

LEGAL DIGEST SUMMER 2019

Preamble

This issue of the quarterly Legal Digest features changes within the Retirement Benefits industry under the Acts of Parliament segment. Some of the changes introduced include:-

- i) Limited access to retirement benefits by members of defined contribution schemes who have not attained the retirement age, to only 100% of their member contributions, with the employers' contributions being inaccessible and locked in until the member attains the retirement age;
- ii) Reduction of the transfer period of Schemes that invest in Guaranteed Schemes from three years to one year; and Allowing members of Umbrella Schemes to make additional voluntary contributions towards funding a post-retirement medical fund.

These changes are mainly aimed to enhance the welfare of retirees and promote the growth of pension schemes.

The segment on Bills highlights the Constitutional (Amendment) Bill 2019 which has been dubbed as the "Punguza Mizigo" Bill as it mainly seeks to address the issue of over-representation in Parliament as well as other matters, including the term of the presidency. The section also discusses the Gaming Bill, the Data Protection Bill, the draft Huduma Number Bill, the Finance Bill and the Land (Amendment) Bill as well as their impact.

From the courts, we focus on developing of jurisprudence on criminal matters, data protection, taxation of Advocates' Bill of Costs, succession, among others. We also highlight the impact of these cases on the citizens, both individual and corporate.

These are only a few of the numerous legislative as well as jurisprudential decisions from the courts which offer guidance on various areas of our laws and it is our hope that you find the Digest informative. We would appreciate your feedback on this issue and previous issues of the Digest, as we continue to strive to share local and global legal developments with you.

A. Acts of Parliament

1. The Assumption of the Office of Governor Act 2019

The main purpose of the Act is to provide for the procedure and ceremony for the assumption of the Office of Governor by the Governor-elect and for connected purposes. The Act establishes in each county, the Assumption of the Office of County Governor Committee, which shall be an ad hoc committee constituting 14 members. The main role of the Committee will be to facilitate the handing over process by the outgoing Governor to the Governor-elect. Under the Act if the election of a governor is nullified IEBC will publish a Gazette Notice indicating that the election of the governor has been invalidated; and announce the date for election of a county governor pursuant to Article 182(5) of the Constitution. Where a vacancy arises under these circumstances, the speaker of a county assembly shall act as a governor and an election shall be held pursuant to Article 182(5) of the Constitution.

Impact: The Act provides the proper procedure for how governors will be sworn into office after they are elected. It also provides clarity on what happens when a governor's election is nullified by court. This Act is important as governors are the heads of the county governments which are a fundamental part of the country's governance structure. It was important to have a clear guideline in light of the fact that was a lacuna in the law on how Governors assume office.

2. Impact of Proposed Budget Changes to Pensions Industry

In the 2019/2020 Budget for Kenya, which was presented in June 2019 to Parliament by the CS Treasury, there were several changes effected to the Retirement Benefits Industry, as discussed below.¹ These changes will impact USIU which has a Retirement Benefits Scheme, the Scheme will have to adhere to these new regulations and also inform its members of the new changes.

- i). Access to employer's portion of Retirement Benefits before retirement: The Umbrella Regulations and Occupational Regulations have been amended to limit access to retirement benefits by members of defined contribution schemes who have not attained the retirement age, to only 100% of their member contributions, with the employers' contributions being inaccessible and locked in until the member attains the retirement

¹ <https://cytonnreport.com/research/impact-of-proposed-budget-changes-to-pensions-industry#focus-of-the-week>.

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age, or on early retirement or on immigration. Previously, members leaving the service of an employer could access 100% of their contributions and 50% of their employer's contributions. The challenge with this was that it eroded the amount one would finally have at retirement as whenever one changes employment there was a tendency to access these benefits and start afresh reducing the funds that one will have at the point of retirement.

Impact: This amendment will increase pension's adequacy and improve the income replacement ratio for retirees. For the industry, this will translate to; (i) faster growth of assets, and (ii) trustees through their Fund Managers will have more room to make long-term investments and hence to translate to better returns to the schemes.

- ii). Transfer of Funds from Guaranteed Schemes: The transfer period of Schemes that invest in Guaranteed Schemes and wish to withdraw their funds and transfer them to another Scheme, (Guaranteed or Segregated) has been reduced from three-years to one-year, effective January 2020.

Impact: This will be favourable to Trustees of Schemes who are dissatisfied with their current Approved Issuer/Insurance Company, as it will mean the assets starting to earn the more favourable returns of the new Approved Issuer/Insurance Company or Fund Manager earlier than having to wait for three years. For Approved Issuers/Insurance Companies offering Guaranteed Schemes, this would mean that they have to be more prudent in their investment decisions and make provisions for this shorter period allowed for liquidation of part of their Guaranteed Fund.

- iii). Distribution of reserves: Occupational Retirement Benefits Regulations and the Retirement Benefits Act make provisions for creation of reserve funds by defined contribution schemes. The main reason why schemes maintain a reserve is to help smoothen the returns in times of bad investment performance due to challenging economic environment. The Schemes are however not required to distribute these reserve funds on the exit of a Member from the Scheme. This in effect means that departing Members exit without accessing their total entitlement from the Scheme. The amendment of the regulations is to ensure that Members receive their appropriate share of the reserves on leaving the Scheme.

Impact: This amendment will make the Retirement Benefits Schemes more attractive as it increases the members' confidence that the regulations are protecting their

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interests and it makes it fair for people leaving the scheme as they have access to the entirety of their savings and investment returns.

- iv). Maximum Allowable Size of Reserve Fund: The Occupational Retirement Benefits Schemes Regulations have been amended to limit the amount of funds held in reserve to a maximum of 5% of the scheme assets. Initially, there was no limit of reserve funds stipulated by law and this was left to the discretion of the trustees to determine the level of reserves to keep.

Impact: This move will see enhanced member protection by increasing member benefits as it limits the returns that can be directed to reserves by trustees, and thus fund managers have to attribute the rest of the income to members. The members will therefore have better returns.

- v). Post-Retirement Medical Fund: The amendment made is to allow members of Umbrella Schemes to make additional voluntary contributions towards funding a post-retirement medical fund. Initially this provision was available for members of Occupational Schemes and Individual Schemes. The amendments have also made a provision that allows members to transfer a portion of their retirement saving, up to a maximum of 10%, into the medical fund to achieve the desired level of medical funds.

Impact: Studies done by the RBA show that medical expenses constituted the biggest expenditure for retired people, and in addition, most insurance companies often decline to cover elderly persons, above 65 years old, as they are considered high risk. This change will play a major role towards the achievement of universal health coverage and allow members to fund their medical needs after retirement. For the members, this shall play a part in lengthening their life expectancy.

- vi). Income Drawdown Option at Retirement: The amendment has made it mandatory for schemes' rules to provide for income drawdown, as an alternative to an annuity or a Lump Sum, as a channel for members to access their retirement benefits at the point of retirement. Initially, it was at the discretion of the founder to include income drawdown as an option at retirement in their trust deeds and rules, and this meant that if the trust deeds and rules of your scheme did not have this provision, you could not transfer your retirement benefits into an income drawdown fund.

Impact: This amendment increases flexibility and gives retirees more options in which they can access their benefits at retirement as opposed to the traditional annuities. This

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will also allow retirees to benefit from income generated from investing their lump sum benefits and thus translating to higher regular pay-out to the retirees. For the industry, we expect this to result in increased registration of income drawdown funds, currently we only have five registered income drawdown funds, consequently beefing up competition and thus offering better service to members. (The five registered Income Drawdown Funds are; (i) Cytonn Income Drawdown Fund, (ii) Enwealth Kesho Hela Income Drawdown Fund, (iii) Octagon Income Drawdown Fund, (iv) Platinum Drawdown by Britam, and (v) Milele Income Drawdown by Gen-Africa.

B. Bills (proposed laws)

1. The Punguza Mizigo (Constitution of Kenya Amendment Bill 2019)

This Bill seeks to amend the Constitution of Kenya pursuant to the Popular Initiative under Article 257 of the Constitution of Kenya 2010. The popular initiative is the process of amending the Constitution where amendments proposed are by a popular initiative signed by at least one million registered voters. The Bill is being supported by Thirdway Alliance Kenya Party leader Ekuru Aukot. The Bill seeks to introduce the following main amendments:

- i. Address the concerns of over representation and to reduce the number of MPs from the current 416 to 147 by:
 - a) Abolishing the 290 constituencies;
 - b) Adopting and using each of the 47 counties as a single constituency for purposes of parliamentary election to Senate and National Assembly;
 - c) Electing one man and one woman to the national assembly and to nominate only six members of parliament from special interest groups (SIGs). This will also consider gender equality so that of the six (6) SIGs, there must be one man and one woman for each category. This, in fact, cures the elusive a third gender rule in Parliament; and
 - d) Electing 47 Senators using the County as a single constituency.
- ii. Elevate Senate to be an Upper House with veto powers. This ensures that the National Assembly is checked and oversight mechanisms provided for.
- iii. Increase Counties' revenue share allocation to, at least, 35% from the current 15%.
- iv. Introduce a one 7-year term presidency.
- v. Reduce cost of running Parliament from current KES 36.8 billion to less than KES 5 billion per year.
- vi. Abolish the position of Deputy Governor - The Governor to nominate from among the duly vetted and appointed County Executive Officers, one of them to be his principal Assistant for purposes of administration. In the unlikely event of the position of Governor falling vacant, the Governor to be elected in a fresh by-election.

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- vii. Corruption and theft of public resources cases to be tried within 30 days and all appeals to be exhaustively concluded within 15 days.
- viii. Constitutional commissions to comprise not more than 5 part-time members who will be sitting on a necessity basis and shall be paid a sitting allowance per sitting as will be set by the SRC.
- ix. Every Kenyan at the age of 18 that acquires a National Identity card shall be deemed to be a registered voter for purposes of elections and referenda. This will save Kenyans and IEBC billions of shillings spent on voter registration.

Impact: The main purpose of the Bill, as its name suggests, is to reduce the cost of government business so that the money saved can be channelled into development projects as opposed to recurrent expenditure, such as salaries of state officers. The proposed one 7-year term presidency is meant to help to achieve free and fair presidential elections. The High Court in July 2019 however stopped the 47 county assemblies across the country from debating and approving the Bill pending a case filed in court against it.² If the High Court petition is decided in favour of the Bill then it will be discussed by the 47 county assemblies and if the same is approved by a majority of the county assemblies, it shall be introduced in Parliament without delay. If Parliament passes the Bill by a majority of the members of each House it shall be submitted to the President for assent. If either House of Parliament fails to pass the Bill, the same shall be submitted to the people in a referendum.³

2. Data Protection Bill 2019

The Bill proposes to give effect to Article 31(c) and (d) of the Constitution which provides for the right to privacy; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes. The Data Protection Bill was first brought to Parliament in 2013 but that Bill was never passed into law. The Bill was recently in 2018 re-introduced to the Senate by the Committee on Information, Communication and Technology, chaired by Baringo County Senator, Mr. Gideon Moi but the same was also not passed. The Bill was again re-introduced to Parliament in June 2019 and this time the ICT CS Joe Mucheru has backed the same terming it as a progressive legislation. The CS proposed minor changes to the proposed law, including changing the name from Data Protection Bill to Data Protection and Privacy Bill. The CS also argued that an independent regulator would be the best body to have an oversight of the data

² The High Court issued orders permitting county assemblies to debate/discuss and possibly approve the Punguza Mizigo bill. Justice John Mativo gave the go ahead on 13th August, 2019.

³ The petitioners have argued that most of the proposals in the Bill will ultimately require a national referendum under Article 255(2).

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collected, instead of a commission as proposed in the Bill. It is envisaged that now that the Bill has received support from the State, the same will be passed into law.

Impact: If enacted into law, this will help in protection of personal data especially the data collected through the NIIMS registration for Huduma Number. The Bill will resolve the legal vacuum on data protection in Kenya. USIU as a data processor of data from students, staff, alumni and other partners will have to comply with the provisions of the Bill if the same is passed into law.

3. The Finance Bill 2019

The Bill seeks to formulate the proposals announced in the Budget for 2019/2020 relating to liability to, and collection of taxes. The Bill also seeks to amend a number of laws including:

- i. The Privileges and Immunities Act (Cap. 179) - The Bill seeks to amend the Fourth Schedule to the Act to exempt goods and services imported or locally purchased by privileged organisations for their official use from taxes.

Impact: Even though it is recognized that the tax exemption would help to foster diplomatic relationships between Kenya and the privileged organisations, on the down side it is worth noting that increasing the number of goods and services that are exempt from tax will increase the burden on the rest of the public who will be expected to cover the amount relieved from the privileged organisations. It should also be noted that the Act does not enumerate the privileged organisations and they could be as many as the CS Interior would choose.

- ii. The Banking Act (Cap. 488) - The Bill seeks to amend the Act by repealing section 33B to remove the caps on interest charged on loans. This follows the declaration of section 33B as unconstitutional by the High Court earlier in the year⁴.

Impact: This will result in commercial banks having the discretion on charging interest rates as opposed to what is currently provided for i.e. not more than 4% above the Central Bank rate (which is currently at 9%). This is aimed at encouraging the banks to provide credit to Small and Medium Enterprises (SMEs). The disadvantage of not capping the interest rate would be that banks will charge hefty interest rates that will work against the common *mwananchi*. Since the main contention in the Court was that section 33B of the Banking Act is vague; perhaps the best way to resolve this is not by

⁴ Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties) [2019] eKLR

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repealing the entire section but by giving clarity to the provisions of the section. Hopefully Parliament will consider the amendments proposed under the Banking (Amendment) Bill 2019.

- iii. The Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009) - The Bill seeks to designate lawyers, notaries and other independent legal professionals as amongst reporting entities to whom Anti-Money Laundering/Combating Financing of Terrorism obligations shall apply.

Impact: This is in recognition of the fact that lawyers are involved in many commercial transactions and are sometimes used as conduits for money laundering. It will be expected that lawyers will report suspicious activities just as is expected of banks and other institutions.

- iv. The Employment Act (No. 11 of 2008) - The Bill seeks to introduce the definition of "basic salary" to guide on the base amount for computing the levy payable to the National Housing Development Fund. Basic salary is defined as an employee's gross salary excluding allowances and other benefits.

Impact: The deduction of the housing levy raised a lot of debate among employers with one of the concerns raised being whether employers should start deducting the levy. The Ministry of Housing had in a notice issued on the Daily Nation newspaper stated that the first contribution for the levy would be due on 9th May, 2019. LSK however applied for orders from court prohibiting the Ministry from effecting the payment of the levy pending hearing and determination of the matter. The orders were granted meaning the levy stands suspended until the court makes the final decision on the matter.

4. The Banking (Amendment) Bill 2019

The principal object of this Bill is to amend the Banking Act to clarify any vague, ambiguous, imprecise and indefinite words contained in Section 33B. The amendment firstly seeks to remove any ambiguity in Section 33B (1) by clarifying that the interest rate under reference is to be computed or applied on an annual basis. Secondly, the amendment will clarify what a credit facility is by replacing the term "credit facility" with the word "loan" which is a more suitable and comprehensive term for purposes of Section 33B(1). The amendment will also ensure consistency in the use of terminologies bearing the same meaning in the context of the Act. In this regard, the term 'loan' is defined in Section 44A(5) and its broad meaning

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thereunder addresses the mischief the provision seeks to cure, that is exorbitant interest rates charged for any financing given on credit terms by banks and financial institutions. Thirdly, the amendment seeks to reaffirm that the maximum interest rate charged by banks and financial institutions on loans should not exceed four percentage points above the Central Bank Rate as set by the Central Bank of Kenya pursuant to the provisions of Section 36(4) of the Central Bank Act. As it stands, the provision is unclear as to whether banks should set the maximum interest rate at four percentage points below or above the Central Bank Rate. For the avoidance of doubt, a further amendment here will also precisely point the applicable base rate as that which is set and published by the Central Bank under Section 36(4) of the Central Bank Act.

Impact: A cap on the interest rate will prevent commercial banks from charging discretionary interest rates that are aimed at enriching the banks at the expense of the public; the current interest rate of 13.5% has been favourable to most as previously banks would charge as much as 26% interest rate which was unaffordable for most Kenyans. The clarification provided under this Bill will also help to resolve the issue of repealing of Section 33B in its entirety.

5. The Gaming Bill 2019

The objective of the Bill is to establish an Act of Parliament to provide for the control and licensing of betting, casinos and other forms of gaming; authorization of prize competitions and public lotteries; the establishment of the National Lottery; the imposition of a tax on gaming and for connected purposes. The Bill seeks to repeal the Betting, Lotteries and Gaming Act of 1966.

Impact: The Bill was introduced in response to the influx of betting firms, which according to the government, have not been remitting taxes, and are largely responsible for sports betting addiction especially for the youth. Recently, the government has cracked down on betting firms (including the directive banning celebrities from advertising betting and limiting advertising times for betting adverts⁵) which are seen to be making astronomical profits at the expense of poor youth who have fallen victim of betting addiction. The Bill also responds to the fact that betting is now done online mostly on smartphones and regulation needs to reflect this reality.

⁵ Kenya's Betting Control Board, via a directive issued on 30 April 2019, banned outdoor & social media adverts, limited TV ads from 6am to 10pm, and barred endorsement of bets and their firms by celebrities. This was later suspended in *R v Betting Control & Licensing Board & anor. ex parte Outdoor Advertising Association of Kenya* [2019] eKLR

6. The Land (Amendment) Bill 2019

The principal object of the Bill is to amend the Land Act No. 6 of 2012 in order to empower the Registrar of Lands under the Land Registration Act, 2012 to issue a certificate of title in the name of the public body, public institution or the relevant ministry - for situations where: 1) public land has been allocated to a public body or public institution by the National Land Commission for a public purpose 2) land is set aside by persons or land buying companies for a public purpose. As it is presently, public land and land set aside for a public purpose by land buying companies continue to be grabbed by private persons primarily because there exist no certificates of title issued in respect to such land. This Bill therefore seeks to provide for registration of public land.

Impact: If passed into law, the Bill will curb the problem of grabbing of public land by individuals as the same will have been registered. It will be noted that this is the main issue in the Ruaraka land saga where it is claimed that public land was sold by an individual.

7. The Draft Huduma Number Bill 2019

The Bill has not yet been published in the Gazette but is still undergoing public participation. The draft Bill proposes to reform the identity ecosystem. It establishes the National Integrated Identity Management System (NIIMS) that will be a primary database for both foundational and functional data, from which every other database with personal data of residents in Kenya, such as databases of voters, taxes, and social services, will be built. This will create an efficient identity system that will present opportunities for fiscal savings, development of the digital economy and enhanced public and private sector service delivery. The Bill proposes to make it mandatory for every individual to have a Huduma Number in order to be - Issued with a passport; Apply for a driving licence; Register a mobile phone number; Register as a voter; Pay taxes; Transact in the financial markets; Open a bank account; Register a company or a public benefit organisation; Transfer or make any dealings in land; Register for electricity connection; Access universal health care services; Benefit from the government housing scheme; Register a marriage; Enroll into a public educational facility; Access social protection services; Register or transfer a motor vehicle; or any other specified public service. These provisions are in violation of the court order which stipulated that the Government shall not deny any citizen a public service on account of lack of Huduma number.⁶

⁶ Petitions No. 56, 58 & 59 of 2019-Kenya Human Rights Commission & 2 Others-vs-AG & 6 Others - The court gave interim orders in this matter to prevent the government from denying anyone services on the basis of lack of a Huduma Number.

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Impact: If passed into law the same will force every single Kenyan to register for the Huduma number in order to access government services and also not incur the hefty penalties imposed. If the Bill is passed into law without enactment of proper data protection laws in Kenya then the information given to the Government could be subject to misuse without any relief for the citizens.

8. Registration of Persons (Amendment) Bill, 2019

This Senate Bill has been gazetted for public participation but is yet to undergo its first reading. It proposes changes to the Registration of Persons Act which provides for the identification, registration and issuance of identity cards to Kenyan citizens over the age of 18. The changes include: providing a definition for intersex persons (and in effect their recognition in law); and compelling the issuance of a new identity card after 6 months of a sex change (but surrender their old IDs). The new definitions will also make way into the Births and Deaths Registration Act should the Bill pass into law.

Impact: The Bill brings to the fore efforts by human right groups to end the stigma of intersex persons based primarily on their lack of legal recognition. The Kenya National Commission on Human Rights has participated in cases such as R.M vs. Attorney General & 4 others [2010] and E.A & Another vs. Attorney General & 6 others which highlighted the challenges faced by intersex persons and the need to establish regulations aimed at protecting intersex citizens. Institutions such as USIU, would have to be flexible in amending data to ensure intersex persons' rights are properly effected (in accordance with the law); that they are recognized and availed their rights to dignity, identity, education and all other such freedoms & services.

9. National CCTV Policy

The Ministry of Interior and Coordination of National Government has drafted and is a proposing a 'National CCTV Policy' that will control and manage the installation, operation, and management of surveillance equipment in private and public spaces. The Policy insists that the Ministry shall 'guide' and not 'restrict' the installation of CCTVs.

The Policy has been uploaded onto the Ministry's website for public participation and will operate alongside acts related to security, data/information, cybercrime and ICT such as the Computer Misuse and Cybercrime Act 2018, the Access to Information Act 2016, the Private Security and Regulatory Act 2016 etc.

Impact: There is already uproar over the proposed policy, with groups such as Amnesty International opposing the Policy's enactment. The human rights watchdog argues that the government should focus on putting in place strong data protection legislation over expanding the collection of CCTV data and granting government agencies extensive access to privately-owned CCTV equipment. Moreover, the Data Protection Bill is pending in Parliament and its provisions may greatly affect the legality of this Policy. If enacted, the Policy would mandate institutions like USIU to archive its CCTV footage; give access to government officials; and ensure its equipment is compatible with the government's digital security network. The process of CCTV installation will therefore be more expensive and lengthier, compounded by other data protection concerns.

C. Hot from The Bench

1. Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR

In this case, the accused person - Moses Kasaine, the sitting Governor of Samburu County, applied for a revision of orders barring him from accessing Samburu county government offices without the prior written authorization from the CEO of the Investigative Agency (EACC) who shall put measures, if any, in place so as to ensure that there is no contact between the Governor with the prosecution witnesses and preserve the evidence until further orders of this Court. Mr. Kasaine was charged with various offences under the Anti-corruption and Economic Crimes Act (ACECA) including conspiracy to commit an offence of corruption and abuse of office. The High Court declined to exercise powers of revision over the decision of the trial court and upheld the decision denying the Governor access to the offices. Justice Mumbi Ngugi held that the Governor was not being 'removed' from office but he was required to not continue to perform the functions of the office of governor while the criminal charges against him are pending. The Court further held that if Chapter Six of the Constitution on Leadership and Integrity, is to be given an interpretation that protects the Governor's access to his office, then conditions must be imposed that protect the public interest, as had been done by the trial court.

Impact: This decision means that a state officer charged with a criminal offence related to their office must step aside so as to prevent interference with witnesses and evidence. Already courts are adhering to the High Court precedent, as Kiambu's Governor-elect Ferdinand Waititu was denied access to his office pending determination of a Shs. 588 million graft case. The decision can also be used by private organisations such as USIU to

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justify suspension of employees where an employee can be barred from accessing their office so as not to interfere with evidence or witnesses.

2. Joseph Lendrix Waswa v Republic [2019] eKLR

This is an appeal from the Ruling of the High Court of Kenya permitting the counsel engaged by the victim of crime to participate in the trial of the appellant, Joseph Waswa. The appellant argued that the victim's lawyer is only allowed to watch brief as the Prosecutor acts as the advocate for the victim. The Court of Appeal held that the concept of "watching brief" in a criminal trial where an advocate for the victim does not play any active role in the trial process is now outdated. The Constitution and the Victim Protection Act now gives a victim of an offence a right to a fair trial and right to be heard in the trial process to assist the court, and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to public interest. That right of the victim to be heard persists throughout the trial process and continues to the appellate process.

Impact: Victims can now engage their own lawyers to make representations in court on their behalf in addition to the submissions made by the prosecution. This guarantees better prosecution of criminal cases which are sometimes dismissed due to weak or poor prosecution.

3. In re Estate of the Late Wandimu Munyi (Deceased) eKLR

In this case the High Court ruled the law that a child born posthumously to a widow not less than nine months upon the death of the husband cannot be regarded as having survived the deceased and is therefore not entitled to inherit the net intestate estate of a deceased person. The decision was made in a succession dispute between Milka Wanjiku and her step-mother, Rose Wangechi, over the distribution of the estate of Wandimu Munyi, who died in 1985. In the case, Ms. Wangechi wanted three children that she bore after Mr. Munyi's death be listed as beneficiaries of the deceased's estate, including a 22-acre piece of land in Mwea.

Impact: The nine months presupposes that pregnancy is normally carried for nine months; although this is a rebuttable presumption. The rule is supposed to ensure the estate of a deceased person is only distributed among the legitimate beneficiaries but it could end up working against genuine beneficiaries.

4. **Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya [2019] eKLR**

In this case the Outdoor Advertising Association of Kenya applied for an order to quash the directive of the Betting Control and Licensing Board made on 30th April, 2019 and 2nd May, 2019 banning outdoor advertising of gambling, and stating that it must approve any form of advertisement of gambling; and that such an advertisement must contain a warning message about the consequence of gambling, and its addictiveness which must constitute a third of the actual advertisement and be of the same font. The Court declared the directive dated 30th April, 2019 and the communication made on 2nd May, 2019 null and void on grounds that they were tainted with illegality, irrationality, unreasonableness and procedural impropriety.

Impact: The directive was declared null as it sought to outlaw a lawful activity such as advertising and the same was punitive and done without employing the proper procedure. It was considered a way of reining in the betting firms and curbing addiction to betting that has been on the increase recently; however, the approach was wrong. The Board should however look into coming up with well thought out regulations on advertising of gambling and give sufficient notice for implementation by the advertising firms.

5. **Andy Forwarders Services Limited & another v Ochieng, Onyango, Kibet & Ohaga Advocates [2019] eKLR**

This appeal stemmed from a dispute between advocate and client over legal fees payable. The respondent, the law firm of Ochieng' Onyango Kibet and Ohaga Advocates (the advocates) was retained by the appellants, Andy Forwarders Services Limited and Peter Muthoka (the clients) to institute suit against Price Waterhouse Coopers Ltd and four others. The suit was settled out of court but the advocates and the clients were unable to agree on the remuneration payable by the clients for work done in connection with that suit. Consequently, the advocates filed an advocate-client bill of costs in which they sought certification of costs against the clients for the amount of Kshs. 91,214,851.06. The clients contested two items in that bill of costs, namely item 3 on instruction fees, initially claimed at an amount of Kshs. 39,142,500.00 and subsequently amended to Kshs. 13,862,000.00; and item 5 on a getting up fee of Kshs. 4,620,666.67. The total bill of costs was taxed and allowed in the sum of Kshs. 5,623,851.06. The clients were dissatisfied with the decision and appealed. The appeal was however dismissed by the High Court and subsequently the Court of Appeal. The Court held that since the subject matter in the taxation was not

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ascertainable, the taxing master's discretion applies in determining the amount of fees to award.

Impact: If the subject matter of a suit cannot be ascertained, the instruction fee due to the advocate will be determined on the discretion of the taxing master. However, if the subject matter can be ascertained the fees will be based on the value of the subject matter.

6. Peter Muthoka & Another v Ochieng Onyango Kibet & Ohaga Advocates Civil Appeal No. 328 of 2017

This case has similar facts to the case discussed above (Andy Forwarders Services Limited & another v Ochieng, Onyango, Kibet & Ohaga Advocates) with some of the parties being the same. The appeal turned on the question of how a Taxing Master ought to determine for purposes of instruction fees, the value of the subject matter for purposes of an advocate-client bill of costs. In this case the advocates had initially filed a bill of costs of Kshs. 128,649,110.40 but later amended the same to Kshs. 45,762,667.29. In the amended Bill of Costs, the advocates sought instruction fees of Kshs. 19,649,500.00. The Taxing Master taxed the entire Bill at Kshs. 29,226,451.22 and in assessing this figure used the value of the subject matter as Kshs. 1,563,000,000. The Court of Appeal set aside the decision of the High Court which upheld the decision of the taxing master and ordered that the Bill undergo fresh taxation under a different Taxing Master. The Court held that the Taxing Master used the wrong amount of Kshs. 1,563,000,000 as the value of the subject matter when the parties had settled the matter out of court for a different figure which should have been used as the value of the subject matter.

Impact: Unlike the first case, in this case the Court of Appeal held that the instruction fee is pegged on the value of the subject matter which in this case was not found in the pleadings but in the Deed of Settlement entered into by the parties to settle the matter out of court.

7. EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)

In this case a three-judge bench ruled that section 162 (a) (c) of the Penal Code of Kenya on unnatural offences and section 165 of the Penal Code on indecent practices between males was constitutionally compliant and in conformity with the principles of legality. The High Court further held that unless Article 45(2) of the Constitution was amended to recognize same sex unions, it was difficult to agree with the petitioners' argument, that,

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there could be safe nullification of the impugned provisions, whose effect would be to open the door for same sex unions and without further violating article 159 (2) (e) which enjoined the court to protect and promote the purpose and principles of the Constitution.

Impact: It was expected that the High Court would rule to repeal sections 162 and 165 of the Penal Code, however the court declined to do so meaning sexual acts between adults of the same sex still remains criminalized under Kenyan law. The gay and lesbian community in the country is still fighting to have the sections repealed so that they are free to express themselves including in marriage but as it is, Article 45 of the Constitution only recognizes marriage between people of opposite sex and this is seen as a reflection of the will of the people. It is worth noting that most African countries have similar provisions criminalizing homosexual acts since most of these laws were adopted from the colonial regime. This was also seen in the case discussed below in the High Court of Botswana (Letsweletse Motshidiemang v Attorney General) which rendered a different judgement from the Kenyan court.

8. **Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi [2019] Eklr**

In this matter Mr. Francis Moriasi moved the court for orders to quash the directive of the Attorney General stating that the engagement of external lawyers by State Corporations, Constitutional Commissions and Independent Offices require his written approval and concurrence as relates to their terms of reference and fees payable, to which he must first issue a Certificate of Appointment. Furthermore, that no such legal fees shall be processed without the AG's approval and authorization, which unlawfully interferes with the practice of lawyers and that officers who engages legal services without such approval are also threatened with personal liability. The contention was that the AG's directive was not based on any Constitutional or statutory provisions and the said Guidelines were ultra vires (not within his powers), as they attempted to undertake a parallel evaluation process and were contrary to the Advocates Act and the Public Procurement and Asset Disposal Act. The court ruled in favour of the lawyer and quashed the directive of the AG.

Impact: Lawyers are free to be contracted for legal services by state corporations, constitutional commissions and independent offices subject to the applicable procurement laws and the Advocates Remuneration Order on payment of legal fees.

9. **Kenya Airways Limited v Alex Wainaina Mbugua [2019] eKLR Civil Appeal 107 of 2018**

Kenya Airways appealed a decision by the Employment & Labour Relations Court (ELRC) stemming from a suit instituted by one of its former employees, Alex Mbugua, who had been sacked from the Chief Finance Officer (CFO) position. Justice Mbaru of the Labour Court declared that KQ had violated the law when it summarily terminated Mr. Mbugua; and awarded the ex-CFO Ksh.144 million (being 3 years' total salary) and 12 months' salary from the date of his sacking - totaling Kshs. 155, 767,000 (or in the alternative, granted an order to reinstate him to his former job).

The Appeal court agreed with the ELRC on its findings in the matter – it concurred that Mr. Mbugua had been un-procedurally dismissed; however, it faulted the ELRC for the award it gave. Mr. Mbugua had in fact not prayed for the 3 year salary compensation, but it was nevertheless awarded to him as well as the 12 months' salary that he had sought.

The Employment Act, 2007 stipulates that 12 months' salary is the maximum amount payable but the ELRC has over the years, through various judgments, implied that this is the default amount payable to every employee whose contract has been unfairly terminated. The Court of Appeal, in this decision, has clarified that the 12 months' pay is the maximum compensation awardable. Despite mangling the disciplinary processes, the court determined that KQ had indeed lost confidence in its CFO. Therefore, the Appellate Court determined that where the employer has valid reasons for termination but falters on the procedure, the damages should be based on what the employee would have been entitled to if the contract had been properly terminated as opposed to if the contract had not been terminated.

Impact: The Court of Appeal has pronounced itself again on the issue of quantum of awards related to employment matters where the employee was un-procedurally dismissed/terminated i.e. 12 months' salary is the maximum amount. This shall make out-of-court negotiations between employers and ex-employees a lot more straightforward.

10. **LWW (Suing as the Administrator of the estate of BMN) deceased v Charles Githinji [2019] eKLR Civil Case 34 of 2012**

The Plaintiff – whose daughter died after being prescribed medication by the Defendant, a pharmacist, – moved to court to sue the Defendant for negligence over the death, claiming mental & emotional anguish. The Plaintiff had, prior to moving to court, filed a complaint

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with the Medical Practitioners & Dentist Board which had found the complaint to be meritorious. The Board determined that the Defendant had failed to consider the deceased's history thus leading to improper diagnosis & prescription. The Court relied on the Board's findings and using a balance of probabilities, established that the negligence of the Defendant was 'irresistible' and that the Defendant was liable for the death on the basis of negligence. The court awarded the Plaintiff Kshs. 1,050,000 in general damages for pain & suffering, mental & emotional distress, and loss of expectation of life.

Impact: Medical practitioners such as pharmacists are to exercise diligence, care and caution in undertaking treatment since they have represented themselves as possessing the requisite knowledge to provide said treatment. The court, in this matter, has reiterated the duty of practitioners to use their qualifications for the benefit of their patients and those who consult them.

11. Safaricom Sued for Alleged Data Breach of its 11.5 Million Gambling Customers⁷

In June 2019, one Benedict Kabugi instituted a suit at the High Court accusing Safaricom of breaching the privacy of 11.5 million customers by exposing their sports betting history and biodata (it is not clear to whom the data was revealed). The data allegedly had specific details identifying subscribers which includes full names, their phone numbers, identity numbers, passport numbers, gender, age and total amounts gambled. The plaintiff wants Safaricom to pay Kshs 10 million each to the 11.5 million subscribers that were affected.

Impact: The case serves to underscore the importance of data protection. Data collected must only be used for the purpose for which it was obtained and not for any other purpose. It also highlights the importance of the country having data protection laws because it would be hard to prosecute a case on data breach without proper laws for the same.

12. Court freezes contract hiring of civil servants

In July 2019, the Kenya National Union of Nurses (KNUN) obtained orders stopping the Government's plan to employ civil servants on contracts. The matter, which was certified as urgent, was informed by plans by the government to employ staff on contract from July 1, 2019; moving away from the permanent and pensionable terms of employment. The move, according to Public Service Commission (PSC) chairperson Stephen Kirogo, is to increase effectiveness of public service and trim the bulging wage bill. The government planned to put its employees on three-year term contracts and renewal will be subject to a

⁷ Details on this case are scanty. No mainstream media reported on it.

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performance contract. The court issued an order stating that status quo should be maintained until conclusion of the matter in court. The matter is still subsisting in court.

Impact: Employing government workers on contract basis could serve to increase their efficiency as they would be motivated by renewal of the contract however it could also serve to demotivate them as a three-year term could be deemed as too short. Given that unemployment is still a major issue in Kenya this could open loopholes for unemployment for those whose terms are not renewed. It could also lead to increased corruption due to the short stay in office.

International Matters

1. Letsweletse Motshidiemang v Attorney General; LEGABIBO (Amicus Curiae) MAHGB-000591-16 High Court of Botswana at Gaborone

This case was similar to the Kenyan case discussed above (*EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another*). The petitioner sought to have sections 164(a), 164(c) and 165 of the Penal Code (Cap 08:01), Laws of Botswana be declared unconstitutional. These sections just like sections 162 and 165 of the Kenyan Penal Code, criminalised homosexual acts. It was the decision of the Court that sections 164(a); 164(c) and 165 of the Penal Code were declared ultra vires the Constitution, in that they violated section 3 (liberty, privacy and dignity); section 9 (privacy) and section 15 (discrimination). The Court held that there was an ardent need to respect diversity and plurality by being tolerant to minority views and opinions. Personal autonomy on matters of sexual preference and choice had to therefore be respected. Any criminalisation of love or finding fulfilment in love diluted compassion and tolerance.

Impact: Matters of the LGBTIQ are sensitive emerging issues currently globally and various international jurisdictions are decriminalizing homosexuality with Botswana, an African country, being the latest. The case will therefore serve as an important precedent should Kenya decide to also decriminalize homosexuality or where there are pending matters to be determined in courts on the rights of the LGBTIQ community.