

SOCIAL DIALOGUE FOR THE SOCIAL SECTOR

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ABSTRACT

Labour disputes in Kenya frequently have more casualties beyond the parties concerned. There is an especially high frequency of labour disputes in the social sectors in Kenya, with a significant portion originating from the education sector. While the parties to labour disputes are in the exercise of their constitutional and human rights, the casualties often extend well beyond them. The losses in man-days, disrupted flow of production, resulting mistrust and reduced quality of work are but a few of the effects of the conventional and more established modes of industrial action. This article narrows down to the effects of labour disputes in the education sector. It begins with an evaluative assessment of the methods used to dissolve labour disputes between the teachers' labour unions (KNUT/KUPPET) and the Teachers' Service Commission. A critical analysis of the efficacy of strikes, go-slows, picketing and collective bargaining agreements (CBAs) is conducted. It is argued that the aforementioned methods have a very high number of casualties not privy to the dispute (i.e., students), as well as inherent limitations to their efficacy, thereby posing a social problem. A discussion on the role of syndicalist harshness in labour disputes clarifies the structural weaknesses of CBAs despite their high popularity. This pivots the discussion to an introduction of social dialogue and its potential for improving the processes and outcomes of labour disputes in the country. The article explores relevant examples where social dialogue has been successfully applied in settling disputes between labour unions in the social sector, and employers, to make the case that social dialogue presents an efficient method of achieving the goals of unionism with minimal collateral

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damage. The author concludes with a critical assessment of the existing framework for social dialogue between teachers and the Kenyan government. Recommendations tailored to strengthen the existing framework and facilitate social dialogue are provided.

1.0 INTRODUCTION

The relationship between the employer and the employee is characterized by an inherent imbalance of power in favour of the employer. In order to mediate said relationship, there has emerged a corpus of laws specifically designed for the purpose. Labour law is defined as the collective of rules and regulations that attempt to grease the points of contact between employers, employees and unions. In its early stages, labour law did not serve many of the purposes of social justice that modern labour law does. In the 1950s, a notice was sufficient grounds for dismissal.¹ That is not to say that dismissal was arbitrary, as workers protected by labour unions enjoyed a significant degree of buttress.

The role of labour unions has been inextricably tied to efforts towards emancipation in the Kenyan context. First, they were oriented towards mitigating the imbalance of power inherent in the employer-employee relationship. A labour union is “an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ organization.”² Thus, the trade union is, by definition, an instrument designed to inject balance into what would otherwise be a feudal relationship. In the execution of their mandate in pre-colonial Kenya, trade unions relied on instruments such as friendly newspapers and handbills to communicate. Case in point, the Trade Union Committee of Mombasa announced its aims and published speeches by its leaders via *Fairplay*, edited by Dr. A.C.L. de Souza.³ The unionist machinery became markedly efficient at mobilization. On 7th January 1947, 15000 workers in Mombasa, representing 75% of the labour force, went on the now famous,

¹ H. Collins. “The Productive Disintegration of Labour Law” (1997) 26 LLJ 295; P. Davies and M. Freedland, *Labour Legislation and Public Policy* (1993).

² The Labour Relations Act, 2007, s 2 (e).

³ D. Shiraz., ‘Trade Union Movement Leads the Way in Kenya’ [2009] 2 ISJ 197, 198.

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surprisingly peaceful and largely successful Mombasa General Strike.⁴ In addition, trade unions became incubators for leaders with different, but optimistic visions of a free Kenya including those of Tom Mboya, Fred Kubai, Makhan Singh and Pio Gama Pinto.⁵ Labour unions presented a significant challenge to colonial powers and continue to fight for the interests of their members.

Industrial action remains a potent tool in what Tom Mboya aptly described as the struggle for “political freedom, for economic opportunities and for human dignity.”⁶ Gathongo and Ndimurwimo emphasize the prevalence of strikes in the public sector, calling attention to the ills bedeviling social sector and public servants at large.⁷ It cannot be gainsaid that strikes, picketing and go-slows have facilitated the advance to a wealthier, healthier and safer labour force. The Mombasa general strike achieved a wage increase of 20-40% for casual and monthly workers, alongside housing allowances, paid holidays, paid overtime and the promise of a minimum wage.⁸ In a study of workers in the Nairobi industrial area, 46.7% of the workers surveyed reported that the intended objectives of the strike they had taken had been successful.⁹ In December of 2017, a 150-day nation-wide nurses’ strike ended after the national and county governments reached an agreement with the striking medical practitioners to provide an initial uniform allowance of Sh15,000, to be increased by Sh5,000 each financial year alongside other benefits such as a risk allowance of between Sh20,000 and Sh25,000, depending on job group.¹⁰ Additionally, collective bargaining agreements, CBAs,

⁴ Emily Kluver, ‘1947: Mombasa General Strike’ (*Global Nonviolent Action Database*, 3 March 2014) <INSERT LINKS> accessed 8 November 2022.

⁵ Shiraz Durrani *Trade Unions in Kenya’s War of Independence* (Vita Books, 2018).

⁶ Library of Congress, ‘Tom Mboya of Kenya: “A World Struggle, A Human Struggle”’ <https://www.loc.gov/exhibits/civil-rights-act/multimedia/tom-mboya-of-kenya.html> accessed 9 November 2022.

⁷ Gathongo JK and Ndimurwimo L, “Strikes in Essential Services in Kenya: The Doctors, Nurses and Clinical Officers’ Strikes Revisited and Lessons from South Africa” (2020) 23 PELJ 1.

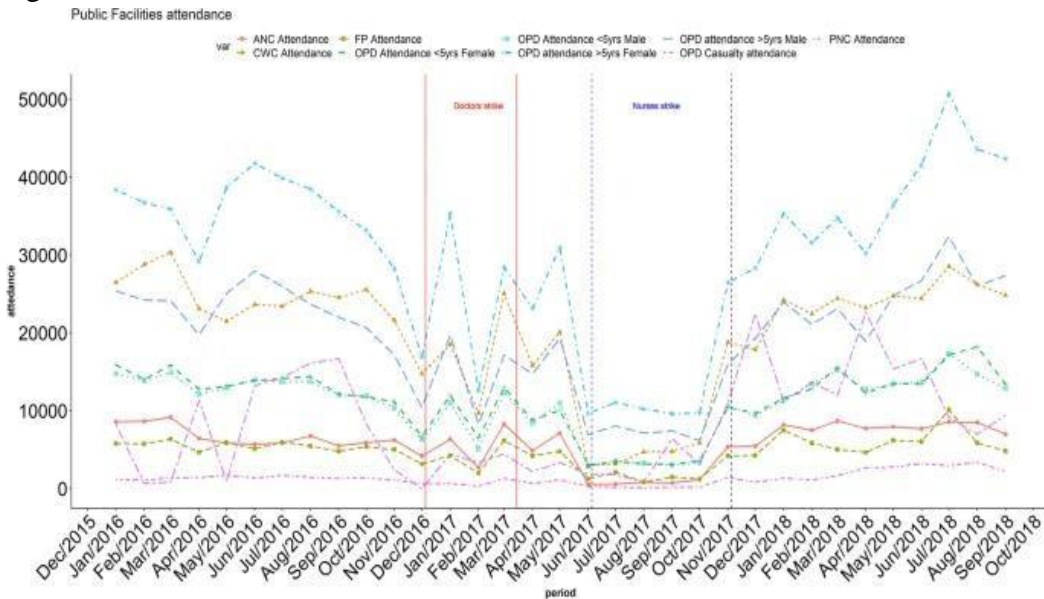
⁸ n4.

⁹ Maureen K’Opiyo, ‘The Nature, Process and Outcome of Industrial Strikes in Nairobi’ (Master’s Thesis, University of Nairobi 2005)

¹⁰ Irimu G and others, “Tackling Health Professionals’ Strikes: An Essential Part of Health System Strengthening in Kenya” (2018) 3 BMJGH

have risen in popularity as a means of industrial relations. However, there are drawbacks to the use of CBAs and conventional industrial action.

Strikes, especially in the social and public sectors, lead to the absolute standstill of service provision with extreme forgone gains, excessive losses in man-hours and disruption of normative functions. In an examination of the 2017 nurses strike, a recent study outlined the disruption of all public health facilities in some counties, the absolute shutdown of dispensaries and a sustained decline in services at public facilities as indicated in the figure below.¹¹



Strategies to keep services operational are “piecemeal, inconsistent and difficult to sustain.”¹² The implementation of CBAs is often dismal if not non-existent.¹³ In December of 2017, the nation-wide nurses’ strike was instigated to demand

¹¹ Waithaka D and others, “Prolonged Health Worker Strikes in Kenya- Perspectives and Experiences of Frontline Health Managers and Local Communities in Kilifi County” (2020) 19 IJEH

¹² n6

¹³ Vincent L and Lucy G, “Factors Influencing Industrial Unrest in the Public Sector in Kenya. A Case Study of Coast Provincial General Hospital” (2017) 32 IJS 287

implementation of a CBA!¹⁴ In the instance of teachers' strikes, children are often disadvantaged by the lack of learning, putting many learners behind in the completion of their curriculum. Conventional industrial action has increasingly proven ineffective and disadvantageous to parties caught in the crossfire. This has led to calls for the implementation of novel tools of negotiation such as Alternative Dispute Resolution mechanisms and conditional provisions for industrial action to precipitate less disruptive negotiations with employers. This article contends that ADR can, and should be employed to facilitate industrial action in the social sector to optimize industrial action. ADR reduces the collateral damage that characterizes strikes, go-slows and picketing, and it should graduate into the preferred mode of interaction between trade unions and employers.

This article begins with an overview of the legal framework supporting unionism. Afterward, the focus of the article narrows down to the education sector. The author evaluates the state of unionism in the education sector by furthering an understanding of the trade unions and their interactions with the national employer. A discussion on the adverse effect of strikes will wind up the section. A comparative assessment of the achievements of strikes in Kenya will follow to elucidate on their efficacy. The article will also address the capacity of ADR to satisfactorily facilitate industrial relations. The fourth chapter will wind up with a statement on the potential of ADR to mitigate the impact of conventional relations between teachers and their employer. Chapter five will explore the existing frameworks enabling ADR. The article will conclude with recommendations on how to optimize the existing frameworks and pathways for implementation.

2.0 THE LEGAL FRAMEWORK UNDERLYING UNIONISM

Trade unions are justified by three tiers of law. This section utilizes a top-down approach to the legal framework underpinning unionism in Kenya.

2.1. International Law

The international law regime facilitates the activities of labour unions. The UN recognizes the right to industrial action vide article 20, which states that:

¹⁴ Naeku C, "Strengthening Labour Relations to Avert Strikes in the Health Care Sector in Kenya" (KIPRA July 20, 2021) <<https://kippra.or.ke/strengthening-labour-relations-to-avert-strikes-in-the-health-care-sector-in-kenya/>> accessed November 9, 2022

*“Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.”*¹⁵

Thus, while the article asserts the positive right to association, a necessary activity in unionist activity, it considers the real possibility of abuse of said right and espouses the negative right to not be forced to belong to an association. Furthermore, article 23 (4) provides that “Everyone has the right to form and to join trade unions for the protection of his interests.”¹⁶ The preceding provision expressly recognizes the right to belong to a union. Evidently, the international law regime is very alive to the need for associations that mediate the relationship between employers and employees. Such progressive sentiments are shared in the African context as well.

African leaders, recognizing the role of trade unions on the continent and in the effort to open it to supra-national accountability, distilled the same safeguards into the African charter. Article 10 states that:

*“Every individual shall have the right to free association provided that he abides by the law. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.”*¹⁷

Worth noting is that some of the duties elucidated upon in article 29, “...whilst reflecting African cultural values, [are] probably not to be strictly regarded as capable of effective implementation but as a code of good conduct for all citizens of African countries.”¹⁸ Thus, the African charter is not to be construed as creating the possibility of compelling one to join a union. The Banjul Charter also recognizes the positive and negative rights of the African in regards to trade unions. Evidently, international law, that which can be considered western and indigenous, creates the prerequisite legal framework for the justification of unionism and the performance of activities in the spectrum of unionism.

¹⁵ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)(UDHR) art 20.

¹⁶ n9.

¹⁷ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.achpr.org/legalinstruments/detail?id=49> [accessed 10 November 2022].

¹⁸ D'Sa RM, “Human and Peoples’ Rights: Distinctive Features of the African Charter” (1985) 29JAL 72.

2.2 Constitution of Kenya, 2010

The 2010 Constitution, often hailed as a global trailblazer in terms of justness and promotion of the rule of law, empowers employees and employers to form associations that help them advocate for their industrial interests. Article 36 and 37 state:

“36. Freedom of association

Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. A person shall not be compelled to join an association of any kind.

Any legislation that requires registration of an association of any kind shall provide that—

Registration may not be withheld or withdrawn unreasonably; and

There shall be a right to have a fair hearing before a registration is cancelled.

37. Assembly, demonstration, picketing and petition

Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.”¹⁹

The aforementioned articles comprise the umbrella under which the activities of trade unions are made possible under the constitution. Statutory provisions provided detail to the otherwise broad provisions of the constitution.

2.3 Statutory Law

Statutory provisions present the third tier of law that facilitates union militancy. This section discusses the main acts in this regard.

2.3.1 Labour Relations Act

The Labour Relations Act repealed the Trade Unions Act, No. 53 of 1952. Under the Act, *“Every employee has the right to –*

¹⁹ The Constitution of Kenya, 2010.

Participate in forming a trade union or federation of trade unions,

Join a trade union; or Leave a trade union."²⁰

"An employee who has not attained the age of eighteen years but appears to be above the apparent age of sixteen years may be a member of –

A trade union and, unless the constitution provides otherwise, shall enjoy all the rights of a member."²¹

Additionally, trade unions are given sufficient leeway to execute their mandate under section 8 which states,

"Every trade union, employers' organization or federation has the right to-Subject to the provisions of this Act-

Determine its own constitution and rules; and Hold elections to elect its officers;

Plan and organize its administration and lawful activities."²²

The Act creates sufficient statutory latitude for the existence and operation of trade unions.

2.3.2 The Employment Act, 2007

This Act recognizes the rights of employees to tender their complaints before a judge or labour officer, and be represented by a trade union official.²³ Additionally, this act protects union members from harassment by expressly stating that neither affiliation with a particular union nor participating in union activity is a valid reason for dismissal, as follows;

*"46. The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty – (d) the participation or proposed participation of an employee in the activities of a trade union outside working hours, or, with the consent of the employer, within working hours."*²⁴

²⁰ The Labour Relations Act, 2007, s4.

²¹ n20, s32.

²² n20, s8.

²³ The Employment Act, 2007, s47(1), 48.

²⁴ n23, s46.

2.3.3 Labour Institutions Act, 2007

This particular statute concerns itself with the administrative sphere of trade unions. The Act greases the points of contact between the labour unions and the government. It stipulates, “The Minister shall appoint a Registrar of Trade Unions who shall be responsible for the registration of trade unions, employers’ organizations and federations.”²⁵

2.3.4 Employment and Labour Relations Court Act, 2011

The Employment and Labour Relations Court Act establishes the Employment and Labour Relations Court and bestows upon it the mandate to deal with matters concerning trade unions and employers, their organizations or trade unions.²⁶ It is under this Act that trade unions can sue or be sued. Thus, it can be said to detail the source of redress for trade unions via litigation.

3.0 UNION MILITANCY IN THE EDUCATION SECTOR

In this section, the focus of the article narrows down to the education sector. The education sector is chosen because of the extensive industrial action that teachers have taken throughout the country’s history vis a vis the limited gains made, as well as the existence of union militancy before and after independence, providing a panoramic view of unionism. It begins with an exploration of the national employer and the two main trade unions in the sector. This section will attempt to describe a successful case of industrial action using various criteria from the literature. A comparative assessment of the efficacy of strikes in the Kenyan context based on the yardstick will follow. Afterward, a discussion of the adverse effects of strikes and the weaknesses of litigation and CBAs will conclude. The goal of this section is to show that despite the significant advances made using the current arsenal deployed in union militancy, friendly fire and recoil are often sustained to the detriment of some innocent parties.

²⁵ Labour institutions Act, 2007, s31(1).

²⁶ Cap 234B, s4, s12.

4.0 MAJOR PLAYERS

The major players in the education sector include the national employer and the two main trade unions; Kenya National Union of Teachers (KNUT) and the Kenya Union of Post Primary Education Teachers (KUPPET).

The national employer is the Teachers' Service Commission (TSC). Interestingly, the TSC was formed as a result of industrial action. In the third ever national teachers' strike initiated on November 1st, 1966, KNUT endorsed a strike that paralyzed learning.²⁷ Harassment from the government led the then union predicant, Job Rob, to unilaterally call off the strike through national media, for which he was fired.²⁸ Then Minister for education, Jeremiah Nyaga, had no option

but to table a bill in parliament leading to the formation of the TSC.²⁹ In addition to the functions set out under article 237 of the constitution³⁰, the functions of the Commission are set out in section 11 of the TSC Act.³¹

KNUT is one of the oldest surviving trade unions in the country. It was formed on 4th December, 1957.³² KUPPET is the younger institution, formed on 26th November, 1998.³³ KUPPET is oriented to the issues of secondary schools and tertiary institutions in the country. The two unions and one employer form the entirety of the industrial players within the education sector. The two have been engaged in a myriad of wrangles with the unions negotiating for, *inter alia*, inadequate remuneration, sub-optimal working conditions, low motivation, strained relationships and misunderstanding of grievances.³⁴ A comparative assessment of the achievements of the strikes vis a vis their original aims is merited

²⁷ Watila M Wekesa, 'Surviving State Corporatism in Kenya: The Case Study of the Kenya National Union of Teachers (KNUT), 1982-2013' (Master's Thesis, University of Nairobi, 2016), 41.

²⁸ *Ibid* 41.

²⁹ Dorothy Jonyo and Bonn O Jonyo, 'Teacher Management: Emerging Issues in Kenya' (2017) 4EJES 18, 34.

³⁰ n19, art 237

³¹ Teachers Service Commission Act, 2012.

³² Stephen M Mugho, 'Causes of the Recent Teachers Strikes in Kenya' (2017) 2 JPPA 28, 30.

³³ *Ibid*

³⁴ Irene Ngotho, Daniel Mange and Felix Kiruthu. 'Effects of Labour Disputes on Quality of Education in Public Secondary Schools in Mvita Constituency, Mombasa County, Kenya' (2019) 3 IJCA 243, 250.

to elucidate upon the efficacy of strikes. However, this article incorporates a new element into the definition of a successful strike to act as the yardstick.

5.0 THE MEASURE OF A SUCCESSFUL STRIKE

In an evaluation of the efficacy of various methods of dispute resolution in the public sector in Canada, Rose utilizes four criteria to characterize the successful strike based on its ability to:

- i. Provide continuance of essential services
- ii. Achieve timely settlements
- iii. Foster peaceful and voluntary settlements
- iv. Promote acceptable outcomes³⁵

The aforementioned metrics form the yardstick to be used in this article for the comparative assessment of all strike action in the education sector. This perspective offers holistic consideration of the strike action that considers all parties. As the strike action is not carried out within a vacuum, this author is mindful of other stakeholders in the education sector that are affected by the same and finds merit in including their position during and after the strike in weighing its overall impact.

³⁵ Rose B Joseph, 'Regulating and Resolving Public Sector Disputes in Canada' (2008) 50 JIR, 545.

6.0 A COMPARATIVE ASSESSMENT OF STRIKES IN THE EDUCATION SECTOR

| Year/Duration | Reason for Strike | Outcome | Continuance of Services | Timeliness | Peaceful | Acceptable outcomes |
|---|--|---|-------------------------|------------|----------|---------------------|
| 18 th September – 11 th October, 1962 | Litmus test for the union ³⁶ Test of national preparedness ³⁷ Free medical treatment Hardship allowances Revision of the salary structure Africanization of Ministry of Education | KNUT’s power was recognized TSC was formed Salaries were raised Trained Teachers given permanent and pensionable employment Uniform terms of service introduced Maternity leave without pay introduced ³⁸ | X | X | ✓ | ✓ |

³⁶ n27, 39

³⁷ Nicholas Wachira and Derrick Odhiambo, ‘The Politics of Teacher Unions: Strategies and Effects’ (2021) 5 IJRISS, 2454.

³⁸ n37

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| | | | | | | |
|---|---|---|---|---|---|---|
| 11 th – 13 th October, 1965 | Establishment of a single employer ³⁹ | Board of Inquiry formed to investigate the issues | X | ✓ | ✓ | X |
| 1 st – 3 rd November, 1966 | Implementati on of Recommendat ions of Board of inquiry | TSC formed | X | ✓ | ✓ | ✓ |
| 5 th November, 1969 (1- month go- slow) | Salary raises | Formation of Teachers' Service Remuneration Committee (TSRC) Recommendat ions by TSRC accepted | X | X | ✓ | ✓ |
| October 1997 (Lasted 12 days) | 300% salary raise | Signing of Legal Notice 534 of 1997 promising 150%-200% salary raise and five allowances; house, medical, responsibility, special, hardship and commuter. Only basic salary increase (34%) | X | X | ✓ | X |

³⁹ Kamau M, *Francis M. Ng'ang'a: Battles and Triumphs: A Portrait of a Modern Trade Unionist* (Transafrica Press 2009), 61.

| | | | | | | |
|----------------------------------|--|---|---|---|---|---|
| | | implemented and discontinued after one year. | | | | |
| October 1998 (Lasted 15 days) | Full Implementation of Legal Notice 534 of 1997 ⁴⁰ | Promise of implementation given but not acted upon. ⁴¹ | X | X | X | X |
| October 2002 (Lasted 2 weeks) | Implementation of Legal Notice 534 of 1997 ⁴² Fear that registration of KUPPET would weaken KNUT ⁴³ | Basic salaries increased to the exclusion of allowances | X | X | ✓ | X |
| January 2009 ⁴⁴ | Teachers demanded a lump-sum payment of Kshs 19 billion | Strike ended after promise to implement payment in three phases of 35%, | X | X | ✓ | ✓ |

⁴⁰ Weissman R (*IMF intervenes in Kenya teacher's strike*2000) <<http://www.hartford-hwp.com/archives/36/195.html>> accessed November 21, 2022.

⁴¹ Cook T, "Violent Attacks on Striking Kenyan Teachers" (*World Socialist Web Site* October 9, 1998) <<https://www.wsws.org/en/articles/1998/10/keny-o09.html>> accessed November 21, 2022. ⁴² Kibet L, "Kenya Teachers First Went on Strike When President Uhuru Kenyatta Was Toddler" *The Standard* (2015) <<https://www.standardmedia.co.ke/education/article/2000167577/kenya-teachers-first-went-on-strike-when-president-uhuru-was-toddler>> accessed November 21, 2022. ⁴³ Fadamana U, "Everything You Must Know about the Remarkable Teachers Strike Incidents in Kenya" (*AnswersAfrica.com* August 15, 2021) <<https://answersafrica.com/teachers-strike-incidences-in-kenya.html>> accessed November 21, 2022.

⁴⁴ n29, 35.

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|--|---|--|---|---|---|---|
| | 8 million learners affected | 35% and 30% respectively. | | | | |
| September 2011 (Lasted four days) | Inadequate staffing to facilitate the Free Primary Education program rolled out by the government ⁴⁵ | Commitment by government to hire 20000 teachers (8000 deficit) ⁴⁶ | X | X | ✓ | ✓ |
| 5 th January 2015 – 14 th January 2015 | Withdrawal of the 50% - 60% basic salary increment proposal (spread over four years) by TSC on advice of the Salaries and Remuneration Commission | The ELRC awarded teachers a pay rise of 50%-60% ⁴⁷ | X | ✓ | ✓ | ✓ |
| 1 st September 2015 – 25 th September | Lack of implementation of the award granted by Hon. M. | Strike suspended for 90 days as the TSC, KNUT, KUPPET and SRC, with the | X | X | ✓ | ✓ |

⁴⁵ n29, 35

⁴⁶ Mutambo A, “Kenya: Government to Hire 20000 teachers on a contract basis” (Legallaw.com2011) accessed November 21, 2022

⁴⁷ *TSC v KNUT & 3 others* [2015] eKLR (Petition No. 3 of 2015)

| | | | | | | |
|--|-----------------------------------|---|--|--|--|--|
| | Nduma in Petition 3 of 2015 | help of the CS for Labour, to appoint a neutral conciliator within 30 days and explore modalities of implementing the disputed award ⁴⁸ | | | | |
|--|-----------------------------------|---|--|--|--|--|

As displayed above, no single strike in the history of this country has met the threshold for what constitutes successful industrial action under the parameters set out herein. Interestingly, 62.1% of teachers aver that unions often achieve success in elaborating their issues.⁴⁹ While it cannot be gainsaid that acceptable outcomes have often been realized, the fact remains that the processes have been sub-optimal and present significant room for improvement as can be inferred from the table above. As long as strikes persist, learners will bear the brunt of lost man-hours, while unions will constantly grapple with the underhand tactics of the government. Over 75% of respondents agree or strongly agree that strikes prevent the completion of the syllabus and necessitate the hasty covering of syllabi to the detriment of many students:⁵⁰ The same was acquiesced by a 2019 study that also linked strikes to reduced performance, loss of motivation on the part of teachers and subsequent provision of low-quality education.⁵¹ In 2012, a strike in Kenyan

⁴⁸ *TSC v KNUT, KUPPET & AG* [2015] eKLR (Petition 72 of 2015).

⁴⁹ n37.

⁵⁰ Mutegi Teresa, 'Factors Affecting Coverage of Syllabus in Secondary Schools in Kenya: A Case Study Of Langata District Schools in Nairobi County' (Master's Thesis, Management University of Africa 2014).

⁵¹ n34, 252.

universities led to the graduating class doing so in 2013.⁵² The losses in man-hours also present a worrying picture for employers who also have rights and a reasonable expectation of continuous or pre-planned productivity. In fact, Kenya lost a total of 411,000 man-days lost due to industrial disputes in 2020.⁵³ On the flip side, unions and teachers themselves undergo a lot of victimization at the hands of a cash-strapped, and often arrogant government.

6.1 State Corporatism

Watila decries state corporatism as a key instrument in the crucifixion of teachers' unions. State corporatism/co-optation is defined as "a pattern of state-society relations where the state takes the role of structuring and regulating interest organizations."⁵⁴ The main strategies employed under state corporatism include the market mechanism, where the union is defanged via the strangulation of its collective bargaining power, and syndicalist harshness, which is the process by which an authoritarian regime limits the channels for the expression of the collectively formulated worker grievances. In pre-colonial Kenya, state corporatism was manifested via paternalistic legislation such as the Deportation Ordinance of 1949 and Compulsory Labour Act of 1949, which enabled the colonial government to keep a tight leash on union activity. Syndical harshness was a pronounced strategy in the Kenyatta regime. Case in point, the 1962 Industrial Charter bound the Kenya Federation of Labour, the overarching trade union body in the country that bound employers and labour unions, to resolve disputes via negotiation, conciliation and voluntary arbitration, negating the possibility of strike action.⁵⁵ Similarly, the Trade Dispute Act of 1965 dictated 21 days' notice to the Minister for Labour as a prerequisite for legality, despite which

⁵² Esendi Lynda, 'Alleviating Strike Actions in Kenya's Healthcare Sector Through Policy and Systems Reforms' (Master's Thesis, Central European University, 2017), 7.

⁵³ Kamer L, "Kenya: Number of Labor Strikes" (*Statista* November 22, 2022) <<https://www.statista.com/statistics/1298463/number-of-labor-strikes-in-kenya/>> accessed December 2, 2022.

⁵⁴ n27.

⁵⁵ Industrial Relations Charter (adopted October 1962, between the government, Federation of Kenya Employers, KFL and COTU. (Revised 30th April, 1984).

he/she could void the strike at will.⁵⁶ A 1971 amendment empowered the Minister for Finance to issue wage guidelines to the industrial depending on the state of the economy, meaning that economic hardship could always be cited as a reason for withholding salary increments. This strategy bears poignant congruence to the law ‘created’ in Civil Appeal No. 195 of 2015 by Hon. Githinji J.A.,

“...the advice by the SRC under article 230(4)(b) of the constitution is binding and that SRC has a role to play in collective bargaining agreement on matters relating to remuneration and benefits of public officers, including teachers.”⁵⁷

The market mechanism was deployed with the formation of the Central Organization of Trade Unions (COTU) as the new umbrella union, whose constitution was formulated by the AG, leadership (i.e., the secretary general) employed and sacked at the discretion of the president all alongside extensive

powers handed to the minister of labour over the union.⁵⁸ Former president Moi made good use of the same antics, preferring to emasculate unions by sacking anti-establishment leaders such as Paul Muite from the Law Society of Kenya, and the appointment of Joseph Mugalla, a government puppet, as head of COTU in the 1986 ‘election’.⁵⁹ The market mechanism emerges as a perpetual aspect of the state, with the Kibaki regime having attempted to introduce a code of regulations that would prevent school heads and their deputies from participating in union

matters. Watila avers that the court became an instrument with which the Kibaki regime meted out extreme syndicalist harshness, citing Lady Justice M. Onyango’s declaration of the 2012 strike in contravention of section 76 of the Labour Relations Act despite its adherence to due process.⁶⁰ The same could be inferred from the decision by the Court of Appeal in 2015 to set aside the 50%-60% pay rise awarded by the ELRC to teachers.⁶¹

Additionally, Hon. Justice Ongaya was

⁵⁶ The Trade Disputes Act (No. 9 of 1964) (Repealed).

⁵⁷ *TSC v KNUT & 3 others* [2015] eKLR (Civil Appeal No. 196 of 2015), para 35(2).

⁵⁸ Goodman SH, “Trade Unions and Political Parties: The Case of East Africa” (1969) 17 *Economic Development and Cultural Change* 338, 342.

⁵⁹ n27, 33.

⁶⁰ *TSC v KNUT & KUPPET* [2012] eKLR (Industrial Court of Kenya Cause 1539 of 2012).

⁶¹ n57.

quick to stop strike action expected to start on 2nd January 2019.⁶² The foregoing paints a gloomy picture of industrial action in Kenya, but recent trends have operated in favour of peaceful deliberation and mutually beneficial outcomes.

6.2 Collective Bargaining Agreements

Wachira and Odhiambo rightly note that “The fact that the gains through strikes can be rescinded by the government as was in the case of the 2015 strike clearly shows that other forms of negotiation like CBA need to be given more thought.”⁶³ Teachers’ unions, cognizant of the same and desirous of implementing the wishes of Hon M. Nduma, who said “The court desires, that the era of acrimony and regular national strikes by teachers will be replaced by an era of collective bargaining in a four year cycle,”⁶⁴ as well as embodying the words of Hon A. Jorum, “...the strike is not good for either of the protagonists. For the teachers it creates in them the moral dilemma of leaving the children whom they love and sacrifice so much to teach, suffer...,”⁶⁵ seem to have solidified the practice with the signing of the 2017-2022 CBA. According to a 2021 survey, 63.1% of teachers are of the opinion that CBAs are the best form of labour negotiations.⁶⁶ However, CBAs have not solved the problems leading to teachers’ strikes. In fact, many protest their use. In the fore mentioned survey, majority of the respondents (92.5%) agreed that lack of adherence to the collective bargaining agreement influenced the extent of participation of teachers in the current teachers strike.⁶⁷ Furthermore, Smith finds “no strong evidence of an acceleration in teachers' salary gains relative to other groups as a result of CN (Collective Negotiations).”⁶⁸ While a proposal is fielded for the assessment of CBAs using metrics such as curriculum and general school policy and issues such as class size, adequate staffing vis a vis

⁶² *TSC v KNUT & Ministry of Labour and Social Protection* (Petition 151 of 2018).

⁶³ n37, 597.

⁶⁴ n47, para 282.

⁶⁵ n48, para 66.

⁶⁶ n37, 597.

⁶⁷ n32, 36.

⁶⁸ Smith AW, “Have Collective Negotiations Increased Teachers' Salaries?” (1972) 54 *The PhiDelta Kappan* 268.

staffing demands, teacher evaluation and physical facilities, the stage remains open for other methods that may harmonize the foregoing considerations alongside the weighty financial issues.

7.0 SOCIAL DIALOGUE IN THE SOCIAL SECTOR

Social Dialogue stands for all types of negotiation, consultation, labour dispute resolution and exchange of information between or among representatives of employer, workers and government on issues of common interest.⁶⁹ Due to the breadth of the phenomenon, this paper will adhere to ADR in the interest of brevity. By elucidating the successes of ADR, this section makes the point that social dialogue is a potentially beneficial tool in ending the incessant strike action and stagnant wage regimes in the social sector.

7.1. Track Record of Alternative Dispute Mechanisms in Settling Trade Disputes

The need to utilize has been made salient in the preceding section. It has also been aptly captured in the Kenyan context by Odhong, Were and Omollo who contend as follows, *“A modern industrial relations system, which is proactive and responsive in nature would reduce the cost of providing and accessing justice, enhance confidence of parties to the industrial disputes in the settlement procedures, and promote compliance and mutuality between the parties. It is a sure way of preventing and minimizing interruptions to businesses and production due to industrial action as it targets improvement in labour management relationships and organizational effective.”*⁷⁰

It is imperative that this article interrogates the feasibility of social dialogue as a means of settling trade disputes to form a substantial basis for recommending the same. The uptake of ADR in industrial disputes is not a nascent phenomenon. In 1955, Tom Mboya invoked the Trade Disputes Arbitration Ordinance for the first

⁶⁹ Ha BT, “The Role of the Trade Union in Social Dialogue in Vietnamese Enterprises” (thesis 2018), 8.

⁷⁰ Emily O, Susan W and Jacob O, ‘Re-thinking Industrial Relations for Enhanced Organizational Performance in Kenya’ (International Conference on Sustainable Research and Innovation, Norway, 2014) < <https://sri.jkuat.ac.ke/jkuatsri/index.php/sri/article/view/112> > accessed 2 December 2020.

time to settle the Mombasa Dock strike, and secured a 33% wage increase.⁷¹ Roche undertakes an evaluation of collective ADR practices (defined as practices such as pre-dispute ‘assisted bargaining’ by agreed facilitators, ‘interest-based bargaining’ (IBB), provisions for collective mediation and adjudicative or arbitral arrangements) in the Irish context.⁷² The upshot is that collective ADR reduced dependence on labour courts, cessation of strikes and industrial action in some cases, and incontrovertible absolute success in major technical and complex disputes on both rights and interests. In the United States, collective ADR has been found effective and expedient, albeit with an emphasis for form rather than substance.⁷³ In the United Kingdom, collective ADR has been associated with lower incidence of industrial disputes, higher levels of cooperation, more effective employee representation and flexible work practices.⁷⁴ Noh and Hebdon aver that voice mechanisms such as ADR enable the reliable resolution of workplace grievances.⁷⁵ Ultimately, collective ADR emerges as an expeditious, non- disruptive and effective means of dispute resolution.

8.0. CURRENT FRAMEWORK OF ADR IN KENYAN LABOUR LAW

The Labour Relations Act facilitates ADR under section 58, worded as follows, “*An employer, group of employers or employers’ organisation and a trade union may conclude a collective agreement providing for—*
the conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties; and

⁷¹ Gilmore LI, “Organised Labour and Government Controls in Kenya” (1975) 11 EALJ 1.

⁷² Roche WK, “How Effective Is Private Dispute Resolution? Evidence from Ireland” [2022] IJL. ⁷³ Thompson C, ‘Dispute Prevention and Resolution in Public Services Labour Relations: Good policy and Practice’ (Geneva: ILO, 2010), Sectoral Activities Programme Working Paper.

⁷⁴ Metcal D and Milner S, “Final Offer Arbitration in Great Britain: Style and Impact” (1992) 142 NIER 75.

⁷⁵ Noh S-C and Hebdon R, “Unbundling Workplace Conflict: Exploring the Relationship between Grievances and Non-Strike Industrial Actions and the Moderating Effect of Voice Mechanisms” [2022] JIR 002218562210997.

the arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by the agreement between the parties.”⁷⁶

9.0. RECOMMENDATIONS

There is merit in harnessing the power of ADR to empower employment relations. Teachers’ unions should embrace ADR as a means of securing better working conditions for their members. The teachers’ unions should strive to engage the government through negotiation, mediation, and arbitration before resorting to strike action. The benefits of ADR starkly contrast the costs of strike action, and the onus is upon representatives of the unions and TSC to evaluate the most favourable outcomes which logically point to alternative processes.

The current ADR infrastructure creates the starting point for the sanding of industrial relations in the education sector. However, this article does not make the mistake of declaring ADR the ultimate solution to the ills plaguing the social sector. Indeed, ADR has been faulted severally. First, ADR fails where there is skewed bargaining power between the parties involved or a defiant disputant

engaged.⁷⁷ Thus, the Kenyan government, notorious for failing to keep its promises with the 1997 pay agreement being a poignant example, is liable to collapse social dialogue in the social sector. Secondly, resorting to ADR does not guarantee that the parties will reach a consensus. The attendant costs of hiring a third party also mean that ADR poses a higher cost to the disputants.⁷⁸ Therefore, several developments should be adopted to optimize ADR in unionism.

The first is in relation to the provisions of the Arbitration Act. Gachie extensively considers the finality and binding nature of the arbitral award and concludes that circumstances leading to the setting aside if an arbitral award are very limited and

⁷⁶ n20, s58.

⁷⁷ Bushe B and Budeli-Nemakonde M, “The Efficacy of Alternative Dispute Resolution (ADR) in Labour Dispute Resolution: A Critical Comparative Analysis of Botswana, South Africa and Zimbabwe” (thesis 2019), 65.

⁷⁸ *Ibid.*

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confined to those set out in section 35 of the Act.⁷⁹ The upshot of section 35 of the Arbitration Act is that only very narrow procedural technicalities may premise setting aside the award.⁸⁰ In *Anne Mumbi Hinga v Victoria Njoki Gathara* the court held that the finality of the award was tailored to restrict the grounds of judicial review to those specified in the Act.⁸¹ However, the finality of the arbitral award has been impugned for its capacity to mete injustice where reasonable grounds of appeal exist.⁸² However, the Supreme Court has pronounced its position on the same in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*, ruling that the Court of Appeal has jurisdiction to hear appeals on arbitral awards.⁸³ In view of the finality of such an award, unions are advised to consistently include clauses that create sufficient leeway of the parties to seek recourse. As stated in *EPCO Builders Limited v Adam S. Marjan Arbitrator & Another*, resorting to litigation would only lead to an exacerbation of the lengthy court processes and backlog that ADR is designed to avoid.⁸⁴ In such a case, parties should resolve to mediation as specifically stipulated by a clause in any consents for arbitration that they subject themselves to. Moreover, the privacy and confidentiality of ADR processes, although one of its prized aspects, may have to be dispensed with. Ouko states that the struggle for confidentiality must take precedence vis a vis the need for transparency where matters of public interest are concerned.⁸⁵ Therefore, any alternative dispute resolution commenced within social sector must, out of necessity be recorded and relayed to the public to ensure that there is no undue influence introduced or disagreeable outcomes presented. Ensuring that teachers and other employees in

⁷⁹ Gachie A, “Finality and Binding Nature of the Arbitral Award” (2017) 13 The Law Society of Kenya Journal 81.

⁸⁰ 1995 (Revised 2012).

⁸¹ [2009] eKLR.

⁸² Ouko A, “Arbitration Act 1995: Is a Reform Overdue?” (*LinkedIn* March 14, 2022)

<<https://www.linkedin.com/pulse/arbitration-act-1995-reform-overdue-austin-ouko>> accessed December 5, 2022.

⁸³ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* [2016] eKLR.

⁸⁴ No 48 of 2000.

⁸⁵ n81.

the social sector are in the know concerning their futures will provide them with the necessary peace of mind to carry out their jobs.

Lastly, while this article has made the case for the adoption of ADR as a rule of engagement between teachers' unions and their employer, it poses the question of how to evaluate the success of ADR in relation to the same. The parameters provided by Rose of continuance of services, timeliness, peace and acceptable

outcomes should guide such processes.⁸⁶ Players in the social sector should agree on what constitutes a timely settlement to avoid delaying tactics on any part as well as what consists acceptable outcomes to avoid short-changing. If approached with trust and the mutual desire to make things work, alternative dispute resolution presents a path to a strengthened social sector.

⁸⁶ n81.