LEGAL AND POLICY FRAMEWORK NECESSARY TO BOOST RETIREMENT BENEFITS COVERAGE IN KENYA: A REGULATORY PERSPECTIVE

BY

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DECLARATION

I declare that this research project is my own original work and that it has not been submitted for examination for the award of a degree at any other university. All sources of information have been acknowledged.

SIGNED:

FRED GEKONDE .... DATE: 16. 11. 2021

This research project has been submitted for examination with my approval as the University Supervisor.

SIGNED:

DR. ELIZABETH MULI .... DATE: 19/11/2021

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My profound thanks also goes to my wife Abigail, baby Gianna, family and friends for their encouragement which kept me focussed throughout the period of writing this project, for your prayers, I am forever indebted.

DEDICATION

I dedicate this Research project to all the retirement benefits sector stakeholders in Kenya. It is my sincere expectation that they will apply this research to introduce the necessary changes to the current policy and legal framework in order to enhance the low retirement benefits coverage that keeps bothering me each day.

LIST OF INTERNATIONAL INSTRUMENTS AND STATUTES

Constitution of Kenya 2010.

Insurance Act, Cap. 487

National Social Security Fund Act, No. 45 of 2013

National Social Security Fund Regulations, 2014

Pensions Act, Chapter 189 of the Laws of Kenya.

Retirement Benefits Act, Cap 197 (RB Act)

Retirement Benefits Regulations, 2000.

Retirement Benefits (Occupational Schemes) Regulations, 2000

LIST OF ABBREVIATIONS

DB Defined Benefit

DC Defined Contribution

ILO International Labour Organization

ILO International Labour Office

NSSF National Social Security Fund

PPF Pension Protection Fund

OECD Organization for Economic Community Development

OPCT Older Persons Cash Transfer

RBA Retirement Benefits Authority

Table of Contents

ABSTRACT

Currently, the retirement benefits system in Kenya is biased in the sense that it primarily accommodates only the formal working population. The system has technically side-lined the self-employed population, the unemployed and of course the informal sector workers. The Retirement Benefits Act (RB Act) and to a greater extent the NSSF Act, do not address both the unemployed or the self-employed Kenyans who deserve to enjoy the right to social security pursuant to the Constitution. Further, the fact that establishment of a retirement scheme in Kenya is voluntary and not mandatory provides an option for employers to avoid registering one. Although the NSSF Act makes it mandatory for all employers to ensure all their employees become members of the fund, the issue of adequacy of benefits at retirement has not been addressed in that Act.

The Constitution of Kenya provides for the right to social security among all the citizens. Old age income security which forms part of social security protection is regarded as a fundamental right by the United Nations. Despite all these developments, 80% of the Kenyan workforce is still left out without any form of retirement benefits guarantee. Kenya does not for instance have a retirement benefits policy which needs to address key issues such as the right to social security as espoused in the Constitution and other aspects such as the universal retirement protection schemes for all citizens.

This study points out at the gaps in the current legal and policy framework for retirement benefits in Kenya which in one way or another have contributed to the low coverage such as pre-retirement withdrawals, lack of a retirement benefits protection fund, presence of conditions to the payment of pension under the Pensions Act, uncoordinated legal framework among others. This study ultimately recommends various changes to both the policy and the law meant to enhance the retirement benefits

coverage in Kenya while pointing at the best practises from countries such as South Africa, United Kingdom, Chile and Singapore whose respective retirement benefits coverage are satisfactorily high.

CHAPTER ONE

1.0 Introduction

The existing retirement benefits systems in the world dates back to late 19th century in Germany.[1] Over time, those systems have dispersed and experienced transformations worldwide regardless of the extent of civilization thus leading to contemporary and structured retirement systems. Nevertheless, notwithstanding the continued transformations, the contentious concern yet to be addressed is how the contemporary and structured retirement systems can be extended to the entire working population all over the world.[2]

There are two urgent concerns for retirement benefits systems in Africa, first is the need to come up with social protection arrangements including retirement schemes in order to counter the ever increasing old age poverty. Secondly, there is need to undertake reforms and transformations in the existing retirement systems so as to address the question of coverage, adequacy and discrimination. For instance, coverage in all the existing systems is so low since they are only a preserve of government workers or people formally employed in multinational companies.[3]

Kenya has witnessed tremendous growth in the retirement benefits industry in the recent years especially after the enactment of the various laws[4]. However, retirement benefits coverage is still very low and majority of the working population is not covered. The total population covered by

[1] Gianasso, Alexandre. "A Brief History of Pensions". Davidson Asset Management. Retrieved 29 June 2017.
[2] Van Dullemen, C., (2007) 'Pensions in Developing Countries: A quest for modern format for intergenerational solidarity', United Nationshttp://www.un.org/esa/ socdev/unyin/documents/egm_unhq_oct07_vandullemen.pdf
[3] Willmore, L., (2006), Universal pensions for low income countries, World Bank.
[4] National Social Security Fund Act (NSSF Act) in 1965 and later the new NSSF Act in 2013, the Pensions Act in 1989, the Retirement Benefits Act in 1997 and finally the promulgation of the Constitution in 2010

retirement benefits schemes stands at 2,603,495 members which amounts to a coverage of 20% with respect to the entire work force in the country.[5]

The Constitution has an elaborate bill of rights espoused in chapter four which among them is the right to social security under Article 43.[6] According to the constitution the state is obligated to provide this right to all Kenyans irrespective of whether they are working or not.[7] Despite all these key achievements in our constitution, social security is still a dream to a majority of the Kenyans since most of them do not have any form of security after an active period of either employment or even self-employment.

The National Social Security Fund (NSSF) is a national fund created by the NSSF Act and whose key mandate is to pay benefits to Kenyans who are members when they attain retirement age.[8] Although NSSF is a mandatory retirement benefits scheme, most employers especially those who employ casuals and in the informal sector at large including self-employed Kenyans are neither members nor contributing to the fund. Currently, there are slightly over 2.4 million members contributing to the fund.[9] This is low compared to over 14 million workers recorded in 2014.[10] This situation therefore implies that the strategies employed to expand coverage are somewhat not effective.

The Retirement Benefits Act (RB Act) was enacted in the year 1997 to bring about regulation and supervision in the retirement benefits sector which was unregulated previously.[11] The RB Act created

[5] Retirement Benefits Industry Statistical Digest 2016: www.rba.go.ke visited 5/5/19. The total members covered only captures members of NSSF and IPP. This is because members in formal employment (occupational and umbrella funds) also contributes to the mandatory scheme (NSSF).
[6] The constitution, Article 43
[7] Ibid, Article 21 (2)
[8] NSSF Act 2013
[9] Retirement Benefits Industry Statistical Digest 2016: www.rba.go.ke visited 5/5/19
[10] According to the Economic Survey of 2015, there were 14.3 million workers in 2014 and 11.8 million were in the informal sector. Only 103,000 were self employed while 2.3 million were in formal employment (GoK, 2015).
[11] Retirement Benefits Act

the Retirement Benefits Authority (RBA) as a regulator to watch over the management and development of the sector in order to ensure that schemes were run professionally to the best interest of members.[12] The Act was envisaged to restore the confidence of service providers in the sector and employees and ensure the growth of the sector thus alleviate the old age poverty and boost national savings.[13] So far, the RB Act has achieved a lot in terms of ensuring growth of retirement benefits schemes and further offering a solution to most of the problems the sector was facing such as: malpractice management of schemes; schemes not sufficiently funded; unprofessional and capricious investment of scheme funds and poor record keeping.[14] However, the Act has not achieved much in increasing coverage within the formal sector nor extending it to the informal sector which forms a huge work force in the country.[15]

The RB Act eventually has also contributed to low income replacement rate. This is due to the fact that the Regulations made under the Act allow access to the retirement benefits prior to retirement. The provision allow employees to access a portion of their accrued benefits upon changing jobs or ceasing employment before they attain their respective specified retirement age.[16] Pensioner Surveys by the Retirement Benefits Authority, show that a majority of Kenyans who changed jobs preferred to withdraw their benefits as opposed to defer the benefits till retirement hence contributing to old age poverty.[17]

The Pensions Act Cap.189, makes provisions for the granting and regulating the payment of pensions, gratuities and other allowances for public servants under the government of Kenya. The

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[12] Ibid, s. 3
[13] Pension Industry in Kenya: Recent Changes in the Regulatory Framework <http://www.natcomreport.com/kenya7/livre/pensions.html> accessed 30 June 2018
[14] Ibid.
[15] Ibid
[16] Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, Regulation 19
[17] RBA Publications: www.rba.go.ke > accessed 5th December, 2018

Act covers civil servants, teachers, police officers, prison staff among others and pensioners.[18] Regrettably, the benefits under the Pensions Act are not assured since they vest to an individual after a minimum period of ten years. Worse still, benefits under the pensions Act are not portable to another retirement benefits scheme hence the restriction of job mobility for civil servants. The act has also failed to solve this problem of coverage since it restricts itself to only civil servants of certain ranks in employment.

In terms of societal behaviour, our traditional African is society currently witnessing a breakdown of traditional systems that ensured the elderly are taken care of by the young and the energetic groups. So unlike in the previous traditional African society whereby there was some form of social security at old age, things have changed nowadays because of the emergency of capitalist economic system whereby every person struggles on their own to make ends meet without any regard to other members of society especially those who are not able to fend for themselves because of either disability or old age.[19] This therefore means that in this current capitalist economic system, we need to come up with the establishment of retirement benefits schemes as an alternative to deal with this problem of breakdown of traditional systems.

1.1 Statement of the Problem

Although the current retirement benefits system in Kenya has undergone some reforms lately, it still favours the formal sector workers both in public and private. As a result, the unemployed population and the ever increasing informal sector workers have been left out. Nevertheless, Kenya lacks a retirement benefits policy to address the need to make sure that all Kenyans in all sectors of the economy as well as the elderly, are covered.

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[18] Pensions Act Cap. 189

[19] World Economic and Social Survey, Sustainable Development Challenges (2013) https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf > accessed 6/7/2019

1.2 Objectives

1.3 General Objective

The main objective of this study is to assess the relevance of the existing legal and policy framework for purposes of increasing retirement benefits coverage in Kenya with the view of recommending a new legislative and institutional framework that can increase the coverage in the country.

1.4 Specific Objectives

The specific objectives of the study are:

i. To evaluate the current situation with regards to the retirement benefits system in Kenya.
ii. To assess the legal and policy framework on retirement benefits in Kenya
iii. To identify the gaps in the law and policy which have contributed to low retirement benefits coverage in Kenya.
iv. To recommend various legal and policy changes meant to increase retirement benefits coverage in Kenya

1.5 Research Questions

This study addresses the following questions

i. What is the current situation with regards to the retirement benefits system in Kenya?
ii. What is the legal and policy framework on retirement benefits in Kenya?
iii. What are the gaps in the law and policy which have contributed to low retirement benefits coverage in Kenya?
iv. What Legal and policy changes will increase retirement benefits coverage in Kenya?

1.6 Hypotheses

The study is based on the following assumptions

1. The current legal and policy framework does not adequately increase the retirement benefits coverage in Kenya
2. The gaps in the law and policy have greatly contributed to low retirement benefits coverage in Kenya.
3. New legal and policy framework will increase retirement benefits coverage in Kenya

1.7 Justification of the Study

The study herein has been aggravated by the need to come up with specific legal and policy framework to broaden the coverage of the retirement benefits system in Kenya. Most authors in this area have identified coverage as one of the challenges to the retirement benefits system in Kenya.[20] However, they have not been able to make specific recommendations on how this challenge can be addressed more so from the legal perspective such as coming up with a policy on retirement benefits in order to accord every Kenyan his or her right to social security in line with the Constitution.

With the breakdown of traditional channels of old age provision; there is need for Kenya to come up with modern ways that addresses poverty at either retirement or old age by making sure that the elderly are adequately provided for, taking into consideration their longevity risk. Therefore, this study offers other options such as the widening of coverage of retirement benefits for Kenyans in all sectors of the economy.

[20] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008)

Studies show that Kenya has experienced a high mortality rate of its senior citizens due to high costs of medication as well as poor living conditions.[21] The dependency ratio is so high hence the working population feels strained by the heavy burden of the old age population, resulting into underdevelopment.[22] Moreover, retirement benefits schemes have effects on economic development and growth through savings and operations of labor and capital markets. As one of the aspects that support the growth of an economy, the retirement industry plays a major role both socially and economically in poverty alleviation as well as enhancing resource mobilization for economic development. The retirement benefits sector is part of the financial system and can influence financial markets stability. Unlike banks, retirement benefits schemes have a more indirect impact on financial stability and are therefore a major component of the financial sector.[23] This study tries to propose ways of achieving this by increasing the number of schemes in the country and further by the adoption of best practices and international standards for the retirement benefits sector.

This study will benefit policy makers in Kenya especially the Kenyan Parliament, the National Treasury Ministry and the Retirement Benefits Authority to aid in legislative reforms on the laws concerning the retirement benefits sector in the country. The findings may also be used as a source of reference for retirement benefits schemes and their stakeholders as well as researchers in this or any other similar field.

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[21] United Nations, Department of Economic and Social Affairs, Population Division, World Population Ageing 2017 https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Highlights.pdf > accessed 6/7/2019

[22] United Nations, Department of Economic and Social Affairs, Population Division, World Population Ageing 2017 https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Highlights.pdf > accessed 6/7/2019

[23] Ibid

1.8 Research Methodology

This research adopted a doctrinal research methodology[24] since it sought to analyse the legal and policy framework in retirement benefits sector in Kenya with the view to understand how it has contributed to the low retirement benefits coverage in the country. The study reviewed government policies, reports and directives pertaining to retirement benefits as well as the constitution, legislation and subsidiary legislations. The legislation studied includes; the RB Act, the NSSF Act, the pensions Act among others. This study further employed a qualitative research method. Qualitative research method tends to be explorative in that it finds out the origin of proofs, views, thoughts and basic explanations of the subject being studied.[25]

This research was also desktop based, it largely relied on secondary data which basically means that data collected and examined by a party other than the primary one, mostly a third party.[26] The secondary sources which were relied on to develop this study include books, articles, reports, conference papers, journals and the internet. These sources contained key data relating mostly to study areas such as social security and the history of the retirement benefits system in Kenya over the years.

The utilization of web sources and library was guided by the availability of literature in the area of retirement benefits coverage and social security at large. The library and web research provided a collection of past literature published on retirement benefits or pension coverage which set the foundation for the study. This study also employed the descriptive survey design technique, particularly the use of secondary information, gathered from different publications by agencies such as Retirement Benefits Authority, National Social Security Fund, scholars, professionals, and case studies.

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[24] Terry Hutchinson & Nigel Duncan, Defining and Describing What We Do: Doctrinal Legal Research, 2012 p. 84
[25] Ibid p. 85
[26] C.R Kothari, Research Methodology Methods, and Techniques, Second Revised Edition 2011 p.95.

A desk research was favoured in this research because it achieves the goal of obtaining a lot of data required to analyse the legal and policy framework of Kenya which one could not have the resources to generate and the fact that it saves time in terms of data collection since it allows faster collection of information.[27] On the other hand, the short coming of this methodology was when it comes to both the freshness and biasness of data but the author tried to moderate that by ensuring that the data analysed was current and impartial.

Other than the author utilising his experiential knowledge in the retirement benefits sector where he works, the choice of this research methodology was also informed by the fact that the author had access to credible data that was useful in testing the hypothesis that it is indeed the lack of policy that has contributed to the low retirement benefits coverage in Kenya.

1.9 Limitations of the Study

This study is limited to the legal and policy ways of addressing the issue of low coverage for retirement benefits. This does not in any way rule out the fact that there are other non-legal strategies to address the same problem. The other limitation is that this study takes a perspective of a regulator and this also does not negate the possibility of having other perspectives to approach this study.

1.10 Theoretical Framework

This research is grounded on two theoretical frameworks; legal positivism and the public interest theory of regulation. The two are further discussed below.

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[27] Cameron, Steffani. "The Advantages & Disadvantages of Secondary Research" bizfluent.com, https://bizfluent.com/info-8205583-advantages-disadvantages-secondary-research. > accessed 3/10/2020

1.11 Legal positivism

This theory was initially advanced by Jeremy Bentham and John Austin[28] and it was later further developed by Hans Kelsen.[29] The advocates of this theory consider that the solitary genuine sources of law are the those which have been codified and clearly enacted, approved, or accepted by the three arms of a government. The central tenet of legal positivism is that laws are passed or "posited," by individuals. In a nutshell, according to the positivists, law acquires its authority from socio-political practices as opposed to existing "naturally" or independently.[30]

The foundation for this theory was set by Jeremy Bentham who indicated that law is the conveyed desire of the sovereign.[31] John Austin on the other hand pointed out that law is the command or instructions from a sovereign that are backed by sanctions. According to Austin, positive law is the only suitable law which ought to be accepted by all studies of law and further that law is that which has been created by the political superiors in order to rule the inferiors or to guide their subjects.[32]

Hans Kelsen maintained that the laws develop their legitimacy from their conventionality with the grund norm, which according to him is the basic norm, order or rule which forms a primary foundation for a legal system. He placed more emphasis on the harmony of a specific legal system by ensuring all the laws are put in any specific system in some kind of hierarchy.[33]

H. L. A Hart established that law is a command or instruction from the one exercising authority or the sovereign to his/her inferiors or subjects and that there exists three components in it: the first one

[28] Austin, John (1995) [1832]. The Province of Jurisprudence Determined. Cambridge University Press.
[29] Kendra Frew, 'Hans Kelsen's Theory andthe key to his normativist dimension' Vol. 4 The Western Australian Jurist p. 285-320.
[30] Ludvig Beckman, Popular sovereignty facing the deep state. The rule of recognition and the powers of the people, Critical Review of International Social and Political Philosophy, 10.1080/13698230.2019.1644583, (1-23), (2019).
[31] Austin, John (1995) [1832]. The Province of Jurisprudence Determined. Cambridge University Press.
[32] Anthony Townsend Kronman, 'Hart, Austin and the Concept of Legal Sanctions' (1975) Vol. 84 The Yale Law Journal p. 584
[33] Kendra Frew, 'Hans Kelsen's Theory and the key to his normativist dimension' Vol. 4 The Western Australian Jurist p. 285

is that the instruction or the command is the rule set by the supreme authority or the sovereign to his or her inferiors or subjects below him or her, secondly, sovereign denotes a person or persons who wish to be respected and their commands obeyed and lastly, sanction is what the sovereign used to threaten whoever that violates the commands.[34]

The most prominent criticism of legal positivism is the obvious fact that it neither recognizes nor is it fair to the contributions of morality to the foundation of law generally. Some critics of this theory have argued that there is no way the law can be delinked from morality yet it plays a critical role in ensuring that people live with accord, peace and upholding a collective good just like morality.[35]

In this research, this theory is really critical since the research is advocating for the enactment and amendment of the current retirement benefits legal framework in ensuring optimal recognition of the right to social security that the constitution has guaranteed every Kenyan. This study also underscored the tenets of this theory that so long as the law has been enacted by a recognized human authority and the fact that that the said authority follows the appropriate procedures in enacting such a law, then that is a valid law which must be complied with by everyone.The foundation of this study rests on this key theory in the sense that it seeks for enactment of the laws by the relevant government agency and the expectation that every citizen and organs of government shall obey such laws irrespective of whether it is a good or a bad law.

This study advocated for a written and codified law as a measure to deal with the problem of low coverage of retirement benefits in Kenya. The study utilized the advantages of this theory such as certainty and predictability in the sense that once a law has been written by the relevant authority, it's

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[34] H. L. A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review p. 593, 601–602
[35] Waluchow, W.J. (1994). Inclusive Legal Positivism. Oxford: Clarendon Press.

a valid law and one can easily predict the change of behavior towards complying with such a law hence the desired outcome of increased coverage.

1.12 Public interest theory of regulation

This is an economic theory of regulation which postulates that rules or directives arises as a reaction to the pleas by the public or community for rectification of ineffective or unbalanced or unjust market prices. This theory was espoused by Arthur Cecil Pigou in the 1960s.[36] This theory basically elucidates that laws, regulations or rules tends to protect the public at large. It hypothesizes that regulators pursue the best interests of the consumers of the products of firms in a regulated industry.[37]

Public interest arises in almost every instance whereby anything seems to disturb the human rights, well-being, or funds of the entire public.[38] Regulation on the other hand is defined as use of legal instruments to implement of socio-economic policy objectives. Major characteristic of legal instruments is that the government induces individuals and organizations to comply with recommended behavior under penalty of sanctions.[39]

Critics of this theory have indicated that it is sometimes vague and also that it is incapable to determine when to advance the interests of the public. They further affirm that it is difficult to make sure that the regulator at any particular time is acting in the public's best interest and not its own. The

[36] Pigou, A. C. (1932) The Economics of Welfare. London: Macmillan and Co
[37] Hantke-Domas, Michael (March 2003). "The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?". European Journal of Law and Economics. P. 165
[38] West's Encyclopedia of American Law, edition 2. (2008). Retrieved May 31 2020
[39] Richard A. Posner, Theories of Economic Regulation, The Bell Journal of Economics and Management Science, Vol. 5, No. 2 (Autumn, 1974), pp. 335-358

critics also indicate that yes the regulations at the beginning might be determined to protect the public, but over time there could arise tendencies of being vulnerable to regulatory capture.[40]

This theory is germane to this study in a number of ways. First and foremost, I propose to use government intervention to come up with laws with respect to expanding retirement benefits coverage hence benefit the entire public. Secondly, this study takes a regulatory perspective meaning the proposals and changes in law are supposed to be effected by the regulator which according to this theory is seen as a neutral arbiter. The regulator in this study is the RBA which is expected to ensure compliance of all the proposed laws and fair treatment of all the stakeholders in the retirement benefits industry for the benefit of the entire public. Also, the fact that the author works for a regulator has informed the choice of this theory.

1.13 Literature Review

The following literature were reviewed in terms of their substance, contribution to this research and how distinguishable they are from this study. The literature review for this study is analyzed in the following subheadings;

1.14 Social Security

Many authors have attempted to define the term social security in their own varied ways depending on the national laws of particular countries within their context. Among the many, Pieters defines social security as measures seeking to help or assist persons facing the danger of incomes[41] whereas International Labour Organisation describes it as a right in reaction to the necessity for safeguard

[40] Smyth, Russell; Söderberg, Magnus (December 2010). "Public interest versus regulatory capture in the Swedish electricity market". Journal of Regulatory Economics. 38 (3): 292–312

[41] Danny Pieters, 2006 Social Security: An Introduction to the Basic Principles, Second Edition, Kluwer Law International p. 2

from the risks of life and social necessities.[42] The two definitions are closely related to our Kenyan context although the latter one is the most relevant bearing in mind Article 43 of our Constitution which pronounces social security as a recognized right.

Msalangi, examines the history of social security in Africa which according to him begins with the period before independence when pensions were started for government workers. He goes on to explain that from ancient times when human beings began to live together, there exists a need for the safeguard from unanticipated life conditions and perils which persons are susceptible to with respect to their earnings. To deal with those risks, he posits that a person is supposed to have some arrangement of safeguard that is assured by either the public or the society at large.[43] In his study, he seemed to be satisfied with the current social security institutions in Africa and went ahead to analyze their structures. This study has some similarities with his in analyzing the current retirement benefits system in Kenya but this study goes ahead to propose new legal and policy changes to the current system meant to enhance retirement benefits coverage.

Barbone and sanchez in their study are pessimistic that even in the next generation, most countries in Africa except Mauritius, Botswana and South Africa may not realize the extension of pension coverage especially to the informal sector and the self-employed unless drastic measures such as having a policy are put in place.[44] This paper is too broad for my study but it is useful in the sense that it helps in emphasizing the need to have a policy on retirement benefits in Kenya which my study recommends at the end.

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[42]International Labour Organisation; International Labour Standards on Social security, http://www.ilo.ch/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm > accessed 6th September, 2020

[43] Msalangi, H.K.M, Origins of Social Security in Developing Countries (The case of African Countries), The African Journal of Finance and Management Vol 7, p. 11

[44] Luca Barbone and Luis-Alvaro Sanchez, *Pension & Social Security in Sub-Saharan Africa Issues and Options,* (A Paper presented at the XIII International Social Security Association African Regional Conference, Accra, Ghana 6-9 July 1999)

Sabu appreciates that pension security (which basically is the same as social security) is a matter of importance to everyone all over the world and that it has many dynamics which affects a pension system of a particular country. However, according to him, the numerous solutions espoused by governments to offer social security could for instance either assist or prevent the economic development of a particular country in the future.[45] This research disagrees with Sabu's on the issue of hindering economic growth by enhancing social security, in fact one of the key focus of this study is to ensure increased coverage of retirement benefits which would then translate to an improved economy in the sense that old age poverty would have been eliminated.

Gillion, et al. in investigating the development and reforms of social security pensions, observed that way back in the 20th century, a small percentage of working population was covered when it comes to their pensions. According to the them, most workers even in the advanced world died in their early years after retirement because there was no form of protection financial which will keep them after they lost their usual wages of employment.[46] They went on to indicate that the situation was worse in the developing world where there was more reliance on children to support the elderly. They concluded their studies by stating that currently the situation has greatly improved in the sense that in both the developing and developed world, the poverty level has gone down and the life expectance has greatly improved because many of them have been enrolled in reasonable retirement schemes.[47] Their study provides hope for many developing countries Kenya included that one day all workers in the world would be at the same bar although the study fails to point out that most developing

[45] KT Sabu, 'Pension-System-Problems-Prospects-and-Reforms' (*Econ-jobscom*, 3 MARCH 2013) <https://www.econ-jobs.com/research/17110-Pension-System-Problems-Prospects-and-Reforms.pdf> accessed 17 June 2019

[46] Gillion, C.; Turner, 3.; Bailey, C.; Latulippe, D. (eds) Social security pensions. Development and reform Geneva, International Labour Office, 2000 p. 27

[47] Gillion, C.; Turner, 3.; Bailey, C.; Latulippe, D. (eds) Social security pensions. Development and reform Geneva, International Labour Office, 2000 p. 29

countries Kenya included have not achieved this yet despite the strides made so far and there is need to continue increasing benefits coverage.

Keizi also identified a number of obstacles in accessing social security by informal economy workers. These obstacles include: a serious trouble in collecting remittances from either workers or sponsors; inability by these workers to commit a portion of their salaries to schemes, and unwillingness to contribute when they very well know that it will be for the future and not their instant requirements. According to Keizi, other obstacles are: lack of information on pension issues; apparent less returns and burdensome administrative measures.[48] Keizi's study is relevant to this study in that his study identified barriers to social security which are not necessarily caused by the legal regime whereas this study focusses on barriers to increased coverage but restricts itself those caused by the current legal framework only.

1.15 Pension Schemes in Developing Countries

The International Labour Organization (ILO) in scrutinizing pension schemes in developing countries found out that it is ineffective governance of schemes that has left a majority of workers all over the world with a threat of extreme poverty when they retire. The article further indicates that a good number of workers especially in the developing world work in the informal sector whereby pension benefits are either very little or none. The writers note that there have been improvements in provision of old age pensions although they insist that the task is only half complete since a greater population of workers is still left out.[49] This article is useful to this research in that it points out to the same arguments that as a country, we made tremendous improvement in terms of extending our retirement benefits coverage but we still need some efforts to realize more results.

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[48] Lazurus Kisia Keizi, Barriers to Pension Scheme Participation by Workers in the Informal Economy (2006) p. 4

[49] International Labour Organisation; Ninety per cent of World Excluded from Old Age Pension Schemes (2000) https://www.ilo.org/asia/media-centre/news/WCMS_BK_PR_19_EN/lang--en/index.htm > accessed 1st may, 2019

Faye, in his study, brings out the possibility of coming up with a basic income for the elderly irrespective of a person's history of earnings more especially in the sub Saharan region. According to him, a greater junk of the population in the sub Saharan Africa depends on the household care such as families whereas less than 2% of the population is covered by the social protection structures. In his study, Faye also examines the possibility of families being biased either to fully support the elderly and ignore the children, which according to him is also another problem, or vice versa. According to him, to address these problems, countries need to rethink and come up with various policies to address the issue of income provision at a future age.[50] This study agrees fully with him more especially his conclusion that there is need for sub-Saharan countries Kenya included to come up with policies which put more emphasis on provision of retirement benefits.

Steward and Yermo while examining the status of the pension scheme in Kenya discusses that the Kenyan system is under the regulation of RBA as the regulator and that the regulator has developed the sector by ensuring prudent management of schemes by trustees and professionals. According to them, even as RBA makes strides towards better management of schemes, there still exists obstacles such as poverty when one attains retirement age and low coverage among other obstacles.[51] Their study is closely related to this research in that this is strictly on legal and policy challenges and their solutions as opposed to them who were too general on the challenges facing the retirement benefits system in Kenya.

[50] Ousmane Faye, Basic Pensions and Poverty Reduction in Sub-Saharan Africa,' (HEC Management School, University of Liege, CREPP Working Papers 2007) p. 4.
[51] Stewart, F. and J. Yermo (2009), "Pensions in Africa", OECD Working Papers on Insurance and Private Pensions, No. 30, OECD publishing p. 5

1.16 Legal Framework for Retirement Benefits or pensions

The current Kenyan legal framework comprises of the Constitution which makes provision for the right to social security to every Kenyan and the RB Act which establishes the RBA as the regulator. Other statutes forming part of the legal framework are the NSSF Act which establishes the mandatory scheme and the Pensions Act which establishes the civil servant pension scheme. Most writers have mostly written on how the current legal framework is fragmented and uncoordinated thereby recommending harmonisation for effectiveness when it comes to implementation and enforcement.[52] Whereas I agree with them, my research goes ahead to propose more changes in the law to assist in enhancing the retirement benefits sector in Kenya.

Machira says that a policy and legal framework to establish a universal pension scheme to provide minimum old age benefits will not only widen coverage but also significantly advance the class of life of the ageing poor in Kenya.[53] His study is germane to this research in the sense that one of this study's recommendation is to legislate universal retirement benefits scheme to persons above the age of 65 years.

Barya noted that a legal framework is key in making sure that there is coverage of all employees either in the public or private sector first, then later the whole population so that the right to social security can be a reality and not just a provision in government programs.[54]

He further argues that developed counties have already put policies in place which largely address the issue of collective coverage for both the ageing, their dependents and the less privileged. According to him, the developing countries are currently laying foundations to achieve the above

[52] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008) p. 27
[53] Machira, C: Can We Afford a Universal Pension Scheme? The Case for Kenya (A Masters Thesis, University of Maastricht, 2006)
[54] John-Jean Barya 2011 Social Security and Social Protection in the East African Community p. 16

strides so far made by their developed counterparts and they have no option other than to follow suit.[55] Barya's study forms the backbone of this research in that we this study is proposing some reforms to our Kenyan legal framework in order to match with those developed countries which have travelled a similar path.

Raichura notes that before the establishment of RBA in Kenya, benefits in schemes were not protected since there wasn't an entity to oversee management of these schemes. He goes on to indicate that schemes were poorly administered and investments were made without prior advice from the experts among other myriads of problems. According to him, the passing into law of the RB Act has resolved all the problems since the Act established the RBA, the regulator which has seen remarkable progress on the management of funds in the sector.[56] I entirely agree with him but still we are not yet there as a country hence this research proposes more strides towards even a better sector.

1.17 Retirement Benefits Coverage

Kyengo did a micro-study of coverage with regards to pension benefits among the self-employed persons and those in the informal sector in Nairobi and the outcome showed that only a minor portion of these persons were indeed covered.

He went on to indicate a number of obstacles that have contributed in one way or another to the low pension coverage among them being inadequate policies, negative opinions and perceptions, little or lack of knowledge on pension among others.[57] Kyengo's study is very key to this study in that it also points out to other factors which have led to low retirement benefits coverage and the factors have

[55] Ibid. p. 18
[56] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008). P. 19
[57] Gideon Wambua Kyengo,2010 A survey of pension coverage of informal sector Workers in Nairobi county

little to do with the current law. Both studies are investigating a similar problem although this research is more tilted towards legal factors as opposed to other factors identified by Kyengo's study.

Knox-Vydmanov et al. suggest that Kenya has generally encountered key problems in any attempts to increase coverage in pensions, thus putting to question the ability of existing approaches in closing the coverage gap. In their 2012 study, they found that an insignificant number of elderly received or continue to receive pension in Kenya. They finally stated that efforts to reach workers in the informal sector have been undermined due deficiency of financial resources that affect their ability to make contributions.[58] Their study is handy to this research in the sense it is for the above reason that this research is being carried out.

Nyakundi explains that the growth of coverage in old age security in Kenya will be primarily determined by the process of economic development. According to him, coverage will gradually grow as contributory pension schemes are broadened to the self-employed and the informal sector. He further states that the pension laws in Kenya were designed to establish a pension system which extended its coverage to the formally employed. He indicated that the ideal coverage like in Mauritius should extend to at least 60% of the elderly.[59] This research concurs with Nyakundi's on the fact that our laws in the sector are skewed towards extending coverage in the formal sector and that we need to amend them in order to reach out to the informal sector or simply the self-employed population.

From the above literature, it is clear that most studies have not critically analysed the shortfalls of the legal and policy framework of the retirement benefits sector in Kenya. I must admit that crucial

[58] Knox-Vydmanov, C., Leon, R., and McPherson, 2008. *Social protection for older Kenyans: Options for implementing the National Social Protection Policy.* Briefing N. 10, 2008, Help Age International.
[59] David Nyakundi, legal and policy framework required to enhance pension coverage in kenya, 2009 p. 7

legal changes have been effected so far but we are not yet there and that's why our statistics[60] have told us that the country's retirement benefits coverage is at 20%, hence there is need to consider the recommendations of this study in order to increase our coverage. It is for this reason that this study is worth being undertaken.

1.18 Chapter Breakdown

Chapter One

This chapter presents the research study. It brings out the background to the problem, the objectives of the study, the statement of the problem and its hypotheses, the justification of the study, theoretical framework, literature review, limitations of the study and methodology used in the study.

Chapter Two

This chapter discusses the situational analysis and introduces the current retirement benefits system in Kenya. This helps one to appreciate the history of retirement benefits in Kenya and the structure of the retirement benefits system including some technical terms and types of schemes in Kenya.

Chapter Three

This chapter investigates the legal and policy framework on retirement benefits in Kenya. The purpose is to critique it and determine whether the existing framework has managed to solve the problem of low retirement benefits coverage.

Chapter Four

This chapter discusses the gaps both in law and policy which have contributed to low retirement benefits coverage in Kenya while referring to examples of best practises from countries that have managed to fix this problem.

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[60] Retirement Benefits Industry Statistical Digest 2016: www.rba.go.ke visited 5/8/20.

Chapter Five

This chapter summarises important conclusions from the previous chapters and finally puts accross recommendations on amendments to be introduced or made on both the policy and domestic laws in order to fix the problem of low retirement coverage in Kenya.

CHAPTER TWO

THE CURRENT RETIREMENT BENEFITS SYSTEM IN KENYA

2.0 Introduction

This chapter seeks to define the term retirement benefits and also to trace the origin and history of retirement benefits in Kenya. Specifically, this chapter discusses the structure of retirement benefits system in Kenya while focussing on the types of schemes such as the NSSF, occupational schemes, individual schemes, umbrella schemes and the civil service pension scheme. This chapter helps one to appreciate the current situation with regards to retirement benefits system in Kenya hence fulfil the first objective of this study as specified in chapter one.

2.1 Definition of retirement benefits

The Collins English dictionary defines retirement benefits as a payment made to a person who has left employment.[61] Retirement benefits can be defined further in details as benefits to be paid to a member of either a pension scheme or a provident fund upon him or her reaching the retirement age or early withdrawal from employment including pension; retirement lump sum and benefits payable to dependants following the member's death.[62]

The common word often used to refer to retirement benefits both in Kenya and the whole world is "pension", however the use of pension in a way narrows the scope to those retirement benefits paid periodically especially monthly. Retirement benefits broadly covers all the benefits including pensions, provident funds and any payment from a scheme as a result of other events other than

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[61] www.collinsdictionary.com > accessed 15th May, 2020
[62] www.pensionsauthority.ie > accessed 15th May, 2020

retirement such as benefits to dependants when a member dies or even benefits paid to members leaving employment due to resignation or dismissal.[63]

A retirement benefits scheme can be defined simply to mean an entity established by an irrevocable trust or an act of parliament whereby and employer commits to remit contributions throughout a working life of a member hence the scheme has an obligation of providing an income to that member or his or her beneficiaries at either retirement or before due to other factors such as emigration, ill-health or death.[64]

2.2 History of Retirement Benefits in Kenya

Kenya has borrowed a lot from the United Kingdom and other common law jurisdictions (commonwealth countries) which practise common law. Right from the establishment of schemes and management, there are quite a number of similarities. Schemes in Kenya for instance are established by either trusts or written law and all schemes in Kenya are managed by trustees as the case is with the United Kingdom and common law jurisdictions. Other similarities with the United Kingdom is the formation of both NSSF and occupational schemes.[65]

Before independence, payment of retirement benefits was only available to civil servants working for the colonial government. Payment of pensions before independence started with the Europeans in the year 1927 whereas it slowly extended to non-Europeans working for the government in the year

[63] Antolin, P., C. Pugh and F. Stewart (2008), "Forms of Benefit Payment at Retirement", OECD Working Papers on Insurance and Private Pensions, No. 26, OECD publishing
[64] www.rba.go.ke. > accessed 15th May, 2020
[65] Mghali, F. (2013). Employee Pension and its effects: A case of Combrok Limited. Mombasa, MBA Thesis University of Nairobi. p. 4

1932.[66] The first Act with regards to matters retirement, Pensions Act (Cap.189) came into operation in January, 1946.[67]

The first post-independence retirement benefits scheme, the NSSF, was established in 1965 through the Act of Parliament.[68] This was a provident fund whereby a member was mandated to contribute to the scheme in the course of employment and once he or she retired, the scheme provided him or her with a lump sum benefits. The retirement age was 55 years. NSSF previously used to be a department under the Labour Ministry until 1987 when the then NSSF Act was amended to make it an independent state corporation.[69]

As times went by, it became apparent that the benefits from NSSF were not adequate hence some good employers started to establish voluntary retirement benefits schemes to supplement the meagre benefits from NSSF.[70] In 1984 the retirement benefits sector received a boost when the then Finance Act introduced tax incentives for the retirement benefits schemes as measure to encourage tax payers to contribute to such schemes.[71]

The major reforms in the Kenyan retirement benefits sector happened in year 1997 when the RB Act was passed which brought about RBA as the regulator. The triggers for these reforms were among others the realization that retirement benefits were not managed professionally, massive looting and politicisation of NSSF and the experiences gained from other successful countries.[72] The Retirement Benefits Act has since introduced standards governing the establishment and management of

[66] www.treasury.go.ke > accessed 15th May, 2020
[67] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008) p. 11
[68] www.nssf.or.ke > accessed 15th May, 2020
[69] Ibid
[70] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008) p. 7
[71] www.rba.go.ke. > accessed 15th May, 2020
[72] Ibid

schemes. It has also created a legal framework for the establishment of occupational, Individual and Umbrella schemes thereby widening the scope of the retirement benefits sector in Kenya.[73]

In 2014, NSSF enacted a new law, the NSSF ACT, 2013 largely to address the issue of inadequacy of its benefits thereby making it both a provident and a pension scheme and buttressing the fact that it will be open to the supervision of the regulator, RBA.[74]

2.3 The Structure of the Retirement Benefits System in Kenya

Currently, the retirement benefits system in Kenya is biased in the sense that it primarily accommodates only the formal working population. The system has technically side-lined the self-employed population, the unemployed and of course the informal sector workers.[75] The Kenyan system has for a long time been supported by two pillars: the first pillar which is the Compulsory NSSF whereas the second pillar contains the civil service scheme, and the voluntary contributions through occupational umbrella and individual schemes.[76]

The zero pillar, which encompasses pension benefits sponsored by the government for Kenyans over the age of 65 regardless of contributions was introduced in Kenya in 2009. It offers a minimum income and it is under the Ministry in the control of social protection. This scheme however has had its challenges one of them being that it is not anchored in a legal framework, hence it may encounter possible termination by consecutive governments, the other challenge is that not every senior citizen is enrolled in this scheme. The first pillar is contributory and compulsory. Similarly, the second pillar is dependent on the employer and it is also contributory excluding the civil service scheme, which the conversion process is underway due to the enactment of the Public Service Superannuation Act,

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[73] Ibid

[74] www.nssf.or.ke > accessed 15th May, 2020

[75] David Nyakundi and Sundeep raichura, 'Developing A Home Grown Social Protection System' [2003] 57(1) Institute of Economic Affairs

[76] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008) p. 15

2012. The individual retirement benefits schemes on the other hand are established and operated by independent financial institutions.[77]

2.4 Broad Categories of Retirement Benefits Schemes

Schemes in Kenya are largely characterised into two; Pension schemes and Provident funds. The fundamental variance between pension schemes and provident funds is how benefits are paid when one reaches retirement age.[78]

2.4.1 Pension Schemes

In a pension scheme, when one attains a retirement age, he or she will be required to access up to a third of his or her total benefits in form of a lump sum whereas the remainder of his or her benefits can be utilized to purchase for him or her an annuity from an insurance company so that he or she will continue to receive periodic payments mostly monthly.[79] The advantage of a pension scheme is that one is assured of the periodic payments and cushions him or her against the risk of outliving his or her benefits. On contrary, the disadvantage of it is that one does not have financial freedom and also its rigidity in the sense that if a person choses it, he or she cannot opt for another alternative.[80]

2.4.2 Provident Funds

In a provident fund, when one attains a retirement age, he or she will be required to access all his or her total benefits in form of a lump sum.[81] With a provident fund, there exists a risk of a member making a wrong investment choice once he or she retires and also one outliving his or her benefits

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[77] Ibid, p.16
[78] Szczepański, Marek and John A. Turner, eds. 2014. Social Security and Pension Reform: International Perspectives
[79] Thomas P. Lemke, Gerald T. Lins (2010). ERISA for Money Managers. Thomson Reuters
[80] Franco Modigliani; Arun Muralidhar (2004), Rethinking Pension Reform. Cambridge University Press.
[81] 'Provident fund', Wikipedia, The Free Encyclopedia, 25 January 2020, <https://en.wikipedia.org/w/index.php?title=Provident_fund&oldid=937563453> accessed 31 May 2020

whereas the main advantage of it is the fact that it is flexible and that one enjoys financial freedom to do anything he or she wishes with the lump sum benefits.[82]

2.5 Scheme Design

A scheme may take up the form of defined benefits; defined contributions or a hybrid, having components of both designs.[83] These three designs are espoused further below.

2.5.1 Defined contribution scheme

A defined contribution (DC) scheme is an arrangement whereby both the employer and the employee remits regular contributions to a scheme, mostly monthly and the contributions are managed and invested by the trustees with the advice of the professional service providers.[84] The said contributions to the scheme are specified in terms of a percentage of the salary of the employee.[85]

In this type of a scheme, the benefit which an employee will eventually get at retirement is determined by the contributions made over the years plus the return on investment of the said funds hence an employee or a member takes the risk of investment as opposed to the employer in other schemes.[86]

Kenya has witnessed a shift from Defined Benefits schemes to Defined Contributions majorly following the Government directive in 2010 for all state corporations to convert from Defined Benefits to Defined Contributions.[87] The fact that benefits in such schemes are highly portable and

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[82] Ibid

[83] Public Pension Systems: Statement of Key Investment Risks and Common Practices to Address Those Risks, Association of Public Pension Fund Auditors (APPFA), July 2000.

[84] Cytonn Investments, 'How Occupational Pension Schemes Work', 2020 https://cytonn.com/blog/article/how-occupational-pension-schemes-work > accessed 19th October, 2020

[85] Gruber, J. Public Finance and Public Policy, Worth Publishers.

[86] Ibid, p.96

[87] Treasury Circular No. 18/2010 of 24th November, 2010.

that employers do not carry any risk has made them most popular option among the three in both the private and the informal sector.[88]

2.5.2 Defined benefit schemes

A Defined Benefit scheme (DB) is an arrangement whereby an employer promises an employee to pay his or benefits at retirement in form of a formula. The formula will take into account the number of years the employee has served, the last salary paid to that employee among other factors.[89] This type of scheme is not strictly contributory like the defined contributory one since it can be either contributory or non-contributory hence a member is not expected to make regular contributions to that scheme.

This types of schemes have been viewed as somehow generous to employees since it is the employer who bears the risk of investment if he decides to establish a scheme. In case of any losses and any liabilities, the employer is expected to take it up.[90] In order to deal with that apparent risk to the employers, there is a requirement to involve an actuary to determine the viability of that scheme hence to help the employers curb that risk. This type of scheme is best suited with employers with a large population like the Government where there is less mobility in the workforce hence they could be viable.[91]

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[88] Cytonn Investments, 'How Occupational Pension Schemes Work', 2020 https://cytonn.com/blog/article/how-occupational-pension-schemes-work > accessed 19th October, 2020
[89] Gruber, J. (2010) Public Finance and Public Policy, Worth Publishers
[90] "Unfunded Pension Plans". OECD Glossary of Statistical Terms. Retrieved 26 January 2009.
[91] Public Pension Systems: Operational Risks of Defined Benefit Plans and Related Plans and Controls to Mitigate those Risks, Association of Public Pension Fund Auditors (APPFA), July 2003.

2.5.3 Hybrid Schemes

This scheme hangs in the middle of a defined benefit and a defined contribution scheme. As the name implies, it comprises elements of both a defined benefit and a defined contribution scheme.[92] Some retirement benefit schemes especially the defined benefits schemes are contributory whereby members contribute a percentage of their monthly wages but then their benefits at retirement is determined by a formula just like a pure defined benefits scheme.[93] In this type of schemes, the risk of investment and in case of any liability can be shared between the employer and the employee hence this makes them popular than the defined benefit schemes among many employers although they are less popular comparing to the defined benefits schemes.[94]

2.6 Retirement Benefits Scheme Funding

Most retirement benefits schemes are basically funded from the monthly remittances by both the employer and employee monthly contributions save for defined benefits schemes which are majorly funded by the employees.[95] All retirement benefits schemes, except for the civil service pension scheme, are required by law to be a hundred percent fully funded at all times.[96] However, due to a combination of many factors, some of which are historical, not all schemes are fully funded; a majority of which being the quasi-government or parastatal schemes.[97] The civil service scheme is funded from the consolidated fund.[98] Efforts are underway to convert it into a contributory scheme as per the Public Service Superannuation Act, 2012.[99]

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[92] Hybrid Public Pension Plans: A Primer, Pew Charitable Trusts, April 2015 p. 1
[93] Ibid, p. 3
[94] Ibid, p.3
[95] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008) p. 15
[96] Ibid, p. 7
[97] Ibid, P. 18
[98] www.treasury.go.ke > accessed 15th May, 2020
[99] Ibid

2.7 Benefits Payout from a retirement benefits scheme

Other than on retirement, there are circumstances when payments are made out of a retirement benefits scheme to a member. Such circumstances include dismissal by employer, resignation by the employee, retrenchment, termination of employment as a result of ill health and emigration out of Kenya with no intention of coming back.[100] In the event of the first three occurrences, a leaving member is entitled to a portion of their benefits whereas in the event of ill-health and emigration, the leaving member is entitled to all his or her benefits in the scheme.[101]

At retirement, benefits payout can be structured in two main ways: provident funds and pension schemes. Provident funds pay a member's benefits in form of a one off lump sum whereas pension schemes on the other hand allow commutation of a proportion of benefits which in most cases is one third of total benefits and the rest de-cumulated in periodic payments for a specified period or until death of the member in the form of annuity or income draw down.[102]

An annuity is a product of an insurance company that provides one with an income either for the rest of one's life after retirement or for a fixed amount of time.[103] One can use his or her pension fund to buy an annuity that will provide him or her with a regular periodic income after retirement. The annuity can be taken individually or jointly with a spouse. It is paid on a regular basis according to your preference whether monthly, quarterly, semi-annually or annually for life.[104]

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[100] Retirement Benefits (Occupational) Regulations, Regulation 19
[101] Retirement Benefits (Occupational) Regulations, Regulation 19
[102] Dariusz Stańko and Nina Paklina, Supervising the Distribution of Annuities and other Forms of Pension Pay-Out, IOPS Working Papers On Effective Pensions Supervision, July 2014
[103] ABI (2005), 'Annuities: Bonus or Burden?', London: Association of British insurers
[104] Antolín, P., Pugh, C. and Stewart, F., (2008), 'Forms of Benefit Payment at Retirement', OECD Working Papers on Insurance and Private Pensions, No. 26, OECD Publishing

On the other hand, an Income Drawdown Plan is an investment product that provides one with an income from your retirement savings. The plan allows you access to your retirement funds as an income while keeping the balance invested.[105]

In conclusion, the design of a retirement benefits scheme is important especially for employers wishing to establish one. Considering the best practises across the world, a defined contribution scheme is highly recommended simply because they are independent from employers and are run professionally not forgetting the fact that members' benefits are held by the trustees as opposed to defined benefit schemes whereby employers have to budget for any member who retires. With regards to the benefits pay out from schemes, the leeway by the current law for access of a portion of benefits has contributed to low retirement benefits coverage in the sense that most people access their benefits before retirement resulting into low and inadequate benefits at retirement hence leading to old age poverty.

2.8 Types of the Retirement Benefits Schemes in Kenya

The Retirement schemes in Kenya broadly consists of the mandatory state retirement benefits scheme (NSSF), the Public Service Scheme, the occupational schemes, Umbrella schemes, individual schemes and old age pension guarantee.[106]

2.8.1 National Social Security Fund (NSSF)

It is a statutory and compulsory fund where employers are obligated to remit contributions on behalf of their employees.[107] It was founded in 1965 as a department in the ministry of labour and since then

[105] Retirement Benefits (Occupational) Regulations, Regulation 25
[106] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008) p. 7
[107] Monika M. Sommer, Senior Specialist on Labour Administration, Legislation and Social Dialogue, SRO-Addis Ababa, September, 2003.

it has grown into a parastatal.[108] It also started as a provident fund but thanks to the new NSSF Act, 2013, the fund has been enhanced to both provident and a pension scheme. The law mandates all the employers to remit a portion of contributions on behalf of their employees and also to ensure their employees remit their portion to this fund.[109] The new NSSF Act, 2013 in trying to enhance its benefits increased the contributions to 12 percent of the pensionable salary.[110] It also introduced tier 1 and tier 2 contributions with the employer having an option to opt out of tier 2 contributions and instead establish an occupational scheme or join an umbrella scheme.[111]

Under NSSF, benefits are held up until a member attains the age of 50 years or earlier in case of termination of employment on ill-health grounds.[112] The Fund is managed by the trustees who come from numerous stakeholders.[113] The fund is also under the regulation and supervision of the RBA, the regulator. As at December 2016, the Fund had a value in excess of Kshs. 172.4 billion and a membership in excess of 2.4 million.[114]

2.8.2 Occupational Retirement Scheme

This type of a scheme is based on employment since they are founded by employers for the benefit of their employees.[115] The distinguishing feature from other schemes is that its membership is restricted to only those employees of a particular employer to the exclusion of any outsider.[116] This scheme can either be a defined benefit or a defined contribution and is managed by Trustees elected from among the employees of the Sponsoring employer, 50% of whom are appointed by the

[108] www.nssf.or.ke > accessed 15th May, 2020
[109] Ibid
[110] NSSF Act, 2013, Section 20
[111] Ibid
[112] Nssf Act, 2013, Section 34
[113] Ibid, section 12
[114] Retirement Benefits Industry Statistical Digest 2016: www.rba.go.ke visited 5/5/20.
[115] Cytonn Investments, 'How Occupational Pension Schemes Work', 2020 https://cytonn.com/blog/article/how-occupational-pension-schemes-work > accessed 19th October, 2020
[116] www.rba.go.ke. > accessed 15th May, 2020

employer and the other 50% elected by the employees.[117] Since the trustees are the scheme's legal owners, they are accountable for the overall management of it.[118] These schemes are set up and managed under the provisions of the RB Act and under the supervision of the RBA as the regulator.[119]

Kenya has witnessed a shift from Defined Benefits to Defined Contributions majorly following the Government directive in 2010 for all parastatals to change from Defined Benefits to Defined Contributions.[120] The Private Sector has followed suit. There are currently over 1,000 registered occupational schemes with a membership of over 500,000 members. The fund value as at December 2016 was over Kshs. 623.85 billion.[121]

2.8.3 Individual Retirement Scheme

This is a type of a scheme which unlike the occupational which restricts membership to only employees of a particular employer, opens its membership to every person who could wish to save for retirement. They are founded in most cases by insurance companies among other sponsors and they invite Kenyans to make contributions either monthly or otherwise with the aim of providing a benefit to its members at retirement.[122] The contributions are flexible in order to accommodate individuals' financial situations. Unlike the occupational ones which may be managed by individual trustees or corporate ones, these schemes are strictly managed by corporate trustees only. These schemes are set up and managed under the provisions of the RB Act and under the supervision of RBA as the regulator.[123] The membership in individual retirement benefits schemes has grown

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[117] Retirement Benefits (Occupational) Regulations, Regulation 8
[118] Thomas M. Forest, "How a Corporate Trustee Can Help a Financial Planner Meet Their Client's Goals", Journal of Financial Service Professionals, Vol. 61, No. 6, November 2007. p. 1
[119] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008) p. 19
[120] Ibid
[121] Retirement Benefits Industry Statistical Digest 2016: www.rba.go.ke visited 5/5/20.
[122] Ibid
[123] Ibid

tremendously and as at December 2016 the membership was over 194,000 members with a fund value of Kshs. 35 billion.[124]

2.8.4 Umbrella Retirement Scheme

An Umbrella scheme is a scheme established by a sponsor who is not the employer and in most cases is the insurance company and thereafter invites employers to join.[125] This fund takes advantage of the economies of scale and since it accommodates many employees from various employers, the cost of operation and other expenses are tremendously reduced hence the overall returns are boosted.[126] This scheme provides a solution to organizations that find setting up a retirement fund and continuously complying with the complex legal and statutory demands a challenge in both monetary and human resource cost.[127]

This scheme also makes it possible to delegate the demanding role of trusteeship with its legal and statutory liabilities to a team of professionals at no additional cost while at the same time saving you the hassle of having to appoint new trustees whenever a trustee leaves.[128] These schemes are set up and managed under the provisions of the RB Act and under the supervision of the RBA as the regulator. By December 2016 there were around 13 umbrella retirement benefits schemes in Kenya with a membership of over 80,000 and a fund value of Kshs. 30 billion.[129]

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[124] Ibid

[125] De Lavenere Lussan, Jerome (2012), The Financial Times Guide to Investing in Funds: How to Select Investments p. 25

[126] Ibid, p. 26

[127] www.rba.go.ke. > accessed 15th May, 2020

[128] De Lavenere Lussan, Jerome (2012), The Financial Times Guide to Investing in Funds: How to Select Investments p. 26

[129] Retirement Benefits Industry Statistical Digest 2016: www.rba.go.ke visited 5/5/20.

2.8.5 Civil Service Scheme

This type of scheme is created by an act of parliament known as the Pensions Act. It is the main scheme for all government of Kenya workers including teachers, disciplined forces and workers in the mainstream government ministries.[130] Unlike other schemes, this scheme is non-contributory and it is also not funded hence it means that the government will have to meet its obligation of paying workers their benefits when they retire from other sources including its budget. One is eligible for the benefits under this scheme upon working for the government for a minimum period of ten years. The scheme is on the verge to change to a contributory one. The Public Service Superannuation Act, 2012 was enacted to jumpstart the conversion process.[131] This scheme is not under the supervision and the regulation of RBA.

2.9 Conclusion

Despite the existence of the current retirement benefits system in Kenya, coverage is still very low.[132] Majority of Kenyans are not covered and the institutional arrangements are somewhat fragmented and disjointed.[133] Out of over 14 million working population in 2016, only 2.3 million were in formal employment. A paltry 11.4 % (1.6 million) are covered under mandatory scheme (NSSF). Those in the occupational schemes, though also covered under the mandatory scheme account for 3.5% of the working population while those covered under the civil service scheme also account for 5% of the working population.[134] This implies that most workers in all sectors of the economy especially the informal one, are not covered. Worst still majority of those covered under the mandatory scheme NSSF who contributes only Kshs. 400 or thereabout will have inadequate savings upon retirement. In view of the current situation, there is need for further analysis of the legal and

[130] www.treasury.go.ke > accessed 15th May, 2020
[131] Ibid
[132] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008) p. 31
[133] Ibid, p. 32
[134] Retirement Benefits Industry Statistical Digest 2016: www.rba.go.ke visited 5/5/20.

policy framework for purposes of identifying gaps that may have contributed to the problem of low retirement benefits coverage.

CHAPTER THREE

THE LEGAL AND POLICY FRAMEWORK ON RETIREMENT BENEFITS IN KENYA

3.0 Introduction

This chapter examines the legal and policy framework governing the retirement benefits industry in Kenya with the aim of critiquing it on how it has failed to fix this issue of coverage. The laws which this chapter will concentrate on include the Constitution, the Pensions Act Cap 189 Laws of Kenya, NSSF Act 2013, Retirement Benefits Act Cap 197 and Regulations made under it. These statutes are the ones which have established various types of retirement benefits schemes discussed in chapter two.

In this chapter, this study takes into consideration the fact that law plays a crucial role in society in protecting individual rights and liberties from violations or unreasonable intrusions by persons, organizations, or government.[135] From the two theories discussed in chapter one, this study contends that any regulatory intervention in the current legal framework is assumed to safeguard and profit the entire population[136]and further that it is the same law that can influence the change of behavior in order to achieve a desired outcome.

The main focus of this chapter is actually to buttress the fact that despite the existence of all these laws and policies, the problem of low retirement benefits coverage remains a major issue that needs urgent attention by introducing new laws or amending the existing laws so as to promote it.

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[135] Jenks, Edward, The Function of Law in Society, Journal of Comparative Legislation and International Law 5, no. 4 (1923): p. 169

[136] Pigou, A. C. (1932) The Economics of Welfare. London: Macmillan and Co

3.1 The Constitution

The Constitution of Kenya was promulgated in the year 2010, it has an elaborate bill of rights espoused in chapter four which among them is the right to social security under Article 43.[137] According to the constitution the state is obligated to provide this right to all Kenyans irrespective of whether they are working or not.[138] Despite all these key achievements in our constitution, social security is still a dream to a majority of the Kenyans since most of them do not have any form of security after an active period of either employment or even self-employment.

Whereas it is crucial to note that the right to social security may be gradually attained over time just as it was by most developed countries, we should be seen to be making strides towards achieving it hence this study is timely in that it proposes ways on how we should begin our steps towards fully realising this important right.

3.2 Pensions Act Cap 189 Laws of Kenya

This is an Act which is responsible for the payment of pensions and other benefits to the people working for the government especially teachers, discipline forces and people working in mainstream government ministries other than the parastatals, independent commissions or government entities which have since came up with their own occupational schemes.[139] The pension scheme for public service employees created by this Act is referred to as civil service scheme which is mostly not funded but financed from the government budget.

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[137] The constitution, Article 43
[138] Ibid, Article 21 (2)
[139] www.treasury.go.ke> accessed 18th September, 2020

Under the Pensions Act Cap 189, pension is payable to those employed on permanent and pensionable terms. The qualifying service is 10 years[140] while the qualifying age is 50 years[141]. This means that any public servant must work for at least ten years for him or her to qualify to receive pension. This provision in other words denotes that pension under this Act is not an absolute right to an individual but restricted to only those who offer their services for a period of ten years or more. This provision alone has led to many individuals missing pension just due to a mere fact that they served for a period less than the 10 years hence contributing to a very low retirement benefits coverage.

This Act further adds insult to the injury by stating that one can forfeit pension if he or she resigns from employment or dismissed.[142] Therefore, an officer who for any reason resigns or is dismissed from serving in public service forfeits all his or her claims to pension. This section places a condition to the payment of pension which should not be the case hence it has led to many public servants missing their pension merely because they were dismissed or resigned hence contributing to low retirement benefits coverage.

This Act also provides for some of the circumstances in which pension may not be paid. Some of those circumstances are termination of an officer's service on public interest[143], where an officer has been declared bankrupt[144] and also when an officer has been convicted.[145] These provisions are meant to reduce the pension coverage among the civil servants in that it provides for avenues where officers can forego their pension due to one reason or another and yet pension is a right regardless of whatever situation one could be in.

[140] Pensions Act s. 5 (3)
[141] Pension Act s. 9 (1) (iv)
[142] Pension Act s. 16 (1) (i)
[143] Pension Act s. 8
[144] Pension Act s. 14
[145] Pension Act s. 15

The Act also restricts transfer of service[146] or retirement benefits from this scheme to another scheme i.e. portability of benefits, this therefore shows that one cannot move from public sector to private sector thereby hindering job mobility in our economy.[147]

The Act provides that the scheme is unfunded, this has become a heavy burden to the government as the sponsor of this scheme, to meet the high costs especially when so many individuals retire at the same time. This more often causes delays in receiving pension among the civil servants since the government is forced to set aside funds each year and sometimes it might under budget hence forcing the retirees of that year to wait for the next financial year.

This Act does give RBA, the regulator, the mandate to regulate the scheme established under it. This then points to the fact that this scheme cannot be subjected to scrutiny or put to account in case it does anything unlawful or against the wishes of the members of the scheme.

In a nutshell, this Act contains provisions which have in one way or another contributed to low retirement benefits coverage and therefore require to be either removed or amended in order to enhance the current coverage.

3.3 National Social Security Fund Act 2013

The NSSF Act, 2013 repealed the NSSF Act Cap 258[148]which instituted the National Social Security Fund which is basically a compulsory scheme meant to provide benefits for all workers in Kenya and

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[146] Pension Act s. 16
[147] www.treasury.go.ke> accessed 18th September, 2020
[148] NSSF Act s.3 (3)

their dependents.[149] However, substantial portions of the Act are not currently in force due to a pending court case challenging the constitutionality of those sections.[150] The enactment of the Act was followed by the enactment of the NSSF Regulations, 2014, which addresses procedural aspects such as registration, contributions and payment of benefits. This Act established two funds; a pension fund which is mandatory and a provident one which is discretional and meant for the self-employed.

The Act requires this scheme to be administered by trustees.[151]According to the Act, the board of trustees are appointed by the Cabinet Secretary for labour. The board has representation from the Government, employers and workers. This has contributed to tussles in the board and also subjecting the board to political influence. All these issues have affected the investment options of the fund merely because the board in most cases could want to make a popular decision as opposed to an economically sound decision. This ends up with the fund declaring low return on investments thus decreasing members' benefits.

With regards to the working population, the Act provides for the compulsory contribution of both the employee and employer to the Fund.[152] This was a positive stride towards increasing membership coverage of the social scheme but then again the issue of adequacy of benefits remains a setback since the amount contributed is still low hence the resultant pay outs are also significantly low.

The Act further provides for discretionary registration of self-employed Kenyans to be members of the fund.[153] It further goes ahead to indicate that every voluntary member shall contribute a minimum

[149] https://www.nssf.or.ke/nssf > accessed 19th September, 2020
[150] Kenya County Government Workers' Union v National Social Security Fund Board of Trustees & 5 others [2015] eKLR
[151] NSSF Act s.5
[152] NSSF Act s.19
[153] NSSF Act s.18 (5)

amount of two hundred shillings.[154] In as much as the Act is encouraging many people to join the fund, the fact that it is voluntary and also since the contributions are so low, the problem of adequacy of benefits at the time of retirement will always pop out.

3.4 The Retirement Benefits Act, Cap 197, Regulations and Guidelines made under it

This Act was enacted in 1997 but most of its provisions came into force in the year 2000. The Act established the Retirement Benefits Authority as a regulator and a supervisor of all retirement benefits schemes except the civil service pension scheme.[155]

Under this Act, establishment of a retirement benefits scheme by an employer is voluntary as opposed to being mandatory. What the Act stresses on is the fact that once an employer has chosen to start one, then he or she has to make sure the scheme is run as per the provisions of this Act.[156] This provision in as much as it does not compel the employers to establish a retirement benefits scheme, remains a major setback to the agitation for the increase in retirement benefits coverage in Kenya.

This law further provides for access of benefits before a member attains retirement age.[157] It states that a member may access his or her benefits before retirement either on resignation, dismissal or simply leaving employment for whichever reason. The effect of this provisions would obviously lead to reduced benefits especially if an employee changes jobs more than twice before he or she attains the retirement age. The primary objective of establishing a retirement benefits scheme or saving for retirement is basically to provide retirees who have reached retirement age with income to sustain them for their entire lifetime. This does not in any way anticipate that a person who has not attained retirement age could access the funds since this could be contrary to the purpose the funds were

[154] NSSF Act s.23 (1) (a)
[155] RB Act s. 5
[156] RB Act s. 22
[157] Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, Regulation 19

meant for and could significantly decrease the benefits the same person would eventually access at retirement.

The Act remains silent on retirement benefits of those individuals employed under contract. As much as this law does not make it unlawful for an employee on contract to join a retirement benefits scheme, by remaining silent, most employers have interpreted it to mean that only those employees on permanent basis are the only ones to be accommodated in the scheme. This has left most employees not permanently employed without a retirement scheme thereby discriminating employees. This Act furthermore does recognize gratuity as a retirement benefit. This has left the individuals who are employed on contract exposed and at the mercy of their employers since one cannot enforce the same under this Act.

This Act does not also provide for the creation of a retirement benefits protection fund just like the Insurance Act does for the protection of policyholders.[158] This is basically a fund that is set aside for those retirement benefits schemes that may be facing any difficulty in paying benefits such as insolvency or other malpractices such as fraud.

3.5 Conclusion

From the analysis in this chapter, it is clear that in this legal framework there is disharmony and disjointed arrangements, hence making it challenging to attain a common and shared goal for the industry. Various categories of schemes have different governing and reporting structures. The civil service pension scheme for instance is administered by the Pensions Department domiciled at the National Treasury, whereas the occupational, umbrella and individual schemes are supervised by the

[158] Section 179 of the Insurance Act creates of a Policyholders Compensation Fund to provide compensation to the claimants of insurer placed under a manager appointed under section 67C (2) of that Act or whose license has been cancelled under the Act.

RBA which is also a parastatal beneath the National Treasury. On the contrary, the mandatory scheme, NSSF, governed by the NSSF Act, 2013 is domiciled at the Ministry of Labour and Social Protection. This could be one of the key reason why we do not have a retirement benefits policy simply because it lacks a specific ministry to spearhead it. It begs the question therefore, of how this policy and legal framework can be quickly harmonized and enhanced to boost retirement benefits coverage in Kenya.

CHAPTER FOUR

GAPS BOTH IN LAW AND POLICY WHICH HAVE CONTRIBUTED TO LOW RETIREMENT BENEFITS COVERAGE IN KENYA

4.0 Introduction

After the analysis of the retirement benefits legal framework in chapter three, this chapter discusses the main gaps in that framework which have in one way or another led to low retirement benefits coverage in Kenya. By identifying them, it will be a step in the right direction in trying to solve this problem later by proposing the remedies towards solving them. In discussing the gaps, this study points at the best practises from four countries namely South Africa, United Kingdom, Chile and Singapore whose respective retirement benefits coverage are satisfactorily high.

Currently, the following gaps exist in the current legal and policy framework for retirement benefits in Kenya:

4.1 Lack of a national policy on retirement benefits

A policy basically is the outline of anything the government plans to and generally what it aims to achieve for the benefit of entire society at large. Policies are only booklets and papers but they are not laws by themselves. Policies may however lead to or inform the next set of laws. At all times laws should be informed by sound policies, in other words, in creating laws, in most cases it begins with coming up of policies first.[159]

The Government of South Africa came up with a retirement funding policy in the year 2004 whose broad objectives were among others to instigate employers to always ensure their employment

[159] Greenberg, George D.; et al. (December 1977). "Developing Public Policy Theory: Perspectives from Empirical Research". American Political Science Review. 71 (4): 1532–1543

contracts with their employees have clauses with respect to retirement benefits and further to make a provision for an assured basic benefits to the elderly and poor people.[160] The pronouncements ended up with the modifications in the Pensions Funds Act of 1956 and as a result the current retirement benefits coverage in South Africa is approximately above 66%.[161] Kenya needs to borrow such best practise and develop policy objectives geared to increase retirement benefits coverage because a policy informs the kind of laws a country enacts.

The functions of the RBA, the regulator in the RB Act is *inter alia* to advise the minister on the policy to be adhered to with regards to retirement benefits.[162] Therefore, the law envisages that there needs to be a policy specifically to address retirement benefits which does not presently exist. Currently, there is the existence of the Social Protection Policy of 2011which is too broad in the sense that it addresses social support to very underprivileged persons.[163] The Social Protection Policy attempts shallowly though, to deliberate on a few aspects of social security but it does not address the issue of retirement benefits and especially to guide the country on the legislative direction it would take in matters retirement benefits.

Due to the absence of the policy, the retirement benefits sector lacks proper coordination, governance and development. The Kenyan retirement benefits legal framework is disjointed and not harmonized hence making it challenging to attain a common and shared goal for the industry. Various categories of schemes have different governing and reporting structures. The civil service pension scheme for instance is administered by the Pensions Department domiciled at the National Treasury, whereas the occupational, umbrella and individual schemes are supervised by the RBA which is also a parastatal beneath the National Treasury. On the contrary, the mandatory scheme, NSSF, governed by the

[160] http://www.treasury.gov.za/public%20comments/Retirement%20Fund%20Reform%20A%20Discussion%20Paper.pdf > accessed 19th October, 2020
[161] https://www.pensionfundsonline.co.uk/content/country-profiles/south-africa > accessed 19th October, 2020
[162] RB Act S. 5 (d)
[163] Kenya National Social Protection Policy 2011, Ministry of Gender, Children and Social Development p. 37-38

NSSF Act, 2013 is domiciled at the Ministry of Labour. Further, in the absence of the retirement benefits policy, definitions of key terms used in the retirement benefits sector have not been harmonized hence each statute has its own definitions which brings ambiguity and inconsistency in the sector.

Due to the absence of this crucial document, the retirement benefits sector lacks guidance and a direction especially on coming up with new laws because of lack of objectives which normally comes with the development of a policy. If one of the main objectives of a policy for example is to increase coverage, it will necessitate enactment of laws geared to achieve that objective just as the case of the Republic of South Africa. Therefore, lack of a specific policy on retirement benefits has led to a low retirement benefits coverage in Kenya.

4.2 Voluntary establishment of retirement benefits schemes by employers

The RB Act enables the employers to register schemes.[164] However, that provision does not compel employers to establish a scheme hence it is concerned with only those employers who could wish to voluntarily start one. This has greatly contributed to the low retirement benefits coverage in the country since many employers do not feel compelled by law to come up with this important entity but instead it is other factors which force them to come up with one such as attracting and retention of skilled manpower, to motivate workers and maybe to maintain a positive image as an employer.[165] Since there are a few employers who care less about the above three factors, most employers perceive a retirement benefits scheme as an extra expense hence it explains why many of them have not endeavored to establish one.

[164] RB Act s. 22

[165] Cytonn Investments, 'How Occupational Pension Schemes Work', 2020 https://cytonn.com/blog/article/how-occupational-pension-schemes-work > accessed 19th October, 2020

Countries like Chile and Singapore which are highly ranked in matters retirement benefits have all enacted laws which provide compulsory enrolment of all persons working both in government and private sector. Both the Chilean[166] and the Singapore[167] systems are contributory and mandatory. If Kenya will not take this path, then the hope of increasing retirement benefits coverage may as well remain a dream.

An attempt by the NSSF Act 2013 to compel all the employers to ensure that they contribute on behave of their employees to the fund[168] have not solved the issue of low coverage since the contributions towards NSSF are very low thereby raising the issue of inadequacy of benefits at retirement for these employees.

4.3 Lack of legislation for the old age pension guarantee or the zero pillar

The old age pension guarantee or simply the zero pillar is an arrangement geared to address the basic income assistance to all citizens who have attained a particular age with the aim of alleviating poverty. It is mostly funded by the state.[169]

In attempts to comply with the Constitution,[170] the Kenyan government has so far come up with two schemes meant to provide regular periodic income to older citizens of this country. The two schemes are the Older Persons Cash Transfer (OPCT) which was started in 2007 and The Inua Jamii Senior Citizens' scheme which was established in 2018.

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[166] Barrientos, A. (1998) Pension Reform in Latin America, Aldershot: Ashgate.p. 2
[167] Asher, M.G. and W. Karunarathne (2001) Social security arrangements in Singapore: An Assessment, mimeo, Singapore: University of Singapore.
[168] NSSF Act, s. 19
[169] Ibid p. 3.
[170] Article 43

OPCT is funded by the government to provide regular and predictable cash transfer to poor, orphaned, persons with severe disability and vulnerable older persons at the age of 65 years and above in identified deserving households.[171] Currently, it provides a basic income of 2,000 Kenyan shillings after two months and it is administered by the Ministry in custody of social protection.[172] This scheme however has had its challenges one of them being that it is not anchored in any law hence it may encounter possible termination by consecutive governments. The other challenge is that not every senior citizen is enrolled in it.

The Inua Jamii Senior Citizens' scheme is an arrangement by the government geared to offer a benefit for all citizens above the age of 70 years.[173] The initiative was introduced back in 2018 with the aim of proving a minimum basic benefits to the old, vulnerable and poor persons. The scheme is largely universal hence every Kenyan is meant to benefit from this key initiative.[174] This scheme also just like the OPCT is not anchored in any law, this then means that it can also be faced out anytime the government feels like.

The initiative of coming up with the two old age pension guarantee schemes above must really be celebrated although the government could have anchored them in a law so as to avoid cases where the future governments could easily find an excuse of terminating them. For now, since they are still initiatives which are not supported by any law, one may struggle to argue that such initiatives have and will lead to increase in the retirement benefits coverage in Kenya. Furthermore, in Kenya, normal age for one to retire is 60 years, as result, there exists a gap in terms of coverage, in the sense

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[171] http://www.socialprotection.or.ke

[172] Ibid

[173] Ibid

[174] International Labour Organization; Social Protection Department, Kenya: Inua Jamii Senior Citizens' Scheme, https://www.developmentpathways.co.uk/wp-content/uploads/2019/05/Inua-Jamii-Country-Brief-1.pdf > accessed 21st October, 2020

that those within the ages of 60 and 70 years are left out under the Inua Jamii Senior Citizens' Scheme.

4.4 Pre-retirement withdrawals of benefits under the RB Act

Under the RB Act and the Regulations, members of a scheme are allowed to withdraw a portion of their benefits from the scheme before retirement when they resign from employment, when they are dismissed from employment or when something occurs which makes them leave employment such as disability.[175] Before the year 2005, the RB Act did not allow members of schemes to withdraw they benefits before attaining the retirement age, an amendment to the RB Act was enacted first in 2005 and secondly in 2010 to provide for access of retirement benefits. The Retirement Benefits Regulations currently offers the members the opportunity to withdraw their full contribution and accrued income and fifty percent of employers' contribution and accrued income upon leaving employment with the employer.[176]

This leeway by the law for people to withdraw benefits before retirement has greatly contributed to a very low retirement coverage in the sense that as a result of one moving from one employer to the other, he or she takes advantage and withdraws a portion of his or her retirement benefits hence at the time of retirement, he or she will be left with inadequate benefits hence leading to old age poverty.

[175] Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, Regulation 19
[176] Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, Regulation 19

4.5 Management challenges caused by the composition of the membership of the board under NSSF Act

The NSSF Act mandates the formation of the board of trustees for the fund which shall be responsible for administering the fund.[177] The composition of the Board comprises of representatives from Government, employers and workers.[178] This has contributed to tussles in the board and also subjecting the board to political influence.[179] All these issues have affected the investment options of the fund merely because the board in most cases could want to make a popular decision as opposed to an economically sound decision.[180] This has led to the fund declaring low returns on investments thus decreasing members' benefits.[181] Politics and vested interests by management have also played a major setback to the fund as they are always not in line with the objectives and mission of the fund.[182]

All these have contributed to low retirement benefits coverage in the sense that Kenyans have lost confidence with the fund therefore most of them could opt for other savings arrangements as opposed to enrolling as voluntary contributors to the fund.[183]

4.6 Lack of legal protection on employees under contract

There has been a practise in the retirement benefits sector that it is only those employees who have been hired on permanent and pensionable terms, who are allowed to join the retirement scheme of

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[177] NSSF Act s. 5 (1)
[178] www.nssf.or.ke/nssf> accessed 19th September, 2020
[179] Koech T. K, "Determinants of growth in National Social Security Fund of Kenya" (master of business administration Kenyatta University, 2010) p. 38
[180] Ibid, p. 38
[181] Ibid, p. 56
[182] Ibid, p. 38
[183] Ibid, p. 4

that employer.[184] Most if not all employers who have established retirement benefits schemes have restricted them to only those employees hired on permanent and pensionable terms.[185] Most trust deeds and rules of occupational schemes only admit employees hired on permanent and pensionable terms to the scheme. This is normally the practise since the law is silent on who should be admitted into the scheme. Employees have taken advantage of this grey area in the law to openly discriminate employees in the similar organisation or entity who have been employed on both short and long term contracts other than on permanent and pensionable terms.

This practise has left many employees out of a retirement benefits scheme deliberately because their terms of engagement with their employers are in form of short term contracts contrary to other employees employed by similar employers under permanent and pensionable terms. The practise has also led to the shift in employment dynamics in that most employers nowadays could want to employ individuals on short term contracts to avoid contributing retirement benefits on their behalf into the scheme thereby cutting their operating costs. The fact that the law is silent, this practise of discriminating employees under contract by deliberately not admitting them into retirement schemes of their respective employers has led to a very low coverage since a bigger percentage of the workforce in Kenya is under short term contractual terms.

4.7 Lack of a retirement Benefits Protection Fund

A retirement benefits protection fund is normally a statutory fund intended to protect members' benefits in cases where the retirement benefits schemes become insolvent.[186] A retirement benefits

[184] Cytonn Investments, 'How Occupational Pension Schemes Work', 2020 https://cytonn.com/blog/article/how-occupational-pension-schemes-work > accessed 19th October, 2020
[185] Ibid
[186] Liu, W.; Tonks, I (2009). "Alternative Risk-based Levies in the Pension Protection Fund for Multi-employee Schemes". Journal of Pension Economics and Finance. P. 451

protection fund is an insurance sort of arrangement whereby premiums are funded by retirement benefits schemes in order for the fund to compensate those schemes affected by insolvencies.[187]

The United Kingdom already has one which was started in the 2005 known as Pension Protection Fund (PPF).[188] It was created as a result of public concerns in case employers establishing a scheme became insolvent, members could lose their hard earned funds. The Fund has really contributed to an enhanced confidence level in the industry.[189]

Possible insolvency of schemes and some other potential risks in retirement benefits schemes have all led to a decrease in confidence in retirement benefits schemes generally in Kenya which has led to a few people wishing to join especially individual retirement benefits schemes hence contributing greatly to low coverage.

4.8 Presence of conditions to payment of pension and rigidity on portability/transfer of benefits under the pensions Act

As earlier stated, under the Pensions Act, one can forfeit pension if he or she resigns from employment or is dismissed.[190] The Act also provides for some of the circumstances in which pension may not be paid. Some of those circumstances are termination of an officer's service on public interest[191], where an officer has been declared bankrupt[192] and also when an officer has been convicted.[193] These provisions are meant to reduce the retirement benefits coverage among the civil

[187] Ibid, p. 451
[188] Pension Protection Fund, https://www.ppf.co.uk > accessed 18th October, 2020
[189] Ibid
[190] Pension Act s. 16 (1) (i)
[191] Pension Act s. 8
[192] Pension Act s. 14
[193] Pension Act s. 15

servants in that it provides for avenues where officers can lose their pension and this will definitely lead to a low retirement benefits coverage.

The Pensions Act restricts transfer of service[194] or retirement benefits to another scheme, this therefore indicates that one cannot move from public sector to private sector with his or her benefits thereby hindering job mobility in our economy.[195]

4.9 Conclusion

It is very clear that the significant problem to the low retirement benefits coverage in Kenya is both the law and policy that has not really been enriched to address the eight issues illustrated above. Critical changes are essential and are supposed to be urgently commenced to address those prevailing gaps.

[194] Pension Act s. 16

[195] www.treasury.go.ke> accessed 18th September, 2020

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter sums up key conclusions from the preceding chapters by presenting the findings to this study's research objectives and hypothesis. Also, in a bid to come up with legal reforms, this paper has presented its recommendations on critical additions and amendments both in the policy and the law on retirement benefits.

5.1 Conclusion

This study sought to investigate and identify key gaps in the legal and policy framework of the current retirement benefits Sector in Kenya with a view to propose critical reforms necessary to increase the retirement benefits coverage.

5.2 Recommendations

In response to the research outcomes deliberated above, the following are the recommendations;

5.2.1 Need to have a national policy on retirement benefits in Kenya

This will be a starting point in solving this problem of low retirement benefits coverage in Kenya. This is a document that will lead the way and provide a sense of direction to this country in matters retirement benefits. This policy should be developed urgently so as to align the current legal framework from basic things such as definitions of various terms used in the retirement benefits industry and to harmonize the fragmented laws in order to ensure that the sector is under one ministry. The policy should be developed in such a way to guide this country to attain major milestones in the retirement benefits sector such as increasing retirement benefits coverage among other milestones.

5.2.2 Establishment of retirement benefits schemes should be made mandatory to all employers

This study recommends an amendment to the Retirement Benefits Act and the Employment Act to introduce a provision making it compulsory for all employers in Kenya to establish retirement benefits schemes for their employees. The provision will demand of any employer currently employing and also those who wish to employ Kenyans to ensure that they establish contributory schemes for them. This express provision would really help since most employers are always reluctant to perform any good thing unless they are compelled to do so and the only tool which can achieve this is the law. Eventually, every employer would comply and this will permanently solve this problem of low retirement benefits coverage.

5.2.3 Old age pension guarantee should be legislated

Both the OPCT and the Inua Jamii Senior Citizens' scheme are required to urgently be anchored into a law so as to guarantee their existence even after the current government is out of power. This study also recommends that the Inua Jamii Senior Citizens' scheme should target citizens from the age of 60 years as opposed to the current target of citizen above the age of 70 years. This is to eliminate a gap in which a majority of Kenyans would be without any income.

5.2.4 The Retirement Benefits Act should provide for the locking of benefits till retirement

This study recommends an amendment to the RB Act and Regulations to provide for locking of retirement benefits in the scheme until retirement. The amendment would mean that there would be no access of benefits when one moves from one employer to another hence aim of a scheme which is to pay members at retirement will be met and members of a scheme would access adequate benefits to enable them lead a comfortable retirement life.

5.2.5 Appointment of a corporate trustee to manage the NSSF under the NSSF Act.

The NSFF Act should be amended to provide for a corporate trustee to manage the affairs of the fund especially in investment of the scheme funds instead of the board. A corporate trustee, as the name implies is a company which undertakes to administer trusts which includes schemes.[196] The advantage of a corporate trustee as opposed to the individual board of trustees is that corporate trustees are known for their expertise and impartiality in discharging their duties.[197] Also a corporate trustee dedicates more time to the management of the scheme unlike individual who normally meet a few times in a year.[198]

The other key advantage of having a corporate trustee to manage NSSF is that individual trustees often face outside pressures such as political influence as the case is with the current fund.[199] This will make NSSF great again and Kenyans will build confidence in the fund hence start making voluntary contributions thus increasing coverage.

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[196] Thomas M. Forest, "How a Corporate Trustee Can Help a Financial Planner Meet Their Client's Goals", Journal of Financial Service Professionals, Vol. 61, No. 6, November 2007. p. 7
[197] Ibid, p. 8
[198] Ibid, p. 8
[199] Ibid, p.8

5.2.6 The Retirement Benefits Act to provide expressly for the admission of all including the employees under short contracts into the employer's retirement benefits schemes

A provision should be introduced in the RB Act to expressly provide that all employees including those employed for a short term basis under contract should be allowed to a retirement benefits scheme. This should be a deliberate provision so as to stop the current practise in which most employers discriminate employees under short term contract by not admitting them into the scheme as their counterparts who are employed under permanent and pensionable terms.

5.2.7 Need to establish a retirement benefits protection fund

This research recommends that the retirement benefits protection fund should be established under the RB Act and require all schemes in Kenya to comply with that law so that all members of these schemes can be assured of compensation in the unlikely event that a scheme becomes insolvent or in case of fraud that causes loss of members' benefits. This would really boost confidence in the retirement benefits sector and will lead to many Kenyans subscribing into schemes especially the individual schemes and as a result increase coverage.

5.2.8 The Pensions Act should remove all the conditions to payment of pension and provide for transfer of service or benefits to other schemes in case of job transfer

Social security is a right secured under the constitution and nobody including the employer should take it away by imposing conditions to it as espoused under the Pensions Act. This research recommends key amendments to the Pensions Act to remove all the restrictions to the payment of pension in order for the members of the civil service pension scheme to enjoy this right to their retirement benefits absolutely when the time for retirement comes.

Movement of workers in all the sectors is normal hence there is need to ensure that benefits of scheme members are protected especially where there are differing legislations. This study therefore recommends that particularly the Pensions Act should be amended to allow transfer of benefits or service to other private retirement benefits schemes

5.3 Summary

This study was meant to examine and identify the gaps in the policy and the legal framework for retirement benefits Kenya which have contributed to a low retirement benefits coverage with the aim of proposing key recommendations to boost the low coverage.

The study has demonstrated that lack of a retirement benefits policy, pre-retirement withdrawals, lack of a retirement benefits protection fund, presence of conditions to the payment of pension under the Pensions Act, uncoordinated legal framework among others have contributed to the current low retirement benefits coverage in Kenya.

It is important to point out that if the eight recommendations that this study has proposed are adopted and incorporated in the review of both the policy and the legal framework for retirement benefits in Kenya, the gaps identified will be filled hence the framework shall comply with the Constitution and ultimately lead to an increase in retirement benefits coverage.

5.4 An area for further research

As per this study, nearly eighty percent of the total workforce in Kenya is not covered with respect to their retirement benefits under the current legal framework. There is need for a further sociological research to investigate the sociological aspects of the class of the people left out by the current retirement benefits system. This will shade light on how their issues and concerns can be separately addressed by the proposed changes to the current legal framework.

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