UNIVERSITY OF NAIROBI
DEPARTMENT OF SOCIOLOGY

CHALLENGES OF INDUSTRIAL ARBITRATION IN A LIBERALIZED LABOUR SECTOR: A CASE STUDY OF INDUSTRIAL COURT IN KENYA.

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RESEARCH PROJECT REPORT SUBMITTED TO THE UNIVERSITY OF NAIROBI, FACULTY OF ARTS, DEPARTMENT OF SOCIOLOGY FOR PARTIAL FULFILLMENT OF THE REQUIREMENT FOR MASTER OF ARTS DEGREE IN SOCIOLOGY (LABOUR RELATIONS MANAGEMENT)

November 2006
I, Peter Maina Mbuthia do solemnly declare that this study was conducted by myself and has not been submitted to any Institution of learning for examination purposes or publication.

Signed by I. on this day of 22/11/2006

We confirm that we have supervised this work and are satisfied that it is the above named student's original work.

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Date: 22/11/2006

2. Mr. Beneah Mutsoso

Sign: [Signature]
Date: 22/11/2006
Dedication

To my Wife, Joyce Mwihaki Njau, Our Children Muhorø, Njau, Nyawira and My Parents
the late Mr. William Mbuthia Macharia and Mrs. Edith Muthoni Mbuthia
The writing of this project work took time and money. If this project work was left on my own I could not have finished. It is only on these bases that I acknowledge a number of people and institutions that contributed positively to this write up.

First and foremost am thankful for the support of my family particularly my wife Mwihaki Njau our sons Muhor Maina and Njau Maina not forgetting our daughter Nyawira for the support and encouragement they gave me.

I also appreciate the professional advice and constructive criticism obtained in the course of this project from my supervisors Dr. Chepkonga and Mr. Mutsoso of the University of Nairobi, department of sociology who encouraged, corrected and guided every chapter of this work.

In the course of writing of this proposal I obtained invaluable support from individuals and relevant institutions and of particular Mrs. Alice Tabu, Chief industrial relations officer of ministry of labour and resource development and Mr. J. H. Mbuthia of the industrial court. In conclusion I thank God almighty for strength and guidance.
The main aim of this study was to identify the challenges of industrial arbitration in a liberalized labour sector, a case study of industrial court. The specific objectives addressed by the study were:

(a) To investigate the causes of industrial disputes with particular reference to disputes referred to industrial court.

(b) To determine the impact of liberalization of the labour sector on industrial court arbitration.

(c) To ascertain how the changing face of trade unions has affected industrial court arbitration.

(d) To determine the impact of change in the management styles by employers on industrial court arbitration.

A total of 25 respondents were selected through purposive non-probability and snowball sampling techniques. The key instrument for data collection was unstructured interviews that were administered to court officials, FKE, COTU and ministry of labour officials. Apart from the unstructured interviews, other data collection methods included direct observation, and review of available records/documents. Data analysis was done qualitatively and descriptive statistics was used to present the data collected. The study found out that industrial court arbitration is tripartite in nature, thus the government, unions, and employers must play their part adequately for industrial peace to be achieved. However, with the liberalization of the labour sector, the study revealed that the industrial court is faced with diminished powers, and that its’ decisions are increasingly being questioned by employers.
Further more the findings revealed that trade unions in the era of a liberalized of labour sector are faced with diminishing bargaining powers due to among others, loss of members, employers' refusal to recognize unions, and their adoption of new management systems. All these factors have impacted negatively in the contents of the collective bargaining agreements and representation of workers at the industrial court.

From the findings it was concluded that liberalization has a negative impact on industrial court arbitration. That employers,' are increasingly turning their backs on court rulings by resorting to civil courts to quash/or repeal earlier industrial court rulings. That the court is faced with the challenge of determining disputes of an economic nature due without data on company productivity, inflation rate and consumer price indexes. This limitation predisposes the court to make rulings that some times could be contrary to its mandate. The court is also faced with the challenge of lack of adequate finances, personnel and office space among others.

Deriving from the foregoing findings and conclusion, it is recommended that the Government should initiate appropriate legal reforms on labour laws so as to reflect the changed labour environment. That the industrial court should be made effective through training of court staff, expansion of the court, hiring of more staff both at the ministry of labour and the court and, last but not least through increased budget allocations. A further study was also felt necessary towards this subject in future to cover contents not covered here.
<table>
<thead>
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<th>Abbreviation</th>
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<tr>
<td>ACAS</td>
<td>Advisory, Conciliation and Arbitration Service</td>
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<td>CPI</td>
<td>Consumer Price Index</td>
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<td>COTU (K)</td>
<td>Central Organization of Trade Union, Kenya</td>
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<td>F.K.E</td>
<td>Federation of Kenya Employers</td>
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<tr>
<td>I.M.F</td>
<td>International Monetary Fund</td>
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<tr>
<td>I.L.O</td>
<td>International Labour Organization</td>
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<tr>
<td>J.C.C</td>
<td>Joint consultation council</td>
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<td>KANU</td>
<td>Kenya African National Union</td>
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<tr>
<td>K.F.L</td>
<td>Kenya Federation of Labour</td>
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<tr>
<td>KFRTU</td>
<td>Kenya Federation of Registered Trade Union</td>
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<tr>
<td>K.N.U.T</td>
<td>Kenya National Union of Teachers</td>
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<td>KUPPET</td>
<td>Kenya Union of Post Primary Teachers</td>
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<tr>
<td>N.A.R.C</td>
<td>National Rainbow Coalition</td>
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<tr>
<td>MLHRD</td>
<td>Ministry of labour and human resource development</td>
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<tr>
<td>S.A.P.S</td>
<td>Structural Adjustment Programmes</td>
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<tr>
<td>U.A.S.U</td>
<td>University academic Staff union</td>
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<tr>
<td>U.N.T.E.S.U</td>
<td>University non teaching staff union</td>
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“Life in its various manifestations is a process and as such cannot remain static; changes are bound to take place. In any country, the system of solving disputes between organized workers and the employers reflects the state of advancement achieved in that country. It is also a reflection of the attitude of the inhabitants at large to the aspirations of their colleagues in the wage economy, social life being a process, it is inevitable that new problems and new pressures should arise and the institutions which have been entrusted with such an important function as industrial arbitration and the persons who are the heads of such institutions must be prepared to change with times to accommodate new challenges otherwise they will outlive their usefulness” (Cocker, 1981).
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CHAPTER ONE: INTRODUCTION

1.1 Background Information

Industrial arbitration may be considered as machinery for solving industrial disputes among employees on the one hand, and between employers and employees on the other. It can take the form of mediation, conciliation, and arbitration, by shop steward and management, Ministry of LHRD officials or Industrial Court. There is the informal arbitration, which takes place at work place and the formal arbitration, which takes place after union branch official writes to the minister of LHRD.

An analysis of industrial arbitration in Kenya reveals a system, which is weak and unable to tackle the challenges of a developing economy. All the actors, that is: trade unions (COTU), Federation of Kenya Employers (F.K.E), and the government face challenges that limit their effective participation in industrial arbitration.

Nicol (1972) says that industrial arbitration may be considered as the process that begins with a claim, by employees (usually represented by a trade union) or rarely by an employer. The claim creates an industrial dispute, which is resolved either by negotiation, if this fails, by mediation and conciliation, and if there is no agreement, and then there is a reference to arbitration.

Cocker (1981) points out that, Industrial Arbitration is inter-linked with the freedom of association and the process of free collective bargaining. In Kenya, industrial arbitration can be traced to the late 1880’s when European missionaries settled in East Africa. The
The colonial economy was organized for the exploitation of surplus resources to facilitate capital formation in Britain.

This meant that labour whether forced or free was increasingly exploited. This, capitalist exploitation created a working class who later expressed demands for better pay and working conditions. Faced with low wages and poor working conditions on settler farms and industries, the formation of trade unions was inevitable. Hence the emergence of Industrial Arbitration after the First World War.

Muthamia (2004) observes that, the rise of trade unionism in Kenya was due to the return of African soldiers who went to fight in the two world wars. The African soldiers enlisted to fight abroad came back with experience after learning new ways of life. After experiencing different working conditions away from their home country, they tried to resist the white settlers upon their return. The militant workers and their awakening to a new way of life, work place activism led to the formation of the first trade union organization in the 1940’s.

Singh (1952) argues that due to the absence of the necessary consultations and dialogue, the wage earners resorted to strikes, and other forms of civil disorders, which were illegal. This therefore necessitated the formation of Federation of Registered Trade Unions (KFRTU) in Kenya in 1950, with the aim of establishing a constitutional struggle for better wages and working conditions. This unrest was operative mainly in the railways and posts and telecommunication sectors where workers were more educated, receptive to unionization and more sensitive to racial discrimination.
According to the Daily Nation of May 6th 2006, the first trade union to be formed in Kenya was the East Africa Indian National Congress (EAINC), which was established in 1914 by immigrant Indian workers. Its aim was to fight against discrimination by colonial authorities. Unfortunately, the First World War broke out, and when Germans bombed the railway line connecting Kenya and Tanzania at the border, the British falsely charged EAINC members with conspiracy to help Germans. Five of its leaders were charged in a Voi court in 3rd December 1915 and within two hours, four of them had been sentenced to death.

The next day they were taken to Mombasa, where one of them was hanged along the streets of Mombasa old town. Later in 1937, Makhan Singh aged only 25 years, founded the labour trade union, with a view to fighting against policy discrimination on native Kenyans. On May 1st 1950, there was a workers strike on Labour Day over establishment of an all white controlled council to run Nairobi. This was organized by the East African Trade Union Congress (EATUC), founded a year earlier by Makhan Singh as an umbrella body of six trade unions.

In view of this background it is evident that industrial arbitration was not founded on the basis of a desire to establish a conducive working environment or limiting strikes and lock out, but to fight for just human laws for Africans and to ensure continued supply of cheap labour for the settlers. The system was not voluntary for both parties but circumstances demanded that both parties sit and dialogue.

Hoffenberg and Amsden (1970), note that the challenges of industrial arbitration can be traced to the early years of colonial history when the Kipande system was introduced. This was a work certificate, which all male Africans were supposed to carry. It limited
their movement and was designed to locate deserters. However, this system was against the workers rights and freedom of movement. African leaders like Harry Thuku led a protest against the Kipande system, thus culminating in the death of 22 Africans in Nairobi in 1924.

It is important to note that in the early years of colonial history, negotiations and agreements were hard to come by. This is a legacy that haunts Industrial arbitration to this day. This same legacy has seen some export processing zones (EPZ) denying workers the right to union representation.

The involvement of trade union officials in the struggle for independence did not further the interests of Industrial Arbitration.

Mindo (2003) contends that, Africans in Kenya were forbidden to engage in political activities during the emergency period around 1952. The trade union movement therefore provided the only platform for African workers to speak out on the basic issues involving human rights.

Ojuka and Ochieng (1975:189) points out that in the early 1950's the Kenya Federation of Labour (K.F.L) took advantage of the opportunity to express the yearning of the African population for freedom. This involvement in politics has haunted trade unions to this day.

Thus successive governments view trade unions as competitors for political power. Most employers also view trade unions as being more of political pressure groups instead of
genuine workers' representatives. This remains a challenge to industrial arbitration to-date.

The period preceding independence (i.e. 1958 to 1962) witnessed increased industrial disputes, which were difficult to distinguish from politics. This led the colonial government to formulate a document in 1962, which was supposed to separate agitation for labour matters from the fight for freedom. This document was referred to as the Industrial Relations Charter. This charter defined the nature of the social contract between the parties involved in industrial relations, namely: the government, employees and employers. It also made provision for a recognition agreement, which forms the basis for collective bargaining process.

The three social partners, that is, the Government, F.K.E and Central Organization of Trade Unions of Kenya (COTU, Kenya), started tripartism. Tripartism approach is used in resolving labour related issues whereby the government of Kenya, COTU and F.K.E, sit together to deliberate on all labour disputes until a settlement is reached. However, employers, some of whom refuse to even recognize unions, rarely honour this social contract. Similarly some rebellious unions might prefer to call for strikes instead of negotiating. Non-conformity from both sides has proved to be a challenge to Industrial Arbitration system in Kenya.

Additional to this problem is that, the Industrial Relations Charter cannot be enforced, as it is a voluntary contract between the social partners. However, available studies by
Cocker (1981), Aluchio (1998) and Damachi (1979) have not established the impact of this scenario to industrial arbitration. This is a knowledge gap, which this research tried to fill.

After independence in 1963, the trade union movement did not grow as expected, partly because of the continued engagement in politics by the trade union officials. On its part, the post-colonial government did not help matters either for instead of nurturing trade unionism and industrial arbitration, it resorted to weakening the trade unions through political interference and by engineering trade unions mergers with KANU, which was the then de-facto ruling party.

Muthamia (2004) argues a case in point that, when KANU won the 1963 elections the Minister for Labour was empowered to appoint the Secretary-General of Kenya Federation of Labour (K.F.L). The government also went further and warned unions that they must curtail union militancy for the sake of economic growth. Ever since then, most trade union leaders have used trade union leadership as a springboard to politics. The net effect is that the trade union leadership has always poorly represented workers. This has proved to be a constant challenge to industrial arbitration.

Industrial Arbitration was further weakened in early 1990’s by the liberalization of the labour markets and the introduction of multiparty democracy in the country. The 1994 Finance Amendment Bill for instance sought to give employers a free hand whenever they want to rationalize labour as opposed to seeking authority from the Industrial Court, as was the practice. “Recently, the Minister for Finance indicated that future wages would be based on productivity for both private and public sector”. According to the
Minister, Kenya’s average cost of unskilled labour in apparel and garment sector is Kshs. 3,420 a month, whereas that of competing suppliers of China and India is Kshs. 2,660, (Daily Nation, 2005). Consequently, to avoid loss of jobs the minimum wages will be adjusted after every two years in line with productivity. However, this poses a major challenge to industrial arbitration in the country, in that it may be difficult to fix wages through the traditional collective bargaining procedures.

Further more, adoption of new management styles by employer organizations remains a challenge to industrial arbitration. Most employer organizations in Kenya adopted new management styles in early 1990’s to remain globally competitive. Some of the management concepts and styles adopted were, employee involvement, participation and empowerment, total quality management, joint consultation, performance based contracts, and outsourcing of non-core activities. These styles emphasize on employee training on organizational goals and missions, employee royalty and empowerment. They also emphasize on individualism rather than collectivism. The result, employees have become well trained and versatile. This has further reduced the demand for union representation.

Another factor, which has challenged industrial arbitration, is the increased democratic space. Most union officials use this freedom to form splinter unions, for instance, Kenya Union of Post Primary Teachers (KUPPET) split from Kenya National Union of Teachers (KNUT) in 1998. Thus causing perennial squabbles and turf wars. This development has contributed to the weakening of industrial arbitration whereby instead of unions concentrating on their core objectives they resort to bickering among themselves on issues of no importance. Besides, unions that are actors in the arbitration system do not
have time for training their leadership in areas such as advocacy and mobilization, negotiations, leadership skills and labour laws. Hence, their contribution in arbitration forums falls far below expectation.

Industrial arbitration as a conflict resolution mechanism has been eroded further by the introduction of Structural Adjustment Programmes by the Government of Kenya through advice from the World Bank and International Monetary Fund (I.M.F). Some of the recommendations by the World Bank and IMF to the government were aimed at reducing expenditure in social services like health, education, and also divesture from the government parastatals. This resulted in massive lay offs, decline in standards of living of workers and a rise in crime rate among others.

The government has consistently been unable to pay competitive salaries and improve working conditions for civil servants. This has resulted in the weakening of industrial arbitration systems since the social actors have been unable to effectively participate in industrial arbitration. The civil service is an important player in industrial arbitration mechanism. However an unmotivated and demoralized civil service can affect the entire arbitration system. This study endeavored to ascertain the effects of the introduction of the Structural Adjustment Programmes on Industrial Court arbitration.

Another factor that poses a challenge to industrial arbitration in Kenya is the labour laws. These laws are not in tandem with the liberalized labour sector and therefore hinder industrial arbitration. Some of the laws on industrial arbitration and industrial relations are the Employment Act cap 226; Regulation of wages and conditions of Employment Act cap 229; Trade Unions Act cap 233; Trade Disputes Act cap 234; Workmen’s
Compensation Act cap 236, factories and places of work Act cap 514. These laws are archaic and colonial; they neither protect worker's basic human rights nor employers' economic interests.

A look at some of these labour laws reveals their inability to enhance industrial peace. For instance, the regulation of wages and conditions of employment act provide for the government to control wages through issuance of minimum wage guidelines, but unions and employers have complained that this is not in tandem with the liberalized labour sector. Unions contend that employers deliberately keep wages down in situations where higher wages would suffice.

Further, the NSSF and retirement benefits acts require an employee to access his or her benefits upon reaching retirement age at either 55 years in the public service, or 60 years in private sector. However with the adoption of new management styles by employers where employment by contract and redundancies are the norm, unions have agitated that employees should be allowed to access their full benefits upon leaving their employer.

Finally with the adoption of SAPs, where, among others the government imposed a freeze in employment and cut in wage bill in the public sector, has resulted to non-compliance of labour laws by employers. Due by shortage of labour inspectors, the question then arises: have the labour laws played their rightful role in industrial arbitration in the era of a liberalized labour market? This forms a critical research question in this study.
1.2: Statement of the problem.

Milkovic and Bondreu (1988), points out that, dealing with unions is frequently an emotionally charged activity. Few employers and/or employees get as emotionally involved over recruitment, methods or selection techniques, as they do over labour relations. The reason is that labour relations and collective bargaining go to the heart of the employee relation’s problems of hiring, paying, judging performance and that of firing and/or dismissals.

Here in Kenya, industrial arbitration has not been that cordial. According to the Ministry of Labour and Human Resource Development, (MLHRD) there were 2,323 industrial disputes in 2003, compared to 892 in 2002. The number of strikes increased from 46 in 2002 to 161 in 2003, representing an increase of 250%. The number of workers involved in these strikes in the year 2003 was 62,312 compared to 18,788 in 2002, an increase of 231.6%. In 2004 employers lost 1,108,216 working hours compared to 22,441.2 in 2002.

Another worrying trend is the continued decline of the number of collective agreements registered with the industrial court. In 2002 there were 309 collective agreements registered with the industrial court compared to 290 in 2003, and 265 in 2004. However, it is not clear yet whether this decline is due to adoption of new management styles by employer organizations, restrictive labour laws, liberalization of labour markets or ineffectiveness of industrial court. It is therefore important to establish the real causes of this decline.

Conventionally, the industrial court is entrusted with the responsibility of limiting strikes and lockouts by ensuring agreement and adherence to procedures of disputes settlement between disputing parties. More importantly, the court is supposed to ensure continuity
and conformity of labour laws and standards. However, the continuous upsurge of trade disputes continues to be a challenge to industrial arbitration in Kenya. In that it reflects a system that is weak and unable to play its role effectively.

Cocker (1981), states that, the Ministry of Labour officials should avoid delaying cases before referring them to the industrial Court. Delays at senior management level at the ministry, and delays at the industrial court, may facilitate strikes by unions. Failure by employers to recognize labour unions continues to be a challenge to industrial arbitration and yet Cocker (1981), emphasizes that, for arbitration to be successful employers must work with unions to remove the fear that unions are time wasting and are interested in limiting the profit of employers. He says that some employers have refused to recognize unions and are therefore unable to establish channels for solving industrial disputes.

In view of this background, it is not clear whether the upsurge of industrial disputes is due to failure by institutions responsible for disputes resolutions to adapt to changing environment or whether there are other reasons. This is a knowledge gap, which this research endeavored to fill.

According to Mindo (2003), global trends on finances, industrial decisions and management styles have in the last two decades conspired to undermine achievements of trade unions. The net effect has been a weak trade unions movement, which is even unable to organize training for its members and officials.

Over the years, trade unions have turned to the industrial court for arbitration of industrial disputes but court delays and employers disregard of court decisions have left many
workers with little respect for union officials and the arbitration system. However I.L.O (1978), reports that relevant training of trade union officials can improve the quality of collective bargaining and effective performance of duty.

Labour laws also continue to be a challenge to industrial arbitration in Kenya. A case in point is the Trade Dispute Act, cap 234 and Trade Union Act cap 233, both of which give enormous powers to the minister and Registrar of trade unions. The Minister has the discretion to declare a strike, whether threatened, or existing illegal, if he is of the opinion that the dispute settlement machinery available has not been exhausted. While the trade disputes Act, cap 234 provides for a strike as a tool of collective action, it imposes obstacles on its use, hence it is almost impossible for any union to call a lawful strike.

The Trade Union Act provides for a registrar of trade unions. However, this registrar is a ministerial appointee and has power to allow or deny registration of a trade union. These powers can be misused by the appointing authority, (Ministry), to deny workers representation.

Cocker (1981) further argues that, labour laws in Kenya lack a balance between intervention in the interest of social protection and non-intervention in the interest of efficiency through market forces. This research is therefore aimed at establishing the impact of labour laws on industrial arbitration and how they affect the operations of the industrial court.

The process of industrial arbitration starts with freedom of association and free collective bargaining. The employees have freedom to join unions of their choice and employers must recognize these unions before collective bargaining can begin. Unresolved disputes
at company level are referred to or registered with the ministry of labour. After which the minister can appoint an arbitrator or investigator, board of inquiry or forward the dispute to the industrial court. Following advice from a tripartite committee consisting of minister’s representative (chief industrial relations officer) as chairman, and a representative each from FKE and COTU (K).

Cocker (1980) however notes that, if the minister refuses to accept a dispute, the aggrieved party can appeal to the industrial court.

This research was guided by the following research questions:

1) What causes the frequent industrial disputes that are referred to industrial court for arbitration?

2) In what ways has the liberalization of the labour sector affected industrial court arbitration?

3) How has the changing face of local trade union movement affected industrial court arbitration?

4) How has the change of organizational management styles, affected industrial court arbitration?

1.3: Objectives of the study.

The overall objectives of this study were to identify the challenges facing the industrial arbitration in the context of a liberalized labour sector.

The specific objectives were:

1) To investigate the causes of industrial disputes with particular reference to disputes referred to the industrial court.
2) To determine the impact of the liberalization of the labour sector on the industrial court arbitration.

3) To find out how the changing face of trade unions has affected industrial court arbitration.

4) To determine the impact of change in the management styles on industrial court arbitration.

1.4: **Justification of the study.**

Industrial arbitration in Kenya has not received the attention it deserves owing to its importance in ensuring industrial peace, creation of employment and economic development. Destructive strikes and boycotts effect the economy negatively. An economy, which is strike prone, does not attract investment. The Kenyan economy is not growing, as it should. There is need therefore for both local investment and foreign direct investment to reverse unemployment, poverty and the impact of HIV/AIDS. If however industrial conflicts are not checked, the government’s goal of eradicating poverty and economic development will not be achieved.

Aluchio (1998), Natal (1986), Ukandi (1979), among others do not link the relationship of actors in industrial arbitration (i.e. the government, Trade unions, and employers association) and yet the actions of any one of these actors can affect the entire arbitration System. This study therefore attempts to provide an in-depth understanding of how the actors influence each other in the process of industrial arbitration, in the context of a liberalized labour sector. It is hoped that through the findings of this study some light can be shed on the need to strengthen the industrial relation system in Kenya.
Further more previous studies by Owiro (1980), Cocker (1981), Aluchio (1998), and Ukandi (1979) have only focused on the role and place of collective bargaining and the industrial court as government interventions to ensure harmonious industrial relations in post independent Kenya and the in context of a controlled economy. However, all these studies have not looked at the challenges facing industrial arbitration in a liberalized labour sector in Kenya. This therefore justified the need for this study.

Secondly, at the policy level, the findings of the study should provide practical solutions into the challenges faced by the industrial court as an institution established to deal with industrial arbitration and how to deal with these challenges in the future.

Thirdly, a study on the challenges of industrial arbitration is necessary at this time when management styles and workers are increasingly being influenced by technological changes, globalization and more so, as the government divests from most state owned enterprises. Finally, the study also reaffirms the important role of industrial court in industrial relation system in Kenya. Since the court was established in 1964, its records reveal, disjointed accounts of the court as final arbiter. A knowledge gap this study sought to address.

1.5: Scope and limitation of the study.

The study was carried out in Nairobi province, the capital city of Kenya. It limited itself to the final stage of formal industrial arbitration by industrial court. Of the many functions of the court, the study only covered arbitration in context of liberalized labour sector. Owing to fact that industrial arbitration is tripartite, the research related, Federation of Kenya employers and COTU (K), affiliate members and the strategies they
have adopted in the era of a liberalized labour market and how these strategies affect arbitration at the industrial court.

However in the knowledge that an institution like industrial court does not stand in isolation the broader picture of the effects of government labour policies, globalization, technological changes, and Structural Adjustment Programmes (SAPs) were studied to determine how they challenge industrial court arbitration. Due to time and financial limitation the study only covered the challenges facing industrial court arbitration in the context of a liberalized labour sector.

Further another limitation of this study was that it used non-probability sampling methods in particular purposive and snowball sampling methods, where the researcher used his personal judgment in deciding those to be interviewed. Further the key informants selected were interviewed for their personal opinions and experiences on industrial court arbitration related issues.
CHAPTER TWO: LITERATURE REVIEW

2.0 Introduction to literature review

In order to comprehend the topic under study, the industrial court as part of industrial arbitration is reviewed. Its place as a final arbitrator in industrial arbitration system is important. The process of disputes resolution starts within the organization, the ministry of labour and eventually to the industrial court. This is after all channels have been exhausted and settlement has failed.

Three sociological theories are highlighted and explained on how they relate to industrial arbitration. These are conflict theory, systems theory and Globalization theory. Of particular interest, the study will evaluate the relationship of trade unions, F.K.E, and the government. The strategies they have adopted in face of liberalization and how they impact on or/ relate to industrial court arbitration.

2.1: An historical perspective of industrial court arbitration in Kenya.

A Presidential Order first established the industrial court in 1964. Section 14 of chapter 234 of the Kenya constitution gave the President power to do so. It was repealed in 1965 and again in 1989. This was to enhance, enlarge and make the scope and powers of the court.

The court adjudicates in trade disputes and deals with very complex disputes, which have difficult questions and issues of economic, political and social concerns. The courts are composed of judges and members. The president of the republic of Kenya appoints the judges for a term of not less than five years. They must have served as advocates of the High Court of Kenya for not less than seven years.
The court has four members in each court appointed by the Minister for Labour after consultation with COTU (K) and FKE. They must be people who are knowledgeable in industrial relations matters, having a background in law and have served as union representatives. One of these members becomes a deputy to the judge. The rules and procedures governing operation of industrial court are made by the chief justice of Kenya for purposes of regulatory procedures of the court. The industrial court may come up with its own procedures where the chief justice rules are inadequate. The industrial court is financed from the vote of the ministry of labour as a special court.

Section 39 of trade disputes act gives the minister of labour powers to refer any matter to the industrial court whether disputes exists or not. Ministry of finance guides the court especially on disputes of economic nature. It takes into account wages guidelines issued by the ministry of finance with regard to inflation, cost of living, and economic situation among others. The industrial court considers economic factors, social factors, good industrial relations practices, and political considerations, which keep changing all the time before making a ruling.

The court deals with disputes registered with it by registered trade unions and minister of labour not individuals. Guidelines and other directives separate the court from the ministry of finance. The court is not too legalistic through legal arguments. The court does not allow legal technicalities to defeat ends of justice.

The court awards act as a bar to subsequent proceedings. The regulations are such that, One does not need to be a lawyer to make submissions. The court doesn’t charge any
costs, parties do not have to pay for any costs for their dispute to be arbitrated (heard) in the industrial court.

No party is entitled to any costs from the other party for cases of first incidence. However where party makes an appeal against the minister order then the court has powers to award costs. The court has powers to order reinstatement and compensation of dismissed workers among others. The industrial court awards are final i.e. are not subject to appeals or induction except on the technicalities. Awards of the Industrial Court are published in the Kenya Gazette to ensure transparency.

2.2: Objectives of industrial court.
The Kenya industrial court like any other organization was set to achieve certain goals and objectives, the extent to which these goals are meet determines the effectiveness and success of the organization. The objectives of Kenya industrial court are (1) Ensuring agreement and adherence to procedures of dispute settlement between disputing parties (2) Limit strikes and lockouts (3) Establish mandatory-binding arbitration by the industrial court in trade dispute for essential service and (4) Provide compulsory check-off of union dues when permitted by Minister of Labor.

2.3 Execution of industrial court awards.
Trade unions have relied on the right to strike to ensure enforcement of an award. When strikes are banned execution is done through administrative pressure extended by Ministry of Labour officials or by the Minister himself. For economic dispute however, section 10 (6) of Trade Disputes Act provides that the court becomes part of contract of employment of workers from the date the court award is to take effect. Therefore,
workers can sue an employer for breach of contract if he fails to implement the award. The industrial court has powers to interpret the awards in order to make them function and this has ensured effectiveness of the court. Its awards take effect from the date of its publication in the Kenya Gazette, unless the awards specify effective date. Most court awards are retroactive, due to the time it takes to resolve a dispute i.e. at the organization level, ministry level, and eventually at the industrial courts.

However many steps and procedures are involved before resulting to industrial court, and the government ban on strikes acts as a deterrent to strike and lock out. In view of this information it is well known that employers take advantage of strikes to sack employees. The process again of enforcing court awards through the court system are slow, and fines to be imposed on employers who fail to honour courts awards are low.

Despite the relative success in which the industrial court has been able to carry it's mandate many have questioned whether other factors have been considered in ensuring industrial harmony rather than the court itself.

According to Aluchio (1998), there has been a decline in strikes since the industrial court was established in 1964. He says that there has been an average of 88 strikes as opposed to the period of 1962 to 1965 where there was an average of 200 strikes per year. He says that this decline was brought about by, (1) restricted labour laws governing the industrial activity. (2) The precarious state of the economy coupled with unending unemployment. (3) The fear that any action could cause indiscriminate closure culminating in redundancies. If indeed, the reasons cited above by Aluchio's (1998), are
true. Then these observations discount the effectiveness of the court as an arbitrator. This study endeavored to establish whether this is true.

Low fines that the court imposes on those who fail to implement its awards/ rulings affect the court negatively and has been a constant challenge to court arbitration. This has proved to be so due to some employers who do not put much emphasis on court proceedings and when awards are made they opt to challenge them in civil courts instead of implementing them. Further some employer have called for the establishment of industrial court of appeal, as is the case with South Africa, this indicates a of lack of faith with current industrial court. The study therefore endeavored to establish the sociological reasons behind this call and their implications on industrial court arbitration.

The Trade Disputes Act gives the Ministers for Labour and finance immense influence over the court. The Minister for Labour appoints half of court members, while the Finance Minister issues wage guidelines periodically to the court. Although it is supposed to ensure harmony, this kind of arrangement may affect the independence and growth of industrial court, bearing in mind that both are politicians and government appointees. Due to this kind of arrangement, many people have accused the court of being a toothless bulldog whose decisions are influenced elsewhere.

According to Cocker (1981), the industrial court has been successful in its responsibilities and has ensured industrial peace in Kenya. However, he observes that employers must work with unions and remove the fear that unions are time wasting and are interested in limiting the profits of employers. He says that some employers have refused to recognize unions and are therefore unable to establish channels of solving industrial disputes.
He further emphasizes that; Ministry of Labour officials should avoid delaying cases before referring them to the Industrial Court. Often times delays at senior management level at the Ministry is likely lead to strike action by unions. The court should therefore have a provision whereby cases of critical a nature, are channeled directly to court for arbitration, instead of passing through the Ministry of Labour. This would cut down on time and eliminate the collusion of labour officers, investigators and employers in defeating justice.

Iwuji (1980), points out that, the industrial court is a permanent and independent tribunal. That it has laid down an impressive body of rules for social and economic conditions. The establishment of industrial court tended to weaken collective bargaining process among union and employers association who preferred the court. This necessitated a requirement, which subjects all wage agreements to be approved by industrial court.

Iwuji (1980) failed in his studies to establish why this was the case. The question then is does liberalization of labour sector weaken industrial court arbitration? This is a research gap that formed the basis of this research.

According to Mwashimba (1991) a ranking Ministry of Labour officer stated that Ministry investigators have been accused of corruption, poor quality reports and incompetence and so the industrial court lacked confidence in them.

Further Mwashimba (1991) reported that non-voting assessor serving on the court appointed in recent years tended to a be political appointee and was not necessarily competent on industrial relations.
Owiro (1980) stated that the participation of industrial court in wage determination can cause difficulties for collective bargaining. It has been argued that compulsory arbitration is not automatically incompatible with collective bargaining. He further argues that the establishment of the industrial court introduces the State as a participant in collective bargaining. The bargainers do not only have to argue their case between themselves, they must also convince the courts that they have a point. The difference between this system and the one where the state participates directly on the bargaining table is one of degree not of kind, where the industrial court is used for enforcement of an income policy, as has been the case since 1973, what matters to him is the use of the decision of the court as a reference point he concludes.

As it has been observed above in the literature review industrial court is an arbitration forum. In most cases it’s the unions who lodge their cases with the court, on the other hand few employers bother to take employees to court either to prevent strike, or lockout or for any other matters of interest. The court on the other hand is unable to execute its awards, and executions are done through strike threat by unions or individuals efforts through civil courts.

The industrial court having been placed under the ministry of labour lack independence and most of its awards could be said to be government focused and advances the interest of capital. In most cases they tend to favour employers and are based on current laws, which do not reflect the changes of our market driven economy. This study endeavored to establish the implication of these factors on industrial court arbitration in the era of liberalized labour sector.
2.5: Industrial court arbitration in some selected countries.

Writing on the origin, establishment and functions of the Industrial Court in Uganda.

Norman (1980) argues that the motive behind the industrial Courts established in Uganda was to act as a public industrial relations watchdog. Norman (1980) notes that reconciliation and arbitration procedures in labour disputes in Uganda had been questionable and many employees felt that there was need for an impartial public body "Ombudsman" to act as a guarantor of public interests. However, in his arguments Norman (1980) does not state clearly whether after the establishment of the Industrial Courts the employers and employees were satisfied by its services or not. Neither does he show the structural functioning of the Industrial Court.

Writing on the emergence, development and growth of trade unionism and government in East Africa, by Nagemi (1972) and Cromwell (1972) noted that trade unionism and the industrial relations legislation in independent East Africa has been severely hampered by various government policies. They argue that although Industrial Courts were established immediately after independence, their structural functioning has been ineffective. Further they noted that decisions arrived at during the Industrial Court's arbitration process are more or less disregarded. They consequently question the loyalty and statutory provisions of the Industrial Court. Since it's decisions and rulings are rarely enforceable. They concluded their work by recommended establishment of a supervisory body for enforcing the rulings and directions of the Industrial Courts.

The current study presupposed that the efficiency of the Industrial Court and its performance index solidly rests on how well its rulings are implemented or adhered to.
This principally determines how often recognizable trade unions will refer their cases for arbitration to the Industrial Court. This study was set to examine the role played by the Industrial Court and how its structure matches its functions.

Haggland (1998), argues that when unionized workers are dismissed from their places of employment as a result of the employers dissatisfaction with their performance, the means by which they can challenge the management decision reached at by an arbitrator should be fair and compelling to the parties concerned. However in his five-nation survey, discovered discrepancies emanating from Industrial Court arbitration process. Some of the discrepancies that he observed were that industrial courts of Kenya, Trinidad and Tobago were least likely to reinstate dismissed workers.

In Trinidad and Tobago the Industrial Court was the most likely to support employers dismissal decision upholding its 75 per cent of the trial on dismissal cases. The court in Kenya was not likely to declare employer's dismissal unjustified but would convert the dismissal to normal termination, which provided certain benefits. In the United States of America arbitrators are generous in reinstating workers to their jobs with full back pay. This is perhaps because the bulk of arbitration is handled by private arbitrators who compete to be chosen from panels and cannot afford to appear one sided.

Haggland (1998) has hypothesized that the reasons why employees love their jobs tend to be similar regardless of their geographical locations. Any differences in outcome are likely due to laws or applications of policies, which infringe on the employees rights or difference in administration of justice in various countries. The current study strives to
unearth the reasons why the Industrial Court of Kenya is perceived not (as observed) to be an instrumental and non-partisan arbitrator.

Another classic study of the industrial court arbitration was carried out by the international labour organization (1973). The I.L.O findings on the examination of 1057 cases they examined noted that decision of the Industrial Court in most of third world countries are not ignored. The report further observes that there are institutional inherent weaknesses that deter its service delivery. These weaknesses, the report says, emanate from the fact that most of the Industrial Court personnel are appointed by their country's chief executive and labour disputes are perceived as government focused. This presents a challenge to industrial courts in third world countries where freedom of association is curtailed. The court must do the balancing act harder to maintain confidence among government, labour movement and employers.

2.5: Trade unions and industrial court arbitration.

There are other factors outside the industrial court, which indirectly affects its performance. In this section, we look at trade unions and how they relate to industrial arbitration by industrial court.

The Industrial Court is an arbitration forum. However, emphasis is made that workers can only be represented at the court by a union, recognized by employers. Thus, individual workers have to seek redress in civil courts whenever their employment conditions are violated. This is a challenge to industrial arbitration especially in Kenya where the informal sector is the fastest growing sector in the economy.
Trade unions play an important role in industrial arbitration. Both strong unions and weak unions alike can mean chaos in industrial relations system. A strong union can mean higher wages, which employers cannot meet. This can also lead to increase in cost of production and hence high prices for goods and services. Weak unions on the other hand can lead to poor services because of low morale of staff, due to exploitation by employers and uneven distribution of income.

In the recent past Trade Unions in Kenya have been affected by low union membership due to redundancy, internal squabbles, corruption, globalization and introduction of structural adjustment programmes. This reduction in union membership has weakened the bargaining power of Trade Unionists. Most Trade Unions rely on union dues to sustain themselves. Without these dues unions cannot comprehensively represent their members in arbitration and engage in other activities like education of union members and training of officials involved in arbitration processes. Further a union with reduced and minimal membership has reduced bargaining power and is susceptible to manipulation by management. The net effect of all was that some unions changed strategies to stem further loss of jobs. One of which was the stop of agitation for higher salaries and wages to that of preserving existing jobs.

This has left Trade Unions handicapped and unable to represent their members effectively. The question therefore arises: What is the role of trade unions in industrial court arbitration in era of liberalized labour sector? Past studies have not related challenges facing trade unions with industrial court arbitration, a research gap this study strived to fill.
Sedowsky (1987) defines structural adjustment programmes (SAPS) as the adoption of consumption patterns, the relocation of resources and the changes in factor accumulation necessary to recover sustained growth in the face of more adverse external environment.

Mindo (2003), points out that, the enforcement of free markets and removal of protection in industry during the period 1980-2000 resulted in raising poverty ratios and social inequalities. Social intuitions, organizations and trade unions were affected.

This decline has been occasioned by introduction of Structural Adjustment Programmes (SAPS) by the Government being as a condition set by the World Bank and International Monetary Fund (IMF) so that the Government can continue to access funds from the two bilateral institutions.

Ghai and Alancantra (1986) on the other hand list reduced wage bills, wage freezes, declines in real wages and salaries, elimination of fringe benefits and labour welfare as part of problems resultant from SAPS. These measures instituted by the Government have a direct consequence on industrial arbitration by industrial court. In early 1990’s the Kenyan liberalized it’s economy following the collapse of communist block and through insistence of World Bank and IMF. The result was flooding of markets with cheap imported goods, second hand clothes, cars, and domestic items. The result was redundancies, retrenchment, downsizing and out sourcing of non-core activities. There also was a general shift from manufacturing to service industries. The loss of jobs due to SAPs lead to, loss of membership which translated to lack of finances and less bargaining power of unions.
Furthermore, most organizations have embraced the human resource management where management emphasizes on rewarding employee on the basis of their performance. It has also incorporated the vision and mission and objectives of the organization of day-to-day activities of the employees. Through human resource management the issue of employee participation take center stage in management strategy of most organizations. This takes the form of joint administration, collective bargaining, joint decision-making, consultation and information sharing among others. The net effect is that there has been low union membership and minimal conflicts in organizations.

During the 1990's most employees acquired more skills and therefore became multiskilled and it was difficult for one to identify with a particular union. The Kenyan economy is an agricultural based. Where there is lack of commitment of permanent employment, most employees are casuals with no union representation. The question then is what are the impact of SAPs especially elimination of fringe benefits, labour welfare and reduced wage bills on industrial court arbitration.

2.7: Globalization and industrial court arbitration.

Globalization can be defined as changes in the way production is organized as required by the general dismantling of trade barriers and the free mobilization of financial and productive capital in the context of due treated technological change.

It involves a rapid integration of national economics into the Global Market and the shifting of power of fundamental economic decision from nation states to stateless corporation (hence undermining the sovereignty of nation states in policy making of major economic decisions). This is apparent in African Growth and Opportunity Act (AGOA). AGOA allows an arrangement whereby African states export to Americans
market clothes duty free with certain conditions. The European Union has also set certain conditions for horticultural exporters into their Markets. This has affected industrial arbitration in Kenya. Globalization affects Environmental Management, International Crime rate, Trade and Commerce, Information and Technology, Culture and Social equality.

According to the United Nations (1996), the challenges facing trade unions in the era of globalization of trade is to ensure that the need to make enormous and rapid changes in the nature of work and labour market is achieved without compromising the goals of full employment and social justice. They have to convince the government that it is essential to act urgently to increase and spread world economic growth more evenly. The wholesale deregulation of labour markets increases the problem countries face in adapting change. Problems are solved where governments, trade unions and employers collectively joins to strengthen labour market institutions so that support is offered to individuals and communities through job creation schemes. Further the report says that rapid technological and commercial change is having an impact on marketplaces the world over. Old systems for the mass production of standard products are being replaced by methods that allow shorter production for more differentiated products. This can seen in the banking and tea sector where automated teller machines and tea picking machines were introduced.

Muthamia (2004) states that in the era of globalization trade unions are no longer negotiating for terms on a nation basis but as a member of state of ILO, the provision of declaration on fundamental bind Kenya principals and rights at work. This has placed a
lot of responsibility on trade unions that bargain at international level. Some challenges are posed by globalization and economic reform policies and the union has to address, the issues go beyond national level that have traditionally occupied their domain. The question then is: What are these sociological factors affecting trade unions, government and employers, in era of globalization? And how do they affect industrial court arbitration.

2.8: Labour laws and industrial court arbitration.


Nyambari (1998), points out that, the purpose and function of labour laws is to protect and regulate working conditions. They therefore regulate the obligation of both labour and management in relation to contract of employment. Further labour laws are supposed to lay recognition procedures, administration adjunction and ensure standards in industrial relation systems. He concludes by emphasizing that much needs to be done to make labour laws viable instruments to propagate social economic growth of both labour and management with a view to sustain productivity, positive change and hence and development.
Kimathi, (2000) emphasizes that, labour laws regulate, support, and restrain the power of management and power of organized labour. It also forbids the conduct of industrial hostilities through violence and arbitrariness. However Nyambari (1998) and Kimathi (2000), fail to point out how these laws have inhibited or promoted industrial peace in Kenya.

A sneak look at the Trade disputes Act cap 234 and Trade unions Act cap 233 of laws of Kenya, reveal that labour laws inhibit rather than facilitate industrial arbitration. The industrial court is founded under the trade disputes Act cap 234. The act limits the court as far as execution of court awards, the court doesn’t execute its awards like civil courts but relies on individuals to execute through civil courts or trade unions exert pressure through industrial action. The penalty for defying court directive is also not deterrent enough.

The trade union Act provide for registrar of trade unions yet the recognition agreement in industrial relations charter gives employers the right to determine which union should represent their workers, this limits the freedom of trade unions. The trade disputes Act also provides the right to strike by trade unions to enforce industrial court awards/ rulings should employers refuse to implement. The act on the other hand gives the labour minister powers to determine legal or illegal strikes, further for a strike be legal is a lengthy and tedious process which defeats the initial purpose. The question then is, with upsurge of industrial disputes, has the labour laws enhanced or inhibited industrial court arbitration in era of liberalized labour sector? These factors are unknown and they form basis of this study.
2.9: Theoretical framework

Singleton et al (1988) holds that all empirical studies should be grounded on theory. Kerlinger (1964) says that a theory is a set of interrelated concepts, definitions and propositions that present systematic view of phenomena and specifying relations between variables with purpose of explaining and predicting phenomena. Francis Abrahams (1980) holds the same sentiments by explaining a theory in social science research as providing general orientation by suggesting potential problems and fruitful hypothesis; developing social concepts furnishing post factum sociological interpretation; formulating of empirical generalization and further development of social theory. In the proposed study the following theories were used:

Conflict theory
System theory
Globalization theory.

2.9.1: Conflict theory

According to Marx and Angles (1868) the social political and intellectual life process are conditioned by the mode of production of material life. The pattern by which people tackle their survival problems becomes the basis for under trading the nature of power and inequality in societies.

Conflict theory also explains Industrial Relations and the set up of Industrial courts. It assumes that conflicts exist in society and in organizations; it is therefore essential to recognize it and to have a framework that deals with it. Conflicts do arise in organizations because of differing value and interests of management and employees. Due to this fact
organizations, Government, and labour unions have devised mechanisms of solving disputes hence the setting up of Industrial Courts.

Karl Marx, (1867) also notes that a society is made up of two conflicting classes, the capitalists who own the means of production and the workers who offer their labour to the capitalists. The expression used to describe the situation is dialectic materialism. The capitalists are the powerful ruling group (bourgeoisie) and the laborers (proletariat). This conflict should lead to a socialist revolution, but then be followed by a classless communist society. Marx does not see the difference between the conflict, which exists in organizations and that which exists in society. He notes that unions exist to protect a worker against exploitation by management and owners of capital, hence collectivism that is powerful than individualism.

Marx (1867/1967: 600) says the desire of capitalists is for more profits and more surplus value for expansion, a situation that pushes capital to what he called the general law of capitalist accumulation. The capitalist seek to exploit workers as much as possible with the intention of forcing labour costs backwards preferably to zero. However, he says that increased exploitation of workers yields fewer and fewer gains. The Government is forced to impose restrictions on the action of capitalists. This can be seen where Government issues wage guidelines, enactment of labour laws on employment, working conditions and signing of industrial relations charter among others. Looked in the context of industrial arbitrations, unions exist to help workers have better terms and condition of work. They offer protection against management and the shareholders. Unions help the underclass in society to have bargaining power in a situation where they would otherwise be powerless.
Coser (1956) argues that conflict may serve to produce cohesion leading to a series of alliances. For example, the formation of COTU (K) and FKE may be looked at in this perspective. He also says that conflicts serve as a communication function. Conflicts also allow the parties to get a better idea of their relative strength and may well increase the possibility of rapprochement or peaceful accommodation. Looked at in this perspective, unions and employers associations realize that they cannot work in isolation hence they establish a mechanism for sorting out conflicts. This can be seen in collective bargaining and signing of industrial relations charter.

2.9.2: System theory

The system Theory is a collection of scientific ideas imported into sociology from other fields including cybernetics information theory, operations research and economic systems theory (Lilien Field 1978).

Buckley (1969) summarized some of the formal principals of systems theory: He says that tension is normal, present and necessary in a social system. Secondly, there is a focus on the nature and sources of variety in the social system. The emphasis on both tension and variety makes the system perspective a dynamic one. Thirdly, he says that concern for the selection process at both the individual and the interpersonal levels in the system are sorted and sifted. This leads to further dynamism where weak actors are strengthened and enforced so as to play their rightful role in the social system. Fourthly, he says that interpersonal level is seen as the basis of development of large structures. The transaction process of exchange, negotiation and bargaining are the process out of which emerge relatively stable social and cultural structures. Finally, he says that despite
Looked in context of industrial court arbitration, the entire system is seen as a process where by all actors that is, unions, employer associations and the Government represented by Ministry of Labour and the Industrial Court must work together to ensure that there is peace and stability in the labour sector. Hence trade, investment and prosperity of the country. In the system theory, one actor who fails to act according to his/her role will ultimately affect the performance of others. The theory lays emphasis on negotiation and bargaining as essential to stability and avoidance of conflict.

2.9.3: Globalization theory

According to globalization theory the world is a global village. Mogoy, Daily Nation (2001), says that globalization started in 1880’s with the scramble of Africa. He says that in globalized village the rich and the poor are lumped together, and the law of the jungle reigns. Knowledge, wealth and technology characterize the core tools of trade in the new economy. Further he says that globalization demands opening of economies to global market forces and limited government intervention in the running of the economy. As “borderless”, global economy flourishes, governments lose their sovereignty and autonomy.

Liberalization of markets and introduction of structural adjustment programmes (SAPs) is a consequence of globalization. Governments must not only institute policies that would attract investment but must open markets to foreign goods. Tax levels, trade facilitation, government policies, labour productivity, business regulation, infrastructure, security,
and corruption are factors that determine competitiveness of a country in globalized world.

Looked in the context of industrial court arbitration, globalization hurts the venerable groups in the society. Job losses through retrenchment, redundancies, adoption of new technologies, and taxation of benefits, and freeze of employment works against the mandate of the court, that of creation of employment and fair distribution of wealth. Globalization emphasizes free flow of capital, foreign direct investment (FDI) that has caused a lot of agony in developing countries. Organizations investing in these countries bring with them foreign labour practices. Export processing zones are a case in point, where a number of companies in these zones have been resisting unionization of their workers. The excuse being that the unions demand of higher wages will make them not competitive globally. The government must therefore come up with policies and enact laws to safeguard the interest of the poor. On the other hand institutions that are held with the responsibility of representing the poor must ensure that they do not suffer.

Further in globalized world the movement of labour in the world defies national borders, the best world footballers are bought by the richest clubs, highly trained doctors, engineers and lecturers in Kenya, are moving to South Africa and Botswana, Europe and North America for greener pastures.

2.9.4: Definition of key terms

1. Changes in Management

Refers to adoption by employer organizations of new management styles such as employee participation, involvement and empowerment.
2. **Collective Bargaining**
This is a method of determining working conditions and terms of employment through negotiation between an employer or a group of employees, or one or more organizations on one hand, and one or more representatives of workers organizations on the other hand with a view of reaching an agreement. I.L.O, (1963).

3. **Effectiveness of Industrial Court**
Refers to the manner in which the court is able to discharge its duties with speed and fairness.

4. **Industrial Action**
This is any action taken by either unions or employers to settle a dispute after the formal dispute settlement machinery has failed. This may take the form of lockouts, strikes or lay offs, among others.

5. **Industrial Arbitration**
This refers to formal or informal machinery established to solve trade disputes at labour industry. This may take the form of conciliation, mediation, and/or arbitration.

6. **Industrial Relations Charter**
This is an agreement where management reaffirmed to recognize and bargain with unions, whereas union agreed to follow established machinery to solve industrial disputes.

7. **Liberalization**
This refers to relaxation of government restrictions on labour management policies in Kenya.
8. **Trade dispute**

This is a row or difference between employers and employees, between employees themselves, between employers and trade unions, or between trade unions and trade unions on matters to do with wages and conditions of employment.

9. **Trade Union**

This is an association of six or more temporary or permanent wage earners come together for purposes of maintaining or improving their conditions and of employment.
CHAPTER THREE: METHODOLOGY

3.0 RESEARCH METHODOLOGY

3.1 Research design

In this section elaborate outline of research area and data collection plan is done. This section covers the study site or description, sources of data, Unit of analysis, sampling procedure, data collection tools and analysis technique. Singleton et al (1988:67), says that a research design is the arrangement of the conditions for collection and analysis of data in a manner that aims to combine relevance to the research purpose with economy in procedure”

3.2 Site description

The study was conducted in Nairobi, the capital, political and commercial center of Kenya. Nairobi also is the headquarters of organizations that were key information sources to this study. These are, MLHRD, COTU, FKE, and industrial court. This research was a case study aimed at establishing the challenges the industrial court faces as a final trade disputes arbiter in labour industry. This study was therefore conducted at the industrial court, which is located in Nairobi, the Capital city of Kenya, and is housed in the National Social Security Fund (NSSF) building on Kenyatta Avenue.

The industrial court was established in 1964 by a presidential order it has five judges appointed by the president and eight members appointed by minister for Labour after consultation with FKE and COTU. The judges must have been advocates of high court for not less than five years. The court members must be people knowledgeable in industrial relations matters, have background in law and must have served as union representatives. One of the court members acts a deputy to the judge. A judge and two
members form a quorum. If need arises the judge may appoint two assessors one representing employers and another representing employees. If members fail to agree on the ruling or decision the judge makes the ruling. Judges are appointed for a term of five years. Appointments are notified in the Kenya gazette specifying terms of reference. They are also not answerable to the chief justice. The registrar is the administrative head of the court. It is financed by and is a department under the ministry of LHRD. The court is guided by the ministry of finance with regard to inflation, cost of living and economic situation among others. It adjudicates in all trade disputes referred by to it by the minister of LHRD. According to ministry of LHRD the court adjudicated a total of 451 cases between 2001 and 2004. It also registered a total of 1067 collective bargaining agreements during the same period. However individual unions can lodge disputes with the court. It is also ensures labour standards are maintained and adhered too. The court also acts as reference to all trade disputes. Industrial court awards are final i.e. are not subject to appeals or induction except on technicalities.

3.3 Unit of analysis.

The Unit of Analysis in this study was the industrial court. Singleton et al (1988) defines unit of analysis as what or who is to be analyzed in the study. This research was a case study looking into challenges facing industrial arbitration in the era of liberalized labour sector, with a focus of industrial court. Baker (1944) says, that unit of analysis is the social entities whose social characteristics is the focus of the study. In this study, units of observation comprised: -Key informants – these were people with information useful to this research like Trade Union, and Federation of Kenya Employers (F.K.E) officials, officers at the Ministry of Labour and Human Resource development, and industrial court.
3.4 Sampling procedure

The nature of this research was qualitative in which case, personal experiences and opinions come handy. The study used non-probability sampling methods. In non-probability sampling there is no way of specifying the probability of each unit’s inclusion in the sample and there is no assurance that every unit has same chance of being included. The definition of the population to be studied is therefore restricted (Nachmas 1996 138). Further non-probability sampling method was used because the population contained few cases and it was difficult to construct sample frame.

Singleton, (1988) says that non-probability sampling method is used if the population itself contains few cases or if an adequate sampling frame cannot be obtained or constructed, then there is no point in considering probability sampling. Further, this study used purposive and snowball sampling method. Purposive sampling is occasionally referred to as judgment sampling, the researcher selects in an attempt to obtain a sample that appears to be representative of the population (David Nachmas 1996).

Singleton 1988: (153:154), says that Purposive sampling method is acceptable in studies that are limited in scope, again as in this study. He also says, that “purposive sampling allows the investigator to rely on his expert judgment to select units that are representative of the population”. Due to the fact that industrial arbitration is tripartite in nature the data was collected from 25 key informants out of the targeted 32. In this study four groups of respondents were identified these were MLHRD, Industrial court, FKE and COTU. The researcher purposively targeted eight respondents from each group. Persons identified were knowledgeable with the topic under study, and served as representatives of groups involved in industrial arbitration.
Of the targeted respondents in identified organization were requested to nominate suitable respondents to be interviewed through snowballing sampling method. This was because in organizations individuals involved in industrial arbitration use different titles that may differ from one organization to another.

3.5 Data collection methods.

In this study, both secondary and primary data were collected using the following data collection techniques.

3.5.1 Primary Data: The data was collected through the use of unstructured interview with key informants. These were people who possessed relevant information to the topic studied. Questions were administered in face-to-face interviews. These informants were Trade Unions and FKE, Court and MLHRD officials involved in Industrial Arbitration matters.

3.5.2 Secondary Data: This was sourced through a reviewing of the Industrial Court, Federation of Kenya Employers and Central Organization of Trade Unions of Kenya (COTU) records, mainly from 1980 to 2004. Reports and Literature from various bodies like International Labour Organization (I.L.O), Ministry of Finance and Economic Planning, Labour and Human Resource Development among others. These reports assisted in understanding the challenges of industrial arbitration by industrial court in context of liberalized labour sector. Others include books on industrial arbitration and newspaper reports. Review of secondary data was done to supplement primary data.

3.6: Data analysis.

The data collected was analyzed qualitatively through descriptive statistics. Further since data was qualitative, emphasis was on content analysis. Baker (1988:111), states that.
qualitative data analysis seeks to make general statement on how categories or themes of data are related. He further says that descriptive statistics refer to simple statistical method that do not support or falsify a relationship between two variables, but simply helps the researcher to understand the data collected from the field. The collected was also interpreted using tables.

3.7: Problems encountered in the field.

(1) Problem of access, the researcher had initial difficulties in getting the selected organizations to allow their officers to be interviewed, however, this problem was overcome by explaining the purpose of the research and by assuring those concerned that the research findings may be useful to their organization.

(2) Incomplete and/or unavailability of required data: The data available from secondary sources was missing due to poor record keeping. This had the effect of prolonging the fieldwork phase of the study. This problem was nevertheless, overcome through patience and collating data collected from various organizations dealing with labour issues.

(3) Unavailability of the selected respondents. Many a time, key informants could make appointments for interviews only to cancel it at the eleventh hour. This problem was overcome through patience and perseverance.

3.8 Ethical consideration.

When conducting this research ethical practices were observed. The permission to carry out this research within the industrial court, Ministry of labour, and Federation of Kenya employers was sought from the registrar of the industrial court, Executive
director federation of Kenya employers, and the industrial relations officers, Ministry of Labour and Human Resource Development respectively. They were also assured that the study findings were purely for academic purposes. Confidentiality of respondent’s identities views, and opinions were maintained and interviews were not conducted in the presence of any other officer. In most cases, the interviews were conducted in respondent’s offices and data collected was securely kept.

<table>
<thead>
<tr>
<th>VARIABLE (v)</th>
<th>FEDERATION (F)</th>
<th>TDU</th>
<th>F&amp;L</th>
</tr>
</thead>
<tbody>
<tr>
<td>FREQUENCY</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>PERCENTAGE</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>
4.0 CHAPTER FOUR: DATA ANALYSIS AND PRESENTATION.

4.1: Introduction

In this chapter the researcher dealt with the analysis of qualitative data, derived through primary, and secondary sources. The data was organized into categories based on themes, which are different from each other; common themes were highlighted using codes assigned manually. Classes of respondents were identified. These are: - the government through ministry of labour and human resource development, the industrial court, unions and Federation of Kenya Employers officials.

The researcher administered questionnaires as a data-collecting tool for primary data, which were filled and then returned and also used secondary data. The data was then coded and analyzed. The analysis and study findings are summarized into percentages and frequencies. These are subsequently presented in tables and graphs as shown below.

4.2 RESPONDENTS PROFILE

In this section information about respondent’s gender, education, this is followed by reported cases of trade disputes in labour industry.

| Table 4.2.1: Gender distribution of key informants |
|---------------------------------|----------------|----------------|----------------|
|                                  | MLHRD/Court    | COTU           | F.K.E          |
| Gender                          | Frequency      | Percentage     | Frequency      | Percentage     | Frequency | Percentage     |
| Male                            | 11             | 91.7           | 5              | 83.3           | 3          | 42.9           |
| Female                          | 1              | 8.3            | 1              | 16.7           | 4          | 57.1           |
| Total                           | 12             | 100            | 6              | 100            | 7          | 100            |

Source: Research data.
The table above shows that, 91.7% of the respondents in the ministry and the court were men while 57.1% of the respondents in FKE were women. This was attributed to the affirmative action on part of employers to involve women in top management positions. There are few women in Trade Union leadership hence only 16.7% women respondents.

Table 4.2.2: Respondents level of education and percentage distribution

<table>
<thead>
<tr>
<th>Level of education</th>
<th>MLHRD/court</th>
<th>COTU</th>
<th>F.K.E</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Frequency</td>
<td>Percentage</td>
<td>Frequency</td>
</tr>
<tr>
<td>Secondary</td>
<td>3</td>
<td>25</td>
<td>3</td>
</tr>
<tr>
<td>Diploma</td>
<td>2</td>
<td>17</td>
<td>1</td>
</tr>
<tr>
<td>University</td>
<td>7</td>
<td>58</td>
<td>2</td>
</tr>
<tr>
<td>Totals</td>
<td>12</td>
<td>100</td>
<td>6</td>
</tr>
</tbody>
</table>

Source: Research data.

According to the table 4.2.1 above a majority of the respondents in MLHRD, the industrial court and FKE, as represented by 58%, 33% and 71.4% respectively have university level of education. Whereas 50% of the respondents in COTU had secondary level of education. The findings reveal that there was a minority of diploma and university certificates holders in COTU among the respondents this was attributed to the recognition agreements where employers have a right to decide who joins union and who does not. Further diploma and university education holders in organizations work as supervisors and managers and are not unionized, hence a big number both in court/MLRD and FKE.
4.2.3: Key informant's responses as represented by percentages

<table>
<thead>
<tr>
<th>Key informants</th>
<th>Target</th>
<th>Actual interviewed</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court/MLHRD</td>
<td>16</td>
<td>12</td>
<td>48</td>
</tr>
<tr>
<td>FKE</td>
<td>8</td>
<td>7</td>
<td>28</td>
</tr>
<tr>
<td>COTU</td>
<td>8</td>
<td>6</td>
<td>24</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>32</strong></td>
<td><strong>25</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Source: Research data.

The table above shows that 48% of the respondents were from the ministry of labour and the court, while 24% and 28% were drawn from COTU and FKE respectively. Some of the respondents were unavailable due to tight schedules of work that required them to be away from office.

4.3: Causes and nature of disputes referred to industrial court for arbitration.

This section deals with the analysis of impact of liberalization of the labour sector on industrial court arbitration, changing face of trade unions, adoption of new management styles by organizations and their effects on industrial court arbitration.

Trade disputes are categorized into two, the "rights" issues and "interest" issues. "Right" issues disputes involve dismissals, poor management practices, and interpretation of C.B.A.'s. On the other hand "interest" issues involve disputes pertaining to the recognition agreement and terms of a new C.B.A.
### TABLE 4.3.1: Classification of industrial court cases by rights and interest disputes in Kenya (1985-1993)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
<th>Rights</th>
<th>%</th>
<th>Interest</th>
<th>%</th>
<th>Others</th>
<th>%</th>
<th>Total %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>150</td>
<td>7</td>
<td>4.7%</td>
<td>73</td>
<td>49%</td>
<td>70</td>
<td>46.3%</td>
<td>100%</td>
</tr>
<tr>
<td>1986</td>
<td>121</td>
<td>17</td>
<td>14%</td>
<td>63</td>
<td>52%</td>
<td>41</td>
<td>34%</td>
<td>100%</td>
</tr>
<tr>
<td>1987</td>
<td>85</td>
<td>33</td>
<td>39%</td>
<td>47</td>
<td>55%</td>
<td>5</td>
<td>6%</td>
<td>100%</td>
</tr>
<tr>
<td>1988</td>
<td>117</td>
<td>22</td>
<td>19%</td>
<td>58</td>
<td>50%</td>
<td>40</td>
<td>31%</td>
<td>100%</td>
</tr>
<tr>
<td>1989</td>
<td>103</td>
<td>34</td>
<td>33%</td>
<td>46</td>
<td>45%</td>
<td>22</td>
<td>22%</td>
<td>100%</td>
</tr>
<tr>
<td>1990</td>
<td>123</td>
<td>35</td>
<td>28%</td>
<td>45</td>
<td>37%</td>
<td>43</td>
<td>35%</td>
<td>100%</td>
</tr>
<tr>
<td>1991</td>
<td>106</td>
<td>51</td>
<td>48%</td>
<td>29</td>
<td>27%</td>
<td>26</td>
<td>25%</td>
<td>100%</td>
</tr>
<tr>
<td>1992</td>
<td>133</td>
<td>33</td>
<td>25%</td>
<td>47</td>
<td>35%</td>
<td>53</td>
<td>40%</td>
<td>100%</td>
</tr>
<tr>
<td>1993</td>
<td>113</td>
<td>54</td>
<td>48%</td>
<td>26</td>
<td>23%</td>
<td>33</td>
<td>29%</td>
<td>100%</td>
</tr>
<tr>
<td>TOTALS</td>
<td>1051</td>
<td>286</td>
<td>27%</td>
<td>434</td>
<td>41%</td>
<td>331</td>
<td>32%</td>
<td>100%</td>
</tr>
</tbody>
</table>


As shown in table 4.3.1 above, there has been an increase in disputes of rights compared to interest disputes. They rose from 7 cases in 1985 to 54 cases in 1992 i.e. 4.7% compared to 48%. There was also a decline in interest cases referred to industrial court for arbitration from 73 cases in 1985 to 26 cases in 1992 i.e. 49% to 23%. According to court officials this was attributed to liberalization of markets and introduction of SAPs, where by due to competition companies, merged, closed down or relocated. Other companies retrenched, cut wages, froze recruitment, and adopted of new management styles. Hence implementing collective bargaining agreements was difficult due to frequent change social-economic factors and an increase in rights disputes was inevitable.
TABLE 4.3.2: Industrial disputes/trade disputes registered in the labour industry between 2001 and 2004.

<table>
<thead>
<tr>
<th>Years</th>
<th>Reported to minister for Arbitration.</th>
<th>Reported to industrial court for arbitration</th>
<th>Collective agreements registered with the court</th>
<th>Disputes arbitrated by F.K.E</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Freq</td>
<td>%</td>
<td>Freq</td>
<td>%</td>
</tr>
<tr>
<td>2001</td>
<td>792</td>
<td>15</td>
<td>83</td>
<td>18</td>
</tr>
<tr>
<td>2002</td>
<td>892</td>
<td>17</td>
<td>95</td>
<td>21</td>
</tr>
<tr>
<td>2003</td>
<td>2323</td>
<td>45</td>
<td>142</td>
<td>32</td>
</tr>
<tr>
<td>2004</td>
<td>1115</td>
<td>23</td>
<td>131</td>
<td>29</td>
</tr>
<tr>
<td>Totals</td>
<td>5159</td>
<td>100</td>
<td>451</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Ministry of labour and human resource development (2005)

As illustrated in table 4.3.2 above, during the period from 2003 to 2004 there was rise in disputes referred to the industrial court for arbitration by 32% and 29% respectively. Compared to the period 2001 and 2002, which was 18% and 21% respectively. The table also shows that out of 5159 disputes referred to the minister of labour for arbitration only 451 disputes representing 8.7% of all disputes registered in the four years under review were forwarded to industrial court for arbitration. In the year 2004 there was drop in collective bargaining agreements registered with industrial court to 21% from 23% registered in 2003. In the year 2003 and 2004 there was an increase in the number of cases federation of Kenya employers represented their members to 27% in 2004 from 28% in 2003 as opposed to 23% in 2001 and 22% in 2004 against a total of 790. The key informants indicate that this was mainly attributed to; (i) Increased freedom brought about by change of government in 2002 (ii) Refusal by employers to sign recognition
agreements and respect industrial relations charter. (iii), and the inability of both the unions and employers to sign collective bargaining agreements.

The table also reveals that, the ability of alternative arbitration system rather than the industrial court was responsible for the decrease of cases referred to industrial court for arbitration, this is because only 8.7% of 5159 cases referred to the minister of labour were eventually referred to the court for arbitration. This also confirms the importance of observing the industrial relations charter.

The following are a summary of the causes of industrial disputes referred to industrial court for arbitration as pointed out by respondents.

a) Court officials felt that, employers’ disregard of court awards and ruling. Some employers disregard court rulings and award, they resort to appealing to the high court, with the sole aim for having the court either order a retrial or quash the awards all together. For instance these appeal cases rose from 3 in 2003 to 15 in 2004.

b) Court officials also pointed out that the Trade disputes Act cap 234,laws of Kenya, provides for elaborate dispute resolution mechanism. However the provision for third party arbitration causes inordinate delays, thus leading to frustrations among unions and in most cases industrial disputes.

c) Further court officials said that, lack of adequate data on company’s profitability or performance of the company. Most unions put up demands for high salaries and allowances, which the employer may not be in position to meet. This has resulted in unions registering disputes based on wrong information.
d) The court officials also indicated that the state of the economy causes trade disputes, with the rise in the cost of living, high inflation and increase in consumer price index, unions agitate for review of salaries and allowance despite the company’s inability to pay.

e) FKE officials said that the involvement of trade unions officials in politics was noted to be a cause of trade disputes. Some union’s officials involve themselves with national politics to the detriment of workers welfare. Unions may decide to support an issue that is totally unrelated to their mandate.

f) Ministry of labour officials pointed out that liberalization of labour markets contributed to an increase in industrial disputes. They that the introduction of the 1994 finance amendments bill giving employers the right to retrench without seeking authority from the industrial court as was the case before, enabled most employers to retrench without following the laid down procedures. In most cases staff have been sent home without being paid benefits, thus resulting in an upsurge in trade disputes.

The study also revealed that introduction of structural adjustment programmes (SAPs), has also contributed to rise in industrial disputes. The government through (SAPs) has introduced wage freezes, elimination of fringe benefits, labour welfare and taxation of benefits in the public sector. The result is that employers are increasingly finding themselves with little money in their pockets, hence their readiness to agitate for more.

Globalization according to this study has, also contributed to industrial disputes. Through globalization, information technology has taken a new meaning in the management of resources. Computerization of banking services, introduction of tea picking machines, among others, has resulted to quicker and efficient services. This development has
however called for the down sizing of staff to reduce the cost of production in these organizations. Thus most unions have been forced resist the replacement of human beings with machines.

The role of management according to court officials has been noted to be a cause of industrial disputes. In some organizations managers are abusive, dishonest, lack integrity and/or corrupt. In most instances they do not practice sound labour practices. They deny workers their rights, over work them and withhold their benefits. In some organization promotions are not based on merit but on nepotism and tribalism. This is especially common in public service.

In some organizations salaries and benefits are skewed in favour management against the other members of staff despite the organization desire to work as a team and achieve targets. Salaries are not based on equal works but on management prerogative nor are job description and duties properly allocated.

4.4: Impact of the liberalization of the labour sector on industrial court arbitration.

Liberalization was a consequence of globalization, countries liberalized in order to be part of the world economy. The World Bank and IMF set conditions to be meet before countries could access loans from these institutions. Some of these conditions were the introduction of Structural adjustment programmes meant to reduce government spending in social programmes. The government had to divest in parastatals through privatization.
Table 4.4.1: Respondents views on the liberalization of labour sector and the court

<table>
<thead>
<tr>
<th>Impact</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court affected negatively</td>
<td>15</td>
<td>60</td>
</tr>
<tr>
<td>Court affected positively</td>
<td>10</td>
<td>40</td>
</tr>
<tr>
<td>Total</td>
<td>25</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Research data.

According to the above table, 60% of respondents felt that the court has been affected negatively by liberalization of labour sector. They noted that the court was affected by public sector reforms that called for cuts in budgetary allocations and staff down sizing. The respondents felt that the government has not done enough to cushion the court from the effects of liberalization. Save from increasing industrial court judges from 2 to 5 other things remain the same. They felt that unless government takes the issues of industrial arbitration as weighty matters there are fears that industrial conflicts might persist and eventually affect economic development. However with liberalization and the increase of disputes has brought the role of the court into focus thus enhancing it image in the country.
<table>
<thead>
<tr>
<th>Years</th>
<th>No. Of strikes</th>
<th>No. Of workers</th>
<th>Man. Days Lost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>68</td>
<td>20,049</td>
<td>67,139</td>
</tr>
<tr>
<td>1994</td>
<td>55</td>
<td>20,749</td>
<td>41,826</td>
</tr>
<tr>
<td>1995</td>
<td>42</td>
<td>9,407</td>
<td>35,513</td>
</tr>
<tr>
<td>1996</td>
<td>58</td>
<td>30,148</td>
<td>57,724</td>
</tr>
<tr>
<td>1997</td>
<td>97</td>
<td>270,660</td>
<td>317,326</td>
</tr>
<tr>
<td>1998</td>
<td>105</td>
<td>214,867</td>
<td>3,037,697</td>
</tr>
<tr>
<td>1999</td>
<td>30</td>
<td>7,768</td>
<td>30,565</td>
</tr>
<tr>
<td>2000</td>
<td>41</td>
<td>17,794</td>
<td>51,171</td>
</tr>
<tr>
<td>2001</td>
<td>21</td>
<td>4,640</td>
<td>12,828</td>
</tr>
<tr>
<td>2002</td>
<td>46</td>
<td>18,788</td>
<td>22,441.2</td>
</tr>
<tr>
<td>2003</td>
<td>161</td>
<td>62,312</td>
<td>Not available</td>
</tr>
<tr>
<td>2004</td>
<td>41</td>
<td>31,699</td>
<td>138,526</td>
</tr>
<tr>
<td>TOTALS</td>
<td>765</td>
<td>708,881</td>
<td>3,812,756</td>
</tr>
</tbody>
</table>


It can be seen from table 4.4.2 above that there were 21 strikes in 2001 compared to 46 in 2002 or an increase of 119%. There were also 18,788 employees involved compared to 4,640 employees in 2001 an increase of 304.9%. There was an increase of man-hours lost from 12,828 in 2001 to 22,441.2 in 2002 representing an increase of 74.9%. In 2003 strikes rose to 161 from 46 in 2002 representing an increase of 250%, the number of workers involved also rose to 62,312 from 18,788 in year 2002 representing an increase of 231%. However the number of strikes dropped from 161 in year 2003 to 41 in the year 2004, which was 25.5% drop.
There was a rise in strikes reported in first six years from 1993 that was mainly attributed to liberalization of labour sector. The decrease in strikes reported after 1994 to 2004 was mainly attributed to adoption of new management styles and changing face of trade unions.

According to ministry of LHRD officials, the continued occurrence of strikes was as a result of:

- **a)** Incitement of workers by Non-governmental organizations (NGO) especially in EPZ workers.
- **b)** Delay in payment of salaries and wages, especially by the local governments.
- **c)** Failure by employers to recognize unions especially in EPZ zones.

According to Njoki N. Njehu in the Daily Nation, 2003, liberalization is a radical “Neo-liberal” school of economics advocated by Margaret Thatcher, the then Great Britain prime minister and the former US president Ronald Reagan. These policies were later adopted by the I.M.F and the World Bank. The I.M.F and World Bank in turn imposed these policies on their members.

Martinez, (1996), says that liberalism is characterized by the following: One, rule of the market this liberates “free enterprise” or private enterprise from any bonds imposed by the government or the state no matter how much social damage this causes. Greater openness to international trade and investment, reduce wages by de-unionizing workers and eliminating workers rights and/ with no price controls or unregulated markets. Two, cutting public expenditure for social services like education and health care. Reducing the safety net for the poor, and maintenance of roads. Three, deregulation, reduce
government on everything that could diminish profits, including protecting the
environment safety of the job. Four, privatization, this is to sell state-owned enterprises.
goods and services to private investors. This includes banks, key industries, railroads, toll
highways, electricity, schools, hospitals and even fresh water. Privatization although done
in the name of efficiency has the effect of concentrating wealth in a few hands and
making public pay even more for its needs. Five, eliminating the concept of “The public
good” and “community” and replacing it with “individual responsibility. This he says
pressuring the poorest people in the society to find solutions to their lack of health care,
education and social security.

According to Njoki Ngehu the 1980’s, says marked the beginning of “structural
adjustment” era. From then on countries desiring to access loans from the World Bank
and I.M.F have to institute various social-economic changes. These include reducing
spending on health, education, social welfare programmes and de-regulation of markets.
This according to advocates of SAPs was to enable loanees to be part of the word
economy.

The impact of SAPs as indicated in previous chapters of this study has been, flooding of
local markets with cheap imported goods, collapse of local industries, loss of jobs, lack of
job security, and increase in poverty levels among others. Further and as revealed in
chapter one, liberalization of the labour sector has taken place through review of Acts by
government through various amendments on management of labour in Kenya. There was
for instance, the 1994 finance amendment Bill that sought to lift controls on
retrenchment, redundancies and among others. Employers who initially had to seek
authority from ministry of labour before doing so were no longer required to do so.
Liberalization therefore brought with it lack of job security in labour sector. Further liberalization has resulted in decline in demand for non-skilled labour and rise in demand for skilled labour. It can be said that with adoption of new management styles such as performance based contracts. As had the role of collective bargaining agreement as a basis setting wage prices diminished.

Similarly the government declaration of early 1990’s not to guarantee automatic employment for university graduates upon finishing their university studies was resultant from SAPs, and further complicated the labour sector. More recently the government also through the 2005/2006 financial budget indicated that future wage increases would be based on productivity, most respondents indicated that there are no agreed standards of measuring productivity both in public and private sectors. Further the government in 1990’s removed controls on basic consumer goods and services, in essence this meant the worker had to dipper in his pocket and hence the desire to agitate for wage increment.

In effect therefore, and according to most respondents liberalization has directly affected industrial court. The court has to contend with increased challenges of economic awards especially that of determining the level of company’s productivity and profitability as opposed to consumer price index (C.P.I) and inflation.

The court officials interviewed noted that the court had to deal with increased disputes due to employers who declare redundancies without following right procedures, and of those that refuse to pay rightful dues to retrenches.
Deriving from data collected and analyzed liberalization has affected industrial court negatively. Trade unions are increasingly turning to industrial court for arbitration due to their weakened bargaining power. Further employer’s adoption of new management styles has led to a decline in collective bargaining agreements and a reduction the scope of collective bargaining. Some employers are also turning to high court to appeal against industrial court awards and rulings, a scenario that reflect industrial court in bad light.

4.5: Trade Unions and industrial court arbitration

Trade unions play a crucial role in industrial relations system. A trade union acts as a watchdog or as a defender of workers rights. When employers violate workers rights and union do nothing about it. Workers lose hope and snub unions.

Table 4.5.1: Key informants responses on changing face of trade unions and it’s impact on industrial court arbitration

<table>
<thead>
<tr>
<th>Impact</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trade unions affected negatively</td>
<td>21</td>
<td>84</td>
</tr>
<tr>
<td>Trade unions affected positively</td>
<td>4</td>
<td>16</td>
</tr>
<tr>
<td>Total</td>
<td>25</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Research data.

The table 4.5.1 above shows that, 84% of the respondents as opposed to 16% felt that trade unions have been negatively affected by liberalization of labour sector. This was attributed mainly to public sector reforms that called for budgetary cuts and staff reduction. Most respondents said that, the most significant factor impeding the effectiveness of trade unions in the era of liberalization is job insecurity and job losses. Further the respondents noted that low unionization, where few members join trade unions leads to unions having less bargaining power. Unions use industrial action as a tool of enforcing industrial court awards. However when a trade union has fewer members they are reluctant to use industrial action as a tool for demanding better pay and
working conditions for their members. The reason being employers may use the excuse of a strike to sack their members; however this would not be the case if the union has many members. However the respondents say that unions have recognized that as they continue to demand for better wages, employers have continued to retrench in order to contain cost. To avoid this kind of scenario some unions have opted to cooperate with employers to save jobs.

Table 4.5.2: Factors influencing trade unions arbitration

<table>
<thead>
<tr>
<th>Factors</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personnel training</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Poor economic growth and unemployment</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Decline in membership</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td>Government income policies</td>
<td>4</td>
<td>16</td>
</tr>
<tr>
<td>Labour laws/ILO conventions</td>
<td>6</td>
<td>24</td>
</tr>
<tr>
<td>Management interference</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Others</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Totals</td>
<td>25</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Research data.

The table above indicates that majority of the respondents were of the opinion that decline in membership and labour laws were the most important factors influencing trade unions arbitration at industrial court, this was accounted for by 20% and 24% respectively.

The respondents expressed that loss of jobs, due to redundancies, retrenchment and other factors brought about by liberalization, has led to decreased bargaining power of trade unions. This decrease in bargaining power has resulted to increased number of interpretation cases being lodged in the industrial court and a rise of employers turning to civil courts to appeal for quashing or setting aside of industrial court rulings/awards. The court officials pointed out that were the unions assertive this kind of scenario would not...
Trade unions with few members are also financially handicapped. According to 20% of respondent interviewed, unions rely on member’s subscription as a source of revenue. With less finance unions are unable to undertake important activities such as training of officials on negotiations skills, advocacy and mobilization. They also attributed poor workers representation at the industrial court to these factors.

The respondents also pointed out that due to marked increase in freedom of association and assembly, trade union have been dogged by internal squabbles, which has led to splits. In other instances employers have encouraged split of union in order to weaken them, they encourage craft, plant instead of industry wide unions. Public universities are a case in point where three unions represent staff i.e. grade I-IV represented by KUDEDHIA, middle grade and other non teaching UNTESU, whereas UASU represents members of academic staff. The formation of craft unions instead of industrial wide unions has weakened unions bargaining power. Instead of a union bargaining at company wide they bargain at plant level and therefore easily manipulated by employers. These scenarios do not advance the course of trade unions in the era of globalization. Where unions are supposed to bargain at industry level instead of plant or craft level. This is especially so in export processing zones, tea and horticulture sectors, where companies must abide by international standards. Further with liberalization the prices of goods and services, and inflation keep on fluctuating. Further 12% of the respondents indicated that the trade union officials lacked skills and knowledge on labour matters and hence their understanding of complex negotiation skills a problem. This is despite the establishment of Tom Mboya labour college in Kisumu to train trade union officials. Accordingly most respondents were of the opinion that lack of skills on negotiation among the trade union officials was a factor in industrial arbitration. Whereas F K E representatives seemed well
versed with labour laws and negotiation skills the same was missing among trade union representatives.

According to court officials’ disputes occur due trivial issues like breakdown in communication. Some negotiators are rude and unwilling to listen. Others are unable to evaluate a case critically. Further most negotiators have a fixed mind and lack flexibility. This respondents noted, leads to communication breakdown and escalation of a dispute. Further the respondents pointed out union officials lacked mobilization and advocacy skills, for instance, there are an estimated 7 million wage earners in Kenya today. 5.5 million are in the informal sector, 1.5 million in the formal sector. The trade unions in Kenya represent a meager 750,000 of 1.5 in the formal sector. The informal sector is difficult to organize and despite the trade union losing members due to liberalization they still have difficulties in recruiting members due to lack of advocacy and mobilization skills. This scenario is compounded further by employers who fail to recognize unions and rapid growth of informal sector where employment is on casual or temporary basis and hence difficult to organize.

According to 12% of the respondents interference of union matters by employers management has contributed to weakening of unions by:

a. Use of union officials as a vehicle of implementing organization policies. This is noted especially when the organization is about to initiate a policy change, the union is the first to support it.

b. Bribing union officials through unjustified promotions, unsolicited management support of union activities and employment of relatives of unions officials
c. Intimidating and threatening union officials with disciplinary action should they continue being vocal.

d. Unnecessary interference of union activities by sponsoring of pro-management candidates in union elections, and encouraging factions and internal squabbles with the aim of distracting them from their objectives.

However despite the employer's interference in union activities most respondents were of the view that unions have pre-occupied themselves mundane issues of bread and butter. Most unions do not practice internal democracy and sound management, and deliberately colludes with employers. However the incorporation of unions as part of management in some companies is encouraging and can go in a long way in minimizing disputes. however the jury is still out whether it will be on workers interest or not.

4.6: Impact of new management styles on industrial court arbitration.

Table 4.6.1: Key informant's responses on management styles influencing employer's arbitration

<table>
<thead>
<tr>
<th>Factors</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joint consultation</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Personnel training/Development</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Job evaluation</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Performance based contracts</td>
<td>4</td>
<td>16</td>
</tr>
<tr>
<td>Employee participation, involvement and empowerment</td>
<td>6</td>
<td>24</td>
</tr>
<tr>
<td>Acquisitions/mergers/out-sourcing</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td>Others</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>25</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Source: Research data.
According to table 4.6.1 above majority of the respondents stated that employee participation, involvement, empowerment and acquisition were factors influencing arbitration among employers as accounted for by 24% and 20% respectively. The respondents felt that employers were able to adopt management styles that helped them cope with liberalization and hence minimize disputes. Some of the styles adopted were joint consultation, personnel training and development, job evaluation, mergers, acquisitions, and performance based contracts. However 8% of the respondents stated that joint consultation plays a big role in resolving disputes between management and union as compared to collective bargaining. Rather than bicker over "negotiability", most employers now appeal to comprehension of unions and employers.

According to Windmuller et al (1994), unions have become generally realistic in their reactions to managerial decisions which are vital to a company's survival and its competitiveness in home and overseas markets instead of fighting a managerial decision a union will try to secure adequate information about it well before its enforcement, and if necessary will press management to modify it to take account of the employees views.

Representatives of employees in the JCC's are almost always of the enterprise union. JCC's serves as an efficient channel of communication between the employer and the employees and helps to promote mutual understanding and co-operation at the enterprise and plant level.

Joint consultation takes place at the industrial level between industrial federations of unions and employers associations. This deals with such issues of common concern like industrial re-organization, technological change, industrial pollution, and the labor
markets, employment situation, and international trade conflicts. This system enables the parties to obtain a realistic picture of the situation and prospects of a given industry, the problems involved and the way in which they can be solved.

According to 24% of respondents, employee participation, involvement and empowerment have played a significant role in reducing trade disputes. Employee participation, covers all forms of individual and representative information consultation and participation, collective bargaining may be excluded from this definition. They can refer to any process in the organization which are introduced by management to convey information to employees on business initiatives decisions and results used interchangeably they can also cover procedures mechanism and process which are set by management unilaterally or in agreement with trade unions thus enabling employees through their unions, or another representatives body to exert influence on and to share in decision making on matters affecting their interests.

According to Brian Stevens, (1990) involvement assures recognition that employees have a great-untapped potential but that managers retain the right to manage. Arkins (1995) says that employee empowerment programmes are strongly associated with culture change initiatives, delay ring and restructuring, often involves devolving power and responsibilities to teams at work place or customer level. Dugay and Salamon (1995) state that the concept of empowerment is to make meaning for people by encouraging them to believe that they have control over contribution is vital not to the success of the company but also to the enterprise for their own lives. It usually applied to non-managerial grades such as team members.
It has several possible meanings. a) Increased authority (legitimate power). b) Job enrichment. c) Increase individual discretion over how they do their work. d) It does not handover power to unqualified to junior management or rank and file employees.

**Employee participation**

Ratchet (1974), says employee participation is any process through a person or group of persons determines (that is intentionally affects) what another person or group of persons will do. Stevens (1990) believes that participation is about employees playing a greater part on decision-making process.

Involvement is a process by management to increase information given to employees and this enhances their commitment. It tends to treat employees as individuals. They address employees directly face to face rather than through their representatives.

Employee participation refers to collective rather than individual process that enable employees through their representatives to influence decision-making. It can extend to

**Examples of Employees participation, involvement and empowerment**

a) Quality circle

b) Financial involvement/participation- the form such as profit sharing and employee share ownership, and gain sharing, and

c) Team building.

Employee participation, involvement, and empowerment entail employees being part of organization’s decision-making processes. A quality circle is a form employee empowerment. Quality circle is a voluntary group of between six and eight employees from the same work area. They meet during work time usually weekly for one hour.
under their supervisor to solve problems relating to improving their work activity and environment.

According to Dale and Asher, (1989), Japanese companies in their mission statements usually stress that their greatest asset is manpower and all employees are encouraged to participate in quality improvement activities. The quality circles provide the means by which the considerable expertise, ability, wisdom and vitality of employees can be utilized for the common good of the organization.

According to 12% of the respondents job evaluation, which entail and consists of job analysis, job description, and job specification has greatly reduced incidences of disputes in work places. Job evaluation is concerned with assessing the relative demands of different jobs within an organization. Its main purpose is to provide a basis for relating differences in job requirements. It is therefore a tool that can be used to help in the structure.

According to Aluchio (1999), Job evaluation can minimize conflicts by establishing acceptable differences in: (1) the wage rates between jobs (2) create simpler, more easily understandable, pay structures (3) reduce the number of grievances over relative wages, (4) provide a yardstick by which grievances or claims about jobs can be judged and also avoid arbitrary decisions (5) fit new jobs into existing pay structure thus easing technological and organization change (6) more efficiency in management organization and working methods and removal of poor working condition and job hazards.
Total quality management (TQM) is another management style adopted by employer organizations. This is a set of management practices throughout the organization geared to ensure the organization consistently meets or exceeds customer requirements or needs. TQM entails quality planning, quality control and quality improvement. The organization must ensure customer satisfaction, expanding market share, increase competition and cut costs. Total quality Management

According to Aluchio (1999) total quality management (TQM) is a set of management process and systems that create delighted customers, empowered employees, higher revenue and low cost.

TQM process involves quality planning, quality control and quality improvement

- Quality planning is a structured participatory approach for discovering customer needs (both internal and external customers) and meeting those needs in a way that will satisfy and delight customers
- Quality improvement is also a structured process for reducing deficiencies in goods, services or processes. It can also be used to improve performance offers that may seem deficient, but which nevertheless offer opportunity to improve.

However the disadvantages of TQM are that, they may cause redundancies in organizations and further the process calls for large capital outlay for training. The training may involve multi-skilling, de-skilling and specification. This in turn may adversely affect the employees who are untrainable.
The adoption of new management styles are supposed to ensure employees loyalty to the organization, reduce production costs, expand organization share of the market and ensure profitability of the company.

Most respondents noted that adoption of these styles has had the impact of reducing industrial conflict however they go to challenge tradition bargaining methods, as we know it. The adoption of these styles the respondents noted discourage employee participation in union activities. The respondents noted that these kind of arrangement are meant to enhance individualism against collectivism thus weakening trade unions and hence a challenge to collective bargaining and industrial court arbitration.

Other management styles adopted were acquisitions, mergers, and out-sourcing of non-core business. According to respondents change of management styles by employer organizations helped organizations that adopted them improve on productivity, increase market share of their goods and services. This they said contributed to improved finances and industrial relations. British American Tobacco (BAT) and Mumias Sugar Company, were cited by respondents as some of the companies benefiting immensely from adoption of these management styles, and hence have good industrial relations.
According to chart above, there has been a steady decline of employer member affiliated to FKE since 1996 to 2002. Membership declined from 2995 members to 2484 members in 2002 a decline of 82.9%. According to FKE respondents this decline was attributed mainly to three factors: One, Liberalization of markets where due to competition companies either closed down, merged, relocated to other countries or and shifted from manufacturing to service industry. Two, weak unions diminished the need for FKE services. Three, employers’ adoption of new management styles that reduced industrial conflict at work places.

Deriving from data collected and analyzed adoption of new management styles by employer organizations can be categorized into two those that reduce incidences of
disputes and promote good industrial relations and those that could ignite disputes. TQM, performance based contracts, mergers, acquisition and outsourcing these management styles call for reduction of staff through retrenchment and redundancies. They not only contribute to job losses but job insecurity also, with the effect of upsurge in formal disputes. On the other hand management styles such as joint consultation, job evaluation, Involvement, participation and empowerment reduce informal industrial disputes especially at work places.

4.7: Challenges to industrial court arbitration.

It was noted by respondents, that the industrial arbitration system in Kenya has not been cordial and effective, since it lacks the muscle to effect its court rulings/ awards. The weak performance of industrial court was attributed to the following:

1) Inadequate Finances

The study revealed that, the court has been affected by the lack of adequate finances. The situation is worse than was the case before when government printer used to print court rulings through Kenya gazette free of charge. This arrangement has how changed and the court has to pay to the government printer to gazette its awards. The cost of printing these awards in Kenya gazette ranges from Kshs. 20,000 to Kshs 300,000 per award. However due to limited resources the court barely gazettes these awards. What is worrying is that some employers have refused to honour these awards with the excuse that the court has not gazetted them.

Further it was noted that due to limited financial resources the court is unable to transact business as it would. Basic things like stationeries, travel allowances and telephone bills
and purchase of new furniture are increasingly becoming difficult to meet. The net effect has been that the court is hand capped in its service delivery to its clients.

2) Exploitation of loopholes in the Labour laws

According to, the Court, ministry of labour and COTU officials, the current labour laws are a hindrance to achieving sound labour relations. It was noted that most employers take advantage of loopholes in labour laws to circumvent implementing issues that would benefit workers.

They cited trade dispute Act Cap 234 of the laws of Kenya that, does not provide for exhaustive and quick of dispute resolutions by the ministry of labour and the industrial court. The Act provides for the third party arbitration, which causes inordinate delays especially for the dismissed and suffering workers.

The Act also designates the industrial court as the final arbiter in trade disputes, however recent happening are worrisome, some employers are increasingly turning to the high court to appeal for the quashing or reversal of the industrial courts awards and rulings. In 2003, 5 cases already determined by industrial court were lodged at the high court for review; they rose to 15 in 2004. The respondents noted that unless immediate measures are taken the courts authority might be eroded. The inability of the court to enforce its awards and the low fines meted to those who delay or defy the court has resulted to many respondents calling for the review of the Act and for establishment of the industrial court of appeal in line with that of South Africa.

Although most respondents supported the elaborate industrial arbitration mechanism, they were also of the view that the many stages that the parties to a dispute undergoes
works against the industrial relations system. Hence amendments should be effected to hasten the process of dispute settlement. Most are familiar with the common saying that justice delayed is justice denied. This, they observed is the current scenario in the Kenyan industrial relation system at present. Most workers due to delay are increasing being comprised by employers who convince them for outside court settlement.

Most respondents also pointed out the trade disputes Act gives enormous powers to the minister of labour and human resource development. They pointed out that these powers could easily be abused if not checked. The minister has discretion to declare a strike illegal or not. Strike is an important tool which workers can use to enforce their rights. The strike threat acts as a deterrent measure to arrogant and insensitive employers. However the lengthy procedures to be observed before declaring a strike has resulted in some unions calling for wildcat strikes, sit-ins and boycotts.

Further it was indicated by most respondents that the trade union Act provide for registrar of trade unions also hinders growth of good industrial relations in Kenya.

The Act they pointed out is against the country’s constitution and international labour organization resolutions that allow for freedom of association and collective bargaining of wage earners. The act was noted is a major obstacle to the growth of trade unions and the establishment a sound industrial arbitration in Kenya.

The trade dispute act, most respondents noted remains a challenge to industrial arbitration. The workman compensation act was pointed out as inadequate, since it does not cover employees in senior management level. Besides the compensation takes a long
time before it is awarded. Similarly, the regulation of wages and conditions of employment act, employment act, and factories and places of work act, are outdated and cannot work properly in an era of liberalization unless amended. The union respondents noted that these not only require labour inspectors to enforce and employees who are adequately informed on their rights. So unless these labour laws are amended they will continue being an impediment to industrial court arbitration and good industrial relations in Kenya.

3) Unrealistic Government income policy

It was noted that government income policy as a continuous challenge to industrial court. The government has indicated that awards of industrial court will in future be based on productivity. However has been pointed out the government is unable to issue guidelines on how to measure productivity. Further the government uses the court to enforce its income policy. The minister of finance is supposed from time to time to issue wage guidelines to the court. The court on its part uses these guidelines in determining wage awards. The danger of this kind of guidelines is that unions feel that the government always keeps wages down for the benefit of employers. The respondents indicated that the last guidelines by the government was in 1994. This, they felt has been overtaken by events yet the government 12 years later has not issued new one. This state of affairs the respondents pointed out keeps the court hostage even in circumstance where a higher award would suffice.

"The wages guidelines which bind the court were last reviewed in 1994. The said guidelines calls for "Moderation in awards" and consideration for "sustainable development" through stable prices. The guidelines favours "productivity awards" over "mere cost of living" increases. However there are, by admission of parties, no clear
available systems or indicators either at government or enterprise level for determining and monitoring productivity. Hence the court is left to look at the data available to it by economic planning division of the ministry of finance, which solely relies on cost of living and inflation indices. Not having such productivity measuring systems in place, we are concerned that at times the court may make awards in opposition of its mandate, one of the judges lamented in one of the court deliberations”. (Industrial courts cause no.29 of 2003). This is a challenge the court fears might lead the court to act against its own mandate.

4) Inadequate Infrastructure

The study revealed that inadequate infrastructure was a major hindrance to courts operation. The industrial court has its headquarters in Nairobi, but expected to sit in Kisumu, Nakuru, Eldoret, Nyeri, Machakos, Embu and Mombasa. This is what is commonly known satellite court. In most cases the court leases premises from either Local authorities or the provincial administration. The Danger here is that there is always the fear of conflict of interest.

Further the respondents indicated that the court does not have adequate library facilities for the judges and court members to conduct meaningful research. They further observed that the lack of research assistants, relevant books and research materials is an impediment to their work.

5) Lack of Information

Lack of information and especially of lack of adequate data especially on economic situation of a country i.e inflation, consumer price index (cpi), profitability and productivity of a company, as a challenge to industrial court arbitration. Further the
claimant’s lack of adequate data especially when arguing cases before the court. Continuous to be a challenge to industrial arbitration. The respondents pointed out that without proper information the court is unable to arrive to a fair and balanced decision. Lack of relevant information was also attributed to delays and adjournments. Further ministries of labour officials regret that some employers withhold information that could make the court arrive at a fair decision.

6) Inadequate and poorly remunerated personnel

It was noted through various interviews with respondents, especially FKE and court officials, that, the industrial court is challenged by lack of adequate personnel. Apart from the registrar, judges and court members, the rest members of staff belong to the ministry of labor and human resource development. The staff are also poorly enumerated and demotivated.

This situation is critical to an extent that some staff members do ministerial duties at the same time as those of the court. This was pointed out as a challenge in that, the court lacks independence and it might be perceived to be an extension of the ministry.

The courts have five judges and 16-members. A judge and two members are required to make a quorum. However with the increase in trade disputes an increase of staff is necessary. Further the idea of government employing people who have retired or over 60 years as court members coupled with poor remuneration were seen as a hindrance to the dispensing justice in labour sector.
7) Globalization
The study revealed that, globalization is a challenge to the functioning of the industrial court. Foreign direct investment, which the government has been pushing for, has created a lot of problems and is a threat to good industrial relations system in Kenya. There are many multinational companies investing in Kenya and opening branches. They in effect transfer some industrial relation systems, which are different from what is practiced locally. The introduction of automated teller machines and tea picking machines were cited as examples. On the other hand these companies have salary scale, which is much higher for the expatriates and the management staff. They also give incentives: allowances and bonuses in line with sister companies abroad. The unionizable workers on the other hand are not as adequately paid, when the union complains about low salaries the companies complain of low productivity and wages. This eventually leads disputes.

8) Perceived corruption.
The ministry of labour and human resource development plays an important role in industrial arbitration. Most respondents pointed out that the way the ministry is run directly affects the operation of the industrial court. The court relies on reports from investigators and labour inspectors in identifying the causes of conflicts in most cases. Labor inspectors are responsible of maintaining standards and for ensuring sound labour practices are adhered to. However most of them are said to be corrupt and are easily comprised by greedy employers.

9) Inaccessibility to Information technology services
The study revealed that, the court at present has not adopted information technology in its departments. This hinders the members and judge from accessing information, which
would be useful when determining a case. The court can utilize information technology in many ways. One is accessing the necessary data, facts and figures. Two, is the processing system, which is computer and human resource. Then lastly that of information and decision making process. Technology reduces costs and enhances productivity. Further it enhances service delivery and customer care.

10) Workers’ and Employers expectation

According to this study, the court is affected by expectation by parties to a dispute. Since the establishment of the Kenya industrial court, parties to a dispute expect any Court decision to be in their favour and should this not happen then the court is accused of favouritism. The court is a government body, which is seen to lack independence, and its awards are perceived to be government driven. For instance if awards are not in favour of employers, the court is accused of not giving awards based on the right indicators especially company profitability and/or state of the economy. Due to this some companies have resorted to challenging industrial court decisions in civil courts, while as some unions have defied its rulings.
CHAPTER FIVE: FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary

5.1.1 Introduction

In this chapter, the research findings are summarized, recommendations and conclusions on the challenges facing industrial arbitration by the industrial court are drawn and research gaps are identified for future studies.

The purpose of the study was to identify the challenges facing the industrial arbitration in the context of a liberalized labour sector. It set up the following objectives: to investigate the causes of industrial disputes with particular reference to disputes referred to the industrial court, to determine the impact of the liberalization of the labour sector on the industrial court arbitration, to find out how the changing face of trade unions has affected industrial court arbitration and finally to determine the impact of change in the management styles on industrial court arbitration.

In order to achieve the above set objectives, the study raised the following research questions i.e. what causes the frequent industrial disputes that are referred to industrial court for arbitration, in what ways has the liberalization of the labour sector affected industrial court arbitration, how has the changing face of local trade union movement affected industrial court arbitration, and finally how has the change of organizational management styles, affected industrial court arbitration.

5.1.2 Summary of Research Findings

The court lacks independence: as is currently constituted the court is a department in the ministry of labour and human resource development. The court officials observed, that
this inhibits the court in its operations, in that decisions involving state may be difficult to make for fear of reprisals.

The Court and COTU officials pointed out that the current labour laws inhibit the effectiveness of the court. The court is guided by the Trade disputes Act cap 234 of laws of Kenya which clearly specifies that industrial court rulings and awards are final but does not give the powers to impose stiffer penalties on those who fail to abide by its rulings. The act further limits access to the court to those who are not members of a trade union from accessing its services however with changing working environment this is quiet discriminatory.

Government income policy was observed continues to challenge industrial court arbitration. The industrial court relies on the government from time to time to issue income policy. However since 1994 the government has not issued income guidelines, the court officials say that, this may lead the court to work against its mandate.

Lengthy dispute resolution mechanism was felt makes the court to be seen as ineffective in dispute resolution. The requirement that parties to a dispute must show that they attempted to solve the dispute through third party arbitration causes inordinate delays. This they said does not help in era of liberalized labour sector, where quicker settling of trade disputes would inspire worker and investor confidence.

Poor remuneration de-motivates and demoralizes court officials. Hence, the tendency for taking or asking for a bribe so as to influence a case.

Court officials and federation of Kenya employers observed, that personnel issues impacts negatively on court operations. The court relies on ministry of labour staff to man its daily operation and yet some of them are unable to distinguish between court duties and routine ministry duties. Court officials felt that they should fall under judicially. They also felt that they lacked relevant training to handle industrial arbitration.
Lack of adequate infrastructure was observed inhibits court effectiveness, although based in Nairobi the court often travels to Eldoret, Mombasa, Kisumu, and Nyeri, to handle dispute cases however in these towns the court does not have its own offices and relies on local government and provincial administration for premises this it was observed may make the court easily compromised.

According to court officials the adoption of new management styles i.e., joint consultation, job evaluations, employee empowerment, participation, and involvement, and Performance based contracts by employers has challenged industrial court arbitration, and have gone to challenge tradition bargaining methods as we know them. The management styles adoption emphasis on individuality as opposed to collectivity. The study revealed this has led to few collective bargaining agreements being registered with the court. Further the findings reveal that collective bargaining as a tool of wage fixing has diminished.

Employer's appeal against court awards and rulings in civil courts was noted is a challenge that might affect court credibility and independence. It was noted that employers are increasingly turning to the high court to request for setting aside or review of industrial court awards or rulings. This is despite the fact that industrial court decisions cannot be quashed or set aside. This therefore according to court officials is a time wasting tactic. This they noted might lead to court authority being undermined.

The study findings reveal that trade unions have been weakened by liberalization of labour sector, job insecurity has increased and trade unions bargaining powers reduced. The unions are more and more turning to industrial court for arbitration in matters that could have better resolved in around table discussion. The problem with unions they said is failure to change to new environment.
According to study the industrial court hears all disputes, disputes of "interest" and disputes of "right". Disputes of right involve, terms and conditions of employment, dismissals, redundancies and interpretation on the other hand disputes of interest involve recognition, and terms of re-newal of collective bargaining agreements. However the study revealed that most disputes referred to industrial court for arbitration are of "rights" in nature.

5.2 Conclusion

Despite its relative short history, the Kenya industrial court can be said to be a success, story. It has been able to maintain and foster peace in otherwise would be chaotic environment. With the increased freedom where unions are free to organize for purpose of collective bargaining; disputes are inevitable. The need therefore to strengthen industrial court need not be over-emphasized. The establishment of industrial court was a milestone in that it set in motion the establishment of industrial law in Kenya. Industrial adjunction of trade disputes is a corner stone to greater economic development and economic growth.

Kenya’s high economic development compared to its neighbors is due to establishment of institutions like industrial court. They not only attract foreign investment but also guarantee good returns for the investors due to industrial peace. The court through history of dispute resolution has set up and evolved principles as a guide to parties involved in a dispute.
5.3: Recommendations

However in order to consolidate these achievements the challenges facing the court as indicated in previous study chapter need to be addressed. The hurdles that deny workers quick dispute resolution must be eliminated. The fear of employers that the court is not fair to them must be removed.

The government should establish an industrial court of appeal to discourage employers turning to civil courts for appeals. The Court must also be de-linked from ministry of labour and adequate funds provided. This if done, the researcher is of the opinion that the court would be at par with those of developed countries.

Industrial relations is a tripartite and efforts towards improving and strengthening, should involve the joint and individual efforts of all social partners i.e. government represented by the ministry of labour through F.K.E and employees through COTU.

The industrial relations charter must be reviewed frequently in order to be in line with the current international labour trends. The specific efforts that social partners should follow are as follows: -

Role of Government

The Government through Ministry of Labour and Human Resource Development is a stakeholder in industrial relation system in Kenya. The government must therefore ensure that it comes with sound labour laws that can ensure industrial peace, wage development, employment creation and economic development.
Role of industrial Court

The industrial court being the final arbiter must ensure that all its ruling are adhered to by all parties to a dispute. The court must be guided by integrity and awards must be impartial and free of political and other influences.

Role of trade unions

Trade unions must ensure that they live by their tenants, ensure that officials do not use unions for personal gains and must also embrace internal democracy and adapt to changing working environment.

Role of F.K.E

The F.K.E. must encourage their members to practice good labor practices, dialogue with unions and involve employees in their management policies. F.K.E should also discourage and even sanction those employers who refuse to recognize unions. It should also offer continuous training and advice to employers on new labour polices and arbitration.

In addition to above recommendation, the following recommendations are made:

The government should consider as matter of priority the review of labour laws. The trade disputes act, employment act, regulation of wages and conditions of employment act, trade unions act, workers compensation act, factories and places of act, these laws should be amended to reflect changes of liberalized labour sector.

The government should de-link industrial court from ministry of labour and transfer it to the judicially. It should be a special court dealing with labour matters. It should be similar the commercial court, children's court, or corruption courts which are under the direction of the chief justice.
Parliament should legislate an alternative dispute resolution mechanism body a long lines of the British. This should be similar to Advisory, Conciliation, and Arbitration Services (ACAS) (U.K.) by act of parliament. This body should act as a professional body, for arbitrators. To train, ensure quality of service and guard against corruption.

The government should consider improving terms and conditions of civil servants and court officials. This could motivate staff and enhance court efficiency.

Channels of communication should be established throughout all organizations to remove distortion of facts and rumors. Top management decision should be communicated to lowest levels. Shop stewards should be given every opportunity and facilities to handle and lodge workers grievances. This will allow shop stewards to differentiate their roles of being a worker and at the same time a worker representative. Communication if effectively handled may result in reduced disputes, better inventory control, quick and effective deliveries and a better performance of the organization.

5.4 Further Research

The study on challenges facing industrial court was limited to the final stage of formal industrial arbitration by industrial court. This study therefore recommends further study to be done on matters and objectives not covered here, such as:

1) As the study concentrated on formal arbitration further research was felt necessary on the role of informal arbitration in preventing trade disputes in labour industry.

2) The relationship of trade unions bargaining power and implementation of industrial court awards and collective bargaining agreements

3) Adoption of new management styles by organizations and their role in preventing or abating trade disputes in labour industry.
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