UNIVERSITY OF NAIROBI

SCHOOL OF LAW

A CRITIQUE OF ARBITRATION CLAUSES/AGREEMENT IN EMPLOYMENT CONTRACTS

BY

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A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M) OF THE UNIVERSITY OF NAIROBI

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ABSTRACT

Whenever parties are involved in a contract of employment, conflicts are bound to occur. Arbitration clauses have therefore been applied to assist parties in a contract of employment, reach an amicable solution to their disputes. Arbitration arises out of an arbitration clause.

Application of arbitration clauses in contracts of employment is gaining traction in Kenya. Usually, Courts have no jurisdiction where such jurisdiction are excluded by the Arbitration agreement. Other Courts have also postulated that Arbitration is not applicable in a contract of employment. The conflict involving application of arbitration clause in contracts of employment has therefore received conflicting interpretations from our Courts. The net effect of this matter is confusion in our Courts, despite the principle of *stare decis*.

Article 162(2) (a) of the Constitution of Kenya gives the exclusive jurisdiction of employment disputes to the Employment and Labour Relations Courts (ELRC). The ELRC Act establishes the ELRC pursuant to Article 162(2) of the Constitution of Kenya 2010. The ELRC is clothed with exclusive jurisdiction, both appellate and original, to preside over all disputes brought to its attention in accordance with Article 162(2) of the Constitution and in so far as the disputes relate to employment and labour relations.[1] Section 75 of the Labor Relations Act (LRA) expressly negates arbitration in employment disputes. A research into this conflict would bring a major conclusion into this grey area and ensure uniformity and clarity in Court decisions in relation to dealing with arbitration agreements in contracts of employment and also encourage future research in this area. The research will therefore inform legislative, judicial, and administrative and policy decisions in reforming and clarifying the application of arbitration in contracts of employment.

[1] Section 12 of ELRCA

DECLARATION

I hereby declare that this research thesis is my original work and has not been presented or submitted elsewhere for award of a degree, publication or examination

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

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DATE: 11/12/17

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DEDICATION

To my daughter Tiffany Taya and to all those who fight for, and seek justice without shortcuts and also to all those who earn an honest living and fight for good governance.

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To my Supervisor Dr. Kariuki Muigua for the prompt directions, response, support and guidance without which I would not be graduating soon. I shall forever remain grateful.

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LIST OF ABBREVIATIONS

ADR	Alternative Disputes Resolution
ACAS	Advisory, Conciliation and Arbitration Commission
CPA	Civil Procedure Act
CAC	Central Arbitration Committee
CCMA	Commission for Conciliation, Mediation and Arbitration
CPA	Civil Procedure Act
EA	Employment Act
EAT	Employment Appeals Tribunal
EDN	Edition
EEOC	Equal Employment Opportunity Commission
ELRC	Employment and Labour Relations Court
ELRCA	Employment and Labour Relations Court Act
FAA	Fair Arbitration Act
LRA	Labour Relations Act
ICSID	International Convention on the Settlement of Investment Disputes
SA	South Africa
UDHR	United Nations Declaration on Human Rights
USA	United States of America
UK	United Kingdom
UNCITRAL	United Nation Commission on International Trade Law

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The Labour Institutions Act of Kenya

The Employment and Labour relations Court Act

Race Relations Act

The Race Relations Act (United Kingdom)

The Fair Arbitration Act (United States of America)

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4. *Jane Muthoni Mukuna v Fsi Capital Limited* Nairobi Cause No. 688'A' OF 2014

5. *Joao Soares v Tuegest Guerema & Anotyer* Nairobi Cause No. 689 of 2012

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7. *William Lonana Shena V Hje Medical Research International Inc* Nairobi Cause 1096 of 2010

8. *Stephen Nyamweya & Another V Riley Services Limited* Nairobi Cause 2469 of 2012

9. *National Bargaining Council for the Road Freight Industry and Another v Carlbank Mining Contracts (Pty) Ltd and Another* (JA 52/10) [2012] ZalAC 11

10. *Nedermar Technology Bv Ltd V Kenya Anti-Corruption Commission & another* Nairobi Petition 390 of 2006

11. *Graham v. Scissor Tail, Inc.*, 28 Cal. 3d 807 (Cal. 1981)

12. *Judicial Service Commission V Gladys Boss Shollei & Another* Civil Appeal No.50 of 2014

13. *United States International University (USIU) v Attorney General & 2 others,* Petition 170 of 2012

14. *Prof. Daniel N. Mugendi –Vs- Kenyatta University & Others* Civil Appeal No. 6 Of 2012

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18. *William Lonana Shena V Hje Medical Research International Inc,* Cause No. 1096 of 2010

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20. *Alexander v. Gardner-Denver Co* 415 U.S. 36 (1974).

21. *Africa Spirits Limited v Prevab Enterprises Limited* HCCC No. 1756 of 2007 (unreported)

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27. *Parsons & Whittemore Overseas Co., Inc. -v- Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir., 1974)

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33. *EEOC v. Frank's Nursery & Crafts, Inc*, 177 F.3d 448 (6th Cir. 1999)

34. *EEOC v Waffle House, Inc* (99-1823) 534 U.S. 279 (2002)

35. *Jones v. Halliburton, Co* 583 F.3d 228, 230-32 (5th Cir. 2009).

36. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

37. *Wright v. Universal Maritime Service Corp* 525 U.S. 70 (1998).

38. *Green Tree Financial Corp. v. Randolph* 531 U.S. 79 (2000)

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40. *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* Civil Appeal No 282 of 2004

41. *Commercial Bank of Australia Ltd v Amadio* [1983] 51 CLR 447

42. *Graham v. Scissor-Tail Graham v. Scissor Tail, Inc.*, 28 Cal. 3d 807 (Cal. 1981)

43. *Circuit City Stores, Inc. v. Adams* 279 F.3d 889 (9th Cir. 2002)

44. *Armendariz v. Foundation Health Psychcare Serv., Inc* 24 cal. 4th 83, 104 (Cal. 2000).

45. *Soul Mmethi v DNM Investments CC t/a Bloemfontein Celtic Football Club* Case Number JS 1298/09

46. *Marshall v. Southampton & S.W. Hampshire Area Health Authority* E.C.R. 1-4367 (1993)

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CHAPTER ONE

Introduction

In recent years, quite a number of labour law scholars have struggled with the question of application of arbitration in contracts of employment.[2] This position has led to increase in disputes in Courts of law on the effect of pre-dispute arbitration clauses in contracts of employment.[3] Questions have therefore risen on whether employment contracts are the same as normal commercial contracts, to warrant arbitration. Employment contracts have been argued by other scholars to be contracts with an assumed asymmetrical and conflicting bargaining parties.[4] It is further argued that development of the concept of labour laws is based on the understanding that contracts of employment are quite different from other contracts.[5]

In Kenya, conflicting interpretations on the application of arbitration clauses are quite glaring. From the outset, it is therefore critical to appreciate the unique nature of these contracts based on the fact that their application may deserve a slight deviation from the normal treatment applicable to commercial contract law. The Courts in interpreting the application of arbitration clauses may therefore need to be guided by different bodies of law.[6] This may call for many considerations including the *sui generis* nature of the contract, freedom to contract, affordability of arbitration, human rights and the concept that employees are weaker parties in a contract of employment bargain.

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[2] G Mundlak, '*Generic or Sui-Generis Law of Employment Contracts?*'(2000) 16 International Journal of Comparative Law &Industrial Relations 309.

[3] Ibid

[4] *Ibid*

[5] C Summers, 'General Report: Similarities and Differences Between Labour Contracts and Civil and Commercial Contracts', in *Proceedings of the 16th World Congress of Labour Law and Social Security,* Jerusalem, Israel, September 3-7, 2000.

[6] P Weiler, '*Governing the Workplace' (1990)* Cambridge, Harvard University Press, (1990) 63.

1.1 Background to the Study

The Arbitration Act of Kenya, 1995 defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution"[7]. Arbitration has features which include arbitration being: a private means for dispute resolution, an alternative to the litigation, choice is made and controlled by the parties and finally that the decision is final and binding on the parties.

Arbitration as a dispute resolution mechanism is contemplated by Article 33[8] of the charter of the United Nations as a first instance means of dispute resolution.[9] Parties have always resorted to arbitration since time immemorial as a means of conflict resolution.[10] With common problems facing litigation including overcrowded cause-lists, unnecessarily cumbersome procedures, unnecessary technicalities, and its costly nature and uncalled for bureaucracy has led to rising calls for alternatives for dispute resolution.[11]

Arbitration is private and confidential, parties choose their own language and procedures, it's less formal, binding and enforceable, flexible and the awards have a wider jurisdiction of application than court judgements.[12] These have encouraged parties to resort to arbitration over other forms of dispute resolution mechanisms, especially litigation. Because of the stated advantages, arbitration has found its way into the employment contracts. Arbitration has then become quasi-judicial process widely

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[7] Arbitration Act of Kenya,1995

[8] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October, 1945).

[9] 3K Muigua *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Limited 2012), 2.

[10] P Capper *International Arbitration: A Handbook* (3rd edn Lovells 2004), 1.

[11] B A Temitayo, *Why Arbitration Triumphs Litigation: Pros of Arbitration*, Singaporean Journal of Business Economics, And Management Studies VOl.3, NO.2, 2014

[12] KI Laibuta *Principles of Commercial Law* 'Commercial Arbitration and Alternative Dispute Resolution' (LawAfrica 2006) 418-440, 418

acceptable and strongly binding. Employment litigation have become one of the most rising areas of civil litigation.[13]

Arbitration is founded on sound principles of party independence and party autonomy and as a contract, party's freedom to contract.[14] A contract is defined as a set of promise or promises that the law will enforce.[15] Contract law is concerned with the duties, rights and obligations that are created by the agreement.[16] Therefore, when a party in an employment relationship contracts to arbitration in a contract of employment, he is expected to abide by the agreement.

The Court of Appeal in Kenya has held that employment contracts are peculiar contracts in their nature and needs a different approach of interpretation.[17] Employment disputes are handled through the Employment and Labour Relations Courts (ELRC) in Kenya. The Kenyan Constitution provides for the establishment of Courts to hear and determine disputes relating to employment and labor relations.[18] This provision marked the birth of the ELRC of Kenya.

ELRC have severally been faced with the challenges of interpretation of the application and jurisdiction of the Courts when it comes to application of arbitration clauses. Courts have made different findings on the subject matter. *In James Heather - Hayes v African Medical and Research Foundation (AMREF)*[19] Justice Marete upheld an arbitration clause and referred the employment matter to arbitration arguing that parties were bound by the contract. The same position was upheld in *William Lonana Shena v HJE Medical Research*

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[13] HB Eastman & DU Rothenstein, 'The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground'(1995) 20 Employee Relation S L.J. 595 .

[14] A Redfern and others *Law and Practice of International Commercial Arbitration* (4th edn Sweet & Maxwell 2004),265.

[15] Guest, AG (ed), *Chitty on Contracts*, Sweet and Maxwell, 27th ed, 1994, p 1

[16] Ryan, Fergus (2006). *Round Hall nutshells Contract Law*. Thomson Round Hall. p. 1

[17] Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited Civil Appeal No. 110 of *2001*

[18] Constitution 2010, Article 162(2)(a)

[19] Cause Number 626 of 2013

International Inc[20]. However, in *Stephen Nyamweya & Another vs. Riley Services Limited*[21], Justice Ndolo posited that arbitration clauses in employment contracts are absurdities and would destroy the mechanism of dispute resolution in employment disputes. While striking out an application for referral to arbitration, Justice Ndolo argues that:

> "What the Applicant is inviting this Honourable Court to accept is an outcome where the Industrial Court would be rendered otiose by moneyed and powerful capitalist elites who will contract out of the reliefs guaranteed to employees under the Employment Act. If this were to be allowed, employment dispute resolution mechanisms would henceforth be commercialized and "capitalized" into feudalistic vestiges where employees would be working with limited or no rights or protection"[22]

The above opinion was also upheld in *Dr. Kennedy Amuhaya Wanyonyi V African Medical and Research Foundation*[23] where the Court upheld the opinion that section 75 of the LRA[24] excludes arbitration in employment cases. Justice Maureen Onyango has reiterated this position in *Jane Muthoni Mukuna v Fsi Capital Limited*[25] where she continues to discredit arbitration in employment cases by terming them costly and time consuming against the expectations of arbitration.

The conflicts above have pitted the Arbitration Act[26] against the Employment and Labour Relations Courts Act[27] , amongst other employment laws. As a result there is no clear cut direction on who has jurisdiction to determine a dispute where arbitration agreement is inferred in a contract of employment. This research argues that Arbitration should therefore not be applied in contracts of employment as it is a contract *sui generis* where parties are not in the same bargaining position at the time of contracting. If arbitration must be applied, it must be by consent of the parties, post dispute.

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[20] Industrial Cause No. 1096 of 2010(Unreported)
[21] Industrial Cause No. 2469 of 2012
[22] Ibid
[23] Industrial Cause No.53 of 2014
[24] Industrial Cause No. 20 of 2011
[25]Industrial Cause No. 688'A' OF 2014
[26] CAP 49 Laws of Kenya
[27] CAP 234B Laws of Kenya

1.2 Statement of the Problem

Whenever a contract of employment has an arbitration clause, and a dispute then arises, a party may approach the Court.[28] The other party to the dispute may apply to stay such an action as per section 6 of the Arbitration Act.[29] When the suit is stayed, reference is made to an arbitral tribunal to make a decision. Some Courts have therefore referred the disputes to arbitration, to the detriment of claimants who sometimes are not able to afford arbitration and towards a solution that may infringe upon their fundamental rights.

The problem that arises then is that the Court lacks proper guidance when an arbitration clause/contract in included in an employment contract, since there is a conflict between the Arbitration Act, 1995 which provides for stay of proceedings and refer the matter to arbitration when arbitration clause is invoked and the employment laws provisions with exclusive jurisdiction in the ELRC. Sometimes the arbitration clauses are included without consent of the employees. Courts have therefore continued to make conflicting decisions, which are dangerous to judicial standards.

Some Courts have held that arbitration is not applicable while others have insisted that arbitration is applicable. Since Kenya is a commonwealth country, which relies on the principle of *stare decisis*, this confusion affects litigants who lack a common direction in relation to the application of arbitration in employment cases. *Stare decisis* is said to "... promote the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process"[30] and should therefore be encouraged.

Due to the conflict of the laws and their interpretations, the Courts continue to make conflicting decisions to the detriment of Employment litigants especially the claimants

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[28] St. John D Sutton and J Gill *Russell on Arbitration* (22nd edn Sweet & Maxwell 22nd 2003), 12
[29] No.4 of 1995

[30] M Koenig, 'Patent Royalties Extending Beyond Expiration: An illogical ban from *Brulotte* to *Schieber*,, (2003) Duke Law Review .

interfering with the principle of *stare decisis*. When the Courts refer the matters to arbitration, Claimants are unable to participate due to the costs involved. This research therefore addresses this problem by arguing that Arbitration is not effective in contracts of employment and if it must be applied, then parties need to agree to seek arbitration post dispute. In arbitration post dispute, a party will not be said to be coerced or taken advantage of by the employer and will also be able to consider the cost.

1.3 Scope of the Study

Whereas the issue of application of arbitration is wide in scope, this study limits itself to the application of arbitration clauses in contracts of employment in Kenya. The inclusion of the position in the United States of America (USA) is for comparison purposes only. It analyzes the efforts made by the Courts to ensure that the rights of the employees are highly protected against the employer who is a stronger party. It also limits itself to the discussion on the practicability of applying arbitration in employment cases in Kenya.

1.4 Justification of the Study

This study is justified on the basis that there exists dangerous conflict in Court decisions in relation to the application of arbitration clauses in contracts of employment. When Courts uphold inclusion of arbitration clauses, the claimants are disadvantaged since they can not only fail to afford the cost of arbitration, but they are also exposed to a process that they did not consent to. The conflicting positions also interfere with predictability and standardization of Court decisions. Kenya is a common wealth country where judicial precedence is key in shaping Court decisions. Any bad precedence that exists literally decides the outcome of future similar disputes. There is need to come up with a single position that controls outcomes in similar disputes. There is also scarcity of expansive literature on the subject of arbitration in employment contracts especially in Kenya. This study seeks to fill the gap and stimulate discussions in the area of applicability of arbitration in contracts of employment.

1.6 Research Objectives

1.6.1 Main Objective

The main objective of this research paper will be to examine whether arbitration is applicable in disputes arising out of contracts of employment.

1.6.2 Specific Objectives

This study is premised on the following specific objectives:

1. To find out if arbitration clauses are applicable in contracts of employment in Kenya.
2. To find out the effect of arbitration clauses in contracts of employment in Kenya.
3. To examine whether labour rights are human rights.

1.7 Research Questions

This research project aims at answering the following key questions:

1. Should arbitration clauses be applicable in contracts of employment in Kenya?
2. What is the effect of an arbitration clauses in contracts of employment in Kenya?
3. Does application of arbitration clauses in employment contracts violates employee's human rights?

1.8 Research Hypothesis

The research will test the following hypothesis:

a) This research proceeds on the assumptions that arbitration clauses/contracts are not applicable in contracts of employment in Kenya.
b) The research also proceeds on the assumption that arbitration in employment disputes denies employees their preferred dispute resolution mechanism.

c) Application of arbitration clauses in contracts of employment deny the employees their human rights

1.9 Theoretical Framework

This research utilizes the conflict theory by Karl Marx. The fusion of this theory creates a perfectly fitting and reinforcing models for the propositions in this research. The rationale for using this theory is set out below. According to Karl Marx, there are two categories of people, the owners of capital and means of production, and the workers.[31] The theory therefore recognizes that there is material inequality in the society. Social structures are borne out of the conflict between individuals with different interest and material resources.[32] In turn, people and resources are influenced by discriminated distribution of power and resources in a social setting.[33]

According to Karl Marx, private ownership and control of the means of production results in irreconcilable conflicts and contradictions, between the economic interests of the exploiters and those of the exploited.[34] Since much resources are in the hands of few individuals and the oppressed are in need of engagement in productive activities, which activities can only be got from the owners of capital, Karl Marx views this relationship as one sided. The inequality therefore leads to a lesser bargaining power for the laborers. The conflict theory will therefore be applied in this research to bring out the conflict in the unilateral relationship between the owners of capital (the employer) who is a stronger

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[31] D Homes and K Hughes and R Julian, *Australian Sociology: A Changing Society* (2nd edn, Pearson Education 2007); see also K Krawford, 'Power in Society – Marx and Conflict Theory: An Analysis of Power in Society' (2009) <www.academia. Edu /.../Marx_and_Conflict_Theory> *accessed 14 September 2016.*

[32] Ibid 78

[33] Knapp, P. (1994). *One World – Many Worlds: Contemporary Sociological Theory* (2nd Ed.). Harpercollins College Div, pp. 228–246.

[34] D Homes and K Hughes and R Julian, *Australian Sociology: A Changing Society* (2nd edn, Pearson Education 2007); see also K Krawford, 'Power in Society – Marx and Conflict Theory: An Analysis of Power in Society' (2009) <www.academia. Edu /.../Marx_and_Conflict_Theory> *accessed 14 September 2016.*

party and the laborer (the employee) who is a weaker party. The weaker party therefore need protection of the law from exploitation by the stronger party.

In examining this theory, Marx argues that there is a power class that controls the working class and that the interests of the stronger power class are opposed to those of the weaker parties.[35] This position causes the class struggle. Societies are made up by inequality that brings forth conflict, instead of that which produces order, fairness and consensus.[36] The only way to overcome this conflict based on inequality is a fundamental shift of the existing social relations in the society between the two classes, and is productive of changed social relations.[37] The weak possess structural interests that run in conflict to the prevailing situation, which, once they are harnessed, will lead to social relations change.[38] Thus, the employees should be viewed as agents of change rather than objects of labour one should sympathize with. Human potential is stagnated by exploitation and oppression by the stronger party, which are in existence in any society with inequality.[39]

Those in control of the means of production always device methods of keeping themselves in control, by exploitation of the weak, resulting in enhanced inequality.[40] In this research, this is shown by the fact that Courts interpretation to favor application of arbitration in contracts of employment exploits the workers. In conflict theory therefore, Karl Marx focuses on the reasons and consequences of class social and economic conflict

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[35] Knapp, P. (1994). *One World – Many Worlds: Contemporary Sociological Theory* (2nd Ed.). Harpercollins College Div, pp. 228–246.

[36] Sears, Alan. (2008) *A Good Book, In Theory: A Guide to Theoretical Thinking.* North York: Higher Education University of Toronto Press, pg. 34-6,

[37] Ibid

[38] [38] E Lepird and S Canny and M Saldana, **'Conflict Theory** v Marxism **Conflict Theory**' (2013) Iowa State University <http://www.soc.iastate.edu/sapp/Conflict.ppt> accessed 21 October 2016.

[39] Sears, Alan. (2008) *A Good Book, In Theory: A Guide to Theoretical Thinking.* North York: Higher Education University of Toronto Press, pg. 34-6,

[40] Credo, 'Conflict Theory' in C. Forsyth & H. Copes (eds), *Encyclopaedia of Social Deviance* (Sage Publications, 2014) <http://search.credoreference.com/content/entry/sagesdeviane/conflict_theory/0> accessed 24 January 2017

among the bourgeoisie (the owners of capital and means of production) and the proletariat (the laborers and the poor).[41]

Focusing on the political, social and economic implications of the growth of capitalism in the world, Karl Marx posited that this system, founded upon the existence of a capitalist minority class (the bourgeoisie) and an oppressed weak class (the proletariat), formed a conflict of class since the interests of the parties were competing, and economic resources were unfairly shared among them.[42] This argument furthers this research in that employment opportunities are few and controlled by availability of few employers while the employees are many fighting for the few available employment opportunities. The Interests of the employers and employees are therefore competing. Employees also compete for the few employment opportunities available and in control of the employers.

Within this social system an unequal social structure was enhanced through ideological coercion which brought forth consensus and agreement of the expectations, conditions and values as decided by the bourgeoisie class. The Employers are therefore in control and able to set terms of employment to the detriment of employees since they are in control of the factors of production. This includes control of the dispute resolution mechanisms that favors employers and that employees are not able to afford arbitration and did to consent to voluntarily. A typical case of who pays the piper calls the tune. This position directly relates to the case of arbitration in employment contracts which favors employers.

The conflict theory is therefore important in this research because, it postulates that there is a the bourgeoisie class who is stronger and has the major factors of production who is the employer and the proletariat who is the weak and poor with a weaker bargaining

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[41] PA Samuelson, 'Understanding the Marxian Notion of Exploitation: A Summary of the So-called Transformation Problem between Marxian Values and Competitive Prices' (1971) 9(2) Journal of Economic Literature 4.
[42] Ibid

power as the employee, who is unable to have an input into the terms of his employment. The employer also forms the minority with the resources against the employees who are the majority with no resources. The majority therefore compete for the little resources in terms of work and employment that is offered by the employers. This position reduces the employees bargaining power against these competing interests within the class, to the advantage of the employer, who can therefore dictate terms to the employee. Therefore, any solution aimed at protecting the employee must realize the employer has a stronger bargaining power than the employee and therefore controls the terms of employment.

However, Karl Marx's conflict theory has faced constant criticisms on its effectivity. Two theorists, Herbert Spencer and Robert Merton have used the theory of structural functionalism to argue that the society is a complex system that requires its segments to work in harmony to promote stability and solidarity to achieve a common goal.[43] Structural functionalism looks at the society like a biological body that needs each organ and body part to make a whole organism with different parts having different important functions. The organs (Bourgeoisie) are more important to make a body function but still needs other body parts (proletariat) to be complete. This theory therefore curtails the rising up of the proletariat against the bourgeoisie as this would create an unstable society.

Secondly, Karl Marx's conflict theory has been criticized for its proposal of a physical conflict in nature whereby war is waged against the bourgeoisie by the proletariat. This criticism of the conflict theory is particularly evident in the employment sector whereby the nature of the conflict is a 'mind battle' to have terms and conditions that favor the interest of either the employee or the employer. This theory can also be said to be the cause of violent protests by the workers against the employers. This theory is also believed to be the cause of labour strikes.

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[43] Macionis, Gerber, Sociology 7th Canadian Ed. (Pearson Canada Inc., 2010), pg. 14

1.10 Literature Review

An arbitration contract in employment can take the form of a specific arbitration contract or a specific clause in an entire agreement prescribing a dispute resolution by arbitration.[44] Arbitration can also be *Ad hoc*. Arbitration clauses/contracts may also be coined to cover specific disputes arising out of employment relationship. According to HB Eastman and DU Rothenstein, the issue of arbitration in employment cases has been quite controversial as different scholars have held different positions in the same.[45]

In the last two decades, employment litigation in the world has increased at a rate of about 1000 percent compared to other forms of litigation.[46] This has led employers to seek alternative methods of dispute resolution in employment matters that are far less expensive and less contentious.[47] Employers worldwide are therefore continuously seeking alternative methods of employment dispute resolution and more so arbitration[48]. These methods would include arbitration, conciliation and mediation which are actually cheaper, confidential, less procedural and quicker.

The clauses in the employment agreements themselves have ended up creating lots of litigation.[49]Dennis Nolan argues that many cases were upheld by the Courts in 1990's because the arbitrations clauses were found to be legitimate and therefore enforceable and therefore the employees were bound by them.[50] According to Nolan, the employees

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[44] Richard A. Bales, 'Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements' (1995) 47 Baylor L. Rev. 591, 594 .

[45] HB Eastman & DU Rothenstein, '*The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground' (1995)* 20 Employees Relation S Law Journal 595.

[46]HB Eastman & DU Rothenstein, '*The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground' (1995)* 20 Employees Relation S Law Journal 595.

[47] Ibid

[48] Michele L. Giovagnoli, 'To Be Or Not To Be? Recent Resistance To Mandatory Arbitration Agreements In The Employment Arena' (1996) 64 UMKC L. Rev. 547, 556

[49] Dennis Nolan, 'Labor And Employment Arbitration: What's Justice Got To Do With It?,(1998) 53-Nov Disp. Resol. J. 40, 42

[50] Ibid

found themselves in a position that they created. Nolan however fails to note that at the time of contracting, the employee is completely absolved of the freedom to contract and therefore the contract lacks voluntary consent. Nolan's position has also been criticized by Richard Bales who argues that voluntary consent and understanding is core to any agreement more so in mandatory arbitration. [51] Nolan also fails to note that according to the UNCITRAL Model laws on Arbitration from which arbitration laws emanate, the concentration was on commercial arbitration rather than employment arbitration.

Courts in Kenya have always held different views in regard to the matter. Where claims are decided by alternative dispute resolution, the parties would be estopped from seeking judicial intervention as the matters would be *Res Judicata* or stopped by collateral estoppel.

Harry .T. Edwards[52] in his analysis of mandatory employment contracts, argues that when thinking about dispute resolution methods, it is important to understand the dichotomy between public and private disputes. He posits that matters of public law should lead to regulation or laws that determine substantive rights and remedies that define human rights. He asserts that when matters of public law are subjected to private fora, an assurance that public interest is defended lacks. He continues to argue that since arbitration are not subject to public scrutiny, the public would not know if their resolutions are in consonance with public law interpretations or laws of equity.

According to Edwards, major conflicts arises when parties are compelled to use alternative dispute resolution instead of a normal judicial process in Court. He gives an example of antidiscrimination laws that contain a fully public law issue to protect laborers against human rights violations based on discrimination including sex,

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[51] Bales, Supra Note 42

[52] HT Edwards, 'Where Are We Headed with Mandatory Arbitration of Statutory Claims in Employment' (1991) *Georgia State University Law Review*: Vol. 16: Iss. 2, Article 2.< Available at: http://readingroom.law.gsu.edu/gsulr/vol16/iss2/2> accessed 24th February,2017

handicap, age, and race. He therefore concludes that persons with viable claims should have an entitlement to direct them to Court and must be exposed to the legislated remedies. Edwards study shows a common trend in where it's the large non-union institutions insisting on arbitration agreements with workers.

However, while Edward's discourse are valid, they are deficient since they fail to consider labour rights as part of human rights and therefore define them specifically as public law issues. This study therefore builds up in his arguments by asserting that labour rights are and should be protected as human rights. He also fails to consider that parties to a contract of employment are not equals at the time of bargaining, which this study seeks to further.

Bahareh (Bee) Morale[53] lends an objective analysis into this discourse. Morale made an exploration among six other countries including The United States of America, United Kingdom, Spain, Brazil, France, Germany and South Africa. He argues that while arbitration can be efficient than a judicial process, it fails to provide the constitutional protections necessary when a rights violation occurs. He calls for Court's protection in disputes involving a breach of public rights and offers discrimination as an example. Morale is persuaded by the French system where voluntary arbitration is encouraged post dispute.

Bahareh (Bee) Morale[54] will aid the comparative study and jurisprudence of the research generally. Specifically, this work will inform in the analysis of the factors considered by the Courts in the United States of America in determining the application of arbitration clauses in employment contracts.

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[53] M Bahareh (Bee), 'Pre-Dispute Mandatory Arbitration in Employment Agreements' (2014). *Upper Level Writing Requirement Research Papers.* Paper 32. <http://digitalcommons.wcl.american.edu/stu_upperlevel_papers/32> accessed 28th February 2017

[54] Ibid

Theodore J. St. Antoine[55] in his article argues that a worker should be offered the choice of arbitration post dispute and no not pre dispute. He disagrees with employers offering standard form contracts with arbitration clauses as a non-negotiable condition of employment. He also notes that employers have used this condition to expose employees to costly arbitration expenses. In his analysis, he disagrees that arbitration is cost effective, especially to the employee. Dr. Kariuki Muigua lends an agreement to this position and argues that Arbitration is becoming as expensive as litigation.[56] This argument and analysis aids this study to the extent that a post dispute arbitration agreement does not impose conditions upon the employee and therefore, the employee is not disadvantaged.

Dr. Kariuki Muigua[57] has analyzed the need for an arbitration agreement for one to resort to arbitration. Kariuki Muigua also opens up the door for "ad hoc" arbitration where there was no prior binding contract to arbitrate. Thomas E. Carbonneau[58] also defends arbitration based on the contracts role in the management of arbitration. He argues that freedom to contract is the core of arbitration. According to him Courts are bound by the parties' intentions and any deviating position would amount to rewriting the contract for the parties. However, he also notes that arbitration agreements always reflect the position of the commercially dominant party. Also, both Muigua and Carbonneau ignore that the freedom of parties to contract is tilted where one party is commercially disadvantaged, like in employee employer relationship.

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[55] St. Antoine, Theodore J. "Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?" T. M. Cooley L. Rev. 15, no. 1 (1998): 1-9.

[56] K Muigua "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011.

[57] Kariuki Muigua, The Arbitration Acts: A Review of Arbitration Act, 1995 Of Kenya Vis-A-Viz Arbitration Act 1996 Of United Kingdom, Rev. March 2010.<www.kmco.co.ke/articles.html> accessed 25th January,2017.

[58] TE Carbonneau, '*The Exercise of Contract Freedom in the Making of Arbitration Agreements*' (2003) 36 *Vand. J. Transnat'l L.* 1189 .< http://elibrary.law.psu.edu/fac_works> accessed 22nd January,2017.

Virginia Mantouvalou [59] in her article examines whether labour rights are human rights. She argues that according to the positivist theory, labour rights are recognized in the Universal Declaration of Human Rights as human rights. This position will advance the position that issues of breach of fundamental rights are better off handled by the Courts when they occur in labour disputes. Dr. Kariuki Muigua also recognizes that the arbitration act lacks proper safeguards against violation of constitutional fundamental freedoms and bill of rights.[60] When it has been shown that arbitration is deficient in the bill of rights, it would be difficult to arbitrate human rights abuses.

The authority of the Courts lies in the principle of *stare decisis.* This is based on the latin statement *Stare decisis et non quieta mnover* meaning align yourself with the precedent and do not depart.[61] This means that once an issue in law has been settled by a Court of competent jurisdiction, it sets a guide which shall inform subsequent decisions of a similar nature and is no longer open to further examination. According to the Supreme Court of the USA, the aim of *stare decisis* is to promote the predictable, even handed and consistent development of legal principles.[62]

According to Randy Kozel and Richard Posner, *Stare decisis* are also expected to provide legal principles that are theoretically sound, meaningful and predictable to enable a society to be able to predict with precision what the law is.[63] This principle of law is globally accepted to a void anarchy in judicial decisions and through it, Courts have set authentic and coherent judicial doctrines.[64]Through this doctrine, a religious and

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[59] V Mantouvalou, 'Are Labour Rights Human Rights?'(2012) 3 European Lab. L. J. 151

[60]K Muigua "Constitutional Supremacy over Arbitration in Kenya" < https://profiles.uonbi.ac.ke/kariuki_muigua/files/constitutional_supremacy_over_arbitration_in_kenya.pdf> accessed 22nd January, 2017.

[61] Randy J. Kozel, "*Stare Decisis* as Judicial Doctrine' (2010) *67 WASH. & LEE L. REV. 411*

[62] Payne v. Tennessee, 501 U.S. 808, 827 (1991)

[63] Richard A. Posner,' Law, Pragmatism, And Democracy" (2003) 63.

[64] William N. Eskridge, '*The Case of the Amorous Defendant: Criticizing Absolute* Stare Decisis *for Statutory Cases*' (1990) 88 MICH. L. REV. 2450.

legitimate expectation of litigants is created. Caleb Nelson posits that *Stare decisis* should be abhorred if they are proved to be massively erroneous and unconvincing.[65]

The principle of stare decisis has sometimes been criticized to create an imperfect systems of law when relied upon. Courts have sought to distinguish themselves from the *stare decisis* by making assertions that some decisions are logically imperfect and poorly reasoned.[66] This position asserts the argument that stare decisis should not be affirmed if it is believed to be wrong. Stare decisis still needs to be tested by Courts to determine whether the precedent should be preserved or disturbed. Courts should therefore turn against *stare decisis* if cogent reasons are given to distinguish the legal principles. *Stare decisis* would also encourage forum shopping where subjects of the law would consider a favorable Court when faced with a dispute.

Stare decisis has the tendency of shaping characters, understanding and behaviors of institutions and individual and is therefore law in itself. Sometimes precedent is not based on law but on a judicial opinion on which a citizen may find himself on the wrong side of law due to *stare decisis* creating confusion in law.[67] The precedent principle in law is therefore of core significance to bring order to judicial authority and law in general. It would also avoid the urge to practice forum shopping by litigants who partake to look for the most favorable Court that shares their view.

Consideration of the rights of employees is not compete without understanding the state of unemployment. According to the Human Development Index of the United Nations 2017 findings[68] the rate of unemployment in Kenya stands at an all-time high of 39.1 % which is higher than any East African country.[69] Kenya therefore suffers from ability to

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[65] Caleb Nelson, 'Stare Decisis *and Demonstrably Erroneous Precedents*' (2001) 87 VA. L.REV. 1, 8
[66] Arizona v. Gant, 129 S. Ct. 1710, 1725 (2009) (Scalia, J., concurring)
[67] Jan G. Laitos, '*The New Retroactivity Causation Standard*' (2000) 51 ALA. L. REV. 1123, 1132
[68] Human Develepment Index(HDI) 2017
[69] Ibid

generate jobs for her population. While living in such an environment, an average Kenyan prefers any readily available job for livelihood. Labour market is characterized by scarcity of employment prospects versus a hugely growing population of unemployed masses.[70] When a high population fights for few jobs, the citizenry lacks choices in employment and therefore any job on offer is acceptable at any terms.

Kenyan mass rates of unemployment has led to widespread poverty and a strain to the ever growing population.[71] Underemployment and unemployment is therefore still rampant in Kenya.[72] For Kenya then, finding employment is still the greatest concern of the citizenry.[73] When the citizenry have employment as the greatest concern, the specific terms of employment are a tertiary consideration. High population of the working class are held in low productivity sector and jobs[74] with informal sector contributing 89.7% of all jobs created in the year 2016.[75] At 75% Kenya also boasts one of the highest dependency ratios worldwide putting a strain on the working class.[76]

With the high rates of unemployment, and the high population fighting for the scarce labour resources, it would hardly be plausible for the citizenry to freely contract for their labour resource freely and by voluntary consent.

The cost of arbitration has also been quite prohibitive. The Nairobi Centre For International Arbitration (NCIA) offers domestic arbitration services. NCIA charges hourly rates for domestic arbitration at the rates of Kshs.25,000 per hour, with 1.5% of the fees charged on top for the arbitrators fees, as the institutional; fees.[77] This is in addition

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[70]The World Bank, 'Kenya Country economic Memorandum: From Economic Growth to Jobs and shared prosperity' (2016)

[71] World Bank (2013), *Kenya Economic Update: Time to shift Gears – Accelerating Growth and Poverty Reduction in the New Kenya,*
World Bank: Washington, DC.

[72] Ibid

[73] Afrobarometer (2015), *Summary of Results, Afrobarometer Round 6 Survey in Kenya, 2014*

[74] World bank Group, Kenyan economic group,(2016)3rd Edn

[75] Kenya National Bureau of Statistics: Economic Survey (2017)

[76] Ibid

[77] http://ncia.or.ke/domestic-arbitration-fees/ (accessed 5/12/2017

to the cost of legal counsel services.[78] The costs involved for an unemployed person would definitely discourage a litigant from pursuing a claim. Cumulatively, the cost of arbitration may surpass litigation especially considering fees charged for the forum, the arbitrator's time and other related fees.[79] The arbitral tribunal under section 34(5) of the Arbitration Act determines their own fees. Dr. Kariuki Muigua questions arbitration fees especially when an individual without financial muscle is pitted against a corporation comfortable with its share of the standard arbitral fees.[80] Muigua argues that there is a risk a party may fail to access justice because of finance leading to a constitutional violation of the right to access of justice under Article 48.[81] Section 32(B) (3) of the Arbitration Act encourages an arbitral tribunal to withhold the award until payment of the arbitration fees in full by the parties. The exorbitant costs of the arbitrators pitted against a party exposed to pauper brief in Court is therefore notable.

1.11 Research Methodology

This study is primarily a library desk top review research. This study will rely on both the primary and secondary sources of data. Primary data provides the first hand information on the topic under study. It shall involve analysis of the national constitution, international and national legislations specifically the legislations and instruments related to labour laws. Secondary data involves accessing information that is already gathered. The secondary data collection technique will entail going through the relevant books, law reports, articles, case laws, journals, conference papers and information from the Internet on interpretation of application of arbitration laws on employment contracts.

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[78] Ibid

[79] Section 32B,Arbitration Act,1995

[80] K Muigua "Emerging Jurisprudence in the laws of Arbitration in Kenya" < https://www.kmco.co.ke/.../Emerging%20Jurisprudence%20in%20the%20Law%20of%20Ar... > accessed 5th November, 2017.

[81] *Ibid*

Publications by relevant labour organizations amongst others shall also provide the researcher with secondary data.

The researcher relies on this methodology because the research is mostly based on analysis and review of case law, judicial opinions and legislations on the application of arbitration in contracts of employment. The reliance on both secondary and primary data sources is influenced by the analytical nature of the research, the availability of the information and scarcity of time.

1.12 Limitations of the Study

This research is majorly a qualitative study which relies mostly on secondary data and desk top research. This has the tendency to provide information that is not up to date with the fast changing world in the labour industry. Secondly, scarcity of time has hampered a wider comparative study involving many jurisdictions. This study has only considered the Kenyan case and the consideration of the United States of America is simply for comparison since they have similar laws to Kenya in terms of stay of proceedings pending arbitration.

1.13 Chapter Breakdown

This research project consists of five chapters as follows:

Chapter one: Introduction: A General Overview and Outline

This chapter shall introduce the topic under study. It will set out the background to the study, the statement of the problem, research hypothesis, theoretical and conceptual frameworks, literature review, scope and limitation of the study, objectives, justification of the study and research questions. It shall be the road map for the study.

Chapter Two: Reflections in Kenya

This chapter will analyze in detail the constitution, legislations and legal instruments, both local and domestic and how the Courts have interpreted them over time. It will discuss the theoretical underpinnings of the subject under study. The chapter discusses the impact of the enactments on arbitration. It also looks at the impact of Court decisions on employee rights. This chapter provides the conceptual understanding of the topic under study.

Chapter Three: Comparative Study

This chapter will offer a comparative study. It will discuss how the United States of America has dealt with the issue of arbitration in employment contracts. This section also tackles lessons that Kenya can assimilate from the United States of America.

Chapter four: Findings

Chapter four will briefly appraise the discourse enhanced in chapter one to chapter three on whether the objectives have been attained, whether the research questions have been answered and whether the hypotheses have been positively manifested.

Chapter 5: Conclusion and Recommendations

This chapter shall enumerate the results of the research and the conclusions of the researcher from the study. The chapter will summarize the whole research. It shall also provide key recommendations and proposing the way forward.

CHAPTER TWO

2.0 REFLECTIONS ON KENYA

2.1 Introduction

In this chapter, the researcher analyzes in detail the Constitution, legislations and legal instruments related to arbitration and the conflicts therein and also unemployment data in Kenya. The researcher analyses both domestic and international instruments and how the Courts have interpreted them in relation to employment arbitration over time. Further, it discusses the theoretical underpinnings of the subject under study and the effects of the legislations on arbitration in employment matters. The chapter further discusses the concept of arbitrability of disputes arising out of contracts of employment and also provides the conceptual understanding of the topic under study.

2.2 Evolution of Arbitration Laws in Kenya

In Kenya Arbitration is governed by the Arbitration Act 1995 (hereinafter "the Arbitration Act") and the Civil Procedure Act and the related rules. The Arbitration Act was assented to on the 10th August, 1995 and commenced operation on the 2nd January, 1996. The laws of arbitration in Kenya started with the Arbitration Act, 1968 followed by the Arbitration Act of 1995.[82] The Arbitration Act is based on the United Nations Commission on International Trade Law (UNICITRAL) Model Law on International Commercial Arbitration.[83] UNCITRAL Model Law was adopted on 21st June 1985. The UNCITRAL required the signatory states to amend their Arbitration Acts to conform to it.[84] Article 5 of the UNCITRAL minimizes the intervention of Courts in arbitration matters. By enacting the Arbitration Act of 1995, Kenya was also heeding to the 1958 New York

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[82] K Muigua, 'The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya vis-a-viz Arbitration Act 1996 of United Kingdom' A lecture delivered at the Chartered Institute of Arbitrators Kenya Branch Entry Course held at College of Insurance on 25-26th August, 2008 (Revised on 2nd March, 2010), 1

[83] Ibid

[84] Ibid

Convention on the Recognition and Enforcement of Arbitral Awards (NYC) and to International Convention on the Settlement of Investment Disputes (ICSID).[85]

Article 159 of the Constitution of Kenya 2010 ("the Constitution"), equally prescribes that Courts, in exercising judicial prerogative should be shepherded by alternative forms of dispute resolution, which embraces arbitration. The Constitution, at Article 2(5) and 2 (6) also provides that general rules of international laws, treaties and conventions sanctioned by Kenya also forms part of the Constitution. Arbitration in Kenya is therefore governed by the Constitution of Kenya, 2010, treaties and conventions, Arbitration Act[86] and the Civil Procedure Act and the related rules. Section 10 of the Arbitration Act which limits Court's intervention in arbitration matters was therefore aimed at bringing the Arbitration Act in conformity with Article 5 of the UNCITRAL Model Law. In 2009, several amendments of the Arbitration Act were made to enhance conformity with the Model laws.[87]

Section 6 of the Arbitration Act[88] provides that where a matter brought to the attention of the Court is subject to an arbitration agreement, a party may apply to the Court to stay the matter and refer the parties to Arbitration. According to the section, as long as a party makes his application for stay at the right time, the matter shall be referred to arbitration.[89] Section 10 of the Act also provides that no Court shall intervene in matters governed by the Act except as provided for in the Act.

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[85]K Muigua, 'Nurturing International Commercial Arbitration in Kenya', page 6, available at <http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf >Accessed 05/02/2017

[86] Act No.4 of 1995

[87]P Ngotho, 'The Bastard Provision in Kenya's Arbitration Act' (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 148-162, 148

[88] Section 6(1) of the Arbitration Act 1995

[89]Africa Spirits Limited v Prevab Enterprises Limited HCCC No. 1756 of 2007 (unreported).

However, section 35(2) (ii) of the Act provides that a person making an application for setting aside of the arbitral award should furnish proof that the arbitration agreement is not valid under the laws that the parties have subjected it. Section 35(2) (iv) also stipulates that an application for setting aside may be made by proof that:

> "the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration... (emphasis mine), provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or..."[90]

Sections 35(2)(b(1) and (2) also provides that the award may be set aside if the Court feels that the dispute is not that capable of solution by arbitration or that the award is against public policy. The above provisions would lead one to ask if the exceptions above contemplated situations like those that arise in arbitration agreements found in the contracts of employment.

2.3 Application of Arbitration to Employment Laws

Article 162(2) of the Constitution prescribes that the legislature shall establish Courts at the level of the High Court to preside over grievances arising out of an employer employee relationship. The legislature is mandated to determine the functions and jurisdiction of the said Courts.[91]

Parliament enacted the Employment Act[92], The Labour Institutions Act[93], the Labour Relations Act[94], and the Employment and Labour Relations Court Act[95]. The Employment and Labour Relations Court Act was enacted after the Constitution and is therefore the product of Article 162(2) and (4), of the Constitution. Clause 7 (1) of the Sixth Schedule of the Constitution states that:

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[90] Section 35(2) of the Arbitration Act of 1996
[91] Article 162(4)
[92] Act No. 11 of 2007.
[93] Act No. 12 of 2007
[94] Act No. 14 of 2007.
[95] CAP 234B

> "All law in force immediately before the effective date continues in force and shall be construed with all the necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."[96]

This clause provides a smooth transition for the labour related laws that were enacted before the Constitution to bring them into conformity with it. This includes Employment Act, the Labour Relations Act and the Labour Institutions Act. Article 159 of the Constitution decrees the Courts to be steered by alternative forms of dispute resolution mechanisms in employing judicial authority but subject to Article 159(3). Article 159(3) provides for the protection of bills of rights. This position was upheld in *Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd*[97] where Justice Gikonyo held that:-

> "Needless to state that arbitration falls in the alternative forms of dispute resolutions which under Article 159(2) (c) of the Constitution should be promoted by Courts except in so far as they are not inconsistent with any written law."[98]

Section 75 of the Labour Relations Act[99] expressly provides that the Arbitration Act shall not apply to any proceedings in the Industrial Court. Specifically, the ELRCA was enacted as *"An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes"*.[100] Section 4 of the ELRCA provides that the Court is established pursuant to Article 162(2) of the Constitution. Section 12(1) of ELRCA provides for the jurisdiction of the Employment and Labour Relations Court. The section provides that;

> "The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including... disputes relating to and arising out of employment between employer and employee."[101]

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[96] Clause 7(1) of the sixth schedule of the Constitution.

[97] Civil Case 204 of 2013

[98] Ibid

[99] No. 14 of 2007

[100] Preamble to the ELRCA

[101] Section 12 of the ELRCA

The ELRCA clothes the Court with authority that exceed the powers of an arbitral tribunal. The Industrial Court under section 12(3) can entertain matters related to breach of fundamental rights and constitutional petitions and award compensation and damages as appropriate, issue prohibitory and declaratory orders and give orders for reinstatement, specific performance, interim preservatory and injunctive orders including injunctions in cases of urgency and any other relief as the Court may deem appropriate [102] Section 15(1) of the ELRCA also excludes arbitration when referring to ADR mechanisms applicable in employment matters.

A conflict between the laws is very outstanding. The Arbitration Act came into force earlier than all the employment laws. The ELRCA is a 2011 legislation, while the Labour Relations Act and the Employment Act are 2007 legislations. The position in statutory interpretation is that in case of a conflict, the latest in time impliedly repeals the older in terms of the inconsistency. This position was held in *Crywan Enterprises Limited v Attorney General & Another*[103], where the Court held that:

> "The petitioner's claim is based on the apparent inconsistency between the two Acts in so far as they relate to packaging. In my view, there is no conflict as it is now settled that where there are two provisions in Acts of Parliament that are in conflict, the later Act repeals the former I agree with the dictum *of* Avory J in Vauxhall Estates Limited v Liverpool Corporation (supra) that, "...if they are inconsistent to that extent, then the earlier act is impliedly repealed by the later."[104]

Hayanga J also followed the same trajectory in *Nzioka & 2 others v Tiomin Kenya Ltd,*[105] where the Court held that:

> "...The EMC Act being a more recent Act must be construed as repealing the old Act where there is inconsistency...where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal (See also Karanja Matheri v Kanji [1976-80]1 KLR 140)."[106]

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[102] Section 12(3)
[103]Petition No. 196 of 2011
[104] Ibid
[105]Civil Case No. 97 Of 2001
[106] Ibid

If interpretations of the conflicts between the LRA and the ELRCA against the Arbitration Act were to be held as per the cited cases, then the employment laws take precedence. Employment laws are also specific to the relationship arising out of employment while the Arbitration Act is a general law. The rule of harmonious construction provides that if the conflicting laws cannot be harmoniously interpreted, the specific law prevails as per the maxim *generalia specialibus non derogant.*[107] Provisions of the ELRCA and the LRA therefore prevails over the provisions of the Arbitration Act.

2.4 Application of Arbitral Jurisdiction in Contracts of Employment Disputes

Continuous conflicts have been on the rise as to whether the Courts or arbitral tribunals have jurisdiction to hear and determine disputes arising out of contracts of employment where there is an arbitration clause. Section 6 and 10 of the Arbitration Act read together provides that where there is an arbitration agreement as long as one party moves the Court in good time, the matter shall be referred to arbitration. In *Nyutu Agrovet Limited vs. Airtel Networks Limited*[108] the Court of Appeal found that parties in a commercial contract make private decisions to engage in arbitration out of the parties' own choice. The Court held that despite the Court system, parties decided in a consensual manner to determine their dispute in a private way through arbitrators. The Court concluded that where parties are engaged in an arbitration agreement, they are bound by it since they decided in advance to avoid Court's way, except only in limited circumstances. However, Section 12 of the ELRCA prescribes that pursuant to Article 162(2) of the Constitution, the Industrial Court shall have exclusive appellate and original jurisdiction to decide disputes arising out of an employment relationship. It provides thus:

> "The Court shall have **exclusive original and appellate jurisdiction** (emphasis mine) to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to

[107] Commercial Tax Officer, Rajasthan *V.* M/S Binani Cement Ltd. & Anr. (Civil Appeal No. 336 Of 2003) [2014] 3 S.C.R. 1
[108] Civil Appeal (Application) No.61 Of 2012

employment and labour relations including.... disputes relating to or arising out of employment between an employer and an employee. " [109]

In this respect, in *Dr. Kennedy Amuhaya Manyonyi v African Medical and Research Foundation*[110] the respondent filed an application seeking orders that the disagreement be remitted to arbitration according to the terms of the agreement signed between the parties in the contract of employment. The Court in this case noted that section 15 of the ELRCA specifically and deliberately avoids to mention arbitration as one of the alternative dispute resolution mechanisms. Section 15 also provides that if alternative method is used, it must be advised by consent of both the parties. The Court held that both the Employment Act and the ELRCA do not recognize arbitration as an alternative means of dispute resolution in contract of employments disputes. The Court also held that contracts of employment must be treated different from commercial contracts. The Court further opined that arbitration agreements are imposed on employees by employers and therefore nonconsensual since employees are vulnerable parties.

When faced with a similar situation in *Joao Soares v Tuegest Guerma & Another*[111] Justice Maureen Onyango reiterates her position in *Dr. Kennedy Amuhaya Manyonyi v African Medical and Research Foundation*[112] that contracts of employment are not commercial contracts to which Arbitration Act were intended for. She maintains that the Labour Relations Act and the Employments Act intentionally exclude reference to arbitration.

Dr. Kariuki Muigua[113] also adds his sentiments against arbitration in some quarters. He argues that arbitration practice has emerged as cumbersome and more formal due to lawyer's entry into arbitration. He further argues that recourse to Courts after arbitration may negatively affect a party's right to access justice. Muigua adds that lack of

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[109] Ibid
[110] Cause No. 53 of 2014
[111] Cause No. 689 of 2012
[112] Cause No. 53 of 2014
[113] K Muigua, 'Constitutional supremacy over arbitration in Kenya, p.11. available at < http://www.kmco.co.ke/index.php/publications/120-constitutional-supremacy-over-arbitration-in-kenya> accessed on 20/03/2017

accountability and supervision of arbitrators hurts the rights of parties. He concludes that all these lessen protection of vulnerable parties. From all the foregoing, it is therefore safe to conclude that employees are vulnerable parties in a contract of employment.

In *Jane Muthoni Mukuna v Fsi Capital Limited*[114] Justice Maureen Onyango held that against common thinking, reference of employment disputes to arbitration is very costly and takes more time than Courts. It was also the Courts position that ELRCA omits arbitration in employment cases. The application for referral to arbitration was consequently dismissed.[115]Kariuki Muigua[116] adds his voice to these sentiments. Muigua argues that arbitration is gradually becoming very expensive especially when parties engage in arbitration for long with the conflict still ending up in the judiciary for determination.

In *Stephen Nyamweya & Another V Riley Services Limited*[117] the respondent raised as preliminary objection to have the dispute referred to arbitration based on an arbitration clause in the contract of employment. Justice Ndolo opined that section 10 of the Employment Act provided for mandatory inclusions in a contract of employment in which dispute resolution was not one. The Court also opined that employment contracts were distinct from commercial contracts and therefore no comparison can be made. Justice Ndolo also held that contracts of employment are standard and employees are not allowed the opportunity to negotiate and therefore the employer owes the employee a duty to ensure that every clause is capable of implementation.[118] The application for referral to arbitration was therefore dismissed since employee did not voluntarily consent.

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[114]Cause No. 688'A' OF 2014

[115] Ibid para 6

[116]K Muigua, "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th - 6th May, 2011.

[117] Cause 2469 of 2012

[118]Ibid

Justice Radido in *William Nyangaya Mabera v Khetia Drapers Limited*[119] while rejecting arbitration by the chairman of the Chartered Institute of Arbitrators noted that arbitration is an expensive process for the claimants.

However, Justice Marete in *James Heather – Hayes v African Medical and Research Foundation (AMREF)*[120] differs with the sentiments above. The Court categorically states that Employment Act does not bar arbitration in contracts of employment. Justice Marette specifically disagrees with the decision in *Stephen Nyamweya & Another V Riley Services Limited*[121] by holding that:

> "I respectfully choose to differ with the findings and sentiments of the learned judge in her analysis of the application of arbitration in employment contracts. I do not suppose, or see the possibility of there having been to contrasting and contradictory statutes on the subject of arbitration. The Arbitration Act is the critical legal authority on issues relating to arbitration. It indeed gets out of its way to define, set and provide for situations where arbitration can be had. The Employment Act and other statutes on employment law in Kenya coming to supplement this by providing various avenues where parties to employment contracts can resort to in the event of dispute resolution. The Act and other laws do not debur arbitration in employment contracts."[122]

The Court proceeded in its complete about turn to opine that Courts were not allowed to deviate from the parties' agreements and also held that there were no distinctions between contracts of employment and commercial contracts in so far as arbitration is concerned. The Court also held thus:

> "It would be unnatural to oust arbitration, an internationally recognized practice of Alternative Dispute Resolution or any pretensions where this was clearly the intention of the parties like in the present case. If like is argued in the Rileys Services Limited case, there is an intention to forbid arbitration on the instance of statutory provisions, the easier option would have been for

[119] Cause No. 189 Of 2015
[120] Cause No. 626 Of 2013
[121] Cause 2469 of 2012
[122] Ibid para 6

> parliament to expressly and explicitly set it down in writing to obviate confusing situations in practice."[123]

From the above position, Justice Marete also argued that the Labour Relations Act does not in any way oust arbitration in contracts of employment disputes and opines that if it did, parliament would have expressly said so. However, section 75 of the Labour Relations Act offers the answer as it holds that:

> "The Arbitration Act (No. 4 of 1995) shall not apply to any proceedings before the Industrial Court."[124]

The Court proceeded to allow the application and referred the dispute to arbitration on the grounds that parties were bound by their agreements. From Justice Merete's decision, three major dynamics of arbitration agreements stand out: party's autonomy, freedom to contract and the application of Section 6 of the Arbitration Act, regardless of a party's bargaining strength.

Further, in *Paul Chemunda Nalyanya v I. Messina Kenya Limited*[125] the Court, on its own motion referred the parties to arbitration despite none of the parties having made an application for the referral to arbitration. Justice Riika held that the dispute was improperly before the Court. In striking out of the case, the learned justice further held that parties could not subject a Court to handle their disputes by ignoring a valid arbitration clause in the contract of employment. The Court concluded that the dispute was clearly a subject of arbitration. Keen observers will note that the Court in this case clearly ignored even the provisions of section 6 of the Arbitration Act in dismissing the case. Section 6 could only be invoked upon a party making an application for referral at the right time.

In *William Lonana Shena V Hje Medical Research International Inc*[126] the respondent filed an application for stay of proceedings and referral to arbitration under section 6(1) of the Arbitration Act based on an arbitration clause in the contract of employment. The Court

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[123] Cause 2469 of 2012
[124] Section 75 of the LRA
[125] Cause Number 259 of 2014
[126] Cause 1096 of 2010

did not hesitate to hold that there was a valid arbitration clause in which the parties were bound by their consensual execution of the contract. No analysis by the Court confirmed voluntary consent. When faced with a similar matter, Justice Abuodha in *Francis Nuttal v Gor Mahia Football Club*[127] where an arbitration contract had provided for arbitration by Kenya Premier League Limited held that in cases of voluntary arbitration contract, a party is bound by the contract. However, the Court in *Nuttal* did not investigate whether the arbitration contract was voluntary and also ignored its exclusive jurisdiction. The Court held that it can only interfere where the contract is contrary to public policy, immoral or illegal.

The Court in *Kenya Chemical & Allied Workers Union v East African Portland Cement & Co. Ltd*[128] posted a unique approach, where the parties in the dispute agreed to seek arbitration. The uniqueness of this case was caused by the fact that the Claimant was a union acting on behalf of its members. The union had the capacity to seek arbitration but lacked failed to trust an arbitration process to issue the demands and relief sought. The Court denied itself jurisdiction before the parties sought arbitration citing article 159 (2) of the Constitution of Kenya 2010.

Justice Riika in *Jeremia Mutia Kiao v Raints Kenya Ltd & another*[129] is called to make a determination in a contract of employment where the choice of discretion in dispute resolution mechanism to be applied between arbitration and Court was placed in the hands of the employer.[130] The Court held that it cannot disregard jurisdictional choice as per the discretion of the employer. The Employers choice of arbitration was upheld by the Court to the detriment of the claimant. In *Carol Adhiambo Olela v Asterisk Limited* [131]the claimant after demanding compensation from the employer, received several replies to demand from the employer asking her to assist in the selection of an arbitrator. The

[127] Cause NO. 807 OF 2016
[128] Cause 1114 of 2012
[129] Cause Number 103 Of 2017
[130] Ibid
[131] Cause Number 1049 Of 2011

employee declined and sued the employer in Court. According to the employer and the Court, the claimant was deliberately and strongly avoiding and uncomfortable with arbitration process. The Court held that the claimant was using Court to stall an arbitration process as she also rejected all the arbitrators appointed by the employer. This case is a demonstration that the claimant was always against arbitration from the beginning, despite several attempts by the employer to appoint an arbitrator.

An issue that even raises more conflicts in law between arbitral jurisdiction and the Courts jurisdiction in employment issues is the issue of human rights. Courts in Kenya have held that labour rights are human rights. Justice Majanja in *United States International University (USIU) v Attorney General & 2 others*[132] held that:

> "Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 **of** the Industrial Court Act 2011 or to interpret the Constitution, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law."[133]

The position taken by Justice Majanja was upheld by a three judge bench in the Court of Appeal in *Judicial Service Commission V Gladys Boss Shollei & Another*[134] where an application was made to the Court to challenge a reference to the ELRC in matters involving breaches of fundamental rights under a contract of employment. The Court of Appeal held that the ELRC had exclusive jurisdiction to hear and determine violations of fundamental rights arising from the contract of employment. Justice Okwengu opined thus:

> "In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship

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[132] Petition 170 of 2012
[133] Ibid
[134] Civil Appeal NO. 50 OF 2014

would defeat the intention and spirit of the Constitution in establishing special courts to deal with employment and labour disputes. Indeed such a stance would not only be inimical to justice, but would expressly contravene Article 20 of the Constitution that provides that the Bill of Rights "applies to all law and binds all state organs and persons", and enjoins a court to promote the spirit, purport and objects of the Bill of rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom."[135]

Justice Kariuki in *Judicial Service Commission V Gladys Boss Shollei & Another*[136] also agrees with the holding of Justice Majanja and further opines that the right to determine fundamental rights breaches in the employment relationship is constitutionally under the Industrial Court thus:

> "Clearly, that is sound reasoning and the argument that the Industrial Court cannot determine issues of violations of constitutional rights interwoven with employment and labour relations does not hold good as it would be antithetical to the letter and spirit of the Constitution. The Industrial Court had jurisdiction to determine the 1st Respondent's petition alleging wrongful termination of her employment and whether the 1st Respondent's fundamental rights and freedoms were breached in the process of the termination of the latter's employment. The Court held that the 1st Respondent's constitutional rights were violated in relation to Articles 25(c); 47(1) & (2); 50(1); 50(2) (a), (b) & (c); 236(b)' 35(1)(b) and 28. The 1st respondent pleaded the violations in the petition and relied on affidavit evidence as proof of the alleged violations. "[137]

The same position was also held by the Court of Appeal in the case of *Prof. Daniel N. Mugendi –Vs- Kenyatta University & Others*[138] where another three judge bench consisting of Justices Mwera, Kiage and Nambuye while agreeing with Justice Majanja's position in *United States International University (USIU) v Attorney General & 2 others*[139] that employment rights are human rights, held that where allegations of breaches of constitutional rights are related to the contract of employment, the Industrial Court shall have the jurisdiction to hear and determine the violations of rights.

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[135] Ibid
[136] Civil Appeal No.50 of 2014
[137] Ibid
[138] Civil Appeal No. 6 Of 2012
[139] Petition 170 of 2012

2.5 The Concept of Arbitrability

The concept of arbitrability determines whether a dispute is one capable of determination by arbitration. Arbitrability is defined as a determination *"whether specific classes of disputes are barred from arbitration because of national legislation or judicial authority."*[140] In Kenya, Courts have held that the public policy would be the determinant of arbitrability of a dispute. The New York Convention of 1958[141] and the UNCITRAL model laws[142] of 1985 left the determination of arbitrable disputes to individual states. The New York Convention stipulates that an award deriving from an arbitration may be denied recognition and enforcement if the "subject matter of the difference is not capable of settlement by arbitration under the laws of that country".[143] The concept of arbitrability has the potential to deny an arbitrator jurisdiction even where there is an arbitration agreement and even render an arbitration agreement null and void.[144]

In making determinations of what is arbitrable, states have relied on public policy which is also determined by several other considerations such as political, economic cultural and social demands.[145] Public policy has been defined as what is considered moral and just in a given society, breach of which would be offensive to the public good or injurious to the informed and reasonable members of the public on whose behalf the state exercises power and authority.[146] States exerting their authority to exclude certain matters from arbitration may consider public policy, the need for judicial intervention and public interest.[147] Jurisdiction of the arbitrator is therefore ousted from the dispute on the basis

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[140] L Shore, 'defining arbitrability'(2014) ,New York Law Journal available on http://www.nylj.com>accessed on 20/03/2017

[141] Article II(1)

[142] Articles 34(2)(b) and 36(1)(b)(i)

[143] Article V(2)(a)

[144] J Mante, 'Arbitrability and public policy: an African perspective' Presented at the Society of legal scholars conference 2015, 1 - 4 September, York, UK. Held on OpenAIR <Available from: openair.rgu.ac.uk.> accessed on 20/03/2017.

[145] B Nigel, C Partasides, A Redfern, and M Hunter, Redfern and Hunter on international arbitration (5th edn, OUP 2009) para 2.114.

[146] *Parsons & Whittemore Overseas Co., Inc. -v- Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir., 1974) per Judge Smith

[147] Gary B Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012)82

of the subject matter. Before a dispute is referred to arbitration, the Courts should therefore consider the existence of an arbitration agreement, arbitrability of the subject matter, capacity of the parties and the scope of the arbitration agreement.[148] This therefore means that what is arbitrable in one jurisdiction may not be arbitrable in another jurisdiction.

Howard M. Holtzmann and Joseph E. Neuhaus also recognize the gap left by the UNCITRAL Model laws to be filled by states as an act of sovereignty.[149] They opine that:

> "...This would also help to make clear that there are special aspects of arbitration which are not regulated in the model law. Such aspects include, inter alia, definitions of arbitrability, the capacity of parties to conclude an arbitration agreement, concepts of sovereign immunity, consolidation of arbitration proceedings..."[150]

The determination of arbitrability may be decided either by the arbitral tribunal or the Courts.[151] This may however lead to a clash between the state Courts and the arbitral tribunals. In Kenya, Section 17(2) of the Arbitration Act provides that the arbitral tribunal may rule on its own jurisdiction which must be raised not later than at the time of submission of the defence by the parties. Traditionally, powers of the tribunal to decide its own jurisdiction emanates from the *Kompetenz- kompetenz* principle.[152] The power of an arbitrator to rule on its own jurisdiction was reiterated in the case of *Justus Nyang'aya v Ivory Consult Limited*[153] where the Court held that an arbitral tribunal could decide on its own jurisdiction.

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[148] J Mante , 'Arbitrability and public policy: an African perspective,' Presented at the Society of legal scholars conference 2015, 1 - 4 September, York, UK. Held on OpenAIR <Available from: openair.rgu.ac.uk.> accessed on 20/03/2017.

[149] HM Holtzmann, JE Neuhaus and United Nations Commission on International Trade Law, *'A guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative history and commentary'* (Kluwer Law and Taxation Publishers1989)

[150] Ibid

[151] Article V of the New York Convention

[152] See the UNCITRAL Model Law, Article 16

[153] Miscellaneous Civil Application No.504 Of 2013

In the case of *Nedermar Technology Bv Ltd V Kenya Anti-Corruption Commission & Another*[154] the Court had an occasion to deal with the issue of arbitrability. Justice Nyamu held that issues of arbitrability depends on the public policy of a specific state and therefore issues of arbitrability are under the domain of national laws to be set through legislation. He argues that the legislature must balance the need to reserve matters of public interest to the Courts against just settling disputes. He further opines that exclusion of public law by agreement is a critical question for Courts to determine in dealing with arbitral jurisdiction.

Some African states have found a unique way of dealing with arbitrability in their Courts. The Arbitration and Conciliation Act, 1988[155] of Nigeria whose goal is to ""provide a unified legal framework for fair and efficient settlement of commercial disputes (emphasis mine) by arbitration and conciliation....."[156]. The Act at section 57 then defines what kinds of disputes are commercial in nature. This is in consonance with the UNCITRAL Model Law that is specific on the use of the word "commercial"[157]

Many countries in Africa enacted arbitration laws under the influence of the UNCITRAL Model Laws and failed to properly domesticate the laws.[158] This lead to enactment of laws that were aimed at dealing with commercial contracts. This is by reason that international arbitration is mostly commercial in nature. Mauritius enacted the International Arbitration Act[159] which specifically deals with commercial matters. Its position in arbitrability is therefore very specific and liberal.[160] Its limit on arbitral disputes is therefore minimal.[161]

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[154] Petition 390 of 2006
[155] CAP 19
[156] ibid
[157] AA Asouzu, '*International commercial arbitration and African states: practice, participation, and institutional development*' (Cambridge University Press 2001)140-176.
[158] J Mante. 'Arbitrability and public policy: an African perspective". Presented at the Society of legal scholars conference 2015, 1 - 4 September, York, UK. Held on OpenAIR <Available from: openair.rgu.ac.uk.>accessed on 20/03/2017.
[159] Act No.37 of 2008
[160] *Supra* N 51.
[161] ibid

Kenyas Arbitration Act provides that the High Court may set aside an arbitral award by the arbitral tribunal if it is against public policy in Kenya.[162] The award may also be set aside if its scope is beyond reference to arbitration.[163] Ghana has expressly provided for non arbitrable matters like matters of public interest. Under section 1 of the Ghanaian Alternative Dispute Resolution Act[164]. The matters excepted from arbitrability include matters of environment, public interest and enforcement and interpretation of the Constitution. Liberia's Commercial Code contains similar provisions and excludes matters relating to public interest, environmental matters and the Constitution from arbitration.[165] In Morocco, matters of personal rights are not arbitrable since they are not matters of commercial rights (emphasis mine).[166] This includes matters involving the breach of human rights. Under the laws of Mozambique, matters related to nonnegotiable and non-inalienable rights are non-arbitrable.[167] Other states in Africa with arbitration laws where matters of public policy and interest and constitutional matters are non arbitrable include Zambia[168], Tunisia[169] and Zimbabwe.[170]

In arguing against recognition of foreign award, Justice Ringera in *Christ for all Nations v Apollo Insurance Co Ltd*[171] defined public policy as anything that is "inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality ... "[172]The learned justice held *interalia* that:

> "Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was

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[162] Section 35(2)(b)(ii)
[163] Section 35(2)(a)(iv)
[164] Act 798 of 2010
[165] Ch. 7 (2010),Article 7.2 (3)
[166] Law No.05/08 Relating to Arbitration and Mediation Agreements, Article 309
[167] Law No 11/99 of Mozambique, Article 5(2)(a)&(b)
[168] Zambia's Arbitration Act [No.19 of 2000], s.6 (2) (a)
[169] Tunisian Arbitration Code (Law No. 93-42 of 26 April 1993),Article 7(1)
[170] Zimbabwe's Arbitration Act, 1996, s.4(2)(a)
[171] (2002) 2 E.A 366
[172] Ibid

either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."[173]

This research however recognizes from the vast authorities cited that definitions of public interest policy is so wide and indeterminate and also ambiguous such that a party may not be sure with accuracy, what constitutes public interest.

2.7 Conclusion

The laws related to employment relationships are more geared towards the position that the ELRC have the exclusive jurisdiction to hear and determine disputes related to and arising out of a contracts of employment. The Courts have also noted that employments contracts cannot be treated the same as commercial contracts to which the Arbitration Act was meant for. Section 75 of the Labour Relations Act expressly provides that the Arbitration Act is not applicable in the Industrial Court matters.

From the authorities cited, it is clear that there are contradictory positions in relation to Court's determination of the effect and application of arbitration clause in contracts of employment. Some Courts uphold the application of arbitration clause in disputes emanating from contracts of employment by staying proceedings and referring the matters to arbitration. Some Courts hold that arbitration is not meant for and also not applicable in disputes emanating from the contract of employment. Lack of uniformity in Courts sets a dangerous position for the jurisprudence.

The conflicts between employment laws and the Arbitration Act are glaring. The researcher argues that the provisions of the employment acts should be upheld not on only because they are the latest statutes, but also because they are the specific statutes in relation to employment issues. From the wealth of authorities generated, it is glaring that other Courts have looked at employees as disadvantaged persons as compared to employers. Employees are given job offer on standard forms in a take it or leave it basis.

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[173] Ibid

The conflict theory is therefore demonstrated as expounded in chapter one. The human rights theory complements the conflict theory to save the employees, through the state powers, from the jaws of the employers. The Courts therefore agreed and held that labour laws rights are part of the bill of rights. The Court of Appeal have also held that matters related to breach of fundamental rights in an employment situation are the exclusive jurisdiction of the Industrial Courts. The researcher also argues that it is only Courts which can hear and determine matters involving violations and infringements of the bill of rights including labour rights and as per Article 41.This goes a long way in complementing the conflict theory in defence of the employees.

Arbitration in Kenya as in many African countries are shaped by the UNCITRAL Law model and the New York Convention which mainly targeted commercial arbitration. Much thought was therefore not applied to realize that there are unique domestic situations that warrant a unique approach to cases like disputes emanating from contracts of employment. This is why the researcher also argues that the Arbitration Act targeted commercial disputes and employment disputes cannot be likened to commercial disputes.

Courts in Kenya and other jurisdictions including Zambia, Mauritius, Zimbabwe, Ghana and Tunisia maintain the position that matters of public interest and policy are not arbitrable. Justice Majanja held, that breaches of employment rights amount to breaches of the bill of rights and therefore breaches of the Constitution. Justice Ringera also found that public interest involves breaches of the Constitution. The researcher therefore argues that labour rights are protected by the bill of rights and therefore not arbitrable on grounds of public policy and interest and also by express exemption.

CHAPTER THREE

3.0 COMPARATIVE ANALYSIS

3.1 Introduction

Chapter two of this research has dealt with the jurisprudential issues in arbitration including analysis of the constitutional provisions, international legal instruments and case laws related the issue of arbitration in employment cases. Having considered the legal and case law provisions, this chapter offers a comparative analysis with other jurisdictions-the United States of America (USA). USA is used for comparison with Kenya due to the almost similarity in the Arbitration Act of Kenya and the Fair administrative Act of the USA and the similar provisions in terms of stay of proceedings.

This chapter will also identify some of the lessons that can be learned from a more commercially viable environment. This chapter will also reveal how the USA jurisprudence have ensured a balanced approach towards different disputes in arbitration.

3.2 The United States of America (USA) Case

The United States Arbitration Act also known as the Federal Arbitration Act[174] (hereinafter the "FAA") was enacted by the congress in 1925. The Act enhances Federal Court's judicial approval of private contract disputes resolution both interstate and foreign through arbitration.[175] The Congress enacted this law to counter judicial hostility towards private arbitration[176] and also to "place arbitration agreements upon the same

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[174] 9 U.S.C.A. (1995).

[175] B M Primm, *'A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements'* (1999) 2 U. Pa. J. Lab. & Emp. L. 151, 153

[176] R Elizabeth, 'Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review' (2004) 12(3) American University Journal of Gender, Social Policy & the Law 519-544.

footing as other contracts".[177] In *Southland v Keating*[178], the Court held that the FAA applied to both the state Courts and the federal Courts.

The FAA is based on an arbitration agreement by the parties and is therefore a contract based law. The FAA was tailored at guaranteeing that arbitration agreements were regarded the same way as normal contracts, "save upon such grounds as exist at law or in equity for the revocation of any contract".[179] The Act expressly exempts some areas of employment law from arbitration.[180] For most of the FAA's history arbitration was not applicable in agreements between businesses and employees.[181] Prior cases involving arbitration only supported it in cases involving businesses rather than individuals.[182] According to Jean sternlight[183], when the congress enacted the statute, congress did not mean to encourage it to be used as a condition to employment. Professor Jean Sternlight opines thus:

> "Indeed, to the limited extent that the possibility of such arbitration was considered by Congress in 1925, when it passed the FAA, those few who spoke on the issue made clear that they did not view such a use of arbitration as appropriate. For example, when one Senator voiced a concern that arbitration contracts might be "offered on a take-it-or-leave-it basis to captive customers or employees," the Senator was reassured by the bill's supporters that they did not intend for the bill to cover such situations. "[184]

Under the FAA, arbitration agreement must be entered pre-dispute or post dispute. The FAA's position was authoritatively confirmed in *circuit city stores, Inc .V. Adams*[185] where the Supreme Court held that arbitration in employment is covered under the FAA. This confirmed that Courts could officially validate arbitration agreements in employment matters. In *Gilmer V. Interstate/Johnson Lane Corp*[186], the Court noted that FAA must ensure

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[177] Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 (1985)
[178] 465 U.S. 1 (1984)
[179] 9 U.S.C. Sec 2 (1994).
[180] Section I
[181] L Bernstein, '*Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*' (1992) 21 J. LEGAL STUD. 115, 148-51
[182] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985)
[183] JR Sternlight, '*Creeping Mandatory Arbitration: Is It Just?*' (2004) 57 Stan. L. Rev. 1631, 1636
[184] Ibid
[185] 532 U.S. 105,109(2001)
[186](90-18), 500 U.S. 20 (1991)

that in arbitration, a party is enabled to effectively vindicate his rights,[187] meaning that a party must be able to receive the same protection and remedies he would be entitled to under the Court. This decision took the number of employment arbitrations to the roof.

In Kenya, section 36(1) of the Arbitration Act provides for the enforcement of arbitration award upon application to the High Court. Challenge of the arbitration award in Kenya must be done within three months of the arbitration award.[188] Similarly, in the USA Once parties appear for arbitration and an arbitral award is given, the enforcement of the arbitral award is left to the Courts, just like any other judgement.[189] The FAA confirms that awards must be enforced through the Courts within one year and any challenge to the award must be raised within three months as is the case in Kenya.

FAA[190] allows a Court to disregard an arbitration award under the following conditions:

a. An award procured by fraud ,undue influence or corruption
b. Impartiality of the arbitrator
c. Misconduct by the arbitrators that prejudices a party's rights
d. Where arbitrators acted ultra vires

Just like the FAA, Section 35(2) of the Kenyan Arbitration Act allows a Court to set aside an award where its making was induced by corruption, fraud, undue influence and bribery. Award may also be set aside if the subject matter is not within the scope of arbitration or not contemplated by arbitration.

In Kenya, there are several statutes that enhances arbitration. These include the Constitution of Kenya, 2010, the Civil Procedure Act (CPA)[191] and the main statute being the Arbitration Act[192]. Article 159(2) (c) of the Constitution encourages Courts to promote

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[187] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).
[188] Section 35(3)
[189] Section I
[190] Section 10
[191] CAP 21 Laws of Kenya
[192] No. 4 of 1995

alternative dispute resolution mechanisms. Arbitration as a means of dispute resolution mechanism is also furthered by section 59 C of the CPA. FAA performs similar roles that the statutes in Kenya perform in relation to arbitration. However, in the USA, there are other bodies with statutory mandate to hear and determine employment disputes despite the existence of arbitration agreements.[193] In *EEOC v. Frank's Nursery & Crafts, Inc*[194] Arbitration agreement does not therefore give a party an automatic right to resort to arbitration as bodies such as the Equal Employment Opportunity Commission (EEOC) are not bound by arbitration agreement.[195]

3.2.1 Equal Employment Opportunity Commission

The United States laws provides for a body known as Equal Employment Opportunity Commission "EEOC" which allows victims of statutory rights abuses to file complaints against their employers. The EEOC was found in 1964. Originally, the EEOC would receive complaints from the public about unfair treatment and discrimination at work place, and investigate the claims and pursue them on behalf of the claimants in terms of mediation.[196]

Originally EEOC lacked powers to pursue litigation on behalf of those persons it found to have been subject to abuse. However the statute was amended in 1971 to give power to EEOC to bring litigation on behalf of claimants it found were discriminated at work place.[197] The EEOC then investigates the charges, and advises an employee to pursue the complaints in Court or pursues a settlement or suit on behalf of the employee.[198] In 1997, EEOC took a stand against predispute mandatory arbitration agreements and issued

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[193] *EEOC v. Doherty Enterprises, Inc Civil Action No. 9:14-cv-81184-KAM*
[194] 177 F.3d 448 (6th Cir. 1999).
[195] Ibid
[196] Equal Opportunity Act of 1972,pub.L.No192-201,section 4
[197] Ibid
[198] Ibid

policy guidelines on its stand.[199] The policy states that mandatory arbitration agreements are inconsistent with civil rights laws.[200] The policy provides that civil rights are protected by the Government and therefore any breach requires the Courts to interpret appropriately through judicial inquiry and scrutiny.[201] EEOC insisted on the development of the law through precedence by the Courts.[202]

EEOC emphasizes public Checks and balances as a constitutional process that can only be scrutinized through judicial opinions in order to develop the public law.[203] Mandatory employment arbitration privatizes public law negatively affecting the Government's capacity to enforce civil and fundamental rights of an individual.[204] EEOC cites a number of studies that prove that mandatory arbitration is inconsistent and discriminatory as employers control the process of arbitration as a "repeat player"[205] and summarizes that mandatory arbitration should not be enforced in employment cases especially against statutory rights.[206] Most importantly, EEOC provides and adjudicates for a post dispute arbitration agreement that is voluntary and emphasizes freedom of the employee to choose the forum to use.[207]

Despite the existence of the FAA, the existence of arbitration cases in employment disputes could not stop the EEOC from bringing a suit to defend discrimination claims. This held that gave rise to "double litigation" through a parallel process. The Supreme Court in *EEOC v Waffle House, Inc*[208] affirmed that an arbitration agreement between the parties in an employment dispute could not stop the EEOC from seeking injunctive relief

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[199] EEOC Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (1997).
[200] Ibid
[201] Section II-IV
[202] Ibid
[203] Section III. B.
[204] Section V
[205] This concept refers to advantages gained by employers as a result of constantly appearing before arbitrators, translating into more financial again enhancing preference of employers over employees.
[206] Section V(B)
[207] EEOC Notice No. 915.002 at section VI.
[208](99-1823) 534 U.S. 279 (2002)

and damages on behalf of the employee. The Court argued that EEOC comes in to vindicate public policy and interest in suits.[209]

The EEOC however recognizes the challenges faced by litigants in Courts in terms of the cost, time taken to resolve disputes, procedures and confidentiality whenever necessary.[210] Despite the challenges noted, EEOC still considers the judicial process as the best and fair most way of resolving employment disputes. Through EEOC therefore, its officers have been instructed to consider mandatory arbitration cases with caution and file claims despite any arbitration agreement.[211] The Court further opined that "while punitive damage benefit the individual employee, they also serve an obvious public function in deterring future violations".[212] It was therefore confirmed that enforcement of public rights could not be interfered with by private arbitration. Through the EEOC, the Courts have actually allowed parallel litigation and *Res Judicata* does not actually arise.[213]

The position of EEOC and the case of *Jones v. Halliburton, Co*[214] where an employee jones had been raped by a gang of coworkers and locked in isolation and guarded by the employer, led to an outcry and called for relooking of the mandatory arbitration clauses. The Employer had wanted to enforce the arbitration claim and the Court allowed jones to litigate instead. The Legislature got concerned and in the year 2008 the Arbitration Fairness Act[215] was introduced in Parliament with the intention to amend the FAA to exempt constitutional rights and employment disputes completely from pre dispute mandatory arbitration.[216] Many legal scholars have also supported the need to amend the

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[209] Ibid
[210] EEOC Notice No. 915.002 at section VI
[211] Section VII. 1.
[212] Supra, note 18
[213] EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 466 (6th Cir. 1998).
[214] 583 F.3d 228, 230-32 (5th Cir. 2009).
[215] Arbitration Fairness Act of 2013
[216] F P Phillips, 'ABA Resolution on "Arbitration Fairness Act' (2009) Business Conflict Blog, <http://businessconflictmanagement.com/blog/2009/08/abaresolution- on-fairness-in-arbitration-act/ citing ABA House of Delegates Recommendation 2009 AM 114>, Accessed 21/03/2017.

FAA in order to free public law, antitrust and employment disputes from arbitration.[217] This is to ensure only parties on equal footing pursue predispute mandatory arbitration. EEOC powers and interests are over and above the private rights of an individual.[218]

Scholars have also pushed a recommendation for a congress approved legislative body, with arbitral power and administrative power to conduct arbitration in employment disputes.[219] The body would be similar to EEOC but specifically for arbitration, with judicial powers and operates like an arbitral tribunal.[220] A similar model is adopted by Great Britain.[221]

3.2.2 Mandatory Arbitration Clauses

The relationship between an employee and employer is founded upon "one of the most complex and important relationships in modern society."[222] The employment contract is always asymmetrical and is not a bargain found in equality.[223] Employers are always in control of the terms of the relationship.[224] The rise of employment disputes in the USA led to increase in employment litigation.[225] Employers therefore had to devise a method to have the disputes resolved in a more comfortable, less costly and privately to suit their needs. The employers reacted to the litigation wave. This situation led to the emergence of mandatory employment arbitration. Mandatory arbitration is defined as "a prospective agreement between employer and employee to resolve future employment disputes by binding arbitration."[226]

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[217] R G Aronovsky, 'The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm, (2012) 42 Sw. L. Rev. 131

[218] Supra, note 40

[219] J R Sternlight, 'Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World' (2001) 56 University of Miami Law Review 831, 849-50.

[220] Ibid

[221] Ibid

[222] J Fineman, 'The Inevitable Demise of the Implied Employment Contract' (2008) 29 Berkeley Journal of Employment & Labour Law. L. 345, 351.

[223] Ibid

[224] Ibid

[225] Ibid

[226] R A Bales, *'Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements'* (1995) 47 BAYLOR LAW REVIEW. 591, 594 (1995).

The phenomenon of mandatory arbitration is a very controversial issue in USA. Since the 1980's, companies have forced 'little guys'[227] to sign contracts of adhesion in the name of arbitration.[228] The debate surrounding mandatory arbitration clause has taken shape with employers and employees on opposite sides. From an employer's point of view, arbitration is a safe and confidential way of avoiding litigation. Employers can therefore customize arbitration to their preference.[229] Scholars however argue over the concept of repeat players where arbitrators may tend to favor employers who are always before them, over a one time employee.[230] Employees on the other side feel arbitration lacks public scrutiny, and offers limited remedies.

Legal scholars have argued that offers on employment with mandatory arbitration clauses come in a "take it or leave it" condition are contracts of adhesion and unconscionable.[231] Further arguments hold that employees are not allowed to understand what exactly they are getting themselves to, while other employers provide for mandatory arbitration agreements in their employment hand books.[232] Employees also find due process applications to be more protected in Courts than in arbitration because of transparency. Sternlight compares the position of the employee in a mandatory arbitration agreement to the David Goliath myth where a weaker party seem wronged by a powerful employer.[233] In fact, others have argued for the outright ban on mandatory employment arbitration.[234]

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[227] Used to refer to the weaker party in a contract of employment, usually the employee

[228] JR Sternlight, *'Is The U.S. Out On A Limb? Comparing The U.s. Approach To Mandatory Consumer And Employment Arbitration To That Of The Rest Of The World '* (2002) 56 U. Miami Law Review 831< Available at: http://repository.law.miami.edu/umlr/vol56/iss4/3> accessed 20/01/2017

[229] Supra, Note 5 at 1650

[230] A J S Colvin, *'From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution'* (2003) 13 Cornell Journal Law & Public Policy 581

[231] *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

[232] Supra, note 11

[233]JR Sternlight, 'Creeping Mandatory Arbitration: Is It Just?'(2004) 57 Stanford Law Review 1631, 1636

[234]L B Bingham & D H Good, 'A Better Solution to Moral Hazard in Employment Arbitration: It Is Time to Ban Predispute Binding Arbitration Clauses' (2009) 93 Minnesota Law Review. Headnotes 1.

In one of the leading cases in employment arbitration, the Supreme Court of USA in *Alexander v. Gardner-Denver Co*[235] refused to compel mandatory arbitration in an employment racial discrimination case on grounds of public policy and statutory rights. Justice Powell in this decision opined that an employee's rights could not be taken away via arbitration. The Court argued that in pursuing a private claim in a public forum, a private individual would be furthering public policy and interest.[236] However the Court took a directly opposite position 17 years later in *Gilmer v. Interstate/Johnson Lane Corp*[237] where it upheld a mandatory arbitration agreement where a federal civil rights statute was breached. The Court held that the FAA was meant to "...reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American Courts, and to place arbitration agreements upon the same footing as other contracts"[238].

In another similar case *Wright v. Universal Maritime Service Corp*[239] the Court held that the waiver to litigate statutory rights in a collective bargain agreement was not binding upon an employee. The Court ordered the claimant to proceed to litigation. The Court further opined that an employee's individual rights must be clear and unmistakable and explicitly agreed and stated.[240] After this finding, the question whether a mandatory arbitration agreement was effective remained wide open.

It is however important to note that after *Gilmer*, employers rushed to change contracts and issued new contracts with mandatory arbitration conditions. Mandatory arbitration agreements are reported to have jumped from 2% in 1992 to 15% in 1998 in the USA.[241]

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[235] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
[236] Ibid
[237] 500 U.S. 20 (1991)
[238] Ibid
[239] 525 U.S. 70 (1998).
[240] Ibid
[241] Supra note 25, at 586-87.

More recently[242], in USA, it has become very common for the Courts to find arbitration terms in contracts of employment to excessively favor employers by containing unconscionable elements.[243] In *Green Tree Financial Corp. v. Randolph*[244] the Supreme Court of USA found that arbitration clauses should not be enforced if arbitration is found to be expensive or to deny an employee an opportunity to completely vindicate his rights. The Court also noted that the arbitration clauses may also be unenforceable if found to be unconscionable and unfair because of the imposition of excessive costs, minimal remedies or found to be unfair. The Court must also be convinced that the actual clause was agreed to. This position mirrors the Kenyan situation under section 1(A) of the Civil Procedure Act (CPA) on overriding objectives of CPA which is enhances the just, expeditious and affordable (emphasis mine) resolution of disputes.

Various school of thoughts against mandatory arbitration in USA posit that in the judicial system, a competent and neutral judge is available while there are no checks to guarantee that an arbitrator is competent and neutral.[245] Employers are more likely to be "repeat clients" of arbitrators hence a source of future business.[246] The "repeat clients" concept may cause arbitrators to favor employers.[247] The challenge is worsened by the fact that arbitrators don't publish their decisions in public. It is even worse that arbitrators need not be lawyers. It is extremely challenging when mandatory arbitration clauses involve

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[242]JR Sternlight, The Ultimate Arbitration Update: Examining Recent Trends in Labor and Employment Arbitration in the Context of Broader Trends with Respect to Arbitration: Presentation to the 2003 ABA Annual Meeting, Session jointly sponsored by Section of Labor and Employment Law and Section on Alternative Dispute Resolution. Sunday August 10, 9:30am - 12:00<http://www.bna.com/bnabooks/ababna/annual/2003/sternlight.doc> accessed 21/02/2017

[243]S Randall, '*Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*' (2004) 52 Buffalo Law Review 185

[244] 531 U.S. 79 (2000)

[245]Williams v. Cigna Financial Advisors, Inc., 197 F.3d 752, 761

[246]CP Johnson, '*Has Arbitration Become a Wolf in Sheep's Clothing?: A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*' (2000) 23 Hamline Law Review. 511, 530-31

[247] P H Haagen, '*New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*'(1998) 40 Arizona Law Review 1039, 1068

matters of constitutional rights and non-lawyers are required to make interpretations concerning constitutional rights of an individual.[248]

In contrast, judges take oath of office and are sworn to uphold the constitution in the most fair and just and neutral manner.[249] Judicial review puts a check on Judges to interpret and apply the law fairly and justly. Constitution tasks the Judges with the responsibility of interpreting the law and therefore making and defining the law.[250] In comparison therefore, Judges are subject to judicial review while arbitrators have minimal or no oversight.[251]

The 1994 Dunlop Commission Report[252] combined with the task force sponsored by the American Bar Association in May 1995 reached a middle ground on the consideration to be made by the Courts in determining enforcement of an arbitral agreement as:

i. Whether an employee was represented by a person of his choice
ii. Whether an arbitrator can award all the remedies available in law to the Courts
iii. Whether the arbitrator will provide a written opinion and award with reasons
iv. Judicial review of the award especially on grounds of law.
v. Provision of a discovery procedure
vi. A neutral arbiter who knows the law

Consequently in In *Wright v. Universal Maritime Service Corp*[253] the Supreme Court held that for an arbitration clause to be enforced, the waiver of the right to litigate by the employee must be shown to be made "knowingly" and must be in "clear and unmistakable"[254] language as a condition precondition to enforceability.

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[248] *Alexander v. Gardner-Denver Co,* , 415 U.S. 36 (1974).
[249] S K Isbell, *'Compulsory Arbitration of Employment Agreements: Beneficent Shield or Sword of Oppression? Armendariz v. Foundation Health Psychcare Services, Inc'(2001)* 22 Whittier Law Review 1107, 1146 (2001)
[250] U.S. CONST. art. III
[251] Supra, note 67.
[252] COMMISSION **ON** THE FUTURE OF WORKER-MANAGEMENT **RELATIONS,** U.S. DEP'TS OF COMMERCE **AND** LABOR, REPORT **AND** RECOMMENDATIONS 33 (Dec. 1994)
[253] 525 U.S. 70, 74 (1998).
[254] Ibid

3.2.3 The Defence of Unconsciability

Labour laws arise from various statutes, rights and contracts.[255] The relationship between contracts and public law is a major source of conflict and tension.[256] The existence of public law components ensure that public rights are protected as enshrined in the Constitution.[257] Employment law is a "hybrid law"[258]emanating from many other laws.

FAA provides for questioning of arbitration agreement on similar grounds of challenge of a contract as "upon grounds as exist at law or in equity for the revocation of any contract. "[259] Employees cornered with arbitration clauses have resorted to the defence of unconscionability. Various reasons have been put forward for this. First, the arbitration decision is always made in a unilateral basis. Therefore an employee lacks decision to bargain and negotiate for a better term.[260] Secondly, arbitration agreements should also be knowingly and voluntarily entered into.[261] Agreements have been found to be involuntary because an employee is presented with a standard form contract with an arbitration clause in it on "a take it or leave it, and be fired/not hired, basis."[262] Lastly, arbitrators are said to be less equipped to deal with the constitutional claims.[263]

Of more importance to this study is the provisions of section 12 of the FAA. It holds that arbitration may be challenged or awards set aside on grounds of unconscionability. An

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[255]C Estlund,' Between Rights and Contract: Arbitration Agreements and Non-compete Covenants as a Hybrid Form of Employment Law' (2006) 155 U. PA. L. REV. 379, 380.

[256] Ibid

[257] Ibid

[258] Laws affecting the contract of employment are crosscutting from both public and private rights including contract law, constitutional law, international laws and human rights.

[259] Section 2 of FAA

[260]M Halvordson, 'Employment Arbitration: A Closer Look'(2008) 64 J. MO. B. 174

[261] JR Sternlight, 'Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns' (1997) 72 Tulane Law Review 1, 57-58 .

[262] J A Marcantel, 'The Crumbled Difference Between Legal And Illegal Arbitration Awards: Hall Street Associates And The Waning Public Policy Exception' (2009) 14 Fordham Jounal of Corporate & Financial Law 597, 600

[263] ML McCormick, 'The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century' (2014) 30 Berkeley Journal of Employment & Labour Law 193.

unconscionable contract has been defined as one that is "so grossly unreasonable or unconscionable in the light of the morals and business practices of the time and place as to be unenforceable according to its literal terms"[264]. They are contracts "... as no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other."[265]

The rise of the defence of unconsciability has been noted in Courts.[266] The major test for unconscionability is "... whether, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[267] The Court of Appeal in Kenya in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited*[268] adopted the definition of an unconscionable contract as defined in the Australian case of *Commercial Bank of Australia Ltd v Amadio*[269] case where the Court held that:

> "Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogues. [Such disability includes] ..."poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary". ... the common characteristic of such adverse circumstances "seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other". (Quoting Blomley v. Ryan (1956) 99 CLR)"[270]

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[264] Mandel v. Liebman, 303 N.Y. 88, 94 (1951)
[265] Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch.1750).
[266] Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750)
[267] American Software, Inc. v. Ali, 46 Cal. App. 4th 1386, 1390 (1996)
[268] Civil Appeal No 282 of 2004
[269] [1983] 51 CLR 447
[270] Ibid

According to Professor Arthur Allen Leff there are two set of test for unconscionability.[271] The parties must first negotiate terms, and secondly incorporate the terms into an agreement. The first stage was termed as procedural and the second stage as substantive. Therefore, unconsciability starts at the execution of the contract.[272] Procedural unconscionability involve surprise and oppression. Surprise involves how much hidden are the terms in a contract by the party who wants to enforce arbitration.[273] Oppression refers to "an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice."[274] Two major factors have also been considered by the Court i.e. whether the contract term was negotiable or whether there was an alternative party the weaker party would have contracted with.[275]

Substantive unconsciability occurs when the terms in an agreement are one sided and harsh against the weaker party.[276] In *Graham v. Scissor-Tail*[277] the Supreme Court applied the two set test for unconscionability to find that a contract of mandatory employment arbitration was unenforceable due to unconscionability. In *Stirlen v. Supercuts, Inc.*[278] the same test was followed to reach a decision that the mandatory arbitration employment contract was unenforceable due to unconscionability .The Court held that the arbitration contract was both substantively and procedurally unconscionable. Similarly, in an unfair termination claim, the Court in *Circuit City Stores, Inc. v. Adams*[279] found that an arbitration clause was substantively and procedurally unconscionable.[280]

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[271] AA Leff, '*Unconscionability and the Code: The Emperor's New Clause*' (1967) 115 University of Pennsylvania. Law Review 485
[272] A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 486 (1982).
[273] Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1525 (1997)
[274] Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1525 (1997)
[275] Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308 (6th Cir. 1998)
[276] Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1525 (1997)
[277] Graham v. Scissor Tail, Inc., *28 Cal. 3d 807* (Cal. 1981)
[278] Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1525 (1997)
[279] 279 F.3d 889 (9th Cir. 2002)
[280] Ibid

It has also become common in USA for Courts to refuse to enforce mandatory arbitration agreements for want of full remedies applicable to a claimant. Arbitrators by law have authority to award limited remedies excluding constitutional rights.[281] In *Paladino v. Avnet Computer Technologies*[282] the Court held a mandatory arbitration agreement unenforceable on grounds that the remedies that could be offered by the arbitrators were limited to breach of contracts and not statutory rights. *Paladino* influenced the Court's decision in *Armendariz v. Foundation Health Psychcare Serv., Inc*[283] where the Court held that "this damages limitation was contrary to public policy and unlawful."[284]

The proposed Federal Arbitration Fairness Act of 2007 was meant to prohibit pre dispute arbitration contracts between employees and employers. The proposed law was meant to negate arbitration contracts in "employment, consumer or franchise disputes, as well as disputes arising under statutes intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power."[285] In the listed matters, parties were to be engaged in a post dispute arbitration.

3.5 Conclusion

Many countries do not allow their employee employer disputes to be resolved by arbitration.[286] Many countries utilize specialized Courts and / or tribunals to resolve employment disputes.[287] Scholars have sampled many countries and apart from the partial and stringent application by USA, only Peru was found to be allowing the same

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[281] RA Bales, '*Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*' (1995) 47 BAYLOR L. REV. 591, 594 (1995).
[282] 134 F.3d 1054
[283] 24 cal. 4th 83, 104 (Cal. 2000).
[284] Ibid
[285] PB Rutledge, '*Who Can Be Against Fairness? The Case Against The Arbitration Fairness Act*' (2008)9 Cardozo Journal Conflict Resolution 267, 269
[286] JR Sternlight, 'Is The U.S. Out On A Limb? Comparing The U.S. Approach To Mandatory Consumer And Employment Arbitration To That Of The Rest Of The World'(2002) 56 University of Miami Law Review 831 < http://repository.law.miami.edu/umlr/vol56/iss4/3> accessed 12/02/2017
[287] Ibid

practice, however it is hardly utilized.[288] The position in the USA has been sprouted more because of the jury system and as a result of class action and the major influence the companies have in politics.[289]

Professor Jean sternlight argues that despite mandatory arbitration in the USA, it is almost impossible to influence other countries since there is no positive remark about it since it is highly controversial and has generated too much criticism in academia, press and politically.[290] She concludes her position as:

> "Permitting companies to use mandatory pre-dispute arbitration clauses to prevent consumers and employees from enforcing their rights may ultimately have a devastating impact on the laws that are intended to ensure that employees and consumers are treated fairly..... As I and many other commentators have argued elsewhere, the practice is highly questionable as a matter of public policy and basic fairness. In examining these arguments, courts, policy makers, and commentators should consider whether the uniqueness of the United States approach reflects a brilliant new discovery akin to the light bulb, or whether it instead represents the unusual ability of United States corporate interests to control public policy in our country"[291]

From the foregoing discussion, Kenya can be seen to have a similar position, almost identical to the USA case. Kenya also offers a unique scenario since the population cannot afford private arbitration as this would ensure that claimants pay "double for the services" for the legal representation and for the arbitrator. Unlike the USA, Kenyans are expected to fully pay for the private arbitration even if the issues involve violation of rights. The Employment and Labour Relations Courts in Kenya are inexpensive, less formal than normal Courts. Their only undoing may be the speed at which disputes are resolved.

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[288] Ibid

[289] S E Schier, "*One Cheer for Soft Money*," in C Luna, ed., '*Campaign Finance Reform*'(New York: H.W. Wilson Company, 2001), pp. 90, 92

[290] Supra, note 53

[291] Ibid

CHAPTER FOUR

4.0 FINDINGS

4.1 Introduction

The focus of this chapter is to establish the findings on the application of arbitration in contracts of employment in Kenya. The chapter summarizes the findings and answers on the research objectives and the various research questions. The chapter also seeks to answer whether the hypotheses have been proved. The chapter also establishes the basis for recommendations, conclusions and the way forward for Kenya which the research will discuss in details ion chapter five of the study.

4.2 Specific Findings

The main objective of this research was to find out whether mandatory arbitration is applicable in disputes arising out of a contract of employment in Kenya. The research has shown that application of arbitration in contracts of employment is an unfair practice as applied against the employee and should therefore not be used especially pre-dispute. This finding is premised on the analysis of the Labour Relations Act[292] (LRA), and the reported opinions and various decisions of the Court.

It is however worthy to note that other Courts have expressed a contrary opinion. The research also reviewed application of arbitration in contracts of employment in other jurisdictions for a comparative study. The findings are therefore also influenced by the practice in the United States of America (USA).

The specific objectives of the study were three: to find out if arbitration should be applicable in disputes arising out of contracts of employment in Kenya; to find out the effects of arbitration clauses in contracts of employment in Kenya and to examine whether labour rights are human rights.

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[292] No. 14 of 2007

The study reviewed several materials and information on mandatory application of arbitration clauses on disputes arising from contracts of employment. In coming up with findings, the researcher reviewed materials on application of arbitration clauses in contracts of employment in the United States of America. The researcher however noted the scarcity of materials about mandatory arbitration clauses in contracts of employment in Kenya. The research noted that there is a gap in information related to mandatory arbitration in contracts of employment in Kenya. The researcher totally relied on written materials to find out the situation in other jurisdictions including USA. In chapter three of the study, the researcher relied on a comparative study from the USA which has a similar clause on stay of proceedings where arbitration is contractual and where the application of mandatory arbitration clauses in contracts of employment has been widely analyzed and criticized.

The research was however limited by the fact that it was purely a desk top research. The researcher analyzed judicial case laws in Kenya and the USA and also relied on books and journals to analyze the positions in the said jurisdictions. The research was also limited by the fact that there are no previously written materials about mandatory arbitration in contracts of employment in Kenya.

The first objective of the research was to find out if arbitration should be used in contracts of employment in Kenya. This objective has been answered by the researcher in the negative. The objective was exhaustively analyzed in chapter two of the research. The researcher has noted decisions and opinions of Justice Riika and the respondent in *Carol Adhiambo Olela v Asterisk Limited*[293] where the Court despite ordering stay pending arbitration, noted that an employee was at pains to accept arbitration. Despite initiation of arbitration by the respondent, the claimant still ignored arbitration process and sought Court's intervention. The researcher has relied on section 75 of the Labour Relations Act (LRA)[294] and Court decisions and analysis to conclude that arbitration should not be

[293] Cause Number 1049 Of 2011
[294] No.14 of 2007

applicable in contracts of employment, especially where the employee did not enter into the contract knowingly and by understanding the implications of the decision. The arbitration clause is therefore non-consensual and expensive.

In *William Nyangaya Mabera v Khetia Drapers Limited,* Justice Radido posits that arbitrating employment matters under the chartered institute of arbitrators is an expensive process to the parties. In *Stephen Nyamweya & Another V Riley Services Limited*[295] Justice Ndolo held that in the ELRC litigants an access justice affordably, expeditiously and with no legal hurdles and also noted the lack of freedom to contract as a barrier. The Court dismissed an application to refer the matter to Arbitration. This goes long to prove that arbitration should not be used in employment contracts.

Application of the Arbitration Act in employment disputes is specifically excluded by Section 75 of the LRA .This provision has been relied on by the ELRC in *Dr. Kennedy Amuhaya Manyonyi v African Medical and Research Foundation*[296] to hold that an employee is not bound by an arbitration clause in a contract of employment and that the arbitration clause was nonconsensual.[297] The Court also found that section 12 of the Employment and Labour Relations Court Act (ELRCA) expressly provided for a mandatory and exclusive jurisdiction of the ELRC to determine disputes arising from an employer employee relationship. If any other method of dispute resolution has to be applied, all the parties must consent to it and also be comfortable with the alternative dispute resolution mechanism.[298]

The second objective was to find out effects of arbitration clauses in contracts of employment in Kenya. The study found that arbitration clauses have been used by employers to deny the employees their rights to judicial process as provided for vide section 12 of the ELRCA[299]. According to the World Bank reports finding has been made

[295] Cause 2469 of 2012
[296] CAUSE NO. 53 OF 2014
[297] Ibid
[298] Ibid
[299] CAP 234B

in research that the state of unemployment in Kenya is at 39.1% against an ever growing population.[300] Courts have also held that arbitration clauses in contracts of employment are not consensual unlike in commercial contracts where they are applicable.[301] The Courts have been categorical that contracts of employment cannot be treated the same way as commercial contracts, whereby parties are likely to have similar capacities. The overall effect is that employees are not able to seek judicial intervention as mostly they are unable to participate in arbitration because of the costs associated. The researcher also found that claimants are denied full remedies including compensation for breach of fundamental and constitutional rights by invoking arbitration. Due to the state of unemployment in Kenya, arbitration in contracts of employment is a luxury Kenya cannot afford

The third objective of the research was to find out if labour rights are human rights. This objective was proved to the affirmative. The objective proven that labour rights are human rights was meant to support the argument that arbitrators are not in a competent position to determine issues related to the breach of fundamental constitutional rights. Labour rights have been held to be not just human rights, but also a concoction of different laws and statutes. Justice Majanja in *United States International University (USIU) v Attorney General & 2 others*[302] and the Court of Appeal in *Judicial Service Commission V Gladys Boss Shollei & Another*[303] and also Court of Appeal in the case of *Prof. Daniel N. Mugendi –Vs- Kenyatta University & Others*[304] all upheld the authoritative position that labour rights are human rights. This position was widely discussed and analyzed in chapter two of the research. The opinion and holding that labour rights being human rights and therefore fundamental being decided by the Court of Appeal becomes binding on other Courts.

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[300] The World Bank, 'Kenya Country economic Memorandum: From Economic Growth to Jobs and shared prosperity' (2016)
[301] Cause No. 53 OF 2014
[302] Petition 170 of 2012
[303] Civil Appeal NO. 50 OF 2014
[304] Civil Appeal No. 6 Of 2012

Determination of the issues of breach of fundamental rights are a preserve of the High Court's jurisdiction. However, whenever the breaches arises out of an employee employer relationship, the ELRC seizes the jurisdiction, as was held in *Judicial Service Commission V Gladys Boss Shollei & Another*[305]. Chapter three of this research offers a comparative study with other jurisdictions. In the USA, whenever an issue of breach of constitutional rights arises in an employee employer relationship, a special administrative body known as the Equal Employment Opportunity Commission (EEOC) takes over the matter, which is then litigated in Court.[306] In South Africa, an administrative body known as the Commission for Conciliation, Mediation and Arbitration (CCMA) determines issues of constitutional rights besides the Courts and the Courts can still seize the jurisdiction.[307] In the United Kingdom there are various bodies like the Race Relations Board that determine issues of racial discrimination.[308]

The research was also premised on several hypothesis. The first hypotheses assumed that arbitration clauses in the contracts of employment are not applicable. This hypotheses was proved to be true in chapter two and three. The LRA negates the use of arbitration in employment contract. Arbitration has been shown to be expensive and the consent to arbitrate is not voluntarily obtained.

The second hypotheses was that Arbitration in employment disputes denies employees their preferred dispute resolution mechanism. This hypotheses was proved in both chapter one and two of the research. Courts have held that standard form contracts are nonconsensual. In *Paul Chemunda Nalyanya v I. Messina Kenya Limited* the Court *suo moto*

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[305] Civil Appeal No.50 of 2014

[306] EEOC Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (1997).

[307] International Trends in Employment Dispute Resolution - Counsel's Perspectives, *Worlds of Work: Employment dispute Resolution Systems Across the Globe*, St. Johns Univ. Sch. of Law. and Fitzwilliam Coll., Cambridge Univ. (2011), 7-10,<http://www.proskauer.com/files/Event/f4ce52c8-78cb-4634-993f-6a188b827e63/Presentation/EventAttachment/18218ba8-fba8-4d9d-85e7- 717a66791533/Agenda.pdf.> accessed 30/03/2017

[308] A Tweedale, K Tweedale, *Arbitration of Commercial disputes International and English Law Practice* (Oxford University press) para 15.51.

refereed parties to arbitration despite the claimant having approached the Court for reliefs despite the claimant lacking legal representation. The Court in *Dr. Kennedy Amuhaya Manyonyi v African Medical and Research Foundation*[309] held that arbitration is not applicable in contracts of employment. Also, the Court in *James Heather – Hayes v African Medical and Research Foundation (AMREF)*[310] and also in *William Lonana Shena V Hje Medical Research International Inc*[311] held that a party's right to arbitrate must be respected by the Courts. The Courts in the latter cases therefore affirmed application of arbitration in a similar way in every case including in disputes arising out of contracts of employment. When search decisions are made by the Courts without much inquiry about voluntary consent, the claimant lacks a preferred dispute resolution mechanism.

The final hypotheses was that labour rights are human rights. This hypothesis was proven in Chapter three. In proving this hypothesis, the researcher was informed by the different holdings by the Court of Appeal to the effect that labour rights are human rights. The hypotheses was also informed by International instruments e.g. the Universal Declaration of Human Rights[312] that labour rights are human rights.

The research also intended to address three research questions. The first question was whether Arbitration should be applicable in contracts of employment in Kenya. This question has been answered to the negative. Arbitration should not be applied in contracts of employment in Kenya, especially pre-dispute, considering the weaker employee as espoused in the conflict theory and the cost of arbitration. A contract of employment is not a commercial contract where all the parties are supported with able legal representatives to ensure knowledge and understanding of the consequences of arbitration.

Secondly, what are the effects of application of arbitration clauses in the contracts of employment on employees? This question was answered both in chapter two and three

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[309] Cause No. 53 of 2014
[310] Cause No. 626 of 2013
[311] **Cause 1096 of 2010**
[312] Adopted by the United Nations General Assembly on the 10th December 1948

of the research. Arbitration is expensive and employees are relieved off their rights due to their inability to afford arbitration. Arbitration may lead to the violation of the right of access to justice where a claimant is estopped from approaching the Courts hence violating their Article 48 constitutional rights. Section 32(B)(3) of the Arbitration Act allows an arbitral tribunal to withhold an award if parties fasil to pay. Employees are also denied remedies and prayers especially those related to breach of rights which are outside the jurisdiction of the arbitrators. Claimants are also denied the right to have their cases properly investigated with full sale discoveries and disclosures.

Thirdly, are labour rights human rights? In chapter two and three of this study, the researcher has answered this question to the affirmative that labour rights are human rights. Labour rights being human rights therefore need a competent Court of the level of the high Court to interpret the breaches.

4.3 Conclusion

The information analyzed point more to the direction that arbitration should not be blanket applied to contracts of employment. Whereby the intention of arbitration may be to enhance justice, the research has revealed that it may actually curtail justice in an employee employer dispute resolution situation. Voluntary consent has also been shown to be key to a valid and enforceable employment contract. Standard form contracts deny employees opportunity to make an informed decision about a preferred dispute resolution mechanism. Labour rights are core constitutional mandates.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The previous chapters in this research study have raised various issues and discussed several subjects in relation to the subject of this research. This chapter summarizes the salient features of the research and is based on the findings of the previous chapters. Chapter one dealt with the objectives, background of the study and theoretical studies upon which the research is based. This research was guided by the conflict theory.

Chapter two of the research widely dealt with conflicting decisions of various Courts in relation to application of arbitration clauses in contract of employment. The chapter also dealt with legislations, both international and national concerned with arbitration and more so employment arbitration. The chapter also touches on the evolution of arbitration laws in Kenya. Chapter three of the study offers a comparative analysis of the study. The researcher looked at the application of arbitration in employment disputes in other jurisdictions including the United States of America. Chapter four of the research study dealt with the findings that arise after considering the information in chapter one, two and three. After collecting information from various sources, in this chapter the researcher concludes the whole study and advises on reforms and recommendations in the application of arbitration clauses in contracts of employment.

5.2 Conclusion

This research sought to critique the application of arbitration clauses in a contract of employment. This led the researcher to find out whether arbitration clauses are applicable in contracts of employment. In critiquing the application of arbitration in employment disputes, the research considered different approaches in different jurisdictions and the opinions of different scholars and writers. The researcher also considered and analyzed several Court decisions that that have been made by the Courts

both in Kenya and in USA in relation to application of arbitration in contracts of employment.

Arbitration has been widely supported by scholarly pundits as a way to solve the challenges faced by parties in Court litigation. It is a universally accepted principle of the law of arbitration that freedom to contract is core to arbitration governance.[313] Agreement between the parties always provide the most significant basis for regulation of arbitration, its principles, procedures and proceedings. Freedom to contract therefore forms the core of arbitration. By parties contracting to arbitration, they agree to privatize dispute resolution and "donate" Court powers to private individuals of their choice. The agreement of the contracting parties therefore become the law of operation under the agreement and therefore, the controlling law.[314] The arbitration agreement can therefore be interfered with by the Courts only on specific grounds provided for under the law of contracts or specific exceptions under the arbitration legislations and laws.

Arbitration has been said to have greater pros. Parties to arbitration have more control on the process, it is less costly to arbitrate, there is speed in determination of the disputes, finality of the award, expertise and confidentiality of the dispute as the hearings are not public and the decisions are not declared to the public.[315] Supporters of arbitration have therefore seen judicial intervention in arbitration matters as antagonistic to the functionality and autonomy of arbitration.

Mandatory arbitration agreement in the context of employment disputes however invites a different approach. Employment contracts have been categorized as contracts *sui generis* where parties' strength of bargain is altered. This argument has been strengthened by the status of unemployment especially in less developed countries, in which Kenya is one. Commonly, employment dispute arbitration reflects the desire of the economically

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[313]TE Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 *Vand. J. Transnat'l L.* 1189 (2003).

[314] Ibid

[315]JK McEwan & Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, looseleaf (Aurora, Ont.: Canada Law Book, 2004).

dominating party.[316] Employment contracts are therefore unilateral in a way that interferes with a party's freedom to contract and borders on coercion. Many employers have used the arbitration agreement as a nonnegotiable precursor to contracting.[317] In employment dispute arbitration, only employers benefit as they can avoid Court adjudications, sanctions and negative publicity.[318]

The same reasons for the support of arbitration have been used to criticize it especially when applied in contracts of employment. In terms of costs, arbitration has been termed as expensive to litigation, more so when more arbitrators are involved.[319] It is also important to consider that a party pays both his lawyers and the arbitrators. The matter becomes worse if the decision is challenged in Courts. Fairness of arbitration has also been challenged as to fairness of the process and especially by the repeat customer's concept. The speed at which arbitration dispute is resolved can be slow especially if the parties involved are many and the matters are complex. Additional time is also taken if the outcome of the dispute is challenged in Court. Finality of arbitral decision or award is also not assured.

Court cases and scholarly articles considered in various jurisdictions point to a more careful and cautious approach by Courts, when faced with a determination of the application of the arbitration agreement. The United States of America have categorized employment cases to hold that those involving breach of statutory rights should not be subjected to arbitration. The Equal Employment Opportunities Commission litigates the breaches on behalf of Claimants. This position is however still controversial. The United Kingdom also has a special body known as Race Relations Board and the Employment Tribunals that hear defined matters involving employment arbitration. The UK also has

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316 T E Carbonneau, '*The Ballad of Trans-border Arbitration,* 56 U. MIAMI L. REV. 773 (2002).

317 Michael R. Holden, *Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law,* 80 CORNELL L. REV. 1695, 1742 (1995)

318 Ibid

319 J. Kenneth McEwan & Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, looseleaf (Aurora, Ont.: Canada Law Book, 2004).

enacted some laws that protect the interest of workers. The Race Relations Act[320], the Equal Pay Act[321] and Sexual Discrimination Act[322] give claimants direct access to the Employment Tribunals. South Africa too has the Commission for Conciliation Mediation and Arbitration (CCMA) which arbitrates most labour disputes.

The three jurisdictions used for purposes of a comparative study have specialized statutory administrative bodies formed to hear workers complaints and arbitrate or offer arbitration services where Courts are not preferred. Since they are Government administrative bodies, their services are not commercialized making them accessible to the public. They are generally government bodies offering employment dispute resolution services outside the jurisdiction of the normal Courts. They fill the gap that arbitration tends to fill, but in a very cheaper, speedy and less formal manner.[323]

Courts in Kenya have continuously held conflicting decisions on the application of arbitration contracts in disputes arising out of contracts of employment. Courts have posited that employment contracts are not commercial contracts[324] and therefore application of mandatory arbitration agreement cannot hold.[325] In Kenya, employment Courts can therefore interfere with arbitral authority despite parties' agreements and especially anchoring their decisions on section 75 of the Labour Relations Act[326] which expressly provides that the Arbitration Act[327] is not applicable in the Industrial Court matters.[328] The non-application of arbitration in disputes arising out of a contract of employment in Kenya cannot therefore be gain said. It is therefore important to consider the gap that arbitration seeks to fill and embrace the approach use by the other cited

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[320] 1976,c. 74 (Eng)
[321] 1970,c.41 (Eng)
[322] 1975,c.65 (Eng
[323]Royal Commission on Trade Unions and Employers Associations 1965-1968,REPORT/1968,Cmnd.3623 AT 156
[324] Joao Soares v Tuegest Guerma & Another, Employment Cause No. 689 of 2012
[325] Dr. Kennedy Amuhaya Manyonyi v African Medical and Research Foundation, Employment Cause No. 53 of 2014
[326] NO. 14 OF 2007
[327] No.4 of 1995
[328] Ibid

jurisdictions to achieve the benefits of arbitration in employment disputes without necessarily opting for private commercial arbitration.

5.3 Recommendations

The challenges faced by litigants while using arbitration to resolve employment disputes are enormous. The major challenge faced involves the claimant rather than the employer. It is always the claimant who feels disadvantaged since most of the times, it is him who is faced with a standard contract, always designed by the employer who has had an opportunity to consult widely on the consequences of the arbitration clause/agreements. The Claimant is therefore faced with a tough choice since the contract is always non-negotiable. Mostly, the contract is issued on a take it or leave it basis. Recommendations below would therefore go a long way in helping the parties and other stakeholders find better solution to the challenges faced.

5.3.1 Law Reforms of the Arbitration Act

Courts that have referred parties to arbitration have always invoked section 6 of the Arbitration Act. The Constitution of Kenya 2010 was more pronounced on the issue of labour rights and disputes. Under Article 162(2) of the Constitution, the ELRCA is established. The ELRCA[329] establishes the ELRC empowered with exclusive appellate and original jurisdiction to determine "disputes relating to or arising out of employment between an employer and an employer"[330]. In addition, section 75 of the Labour Relations Act[331] expressly prohibits application of the Arbitration Act[332] in Industrial Court matters. The conflict has therefore been widely glaring. There need to be law reforms to amend the arbitration with a specific provision that expressly excludes the application of arbitration in employment disputes.

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[329] CAP 234B
[330] Section 12
[331] NO. 14 OF 2007
[332] No.4 of 1995

5.3.3 Advisory Opinion by the Supreme Court

Article 163(7) of the Constitution of Kenya, 2010 provides that all Courts are bound by the decisions of the Supreme Court. The principle of *stare decisis* would therefore follow. Litigants need to make an application to the Supreme Court to give an advisory opinion under Article 163(6) on the application of arbitration clauses in a dispute arising out of a contract of employment to avoid the conflicting opinions of different Courts and set the record straight once and for all. This would give clarity that is binding on other superior Court according to article 163(7) of the constitution of Kenya 2010. Alternatively litigants need to seek to institute appeals to the Court of Appeals to set a binding direction.

5.3.4 Awareness

Awareness need to be enhanced to the judiciary, advocates and more importantly, members of the public.[333] It is due to lack of information that members of the public are entangled in the web of contracts that is beyond their comprehension. Members of the public need to be educated on what arbitration is and the likely consequences of signing an arbitration contract. Judiciary Training Institute should come in handy where judicial officers are trained to ensure effective understanding of application of arbitration matters[334] in the context of employment disputes.

5.3.5 Post Dispute Arbitration

As a short time solution, parties to a contract should promote post dispute arbitration. It is a very common excuse from claimants that they signed a one sided contract on a take

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[333] M Wambua, 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice' (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 15-35, 16.

[334] K Muigua 'Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya' (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 43-78, 58.

it or leave it basis. When a dispute has already occurred, parties find themselves in equal bargaining power and the decision made post dispute will be made without any undue influence of a claimant.

5.3.6 More Research

While quite much information, on the application of mandatory arbitration agreement in contracts of employment is available in other foreign jurisdictions, though conflicting, in Kenya the information is very scanty. Much research needs to be done in order to enhance information available on the subject.

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