to allow for the smooth running of the devolved system. In my opinion the governors and the members of county assembly should receive civic education on their roles in the management of the health to avoid all the confusions that leads to strikes.

Counties should in connection with the salaries and remuneration authority review their grading system of doctors and nurses to see that they get paid that which is sufficient seeing that their

⁷² 'The Miscellaneous Amendment Bill 2018 and Its Implication on Labour Relations in Kenya | MMAN ADVOCATES' <https://mman.co.ke/content/miscellaneous-amendment-bill-2018-and-its-implication-labour-relations-kenya> accessed 15 October 2018.

services are very crucial to the well-being of the society. Counties that offer short term contracts to nurses and doctors should review their contracts to give them better jobs and assure them job security. Proper staffing should be ensured to avoid overworking of the doctors and nurses that in turn lead to the breakout of strikes.

Nurses and doctors should receive risk allowances seeing that it was among the main reason that nurses went on strike in in 2017. Just like any other profession the doctors and nurses should receive allowances beneficial to them in their professional capacity.

Collective Bargaining Agreements that are made between the counties and the doctors and nurses should be resolved quickly given the nature of the service they provide. This can be done through proper management and risk control at the county level.

Doctors and nurses should be trained in a manner that they understand that above having labour rights they owe the Kenyan citizens a duty of care that cannot be waived given that it is their moral obligation to ensure the well-being health wise of their patients. They need to be sensitized at an early stage while in campus that the utilitarian theory⁷³ ought to apply in that, taking care of patients who are more in number as compared to one doctor or nurse would generate more happiness once a life is saved or preserved as compared to one interest of the a doctor or nurse being paid.

Doctors and nurses should also see that they emulate in Samburu who in 2017, group of 15 nurses defied the strike called by the Kenya National Union of Nurses (KNUN) which lasted

⁷³James E Crimmins, 'Jeremy Bentham' in Edward N Zalta (ed), The Stanford Encyclopedia of Philosophy (Summer 2018, Metaphysics Research Lab, Stanford University 2018)
<https://plato.stanford.edu/archives/sum2018/entries/bentham/> accessed 3 October 2018.

more than hundred days even after sacking threats from county governments.⁷⁴ Being in the essential services should be more about helping those in need first other than going on strikes that sometimes are sympathy strikes.

The Attorney General as the legal representative of the state, ought to advise the government on the necessary legislative amendments to align the provisions of essential services under the Labour Relations Act to the Constitutional limitation of rights and freedoms⁷⁵ to address strikes in essential services and especially the health sector in order to ensure that the sector is not crippled by strikes in the future.

⁷⁴ ‘Noble Samburu Nurses Defy Strike Order’ (Citizentv.co.ke) <<https://citizentv.co.ke/news/noble-samburu-nurses-defy-strike-order-175852/>> accessed 1 October 2018.

⁷⁵ Petition No. 70 of 2014. 2017, Okiya Omtatah Okoiti v The Hon. Attorney General and Others.

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