LEGAL DIGEST FALL 2019

Preamble

In this last issue of the year, we highlight recently enacted laws including the Data Protection Act 2019; the Finance Act 2019; the Copyright (Amendment) Act 2019; the Division of Revenue Act 2019; and the Small Claims Court Act Rules 2019. It will be noted that some of these laws like the Data Protection Act and the Copyright (Amendment) Act had been pending as Bills in Parliament for a while, and it is a welcome move for them to finally be enacted.

With the enactment of the EU General Data Protection Regulation 2016/679 there has been a focus on data protection and enhancement of data protection laws. This trend has also been felt locally, especially with the introduction of the Huduma Number. There is more debate on the safety of personal data and Kenyans are now more aware of their rights as data subjects. The Data Protection Act is therefore a big step in the right direction and it is hoped that the government will exercise goodwill in implementation of the provisions of the Act. There is need for sensitization of the public on the provisions of the Act so that more people are informed of their rights as well as obligations when it comes to protection of personal data. The liability of Internet Service Providers (ISPs) and the procedure for taking down infringing content online is also set to enhance protection of copyright material online which was long overdue.

From the courts, we have featured legal precedents focusing on employment matters and constitutional petitions. The High Court gave a landmark ruling in the case of *J W M (alias P) v Board of Management O High School & 2 others [2019] eKLR* where the court held that the refusal to admit a student who was of the Rastafarian faith due to her dreadlocks was an infringement on their freedom of religion.

Internationally, the Supreme Court of the United Kingdom also made a ground-breaking ruling on 24 September 2019, in a unanimous decision by eleven justices, where they found that the advice given by UK Prime Minister Boris Johnson to Her Majesty the Queen to prorogue the UK Parliament was both unlawful and void.

A. Acts of Parliament

1. Data Protection Act No. 24 of 2019

The Data Protection Act was passed into law on 8th November, 2019 and comes into force on 25th November, 2019. The main purpose of the Act is to give effect to the right to privacy guaranteed under Article 31 of the Kenyan Constitution. The Act establishes the office of the Data Protection Commissioner ("DPC") to be recruited and employed by the Public Service Commission upon appointment by the President and subject to the approval of the National Assembly. The Act makes it an offence to act as a data processor or data controller unless one is registered with the DPC. Data must be processed in a manner that: upholds the data subject's right to privacy; lawfully; limited to the purpose for which it is collected; accurate and up to date; kept in a form which identifies the data subjects for no longer than is necessary; and not transferred outside Kenya unless as stipulated under the Act. Personal data may only be transferred outside Kenya with the approval of the DPC upon proof of the existence of appropriate safeguards for the data being transferred. Data controllers must employ appropriate security measures to prevent the unauthorized access, disclosure or loss of the personal data collected by them. In the event of breach, they are required to report it to the DPC within 72 hours and to the affected data subjects without undue delay. The Act imposes criminal penalties for non-compliance; there is a general penalty of a fine not exceeding Kenya Shillings Three Million Shillings (Ksh. 3,000,000/-) or imprisonment for a term not exceeding 10 years, or to both.

The Act makes consequential amendments to other laws to ensure data is handled in accordance with the provisions of the Data Protection Act. These laws include the Universities Act, which is amended under Section 13 thereof to provide that any information containing personal data presented by a University to the Commission for University Education shall be handled in accordance with the data protection principles set out in the Data Protection Act. The Act also amends the Employment Act under Section 61 to provide that where an employer maintains a register of employees, the register shall be maintained in accordance with the principles of data protection as set out in the Data Protection Act. Other laws amended are: the Births and Deaths Registration Act; the Capital Markets Act; the IEBC Act; the KNEC Act; the Kenya Citizenship and Immigration Act; the Basic Education Act; the Central Depositories Act; the Anti-money Laundering and Proceeds of Crime Act; the Kenya Information and Communications Act; and the Insolvency Act.

There will be need for the Cabinet Secretary, ICT to formulate regulations to help in implementation of the Act. It should also be noted that a Mr. Okiya Omtata filed a

constitutional petition at the High Court seeking to have the Act declared unconstitutional for having not been considered by the Senate yet the same had provisions affecting the powers and functions of county governments. He also claims that the Act was not subjected to effective public participation. The court declined to issue conservatory orders suspending operationalisation of the Act. There is, however, a possibility that the Act could be declared unconstitutional and annulled. However, for now the same is set to come into effect on 25th November, 2019.

Impact: From the definitions provided in the Act, the University is both a data processor and controller, as it collects data from various people including students, employees, prospective students, contractors and others. The University will therefore need to adhere to the provisions of the Data Protection Act; including registering with the DPC and appointing a Data Protection Officer. The University Data Protection Policy also needs to be amended to be in line with the Data Protection Act. There needs to be sensitization on the Act for all the stakeholders (those involved in data processing and controlling) in the University as well educating data subjects on their rights.

2. The Finance Act No. 23 of 2019

The Act was assented to on 7th November, 2019 after having been previously rejected by the President. The Finance Bill 2019 had initially retained the interest rate cap and the President returned the Bill back to the National Assembly with recommendations to remove the provision on interest rate capping. The Bill was accordingly amended by the National Assembly and passed into law by the President. In the Summer 2019 Legal Digest, we highlighted the main amendments introduced by the Finance Bill, which is now the Finance Act: the Finance Act was enacted to amend the law relating to various taxes and duties and for matters incidental thereto. The Act amends various provisions of the Income Tax Act, the Value Added Tax Act, the Excise Duty Act, the Tax Procedures Act, the Miscellaneous Fees and Levies Act, the Privileges and Immunities Act and the Capital Markets Act. The main change introduced under the Act is the removal of the interest rate cap which had been introduced in 2016 under the Banking Act. The Act repeals Section 33B of the Banking Act which provided that a bank or a financial institution shall set the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the Central Bank Rate set and published by the Central Bank of Kenya. The removal of the cap was among other economic factors, necessitated by the High Court declaring Section 33B of the Banking Act unconstitutional in the case of *Boniface Oduor v Attorney General & Another; Kenya Banker's Association & 2 Others (interested parties) [2019] eKLR.*

Impact: The removal of the cap on interest rates now means that banks can charge a discretionary interest rate. There are some banks that have already increased the interest rates which had since 2016 not gone above 14% p.a. but some banks are now charging as much as 19%. It was believed that the interest rate cap was hurting micro, small and medium enterprises, as they were not able to access credit facilities from banks and this was stifling the economy hence the push to remove the cap. The Finance Act however provides that notwithstanding the repeal of Section 33B, any agreement or arrangement to borrow or lend which was made or entered into, or varied pursuant to the provisions of Section 33B, shall continue to be in force on such terms, including interest rates, and for the duration specified in the agreement or arrangement: Provided that the interest rate chargeable under that agreement or arrangement may be varied downwards. This means the law shall not apply retroactively and banks will not be at liberty to increase interest rates for existing loans. It will be seen whether the repeal of Section 33B will aid in improving the micro, small and medium enterprises and ultimately the economy, as predicted.

3. The Copyright (Amendment) Act No. 20 of 2019

The Act was passed into law on 18th September, 2019 and will come into force on 2nd October, 2019. The Act makes various amendments to the Copyright Act, which amendments are supposed to update provisions of the Copyright Act to take into consideration digital copyright. The Act addresses areas such as applying the principle of fair dealing in computer programs, the possibility of circumvention of technological protection measures in limited circumstances, and the reproduction of materials for the visually impaired by authorized entities without liability for copyright infringement. The Act provides for liability of Internet Service Providers (ISPs) for copyright infringement and a process for taking down infringing online content. The Bill provides new Copyright offences in line with the technological development and proposes new objective criteria for sentencing of convicted offenders based on value of the goods seized and the market price. It also provides for a situation where offences are committed against rights managed by collective management organisations.

Impact: The provisions of the Act will be favourable to the University as there are provisions to include fair dealing of copyright material by educational institutions. The Act now provides that the following will not include copyright infringement: (a) the inclusion in a collection of literary or musical works of not more than one page from the work in question if the collection is designed for use in a school or any university established by or under any written law and includes an acknowledgement of the title and authorship of the work; (b) the reprographic reproduction, for teaching in education institutions the activities of which do

not serve direct or indirect commercial gain, of published articles, other short works or short extracts of works, to the extent justified by the purpose, provided that the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions, and there is no collective licence available, offered by a collective management organisation of which the educational institution should be aware, under which such reproduction can be made; the source of the work reproduced is sufficiently acknowledged; (d) the broadcasting of a work if the broadcast is intended to be used for purposes of systematic instructional activities; (e) the reproduction of a broadcast referred to in the preceding paragraph and the use of that reproduction in a school or any university established by or under any written law for the systematic instructional activities of any such school or university.

4. Division of Revenue Act No. 18 of 2019

The Act was assented to on 17th September, 2019 but is deemed to have come into operation on 1st July, 2019. The main purpose of the Act is to provide for the equitable division of revenue raised nationally between the national and county governments in 2019/20 financial year, and for connected purposes. The Act provides that the revenue raised by the national government in respect of the financial year 2019/20 shall be divided among the national and county governments as set out in the Schedule to the Act and if the actual revenue raised nationally in the financial year falls short of the expected revenue set out in the Schedule, the shortfall shall be borne by the national government.

Impact: The Act was passed into law after a mediated version of the Division of Revenue Bill was agreed upon by the county and national governments. The initial bill drafted by the National Treasury did not succeed after the National Assembly and the Senate failed to agree on the amount to be allocated to the counties. This decision turned the two Houses against each other and there was a stalemate leading to delayed disbursements of funds to the counties which paralyzed some county operations. The houses thereafter came to an understanding and the Bill was signed into law. It is important for counties to receive enough money from the national government because essential services such as health are devolved and if proper allocation is not done such services will suffer and the ordinary citizen will be affected.

5. Small Claims Court Act Rules 2019

The Rules were enacted to better implement the Small Claims Court Act which was enacted in 2016. The Small Claims Court Act provides for filing of claims not exceeding two hundred thousand shillings relating to a contract for sale and supply of goods or services; a contract relating to money held and received; liability in tort in respect of loss or damage caused to any

property or for the delivery or recovery of movable property; compensation for personal injuries; and set-off and counterclaim under any contract. The Act allows litigants to represent themselves in court as opposed to being represented by lawyers: the objective is to reduce backlog in courts caused by technicalities. The Rules provide the manner in which a claim shall be filed in the Small Claims Court; the same shall be done through a Statement of Claim a template of which is provided under the Rules. The person sued is then required to respond to the Statement of Claim by filing a Response to Statement of Claim whose prescribed form is given under the Rules.

Impact: Litigants have better guidelines on filing of claims in the Small Claims Court. Since there will be no legal representation in the court it is important for the public to familiarize themselves with the provisions of the Rules and the Act. The Rules provide the forms required to be filed in court and describe the processes in detail so as to make it easier for the public to file claims.

6. Pension Preservation: Annulment of the Legal Notice No. 88 of 2019

Effective 7th November 2019, Parliament annulled in its entirety Legal Notice No.88 of 2019 through which the Cabinet Secretary, National Treasury had sought to amend Regulation 19, (5) of the Retirement Benefits (Occupational) Regulations to lock up 100% of the employer's contributions until the contributor attains the age of retirement or on any of the grounds set out thereunder. The said Legal Notice had also proposed to include a provision allowing for distribution of reserve funds to exiting members where the scheme maintains a reserve fund and to limit the maximum reserve funds held by a scheme to five (5) percent of the total value of the scheme fund. The effect of this annulment is that ALL the amendments carried in the Legal Notice have been invalidated and will not take effect.

Impact: The effect of the annulment on the preservation rule is that, where a member of a defined contribution scheme leaves employment before attaining the specified early retirement age, he/she may opt to access 100% of his own contributions and 50% of the employer contributions together with the investment income accrued in respect of those contributions. This may, however, lead to a situation where a person withdraws their contributions and suffers in their retirement due to lack of retirement benefits.

B. Bills (proposed laws)

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

As reported in the Summer 2019 Legal Digest the Punguza Mizigo Bill is a draft Bill seeking to amend various provisions of the Constitution of Kenya by popular initiative. The High Court gave the go ahead for the Bill to be debated in county assemblies across the country, which process has been ongoing for the past few months. So far there are 25 counties which have discussed the draft Bill in the county assemblies; 3 of those counties have passed the Bill while 22 have rejected it. 22 county assemblies are yet to discuss the Bill.

Impact: Unless the Bill is passed by a majority of the county assemblies it will not make it to Parliament for discussion and therefore the proponents of the Bill will have to begin the process afresh to reintroduce the same to Parliament. As at the date of publication of this Digest, the Bill had failed to meet the threshold required.

2. The Alcoholic Drinks Control (Amendment) Bill 2019

The principal object of this Bill is to amend the Alcoholic Drinks Control Act, No. 4 of 2010 to empower the Cabinet Secretary to prescribe the hours within which electronic advertisement of alcoholic drinks shall done. This is in order to reduce the exposure to children and other vulnerable persons in the community such as recovering alcoholics of unsuitable content on alcohol consumption.

Impact: If the Bill is passed into law then companies that manufacture alcoholic drinks have to comply. The law may have negative impact on their businesses and so they may challenge the same in court for being discriminatory. The question that still begs is whether the law will have the effect it is intended to have; does it mean if there are prescribed hours for advertisement then children and the vulnerable persons will not access the alcohol if they want to?

C. Hot From The Bench

1. Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & another [2019] eKLR

The petitioner (Bryan Mandila Khaemba) was employed as a Magistrate in Kenya on July 1, 2010. On May 23, 2019, having explained that he was unwell, the petitioner was off duty. However, he later went to court and handled one matter - an application for anticipatory bail for Governor Ferdinand Waititu. The Chief Justice asked him to explain why he handled that matter on a day he was off duty and without the requisite jurisdiction. He stated that he had been unwell in the morning and his condition had improved by the time he went to court. He added that he handled a particular matter after being informed by the relevant Head of the Criminal Registry of an impatient advocate that was on record. The Petitioner was suspended with no pay on grounds of alleged gross misconduct and was to face disciplinary action. After receiving the suspension letter, he explained why the suspension amounted to constructive dismissal from employment. He then went to court seeking various reliefs including damages and reinstatement. The Court held that the withholding of an employee's pay during the period of suspension has no basis and validity under the Employment Act, 2007. The Court ruled that it is unconstitutional for an employer by policy or regulation to impose suspension with nil pay as an administrative or executive interlocutory disciplinary measure pending the finalization of the disciplinary process. The Court considers that it amounts to unfair labour practices in contravention of Article 41 of the Constitution for an employer to impose suspension, more so an indefinite suspension, with nil pay.

Where an employer withholds salary during interdiction, then the employee would be entitled to recover at the end of disciplinary process and there cannot be a notion of suspension with nil pay. The court further found that the petitioner was suspended indefinitely which amounted to constructive termination which amounts to unfair termination. It was also held that the suspension of the petitioner was premature and free from the statutory safeguards that chained the exercise of the delegated power to suspend as was vested in the JSC. It was found that there were no documented procedures for undertaking the business of the Magistrates' Courts at Kiambu.

It was the Court's opinion that for efficient, effective, ethical and accountable delivery of judicial service, it is important that the respondents institute documented procedures of practice and service delivery such as in matters of allocation of files to judicial officers, dealing with

sudden absence of an officer or urgent matter, conferencing procedures where a matter is to be handled by more

than one judicial officer, and such other operational matters. The Court observed that towards safeguarding the independence of the Judiciary, a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. The court ordered inter alia, that the petitioner be paid all salaries, allowances and given all other due contractual and statutory benefits withheld throughout the suspension period and reinstatement of the petitioner to continue in employment without loss of rank, status, and all attached benefits.

Impact: The case sets the precedent as regards suspension of employees and the safeguards that ought to be taken in case of suspension. The safeguards include stipulating the period of time within which the Disciplinary Committee must conclude its investigations and findings in a disciplinary case before it; conditions that may be imposed against an officer who is placed on suspension or interdiction; release to an affected officer such payments or benefits that might have been withheld during interdiction or suspension; and the fate of outstanding work as may have been assigned to an officer who is placed on suspension or interdiction. The same is applicable to all employers and not those in public service. In cases of disciplinary action against employees it is important for offences the employee is accused of to be based on policy and not perceived wrongdoing as in this case where there was no procedure for the allocation of files in the court station.

2. Constitutional Petition No. 425 of 2019 Law Society of Kenya-v-Cabinet Secretary Treasury & Others

In this matter, the Law Society of Kenya filed the Constitutional Petition on 25th October 2019 and obtained several interim orders, key among them being an order compelling the National Treasury to fully implement the duly approved Judiciary budget by drawing the necessary funds due to the Judiciary from the consolidated fund. The orders were obtained and served on the National Treasury and all the other parties on the 29th October 2019. Further to this, the petition came up on 6th November 2019 for mention for directions; and there was extension of the Court Orders pending the hearing and determination of the petition. The matter comes up on 27th November 2019 for further directions.

Impact: The Petition had been filed after it emerged that circuit courts of appeal in Mombasa, Nakuru, Eldoret and Nyeri had been suspended and 53 mobile courts working in remote areas had also stopped working owing to lack of money for vehicles and fuel. This would result in a backlog of cases and the many litigants who had filed cases in the courts to suffer a great

injustice. The interim orders obtained in the matter resulted in the Judiciary's recurrent and development budget for FY 2019/20 being restored in the budget for the half year and being uploaded on IFMIS as approved by the National Assembly.

3. Civil Appeal No. 308 of 2016 Kenya Revenue Authority-v-SKC & 3 Others

In this matter the Respondents (SKC & 3 Others) were engaged by KRA as graduate trainees. On 29th August 2007 they were said to have acted contrary to examination procedures and instructions by cheating during a Continuous Assessment Test. On 18th February, 2008 they were informed that their results had been cancelled and were given a final warning but were allowed to re-sit the test. On 10th September, 2008 they were issued with a notice to show cause why disciplinary action should not be taken against them for cheating as well as removing confiscated unauthorized material from KRA custody. They were later terminated for the offences. They sued KRA claiming they were being punished twice for the same mistake; the court found in their favour and ordered for their reinstatement. KRA appealed against the decision. The Court of Appeal held that the termination was lawful because of the Claimants' misconduct even though there were procedural flaws in the termination therefore the Claimants were not entitled to reinstatement.

Impact: An employee who is guilty of misconduct cannot benefit from their wrongdoing just because there was a flaw in the procedure for termination. The employee can only be entitled to the remedy that would occasion were the proper procedure followed but not to compensation or reinstatement.

4. Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR

A three judge bench of the Court of Appeal ruled that the determinations and recommendations of the Commission on Administrative Justice, also known as Office of the Ombudsman, have the force of law hence are binding on public institutions. The case arose out of a complaint by Eng. Judah Abekah lodged with the Commission on 21st August 2012. According to Eng. Abekah, he was employed as the Director (Enablers and Macro) at the Vision 2030 Delivery Secretariat Board and upon the expiry of his contract after three years, he unsuccessfully applied for a renewal. Subsequently, he appealed to the Minister of Planning, National Development and Vision 2030 who renewed his contract for one year in March 2012. However, upon receiving the letter, the Director General of the Board, Dr. Mugo Kibati, refused to forward the letter to Eng. Abekah insisting that he had to handover and exit the Board. Having unsuccessfully appealed for his matter to be reconsidered by the Board, Eng.

Abekah lodged a complaint with the Commission. The Commission considered the matter extensively and determined that the Board should:-

i. pay Eng. Abekah an equivalent of twelve months' salary and allowances in compensation for the one-year period of the renewed contract;
ii. facilitate Eng. Abekah to access his personal effects from his former office;
iii. and offer an unconditional apology to Eng. Abekah for the mistreatment meted out to him.

The Board failed to implement the determination of the Commission which prompted Eng. Abekah to move to the High Court for enforcement of the decision. The Commission appeared in the matter as an Interested Party. Having considered the matter, the High Court dismissed the case on the basis that the determination of the Commission could not be enforced through judicial review and that the Board was not under any obligation to implement the determination of the Commission. In other words, Judge Weldon Korir ruled that the determination of the Commission did not have the force of law thus not binding. He further ruled that the only remedy available to the Commission upon failure to implement its determinations was to report to the National Assembly for action. Being dissatisfied with the decision of the High Court, the Commission appealed to the Court of Appeal. In their judgment of 26th September 2019, the Court of Appeal found as follows:-

i. the Commission complements the judiciary in providing a platform for redress of administrative injustices;
ii. the enforcement of the determinations or recommendations of the Commission is not limited to reporting to the National Assembly;
iii. the determinations and the recommendations of the Commission have the force of law and can be enforced in a court of law hence they are binding; public institutions and officers have no latitude to choose whether to comply or not in the absence of an appeal;
iv. a beneficiary of the determinations of the Commission can seek enforcement in court through judicial review proceedings; and
v. the determination of the Commission was sound and well founded in law and facts of the matter.

In light of this, the Court proceeded to confirm the determination of the Commission which included payment of 12 months' salary as compensation to Eng. Abekah in lieu of the renewal of the one-year contract which had been declined, allowing him to collect his personal effects from the office and to offering an apology to him for unfair treatment. To this end, the Court of Appeal issued mandamus orders to compel the Board to implement the determination of the Commission. In addition, the Court awarded Eng. Abekah Kshs. 700,000/= as compensation for infringement of his right to fair administrative action.

Impact: Seeking redress from the office of the Ombudsman is as enforceable as seeking redress from the courts when it comes to administrative injustices. The case also demonstrates that arbitrary action such as that of the Director General of the Board is an unfair administrative action and is actionable.

5. Lawyer files complaint against telecommunication companies over expiry of bundles

Lawyer and ICT practitioner Adrian Kamotho sued telecommunication operators for irregularly depriving consumers of their unused data bundles. In a complaint filed before the Communications and Multimedia Appeals Tribunal, Mr. Kamotho said he was aggrieved by the high cost of data and frustrated by the arbitrary expiry of hard-earned bundles. He sought to have the Tribunal order Safaricom, Airtel and Telkom Kenya to furnish him with their current data tariffs, or prominently display the current data tariffs on their websites. Mr. Kamotho argued that Regulations 3 of the Kenya Information and Communications (Consumer Protection) Regulations, 2010, accords customers the right to receive clear and complete information about rates, terms and conditions for available and proposed products and services.

Impact: Following the suit, Safaricom removed the provision of expiry of data bundles which is in the best interest of consumers of data as they can fully utilize what they have bought.

6. Simon Rotich Ruto v Judicial Service Commission & another [2019] eKLR

In this case the Petitioner (Simon Rotich Ruto) was at first interdicted from duty for being habitually drunk during working hours, an action which compromised the petitioner's integrity and capacity to perform judicial duty. The Judicial Service Commission (JSC) considered the medical report which, amongst other things, stated that the petitioner had developed a potentially serious ailment due to excessive intake of alcohol and abuse of substance. JSC was considerate and humane and lifted the interdiction. In lifting the interdiction, the petitioner was sternly warned against involving himself in acts of gross misconduct or conducting himself in a manner that does not portray proper decorum of an officer of the court.

The petitioner was to be transferred to another station (a new environment) to prove himself and his performance was to be monitored for the first six months with a view of ensuring his performance was above board. However, the petitioner was involved in another incident where he was drunk at work and he was subsequently dismissed by JSC after being taken through a disciplinary hearing. The petitioner alleged that the proceedings against him were unprocedural and illegal and sought the court to declare the same unconstitutional. The Court found that the Chief Registrar of the Judiciary who was the 2nd Respondent in the matter, acted ***ultra vires*** the provisions of Sections 16 and 25 of the 3rd Schedule to the Judicial Service Act, 2011 by

issuing the charge and the interdiction against the petitioner as this was the mandate of the Chief Justice.

To the extent that the interdiction was empty of the requisite authority and was ***ultra vires***, null and void ***ab initio***, the petitioner was awarded the withheld pay during the interdiction and as prayed for at **Kshs.1, 275, 501.00.** The Court also declared that Section 23 of the Third Schedule to Judicial Service Act, 2011 purporting that a judicial officer or staff shall not be entitled to reports or recorded reasons for decisions is unconstitutional and inconsistent with Article 47(2), Article

35 and further undermines the principles of the rule of law, transparency and accountability under Article 10 (2) (a) (c) and further contravenes and undermines the principles of public service under Article 232 (1) (e) (f) and (e) of accountability for administrative acts, transparency, and provision to the public of timely, accurate information; all of the Constitution of Kenya, 2010 - and the section is hereby declared unconstitutional, null and void to that extent.

Impact: Employers must provide employees undergoing disciplinary action with reports or recorded reasons for disciplinary verdicts. Employees have the right to access to that information in accordance with the Constitution.

7. Fina Bank Limited v Evangeline Wanjira Njoka [2019] eKLR

The respondent (Evangeline Wanjira Njoka) had a bank account with the appellant (Fina Bank). At some point the respondent wanted to withdraw some money but was refused to do so by the appellant's agents and or managers, notwithstanding that there were adequate funds in the account to meet the demand. The reasons advanced by the appellant were that the account did not have sufficient money and that there were instructions not to operate that account. It was the respondent's case in the lower court that the appellant's action was illegal, unlawful and contrary to public policy which caused the respondent hardship, embarrassment and ridicule, as a result of which she suffered loss and damage for which she held the appellant liable. The claim was therefore that the conduct of the appellant be declared illegal and unlawful, and that the respondent be allowed to operate her account and withdraw the money.

She also claimed general damages for the injury suffered. The appellant denied the respondent's claim and further pleaded that the respondent was a shareholder of a company known as Zingo Investments Limited which obtained a loan from the appellant, upon which the respondent also gave a personal guarantee. The conditions of the said loan were breached by the directors which led to the compromise of the account held in the name of the respondent.

After a full trial, the lower court gave judgment in favour of the respondent and made an award of Kshs. 250,000/= general damages plus costs and interest. The appellant was aggrieved by the said judgment and filed this appeal. In upholding the decision of the lower court, the appellate court found that there was no evidence whatsoever that the respondent was given notice by the appellant of any limited access to her account, for reasons of personal guarantee to secure the indebtedness of Zingo Investments Limited to the appellant. The fiduciary relationship between the appellant and the respondent required that the respondent be informed of any limitation attached to her account. The failure by the appellant to do so was in breach of that relationship.

Impact: Banks must always communicate to customers any action taken on their bank accounts as lack of communication will be deemed as breach of fiduciary duty. In similar fashion, any institution with a similar fiduciary duty such as the University is expected to adhere to the same standards. For example, if any money is deducted from an employee or student the same must be communicated to them first.

8. Kipsiwo Community Self Help Group v Attorney General And 6 Others [2013] eKLR

This was a constitutional petition instituted by a self-help group in the Environment & Land Court alleging various violations based on historical injustices. A preliminary objection was filed on the grounds that the entity that had filed the suit had no such capacity. The Court upheld the preliminary objection and struck out the petition as having been filed by an entity unknown in law and which has no capacity to institute action in its own name.

Impact: The law is clear on the entities that are capable of suing and holding property and entering into contracts. Without an entity being recognized under the law, a transaction or proceedings in court like in the present case can be invalidated or struck out. Consequently, the university must always endeavour to contract with partners whose legal status is clearly established.

9. Republic v Henry Rotich & 2 others [2019] eKLR

This application for revision raised the question whether an Advocate, instructed as such to represent a client in a criminal matter, can take the plea to the charges on behalf of his client. It arises out of the ruling of the Chief Magistrate, Hon. D. Ogoti, in ACEC No. 18, 19, 20 and 21 of 2019 made on 29th July 2019. In its ruling, the plea court determined that it was in order for Mr. Anami, an Advocate of the High Court of Kenya instructed to represent two companies, CMC Di Ravenna Itinera JV and CMC Di Ravenna Itinera JV Kenya Branch which are charged

alongside their co-accused with various offences under the Penal Code and the Anti-corruption and Economic Crimes Act to take plea on the companies' behalf. The Court found that a court may, if satisfied that the person before it is authorized to take plea on behalf of a corporate entity, allow him or her to do so. This requires an inquiry by the court with respect to the position of the person, within the corporate entity, who presents himself as having the authority to take the plea. The Court however, proceeded to hold that the person who can properly represent a corporation in courts is an officer of the corporation, properly authorized and such person would ordinarily be a Director of the corporation. The Court emphasized that it is necessary to have corporations appear and plead by their Directors. It cannot be in the interest of fighting corruption that the alleged corporate accomplices of individual perpetrators of economic crimes remain in the shadows and hide behind legal representatives when such matters come to trial. The plea recorded by the subordinate court with respect to the respondents on the basis of a plea by their defence Counsel was irregular and improper and it was directed that the respondents shall appear before the court to take plea by a Director or Directors of the corporations.

Impact: The court clarified the position in Kenya, unlike some other jurisdictions, that lawyers cannot take plea on behalf of their corporate clients. The case reiterates that the directors of a company are the ones who act on behalf of the company and are thus culpable for any of the company's offences. In other words, accountability and fiduciary duty are the ultimate responsibility for a Board and Boards must own their responsibility.

10. <u>Allan Njau Waiyaki v Eddie Waiyaki Hinga [2019] eKLR</u>

The appellant Allan Njau Waiyaki is the son of the respondent Eddie Waiyaki Hinga and Joyce Waiyaki who are divorced. The appellant was pursuing a Master's programme at the University of Salford, Manchester. The respondent had educated him up to the completion of his undergraduate studies. He obtained a Bachelor's degree in International Studies and Politics. The appellant wanted to complete the Master's programme which he had deferred. His mother paid Kshs. 2,664,775/= towards it. He was left with Kshs. 2,880,000/= to pay. He went to the Children's Court at Milimani seeking that the respondent be ordered to maintain him until he completes his education by paying Kshs.2,880,000/= to cover the entire period of the studies, and he refunds the Kshs.2,660,775/= to the mother. He was basing his claim on parental responsibility owed to him. The appellant had sought extension of parental responsibility. There is no dispute that up to the age of 22 when the appellant completed his undergraduate studies, the respondent had educated and maintained him. The Court held that the respondent had no responsibility to pay the fees for the Master's programme because the appellant had a source of income as a 30-year-old and the appellant went for extended parental

responsibility long after he was 18, and when there was no continuing programme that the respondent was providing, or was responsible for.

Impact: Under Section 28 of the Children's Act, parental responsibility over the child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or on its own motion, that special circumstance exist with regard to the welfare of the child that would necessitate such extension being made. This case makes it clear that a parent is responsible for the education of a child but once the child attains the age of 18 and the programme he had enrolled for has not ended, at that point if the parents stop paying or threaten to stop paying, then the child is entitled to go to the Children's Court to seek an order for extension of parental responsibility to force the parents to see him through the completion of that programme. At the conclusion of that programme, parental responsibility will cease. His parents will now be dealing with an adult who is supposed to fend for himself. This will also apply to guardianship orders in the Children's Court.

11. Tukero ole Kina v Attorney General & another [2019] eKLR

This Petition sought a declaration that Section 66 (1) of the Marriage Act, 2014 which provides that a party to a Civil marriage may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage, is unconstitutional, null and void for running afoul of among other attendant rights and freedoms, Article 27 of the Constitution of Kenya, 2010 on the right to equality and freedom from discrimination. The Petitioner contended that Section 66 (l) of the Marriage Act, 2014 is discriminatory in that it bars the filing of a petition for the separation of the parties or for the dissolution of the marriage under Civil Marriages unless three years have elapsed since the celebration of the marriage whereas under all the other forms of marriages as provided under Sections 65, 69 (l), 70 and 71 of the Marriage Act, 2014 there was no similar bar as to time when to file the same. The Court upheld the petition and made the declaration that Section 66 (1) of the Marriage Act, 2014 is unconstitutional, null and void to the extent that it limits the presentation of a Petition for separation or divorce in a civil marriage until the expiry of three years.

Impact: Parties in civil marriages will now be at liberty to petition for separation or divorce at any time and not have to wait for the expiry of three years as was previously provided. This may see an increase in the number of divorce petitions filed.

12. Okiya Omtata Okoiti v Cabinet Secretary, for Information, Communication and Technology & 2 others; Mahmoud Mohamed Noor & 6 others (Interested Parties) [2019] eKLR

This case is founded on a decision by the Cabinet Secretary, ICT to handpick and appoint the interested parties, as Board members of the Communication Authority of Kenya. The Court agreed with the Petitioner's contention that the said decision is a nullity in law as it is inconsistent with the express provisions of the Constitution and statute which require an open, fair, competitive, merit-based and inclusive process of recruiting and appointing individuals into public offices. Further, the processes should be subjected to public participation, which includes advertising vacancies, publishing lists of all applicants and shortlisted candidates and announcing and holding interviews in the open. The Court issued conservatory orders suspending the appointment of the Board members pending full determination of the matter. The matter is yet to be concluded.

Impact: It is important for board members of any institution or organization whether public or private to be appointed in accordance with laid down procedures. The process of recruitment has to be fair, competitive and inclusive. Board members are responsible for critical decisions affecting an organization so any board member illegally or unprocedurally appointed may make a decision that can easily be vitiated and detrimentally affect the organization.

13. J W M (alias P) v Board of Management O High School & 2 others [2019] eKLR

This case was filed on behalf of a Rastafarian child who had been denied the right to receive education because she wore rastas (dreadlocks) due to religious beliefs. JWM alias P, the Petitioner, is father to MNW a 15-year-old Rastafarian girl who was admitted to Form One at O High School, a public secondary school, for her secondary school education in January 2019. She reported to school, paid the required fees and was duly issued with an admission number, allocated a class and even attended lessons. However, it was soon discovered that MNW keeps rastas which led to her being sent home with a warning not to return to school until she had shaved the rastas. The Petitioner felt that this was discrimination and a violation of MNW's right to education based on her religious beliefs. He filed this petition on behalf of the minor against the Board of Management of O High School, the Ministry of Education and the Attorney General, challenging the School's action. The Court allowed the petition and held that the decision by the School administration of O High School to exclude MNW from school on the basis of her keeping Rastas which manifests her religious beliefs is a violation of her rights guaranteed under Articles 32, 43 and 53 of the Constitution and is therefore unconstitutional, null and void. An order was also issued directing the School administration

of O High School to immediately recall MNW to resume and continue with her education unhindered.

Impact: Educational institutions have to respect the religious freedom of students even though the same may conflict with the rules of the institution. The guaranteed freedoms under the Constitution override the rules and regulations of any place. While the freedom of religion is not absolute, limitation thereof is only to the extent that it is reasonable and justifiable in an open and democratic society. The limitation should, however, take into the account the nature of the right so that enjoyment of one's right is not prejudicial to the rights of others. Most importantly, limitation is acceptable if there is no less restrictive means of achieving the intended limitation.

14. Simon Mwangi Kamau & another v Council of Legal Education & another [2019] eKLR

The petitioners in this case had been admitted at the Kenya School of Law in December 2011 for 2012/2013 academic year. The 1st petitioner did his examinations but did not succeed in all the papers; he did the examination again but failed in one paper. He paid for the examination, sought to defer the paper and in 2016 he wrote to the Respondent Council requesting that he defers the paper to November 2017. The Council responded to his request through a letter dated 3rd November, 2016 advising him he was not eligible to defer the paper and that he could do the paper in 2017 as he was still within the 5 years' statutory timeline. The 2nd petitioner's case is that she did not sit for the examination on medical grounds and deferred sitting her examination in 2013 and that due to deferment her 5-year timeline commenced in 2013 and terminated in November 2017. The 2nd petitioner admitted sitting for her examination in 2013 but was not successful in all her papers, as she failed in one paper, which paper she continued attempting till October 2017 when she sought to apply to sit for the same but the Council for Legal Education declined her application on grounds that her 5 years' timeline had exhausted. The Petitioners contended that the regulations barring them from sitting the exams after 5 years are unconstitutional, as they were amended without public participation and were thus in violation of Article 118 of the Constitution, that the regulations violated their rights to livelihood and by extension their rights to life and that the regulations are discriminatory as they treat the petitioners differently from other candidates admitted in different years. The Court dismissed the petition as it did not find that there was any right of the petitioners that had been violated: the court held that the Regulations of the CLE were applicable to all the students joining KSL and not just to them.

Impact: Regulations governing an institution cannot be said to be discriminatory if they apply to all persons. Just because the regulations do not favour one's position does not mean they are discriminatory.

15. Mwende Maluki Mwinzi v Cabinet Secretary, Ministry of Foreign Affairs & 2 others [2019] eKLR

Under Article 132(2) of the Constitution, the President nominated the petitioner (Mwende Mwinzi) as Ambassador of Kenya to the Republic of Korea. The National Assembly Departmental Committee on Defence and Foreign Relations recommended the petitioner's appointment to the position of Ambassador on condition that she renounces her American citizenship. The Petitioner then filed this suit challenging the said decision of Parliament and contended that to be appointed only on condition, that she renounces her American citizenship is unconstitutional, illegal and void. The Petitioner therefore sought, among other orders, a declaration that once the Petitioner was appointed by the President and vetted by Parliament, her appointment was completed and she is entitled to posting to Korea as Ambassador of Kenya. The Court dismissed the petition on the basis that it was filed prematurely. It opined that public interest strongly militated against the exercise of the court's determination of the issues raised in the petition as the current process of approval, return of the approval to the Appointing authority and appointment is not complete and thus the process should be allowed to be completed. The Court, however, held that citizenship by birth is an alienable right which cannot be taken away from anyone based on Article 14 of the Constitution of Kenya 2010 which clearly pronounces that *"A citizen by birth does not lose citizenship by acquiring the citizenship of another country"*.

Impact: The Court emphasized the fact that a citizen by birth cannot lose the citizenship by acquiring the citizenship of another country. This was an issue in contention when Miguna Miguna, an aide to the former Prime Minister, was deported to Canada on the basis that he had renounced his Kenyan citizenship by acquiring Canadian citizenship.

16. Law Society of Kenya v Attorney General & Central Organization of Trade Unions (Petition No. 4 of 2019)

The Law Society of Kenya (LSK) appealed against the judgment of the Court of Appeal overturning the decision of the High Court – which decision declared certain sections of the Work Injuries Benefits Act 2007 (WIBA) null & void for being unconstitutional.

LSK had gone to the High Court to challenge Sections 7(1),0(4), 16, 21, 52(1)&(3) and 58(2) of WIBA, after a 7 member taskforce appointed by the Attorney General (AG) gazetted amendments to the existing Act in 2008. The Central Organization of Trade Unions (COTU) was later admitted as an interested party.

LSK opposed the aforementioned WIBA sections on the basis that Section 7 would limit the freedom of association; Section 16 would impede employees' rights to a fair trial as would Sections 23 & 25 since those Sections failed to confer equal rights of appeal to both the objector & offender, and Section 58 would apply retrospectively. COTU, in the petition, agreed with the AG and disputed LSK's assertion that the new Sections were unconstitutional.

The Supreme Court, in interpreting the constitutionality of Section 16, acknowledged that the provisions of that Section did not limit a claimant/employee from accessing the courts; the Act merely dictated that the first point of call when making a claim for compensation must be the Directorate (Directorate of Occupational Safety & Health Services (DOSHS). Additionally, to make such an interpretation, Section 16 should be read together with Sections 23 and 52, and not in isolation. Section 21, on the other hand, had never been in contention (the Court of Appeal had quoted a non-existent Section) therefore the Supreme Court dismissed it.

Section 25, mandating a medical examination for an employee claiming compensation, was found to be sound as it strives to ensure equality and non-discrimination/fair reporting.

Section 58 was also pronounced as sound/fair since any claim existing before the Act would be seen to have been lodged properly within WIBA. LSK's interpretation that the Section would take away legal right/process, remove access to courts and take away property rights was incorrect.

All in all, the Supreme Court dismissed the appeal and also for avoidance of doubt, rendered null the decision of the High Court in Mombasa (Juma Nyamawi Ndungo & 5 others v AG 2019 eKLR) that had determined some issues regarding the constitutionality of WIBA provisions. The Supreme Court noted that the decision had been delivered prematurely since this petition had already been lodged before the Supreme Court.

Impact: WIBA and the office of the Director of Occupational Safety & Health Services can now operate optimally after the Supreme Court decision clarified the contested provisions. Employees claiming compensation must first report to the Directorate; but must also be aware that they have recourse (appeals etc.) in courts of law. This includes employees with claims preceding enactment of the Act. Additionally, claimants must undergo the medical tests, as it was ruled that this requirement is not discriminatory.

International Matters

1. **R (on the application of Miller) v the Prime Minister; Cherry and others v Advocate General for Scotland [2019] UKSC 41 Supreme Court of the United Kingdom**

The issue in this matter was whether the advice given by Prime Minister Boris Johnson, to Her Majesty the Queen on 27th or 28th August 2019 that the Parliament of the United Kingdom should be prorogued from a date between 9th and 12th September until 14th October was lawful. The matter had never arisen before but the decision set a future precedent if ever such a matter ever arose. While Parliament is prorogued, neither House can meet, debate and pass legislation. Neither House can debate Government policy. Nor may members of either House ask written or oral questions of Ministers. They may not meet and take evidence in committees. In general, Bills which have not yet completed all their stages are lost and will have to start again from scratch in the next session of Parliament. Parliament does not decide when it should be prorogued. This is a prerogative power exercised by the Crown on the advice of the Privy Council. The Court held that if the power of prorogation was unchecked, then the executive could indefinitely prorogue Parliament, undermining its sovereignty and obligation to make and scrutinize laws. As a result, the Court concluded that the advice to prorogue was unlawful because it frustrated Parliament's constitutional functions.

Impact: The case demonstrates the doctrine of separation of powers. The Prime Minister, being in the Executive arm of government, wished to infringe on the independence of Parliament by advising the Queen to prorogue it and the Supreme Court intervened to rule that the advice was unlawful and void. The independence of the three arms of government is at the core of the rule of law and it is important for one arm, in most cases the Executive, not to unduly interfere with another arm. This precedent may be well applicable in any part of the world, including Kenya where most recently the Judiciary's independence came under threat due to the refusal by the Exchequer to release funds allocated to it.

2. **Constitutional Court in South Africa abolishes delictual claim for adultery**

In this matter the Constitutional Court (CC) of South Africa had to decide whether someone whose spouse commits adultery has a delictual right to claim damages against the third party for injury or insult to self-esteem and loss of comfort and society (consortium) of the spouse. The issue arose from a judgment in the North Gauteng High Court, where a husband successfully sued a third party for damages after the third party had an adulterous affair with his wife. The

High Court awarded the husband R 75 000 for damages with interest and costs. The matter then went on appeal to the Supreme Court of Appeal (SCA) where the issue about whether this type of delictual claim should continue to exist in our law was raised. The SCA determined that based on the changing views of society; there is no longer a place for a delictual action for adultery in a modern legal system. The husband of the adulterous spouse disagreed and brought the matter on appeal to the CC. The CC considered the historical trajectory of such claims, the position in foreign legal systems and the evolving societal norms towards adultery and the institution of marriage. The court found that it could not assess marital fidelity in terms of money and that there was a need to develop this area of law to bring it in line with constitutional values. The CC therefore decided that the innocent spouse's delictual action for adultery against the third party is outdated and unconstitutional.

Impact: This decision is a very progressive one as internationally; the trend has been to eradicate civil claims for adultery. Under the Matrimonial Causes Act Cap 152 Laws of Kenya (now repealed under the Marriage Act 2014) a husband could, on a petition for divorce or for judicial separation, claim damages from any person on the ground of adultery with the wife of the petitioner. The provision is no longer included under the Marriage Act 2014 as the same was deemed outdated and discriminatory against women.

3. UK Government loses supreme court fight over bedroom tax

In the UK there is an under-occupancy penalty, spare room subsidy or bedroom tax as it is more commonly known, which is a welfare reform that sees housing benefits reduced if a tenant has a spare bedroom. It came into effect under the coalition government in 2013 as part of the Welfare Reform Act 2012. The policy was introduced to encourage council tenants living in houses too big for their needs to move to smaller properties, thereby freeing places for large families living in cramped conditions. Recently the UK Supreme Court ruled against the UK government's attempts to force the bedroom tax on 155 partners of people with severe disabilities. The court held that a couple with a one person who is severely disabled need an extra bedroom for medical equipment and it would be unfair to subject them to the bedroom tax.

Impact: The case has potentially wider implications by bolstering the primacy of the UK Human Rights Act against any attempt to enforce secondary legislation, like the bedroom tax and potentially other welfare changes, where it can be shown that to do so would breach human rights. This case also emphasizes that human rights take precedence and that there is need to offer special protection to persons with disability. This precedent may be applied in Kenya in a bid to have persons with disabilities enjoy certain benefits, including tax reliefs.