AN ANALYSIS OF THE LEGAL REGULATION OF OUTSOURCING TRIANGULAR EMPLOYMENT RELATIONSHIPS IN KENYA

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STATEMENT OF ORIGINAL AUTHORSHIP

I, **Melissa Wanjiku Muindi,** declare that this thesis is my original work and that it has not been presented and will not be presented to any other university for a similar or any other degree award. To the best of my knowledge and belief, this research thesis contains no material previously published or written by another person except where due reference is made.

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DEDICATION

To my mother, Dr Wachuka Gathigia Njoroge and my father, the late Dr Steve Njoroge Gachie. You inspired me to reach for the skies in many areas, and completing this thesis is one of them. All this is due to your belief in me.

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LIST OF STATUTES

Basic Education Act 2013

Children Act 2001

Constitution of Kenya 2010

Counter-Trafficking in Persons Act 2010

Employment Act 2007

Employment and Labour Relations Court Act 2011

Interpretation and General Provisions Act 1956

Labour Institutions Act 2007

Labour Institutions (Private Employment Agencies) Regulations, 2016

Labour Relations Act 2007

National Hospital Insurance Fund Act 1998

National Social Security Fund Act 2013

Occupational Safety and Health Act 2007

Occupiers Liability Act 1963

Regulation of Wages (General) (Amendment) Order, 2013

Regulation of Wages (General) Order (Labour Institutions Act, Sub Leg)

Retirement Benefits Act 1997

Science, Technology and Innovation Act 2013

Special Economic Zones Act 2015

Work Injury Benefits Act 2007

LIST OF INTERNATIONAL INSTRUMENTS

ILO Instruments

Abolition of Forced Labour Convention (ILO C105) 1957

Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia) 1944

Discrimination (Employment and Occupation) Convention (ILO C111) 1958

Domestic Workers Convention (ILO C189) 2011

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Employment Promotion and Protection against Unemployment Convention (ILO C168) 1988

Employment Relationship Recommendation (ILO R198) 2006

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Fee-Charging Employment Agencies Convention (Revised) (ILO C096) 1949

Forced Labour Convention (ILO C029) 1930

Freedom of Association and Protection of the Right to Organise Convention (ILO C087) 1948

Holidays with Pay Convention (Revised) (ILO C132) 1970

Home Work Convention (ILO C177) 1996

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Hours of Work (Industry) Convention (ILO C001) 1919

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International Labour Organization Constitution 1944

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Minimum Age Convention (ILO C138) 1973

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Part-Time Work Recommendation (ILO R182) 1994

Private Employment Agencies Convention (ILO C181) 1997

Proposed Convention concerning Contract Labour 1998

Protection of Wages Convention (ILO C095) 1949

Right to Organise and Collective Bargaining Convention (ILO C098) 1949

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Termination of Employment Recommendation (ILO R166) 1982

Unemployment Convention (ILO C002) 1919

Working Conditions (Hotels and Restaurants) Convention (ILO C172) 1991

Workmen's Compensation (Accidents) Convention (ILO C017) 1925

Worst Forms of Child Labour Convention (ILO C182) 1999

United Nations instruments

International Covenant on Civil and Political Rights 1966

International Covenant on Economic, Social and Cultural Rights 1966

Universal Declaration of Human Rights 1948

Statutes from other jurisdictions

Act of the Republic of Indonesia Concerning Manpower 2003

Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers 2002 (COM/2002/0701 final - COD 2002/0072)

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Constitution of the Republic of Ecuador 2008

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work 1997 [31997L0081]

German Act Regulating a General Minimum Wage (Mindestlohngesetz – MiLoG) 2014

Korean Act on the Protection, etc. of Fixed-Term and Part-Time Employees 2006

South Africa Basic Conditions of Employment Act 1997

Title VII of the Civil Rights Act of 1964 (United States of America)

United Kingdom National Minimum Wage Act 1998

United Kingdom's Transfer of Undertakings (Protection of Employment) Regulations 2006

LIST OF CASES

Kenyan cases

Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016] eKLR (Court of Appeal)

Aviation and Allied Workers Union v Kenya Airways Limited & 3 others [2012] eKLR (Industrial Court)

Bakari Ali Mbega v Kwale International Sugar Company [2019] eKLR (ELRC)

Bakery Confectionery Food Manufacturing and Allied Workers Union (K) v Kenafric Industries Limited [2019] eKLR (ELRC)

Bernard Wanjohi Muriuki v Kirinyaga Water And Sanitation Company Limited & another [2012] eKLR (Industrial Court)

Charles Getuno Omwenga v Henderson Magare t/a Henderson Magare Timber Yard [2015] eKLR (Industrial Court)

Child Welfare Society of Kenya v Margaret Bwire and Isiolo Children's Home unreported (Nairobi Industrial Court Cause Number 684 of 2011)

Chitsaka Rungwa Charo v Rea Vipingo Plantations Ltd [2017] eKLR (ELRC)

Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] eKLR (Industrial Court)

Elizabeth Washeke & 62 Others vs Airtel Networks (K) Limited & Another [2013] eKLR (Industrial Court)

Everret Aviation Limited v Kenya Revenue Authority (Through The Commissioner of Domestic Taxes) [2013] eKLR (High Court)

Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 6 others [2014] eKLR (Industrial Court)

George Kamau Ndiritu & another v Intercontinental Hotel [2015] eKLR (ELRC)

Harrison Karani & 19 others v Insight Management Consultants Limited [2016] eKLR (Industrial Court)

James Mchovoti Nalisi v Eclipse International Limited [2019] eKLR (ELRC)

Javan Were Mbango v H Young & Co (EA) Ltd [2012] eKLR (Industrial Court)

Cases from other jurisdictions

LIST OF ABBREVIATIONS AND ACRONYMS

AAWU	Aviation and Allied Workers Union
BCFMAW Union	Bakery Confectionery Food Manufacturing and Allied Workers Union
BPO	Business process outsourcing
CAS	Committee on the Application of Standards
CBA	Collective bargaining agreement
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CP rights	Civil-Political rights
CS	Cabinet Secretary
ELRC	Employment and Labour Relations Court
ESC rights	Economic, Social and Cultural rights
EU	European Union
HRM	Human Resource Management
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Information Communication and Technology
IFMIS	Integrated Financial Management Information Systems
ILO	International Labour Organization
KALRO	Kenya Agricultural and Livestock Research Organization
KEWU	Kenya Engineering Workers Union
KHAWU	Kenya Hotels and Allied Workers Union
KIRIWASCO	Kirinyaga Water and Sanitation Company

KPAWU	Kenya Plantation and Agricultural Workers Union
KPO	Knowledge Process Outsourcing
KPOWU	Kenya Petroleum Oil Workers Union
KRA	Kenya Revenue Authority
KUCFAW	Kenya Union of Commercial Food and Allied Workers
LSP	Labour and Social Protection
NACOSTI	National Commission for Science, Technology and Innovation
NAWASSCO	Nakuru Water and Sanitation Services Company
NSE	Non-Standard Employment
NSW	Non-Standard forms of Work
OSH	Occupational Safety and Health
OSHA	Occupational Safety and Health Act
PAYE	Pay As You Earn
SDG	Sustainable Development Goal
SER	Standard Employment Relationship
STEP	Strategies and Tools against social Exclusion and Poverty
TER	Triangular Employment Relationship
Tuskys	Tusker Mattresses Limited
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
WIBA	Work Injury Benefits Act

LIST OF FIGURES

LIST OF TABLES

TABLE OF CONTENTS

ABSTRACT

In Kenya, the current legislative framework on employment focuses on the SER and does not adequately cater for NSWs; it is unable to deal with many of the challenges faced by outsourced workers. Employment laws are framed with the SER in mind and envisage direct employment relationships with a single employer. They are difficult to apply to outsourcing TERs. The splitting and sharing of employment functions between the outsourcing company and the client enterprise often affect the enforcement of outsourced workers' rights and their job security. Further, even though outsourced workers may perform duties similar to directly employed workers of the client enterprise, they may experience differential treatment at the workplace.

The overall objective of this study was to analyze the legal regulation of outsourcing triangular employment relationships in Kenya to find out whether it is sufficient to protect the rights of outsourced workers in order to identify possible interventions that can enhance the protection of outsourced workers. To achieve the general objective, this study specifically investigated the nature of outsourcing triangular employment relationships based on the experiences of outsourced workers in Kenya. Second, it assessed the suitability of the current legal employment framework in protecting outsourced workers, in light of the peculiarities of outsourcing triangular employment relationships. Third, the study reviewed the International Labour Organization's interventions towards the regulation of outsourcing triangular employment relationships. Finally, it identified the best practices that can be adopted to enhance the regulation of outsourcing triangular employment relationships in Kenya

This study tested and proved the hypothesis that clarity on the employment status, employment rights and job security of outsourced workers will enhance the legal regulation of outsourcing triangular employment relationships in Kenya. It was found that the perceived advantages and disadvantages of outsourcing arrangements varied depending on whether the workers were basic-skilled outsourced workers, professionally-skilled outsourced workers or convenience short-term outsourced workers. Further, outsourced workers felt inadequately integrated into their workplaces and experienced varying levels of job security because they relate with two authority figures. It was also found that the law classifies outsourced workers as employees of the outsourcing company, but it does not provide for the relationship between the outsourced workers and the client enterprise.

This study makes a valuable contribution to the existing literature by addressing the precarious nature of outsourcing TERs due to employee misclassification and problems related to attribution of employer status. It also specifically addresses the employment-related challenges experienced by outsourced workers in Kenya. The study recommends the adoption of joint and several liability, as well as measures on equality of treatment through regulation of outsourced workers' wages and the full incorporation of worker status in the employment laws. It also recommends the adoption of comprehensive legislation to protect outsourced workers.

CHAPTER ONE

THE CHALLENGES OF THE LEGAL REGULATION OF OUTSOURCING TRIANGULAR EMPLOYMENT RELATIONSHIPS IN KENYA

1.1 BACKGROUND TO THE STUDY

The world of labour is continuously evolving. Due to the competitiveness of the business world, employers are continuously coming up with new and innovative ways to stay ahead of their competitors and to reduce some of the employment-related risks and costs. In a bid to save money and avoid restrictive legislation, new employment arrangements, collectively classified as non-standard forms of work (NSW), are on the rise.[1] The term NSW was coined to differentiate these arrangements from the standard employment relationship (SER).

Globally, no legislation defines the SER; it is a social, political and historical construct used to carve out subordinate work from self-employment.[2] The traditional view is that the SER entails an open-ended contractual relationship, in which there is a vertical power relationship between a single employer and employee, and also a mutuality of obligations that sustains the relationship for a long duration of time.[3] However, beneath the constructs of employment and self-employment

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[1] ILO, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (PRODOC 2016) 7.
[2] Valeria Pulignano and others, *Non-Standard Work, Self-Employment and Precariousness* (Frontiers Media SA 2021) 42.
[3] Günther Schmid, 'Non-Standard Employment and Labour Force Participation: A Comparative View of the Recent Development in Europe' [2010] IZA Discussion Paper No. 5087.

lies an ambivalent and complex reality that may require a shift of focus towards a greater understanding and regulation of the grey zones created by NSWs.[4]

In scholarly literature, the term NSW also refers to atypical work, atypical employment, or non-standard employment (NSE) and is contrasted to typical or standard work.[5] The term 'atypical' may be used to denote something that is "unusual, irregular, and infrequent."[6] Hence, atypical work is associated with employment arrangements that deviate, in one way or another, from the concept of an open-ended, continuous and permanent employment relationship between a worker and a single direct employer.[7] Consequently, atypical work is often associated with working arrangements that are characteristically flexible and not permanent. Even though the terms NSW, NSE and atypical work can be used interchangeably, for purposes of consistency this study refers to NSW.

Historically, the preference for the SER over NSWs was that the SER was the norm and led to 'good' jobs which effectively categorized NSW as 'bad' jobs.[8] The SER epitomized security and stability which are ideals worth seeking, hence the categorization as good jobs. Over time

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[4] Pulignano and others (n 2) 42.
[5] Carole Lang, Isabelle Schömann and Stefan Clauwaert, 'Atypical Forms of Employment Contracts in Times of Crisis' [2013] ETUI 5.
[6] Peter Cappelli and JR Keller, 'Classifying Work in the New Economy' (2013) 38 Academy of Management Review 575.
[7] Cristina Tealdi, 'Typical and Atypical Employment Contracts: The Case of Italy' [2011] MPRA 2.
[8] Arne L Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s-2000s* (Russell Sage Foundation 2011).

workplace dynamics have blurred the distinction between good and bad jobs and seemingly watered down this biased categorization.[9] An example to demonstrate this is that a part-time computer programmer may earn more and have better social integration than a full-time employee engaged as a cleaner. Hence, some of the considerations which in the past were used to categorize jobs as good and bad may no longer be useful. Bearing this in mind, even though the SER takes the lion's share of the labour market, the changing attitudes towards NSWs have led to their increased uptake and thus NSWs warrant scholarly attention.[10]

Outsourcing is an NSW because it involves a labour intermediary: an outsourcing company. This deviates from the SER because the latter involves direct employment arrangements between two entities: an employer and an employee. In Kenya, these companies are sometimes referred to as bureaus, recruitment companies, human resource management (HRM) companies or HRM consultancy firms. For purposes of consistency, this study adopts the use of the term 'outsourcing company.'

The outsourcing company hires workers (hereinafter referred to as 'outsourced workers') and this creates an employment relationship between them. The outsourcing company signs a service contract with another organization, its client, in which the outsourced workers are availed to the

[9] Debra Osnowitz, *Freelancing Expertise: Contract Professionals in the New Economy* (Cornell University Press 2010) 10.
[10] Jan Buelens and John Pearson (eds), *Standard Work: An Anachronism?* (Intersentia 2012) 6.

other organization (hereinafter referred to as 'client enterprise'). This creates a multi-party employment relationship. In academic circles, this arrangement is also referred to as a triangular employment relationship (TER),[11] which is the terminology that this study adopts.

Outsourcing, as an employment model, is a growing phenomenon. In 1996, the global estimate of the number of outsourced workers was 3.9 million workers, but by the year 2006, this number had increased to 8.9 million workers employed through approximately 67,500 outsourcing companies.[12] The countries in which outsourcing was highest were the United States of America (2.96 million outsourced workers), the United Kingdom (1.265 million) and Japan (1.2 million).[13] Within a decade, the global number of outsourced workers has grown exponentially to 71.9 million workers, with the lead countries being India (27.8 million), the United States of America (14.6 million), Europe (11.32 million) and China (8.1 million).[14] And the numbers keep rising over the years. This warrants scholarly attention.

[11] BPS Van Eck, 'Temporary Employment Services (Labour Brokers) in South Africa and Namibia' (2010) 13 PER: Potchefstroomse Elektroniese Regsblad 107; Robert Buch, Bård Kuvaas and Anders Dysvik, 'Dual Support in Contract Workers' Triangular Employment Relationships' (2010) 77 Journal of Vocational Behavior 93; Guy Davidov, 'Joint Employer Status in Triangular Employment Relationships' (2004) 42 British Journal of Industrial Relations 727.
[12] International Confederation of Private Employment Services, 'The Agency Work Industry around the World: Main Statistics' (CIETT 2007) 6.
[13] International Confederation of Private Employment Services (n 12) 20.
[14] International Confederation of Private Employment Services, 'Annual Economic Report' (CIETT 2016).

The growth of outsourcing may be attributed to socio-economic reasons, as well as regulatory reasons.[15] From a regulatory point of view, sometimes the law either directly or inadvertently encourages NSW. This may be through the creation of incentives for employers to use such employment models. Alternatively, there may be grey areas or gaps in the legal framework which allow for the growth of NSWs.[16] In other words, the growth of outsourcing may be attributed to the absence or the inadequacy of the labour law legislative and regulatory frameworks.[17]

From a socio-economic point of view, outsourcing companies enable companies to adapt to labour market challenges, including digitization, globalization and the changing view of work.[18] Outsourcing is useful as a cost-cutting measure, it increases flexibility and enables companies to better embrace technological advancements.[19] In addition, outsourcing can help companies achieve a competitive advantage.[20]

Outsourcing is an employment model that allows organizations to engage third parties who take on certain employment aspects such as recruitment, selection, payroll, appraisal and training of workers. These roles that are played by outsourcing companies would previously have been

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[15] ILO, *Non-Standard Employment around the World* (n 1) 2.
[16] ILO, *Non-Standard Employment around the World* (n 1) 2–3.
[17] Sandra E Gleason, *The Shadow Workforce: Perspectives on Contingent Work in the United States, Japan, and Europe* (WE Upjohn Institute 2006) 8.
[18] International Confederation of Private Employment Services (n 14).
[19] ILO, *Non-Standard Employment around the World* (n 1) 157–164.
[20] Holger Görg and Aoife Hanley, 'Services Outsourcing and Innovation: An Empirical Investigation' (2011) 49 Economic Inquiry 321.

undertaken by in-house human resource managers. Further, some of the positive outcomes of outsourcing that are available to both the client enterprises and the workers include improved job matching between the demands of the client enterprises and the supply of skills in the labour market.[21] Another benefit that outsourced workers may experience is a potential transition to permanent employment under SER arrangements.[22] Outsourcing may be beneficial towards increasing employability firstly, by reducing unemployment and secondly, by offering a bridge to permanent employment opportunities.

It has been noted with concern that outsourcing generally places workers in positions of perceived detachment from the client enterprises in which they work.[23] This detachment can lead to feelings of discrimination due to the disparate access to training and career development opportunities, the differences in pay and benefits between outsourced workers and directly employed workers, and the lack of organizational identification.[24] These feelings of discrimination may be even more pronounced when the outsourced workers confound the day-to-day control that the client enterprises with legal control and thus perceive the client enterprise to be their employer.

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[21] Joakim Hveem, 'Are Temporary Work Agencies Stepping Stones into Regular Employment?' (2013) 2 IZA Journal of Migration 21.
[22] Marloes de Graaf-Zijl, Gerard J Van den Berg and Arjan Heyma, 'Stepping Stones for the Unemployed: The Effect of Temporary Jobs on the Duration until (Regular) Work' (2011) 24 Journal of Population Economics 107.
[23] Matthew Bidwell and others, 'The Employment Relationship and Inequality: How and Why Changes in Employment Practices Are Reshaping Rewards in Organizations' (2013) 7 Academy of Management Annals 61.
[24] Bidwell and others (n 23).

Sometimes confusion arises among the outsourced workers as to their employment status because they relate with two authority figures, namely the client enterprise and the outsourcing company. Outsourced workers usually provide their services from the premises of the client enterprise. Confusion may arise in instances where they are supervised by the management of the client enterprise rather than the outsourcing company and this arrangement has continued for a long time. It may be heightened in cases where the workers were previously employees of the client enterprise who were then 'transferred' to the outsourcing company but yet they continue working at the premises of the client enterprise, carrying out the same tasks.[25]

Relatedly, sometimes client enterprises may adopt outsourcing as an employment model to alter workers' employment terms and conditions of service. This may be witnessed, for example, when permanent employees of the client enterprise are 'transferred' to the outsourcing company, and the outsourcing company employs them on casual, temporary or contractual terms.[26] This obscures the workers' employment protections which they would have been entitled to under the SER. Further, sometimes outsourcing arrangements classify the outsourced workers as independent contractors thus denying the employment relationship between the parties. This effectively excludes outsourced workers from labour law protections because independent contractors operate under a contract for the provision of services instead of a contract of service.[27]

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[25] *Harrison Karani & 19 others v Insight Management Consultants Limited* [2016] eKLR (Industrial Court).
[26] *Harrison Karani v Insight Management* (n 25).
[27] Van Eck (n 11).

In Kenya, the current employment legislative framework focuses predominantly on the SER and makes little reference to NSW.[28] Kenya has a growing outsourcing sector which began in the early 2000s.[29] As of the year 2007, the outsourcing sector comprised an estimated 30 outsourcing companies and by the year 2009, the number had increased to around 50 registered outsourcing companies.[30] As of 2012, it was estimated that there were around 7,000 outsourced workers, and it was anticipated that these numbers would rise due to Kenya's Vision 2030.[31] The original design of Kenya's outsourcing strategy was aimed at attracting foreign clientele through offshoring, but as of the year 2013 when it was realized that this would not materialize as planned, the focus shifted to attracting Kenyan clientele.[32] The policy change was due to the realization that there is sufficient work locally to sustain the industry. Currently, there are now 118 registered outsourcing companies in Kenya.[33]

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[28] See generally Employment Act 2007.
[29] Laura Mann and Mark Graham, 'The Domestic Turn: Business Process Outsourcing and the Growing Automation of Kenyan Organisations' (2016) 52 The Journal of Development Studies 530, 532.
[30] Mann and Graham (n 29) 533; Moses Kemibaro, 'Outsourcing Boom Coming to Kenya.' (*Moses Kemibaro*, 11 April 2009) <https://moseskemibaro.com/2009/04/11/outsourcing-boom-coming-to-kenya/> accessed 16 March 2021.
[31] Agnes Wausi, Robert Mgendi and Rosemary Ngwenyi, 'Labour Market Analysis and Business Process Outsourcing in Kenya: Poverty Reduction through Information and Digital Employment Initiative' (2013) Research Report 2013 No 3 10; XN Iraki, 'Outsourcing and Vision 2030: An Analysis into Kenya's New Economic Frontier' (2013) 7 African Journal of Business Management 1218, 1221.
[32] Mann and Graham (n 29) 535.
[33] Chege Purity Nyambura, Jesse Maina Kinyua and Kirema Nkanata Mburugu, 'The Influence of Political Environment on the Performance of Business Process Outsourcing Sector in Kenya' (2020) 6 The Journal of Social Sciences Research 770.

At common law, the exercise of control over employees is the predominant character in the determination of who an employer is, and in the attribution of employment status.[34] In outsourcing arrangements, the client enterprise exercises day-to-day control over the outsourced workers though it is not considered to be their employer, and legal control is ascribed to the outsourcing company.

Based on this day-to-day control over the outsourced workers, where the outsourcing agreement is silent, should the law step in to impose legal obligations on the client enterprise concerning outsourced workers? Further, could there be shared vicarious liability between the outsourcing company and the client enterprise for tortious actions of the outsourced workers, especially where the workers are working at their premises and are perceived by third parties to be employees of the client enterprise? These are important issues worth evaluating because this uncertainty can lead to challenges at the workplace, for the outsourced workers themselves, as well as for third parties with whom they interact.

Another challenge relates to the job security of the outsourced workers. The legal framework on employment has no means of redress for 'dismissals' which occur when the client enterprise simply instructs the outsourcing company to take back the outsourced worker or the client enterprise asks the outsourced worker to leave and thereafter prevents the worker from accessing

[34] ILO, *Non-Standard Employment around the World* (n 1) 263.

the premises.[35] In addition, where the outsourced worker's employment contract is hinged upon the continued existence of the service contract, the outsourced workers may unceremoniously find themselves "out of a job" as soon as the service contract is terminated.[36]

Technically, there are no strict rules of employment that prohibit client enterprises or outsourcing companies from taking such steps. This does not amount to the resignation of the worker and neither does it amount to dismissal as envisaged by the current laws on termination of employment. Nevertheless, the outsourced workers' services have been terminated. And depending on the wording of the outsourcing agreement, such an outsourced worker may be unable to seek redress from both the client enterprise and the outsourcing company.

In addition, the perceived detachment of outsourced workers from the client enterprise often comes with differential treatment between outsourced workers and directly employed workers of the client enterprises. [37] This may be akin to discrimination and often puts outsourced workers in a precarious position. Notably, even where outsourced workers and directly employed workers provide services on the same premises, the two categories of workers have different employers. Nonetheless, it is essential to have minimum standards for the treatment of all categories of workers, be they in the SER or NSW.

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[35] Van Eck (n 11).
[36] Van Eck (n 11).
[37] Bidwell and others (n 23).

Another challenge relates to its impact on trade unions' acceptance of outsourcing. Despite outsourcing's positive impact on the labour market, its steady rise in Kenya has been met with fierce opposition from trade union officials, who perceive that the practice threatens their bargaining power.[38] They have sharply reproached the practice, equating it to an indirect form of slavery.[39] Though this criticism is unduly harsh, it depicts how trade unions in Kenya perceive outsourcing as a negative practice that they feel should be fought against.

Sometimes these biases are passed on to employees, who then resist company efforts to adopt outsourcing as a business practice.[40] These negative attitudes can be seen in the increased litigation through trade unions on matters relating to outsourcing.[41] Consequently, this study sheds light on the nature of outsourcing TERs and possible ways in which the regulation of outsourcing can be enhanced to protect outsourced workers. It is hoped that the ripple effect will be felt in a reduction of litigation and trade disputes in which outsourcing is an underlying issue.

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[38] See, for instance, *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union* [2016] eKLR (Court of Appeal).
[39] Olive Burrows, 'Atwoli Speaks Strongly against Outsourcing Workers' (*Capital News*, 1 May 2016) <https://www.capitalfm.co.ke/news/2016/05/atwoli-speaks-strongly-outsourcing-workers/> accessed 19 March 2017.
[40] See, for instance, *Kenya Union of Commercial Food and Allied Workers v Tusker Mattresses Limited* [2017] eKLR (ELRC).
[41] See for instance, *Abyssinia v KEWU* (n 38); *Kenya Petroleum Oil Workers Union v Giefcon Limited & another* [2015] eKLR (Industrial Court); *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others* [2012] eKLR (Industrial Court).

This study has addressed these gaps by evaluating the nature of outsourcing TERs and the challenges faced due to the inadequacy of the legislative framework in Kenya. Finally, after identifying best practices from other jurisdictions, this study proposes recommendations that would enhance the protection of outsourced workers in Kenya.

1.2 STATEMENT OF THE PROBLEM

The current legal framework on employment in Kenya focuses on the standard employment relationship and makes little reference to non-standard forms of work. It is thus unable to deal with the challenges faced by outsourced workers in Kenya. The employment laws are framed with the SER in mind and envisage direct employment relationships with a single employer. This means that employment laws are difficult to apply to outsourcing arrangements. For outsourcing arrangements, the splitting and sharing of employment functions between the outsourcing company and the client enterprise create a lacuna that has important implications for the enforcement of outsourced workers' rights. In addition, outsourced workers often face challenges relating to job security.

Further, even though outsourced workers may be engaged in work that is similar to that carried out by directly employed workers of the client enterprise, they may be treated differently at the workplace in terms of training opportunities, benefits, pay and allowances, and be exposed to comparatively worse working conditions. The main objective of this study was to analyze the legal regulation of outsourcing triangular employment relationships in Kenya to find out whether it is

sufficient to protect the rights of outsourced workers in order to identify possible interventions that can enhance the protection of outsourced workers.

1.3 OBJECTIVES OF THE STUDY

1.3.1 General Objective

The overall objective of this study was to analyze the legal regulation of outsourcing triangular employment relationships in Kenya to find out whether it is sufficient to protect the rights of outsourced workers in order to identify possible interventions that can enhance the protection of outsourced workers.

1.3.2 Specific Objectives

To achieve the main objective, this study specifically sought:

1. To investigate the nature of outsourcing triangular employment relationships based on the experiences of outsourced workers in Kenya.
2. To assess the suitability of the current legal employment framework in protecting outsourced workers, in light of the peculiarities of outsourcing triangular employment relationships.
3. To review the International Labour Organization's interventions towards the regulation of outsourcing triangular employment relationships.
4. To identify best practices that can be adopted to enhance the regulation of outsourcing triangular employment relationships in Kenya.

1.4 RESEARCH QUESTIONS

This study sought to answer the following research questions:

1. What is peculiar and unique about outsourcing triangular employment relationships as depicted in the lived experiences of outsourced workers in Kenya?
2. How suitable is the current legal employment framework in Kenya in protecting outsourced workers, in light of the peculiarities of triangular employment relationships?
3. To what extent does Kenya comply with the International Labour Organization's framework on the legal regulation of outsourcing triangular employment relationships?
4. What best practices can be adopted from other jurisdictions to enhance the regulation of outsourcing triangular employment relationships in Kenya?

1.5 HYPOTHESIS

This study tested and proved the following hypothesis:

Clarity on the employment status, employment rights and job security of outsourced workers will enhance the legal regulation of outsourcing triangular employment relationships in Kenya.

1.6 SCOPE AND LIMITATION OF THE STUDY

NSWs are a heterogeneous amalgamation of work arrangements that can be divided into four broad categories based on how they deviate from the SER, namely, temporary employment, part-time

work, disguised employment and TERs.[42] Although they are all broadly classified as NSWs, scholars argue that their distinctions warrant individual attention in terms of scholarly research so that each category is investigated independently, rather than lumping them up together.[43] Such individual consideration avoids the conceptual hurdles experienced by failing to take into account the inherent distinctions that each category bears to the SER. Bearing this in mind, this study focuses on only one of these NSWs, namely TERs. To further narrow down the scope of this study, only outsourcing is studied.

It is recognized that an evaluation of all NSWs would be useful in answering the question of whether labour laws still meet their intended objective of effectively protecting the seemingly-vulnerable category of persons known as 'the worker'. It is, however, not possible to undertake such a venture within the constraints of a doctoral study. Nevertheless, this study serves as a useful piece of the puzzle. A limitation brought about by the narrowing of the scope in this manner is that though the findings of this study may be extrapolated to other TERs, they may not apply to the other NSWs which only involve two parties.

One limitation of this study was that in March 2020, as soon as the researcher was granted a research license by the National Commission for Science, Technology and Innovation

[42] ILO, *Non-Standard Employment around the World* (n 1).
[43] Cappelli and Keller (n 6).

(NACOSTI), there was an outbreak of the novel coronavirus (covid-19). The methodology was thus modified to the collection of narratives by telephone interviews, because face-to-face contact may have caused potential health risks.

1.7 JUSTIFICATION

The current employment legislative framework in Kenya focuses predominantly on the SER and makes little reference to NSWs such as outsourcing.[44] Bearing in mind the increasing popularity of outsourcing and the challenges faced by outsourced workers due to the peculiar nature of outsourcing TERs, there is a need for increased scholarly attention on the possible legal regulation of outsourcing TERs in Kenya. This would ensure the proper and fair regulation of outsourcing TERs, primarily for the benefit of the outsourced workers. The findings of this study provide empirical evidence of the nature of outsourcing TERs based on the experiences of outsourced workers. The study provides a good basis to assess the employment status, employment rights and job security of outsourced workers. The findings provide a comprehensive understanding on enhancing the legal regulation of outsourcing triangular employment relationships in Kenya.

Not many studies have been undertaken on the regulation of outsourcing TERs in Kenya. Most of the studies on outsourcing in Kenya have focused on the economic and HRM perspectives.[45] Not

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[44] See generally Employment Act.

[45] CK Kahari, G Gathongo and D Wanyoike, 'Assessment of Factors Affecting the Implementation of Integrated Financial Management Information System in the County Governments: A Case of Nyandarua County, Kenya' (2015) 3 International Journal of Economics, Commerce and Management 1352; Dorobin N Agoti, 'Information and

much attention has been given to the legal dimension of outsourcing TERs and how to effectively protect outsourced workers in Kenya. This study makes a valuable contribution to the existing literature by addressing the precarious nature of outsourcing TERs due to employee misclassification and problems related to attribution of employer status. It also specifically addresses the employment-related challenges experienced by outsourced workers in Kenya.

1.8 LITERATURE REVIEW

Globally, there has been increased interest in outsourcing, as an upcoming business or employment model.[46] Most of the literature on outsourcing has focused on the economic and human resource management (HRM) perspectives.[47] From these points of view, studies include evaluating the factors affecting the growth of outsourcing companies, factors affecting the adoption of outsourcing strategies, the implementation of outsourcing strategies, how outsourcing affects organizational performance and the challenges experienced by client enterprises.[48] The common

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Communication Technology Outsourcing and Performance of Humanitarian Organizations in Kenya.' (PhD Thesis, University of Nairobi 2014); Joyce Wambui Ichoho, 'Implementation of Outsourcing Strategy at the Nairobi Hospital, Kenya' (Masters of Business Administration, University of Nairobi 2013); Abby Aboka, 'Challenges Faced by Bharti Airtel Kenya in Outsourcing of Its Services' (PhD Thesis, University of Nairobi, Kenya 2012); Petronilla M Kalamu, 'Challenges of Outsourcing Strategy by Mobile Phone Operators in Kenya' (PhD Thesis, 2009); Dulacha G Barako and Peter Gatere, 'Outsourcing Practices of the Kenyan Banking Sector' (2008) 2 African Journal of Accounting, Economics, Finance and Banking Research 37.

[46] Carmen Weigelt and MB Sarkar, 'Performance Implications of Outsourcing for Technological Innovations: Managing the Efficiency and Adaptability Trade-Off' (2012) 33 Strategic Management Journal 189; OF Bustinza, D Arias-Aranda and L Gutierrez-Gutierrez, 'Outsourcing, Competitive Capabilities and Performance: An Empirical Study in Service Firms' (2010) 126 International Journal of Production Economics 276; Farok J Contractor and others, 'Reconceptualizing the Firm in a World of Outsourcing and Offshoring: The Organizational and Geographical Relocation of High-Value Company Functions' (2010) 47 Journal of Management Studies 1417.

[47] Kahari, Gathongo and Wanyoike (n 45); Agoti (n 45); Ichoho (n 45); Aboka (n 45); Kalamu (n 45); Barako and Gatere (n 45).

[48] Kahari, Gathongo and Wanyoike (n 45); Agoti (n 45); Aboka (n 45); Kalamu (n 45).

feature of these and other related studies is the focus on the corporations and there is little reference to the outsourced workers.

In the absence of specific legislation that focuses on outsourcing TERs in Kenya, outsourcing is seen as a precarious employment model. The precariousness of outsourced workers may be attributed to the lack of employment rules and regulations that factor in NSWs since the employment laws were developed with the SER in mind. As a result, outsourced labour in Kenya is often treated as a commodity, in direct contravention of the international labour standards. This study seeks to address this gap in knowledge by analyzing the legal regulation of outsourcing triangular employment relationships in Kenya to find out whether it is sufficient to protect the rights of outsourced workers in order to identify possible interventions that can enhance the protection of outsourced workers.

From the employment point of view, the literature has focused on the rise of NSWs and how this affects the workers engaged under such employment models. Some of the recurrent themes revolve around the changing face of employment due to the vertical disintegration of the firm and the SER-NSW divide, the various sourcing models and the determinants and challenges of outsourcing decisions. The literature focuses on the workers, in a bid to equalize their bargaining power within the employment arrangements. This study explores the literature on these themes about outsourcing TERs.

1.8.1 Vertical disintegration of organizations

Freedom of contract is one of the central tenets upon which the law of contracts is premised. Since employment arrangements are contractual arrangements, freedom of contract is also important to employment law. It gives parties the freedom to enter into employment arrangements that deviate from the SER contracts that the employment laws envisage. Hence, parties can contract themselves into NSWs.

Hugh Collins attributes the rise in NSWs to what has been termed the "vertical disintegration of the firm".[49] Collins explains that historically the market was geared towards increased integration and consolidation of the means of production. Hence, companies grew larger and more bureaucratic. However, the global recession that began in the 1980s resulted in a reversal of this trend, resulting in increased disintegration and a rise in business practices such as outsourcing and franchising.[50]

Some scholars have predicted that the move towards vertical disintegration was not just a temporary reaction to the recession, but rather, a long-term strategic move.[51] Such scholars see the future as consisting of small networked companies that could easily adapt to suit the tastes of

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[49] Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 Oxford Journal of Legal Studies 353.
[50] Collins (n 49).
[51] Michael Piore and Charles Sabel, *The Second Industrial Divide: Possibilities For Prosperity* (Reprint edition, Basic Books 1986); Fergus Murray, 'The Decentralisation of Production—the Decline of the Mass-Collective Worker?' (1983) 7 Capital & Class 74.

consumers rather than having the traditional integrated model. Bearing in mind the empirical evidence on the steady growth of outsourcing and other NSW, perhaps their predictions may be considered plausible.[52]

From an economic perspective, the decision on integration or disintegration is predominantly linked to the theory of competitive advantage, otherwise known as the 'make-or-buy' theory, expounded by Ronald Coase in his analysis of the boundaries between firms and the market.[53] Organizations are always faced with the decision of whether it is more cost-effective to produce goods and services within the organization or to purchase these commodities from the marketplace. Vertical integration predominantly favours internal production whereas disintegration predominantly favours external purchase.[54] This choice of integration or disintegration can be made for each business process. For example, a university may consider it cheaper to outsource cleaning services whereas clerical work may be more effectively sourced internally.

In Africa, vertical integration was once considered to be the preferred model of dealing with market imperfections.[55] However, over time there has been an increased focus on vertical disintegration.

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[52] Deloitte, 'Deloitte's 2016 Global Outsourcing Survey' (2016); International Confederation of Private Employment Services (n 14); International Confederation of Private Employment Services (n 12).
[53] Ronald H Coase, 'The Nature of the Firm' (1937) 4 Economica 386.
[54] Paul L Joskow, 'Vertical Integration' (2012) 57 The Antitrust Bulletin 545.
[55] Mark Casson, *Multinationals and World Trade: Vertical Integration and the Division of Labour in World Industries* (Routledge 2012).

Various arguments have been raised in support of vertical disintegration.[56] They share a common thread, namely, cost savings. First, vertical disintegration allows the adoption of employment models such as outsourcing, which enable organizations to avoid or reduce some of the employment-related costs, such as hiring and training of employees.[57] Secondly, vertical disintegration enables organizations to focus more on the contractual enforcement of performance rather than a focus on the mutuality of obligations inherent in employment relationships.[58]

In Kenya, the vertical disintegration of organizations has been linked to avoiding the costs associated with employment protection legislation.[59] Though this study supports the increased vertical disintegration, it recognizes that this disintegration has posed several challenges to the labour market. For example, organizations end up having less control over workers, the workers themselves can take on greater business risks, and also the workers may be less integrated into the organizations where they work. The new paradigm places outsourced workers, and other NSW workers, beyond the reach of labour law protection.

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[56] Hajo Holst, '"Commodifying Institutions": Vertical Disintegration and Institutional Change in German Labour Relations' (2014) 28 Work, Employment and Society 3; Yongmin Chen, 'Vertical Disintegration' (2005) 14 Journal of Economics & Management Strategy 209.

[57] Olufemi Amos Akinbola, Olaleke Oluseye Ogunnaike and Olugbenga Abiola Ojo, 'Enterprise Outsourcing Strategies and Marketing Performance of Fast Food Industry in Lagos State, Nigeria' (2013) 3 Global Journal of Business, Management and Accounting 22.

[58] Akinbola, Ogunnaike and Ojo (n 57).

[59] Owidhi George Otieno, 'The next Step for Trade Unions Handling Redundancy in Kenya' [2017] Central Organization of Trade Unions - Kenya.

Bearing in mind the link between labour law protection and employment status, it is understandable that labour laws are consequently unable to comprehensively cater for the NSWs brought about by vertical disintegration. In outsourcing arrangements, this is sometimes evidenced through the substitution of employment relations with service contracts and terming outsourced workers as independent contractors.[60] This effectively places the workers outside the scope of employment protections. These challenges that are brought about by vertical disintegration ultimately affect the rights of outsourced workers in Kenya. This study, therefore, analyzes the legal regulation of outsourcing triangular employment relationships in Kenya to find out whether it is sufficient to protect the rights of outsourced workers in order to identify possible interventions that can enhance the protection of outsourced workers.

1.8.2 The SER - NSW divide

In line with the discussion on employment protections, is the SER – NSW divide. It is important to differentiate these two forms of work arrangements and how this affects the workers involved in the different contractual arrangements. To begin with, it is worth considering why NSWs are viewed as new arrangements. The traditional school of thought was that services could only be provided under either a contract of service or a contract for services.[61] The former led to an employment relationship in which the employee was entitled to employment protections. On the

[60] Otieno (n 59).
[61] Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Routledge 2016) 16–39.

other hand, the latter was self-employment and the worker was termed as an independent contractor who was outside the scope of employment protections. The divide was between employment and self-employment.

Globally, the line between employment and self-employment is increasingly getting blurred, such that there are now forms of employment that bear characteristics which were commonly attributed to both employment and self-employment.[62] This in-between category is commonly referred to as atypical employment or NSW, even though it essentially comprises several different employment forms. Generally, the SER refers to the full-time employment relationship with a single, direct employer who exercises control over such workers and who bears the risks of profit and chances of loss.[63] Such workers under the SER form the 'core' of the workforce and are accorded the full protection of labour legislation.[64] Workers engaged under NSWs fall outside the scope of employment protections, despite not being independent contractors. Even though their contractual arrangements deviate in one way or another from the SER, ideally this should not exclude them from the employment protections framework because they work under conditions of dependence.

This problem was identified by the International Labour Organization (ILO), which then set out to develop conventions and recommendations that would extend labour protection to persons

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[62] ILO, *Non-Standard Employment around the World* (n 1).
[63] Adalberto Perulli, 'The Legal and Jurisprudential Evolution of the Notion of Employee' (2020) 11 European Labour Law Journal 117, 118.
[64] See generally the *Employment Act*, 2007.

working in conditions of dependency that do not amount to what is recognized as employment.[65] The ILO commissioned some country studies aimed at identifying the extent to which such workers received inadequate protection from labour laws. These studies depicted that internationally there was a decrease in employment protection that was brought about by the concealment of employment relations and the increase in ambiguous terms of employment.[66]

Labour laws' conception of the SER is in line with the vertical integration model of the firm.[67] Generally, employment protections are tied to the establishment of employment status.[68] This question on determining the category of persons who should be granted employment protection raises two distinct yet related issues. The first issue relates to legislative policy. It is a question of which legal instruments and institutions should determine who receives employment protection and the range of protection that is to be granted. The second question relates to judicial interpretation. It is the question of how courts and other arbitral bodies determine the matter of who should receive employment protection.

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[65] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (revised), ILO 2006).
[66] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n 65) 26.
[67] Vertical integration and disintegration is discussed in section 1.8.1.
[68] Jacob Omolo, 'The Dynamics and Trends of Employment in Kenya' (2010) 1 Institute of Economic Affairs Research Paper.

Both avenues link labour law protections to employment status. In other words, within the context of the workplace, employment rights and protections are limited to individuals who are categorized as employees.[69] For outsourced workers, their employment status is not based on the binary relationship envisaged by the SER. Rather, outsourced workers provide their services within a TER. Outsourced workers, therefore, sometimes face challenges in terms of access to employment rights and benefits.

When considering the binary divide of employed versus self-employed, then this would be logical from a common-sense point of view. Independent contractors fall purely within the domain of contractual relations.[70] Hence, for example, if two businesses are interacting with each other at arms-length, the dissolution or termination of their business dealings is governed by the law of contracts. Since there is no subordination of one party over the other in the sense brought out by employment, there can be no dismissal and consequently no legal protection against dismissal. The same logic applies to other labour law protections such as minimum wage, leave entitlements and unionization.

Considering the changing face of employment, scholars have argued that the focus should move from viewing the SER as the sole basis upon which employment protection should be granted, to

[69] Omolo (n 68).
[70] Kibaya Imaana Laibuta, *Principles of Commercial Law* (LawAfrica 2006).

a more holistic approach that incorporates NSWs as well.[71] Such scholars argue that the labour market is dualistic, and further that NSWs should not be viewed as inferior to the SER. As a result, this study on outsourcing forms part of the global discussion on market dualism. In particular, the study investigates the nature of outsourcing TER and proposes options to enhance its legal regulation in Kenya.

In a 2009 policy brief on the development of outsourcing in Kenya, Waema and others identified Kenya's weak legislative framework as one of the factors hindering the success of outsourcing in Kenya.[72] They compared the Kenyan situation to that of India and South Africa. Though their focus was on the interplay between information communication and technology (ICT) and outsourcing, their findings can be applied to outsourcing arrangements in general. The policy brief by Waema and others recommended the strengthening of the existing legislative framework to create an enabling environment for outsourcing in Kenya.[73] They noted that an ideal long-term goal would be the development of separate legislation in Kenya to regulate outsourcing.[74] To date, the recommendations of this policy brief are yet to be realized.

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[71] Ruth Tubey, J Kipkemboi and Margaret Bundotich, 'An Overview of Industrial Relations in Kenya' (2015) 5 Research on Humanities and Social Sciences 2224.
[72] Timothy M Waema and others, 'Development of a Business Process Outsourcing Industry in Kenya: Critical Success Factors' (International Development Research Centre 2009) Policy Brief.
[73] Waema and others (n 72) 8.
[74] Waema and others (n 72) 8.

Similarly, Barako and Gatere's study on outsourcing practices in the Kenyan banking sector noted with concern that nearly half of the financial institutions in Kenya are involved in outsourcing certain banking functions, in an environment without a regulatory framework.[75] They recommended the urgent institution of a regulatory framework in the form of outsourcing guidelines to the banking sector. In line with this approach, this study proposes the regulation of outsourcing in general, since this is a phenomenon that affects several economic sectors.

Generally, the increased proliferation of NSWs is worth academic interrogation because the number of workers engaged through NSW arrangements is increasing, both in absolute numbers and in proportion to the rest of the workforce.[76] These atypical workers should not be excluded when studying the diversification of labour, but rather each NSW category should be treated as an independent research theme. As such, this study focuses on outsourcing as an independent NSW. To better understand outsourcing as an NSW, it would be important to first discuss the various sourcing models.

1.8.3 Sourcing models

Sourcing may be defined as the delegation or contracting of work to another entity, whether internal or external, which could be physically located anywhere.[77] This definition is broad as it

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[75] Barako and Gatere (n 45) 47.
[76] Tubey, Kipkemboi and Bundotich (n 71).
[77] Ilan Oshri, Julia Kotlarsky and Leslie P Willcocks, *The Handbook of Global Outsourcing and Offshoring* (3rd edn, Springer 2015) 3.

incorporates both insourcing and outsourcing. Insourcing has been defined by Schniederjans as the allocation of resources within the same organization, even if it is in different geographic locations.[78] Insourcing is in line with the vertical integration of the firm whereas outsourcing leans towards vertical disintegration.

Outsourcing has been defined by Abdullah and others as an "act of moving some of a firm's internal activities and decision responsibilities to outside providers."[79] Similarly, Oshri and others define outsourcing as "the contracting with a third party supplier for the management and completion of a certain amount of work, for a certain duration, cost and level of service."[80] These definitions emphasize that outsourcing comprises the transfer of business activities from an internal source to an external source. A potential source of confusion is that the term outsourcing is used in various contexts, which are often similar and may overlap thus the view that the situation is a "kind of terminological jungle in which various definitions compete."[81] Bearing this in mind, the common types of sourcing which bear the name outsourcing shall now be distinguished.

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[78] Marc J Schniederjans, Ashlyn M Schniederjans and Dara G Schniederjans, *Outsourcing and Insourcing in an International Context* (Routledge 2015) 3.
[79] Haim Hilman Abdullah and others, 'The Effect of Sourcing Strategies on the Relationship between Competitive Strategy and Firm Performance' (2009) 5 International Review of Business Research Papers 346, 350.
[80] Oshri, Kotlarsky and Willcocks (n 77) 8.
[81] Dmitrij Slepniov, Sigitas Brazinskas and Brian Vejrum Wæhrens, 'Nearshoring Practices' [2013] Baltic Journal of Management 7.

A client firm may source for business activities from a provider who is located in a different country. This is referred to as offshore outsourcing, or simply offshoring.[82] Offshore outsourcing should be distinguished from situations where a client offshores their operations to a different country by setting up their business there since that is essentially insourcing. This distinction highlights the importance of distinguishing whether the offshored activities are performed by a third party or by a different branch of the same organization. If they are performed by a third party then that would count as outsourcing.

Where offshore outsourcing is between neighbouring countries this is referred to as nearshore outsourcing, or simply nearshoring.[83] For example a client in Kenya sourcing from Tanzania or a client in Uganda sourcing from Sudan. The Economist defines nearshoring as the contracting of business activities to "countries that are quite cheap and very close rather than very cheap and far away".[84] This definition essentially explains the rationale for nearshoring as opposed to offshoring. Nearshoring offers firms the possibility of balancing the distance versus cost-risk dilemma in that they can focus on sourcing from places which, though not providing the cheapest options, are not geographically distant, consequently reducing some risks.

[82] Schniederjans, Schniederjans and Schniederjans (n 78) 8.
[83] Schniederjans, Schniederjans and Schniederjans (n 78) 8.
[84] The Economist, 'The Rise of Nearshoring' (2005) 377 The Economist 61, 61.

Outsourcing may also be adopted as a temporary measure in which an older business model is outsourced as the firm focuses on operationalizing a new system. For example, a third party can be engaged to run an existing computer-based system so that the firm continues its regular operations as the firm works on installing a newer system. This is referred to as transitional outsourcing.[85]

This may be distinguished from business transformation outsourcing in which an external party is engaged to help transform the client's business or to create a new business model or infrastructure. In business transformation outsourcing, the client continues its operations with its employees but it engages a third party to leverage the knowledge and capabilities of the business unit and to improve the client's operations.[86] A similar form of outsourcing is co-sourcing, which is target-based. In co-sourcing, the payment of the provider is based on a target such as the improvement of the client's business performance.[87] Another category is value-added outsourcing, which refers to situations where the client and the outsourcing company work together, combining their strengths towards the marketing of services or products.[88]

[85] Schniederjans, Schniederjans and Schniederjans (n 78) 8.
[86] Jie Gao and others, 'Service-Oriented Manufacturing: A New Product Pattern and Manufacturing Paradigm' (2011) 22 Journal of Intelligent Manufacturing 435, 439.
[87] Schniederjans, Schniederjans and Schniederjans (n 78) 8.
[88] Schniederjans, Schniederjans and Schniederjans (n 78) 8.

When outsourcing involves the transfer or contracting of an entire department or process, then this is referred to as business process outsourcing (BPO).[89] For example, a firm may outsource its entire accounting department, its information systems department or its finance department. In Kenya, BPO has been hypothesized to be one of the fulcrums of economic growth. BPO has been identified as one of the pillars towards the achievement of Kenya's Vision 2030; the country's vision of reaching a middle-income level by the year 2030.[90] It is expected that BPO will help create thousands of jobs for the increasing Kenyan population.

In addition, BPO has been termed as a useful strategy for the alignment of the supply and demand for skills (and human resources generally) within the labour market.[91] It is expected that the labour and manpower development that can be achieved through BPO would be instrumental towards the attainment of quality life for all within the country. Though important, BPO does not cover all the outsourcing possibilities in that it may be possible to outsource personnel, rather than an entire process. Though the focus of the literature on outsourcing in Kenya is on outsourcing of processes and it is conceded that this indeed is beneficial, this study examines outsourcing TERs to bring in the employment-related aspects of the outsourcing arrangements.

[89] Schniederjans, Schniederjans and Schniederjans (n 78) 8.
[90] Iraki (n 31).
[91] Barako and Gatere (n 45).

A related type of outsourcing is knowledge process outsourcing (KPO). This relates to the outsourcing of high-end knowledge or judgment services.[92] Rather than involving the commodity processes usually included in BPO contracts, KPO relates to knowledge processes such as research and development. KPO involves services such as legal research, clinical research, patent-related and intellectual property services, business research and analysis, among others. One challenge that may be experienced with KPO is the potential risks to the knowledge learning curve because KPO involves outsourcing the knowledge itself. Also, KPO may create a level of dependence on the third party, and also poses security and intellectual property issues. For example, there may be a challenge in ensuring the confidentiality and security of data. Relatedly, it may be unclear who would be considered the owner of the outcome when the research and development process is outsourced.[93]

In situations where a firm outsources to multiple providers simultaneously, this is referred to as multisource outsourcing, or simply multisourcing. This may be viewed as a 'best-of-breed' sourcing strategy in that a firm breaks up its processes into smaller bundles and engages in a form of competitive bidding for outsourcing arrangements.[94] This is a business model that was adopted successfully by Nike Inc.[95] In doing so the company managed to outsource almost all of its shoe

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[92] Bharat Vagadia, *Strategic Outsourcing: The Alchemy to Business Transformation in a Globally Converged World* (Springer Science & Business Media 2011) 49.
[93] Vagadia (n 92) 50.
[94] Schniederjans, Schniederjans and Schniederjans (n 78) 8.
[95] B Padmapriya, 'A Study of Global Perspective of Outsourcing Practices' (2014) 5 International Journal of Management 30, 38.

production and manufacturing processing, leaving to itself only the key technical aspects of the Nike Air system. Though it is one of the largest global suppliers of shoes, with such an approach the company has been able to focus its attention on the research and development pre-production activities, coupled with the marketing and sales post-production activities.

The converse is shared outsourcing in which one outsourcing company provides services to more than one client at the same time.[96] For example, one ICT software provider may work with multiple banks that all require the same software to serve their clients. The challenge that arises through the adoption of this sourcing model is potential knowledge leakage between competitors and also the uplifting of rivals which may affect the competitiveness of the firms. According to some scholars, these challenges are particularly acute when shared outsourcing relates to KPO because these are considered to be high-value-adding activities.[97] Another challenge is that shared outsourcing may limit the innovative objectives of the firms that share the outsourcing company.

A common aspect of all these outsourcing models is that they each require an agreement between the client and a third party which is an external party to the organization. The literature on these outsourcing models is useful in that it illustrates the different levels of inter-organizational dependence between the two authority figures in outsourcing TERs. It should be noted that the

[96] Schniederjans, Schniederjans and Schniederjans (n 78) 8.
[97] Andrea Martínez-Noya and Esteban García-Canal, 'Location, Shared Suppliers and the Innovation Performance of R&D Outsourcing Agreements' (2018) 25 Industry and Innovation 308, 310.

focus of the literature is on the service contracts between the corporate entities, that is, the business-related aspects of outsourcing. To build on the existing literature, this study focuses is on outsourcing TERs, particularly the protection of outsourced workers.

1.8.4 Determinants and challenges of outsourcing decisions

Globally, since the 1980s there has been increased scholarly attention on the changing face of employment through increased flexibility and the adoption of NSWs as employment models.[98] Throughout the 1980s, the issue resurfaced regularly in various conferences and academic journals.[99] The spark that set this debate on fire was an article by John Atkinson in which he explained that generally, firms seek three different forms of flexibility: numerical, functional and financial.[100] Numerical flexibility ensures that the number of workers can easily be increased or decreased so that the number of employees is an exact match to the organization's requirements.[101] This is an HRM perspective that calls for flexibility in a company's hiring and firing policies.

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[98] Catherine Hakim, 'Core and Periphery in Employers' Workforce Strategies: Evidence from the 1987 ELUS Survey' (1990) 4 Work, employment and society 157, 157.
[99] Wolf V Heydebrand, 'New Organizational Forms' (1989) 16 Work and Occupations 323; Horst Kern and Michael Schumann, 'Limits of the Division of Labour. New Production and Employment Concepts in West German Industry' (1987) 8 Economic and Industrial Democracy 151; Efren Cordova, 'From Full-Time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour Relations' (1986) 125 International Labour Review 641.
[100] John Atkinson, 'Manpower Strategies for Flexible Organisations' (1984) 16 Personnel Management 28.
[101] Atkinson (n 100) 30.

Functional flexibility is a strategy for the effective redeployment of workers across several tasks and activities.[102] This approach guarantees a consistent workforce because the workers are the same; what changes are their roles and positions. Finally, financial flexibility allows organizations to deflect pay and other employment costs to the external labour market so that they acquire labour at the cheapest cost possible.[103] There is nothing new about organizations seeking increased flexibility in their workforce. However, the difference relates to what Atkinson referred to as new employment models that allow organizations to adopt these three types of flexibility simultaneously. One of these new employment models is outsourcing.

In Kenya, organizations are increasingly undergoing challenges that oblige them to find means of reducing costs while ensuring maximum output from their human resources. A survey of human resource executives in Kenya found that 85% had personally led an outsourcing effort within their organizations.[104] Outsourcing, as a concept, is attractive to HRM because it is positively correlated to organizational performance.[105] By effectively adopting outsourcing practices, human resource managers can satisfactorily enhance their company's performance. The outsourcing of non-core activities gives room for a company to intensify managerial attention, as well as the resources allocated, to its core functions. This focus can enhance its effectiveness, innovativeness and skills

[102] Atkinson (n 100) 30.
[103] Atkinson (n 100) 30.
[104] Dorothy A Muga, 'Factors Influencing Human Resource Outsourcing at Kenya Commercial Bank (KCB) Limited' (Thesis, 2012) <http://erepository.uonbi.ac.ke/handle/11295/12550> accessed 14 February 2021.
[105] Agoti (n 45); Akinbola, Ogunnaike and Ojo (n 57).

development in its core activities. As a result, it may be said that outsourcing allows companies to focus more on their organizational management and also allows for flexibility in their processes.[106]

Outsourcing enables organizations to benefit from lower labour costs within the market when their internal labour rates are unduly high. To bridge unemployment gaps, some organizations have taken advantage of the situation to acquire cheap labour and outsourcing has been adopted as an effective cost-cutting measure.[107] Studies have identified that, in addition to cost reduction, other benefits of outsourcing include an enhanced focus on core competencies and improved services.[108]

From the client enterprise's point of view, some of the identified risks of outsourcing include reputational, operational, contractual and strategic risks.[109] These risks may arise where data processing or customer operations in handled by outsourced workers. The risk levels increase when outsourcing relates to key business operations since efficiency and adequacy must be ensured. Take for example the outsourcing of ICT functions. These functions have a direct impact on the financial reports and important client data. The risks are heightened even more when the

[106] Lilian Nanjala Wabwile and GS Namusonge, 'Determinants of Outsourcing as a Competitive Strategy in Supply Chain Management of Manufacturing Companies in Kenya (A Case Study of East African Breweries Limited)' (2015) 5 International Journal of Academic Research in Business and Social Sciences 190.
[107] Barako and Gatere (n 45).
[108] Oliver A Mulama, 'Logistics Outsourcing Practices and Performance of Large Manufacturing Firms in Nairobi, Kenya' (Masters of Business Administration, University of Nairobi 2012).
[109] Barako and Gatere (n 45) 47.

outsourced work touches on the privacy and security of corporate information, as is sometimes the case in KPO.

From the workers' perspective, the desperation for work amongst workers who need to sustain themselves and their dependents may lead them into situations where they would accept whatever remuneration and conditions of employment imposed on them by opportunistic organizations. As a result, they may take on outsourcing opportunities or other NSWs, and these opportunities may be more precarious than the SER. Consequently, it may be argued that there is an association between outsourcing and labour market precariousness.[110]

Nonetheless, it is worth mentioning that outsourcing can be a useful tool to further the eighth Sustainable Development Goal (SDG) on the achievement of decent work and economic growth by the year 2030.[111] The United Nations (UN) estimates that between 2016 and 2030, nearly 470 million jobs will be required globally for new entrants into the labour market.[112] Outsourcing can be used as a stepping stone towards decent work opportunities which can help achieve sustainable economic growth. As a country, we are committed to the achievement of the SDGs. Evaluating the legal regulation of outsourcing TERs in Kenya is therefore important.

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[110] Otieno (n 59).
[111] United Nations, 'The Sustainable Development Goals Report 2017' (United Nations 2017) 34.
[112] United Nations (n 111).

In Kenya, outsourcing has become a major element of company management strategies. For example, outsourcing of technical assistance is now being employed in the development and implementation of integrated financial management information systems (IFMIS).[113] Some challenges have been experienced in this process. Scholars caution that even though outsourced consultants often have extensive expertise and experience in the design, implementation, management and operation of computerized IFMIS, they must be closely monitored to ensure that they do not pursue their interests to the detriment of the company.[114] Further, it has been noted that companies sometimes take on outsourcing arrangements without fully taking into account their technological capabilities, which has resulted in companies paying high amounts of money for poor services, which they could easily have carried out themselves.[115] The same can be said about outsourcing arrangements that relate to other processes or services.

Studies have also been conducted to determine the most outsourced ICT systems and the factors that influence the decisions to outsource. Generally, smaller organizations tend to have higher levels of outsourcing than medium and larger ones and this is usually influenced by the desire to offer higher-quality services at reduced costs.[116] Also, smaller companies may lack the technical capacity that larger companies have.

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[113] Kahari, Gathongo and Wanyoike (n 45).
[114] Kahari, Gathongo and Wanyoike (n 45) 1363.
[115] Edward Muchai and Freddie Acosta, 'Assessment of Factors Influencing Decision to Outsource Information and Communication Technology by Commercial Banks in Kenya' (2015) 22 DLSU Business and Economics Review 63, 66.
[116] Muchai and Acosta (n 115).

Within the transport sector in Kenya, logistics outsourcing has increasingly been adopted in road construction projects.[117] Outsourcing services such as transport and material handling has had a positive impact on the projects' performance. Additional outsourcing benefits include an enhanced level of expertise and increased efficiency in service delivery.[118] And when it comes to outsourcing ICT services, the majority of human resource managers agree that it improves the general performance of the organization.[119]

Identified drawbacks include the risk of exposure of confidential information, data security challenges, and reduced customer service focus by the outsourced workers.[120] Studies have also noted that when companies take on outsourcing arrangements, quite a bit of the management's time is expended in monitoring and managing the outsourced workers.[121] This may increase operational costs, as well as the 'time costs.' In light of this, it has been proposed that the outsourcing service contracts should be detailed and specifically articulate the outsourcing structure and the expectations of multiple parties.[122] Ideally, such factors could also be factored

[117] Anne N Wanyonyi, 'Logistics Outsourcing and Performance of Road Construction Projects in Nairobi County' (Masters of Business Administration, University of Nairobi 2014).
[118] Ichoho (n 45).
[119] Rebecca Njeri Kariuki, 'Business Process Outsourcing and Operational Performance among Private Hospitals in Nairobi' (Masters of Business Administration, University of Nairobi 2015).
[120] Kariuki (n 119).
[121] Muchai and Acosta (n 115) 71.
[122] Muchai and Acosta (n 115).

into the legal framework for outsourcing in Kenya. This study considers these factors in its identification of possible interventions that can enhance the protection of outsourced workers.

1.8.5 Summary

It is undeniable that NSWs are gaining ground in the world of work. Due to increased vertical disintegration, more companies are adopting business strategies such as outsourcing.[123] The literature on the proliferation of NSWs is mostly from the economic and HRM perspectives.[124] On the other hand, some of the recurrent themes under the labour law literature include the vertical disintegration of the firm and the use of employment status, as envisaged by the SER, as the basis for ascribing employment rights to workers. Though the traditional corporate strategy was vertical integration which made corporations larger and more bureaucratic, there is a shift towards vertical disintegration in which companies externalize some of the employment risks and costs to become more profitable.

In line with the vertical disintegration is the increased proliferation of NSWs which has brought a new category of work that falls between employment and self-employment. The traditional model focused on the binary divide between employees and independent contractors. Contracts of service essentially relate to the SER. This inevitably locks out NSW workers as they do not fit squarely

[123] Holst (n 56); Chen (n 56); Collins (n 49).
[124] Kahari, Gathongo and Wanyoike (n 45); Agoti (n 45); Ichoho (n 45); Aboka (n 45); Kalamu (n 45); Barako and Gatere (n 45).

within the employment paradigm. Though this has been identified by the ILO, which then commissioned country studies to investigate the inadequacies of the current global employment protection frameworks, the ripple effects have not been felt in Kenya in terms of adequate protection of outsourced workers engaged under outsourcing TERs.

In terms of the literature on outsourcing as a business and employment model, it was noted that the term itself refers to several work arrangements which may be considered similar and in which there may be considerable overlaps. The common thread between these sourcing models is that they all involve the externalization of services through engaging a third party. In Kenya, the focus of policies such as Vision 2030 is on BPO. Though this is important, this study argues that it is also imperative to consider the outsourcing of personnel generally so that the precarious position of outsourced workers is not overlooked. This study makes a significant contribution to the literature in that it considers this aspect of outsourcing TERs.

There is also relevant literature on the determinants and challenges of outsourcing decisions. Though this predominantly overlaps with the economic and HRM perspectives on outsourcing, these studies are important as they rationalize the growth of outsourcing as an employment model and they set the basis for the discussion on the challenges faced by outsourced workers in Kenya. Since in most cases the law follows the fact, these highlighted challenges, as well as those highlighted within the rest of this study, form a basis for arguing for options on enhancing the regulation of outsourcing TERs in Kenya.

1.9 RESEARCH METHODOLOGY

1.9.1 Research design

The objectives for the study, as set out in section 1.4, include an assessment of the suitability of the current legal framework on employment in protecting outsourced workers in Kenya in light of the peculiarities of outsourcing TERs. This objective is exploratory hence a qualitative approach is appropriate. Quantitative methods concentrate on collecting 'hard' numerical data to identify the relationship between variables; such data is then analyzed mathematically using statistics.[125] Such an approach would not be well-suited for this study.

This study involved human subjects, that is, the outsourced workers engaged under outsourcing TERs. Due to the inadequacy of quantitative methods in considering the 'soft' personal data of participants, qualitative methods were more suitable for this study.[126] This approach led to the uncovering of hitherto undiscovered issues, as well as the interpreting of a social phenomenon through the eyes of its participants.[127] Further, in line with Baraza, to emphasize the fact that the research participants are individual persons with unique stories to tell, the study refers to "narrative collection" and "narrative analysis" rather than "data collection" and "data analysis."[128]

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[125] Nicholas Walliman, *Your Research Project: Designing and Planning Your Work* (3rd edn, SAGE Publications 2011) 174 and 176.
[126] Walliman (n 125) 174.
[127] Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012) 380.
[128] Nancy Makokha Baraza, 'The Impact of Heteronormativity on the Human Rights of Sexual Minorities: Towards Protection through the Constitution of Kenya 2010' (Doctor of Philosophy in Law, University of Nairobi 2016) 43.

In addition to the empirical narrative collection, the study also adopted desk research as a secondary data collection technique. The conceptual and theoretical analyses on the nature of outsourcing TERs were based on desk research. Background information on the current Kenyan legal framework and its underlying assumptions that pose challenges to outsourced workers were reviewed through desk research. The study also reviewed relevant ILO conventions, recommendations and reports, as well as legislative provisions from select jurisdictions on best practices relating to key aspects of the legal regulation of outsourcing TERs. The secondary data collection included a review of relevant books, journal articles, government reports, legal commentaries, periodicals, relevant statutes, treaties and conventions.

One limitation was that at the time the research was conducted there were limited written works that were specific to the legal framework for outsourcing TERs in Kenya. Bearing in mind this limitation, qualitative research methods were used to corroborate the desk research. This was useful in terms of finding new information on the peculiarities of outsourcing TERs and the consequent challenges posed by the current employment legal framework. The adoption of relevant international perspectives in light of the challenges faced by the outsourced workers in Kenya proved the hypothesis that clarity on the employment status, employment rights and job security of outsourced workers will enhance the legal regulation of outsourcing triangular employment relationships in Kenya. The focus on the narratives of the outsourced workers viewed through the human rights, paternalism and decommodification theoretical lenses brought out the need for interventions that address the differential and unequal treatment of workers.

1.9.2 Study population

The population for this study consisted of outsourced workers engaged under outsourcing TERs. Based on the objectives of this study, the researcher undertook a qualitative study and interviewed forty-five outsourced workers engaged under TERs. The respondents were of various ages, the majority ranging between 24 and 35 years. There was a minority who were above the age of 50 years and the oldest respondent was 60 years. Though the level of education of the respondents varied, the vast majority had undergraduate degrees. The lowest level of education was the Kenya Certificate of Secondary Education (KCSE) certification. There was a minority who had master's degrees, which was the highest level of education. The narrative collection was conducted solely by the researcher of this study. Most participants were cooperative and gave the required information after a brief introduction in which the researcher explained the study and its intended outcomes.

Only outsourced workers who had attained the age of majority were included. The study excluded workers who were directly employed by client enterprises. Although their working environment and experiences may be similar, the distinction between the two categories of workers is drawn because each category has a different employer. The study also excluded all other categories of workers engaged under other NSWs. Participation in the study was voluntary. All outsourced workers who expressed that they did not wish to participate in the study were excluded.

1.9.3 Sampling techniques

The qualitative study focused on outsourced workers and sought to investigate their experience within outsourcing TERs, including their employment rights and duties, as well as their job security. The respondents were selected using theoretical sampling, a variant of purposive sampling. The basis for choosing them as key informants was their practical experience as outsourced workers. The study sought information from, *inter alia,* respondents who were previously employed under the SER and thereafter became the 'victims' of corporate restructuring hence ending up outsourced. It also sought out respondents who were in job positions that were pseudo-core to the organization rather than outrightly peripheral jobs, such as cleaning and security services. The theoretical sampling method was deemed appropriate for this study as it enabled the collection of narratives from those who knew most about the subject.[129]

The researcher adopted a purposeful sampling technique which involved identifying outsourcing companies from the internet and then seeking out workers engaged through the outsourcing companies.[130] This approach was predominantly successful. However, in some instances, the outsourcing companies refused to be associated with the study. For example, one outsourcing company first requested to see a copy of the interview guide. After emailing it, the response

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[129] Walliman (n 125) 188.

[130] Zack Abuyeka, 'List Of Business Process Outsourcing Companies In Kenya' (*https://victormatara.com/*) <https://victormatara.com/list-of-business-process-outsourcing-companies-in-kenya/> accessed 3 March 2020; 'Top HR Outsourcing Companies in Kenya Reviews 2020 | GoodFirms' <https://www.goodfirms.co/business-services/hr/kenya> accessed 2 March 2020; 'Best HR Outsourcing in Kenya - List of HR Outsourcing Companies Kenya' <https://www.businesslist.co.ke/category/hr-outsourcing> accessed 3 March 2020.

received was that it did not have any authority to allow the outsourced workers to be interviewed as they were not directly under their supervision. Nonetheless, most outsourcing companies acted as a useful bridge of access to the outsourced workers.

In addition, to supplement this technique, the respondent adopted a snowball technique in which interviewed respondents were requested to bring other outsourced workers on board. It relied on the recommendation by Jorenz and others, of avoiding a preconceived sample profile and of adopting an exponential non-discriminative snowball sampling technique.[131] A noted limitation of these non-random sampling techniques is that, generally, they may form a weak basis for generalization.[132]

The sample size for this study was forty-five respondents. The approach adopted in this study was not geared towards representativeness but rather towards a richer understanding of the thematic areas under investigation. In investigating the nature of outsourcing TERs, it was deemed beneficial to adopt a methodology that focused on the experiences of outsourced workers – their perceptions, feelings and thoughts. These non-random sampling techniques were considered appropriate to this study since it was qualitative.

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[131] Yves Jorens and others, 'Atypical Forms of Employment in the Aviation Sector', European Social Dialogue, European Commission, 2015'.
[132] Zina O'Leary, *The Essential Guide to Doing Research* (SAGE 2004) 109.

1.9.4 Narrative collection

The narratives were collected using semi-structured telephone interviews using an interview guide as a research tool. The initial plan was to conduct face-to-face interviews since they allow for the observation of body language, which can serve as a useful cue to ask alternative probing questions as a means to minimize non-response. However, in March 2020, as soon as the researcher was granted a research license by the National Commission for Science, Technology and Innovation (NACOSTI), there was an outbreak of the novel coronavirus (covid-19). The country then went into a series of social distancing measures such as a lockdown on the major hotspots, curfews, and other protective measures to minimize the spread of the virus. Bearing in mind the covid-19 pandemic, it was deemed appropriate to modify the methodology and instead conduct telephone interviews, because face-to-face contact may have caused potential health risks.

Each respondent was interviewed for around 20-30 minutes. For the respondents who were not comfortable with telephone interviews, a self-administered questionnaire was available through google drive. The link was availed to the respondents and they filled in the questionnaire from their phones or computers. Once the respondents completed and submitted the questionnaire, the data was automatically saved on an excel sheet on the researcher's google drive.

Nonetheless, the preferred mode of narrative collection was telephone calls because it offered increased chances of clarifying issues to the respondents and asking follow-up questions. On the other hand, some of the respondents preferred answering the questionnaire because it seemed less time-consuming, they could save responses, and they did not have to dedicate a block of time to

it. Inevitably, those who opted for telephone conversations had to share their telephone numbers. To protect the identity of these respondents, during the narrative analysis their phone numbers were excluded from the record. Of the forty-five respondents, sixteen opted for the self-administered questionnaire instead of the telephone calls.

The interview guide provided a checklist of the thematic areas under investigation (Appendix 1). The questions under the interview guide were used to provide information on three thematic areas relating to the outsourced workers, namely, the perceived employment status of the outsourced workers, the employment rights of outsourced workers, and the termination of the relationship between the parties to outsourcing TERs. Questions were asked to determine whether the workers understood their status as outsourced workers and consequently their understanding of the division of the employer function between the outsourcing company and the client enterprise. The current employment framework hinges access to employment benefits upon employment status, which is easily identifiable under the SER but may not be as obvious under NSWs such as outsourcing. The plight of outsourced workers was investigated, bearing in mind these underlying assumptions.

Some questions were asked relating to outsourced workers' perceptions of how their status as outsourced worker affects their workplace rights and benefits. These questions focused on the perceived differences between the outsourced workers and directly employed workers of the client enterprise in terms of their pay, responsibilities and general employment rights. Questions about the length of service and work conditions also contributed to understanding how outsourced workers perceive their work environment and how this affects their access to employment rights.

The third set of questions investigated the practices related to the termination of the relationship between the outsourced workers and the client enterprises or the outsourcing companies.

The purpose of these interview questions was to investigate the challenges that outsourced workers face as they provide services at the client enterprises' premises. This was deemed important because the outsourced workers relate with two authority figures, which may confound their perceptions of employment status, their access to employment rights and benefits, and their perceptions of job security. This proved the hypothesis that clarity on the employment status, employment rights and job security of outsourced workers will enhance the legal regulation of outsourcing triangular employment relationships in Kenya.

Generally, interviews enable the researcher to clarify any issues that the respondent may find ambiguous and also build trust between the researcher and the respondent.[133]In addition, the structure of semi-structured questions was considered suitable for this research because of the freedom that they give to the respondents, such that they are not limited to 'yes' and 'no' responses.[134] The aim of collecting the narratives was to supplement the desk review with empirical qualitative research. The information obtained was triangulated into the findings from the desk review.

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[133] Walliman (n 125) 192.
[134] Vernon Trafford and Shosh Leshem, *Stepping Stones to Achieving Your Doctorate: By Focusing on Your Viva from the Start: Focusing on Your Viva from the Start* (McGraw-Hill Education (UK) 2008) 91.

1.9.5 Narrative recording

At the beginning of each interview, the researcher explained the objectives of the research and sought consent from each respondent. Only respondents who willingly cooperated and agreed to be interviewed were used in this study. Each respondent was asked to confirm consent on two levels, namely, to be a participant in the study and to have the conversation recorded. The interviews were recorded using the Cube ACR Connector mobile application. Cube ACR is a built-in technologically advanced application that can be used to automatically record incoming and outgoing phone calls on android devices. The application then saves the recordings on the mobile phone's memory card. The researcher then transferred the recordings to Google Drive cloud storage because this offered more storage capacity than that which was available on the mobile phone.

A challenge that was initially experienced due to the use of the Cube ACR Connector was that the sound quality of the recorded interviews was poor. This was noted during the first pilot study interview. The researcher's voice in the recording was captured clearly but the respondent's voice seemed distant. This was resolved by enabling the 'speaker' function when making the subsequent phone call interviews. Doing so allowed for both parties to be heard clearly in the recordings.

1.9.6 Narrative analysis tools

Narrative analysis refers to a broad category of approaches that "are concerned with the search for and analysis of the stories that people employ to understand their lives and the world around

them."[135] As mentioned earlier, this study conducted telephone interviews to collect narratives from outsourced workers. The focus of the interviews was to find out how the outsourced workers made sense of their situation as outsourced workers. In line with Bryman's critique, quantitative data analysis tools are unsuitable for the analysis of qualitative narratives since they neglect how people perceive their lives as a continuum, albeit being composed of several processes; further that they neglect the perspectives of those being studied.[136] Bearing this in mind, this study adopted a hermeneutic approach, a comparative approach and a juridical-legal approach.

1.9.6.1 Hermeneutic phenomenology

A hermeneutic approach entails "the study of phenomena as they appear to human consciousness as intentional and as lived in perception, imagination, expectation, remembering, thinking and feeling."[137] This study investigated the nature of outsourcing triangular employment relationships based on the experiences of outsourced workers in Kenya. The outsourced workers' subjective experiences of outsourcing TERs were considered unique and worth investigating.

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[135] Bryman (n 127).
[136] Bryman (n 127).
[137] Atieno Kili K'Odhiambo, 'A Phenomenological Investigation into the Efficacy of University Entry Examinations in Kenya: The Lived Experiences of Prospective Teachers' (Doctor of Philosophy in Education, University of Nairobi 2013) 16.

Phenomenology is a 20th-century method of philosophical study, founded by Edmund Husserl.[138] The word phenomenology comes from the Greek, *propaideuein*, meaning "to teach beforehand."[139] Phenomenological research aims to explore what has previously been lived unreflectively. Phenomenology starts from ordinary human experience because it is through experience that we interact with the world around us. This study adopts a phenomenological approach since it reaches the realms of subjectivity in investigating the lived experiences of outsourced workers in terms of how they perceive their employment status, access to employment rights and benefits, as well as job security.

1.9.6.2 Comparative Approach

The research design of this study did not entail the evaluation of two contrasting jurisdictions using more or less identical methods, which is what usually comes to mind when speaking of a comparative approach. As such it was not a cross-national or cross-cultural study. Nonetheless, it adopted a comparative methodology in understanding the global perspectives on the resolution of the challenges faced by outsourced workers. In this regard, this study examined the applicability of the ILO standards to protect the rights of outsourced workers. Several other countries have adopted measures to regulate outsourcing TERs. Based on the themes adopted through the qualitative empirical study, this study undertook a thematic evaluation of the approaches adopted

[138] Edmund Husserl, *The Idea of Phenomenology: A Translation of Die Idee Der Phänomenologie Husserliana II* (Lee Hardy tr, Springer Science & Business Media 2013).
[139] Fiachra Long, 'Philosophy for the Competent Only?' [2013] Yearbook of The Irish Philosophical Society 65, 68.

by other jurisdictions in a bid to identify possible options to enhance the legal regulation of outsourcing TERs in Kenya.

1.9.6.3 Juridical-legal Approach

In addition, a juridical-legal approach was adopted since the study focused on the principles, norms and rules on outsourcing that were to be interpreted. This study was concerned with the analysis of the legal regulation of outsourcing TERs in Kenya. The SER, NSW and TER are all legal concepts, and so are the concepts of employee, worker and employer. A juridical-legal approach was considered essential to understanding and challenging the dominant categorizations which are central to this study. It entailed an evaluation of the labour laws and Constitutional principles, as well as the international principles that were useful in answering the research questions. It also involved the analysis of relevant general rules and principles on the regulation of outsourcing TERs.

1.9.7 Narrative coding

The audio-recorded interviews were loaded into the Analysis of Qualitative Data (AQUAD) version 7 computer program. AQUAD is a qualitative data analysis software that supports both text and audio formats.[140] AQUAD was preferred as an analysis software because it is open-source, it is free for download from the internet, and it is easily obtainable. The recorded interviews were

[140] Günter L Huber, 'AQUAD (English)' (2018) <http://www.aquad.de/en/> accessed 12 March 2018.

then coded as codes and meta codes based on the themes of employment status, employment rights and benefits, and job security. The coded narratives were reviewed to draw patterns and themes.

Another reason why the AQUAD was preferred was that it allows for audio information to be coded directly without the need to first transcribe, which increased the reliability of the narratives because the analysis was based on the 'real' narratives rather than paraphrased versions of the narratives. Generally, AQUAD was considered a suitable software for this research since the research was qualitative and it is a computer program that suits qualitative analysis.

1.9.8 Ethical considerations

This study involved human subjects, namely outsourced workers engaged under outsourcing TERs. As such, the researcher sought and was granted a research license by the NACOSTI in March 2020, before the commencement of the fieldwork. NACOSTI is established under the Science, Technology and Innovation Act, 2013 with a mandate to approve all scientific research in Kenya.[141] The approval from NACOSTI served as a confirmation to all respondents that the research was purely for official and educational purposes, which increased the respondents' confidence to participate in the study.

[141] Science, Technology and Innovation Act 2013 ss 3, 6(f) and 6(l).

In addition, the researcher ensured that confidentiality was maintained. The researcher aimed to respect the respondents' constitutional right to privacy.[142] As such, personal information that would identify the respondents, including their names, telephone numbers, and email addresses, was not mentioned in the study. All respondents were informed of this aspect of confidentiality before the commencement of the interview process.

1.10 CHAPTER BREAKDOWN

This thesis is divided into seven chapters as follows:

Chapter One: The challenges of the legal regulation of outsourcing TERs in Kenya

The introductory chapter entails a general introduction to the challenges of the legal regulation of outsourcing TERs in Kenya. It begins with a background on the study, which then builds up to the statement of the problem. It also contains the objectives of the study, the hypotheses, the research questions to be investigated, the scope and significance of the study, the justification for the study, a brief review of the existing literature and the methodology used to carry out the research.

Chapter Two: Theoretical and conceptual frameworks

Chapter Two expounds on the theoretical and conceptual frameworks that underpin this study. The main legal theories that underpin this study are the paternalistic theory, the decommodification

[142] As guaranteed by the Constitution of Kenya 2010 art 31.

theory and the human rights theory. The chapter also examines the concept of market segmentation. It then discusses the concept of the heterogeneity of NSWs and then zooms in on the concept of TERs. It then discusses outsourcing as a distinct TER. This sets the basis for the later discussion on the arguable proposals of legislative and other options specific to the regulation of outsourcing TERs in Kenya.

Chapter Three: The peculiarities of outsourcing as a non-standard form of work: the lived experiences of outsourced workers in Kenya

Chapter Three presents the narratives of the interviewed outsourced workers, capturing their day-to-day experiences of the outsourcing TER and how it affects their perceptions of employment status, employment rights and duties, and job security. This chapter exposes the challenges faced by outsourced workers and their consequent legal implications. It should be noted that none of the existing acts of Parliament in Kenya is concerned specifically with outsourcing TERs. It is argued that for Kenya to have an effective means of regulating outsourcing TERs there is a need to have specific legal provisions that regulate outsourcing TERs in Kenya.

Chapter Four: The legal framework on outsourcing triangular employment relationships in Kenya

Chapter Four analyzes the current legal framework for regulating outsourcing TERs in Kenya. The chapter assesses the relevant statutes and case law relating to three main themes: the determination of employment status, the employment rights and duties and finally the job security of outsourced

workers. The chapter demonstrates the extent to which the legal framework on employment addresses the peculiarities of outsourcing TERs.

Chapter Five: International framework for the legal regulation of outsourcing triangular employment relationships

Bearing in mind the identified gaps in the Kenyan legal framework, Chapter Five discusses the international framework in the legal regulation of outsourcing TERs. It reviews the International Labour Organization (ILO) labour standards. The ILO is a specialized UN body which promotes the realization of uniform labour standards worldwide. It achieves this objective through various conventions and recommendations. The labour standards provide an international legal framework upon which member states can base their national legislative frameworks. Kenya is an ILO member state and is expected to embrace the ILO standards. This chapter discusses what the ILO envisages in terms of the legal regulation of NSWs in general and outsourcing TERs in particular.

Chapter Six: Bridging the regulatory gaps in the regulation of outsourcing triangular employment relationships

This chapter discusses some of the measures that have been taken in select jurisdictions to bridge the regulatory gaps in the regulation of outsourcing TERs. The measures to provide clarity on the employment status of outsourced workers include addressing employee misclassification and rethinking the attribution of employer status within outsourcing TERs. To ensure equality of treatment, measures include applying the principle of non-discrimination, as well as the concept

of shared liabilities. In addition, the enhancement of the job security of outsourced workers may be enhanced through the flexicurity model.

Chapter Seven: Conclusion and Recommendations

The final chapter concludes by providing a summary of the findings of the study. It also discusses the recommendations from this study in terms of proposals to enhance the legal regulation of outsourcing TERs in Kenya. Finally, it also discusses recommendations for further research based on additional issues exposed through the study.

CHAPTER TWO

THEORETICAL AND CONCEPTUAL FRAMEWORKS

2.1 INTRODUCTION

The first part of this chapter reviews the theories which form the lens through which this study assesses outsourcing TERs, namely, the paternalism theory, the decommodification theory and the human rights theory. Through the lens of the paternalism theory, one may find motivation for the legal regulation of outsourcing TERs in Kenya, rather than it being completely unregulated or self-regulated by concerned parties. The lens of the decommodification theory may justify the legal regulation of outsourcing TERs in Kenya so that outsourced workers are not treated merely as commodities. The human rights theory underpins this study because it can offer additional protection for outsourced workers, by reaching beyond the general employment laws which are hinged upon the attribution of employment status. The framework of employment laws is designed to primarily protect employees. On the other hand, evaluating outsourcing through the human rights theory may be a suitable option to safeguard outsourced workers' rights without the need to classify them as employees.

The second part conceptualizes outsourcing as a distinct non-standard form of work (NSW). NSWs deviate from the standard employment relationship (SER) in one way or another. Outsourcing is non-standard because it is a triangular employment relationship (TER) whereas the SER comprises a direct employment relationship between only two parties; an employee and a single employer. This part begins with an evaluation of the concept of market segmentation; which explains that the

market in which the employment framework operates is segmented rather than unified. The SER accounts for one segment of the market and the NSWs account for another segment of the market.

The chapter then discusses the heterogeneity of NSWs. The market is further fragmented in that the NSWs segment is not homogeneous but instead is composed of several distinct forms of work. These can broadly be categorized into four segments, namely, temporary employment, part-time work, disguised employment and TERs. This chapter then zooms in on the fourth NSW category, TERs, since outsourcing is a TER. Finally, it discusses the concept of outsourcing as a distinct TER, differentiating it from franchising, offshoring, nearshoring and subcontracting.

2.2 THEORETICAL FRAMEWORK

The general objective of this study was to analyze the legal regulation of outsourcing triangular employment relationships in Kenya to find out whether it is sufficient to protect the rights of outsourced workers in order to identify possible interventions that can enhance the protection of outsourced workers. The critique of outsourcing TERs is based on three theories, namely, the paternalism theory, the decommodification theory and the human rights theory.

2.2.1 The paternalism theory

> "Paternalism is justified only to preserve a wider range of freedom for the individual in question. How far this principle could be extended, whether it can justify all the cases in which we are inclined upon reflection to think paternalistic measures are justified remain to be discussed… I suggest that since we are all aware of our irrational propensities, deficiencies in cognitive and emotional capacities and avoidable and unavoidable

> ignorance it is rational and prudent for us to in effect take out "social insurance policies". We may argue for and against proposed paternalistic measures in terms of what fully rational individuals would accept as forms of protection."[143]

The paternalism theory is a theory of law which emphasizes the interference with a person's freedom of action for the benefit of that person.[144] It is usually seen as a counter-theory to liberalism, which advocates for free choice. According to John Stuart Mills, a proponent of the libertarian theory, individuals should have the freedom to lead their lives as they please, provided they do not harm others.[145] The rationale is that every individual has an understanding of his or her circumstances and feelings which is greater than that which any other person may have about them.

The argument is that, if society was to interfere with people's judgment on personal matters, such interference would be based on assumptions, which may be wrong or misapplied to individual cases.[146] Human beings, as rational beings, should be allowed to act freely, insofar as they do not cause harm to others. Nevertheless, a State's intervention in the affairs of its citizens may prevent harm to other people without necessarily being detrimental to the liberty of the person whose freedom is restrained.

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[143] Gerald Dworkin, 'Paternalism' (1972) 56 The Monist 64, 81.
[144] Dworkin (n 143) 65.
[145] John Stuart Mill, *On Liberty* (Batoche Books Limited 2001) 13.
[146] Mill (n 145) 16.

For example, the State may validly regulate the sale of poisons to prevent the murder of its citizens. A total limitation of freedom through a complete ban on the sale of poisons may be unrealistic because the poisonous substances may have other legitimate uses. However, regulations relating to proper documentation by salespersons as to the details of the purchasers and their intended use may curb illegal use. Such documentation may also be useful in the early detection and prosecution of murders carried out using poisonous substances. Even though some citizens may prefer to be free to take poisonous substances, the regulation of poisonous substances would ultimately be of benefit to these persons because it would be in their interests, whether they appreciate it or not, to remain alive.

This study argues that the limitation of freedom should consider additional factors beyond harm to others. It may be beneficial to workers to have their freedom of contract regulated so that they are not exploited. Essentially agreements for the provision of labour are contractual relationships. One of the central tenets of the law of contract is freedom of contract. Based on this doctrine, parties can freely negotiate and decide on the terms and conditions by which they want to be bound. From a libertarian point of view, to facilitate such freedom, the law should take a *laissez-faire* approach to govern contractual relationships because the parties are rational beings.[147]

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[147] Jo Ann Boydston (ed), *John Dewey: The Later Works, 1925-1953* (Southern Illinois University Press 1987) 11.

Taking a libertarian approach, the parties to outsourcing arrangements should be completely free to negotiate and determine whatever terms and conditions they feel are best suited to their situation. The two corporate figures that the outsourced workers relate with should be free to conduct their business as they see fit; to maximize their profits for their own sake and the sake of their shareholders. Similarly, the workers should be free to negotiate for their preferred working conditions, remuneration, and other rights and benefits. Since each party is presumed to be rational, the expectation would be that each party would seek what is in their best interests.

Employment relationships embody an inherent imbalance of bargaining power which may warrant paternalistic State interference. In the SER, paternalistic State interference is seen through the labour law initiatives that limit the parties' freedom of contract in a bid to equalize the bargaining power. These labour law measures include the provision of minimum wages, the regulation of maximum working hours, leave entitlements and rest days among others. One limitation of such a libertarian approach when applied to employment relationships is that it does not factor in unequal bargaining power, which usually favours the employer.[148]

In outsourcing arrangements, the bargaining power may tilt towards the two authority figures rather than the outsourced workers. Left to their own devices, the workers may not be in a position

[148] Peter Ackers, 'Rethinking the Employment Relationship: A Neo-Pluralist Critique of British Industrial Relations Orthodoxy' (2014) 25 The International Journal of Human Resource Management 2608.

to fight for what is in their best interests. Since outsourced workers are not SER workers, the realm of protections offered under employment laws may not effectively apply to their work arrangements. To cure this deficiency, this study argues for paternalistic State interference to protect outsourced workers and reduce their precariousness.

The precariousness of outsourced workers may, for example, arise at the point at which the outsourced worker is entering into a contractual relationship. The worker may not understand the nature of outsourcing TERs or the division of the employer function between the two authority figures. Paternalistic interference would be beneficial for such outsourced workers, to mitigate the precariousness of their employment situations. This study argues that the law should step in to ensure that outsourcing contracts are framed in a way that would ultimately protect the interests of the outsourced workers, irrespective of whether or not the workers comprehend the intricacies of outsourcing TERs.

In other situations, outsourced workers may understand the nature of outsourcing TERs but, due to their unequal bargaining power or lack of collective voice, may not be in a position to ensure that their interests under the contractual outsourcing arrangements are taken care of. In such a situation, paternalistic intervention would arguably enable the outsourced workers to meet their own goals. The law would give the outsourced workers a voice which would otherwise be muted because of the inherently unequal bargaining power.

A third alternative is where the outsourced workers understand the nature of outsourcing TERs but downplay the precarious outcomes as too remote. In this sense, the legal regulation of outsourcing TERs would truly be an imposition of a good on someone who does not want to be restricted. According to Dworkin, in such situations, paternalistic intervention should be kept at a minimum.[149] For it to be justified, there must be a clear demonstration of the exact harmful consequences that are to be avoided or the beneficial consequences of the intervention. Secondly, it should be maintained as one of the least restrictive alternatives.[150]

This study proposes the regulation of outsourcing TERs which would essentially affect all outsourced workers, irrespective of where they fall within the three alternatives explained above. To ensure that the study provides for those who fall into the third alternative, it endeavours to meet the two criteria identified by Dworkin. This study collects narratives on the experiences of outsourced workers to depict the challenges they face within outsourcing TERs. This enables a proper evaluation of the minimum required paternalistic interventions that would ultimately benefit outsourced workers. In addition, the recommendations proposed in this study are phrased in a way that they are not unduly restrictive to all concerned parties.

[149] Dworkin (n 143) 83.
[150] Dworkin (n 143) 84.

It may also be noted that in employment relationships, the complete freedom of contract may ultimately lead to the commodification of labour.[151] On the other hand, labour laws, as a bundle of rights, put a restraint on the freedom of contract.[152] The paternalistic legislative interference of outsourcing TERs may also meet the goals of the decommodification theory. The question of whether a person's labour is, or should be, a commodity is contested and leads to different theories depending on which end of the spectrum the theorist belongs to. On one end of the spectrum is the commodification theory which sees labour as a commodity. On the opposite end is the non-commodification theory which relies on the dignity of labourers to justify non-commodification. This study leans more towards the non-commodification theory albeit incompletely; it relies on the decommodification theory.

2.2.2 The decommodification theory

> "Although work has not been fully decommodified, it is incompletely commodified. Reforms such as collective bargaining, minimum wage requirements, maximum hour limitations, health and safety requirements, unemployment insurance, retirement benefits, prohibition of child labour, and antidiscrimination requirements reflect an incompletely commodified understanding of work."[153]

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[151] *See* section 2.2.2.
[152] Horacio Spector, 'Philosophical Foundations of Labor Law' (2006) 33 Florida State University Law Review 1119, 1139.
[153] Margaret Jane Radin, *Contested Commodities* (Harvard University Press 1996) 108.

The decommodification theory acknowledges that labour is indeed a commodity but not one like any other, and it advocates for increased measures to ensure it is not treated as merely a commodity.[154] To begin with, it is important to consider the appropriateness or inappropriateness of the alienation of different goods from the person through *laissez-faire* market trading. Through this, a distinction may be drawn between complete commodification and complete non-commodification. Goods that are completely commodified are referred to as universal commodifiers whereas completely non-commodified goods are referred to as universal non-commodifiers.[155]

Commercial products such as maize and beans are universal commodifiers in that they can be traded freely in the market. On the other hand, babies and blood would be considered universal non-commodifiers in that it would be morally and legally wrong to openly trade them in the market. Many goods can be placed squarely within the categories of complete commodification and complete non-commodification. However, some goods sit on the fence. These goods which possess features of both universal commodifiers and universal non-commodifiers are considered to be incompletely commodified. This study agrees with the view that a person's labour is incompletely commodified.[156] In addition, this study proposes further decommodification of outsourcing through legal reforms, for the benefit of outsourced workers.

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[154] Margaret Jane Radin, 'Market-Inalienability: Making and Selling Babies' [1987] Harvard Law Review 174.
[155] Radin (n 154) 175.
[156] Radin (n 153) 108–110.

To begin with, complete commodification is a concept used to describe goods that are tradeable in the market, that is, goods that can be replaced by an equivalent thing.[157] If something can be bought and sold in the market, it has a price and it is considered to be a commodity. Commodities have a two-fold nature. First, they have use-value, which is their intrinsic value and is dependent on the characteristics of the commodity.[158] Second, commodities have exchange value, which is extrinsic and dependent on their value to other people in the market. Commodities are both objects of utility and depositories of value.[159]

The labour provided by outsourced workers is indeed tradeable within the market in that the outsourced worker provides his labour in exchange for wages or a salary. It cannot be denied that the outsourced worker's labour is a commodity. However, there is a problem when labour's objectification in the specific acts of production is not distinguished from its unique status as the source of value.[160] In other words, one shortfall of the commodification theory is that it can lead to a mindset of objectification of labour. To understand the decommodification theory it would be important to first investigate both the commodification and non-commodification theories, and thereafter consider the decommodification theory.

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[157] Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Yale University Press 2018) 33.
[158] Karl Marx, *Capital, Volume I* (Frederick Engels ed, Samuel Moore and Edward Aveling trs, Progress Publishers 1887) 27.
[159] Marx (n 158) 33.
[160] Martha Lampland, *The Object of Labor: Commodification in Socialist Hungary* (University of Chicago Press 1995) 11.

The birth of the commodification theory can be attributed to Adam Smith, who posited that the market forces of supply and demand are enough to regulate the market.[161] Smith differentiated between the natural price and the market price of goods, and their relationship. The natural price is the cost necessary to bring an item to its fruition. On the other hand, the market price is the cost that parties in need of a commodity would be willing to pay for it.[162] Generally, the market price of an item depends on its supply and demand and it may rise above its natural price or fall below it. In principle, this rise and fall in price can be regulated by the market itself, through either withdrawing or increasing the quantity of the particular commodity within the market.[163]

The commodification theory views labour as a commodity which can be regulated by the supply and demand forces in the same way that all other commodities are subject to these market forces. Since an outsourced worker's labour is exchangeable for his or her sustenance, labour can validly be classified as a commodity. [164] Based on this approach, it would not be necessary to give the labour aspects of the outsourcing contractual arrangements any special attention. It would be inconsequential whether the salary earned is enough to sustain the outsourced workers. The greatest consideration would be that there is a need for a particular skill and the outsourced workers

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[161] Adam Smith, *An Inquiry into The Nature and Causes of The Wealth of Nations (1776)* (Jim Manis ed, World Scientific 2005) 51–58.
[162] Smith (n 161) 51.
[163] Smith (n 161) 52–53.
[164] Edmund Burke, 'Thoughts and Details on Scarcity', *The Works of the Right Honourable Edmund Burke*, vol 4 (Wells and Lilly 1826) 229.

can meet that need; this exchange of labour for wages would be guided by the supply and demand market forces.[165]

One shortfall of this theory is that it does take into account the market imperfections experienced in the labour market. Generally, workers are almost invariably more numerous than masters. More often than not, the supply of labour supersedes its demand. Theoretically, a perfect market would effectively regulate itself by decreasing the number of workers within particular occupations and increasing the numbers when the need arises. But this is not the case. In reality, market imperfections enable masters to either by tacit or express concurrence keep workers' wages at certain levels due to the inequality in bargaining power.[166] In addition, sometimes these wage levels fall below the natural price. For example, the remuneration of the vast majority of manual labourers in Kenya falls below the minimum wage levels that the law prescribes.[167]

Another major problem with the commodification of labour theory is that it does not significantly recognize the social relations that labour embodies as it produces other commodities.[168] If the social relations are ignored, this would result in a curious displacement known as "the fetishism of commodities" in which commodities are valued more than social relations.[169] This fetishism of

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[165] Burke (n 164) 233.
[166] Ackers (n 148).
[167] George Owidhi, 'Analysis of Working Conditions and Wages of Domestic Workers in Kenya' (Africa Labour, Research and Education Institute 2017).
[168] Marx (n 158) 119.
[169] Marx (n 158) 47–59.

commodities may eventually work to the detriment of the outsourced workers, who would end up becoming devalued as they create more wealth for the corporate entities.

On the opposite end of the spectrum is the complete non-commodification approach. Universal non-commodifiers are goods that cannot be replaced because they do not have an equivalent. They have *dignity* rather than a *price*.[170] The non-commodification theory holds that a person's labour has dignity in that it cannot be separated from the person.[171] This theory holds that the sale of labour power effectively amounts to the bondage of the worker. Work is inherently tied to a person's self and is important towards his or her achievement of personal fulfilment and self-identity. [172] Allowing market forces to solely regulate outsourcing TERs would strip that relation of its moral basis.

The complete non-commodification theory posits that labour is market inalienable. Labour power is too precious for its price to be regulated solely by the market.[173] The rationale is that the commodification of labour fails to recognize its social functions. It is important for masters not to

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[170] Kant (n 157) 33.
[171] See generally Karl Renner, *The Institutions of Private Law: And Their Social Functions* (Transaction Publishers 2009); Otto Kahn-Freund, 'A Note on Status and Contract in British Labour Law' (1967) 30 The Modern Law Review 635.
[172] Pope Pius XI, 'Quadragesimo Anno: Encyclical of Pope Pius XI On Reconstruction of the Social Order' (15 May 1931) para. 83.
[173] Paul O'Higgins, 'Labour Is Not a Commodity - An Irish Contribution To International Labour Law' (1997) 26 Industrial Law Journal 225, 226.

treat their workers as their bondsmen and they should instead uphold the workers' dignity.[174] Workers' remuneration should be high enough for them to cater for their families and integrate into society. To emphasize this, the ILO embraced the expression "labour is not a commodity" as one of its founding principles.[175]

One drawback of the complete non-commodification theory is that it may be likened to the proverbial ostrich who buries its head in the sand. The theory fails to recognize the obvious fact that outsourced workers' labour is indeed tradeable for pay. Tradability is evidenced in the exchange of the outsourced workers' skills for wages or a salary. Hence, it is inaccurate to classify an outsourced worker's labour as a universal non-commodifier.

The commodification versus non-commodification debate has received considerable attention in labour law discussions on deregulation and the shift towards increased flexibility.[176] In addition, several attempts have been made towards a middle-ground theory; the incomplete commodification theory. Central to this theory is that it recognizes that labour has features that classify it as both a commodity and a non-commodity. It holds that labour is indeed a commodity, but it is a peculiar one and it is incompletely commodified.

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[174] Pope Leo XIII, 'Rerum Novarum: Encyclical of Pope Leo XIII On Capital and Labor' (15 May 1891) para. 20 and 36.
[175] Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia) 1944 art 1.
[176] Stein Evju, 'Labour Is Not a Commodity: Reappraising the Origins of the Maxim' (2013) 4 European Labour Law Journal 222, 222.

This peculiarity is evidenced, for example, in its perishability. [177] For any other commodity, if it is not sold on a particular day, it may be taken home and brought back to the market on the following day. However, if a day's labour is not used on a particular day, then the worker, and perhaps the entire community, lose it and it cannot be recovered. The perishability of labour argument may be challenged because it is equally possible for other commodities to be perishable. Farm produce such as milk, fruit and vegetables may ferment or rot if not consumed within a certain time frame.

Nonetheless, an outsourced worker's labour can be termed as a peculiar commodity in that his labour may be indistinguishable from the person himself.[178] When the corporate entities in outsourcing TERs enter into a service contract over the temporary acquisition of the labour-power of the outsourced workers, essentially they acquire control over the outsourced workers. Bearing in mind the social and economic functions that labour performs, one should not ignore the opportunity that outsourcing gives for the outsourced workers to integrate into society and contribute towards the growth of the economy.

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[177] Hand-loom Weavers Committee, 'Analysis of the Evidence Laid before the House of Commons during the Sessions of 1834 and 1835, Relative to the Industrial Condition of the Hand-Loom Weavers of Cotton, Silk and Woollens' (HM Stationery Office 1835) Parliamentary Paper 12.
[178] Lujo Brentano, *The Relation of Labor to the Law of Today* (Porter Sherman tr, G P Putnam's Sons 1891) 170.

Generally, the law has attempted to decommodify labour through the facilitation of trade union activities such as collective bargaining and industrial action;[179] occupational health and safety standards;[180] retirement benefits to cater for workers who have ceased to work upon reaching the normal age for leaving service;[181] labour rights such as antidiscrimination, maximum hour limitations and minimum wage requirements;[182] and the protection of children from child labour.[183] Although work has not been fully decommodified, these measures have ensured that it is incompletely commodified. Building on the achievements labour law has made thus far, this study argues for further decommodification through the regulation of outsourcing TERs in Kenya.

Such decommodification would ensure that outsourcing TERs does not devalue the outsourced workers. Recently outsourcing as a form of work has received criticism as falling within the commodification end of the spectrum.[184] It is contended that increasingly, more business activities and processes are being given 'commodity status' in which the contribution of individual workers to the process is overlooked.[185]

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[179] Labour Relations Act 2007.
[180] Occupational Safety and Health Act 2007.
[181] Retirement Benefits Act 1997.
[182] Employment Act.
[183] Children Act 2001.
[184] Holst (n 56); Indra Abeysekera, 'Intellectual Capital Practices of Firms and the Commodification of Labour' (2008) 21 Accounting, Auditing & Accountability Journal 36.
[185] Nada Kakabadse and Andrew Kakabadse, 'Critical Review–Outsourcing: A Paradigm Shift' (2000) 19 Journal of management development 670, 677.

Outsourcing is a business and employment model in which two authority figures enter into agreements for the provision of services by outsourced workers in consideration of payment. The focus of the literature is often on the processes and services, especially from the point of view of the authority figures, rather on than the labour-power of the outsourced workers, who remain in the shadowy background. If left solely to the regulation by market forces, outsourcing as a business practice may fail to recognize the underlying social relations and consequently may end up as a universal commodifier.

In principle, there is nothing wrong with business models that focus primarily on the increase of profits. Profit-making is highly encouraged, as it is pivotal towards increasing the country's gross domestic product (GDP) levels and ultimately its economic prosperity.[186] The problem arises when outsourcing becomes part of "a race to the bottom" in which profits are the ultimate goal at the expense of workers' conditions and well-being.

Labour laws have been a useful tool in the progressive decommodification of labour. This primarily benefits employees but the benefits may not extend to NSWs. To extend the scope of protections to outsourced workers, it may also be beneficial to identify their rights through the

[186] Timothy J Sturgeon and Gary Gereffi, 'Measuring Success in the Global Economy: International Trade, Industrial Upgrading and Business Function Outsourcing in Global Value Chains' (2009) 18 Transnational Corporations 1.

human rights framework. Unlike the employment rights framework, the human rights framework does not depend on employment status.

2.2.3 The human rights theory

The human rights theory advocates for the dignity of human beings as human beings irrespective of their socio-economic standing, race, tribe, religion, politics, ideology and other factors that differentiate human beings.[187] Human rights are entitlements that are indefeasible and inalienable. The State does not grant these rights, but rather upholds and guarantees them. In this sense, human rights are universal.[188] The human rights theory advocates for the conformity of positive laws to the law of nature which existed even before societies were formed. And what is this natural law?

Some scholars equate it to the will of God.[189] And by this will of God, persons are entitled to *inter alia* the rights to life, liberty and property. In contrast, some attribute natural law to human reason rather than a supra-human being.[190] Human reason is a special trait in human beings; they are the only beings on earth who are capable of reason. This is what distinguishes human beings from animals and makes them transcendentally free. This is the basis of human dignity. With this in

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[187] Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 Metaphilosophy 464; Ernest L Fortin, *Human Rights, Virtue and the Common Good: Untimely Meditations on Religion and Politics* (J Brian Benestad ed, Rowman & Littlefield Publishers 1996) 19.
[188] Brian Orend, *Human Rights: Concept and Context* (Broadview Press 2002) 41.
[189] John Locke, *Two Treatises of Government* (Dave Gowan ed, 10th edn, Project Gutenberg Ebook 2005) 148.
[190] Luigi Caranti, 'Kant's Theory of Human Rights' in Riccardo Dottori (ed), *Autonomy of Reason?* (LIT Verlag Münster 2009) 285.

mind, all human beings are innately entitled to certain rights which include civil-political rights (CP rights), economic, social and cultural rights (ESC rights), and solidarity rights.[191]

Though this study analyzes the regulation of outsourcing TERs primarily through the lens of labour law, an added important lens is that of human rights. Generally, labour rights may be defined as "entitlements that relate specifically to the role of being a worker."[192] It has been noted that the human rights movement and the labour rights movement are two independent paths which "run on tracks that are sometimes parallel and rarely meet."[193] Macklem refers to these two movements as "distant cousins who share a common heritage but rarely explore the extent to which they share similar values and aspirations."[194] By attempting to bridge these two paths, it may be possible to take advantage of both movements and thus access an additional range of possibilities on the regulation of outsourcing TERs. This has important implications for outsourced workers since human rights do not depend on employment status.

There are four arguments to support the "parallel tracks" assertion: the non-compellingness argument, the non-universality argument, the non-strictness argument and the non-timelessness

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[191] Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966; Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80 American Journal of International Law 1.
[192] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 European Labour Law Journal 151, 152.
[193] Virginia A Leary, 'The Paradox of Workers' Rights as Human Rights' in Lance A Compa and Stephen F Diamond (eds), *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press 1996) 22.
[194] Patrick Macklem, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005) 61.

argument.[195] This separation approach effectively leaves workers with only one avenue of redress, namely, labour rights. From a normative point perspective, the rights of workers, including outsourced workers and other NSW workers, could potentially be classified as human rights. To support this assertion, this study briefly examines and challenges these four arguments.

The first argument is that even though labour rights are important, they are not as morally compelling as human rights.[196] To illustrate the difference, the human right not to be tortured is more morally compelling than the labour right to paid holidays. One criticism is that some human rights are not as morally compelling as the freedom from torture, an example being the right to deny the Holocaust.[197] Relatedly, some labour rights are normatively as compelling as freedom from torture. For example, the abuse of migrant domestic workers may be considered tantamount to modern-day slavery.[198] Similarly, the obscuring of outsourced workers' employment protections is indeed morally compelling.

The second argument is that human rights are universal, whereas the focus of labour rights is on persons who are in employment relationships.[199] This approach can be criticized on the basis that

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[195] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The idea of labour law* (Oxford University Press 2011) 140–144.
[196] Collins (n 195) 142.
[197] Mantouvalou (n 192) 165.
[198] Virginia Mantouvalou, 'The Many Faces of Slavery: The Example of Domestic Work' (2012) 14 Global Dialogue 73.
[199] Collins (n 195) 142.

even though human rights are universal, their corresponding duties may be limited subject to the status of the right-holder.[200] For example, the corresponding duty to the human right to a fair trial requires a criminal case against the arrested person. The same argument can be extrapolated to account for the rights under outsourcing TERs that this study assesses, in which their corresponding duties are conditional upon the rights-recipient being an outsourced worker.

The third argument is that labour rights such as minimum wage can vary among different societies, whereas human rights set the floor below which all governments should not fall.[201] This argument may be viewed as too narrow because it only holds for CP rights.[202] Inevitably, the realization of ESC rights varies from one society to the next. Yet, it is undeniable that ESC rights are human rights despite their progressive realization.[203] Relegating the ESC rights of outsourced workers to a secondary position, in comparison with CP rights, may contribute to workers such as outsourced workers being considered expendable in worldwide economic developments.[204]

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[200] John Tasioulas, 'On the Nature of Human Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: contemporary Controversies* (de Gruyter 2011) 37–39.
[201] Collins (n 195) 143.
[202] Sital Kalantry, Jocelyn E Getgen and Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 Human Rights Quarterly 253, 255.
[203] PWESCR, *Human Rights for All: International Covenant on Economic, Social and Cultural Rights - A Handbook* (PWESCR 2015) 3.
[204] James A Gross, 'Takin' It to the Man: Human Rights at the American Workplace' in James A Gross and Lance Compa (eds), *Human Rights in Labor and Employment Relations: International and Domestic Perspectives* (ILR Press 2009) 13.

Finally, it is argued that human rights are framed as timeless entitlements, whereas labour rights are adaptable over time to conform to labour market changes.[205] This argument can be challenged since labour market changes result merely in variations in the expression of rights and not changes in the entitlements themselves.[206] In the same breadth, the application of human rights entitlements can vary over time according to different contexts. For example, technological advancements can have implications for the right to privacy but this does not affect its status as a human right. Similarly, even though NSWs are numerous and the rights due in each category may vary, the rights can be framed in a way that makes them timeless entitlements.

In conclusion, it is argued that it would be beneficial to address outsourced workers' rights through the human rights framework. Approaching these rights from a human rights perspective opens up more channels for their advancement and enforcement. Outsourcing arrangements are essentially TERs. This leads to situations where a worker may be working for one organization that exercises day-to-day control over their activities yet there is a different party that exercises legal control in terms of granting employment status. Even though the rights of outsourced workers may not fit squarely into the current employment legal framework, approaching the issue from a human rights perspective may lead to better results.

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[205] Collins (n 195) 142.
[206] Mantouvalou (n 192) 168.

2.2.4 Summary

This study relies on three theories, namely, the paternalism theory, the commodification theory and the human rights theory. The paternalism theory supports interference by the State in outsourcing arrangements instead of taking a *laissez-faire* approach which leaves them to be governed purely by the law of contract. Adopting a paternalistic approach, rather than a libertarian one, would be to the benefit of outsourced workers in that it proposes the imposition of a good for their benefit, whether they recognize it or not.

Secondly, this study relies on the decommodification theory which seeks the progressive decommodification of outsourcing through legal regulation. Even though the labour provided by outsourced workers may be deemed a commodity, it is a peculiar commodity because of the social relations that outsourcing TERs embody. This theory considers the dignity of outsourced workers and seeks to ensure that outsourcing as a business model does not lead to outsourced workers being viewed as mere commodities.

Finally, the human rights theory offers a useful avenue for advocating for the rights of outsourced workers because human rights do not depend on employment status, which is a prerequisite of labour rights. Consequently, the rights of outsourced workers can effectively be addressed without the need to classify them as employees.

2.3 CONCEPTUAL FRAMEWORK

Figure 1 below is a simple diagrammatic sketch that illustrates how the variables of the study relate to each other. In this study, there is one dependent variable and three independent variables. The dependent variable is the effective legal regulation of outsourcing TERs in Kenya. This is in line with the general objective of this study, that is, to analyze the legal regulation of outsourcing triangular employment relationships in Kenya to find out whether it is sufficient to protect the rights of outsourced workers in order to identify possible interventions that can enhance the protection of outsourced workers.[207]

The independent variables are clarity on the employment status of outsourced workers within outsourcing TERs, minimum standards on the employment benefits and working conditions for outsourced workers and improved job security for outsourced workers in Kenya. These independent variables featured as thematic areas in the collection of the empirical data, in the evaluation of the domestic and international legal frameworks, and the consideration of best practices.

[207] See section 1.3.

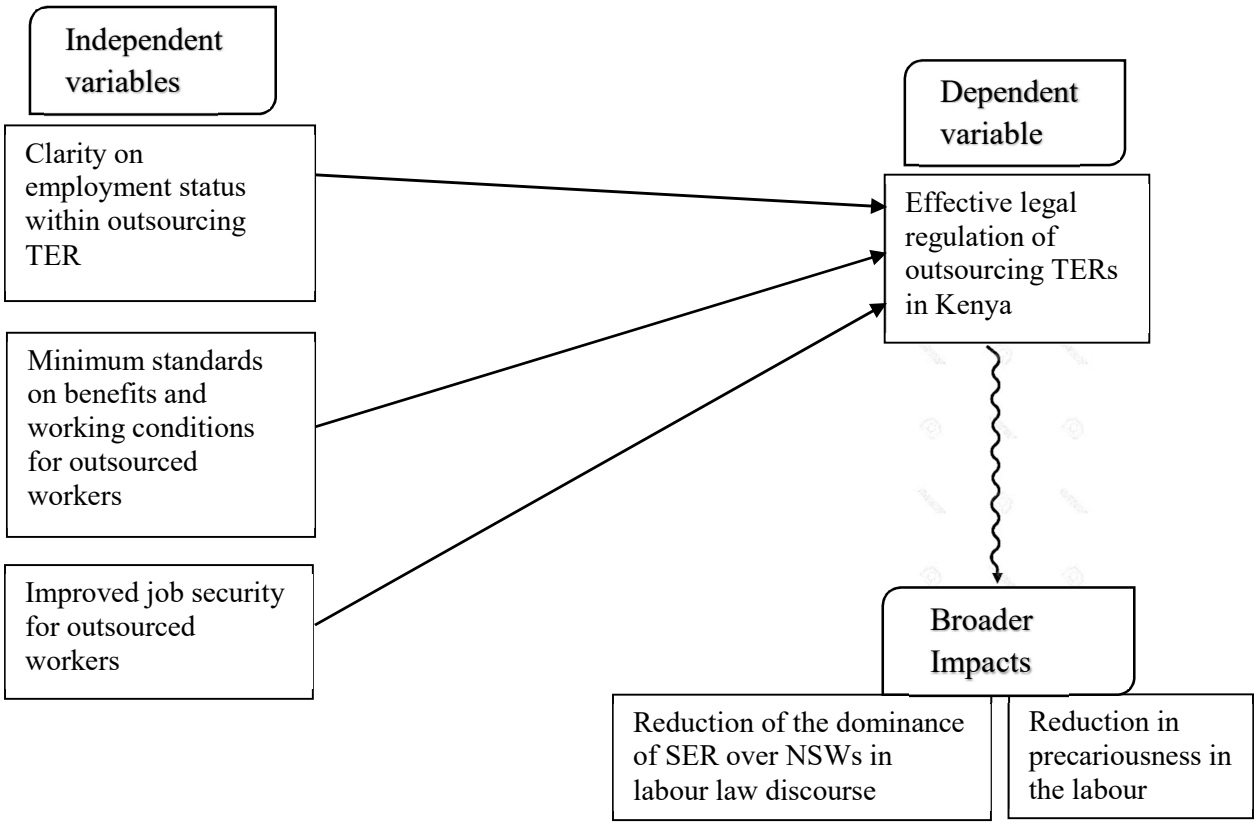

Figure 1: Diagrammatic representation of variables

The diagrammatic representation also depicts the broader impacts of this study. The broader impacts that would be felt if the dependent variable is achieved are the reduction in precariousness in the labour market and the reduction of the dominance of SER over NSW in labour law discourse. Even though these broader impacts are not expressly discussed in the chapters of this study, they resound as undercurrents.

The sub-sections within this conceptual framework elucidate the key concepts as one would peel the layers of an onion ring to get to the centre, which in this context is outsourcing. This subsection

begins with an examination of the concept of market segmentation. This illustrates how the market is segmented and how this leads to perceptions of insiders and outsiders; the insiders being SER workers and the outsiders NSW workers. The next key concept that is discussed is the heterogeneity of the NSW outsider segment of the dual labour market. This depicts the broad categorizations of NSWs and briefly illustrates how each category deviates from the SER. After that, the concept of TERs is investigated since it is the NSW category that is most relevant to this study. Finally, outsourcing is distinguished as a unique TER to support the assertion that it is a unique employment model that is worthy of academic interrogation and possible legal regulation, for the benefit of outsourced workers.

2.3.1 Market segmentation: insiders and outsiders

The evaluation of market segmentation is beneficial as it provides clarity on the nature of the market. Once upon a time, it was believed that reliance on the right economic policies and the attainment of a certain level of resources could turn all economies into modern dynamic economies.[208] The point of economic development at which this would happen was labelled the 'Lewis Turning Point' in honour of the Nobel Prize winner who visualized this utopia and described it in his 1954 essay.[209] Sadly, this Lewis Turning Point is an elusive mirage and the

[208] W Arthur Lewis, 'Economic Development with Unlimited Supplies of Labour' (1954) 22 Manchester School of Economic and Social Studies 139.
[209] Lewis (n 208).

reality in most countries consists of a heterogeneous market consisting of a mélange of both low-income traditional set-ups and modern dynamic set-ups.

The reality is that the market is segmented, with each segment offering different working conditions, promotion criteria, remuneration and benefits.[210] It may be construed that workers do not all fall within a single market but rather operate within different labour markets. In other words, there is market duality. The primary market offers more job stability than the secondary market. Some features of the primary market include a requirement for stable working habits, the existence of defined job ladders to allow for vertical progression in the workplace and the availability of relatively higher wages.[211] On the other hand, in the secondary market, stable working habits are not required, there is a much higher turnover and the wages tend to be lower. Several studies have noted with concern that jobs within the secondary market tend to be taken up by women, youth and minority workers.[212] The secondary market is less regulated and the jobs offer fewer legal protections, hence these workers are more vulnerable and precarious.[213] Outsourced workers fall

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[210] Michael Reich, David M Gordon and Richard C Edwards, 'A Theory of Labor Market Segmentation' (1973) 63 The American Economic Review 359.
[211] Reich, Gordon and Edwards (n 210) 360.
[212] Marloes De Lange, Maurice Gesthuizen and Maarten HJ Wolbers, 'Youth Labour Market Integration across Europe: The Impact of Cyclical, Structural, and Institutional Characteristics' (2014) 16 European Societies 194; Carlos Oya, 'Rural Wage Employment in Africa: Methodological Issues and Emerging Evidence' (2013) 40 Review of African Political Economy 251; Gary S Fields, 'Labor Market Analysis for Developing Countries' (2011) 18 Labour Economics S16.
[213] Arne L Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s-2000s* (Russell Sage Foundation 2011).

within the secondary labour market since they are NSW workers. This study focuses on the secondary labour market in an attempt to offer regulatory reprieve to outsourced workers.

At the firm level, market duality results in a stable 'core' based on firm-specific skills and a 'periphery' of workers with general skills.[214] Outsourcing falls within the periphery because, more often than not, general skills are outsourced, rather than firm-specific skills. Within the core, the focus is on functional flexibility; in other words, the ability to easily redeploy workers between different tasks and activities when the need arises. On the other hand, within the periphery, numerical flexibility is usually more important. This refers to the possibility of varying the number of workers in a workplace to match the company's labour demands. This may necessitate looser contractual arrangements which allow for easier hiring and firing.

The core of the market is dominated by the SER; the periphery is dominated by NSWs. Though the periphery consists of different work arrangements, it may broadly be seen to comprise two groups. The first group consists of employees with general skills who do not enjoy the same benefits and job security as the core group. Essentially, they have a job, but not a career. Workers within the second periphery group are engaged on contractual terms as a supplement when further

[214] Atkinson (n 100).

external labour market to cater for either routine or specialized tasks, through increased outsourcing, subcontracting, temporary employment agency workers and self-employed workers. This model of market segmentation is illustrated in Figure 2.

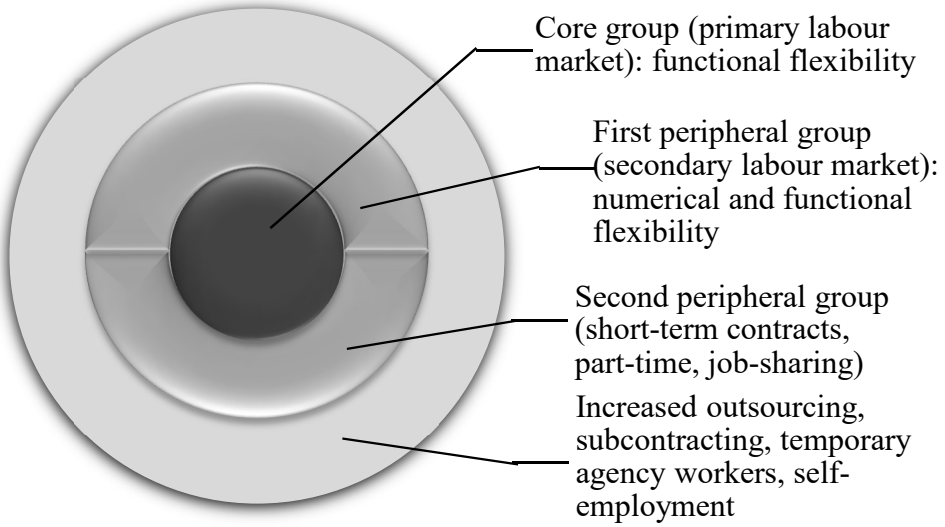

Figure 2: Model of market segmentation[215]

The effect of this concept of segmentation is an 'insiders' and 'outsiders' divide.[216] The insiders are the workers within the primary labour market, who often have more privileged positions and benefits. The outsiders fall within the secondary labour market whereby they hold more precarious positions. The insider-outsider divide provides insight into the distinction between the SER and

[215] Adapted from Atkinson's model of the flexible firm in Atkinson (n 100) 30.
[216] Silja Häusermann and Hanna Schwander, 'Varieties of Dualization? Labor Market Segmentation and Insider-Outsider Divides across Regimes', *The age of dualization: The changing face of inequality in deindustrializing societies* (2012); Assar Lindbeck and Dennis Snower, 'The Insider-Outsider Theory: A Survey' [2002] IZA Discussion Paper No. 534; Assar Lindbeck and Dennis J Snower, 'Insiders versus Outsiders' (2001) 15 Journal of Economic Perspectives 165.

NSW categories. Workers with SER contracts are insiders and those with NSW contracts are outsiders.

In Kenya, the insider-outsider discourse adds another dimension by focusing on the formal and informal employment sectors. The insiders are the formal sector workers and the outsiders fall within the informal sector.[217] The informal sector includes street vendors, garbage collectors, and *jua kali* workers who collect and recycle scrap metal, among others. The workers who are based on the streets and in the open air are the most visible category of informal workers. The less visible ones are home-based workers and casual workers. Those with a keen eye will not fail to notice women seated near certain residential areas each morning awaiting daily housekeeping short-term contracts. One may also sometimes notice young men who stand waiting for trucks to ferry them to construction sites where, if they are lucky, they will be engaged to perform various manual tasks. Other examples of work in the informal sector are casual workers in hotels, temporary off-site data entry workers, and outsourced cleaners and guards, among others. Though the working conditions and level of earnings vary significantly within the informal sector in Kenya, one thing that these workers have in common is their precariousness; they lack adequate legal and social protections.[218]

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[217] ILO, 'Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya' (International Labour Office 1972) 503–508.
[218] Martha Alter Chen, 'The Informal Economy: Definitions, Theories and Policies' (2012) WIEGO Working Paper 1 4.

The informal sector in Kenya is not a homogeneous entity. It may be divided into self-employment and NSWs. Though self-employment forms part of the informal sector, it is beyond the scope of this study. This study focuses solely on NSWs. Conceptually, even NSWs as a whole consist of several forms of work; it would be useful to break down NSWs into more homogeneous sub-categories. This sub-division is highlighted in the next section of this study.

2.3.2 The heterogeneity of non-standard forms of work

As mentioned previously, market segmentation brings an insider-outsider effect. The outsider segment, which consists of NSWs, is not homogenous, but rather heterogeneous. NSWs can be classified into four seemingly-homogenous categories based on how each form deviates from the SER.[219]

Temporary employment is the first NSW category. These are employment arrangements whose duration is predetermined by a particular event or time frame.[220] They relate to both fixed-term contracts and casual work. Casual work, which is a form of temporary employment, usually relates to work that is performed intermittently, for short durations of time and is usually informal. Similarly, though fixed-term contracts offer more stability than casual work, they are also

[219] ILO, *Non-Standard Employment around the World* (n 1).
[220] Angelika Aleksynska and Angelika Muller, 'Nothing More Permanent than Temporary? Understanding Fixed-Term Contracts' (International Labour Office 2015) INWORK and GOVERNANCE Policy Brief No.6 1.

temporary in that their end is implicitly tied to the completion of a certain project or the reaching of a particular date. They are considered non-standard because the SER is open-ended.[221]

The Employment Act, 2007 defines casual workers as workers who are engaged under terms which provide for remuneration at the end of each day; in addition, to be a casual worker, the person should not be engaged for a longer period than twenty-four hours at a time.[222] Since casual workers are engaged daily, their remuneration is due at the end of each day that they provide their services. To prevent the abuse of such employment arrangements, the Act further provides for the conversion of casual contracts to SER contracts where the casual worker is engaged for a continuous number of days which amount to at least one month or they are engaged to provide work which is expected be completed in more than three months.[223] Though the Employment Act does not make specific reference to fixed-term contracts, there is an indirect reference to them in that the requirement to give termination notice commensurate to the wage payment interval excludes contracts to perform specific work and contracts that have limited time durations.[224]

The second NSW category is part-time work. One distinguishing feature of the SER is that it guarantees regular working hours to employees.[225] For part-time work arrangements, the working

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[221] Cappelli and Keller (n 6) 585.
[222] Employment Act s 2.
[223] Employment Act s 37.
[224] Employment Act s 35.
[225] ILO, *Non-Standard Employment around the World* (n 1) 76.

hours are either longer or shorter than what is considered to fall within the SER.[226] Part-time contracts may be divided into four types, namely, marginal part-time (below 15 hours a week), short part-time (16-20 hours a week), substantial part-time (21-34 hours each week) and zero-hours or on-call contracts (the hours vary depending on when the workers are needed).[227]

The term part-time worker is defined as an employed person whose normal working hours are less than those of comparable full-time workers.[228] Part-time workers, however, do not include the category of full-time workers whose hours are reduced due to age or because the work involves exposure to hazardous substances, or they are increased because they involve night work. In Kenya, the normal working hours are fifty-two hours spread over six days and sixty hours per week for night work.[229] Further, employees below sixteen years of age should not work longer than six hours a day.[230] Significant deviations from these hours would be considered to be part-time work. The employment laws in Kenya do not specifically provide for part-time work, though the practice is widely accepted.

Disguised employment is the third type of NSW. Generally, working arrangements are presumed to be divisible into two neat categories, namely, employment and self-employment.[231] Disguised

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[226] Part-Time Work Convention (ILO C175) 1994 art 1.
[227] Colette Fagan and others, 'In Search of Good Quality Part-Time Employment' (International Labour Office 2014).
[228] Part-Time Work Convention art. 1.
[229] Regulation of Wages (General) Order (Labour Institutions Act, Sub Leg) s 5(1) and 5(2).
[230] Regulation of Wages (General) Order s 5(3).
[231] Peggie Smith and others, *Principles of Employment Law (Concise Hornbook Series)* (West Academic 2009) 1–13.

employment relates to arrangements in which the worker's level of dependence on the employer is the same as that of an employment relationship, yet the parties do not classify themselves as being in an employment relationship.[232] This category includes dependent self-employment and gig economy work.[233]

Disguised employment is defined as employment arrangements in which an employer treats a worker as though he is not an employee to hide the true legal employment status.[234] Dependent self-employment is considered to be a form of disguised employment. This relates to work arrangements in which workers provide their services to an organization under an arrangement that is not classified as an employment contract yet the worker is dependent on the organization in terms of income and specific guidelines on how the work should be performed.[235] The laws in Kenya do not provide for dependent self-employment; they just recognize the binary divide between employment and self-employment.

An example of disguised employment is the gig economy, which is also referred to as the on-demand economy. This refers to work arrangements that are mediated by online web platforms.[236] It includes work on-demand via applications and crowdwork. Examples of the former include taxi-

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[232] Valerio De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork and Labour Protection in the "Gig-Economy"' (International Labour Office 2016).
[233] ILO, *Non-Standard Employment around the World* (n 1) 98.
[234] Employment Relationship Recommendation (ILO R198) 2006 art. 4.
[235] ILO, *Non-Standard Employment around the World* (n 1) 36.
[236] ILO, *Non-Standard Employment around the World* (n 1) 39.

hailing applications such as Uber, Bolt and LittleCabs; applications such as Lynk which link customers with blue-collar workers such as plumbers and electricians; on-demand logistics platforms such as Getboda; food delivery and courier services such as Glovo and UberEats, among others.[237] The workers are invariably categorized as independent contractors and neither the businesses behind the applications nor the customers bear any employment-related costs such as social security and employment duties such as leave entitlements.

Another common element of these work arrangements under the gig economy is that the work is highly dependent on customer ratings and reviews. These ratings often benefit the application companies in that they are useful indicators of customer satisfaction which can improve competitiveness. From the workers' point of view, these ratings can affect their possibility to access future work or better-paying engagements, and they may even suffer exclusion from the platforms due to the customers' ratings. In some instances, these reviews may often expose the workers to discrimination.[238] For example, if after a terrorist attack customers are less pleased by being driven by an immigrant with a Muslim-sounding name and rate him poorly because of islamophobia then the worker may be disciplined or terminated because of poor ratings, yet this does not relate to the

[237] Gituku Ngene, 'The Rise (and Rise) of the Gig Economy in Kenya – And How to Take It to the Next Level' (*NextBillion*, 9 September 2019) <https://nextbillion.net/kenya-gig-economy-next-level/> accessed 18 December 2020.
[238] Noah Zatz, 'Beyond Misclassification: Gig Economy Discrimination Outside Employment Law' (*OnLabor*, 19 January 2016) <https://www.onlabor.org/beyond-misclassification-gig-economy-discrimination-outside-employment-law/> accessed 18 December 2020.

worker's conduct or capabilities. These and other related issues are not provided for under Kenyan employment laws.

Crowdwork essentially connects organizations and individuals through online platforms provided over the internet to perform work potentially on a global basis.[239] They provide clients with access to a large, flexible workforce, hence the name crowd, for the completion of small tasks, usually of a clerical nature, which can be executed remotely so long as the person has access to the internet. An example of crowdwork is where a platform launches a competition which gets several people to simultaneously work on the same task and then the client only pays the person who produces the best work. On the other hand, some platforms remunerate on a per-task basis and this remuneration may either be a minimum one set on the application or one set by the client.

Some of the legal issues that arise include the potential abuse or opportunistic behaviour by the platforms or clients, often to the detriment of the workers. Further, such workers are not classified as employees and they do not have access to employment protections. In the United States, some crowdworkers filed a collective action to push for minimum wages.[240] In Kenya, crowdworking is a practice that is currently unregulated. Perhaps the country could benefit from initiatives such as those that were taken against Crowdflower in the United States.

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[239] ILO, *Non-Standard Employment around the World* (n 1) 40.
[240] *Otey v CrowdFlower Inc* [2013] Case No 12-cv-05524-JST (United States District Court Northern District of California).

And finally, the fourth category of NSWs is TERs. The SER envisages a direct, vertical employment relationship between a single employer and an employee.[241] Employment relationships involving multiple parties are deemed non-standard. Essentially, TERs relate to arrangements where the worker is not directly employed by the organization where he or she provides services.[242] This study focuses on this fourth category, TERs, paying particular attention to outsourcing. The next section provides an analysis of the concept of TERs.

2.3.3 Triangular employment relationships

Triangular employment relationships (TERs) may be defined as work relationships mediated by an intermediary between the worker and the organization.[243] There are three main parties to these employment relationships: a worker, an organization for which work is performed and a third party. In TERs, the worker is not directly engaged by the organization where he or she provides services. TERs vary in terms of their organizational structure. They include outsourcing, franchising, offshoring, nearshoring, and subcontracting and may also have elements of disguised employment in which employees are categorized as self-employed businesses.[244]

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[241] Cappelli and Keller (n 6) 585.
[242] Private Employment Agencies Convention (ILO C181) 1997 art 1.
[243] ILO, *Non-Standard Employment around the World* (n 1) 87.
[244] ILO, *Non-Standard Employment around the World* (n 1) 35–36; David Bauer, 'The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem' (2015) 12 Rutgers Journal of Law & Public Policy 138; MinWoong Ji and David Weil, 'Does Ownership Structure Influence Regulatory Behavior? The Impact of Franchisee Free-Riding on Labor Standards Compliance' (2010); Katherine VW Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press 2004).

It may also be noted that TERs sometimes have more than one intermediary, thus forming some sort of vignette. For example, consider a situation where a young lady works as a cleaner for a well-known international hotel brand. The particular premises where the hotel is located is owned by an investment trust, and it is with this legally established entity that she negotiated and entered into a contractual arrangement. Concerning her duties, her work routines are established by the international hotel chain but her day-to-day tasks are supervised by a local hotel management company. The question that may arise in such situations is where 'employment' resides. Though this cleaning lady may wear a uniform bearing the logo of the international hotel brand and be viewed to be employed by the hotel chain, she is by law, not their employee. Further analysis of this division of employer function between the various entities and its implications on outsourced workers is covered in chapter three of this study.[245]

Such situations are not limited to the hotel industry. Increasingly, more companies have shed off some of their direct employer roles to intermediary entities. The shifting of direct employment of workers from major corporations to lower-level businesses often creates competition between these smaller companies which often operate head-to-head with other small companies seeking to offer services to the larger corporations. The increased competition brings with it the pressure to reduce costs, and one of the affected costs is that of labour. These intermediaries often employ

[245] See section 3.2.4.

vulnerable workers, offering them lower wages than those that they would receive if they were SER workers, and frequently subjecting the workers to working conditions that may violate workplace protection standards.[246]

In Kenya, the predominant TER is outsourcing.[247] Globally, the practice of outsourcing carries different names such as labour-hire (in Namibia and Australia), labour dispatch (in China and Taiwan) and labour brokerage (in Thailand, Nepal and South Africa).[248] In Kenya, the terminologies used for the practice include business process outsourcing, business process offshoring and outsourcing.[249] Despite the variation in terminology, the essence of the practice is the same. For purposes of consistency, this study adopts the use of the term outsourcing. The next sub-section expounds on outsourcing and distinguishes it from other TERs.

2.3.4 Outsourcing as a distinct triangular employment relationship

Sourcing is defined as delegating or contracting work to another internal or external entity.[250] Outsourcing as a form of sourcing enables an organization to contract with an intermediary for the provision of workers for a particular duration and cost.[251] Outsourcing is a TER which involves

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[246] David Weil, 'Enforcing Labour Standards in Fissured Workplaces: The US Experience' (2011) 22 The Economic and Labour Relations Review 33, 34.
[247] Deloitte (n 52).
[248] ILO, *Non-Standard Employment around the World* (n 1) 30.
[249] See generally Wausi, Mgendi and Ngwenyi (n 31); James K Sang, 'Outsourcing in Kenyan Universities: An Examination of Challenges and Opportunities' (2010) 1 International Journal of Business and Social Science.
[250] Oshri, Kotlarsky and Willcocks (n 77) 7.
[251] Oshri, Kotlarsky and Willcocks (n 77) 8.

three categories of persons: the outsourced worker, the outsourcing company and the client enterprise. In an outsourcing TER, the outsourcing company and outsourced worker enter into an employment relationship. Additionally, the outsourcing company signs a service contract with the client enterprise through which it avails the services of the outsourced workers to the client enterprise. This relationship is illustrated in Figure 3.

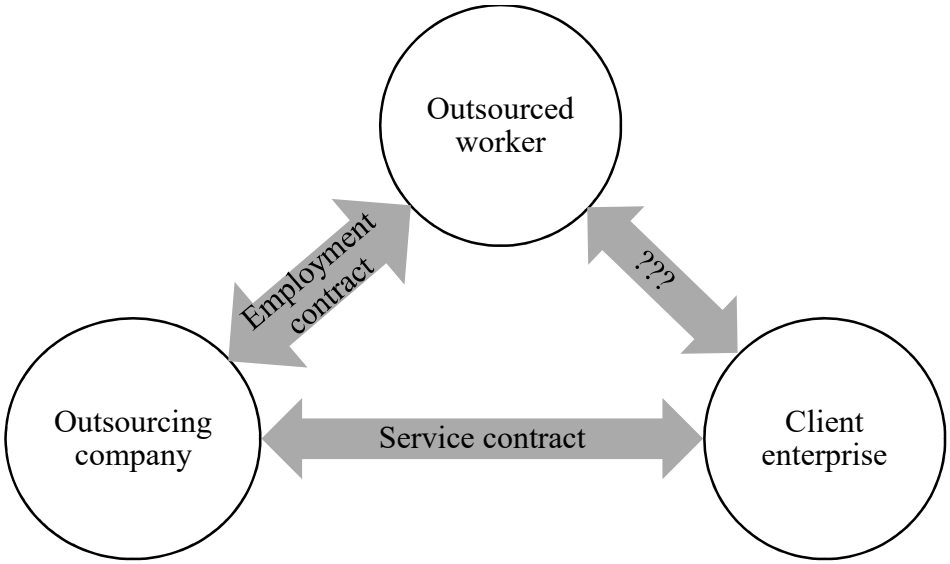

Figure 3: Graphic representation of the outsourcing triangular employment relationship[252]

Under such an arrangement, the outsourced workers supply services to the client enterprise without being directly employed by it.[253] The client enterprise pays the outsourcing company a predetermined amount of money. The outsourcing company then remunerates the outsourced

[252] Adapted from Mohammad Belayet Hossain, 'Temporary Agency Workers: Typical Triangular Employment Relationship' (2015) 3 International Journal of Entrepreneurship and Development Studies 307.
[253] Van Eck (n 11).

workers after making the requisite statutory deductions. This means that outsourced workers relate with two different authority figures who have varied levels of control over them.[254] The outsourcing company exercises legal control over the outsourced workers because of the employment contract. On the other hand, the client enterprise exercises 'day-to-day' control over the outsourced workers as they carry out their duties. This division of employer functions between the authority figures in terms of the control they exercise over the outsourced workers has several implications, particularly for outsourced workers.[255] These are investigated in chapter 3 of this study.

As mentioned earlier, other TERs are franchising, offshoring, nearshoring and subcontracting. In addition, there may be an overlap with disguised employment in which employees are categorized as self-employed businesses. Though there are similarities between these other TERs and outsourcing, there are important differences which make each category unique. This study compares and contrasts these different TERs to justify the uniqueness of outsourcing as a distinct category.

Franchising is a business model that also involves three parties. In this model, a parent company, the franchisor, develops a service or product and engages another company, the franchisee, to sell

[254] Davidov (n 11).
[255] See generally chapter 3.

the product or service in the franchisee's location.[256] The franchisee usually pays the franchisor a lump-sum down payment plus periodic royalties in exchange for the use of the specified product or service. The parent company offers managerial assistance to the franchisee and conversely, the franchisee agrees to carry out their business according to the franchisor's requirements. It is a form of fissurization of the organization.[257]

The two entities relate to each other in a manner that resembles full vertical integration; it is as though one firm is a subsidiary of the other. Through this, the franchise model portrays an image of uniformity and consistency to its customers even though in reality it is a network of independently owned businesses. However, the franchisor and franchisee are truly independent. The employees of the franchisee are not employees of the franchisor. The franchisee handles the day-to-day operations of its franchise, it can hire and fire its employees and it can choose its market and customers.[258]

The main distinction between franchising and outsourcing is the relationship between the two economic entities. In franchise arrangements, the franchisor and franchisee engage as though they form part of the same organization. They engage in the same business or service provision. On the

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[256] Seth W Norton, 'An Empirical Look at Franchising as an Organizational Form' (1988) 61 Journal of Business 197, 198.
[257] Nour Barnat and David Hunter, 'Multi-Party Work Relationships; Concepts, Definitions and Statistics', *20th International Conference of Labour Statisticians* (ILO 2018) 3.
[258] Dean T Fournaris, 'The Inadvertent Employer: Legal and Business Risks of Employment Determinations to Franchise System' (2008) 27 Franchise Law Journal 224, 224.

other hand, the outsourcing company and client enterprise in outsourcing arrangements are usually engaged in different services. The role of the outsourcing company is usually to supply workers to the client enterprise to perform peripheral tasks within the client enterprise. Further, the same outsourcing company may supply workers to multiple client enterprises. This is unlike the control-like features witnessed in franchising.

As regards the distinction between offshoring, nearshoring and outsourcing, it is based on the physical location of the transacting entities. In outsourcing arrangements, all parties are usually located in the same country. Offshoring occurs when an organization decides to carry out some of its functions and processes in a different country.[259] This may be adopted where the labour costs of a particular service are significantly cheaper in another country. For example, the traditional offshore locations for ICT services are India, China and the Philippines.[260] In addition to increasing domestic outsourcing within Kenya itself, the country also aims to join these traditional offshore locations.[261] It may be noted that due to the similarities between these two work relationships, the findings of this study may also be useful for workers engaged in offshoring arrangements.

[259] Nora Palugod and Paul A Palugod, 'Global Trends in Offshoring and Outsourcing' (2011) 2 International Journal of Business and Social Science 13, 13.
[260] Palugod and Palugod (n 259) 15.
[261] Mann and Graham (n 29) 531.

Nearshoring, on the other hand, is a form of offshoring that involves the relocation of organizational activities to a neighbouring country, rather than to remote locations.[262] In addition to geographical proximity, nearshoring also relates to the proximity of culture, time zones, institutions and ethics. With this in mind, it is a model that may increasingly become more prevalent because it involves lower travel costs and encompasses closer cultural compatibility. Hence, some analysts argue that nearshoring may ultimately be a better cost-cutting initiative than offshoring.[263]

Similarities may also be found between outsourcing and subcontracting which both involve an intermediary between the worker and another organization. The main distinction between outsourcing and subcontracting is that a subcontractor hires out a service rather than the workers themselves.[264] The subcontractor typically oversees the execution of the work and manages the workforce. On the other hand, in outsourcing the workers themselves are the ones who are hired out. The outsourced workers are paid by the outsourcing company but their work is overseen by the client enterprise. It is the client enterprise that usually manages the workforce. It may be noted though that the fine line between these two categories of work is sometimes blurred, especially where some aspects of supervision are carried out jointly.

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[262] Oshri, Kotlarsky and Willcocks (n 77) 26.
[263] Oshri, Kotlarsky and Willcocks (n 77) 27.
[264] Barnat and Hunter (n 257) 2.

Bearing in mind the distinctions between the different TERs, the status of the workers between each arrangement may vary. Though the distinctions may be slight, it still warrants an independent evaluation of outsourcing. Nonetheless, the findings of this study may be beneficial to understanding the plight of all TER workers, as well as the conditions of all workers engaged in NSWs.

2.4 CONCLUSION

The labour market is not a homogenous entity but rather is segmented, leading to a reality of insiders (typically SER workers) and outsiders (usually engaged in NSWs). In addition, the NSW category is further segmented into four different sub-categories, depending on their deviations from the SER. These sub-categories are temporary employment, part-time work, disguised employment and TERs. The latter category deviates from the SER in that the SER involves two parties, an employer and an employee, whereas TERs involve more than two parties. The conceptualization undertaken in this chapter has shown that outsourcing, as a TER, is a unique NSW worthy of academic interrogation. This conceptualization forms part of the investigation of the nature of outsourcing TERs. Bearing in mind its uniqueness as a work relationship, this study focuses solely on outsourcing in a bid to ensure its effective regulation for the benefit of outsourced workers in Kenya.

This chapter discussed three theories that underpin this study. The paternalism theory is relevant as it justifies legislative interference of outsourcing TERs in the interest of outsourced workers. In addition, the legislative proposals made in this study may be seen as attempts towards progressive

decommodification, in line with the decommodification theory. Finally, the human rights theory gives an added dimension through which the legislative reforms may offer reprieve to outsourced workers without the requirement of employment status, as would be necessitated if addressed solely through the lens of labour law.

The second part of this chapter provided the conceptual framework which depicted conceptualized outsourcing as an NSW by first evaluating the concept of market segmentation. Building on the discussion on market duality, the heterogeneity of NSW was discussed. The chapter then zoomed in on TERs and finally distinguished outsourcing from other TERs.

The exponential growth of NSWs creates increased flexibility within the labour market and this indeed is useful for the growth of the market. Despite the benefits of increased flexibility, it has been noted with concern that this had led to attempts by employers to avoid labour law protections.[265] Labour laws exist for a reason; primarily to protect workers and give them greater bargaining power.[266] The attempts to avoid labour regulation through outsourcing and other NSWs need to be carefully scrutinized and, where necessary curtailed. With this in mind, Chapter 3 of this study presents the narratives of the interviewed outsourced workers, capturing their day-to-day experiences within the outsourcing TERs.

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[265] ILO, *Non-Standard Employment around the World* (n 1) 7.
[266] Ackers (n 148) 2619.

CHAPTER THREE

THE PECULIARITIES OF OUTSOURCING AS A NON-STANDARD FORM OF WORK: THE LIVED EXPERIENCES OF OUTSOURCED WORKERS IN KENYA

3.1 INTRODUCTION

Due to increased vertical disintegration, more companies are adopting business strategies such as outsourcing.[267] As an employment model, outsourcing falls within the spectrum of NSWs. Since employment protections are tied to the establishment of employment status, there is increased precariousness within NSWs.[268] This chapter discusses the nature of outsourcing triangular employment relationships (TERs) based on the experiences of outsourced workers in Kenya. Since in most cases the law follows the fact, the challenges highlighted within this chapter form a basis for arguing for options on enhancing the regulation of outsourcing TERs in Kenya.

The focus of the chapter is on the experiences of outsourced workers in Kenya under outsourcing TERs. It highlights the fact that outsourced workers' experience of work may be different from employees engaged under the standard employment relationship (SER). Non-standard forms of work (NSWs) are often viewed as precarious work arrangements, riddled with poor remuneration, lower employment rights, lack of integration at the workplace and reduced job security.[269]

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[267] Holst (n 56); Chen (n 56); Collins (n 49).
[268] See generally section 1.8.
[269] Thomas Prosser, 'Dualization or Liberalization? Investigating Precarious Work in Eight European Countries' (2016) 30 Work, Employment and Society 949; Claudia Weinkopf, 'Precarious Employment and the Rise of Minijobs'

However, rather than examining all NSWs, this study focuses on outsourcing as a unique NSW. This allows for an exploration of the peculiarities of outsourcing TERs by examining the lived experiences of outsourced workers in Kenya.

This chapter addresses the first objective of this study which was to investigate the nature of outsourcing triangular employment relationships based on the experiences of outsourced workers in Kenya. This chapter presents and analyses the findings of the qualitative field study and provides an interpretation thereto. It begins with some of the views that outsourced workers have regarding their employment status, including the advantages and disadvantages of working within outsourcing TERs. Their views on the availability of employment rights are then investigated to determine what aspects of employment rights are important to outsourced workers. Issues surrounding the job security of outsourced workers are also explored. The discussion includes an evaluation of how outsourced workers handle workplace grievances.

The decommodification theory underpins the discussion on outsourced workers' experiences in that the investigation of the nature of outsourcing aids the progressive decommodification of outsourced labour. The exploration of the peculiarities of outsourced TERs also justifies legislative interference of outsourcing TERs in the interest of outsourced workers, in line with the paternalism

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in Leah F Vosko, Martha MacDonald and Iain Campbell (eds), *Gender and the Contours of Precarious Employment* (Routledge 2009).

theory. In addition, the human rights theory gives an added dimension through which the legislative reforms may offer reprieve to outsourced workers without the requirement of employment status, as would be necessitated if addressed solely through the lens of labour law.

3.2 EMPLOYMENT STATUS OF OUTSOURCED WORKERS

This section addresses the first independent variable, namely, clarity on the employment status of outsourced workers within outsourcing TERs by discussing outsourced workers' experience of their employment status. First, it describes what outsourced workers experience as their nature of employment. It then outlines what outsourced workers' perceived advantages and disadvantages of outsourcing are. It also creates an outsourced workers' typology based on the reasons the workers took up outsourcing arrangements. Finally, it explores the question of whether there is a single employment relationship or multiple employment relationships between the parties, and how this affects the division of employer function between the two authority figures. Through the lens of the decommodification theory and the paternalism theory, this analysis is useful in determining if the reality of the outsourced workers' experiences corresponds with the protections offered to workers under the employment framework in Kenya and the ILO standards and whether this represents a desirable state of affairs.

3.2.1 Nature of employment

In Kenya, as in other countries, NSWs have been steadily on the rise.[270] NSWs include part-time work, disguised employment, temporary work and TERs. The latter, with specific reference to outsourcing, is the focus of this study. In outsourcing arrangements, the outsourced workers relate to two authority figures: the outsourcing company and the client enterprise. As will be discussed in chapter 4, the focus of the employment laws in Kenya is on the contractual relationship between the outsourcing company and the outsourced workers.[271]

The employment laws require a written employment contract where the period of service is longer than three months.[272] Of the interviewed outsourced workers, 95% had written contracts of employment between themselves and the outsourcing company. Nine respondents agreed to share copies of their employment contracts. Table 3.1 shows the contract provisions that were depicted in the employment contracts.

All the written employment contracts had an engagement clause which stipulated the parties to the contract as the outsourcing company and the outsourced worker. 22% of the contracts then proceeded to state the name of the client enterprise that the outsourced worker would be allocated. The other 88% did not specify the client enterprise and this was especially where the outsourced

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[270] ILO, *Non-Standard Employment around the World* (n 1) 7.
[271] This is generally discussed in section 4.2, especially section 4.2.3.
[272] Employment Act s 9.

worker would be expected to work with several client enterprises on short-term bases. The presumption was that the long-standing relationship would be with the outsourcing company rather than the client enterprises. For the minority which specified the details of the client enterprise, there was the presumption that there would be a long-standing relationship with the client enterprise as well.

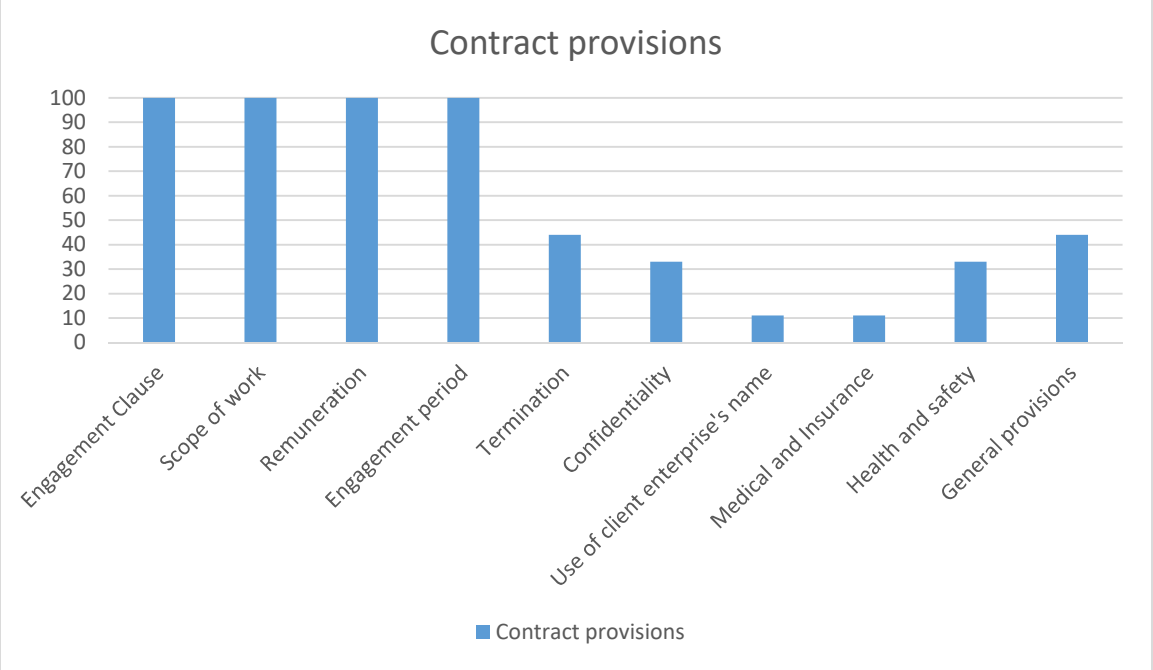

Table 3.1 Contract provisions in outsourced workers' employment contracts

In addition, all the written contracts had a remuneration clause. This took the form of either stating an all-inclusive consolidated salary, mentioning the salary and specific allowances, or the provision that this would be agreed upon in consultation with the client enterprise. Nonetheless, there was a recognition of the fact that the outsourcing company was responsible for remunerating the outsourced worker for their services. Though all outsourced workers were remunerated by the

outsourcing company, this was not indicative that they identified with the outsourcing company as an employer, as is discussed in section 3.2.4.

Though all contracts specified the scope of work, 67% were general and simply mentioned that the outsourced workers would be assigned to other companies or departments to perform their listed duties. Those that offered greater specificity, in terms of the scope of work, related solely to professionally-skilled outsourced workers. All contracts also included an engagement period in terms of months or years.

It was noted that only 44% of the contracts had termination clauses which stipulated how the contract could be terminated by either the outsourcing company or the outsourced worker. This makes sense because these are the parties to the employment contract. They also stipulated the expected notice periods. However, none of the contracts envisaged situations where the relationship could be terminated at the behest of the client enterprise, which is a reality that the outsourced workers experienced or feared.

Other provisions that were included in some contracts included clauses on confidentiality, use of the client enterprise's name, medical cover, insurance, and health and safety. Confidentiality clauses require the worker not to use or disclose to any person, during or after the time of engagement, any information relating to the business or operations or other sensitive matters which

may come to the worker's knowledge while providing their services.[273] This is aimed towards better protecting the company. One contract had a unique clause which stated that the outsourced worker was not to use the client enterprise's name and/or logo for any purpose beyond the performance of the obligations under the agreement unless prior consent had been sought.

The employment contracts were drafted by the outsourcing companies and the workers expressed that they had little control over the terms, save for their salaries. This is evidence of the unequal bargaining power that is experienced by workers in general.[274] These written contracts were presented by the outsourcing company on a take-it-or-leave-it basis such that the workers just took what they got. When asked about the specific content of the employment contracts, it was found that 67% of the outsourced workers' contracts were quite basic and just covered the scope of work that was to be done, the deliverables that were expected of the workers, the workers' remuneration and termination.

It was found that 22% of the contracts included exclusion clauses to limit the outsourcing companies' liabilities to the outsourced workers. For example, respondent 36 explained that his contract included a clause that limited how much he could sue the outsourcing company for. He could only sue for the equivalent of one month's salary which he lamented was too low because

[273] Norman D Bishara, Kenneth J Martin and Randall S Thomas, 'An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants' (2015) 68 Vand. L. Rev. 1, 19.
[274] Ackers (n 148).

there was the possibility that he would have a claim worth more than that. He explained that if he were to be terminated unfairly, he would not bother taking up the matter in court because he would not have much to gain financially from doing so.

Only two respondents mentioned that they did not have written contracts with the outsourcing company, but rather had agreed orally upon the terms of engagement.[275] It may be noted that both these outsourced workers were cleaners and were categorized as basic-skilled outsourced workers. For these two respondents, the lack of a written contract brought a lot of confusion in terms of enforcing any employment rights and duties because both the outsourcing company and the client enterprise were often evasive. Both these outsourced workers referred to themselves as casual workers, though they were aware that they were in a TER seeing as they were involved with two authority figures. They were, however, unable to distinguish with certainty what the obligations of each of the authority figures were towards them.

On the other hand, none of the respondents had any written document between themselves and the client enterprise to list out their various rights and obligations to each other. Though there was clarity in terms of their relationship with the outsourcing companies, this was not the case with the client enterprise. The outsourced workers were under the obligation to provide their services to the

[275] Respondent 14 and respondent 18.

client enterprise but without clarity as to what the obligations of the client enterprise were to them. As respondent 2 explained,

> "I think most times outsourcing is done because it's a cheaper option for the company. As a worker, it's sort of the Uber situation. For all intents, you work like an employee but you're treated like an outsider to the company. So I work full-time for the company but I can't ask for the same rights as their own workers. So it's funny that for all intents and purposes I work like an employee but by contract, I am not."

93% of the respondents were employed on fixed-term contracts whereas 7% referred to themselves as casual workers. Though the latter worked within the client enterprise for relatively long periods and reported to work daily, they were deemed casual workers because they had monthly contracts rather than being given contracts with longer durations. In this way, their outsourcing contracts did not offer the workers permanence in terms of the duration of employment, which they felt was a disadvantage. Upon further inquiry during the interviews, these casual outsourced workers expressed that their preference would be alternative contractual arrangements that could offer them more permanence. These casual outsourced workers expressed a desire for permanent work and stated that they would be willing to move to SER contracts if the opportunity arose.

87% of the outsourced workers had contracts that provided for a fixed amount in terms of monthly remuneration. However, 11% of the workers had their pay calculated per hour. This was usually where the client enterprise did not want them paid for unproductive hours, such as time spent attending staff meetings. In this way, the client enterprise could indirectly steer the outsourced workers' focus to their productive time because the workers would want to increase their pay. This

would be to the detriment of the workers' integration with the SER workers of the client enterprise. Three of the outsourced workers saw this as a benefit since they felt they were at the client enterprise's premises solely to do a job and not much else would be expected of them. They were happy to have the freedom from organizational bureaucracy.

64% of the respondents regarded their outsourcing opportunities as a bridge to regular employment. Their rationale was that most outsourced workers end up in SER contracts after they have attained a certain level of work experience. It is as though outsourcing was being used as an entry-level stepping stone towards building experience. Nonetheless, the preference for SER work also depended on the level of support that the outsourcing company granted the outsourced workers.

In addition, outsourcing was seen as a useful means of getting employment. Respondent 6 narrated how outsourcing had been a quick way of getting employment immediately after she had been declared redundant by her previous employer. She, and most of her team, had been recruited by an outsourcing company and offered similar pay packages, soon after the company she initially worked for had declared redundancies. Similarly, respondent 13 gave the example of her field of work, information and communications technology (ICT). She explained that sometimes ICT workers found it more advantageous to leave for outsourced opportunities because they would have more varied exposure in terms of work experience. The following sub-section looks at the main advantages that outsourced workers identified, that came about through working under outsourcing TERs.

3.2.2 Advantages and disadvantages of working as an outsourced worker

Outsourced workers outlined a variety of advantages and disadvantages of working within outsourcing TERs. It was noted that the outsourced workers' education levels varied, with 69% being undergraduate degree holders and the highest level of education being master's degree holders. However, it was noted that even the professionally-skilled outsourced workers faced some level of marginalization concerning their employment rights and duties. Respondent 27 explained the differential treatment in terms of training. She lamented, *"If you are supposed to empower your team, empower all of them."*

On the other hand, respondent 34 explained that,

> "We don't have the same rights, mostly because the client is a foreign company. The permanent workers are mostly from outside. There are a lot (sic) of benefits because you are working in a foreign country. Us as we are local, they assume we can handle our own stuff so we don't need all that."

Nonetheless, it may be noted that the divisions between professionally-skilled and basic-skilled outsourced workers did not fully account for the diverse perceptions of outsourcing TERs. This sub-section explores these perceptions, focusing on the outsourced workers' perceived advantages and disadvantages of working in outsourcing arrangements.

3.2.2.1 Advantages of outsourcing

Different outsourced workers, even within the same job categories, expressed different advantages of being outsourced. One advantage was that outsourcing afforded the workers a greater level of control over their working lives in that they had increased flexibility since they were not permanently attached to a single corporation. Relatedly, outsourcing enabled workers to take breaks from employment when needed, with the ability to plug into similar jobs through an outsourcing company. It also allowed for greater geographical mobility which allowed workers to take on different opportunities under different client enterprises, hence broadening their work experience. As respondent 5 joyously explained,

> "As an outsourced worker, yes, I am happy because honestly, I feel like I am growing compared to those other kind of workers and I am able to acquire different experiences. For me I just come, do my work; when I'm done, I leave. I'm very happy being an outsourced worker as I get more experience."

Another advantage was the ability to be relocated to a different company if the position the worker had with the client enterprise was declared redundant. Outsourcing allows for greater flexibility and can allow workers to grow their networks more effectively.[276] Respondent 9 also mentioned that, for him, the greatest advantage of outsourcing was that he was able to get higher remuneration than if he had stuck to a single employer as an SER worker. Also, the ability to work for different

[276] Wabwile and Namusonge (n 106).

organizations under varying engagements meant that the work was never monotonous. Similarly, Respondent 13 described the advantages of being outsourced as follows,

> "I would recommend outsourcing to someone who is adventurous; a person who does not like staying in one place for too long. Outsourcing helps you get more experience and exposure. For regular employees, the skills you have is only surrounded *(sic)* by the company you are in. As an outsourced worker, I get to interact with different types of technology. I am always learning. I have different clients who I help differently, and I have more experience compared to someone who has worked in the same organization for 15 years. For example, I have worked for… *(previous client enterprise's name omitted)*. Their applications are very good, the technology that they use is very efficient. Now you see when I moved from *(previous client enterprise's name omitted)* to *(current client enterprise's name omitted)*, I have the skills that *(previous client enterprise's name omitted)* use."

There were mixed views regarding the management styles adopted for outsourced workers as compared to directly employed workers of the client enterprise. Though some saw the exclusion from meetings and training days as a disadvantage, 27% of the respondents saw freedom in the exclusion from organizational bureaucracy. They appreciated that they had weaker organizational ties than the directly employed workers of the client enterprise. They loved the distance from the client enterprise that their outsourcing contracts afforded them. They did not have to buy into the company's operational strategies and they did not have to be part of organizational politics and manipulations.

Respondent 15 mentioned that this detachment was an advantage because she always knew her place within the client enterprise. Conversely, in the face of organizational restructuring, SER

workers would be unsure of where they stood. She did not share such fears since she could easily move from one role to another. She explained that if she found herself with a client enterprise that she was not comfortable with, she did not have to put up with it since she was not a permanent employee; she could easily transition to another job. To her, outsourcing was an effective means of escape from organizational bureaucracy, which she felt gave her a higher level of control over her work life than what SER workers experienced.

3.2.2.2 Disadvantages of outsourcing

On the flip side, there were some disadvantages that the outsourced workers mentioned that they experienced due to working within outsourcing TERs. The predominant disadvantage was related to remuneration. 67% of the respondents complained about their pay stating that it was lower than what permanent workers received. For example, Respondent 21 explained that no matter how many clients she worked for, her pay remained the same. She felt that there was no growth or possibility of promotion comparable to the possibilities provided to employees who were integrated into the company.

In addition, 84% lamented that they had fewer benefits than directly employed workers. For example, they noted a lack of insurance and pension, as well as job insecurity. Respondent 32 described the mental torture that she experienced due to comparing herself with the directly employed workers,

> "I am on contact terms and I'm not sure if I'll get another job after the contract is terminated and I'm surrounded by people who are permanent. The organization itself is very good and

> has good welfare schemes. So it's so disturbing since I keep on wishing that I was part of that organization. It's almost like psychological torture. Then the staff of the organization where I am based sometimes have a low opinion on outsourced workers and can be degrading. Sometimes I can be given duties that are not part of my contract but for the sake of my job, I undertake them without pay. Then (*outsourcing company's name omitted)* does not always keep their part of the contract. They may delay salaries. And the permanent staff always get their salaries on time."

Other identified disadvantages included a lack of access to training and facilities for upscaling their skills.[277] In addition, outsourced workers were often excluded from training days and sometimes even staff meetings.[278] This showed a difference in the management of permanent and outsourced workers, albeit being subtle and often unofficial.

Job insecurity was also identified as a disadvantage of outsourcing arrangements.[279] Outsourced workers seemed easier to dismiss than SER workers. In addition, the concept of working for two different authority figures was in itself considered problematic. Where the outsourcing company was more involved in the work being carried out, there was sometimes the challenge of meeting the expectations of both authority figures. In addition, sometimes there were conflicting modes of

[277] For example, Respondent 22 explained that she did not receive training because the client enterprise only trained its directly employed workers and the outsourcing company did not organize staff trainings.
[278] This brought about a perceived detachment from the client enterprise. Though, as discussed in the previous section, 27% of the respondents saw freedom in the exclusion from organizational bureaucracy.
[279] This is discussed in section 3.4.

operation on matters such as handling overtime for the hours worked. And sometimes managerial decisions involving the outsourced workers took a long time because of the consultations involved.

Another identified disadvantage was the lack of unionization.[280] Most of the respondents did not know that they had the right to be unionized. They expressed a general inability to join trade unions and did not know how they could be part of the trade unions in their sectors of employment because they saw this as a right granted solely to SER workers. This is despite the constitutional right to be unionized.[281] Another identified disadvantage related to the management of workplace grievances.[282]

This subsection discussed the advantages and disadvantages that the outsourced workers experienced within outsourcing TERs. The advantages included greater flexibility and geographical mobility. There were mixed views on remuneration. The majority identified low pay as a disadvantage of outsourcing but there was a minority that received higher pay through outsourcing and so termed this as an advantage. Other than pay differentials, other identified disadvantages related to the differential treatment of outsourced workers and SER workers, job insecurity, lack of unionization, and ineffective resolution of workplace grievances. It is worth noting that the perceived advantages and disadvantages partially depended on the reasons for

[280] See section 3.3.5.
[281] Constitution of Kenya art. 41.
[282] This is discussed in section 3.4.2.

choosing outsourcing arrangements and the job types that the workers had. As such, this study created a typology to categorize the outsourced workers, and this is discussed in the next subsection.

3.2.3 Outsourced workers' typology

Outsourcing as an employment model is often used for skills that a company considers non-core.[283] Outsourced workers are a diverse group, but divisions can be made based on their job types and their reasons for choosing outsourcing arrangements. This section offers a broad characterization of outsourced workers and discusses how this impacts their experience of working within outsourcing TERs. To capture the diversity of outsourced workers, this study has developed the following categories: convenience short-term outsourced workers, professionally-skilled outsourced workers and basic-skilled outsourced workers. This recognition of the diversity of outsourced workers is important because it is not a one-size-fits-all. It would be beneficial if the laws enacted to protect outsourced workers bear this in mind.

3.2.3.2 Convenience short-term outsourced workers

This category of outsourced workers chose outsourcing arrangements because it was convenient for them at that time. They used it as a way to remain in employment as they sought out more permanent opportunities. These workers were all young (25 to 35 years old), at the beginning of

[283] See generally Vagadia (n 92).

their careers and had no dependents. The main reasons for choosing outsourcing arrangements were needing money and seeing outsourcing as an easy way to get a job (50%), being between jobs and using outsourcing as a means to remain in employment (29%).

It was noted that it was their personal circumstances that led to them taking on outsourcing opportunities. Respondent 7 narrated how she was approached by an outsourcing company as soon as she was declared redundant. The outsourcing company had reached out to her and her team and offered them similar pay packages to work under an outsourcing contract but within the same premises as before. She continued working at the same premises but had a new contract with the outsourcing company as the employer. She explained that her preference was to have a permanent job so she was in the process of seeking out another permanent job, but had taken up outsourcing to bridge the gap so that she would not be out of a job.

Outsourcing, and other NSWs, may be viewed as a bridge to regular employment.[284] Four outsourced workers expressed that sometimes it was not easy to access regular employment opportunities in some professions such as ICT and finance. So they found it convenient to seek out outsourcing arrangements to gain experience which they would use later on to access permanent jobs. They rationalized that their current positions were temporary and that they would last for a short finite duration, after which they would get permanent jobs. These workers seemed to view

[284] Hveem (n 21); de Graaf-Zijl, Van den Berg and Heyma (n 22).

SER jobs as superior to outsourcing arrangements and so were just making use of outsourcing as a stop-gap measure.

3.2.3.2 Professionally-skilled outsourced workers

The professionally skilled outsourced workers were qualified in a diverse range of skills, including ICT, marketing and public relations, finance, accounting and customer support. For this category of workers, the terms under the outsourcing contracts seemed better and they seemed to enjoy working as outsourced workers. The contract duration for each of these was either one-year or two-year contracts. There was great variation in age, whether or not they had dependents and marital status. Some of the professionally-skilled outsourced workers had begun as convenience short-term outsourced workers and found that they enjoyed it enough to make a career out of it.

For example, Respondent 13, who worked in the ICT field, had taken on an outsourcing contract as her first job opportunity and she had grown over the years from her initial junior position. She saw the outsourcing company's advertisement and applied; she passed the interview and had been with them since then. At the time of this study, she had completed five years under the same outsourcing company but had been placed with various client enterprises during that period. Similarly, Respondent 41, who referred to herself as a business consultant specialist, was happy to be a career outsourced worker. She explained how someone at the outsourcing company had approached her; the company was looking for people and the deal looked good. She decided to take a chance and did not regret her choice of employment.

The reasons to take out outsourcing as a professionally-skilled worker varied, but most seemed to enjoy the variety of work and the exposure gained through working for different client enterprises. As Respondent 29 explained,

> "My motivation for being an outsourced worker was basically the company. I really wanted to work for this company. Technically it matched my skills and my passion. The idea also of working with clients like *(client enterprise's name omitted)* and *(client enterprise's name omitted)*. It's really amazing because I get to meet and work with top companies. It gives me great opportunities."

In addition, Respondent 1 cited reasons as to why she did not want to take up a permanent job,

> "Personally I wouldn't want to be a permanent employee. I'm a business analyst. I have been employed by *(outsourcing company's name omitted)* and from there they place me with different other organizations who they have contracts with. The way I work enables me to build up my CV such that one time I was working at *(client enterprise's name omitted)* and the other time it was *(client enterprise's name omitted)* and this time it is *(client enterprise's name omitted)*. I want to build up my CV. I am a person who likes to explore different places. I think people like having an outsourced business analyst because a business analyst would be more competent if this person is working with different businesses. If I am brought to a company I do my thing, I help you guys grow your business and do a project, and then I move to a different company but still through *(outsourcing company's name omitted)*. Being a business analyst for one company is like you're going to be doing the same thing over and over. That's why being outsourced is better"

Relatedly, Respondent 35 explained that as an outsourced worker he could work for an organization without having to buy into its corporate culture. He was quite free-spirited and enjoyed being somewhat removed from the organizations where he was placed. He felt that if he

had been a directly-employed worker, he would have had to deal with the company's bureaucracy. He explained that it was not that he was not committed to his work; rather, it was that he did not have to deal with the company's protocols in the same way that their employees did.

3.2.3.3 Basic-skilled outsourced workers

This category of outsourced workers just wanted to have a job and took up outsourcing opportunities involuntarily, as the only opportunities that were available to them. None of these outsourced workers had professional qualifications; the highest level of education of the interviewed respondents in this category was KCSE certification. In terms of job categories, these outsourced workers were cleaners, security guards and other related occupations which did not require specialized skills.

Scholars have debated as to whether NSWs could be stepping stones to permanent work or a trap.[285] This category of outsourced workers felt trapped by outsourcing, especially those who had sought permanent jobs but failed to get them. Respondent 38 painfully narrated how she had served faithfully within the same client enterprise for several years. She felt she had been loyal to the client enterprise and saw the outsourcing company as merely an entity through which her salary was paid. She felt disappointed that after all those years, the client enterprise had not rewarded her

[285] Giovanni SF Bruno, Floro E Caroleo and Orietta Dessy, 'Stepping Stones versus Dead End Jobs: Exits from Temporary Contracts in Italy after the 2003 Reform' (2013) 121 Rivista Internazionale di Scienze Sociali 31; Florent Fremigacci and Antoine Terracol, 'Subsidized Temporary Jobs: Lock-in and Stepping Stone Effects' (2013) 45 Applied economics 4719; Hveem (n 21).

loyalty by giving her a permanent contract. When interrogated further, she disclosed that she had KCSE certification but had not proceeded to college and that is why she worked harder than the rest, so that she would be seen as more loyal. This was an interesting case of misidentification of her employer, which was the cause of undue stress and frustration at her lack of growth opportunities.

3.2.4 Division of employer function between outsourcing company and client organization

In considering the employment status of outsourced workers, it is of great benefit to bear in mind the fact that two authority figures exercise different levels of control over the outsourced workers.[286] This study sought to assess how the employer function was divided between these two authority figures. The outsourced workers were asked about the roles that each of the authority figures played within the employment relationship, including with whom they negotiated their contracts, who paid their salaries and the day-to-day management of their work. They were also asked to describe the relationship between the authority figures and how this affected their perceptions of their employment status.

Among the respondents interviewed, the level of interaction with the two authority figures varied. It was noted that the majority of outsourced workers had been interviewed by and negotiated their

[286] Davidov (n 11).

terms with the outsourcing company. Then the outsourcing company would reach out to the client enterprise and link the outsourced workers to the opportunities. As Respondent 31 explained,

> "I'm employed by (*outsourcing company's name omitted*). I negotiated my skills with them. Then (*outsourcing company's name omitted*) is the one that is in the position to talk to clients and tell the clients, we will bring you workers that will do this job for you. You really don't negotiate your position with a client."

There were, however, three respondents who explained that they had to negotiate with both the client enterprise and the outsourcing company. As Respondent 16 explained,

> "I did an interview with *(outsourcing company's name omitted)*. Then I had to reach out to *(client enterprise's name omitted)*. Then regardless of what I had negotiated, the final determinant was *(client enterprise's name omitted)*. They have the final say. But *(outsourcing company's name omitted)* also have to give a guideline like don't pay them less than this."

In terms of describing the relationship between the two authority figures, 71% of the outsourced workers viewed it as a purely commercial relationship in which the outsourcing company provides cheap labourers who require little or no benefits and are easily dispensable. It was seen to be a cordial yet somewhat distant relationship. There was usually minimal interaction between the two authority figures unless it related to payment matters or HRM issues. It was also described as a partnership in which the outsourcing company complimented the client enterprise's efforts.

It was found that the roles that outsourcing companies take up within the outsourcing triangular relationship vary greatly. On one end of the spectrum, the outsourcing company's roles were

extensive and included the supervision and training of the workers, in addition to payroll management. In such instances, the stable relationship that the outsourced worker had was with the outsourcing company; such workers were usually assigned to various client enterprises on short-term, temporary bases.

On the opposite end of the spectrum were outsourced workers who were assigned to a particular client enterprise on a long-term basis and who performed their work just as any other employee of the client enterprise. In such instances, the stable, long-term relationship was with the client enterprise. The outsourcing company was not involved in the allocation and supervision of tasks that the outsourced worker was engaged in, and only played minimal roles such as 'payrolling.' The outsourcing company received payment from the client enterprise every month. Such payment included the wages of the outsourced workers and its commission for the payroll management service. It then made the necessary statutory deductions, paid the outsourced workers and kept its commission.

In addition, 11% of the respondents initially worked with the client enterprise before being outsourced. They explained how they used to report to the client enterprise itself then the outsourcing company came up as an intermediary and they were informed that they were under a different employer. They expressed concern over the change of guard, especially since they continued in the same roles.

Respondent 4 had negotiated his contract with the client enterprise. However, he expressed that his employment arrangement was complicated. He explained that he felt the outsourcing company was a shadow entity that the client enterprise used to limit his rights. He is a young lawyer; a recently admitted advocate. He explained how he was interviewed by partners at the law firm and negotiated his contract with them. Yet when the time to sign his contract came, the contract bore the name of a different company, which he was informed was an outsourcing company. He had never interacted with the outsourcing company, save for the fact that his paycheck also came in their name. His duties were allocated and supervised by the law firm partners. He later explained that upon further investigation he discovered that some of the directors of the outsourcing company were equity partners at the law firm. He described it as an intertwined relationship. He identified with the law firm as his true employer and termed the outsourcing company as a mere sham behind which the law firm was hiding to vary their employment terms.

The variations and resultant challenges experienced, in the delineation of employment functions may be because the employment framework was developed against the backdrop of the SER, which presupposes a linear relationship between two parties: a single employer and employee.[287] However, over time there has been the development of employment relationships that include more

[287] This is discussed in greater detail in section 4.2.

than two parties, such as outsourcing.[288] The question then arises as to whether the client enterprise should assume some employment responsibilities over the outsourced worker.

Within this study, it was found that the day-to-day management of 84% of the outsourced workers was primarily handled by the client enterprises. Though the outsourcing companies were predominantly involved in the payment of salaries and wages, they seemed to have little or no involvement in day-to-day management. Control and supervision over tasks handled by the outsourced workers within the client organization's premises were borne by the client organization.

The responses on the outsourced workers' perception of who their employer was varied greatly, as depicted in Table 3.2. Though all of the written contracts stated that the outsourcing company was their employer, only 33% felt that the outsourcing company was indeed their employer. Respondent 29 justified this by explaining that the outsourcing company was her employer because it is the one that recruited her, and not the several client enterprises that she interacted with. Respondent 20 also explained that, in her opinion, the ultimate employer was the outsourcing company because it was the entity that paid her salary and she appeared in their payroll, rather than that of the client enterprise.

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[288] See generally section 2.3.

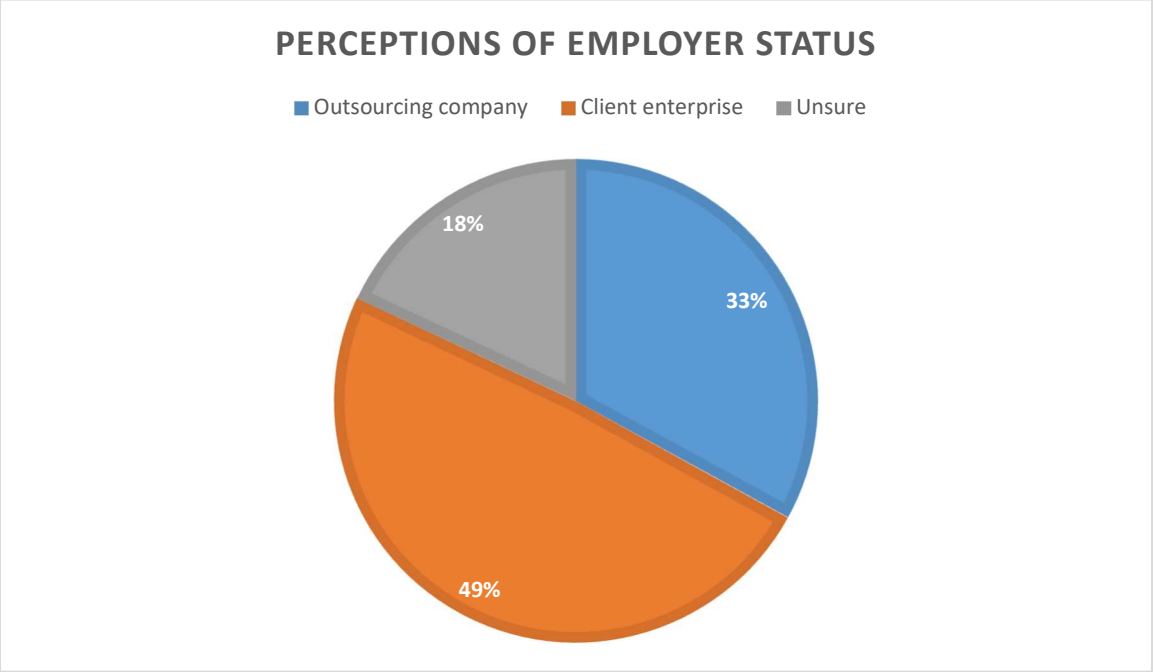

Table 3.2 Outsourced workers' perception of employer status

On the other hand, 18% were unsure about who their employer really was. They knew that they had to interact with two authority figures and that each played different functions within outsourcing TERs. However, they were unclear as to which of those functions took precedence and thus warranted employer status classification; whether it would be the day-to-day management or the payment of salaries.

In addition, 49% of the respondents identified the client enterprise as their real employer despite what their contracts stated. Respondent 19 described it as follows,

> "An employer is a person who gives a worker a specific job to do and pays the worker after the services have been delivered. So the company that allocates and supervises my duties is my employer. They also ensure that I am paid for my services, though they do this indirectly. Anyway, that is still my employer."

The outsourced workers' perceptions of who their employer is affects how they relate with the two authority figures within the outsourcing TER. Where the services of the outsourced workers are provided on a short-term, temporary basis to several client enterprises based on their numerical flexibility requirements, the outsourcing company may be deemed to be both the *de facto* and *de jure* employer. However, where the outsourced workers are assigned to a single client enterprise on a long-term basis, for extended periods, the client enterprise may seem to be the *de facto* employer and the outsourcing company the *de jure* employer and which, arguably, should shoulder some level of employment responsibility.[289] The normative discussion on who *should* be considered the employer is of great importance, especially for outsourced workers who have long-term service arrangements with the same client enterprise. It also affects the outsourced workers' employment rights, which is discussed in the next subsection.

[289] See e.g. *KPOWU v Giefcon* (n 41).

3.3 EMPLOYMENT RIGHTS AND DUTIES

This section addresses the second independent variable, namely, minimum standards on the employment benefits and working conditions for outsourced workers. Through literature, there is evidence that NSW workers often do not understand their employment rights.[290] And even where the outsourced workers know that they are entitled to employment rights, the law may sometimes not give them a definite answer as to how their employment status affects their access to employment rights.[291] Outsourcing TERs may pose legal problems from an employment point of view in that employment rights are often premised on the SER. This may leave the outsourced workers uncertain as to whether they possess employee status as envisaged by the employment laws and whether they are entitled to the corresponding employment protections. 67% of the outsourced workers in this study lamented the inadequacy of their employment rights as compared to SER workers. The discrepancies that they mentioned related to their salaries and allowances, access to loan facilities, access to medical insurance cover, access to training opportunities, the management styles for outsourced workers as compared to SER workers, and lack of unionization. These shall now be discussed in greater detail as independent subsections.

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[290] See generally ILO, *Non-Standard Employment around the World* (n 1) 186–217.
[291] The employment rights granted under the Kenyan employment framework are discussed in section 4.3.

3.3.1 Salary and other allowances

The pay packages that the outsourced workers received varied. When asked which authority figure determined their salary, 82% of the outsourced workers mentioned that it was the outsourcing company and the remaining 18% felt that it was the client enterprise. Respondent 1 explained that the outsourcing company sets the base salary. For example, entry-level staff were offered a minimum salary of 50,000 Kenya shillings. However, once they were placed with a client enterprise, the client enterprise would determine the pay, but it would never go lower than the minimum that was set by the outsourcing company. As she explained,

> "The pay is different. You'll find you work in a department at the client. You could be doing the same work that you were doing for a different client but you're paid differently depending on the client you are working for. Like I had earlier said, the client you're working for dictates the pay. But they never go beneath the minimum that (*outsourcing company's name omitted*) says."

The pay package of the outsourced workers seemed to be at the core of their outsourcing contracts since that was a major thing that they could negotiate for. Only 22% reported that they earned comparable salaries to the permanent employees of the client enterprise. As Respondent 13 explained,

> "Yes, I think I earn as much as the permanent staff. You would assume that I would be paid lower but not all the time. I found that (*outsourcing company's name omitted*) have managed to negotiate my pay so the pay is okay."

On the other hand, 71% felt that they received a lower salary than the permanent employees of the client enterprise. Some even expressed that they received half of what the direct employees of the

client enterprise were being paid. Respondent 44 explained with sadness that he and the other outsourced workers worked side-by-side with the SER workers, knowing that the employees were paid much more than they are paid. His sentiments were that,

> "I'm not very proud. Let me give you an example. Assuming that we are six and we are doing a certain type of work. At the end of the month, I get half the salary that the permanent workers who are doing the same work get. And that's usually frustrating"

Respondent 10 and respondent 11 explained that they had no point of comparison because the entire department was outsourced. Since no direct employees were working in a similar capacity, there was no point of reference as to whether the remuneration was equitable. This was an interesting approach and in this way, both respondents expressed satisfaction with their pay. It seems that the point of distress for outsourced workers was the comparison with the direct employees of the client enterprises who they worked side-by-side with. Once this was eliminated then the outsourced workers were satisfied with their pay. It was not that they were paid significantly higher than the other interviewed outsourced workers, but rather they were not comparing themselves to SER workers.

In addition, the effects of the coronavirus seemed to be different for outsourced workers and directly employed workers. Some respondents expressed their disappointment with the fact that they received greater pay cuts than the permanent staff of the client enterprises. For example, Respondent 12 explained that, in April 2020, the outsourced workers' pay was reduced to half indefinitely but this did not happen for the directly employed staff. Similarly, Respondent 11 lamented that, due to the pay cuts that began in April 2020, he just had enough to cater for his rent,

food and electricity; he said he was lucky he was single because if he had been married the money would not be enough. He was, however, grateful that he still had a job because some of his colleagues were worse off because they were laid off.

Beyond remuneration, 84% of the respondents reported that they did not receive any allowances from either the client enterprise or the outsourcing company. They just received a salary with no extra benefits such as allowances. Some of the allowances that they mentioned that directly employed workers received, which they would have also liked to receive, included transport allowance, airtime and internet bundles, entertainment allowance and meals allowance. The disparity concerning airtime and internet bundles became increasingly important during the covid-19 pandemic when some workers were sometimes required to work remotely.

3.3.2 Loan facilities

Access to loan facilities from banks and microfinance institutions is sometimes pegged on remuneration, in that a worker's salary can be used as collateral for personal loans. Salary-linked loans are taken by workers to meet various needs such as educational expenses, house rental needs, purchase of building materials, medical and funeral expenses, immediate investment needs and

urgent financial needs such as servicing other loans.[292] Hence, they are an important means towards self-development.

It was noted that outsourced workers faced challenges in using their salaries to access loan facilities because they were on contracts which lasted short periods. On the other hand, the permanent employees of the client enterprise had access to loan facilities. As Respondent 37 explained,

> "You see now that's the issue. My contract is like a contract at the moment. A company like (*client enterprise's name omitted*) will not commit to outsourced workers. They only issue loans to permanent workers."

This felt like a double-edged sword because it was also sometimes impossible to access loan facilities through the outsourcing company. After all, they were on short-term contracts. This lack of access to credit facilities would indirectly hamper their ability to take on big developmental projects such as buying land, building homes and so on.

3.3.2 Medical insurance cover

80% of the outsourced workers relied on the National Hospital Insurance Fund (NHIF) whereas 11% had company-sponsored insurance covers, from the outsourcing company. Those who had company-sponsored insurance covers complained that the limits of the insurance covered were

[292] Sydney Tembo, 'Effects of Salary-Based Microfinance Lending on Public Service Workers in Selected Government Ministries of Lusaka' (Master of Arts in Development Studies, University of Zambia 2014) 26.

very low. For example, Respondent 37 lamented that the limit on his medical cover was 100,000 Kenya shillings. On the other hand, the directly employed staff at the client enterprise where he was stationed had a medical cover limit of two million Kenya shillings for in-patient and 700,000 Kenya shillings for out-patient. In addition, they had an additional benefit that their families would receive up to twelve million upon death, which the outsourced workers did not have. He lamented that outsourced workers had to work hard to prove themselves because they were not permanent, yet the permanent staff did not have to work as hard and yet they received greater benefits.

On the other hand, Respondent 26 narrated how, though his contract provided that he had medical cover through the outsourcing company when he was unwell he found he could not access it. He narrated how it had affected him,

> "You see what happens is, when you are signing an insurance form, the insurance form is a contract between you and the insurer. So should the insurer breach, you can sue the insurer. So these guys had a funny type of cover called group cover where it's the whole group. I guess it's like they've been classified as a family. It's like when you have insurance under your parents, only they can sue on your behalf. So my appendix got raptured. I was supposed to be given a small surgery which was to cost around 45,000 shillings. It would have been within the limit. I went to hospital and they took a while before treating me because of insurance issues. Then it got infected. It led to a series of complications. Then after the surgery, when I got out, they started telling me that I owe the hospital money. Then I found out that I can't even complain to the Medical and Dentists Practitioners Board because like three-quarters of the Board are consultant doctors, so even if you bring a case it goes nowhere."

It was noted with concern that none of the respondents was aware of their occupational safety and health (OSH) rights while providing services at the client enterprises' premises. It seemed that none of them had been trained on OSH. This was in addition to the lack of training in other occupational-related aspects, as discussed in the next section.

3.3.3 Access to training

Access to training opportunities within employment is important towards workers' improvement of cognitive skills, non-cognitive skills and specific professional skills.[293] General cognitive skills may relate to literacy and numeracy. Though these skills are primarily developed within the lower levels of the education system, they may be furthered through short courses. Non-cognitive skills that may be nurtured through training opportunities include communication skills and creativity.[294] On the other hand, professional skills are more technical and may be of a technological or vocational nature. Generally, training opportunities are important since they enhance workers' performance.[295]

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[293] Peter Darvas and Robert Palmer, *Demand and Supply of Skills in Ghana: How Can Training Programs Improve Employment and Productivity?* (World Bank Publications 2014) 12.

[294] Muhammad Saqib Nawaz and others, 'Impact of Employee Training and Empowerment on Employee Creativity through Employee Engagement: Empirical Evidence from the Manufacturing Sector of Pakistan' (2014) 19 Middle-East Journal of Scientific Research 593; Vicki Kaskutas and others, 'Fall Prevention and Safety Communication Training for Foremen: Report of a Pilot Project Designed to Improve Residential Construction Safety' (2013) 44 Journal of safety research 111; Kamal Birdi, Desmond Leach and Wissam Magadley, 'Evaluating the Impact of TRIZ Creativity Training: An Organizational Field Study' (2012) 42 R&D Management 315.

[295] Uzma Hafeez and Waqar Akbar, 'Impact of Training on Employees Performance (Evidence from Pharmaceutical Companies in Karachi, Pakistan)' (2015) 6 Business Management and Strategy 49; Nelson Jagero, Hilary Vincent Komba and Michael Ndaskoi Mlingi, 'Relationship between on the Job Training and Employee's Performance in Courier Companies in Dar Es Salaam, Tanzania' (2012) 2 International Journal of Humanities and Social Science 114.

It was noted that it was difficult across the board for outsourced workers to access occupational-related training. Within this study, 27% of the outsourced workers were able to access training from the client enterprises, only 11% through the outsourcing companies and 62% took care of their professional development based on what they could afford. Most of the outsourced workers paid for their own training.

51% of the respondents expressed disappointment with the lack of access to training. Their experience was that for the organization-sponsored training opportunities, the client enterprises would pay for their SER workers but not the outsourced workers. It was felt that the client enterprises considered the outsourced workers to be an add-on. Since the outsourced workers were not permanent, they were not considered worth investing in skills-wise. As a result, the outsourced workers did not get to grow their skills in the same way as SER workers. As Respondent 22 explained,

> "Now that's the biggest challenge. Every department has its own training budget. They give their internal staff the opportunities to train and improve their skills. And since I am not part of (*client enterprise's name omitted*) and the mother company that has hired me rarely does staff training, I don't get trained."

87% of the outsourced workers expressed that they did not receive professional development support from the outsourcing companies. However, they often received role-specific training from their outsourcing companies to maintain their employability. In addition, this was often supplemented by the role-specific induction by the client enterprise. This role-specific training

also included on-the-job training. There was a distinction between access to professional development and role-specific training. Though SER workers would often have access to both, the focus for outsourced workers was on role-specific training. Employment status was used as a determinant for access to training.

Generally, training for outsourced workers revolved around what they required to effectively perform their jobs. The focus was rarely on their professional development. With this in mind, the option available to the outsourced workers was that they seek their own professional development and training opportunities. But this was not always feasible, since most training opportunities are expensive. For example, depending on the areas of specialization, some training sessions could cost as much as 50,000 Kenyan shillings for three days. 55% of the outsourced workers lamented that they could barely afford self-training because what they earned did not allow them such luxuries. It was, however, noted that some outsourced workers who were in the civil society space received training because the non-governmental organization budgets allowed them to sponsor workers who were not strictly employees.

It was interesting to note that 13% of the outsourced workers had access to professional development through outsourcing companies. This was commendable because it depicted that some outsourcing companies took a more proactive role in the qualifications that they identified as important towards the provision of services. They moved beyond being a traditional provider of labour and were more actively involved in the welfare of the outsourced workers. This is a commendable trend because a selling point for outsourcing companies would be their involvement

in career management through skills-development packages, which would encourage professionalism even in outsourcing arrangements.

3.3.4 Management style for outsourced workers versus direct employees

In some client enterprises, there was no distinction in the way outsourced workers and permanent employees were treated. Respondent 9 and respondent 13 were happy to report that some managers within the client enterprise did not even know that they were outsourced, which made them feel that they had more or less the same status as the permanent employees. Respondent 13 felt that she was treated better because she was seen to be an expert in her field of work. When speaking of how she had been treated by the management of the client enterprises she had worked for thus far she explained,

> "They treat me as though I already come with expertise to offer, not like the way they sometimes treat employees who when they take on they need to train for like three months. So what I can offer is that I can hit the ground running. So when I start the assumption is that I already know what I am doing. And sometimes employees are treated as if they know nothing. So long term, if I manage to weather through the covid-19 crisis, being an outsourced worker can end up being better than being a regular employee."

However, 33% felt that the management and SER workers looked down upon them because they were not integrated into the organization. They expressed how the expectation was that they would be less good at their jobs because they were brought in by an outsourcing company rather than being directly recruited. But overall, whether they felt valued as outsourced workers depended on their team and the work culture at the client enterprise.

Respondent 17 felt that the directly employed workers were justified in treating them as outsiders, especially where they were engaged on short-term contracts. This is because the temporary nature of the outsourcing arrangements did not allow for them to remain with client enterprises for long enough for the permanent staff to consider it worthwhile getting to know them well. Nonetheless, it was noted that where the outsourced workers were placed with the client enterprises for long durations, they experienced better social integration. But, it was still common for outsourced workers to feel that they were treated as outsiders, even when they had a long-term contract under the same client enterprise. Respondent 20 explained that he had worked with the same client enterprise for three years. However, he felt that he was still not treated as part of the organization because he was an outsourced worker.

The fact that outsourced workers were often treated differently by management at the client enterprise as well as the directly employed staff, affected their sense of social integration. They expressed a perceived outsider status within the client enterprise. In addition, they also did not get to interact with other outsourced workers engaged by their outsourcing companies because they were placed at different client enterprises. Outsourced workers faced challenges in uniting with permanent employees to resolve workplace grievances, even where they felt they were collective or semi-collective problems. The outsourced workers generally experienced problems unionizing.

3.3.5 Unionization

This subsection considers the desire for a collective voice and the barriers against unionization that are faced by outsourced workers. The Constitution of Kenya guarantees every worker has the right to form, join and participate in the activities of a trade union.[296] This right to unionize upholds the workers' freedom of association.[297] This freedom embodies both the freedom to associate and to dissociate. The subsection investigates the extent to which the outsourced workers in this study valued having a union voice. The outsourced workers were asked to assess the benefits that being a trade union member could offer outsourced workers. They were then asked to assess the extent to which they felt trade unions could help them in their capacity as outsourced workers. The subsection also discusses the barriers to unionization that the outsourced workers experienced.

Workers' individual decision to unionize is supported within the national legislative framework.[298] Though the Labour Relations Act lists this as a right due to employees, the Constitution makes the right to unionize available to all workers.[299] In this study, 87% of the outsourced workers felt that trade unions could potentially assist them with general matters, as well as issues that were specific to outsourcing.

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[296] Constitution of Kenya art 41(2).
[297] Constitution of Kenya art 36.
[298] Constitution of Kenya arts. 36 and 41; Labour Relations Act s 4.
[299] Vincent Kiplangat Mutai, 'Constitutionalizing Labour Rights: "Fair Labour Practices" as a Constitutional Standard in Kenya' (2016) 12 The Law Society of Kenya Journal.

It was interesting to note that 11% of the interviewed outsourced workers were members of a trade union. Respondent 23 said he joined a trade union due to civic education; the other unionized outsourced workers were approached by union members during union meetings at the client enterprise's premises. They expressed various reasons for joining trade unions and these reasons would be considered consistent with those that would be offered by SER workers. The most commonly cited reason was the possibility of receiving workplace support if problems arose.

It was found that 89% of outsourced workers were not trade union members and the main reason given was that they had not been offered the opportunity to join a trade union. It seemed like they were largely invisible to trade unions which seemed to focus only on SER employees. Trade union representatives did not approach outsourced workers to recruit them, and neither did the outsourced workers know where to find union representatives to find out about membership. It was not easy for the outsourced workers to unionize. For the outsourced workers who had previously been in SER engagements, they expressed that they felt a subtle exclusion upon becoming outsourced, in that they now had unionization challenges.

Nonetheless, 87% of the outsourced workers identified it as potentially beneficial to be unionized. The identified benefits were the potential for collective negotiations for better pay and benefits, as well as assisting in fostering better employer-employee relations within the TER. In addition, trade unions could offer support to and advocacy on behalf of the workers, including legal representation if the need arose. They could provide a unified voice and medium through which the outsourced

workers could channel their grievances, as well as challenge how they were treated by the client enterprises and outsourcing companies.

13% of the outsourced workers mentioned that trade unions would be of no benefit to them. Respondent 9 went as far as asserting that, in his opinion, trade unions offer little or no benefit even to employees. He said he disapproved of the quality of representation that they offered to workers; that most of the time they were just trouble-makers who seemed to manage to increase their gains but there was little trick-down to the workers themselves.

In addition, respondent 42 mentioned that from her experience, trade unions would be of no benefit to outsourced workers. She mentioned that she had once sought trade union membership, but the trade union had faced challenges in accessing the client enterprise's premises where she provided her services. She explained that the client enterprise had denied access on the basis that it was not the outsourced workers' employer and had requested the trade union representatives to seek assistance from the outsourcing company.

In principle, it should be possible for outsourced workers to join trade unions despite the transient nature of their jobs.[300] This can be likened to how workers like teachers often change employers but they can remain protected by the same union. Workers such as teachers identify with their

[300] Hila Shamir, 'Unionizing Subcontracted Labor' (2016) 17 Theoretical Inquiries in Law 229, 240–246.

trade unions not based on their employment with a particular employer, but rather due to their membership in a particular sector of employment. Their membership in the trade union is consistent even when they transition between employers within the same sector. Adopting a similar approach towards outsourcing TERs in which the unionization of outsourced workers would be based on their occupational categorizations may be useful; the availability of a collective voice may help outsourced workers achieve the elusive goal of equal access to employment rights similar to SER workers.

This subsection discussed the outsourced worker's perceptions of their employment rights and benefits. The main themes were salary and other allowances, access to loan facilities, access to medical insurance cover, the managerial approaches adopted on outsourced workers, and the unionization challenges. It was noted that the outsourced workers' perceptions were often based on comparisons with the directly employed workers of the client enterprises where they were placed. The next subsection investigates the outsourced workers' perceptions of their job security.

3.4 JOB SECURITY OF OUTSOURCED WORKERS

This section addresses the third independent variable, namely, improved job security for outsourced workers in Kenya. Perhaps one of the biggest differences between outsourced workers and SER workers is the difference in job security. Job security, as a human right, may be defined as the absence of fear or threats of losing employment; it is also related to protection from unfair

or unjustified dismissals.[301] The insecurity inherent in outsourcing arrangements is related to their impermanence.[302] The nature of their employment status through the use of the TER enables easier hiring and firing decisions. Generally, concepts of security and insecurity involve the likelihood, and associated perceptions, of a worker continuing their contractual engagements under their current employer.[303] Bearing this in mind, the outsourcing contractual arrangements may be perceived to be particularly problematic in granting outsourced workers adequate job security.

This study investigated the perceptions of outsourced workers on the level of job security they experienced. When asked about this, 31% of the respondents expressed that they experienced no level of job security and 44% expressed that they experienced lower job security than the directly employed workers of the client enterprise. Respondent 33 explained that his employment contract provided for termination of the contract by notice. However, three months into his engagement with the previous client enterprise, he was informed by a manager at the client enterprise that his services would no longer be required. Due to the covid-19 pandemic, the outsourcing company was unable to find him another role so he had been jobless for quite a while. He expressed that he felt he had no form of redress. As he explained,

> "There's a lot you can't do as an outsourced worker. I had nowhere to complain when this happened to me. It's like most of the clauses are unenforceable. The contract was like 20 pages. I mean I could barely go through it. Then later I realized that the reason they make

[301] Sukti Dasgupta, *Employment Security: Conceptual and Statistical Issues* (International Labour Office 2001) 2.
[302] Burrows (n 39).
[303] Dasgupta (n 301) 2–5.

> it so long is like they put things like they limit the amount you can sue them for. I remember after signing the contract thinking this is just dodgy. And there's nothing I could change in the contract. And this was not the first time something like that happened to me. And the circle is so tiny. So what do you do? Do you now go and sue the people who later you will be seeking employment from? So you just leave it and accept your fate. You don't want to be labelled as a *kichwa ngumu* (hard-headed person) who nobody can work with"

Limited legal protection under outsourcing TERs may mean that outsourced workers can be terminated from their positions with little or no regard for substantive and procedural fairness.[304] In addition, even the term employer, in the sense of the person who can terminate the employment, can prove to be challenging.[305] Sometimes the termination of the outsourced workers' services is at the behest of the outsourcing company but often it is at the command of the client enterprise. And sometimes a cessation of work by the client enterprise may not amount to an exclusion from employment, since the outsourced workers may move between client enterprises thanks to the outsourcing company, but sometimes the cessation of work may be conclusive if the outsourcing company is unable to provide other employment opportunities. With that in mind, 22% of the outsourced workers felt that their employment was secure despite the termination of opportunities with client enterprises. So as not to ignore their varying relations with the two authority figures, it may be useful to consider outsourced job security as involving both "outsourcing company

[304] Termination fairness is protected by the Employment Act pt VI.
[305] This is discussed in greater detail in section 3.2.5.

security" and "client enterprise security." This may be beneficial in the analysis of whom the outsourced workers perceive to provide them with job security.

3.4.1 Varying levels of job security

A significant portion of the literature on NSWs in general, and outsourcing in particular, refers to the insecurity inherent in NSWs.[306] The traditional conception of job security is premised on the SER which involves the assumption that employment is permanent and direct with a single employer figure.[307] For outsourced workers, the perceptions of job security would vary from the traditional model. Their conceptions of job security relate to both their security within their current roles with the current client enterprise, together with future employment prospects through the outsourcing company. The traditional model may be too narrow to cater for outsourced workers' job security perceptions. It may be useful to expand the definitions of job security to fully incorporate the outsourced workers' perceptions of job security.

44% of the respondents reported that they experienced lower job security than that of the client enterprises' permanent employees. Respondent 37 explained that,

> "Assuming I have an issue with the client, if they say they don't want me, that's it. That's because this is not a permanent position. Then I have to take it up with the company that I

[306] ILO, *Non-Standard Employment around the World* (n 1); Kalleberg (n 213); Van Eck (n 11).
[307] Dasgupta (n 301) 2–5.

have been outsourced from. They should try to put me with another position if any is available."

Notwithstanding the high levels of client enterprise insecurity that outsourced workers faced because they were not permanently attached to the client enterprise, 22% of the respondents perceived relatively high levels of outsourcing company security. They were generally confident that upon leaving their positions with their current client enterprise, they would get another placement through the outsourcing company, without having to endure long periods of unemployment. This was even though contractually they had no guarantee of work. Their perceptions of job security were based on experiences which had illustrated that work through outsourcing companies was readily available.

This was particularly common among the professionally skilled outsourced workers (67%). Their concerns about job security involved continuity within their current roles under the client enterprise, rather than the wider aspects of employability. These workers often relied on the outsourcing companies to link them to several jobs under multiple client enterprises and they exhibited loyalty to the outsourcing companies; as such, they would not consider working through a different outsourcing company for as long as employment opportunities were readily available. Notwithstanding their employment status, they experienced moderately high job security levels.

However, this was not always the case. One professionally skilled outsourced worker explained how she did not feel tied to outsourcing. Respondent 21 explained that at the end of her current

outsourcing engagement she would seek out whatever opportunity matched her skills if the outsourcing company would not find her another post with higher pay. This demonstrated more of a focus on labour market security and employability than on either outsourcing company security or client enterprise security. With this approach, though she was currently engaged as an outsourced worker, she was also seeking employment opportunities as either a permanent employee, a fixed-term contract employee or a consultant.

For the professionally skilled outsourced workers, the insecurity inherent in outsourcing TERs was counterbalanced by the general labour market security. Their perceptions of security were based on employability and not tied to specific engagements with the various client enterprises. Though they perceived the likelihood of losing their current engagement, this did not hamper their perceptions of employability. Rather than viewing job security from the traditional viewpoint, they focused on their skills and employability. In this sense, job security may be viewed as the probability of continuing to work in the same field and having consistency about the available opportunities.[308] Despite this viewpoint, though they enjoyed job security based on employability, 53% were unsatisfied with the precariousness experienced under outsourcing TERs due to their inadequate access to some employment rights and how this affected their financial security.

[308] Dasgupta (n 301) 22.

Nonetheless, 8% of the professionally-skilled outsourced workers had a partial sense of employment insecurity. Though they recognized that the labour market would offer them other employment opportunities, they felt limited in that the outsourcing company could only provide opportunities linked to the specific client enterprises that they had service contracts with. Respondent 8 described it as follows,

> "I'd say my job security is a 50/50 because as an outsourced worker, I am only limited to the clients that the company has negotiated with and those opportunities are sometimes limited. So if my time with the client ends and they don't have openings coming up with another client, then that's it. And also with (*outsourcing company's name omitted*), I am on contract. So, if my contract is not renewed, then there'll be that question of what next."

Bearing in mind the outsourced workers' perceptions of job security, this study proposes the division of the concept of job security into placement security, employer security (which can be further subdivided into outsourcing company security and client enterprise security) and labour market security. This would correspond with the outsourced workers' perceptions of job security. Discussions on outsourcing TERs tend to depict outsourced workers as having no job security.[309] This may be true in the sense that the nature of outsourcing TERs offers them low levels of placement security within the client enterprise. However, 22% of the outsourced workers experienced high levels of job security; these were mostly professionally-skilled outsourced

[309] Holger Görg and Dennis Görlich, 'Offshoring, Wages and Job Security of Temporary Workers' (2015) 151 Review of World Economics 533; Monica Belcourt, 'Outsourcing—The Benefits and the Risks' (2006) 16 Human resource management review 269.

workers who had high levels of labour market security because their skills were in high demand. Such workers experienced high levels of job security because of their employability, rather than their placement-based or employer-based security.

The outsourced workers with lower levels of skills, such as cleaners and security personnel, provided a contrast. These workers seemed to have taken up outsourcing contracts because they were the only opportunities that they had. These basic-skilled outsourced workers were well aware of the placement insecurity about the client enterprise, but also seemed insecure about their career prospects upon the conclusion of their current placements. Respondent 30 expressed that she felt secure up till the end of her placement with the client enterprise but was unsure what her fate would be after that, as there was no guarantee that she would get another well-paying opportunity. For these workers, the end of a placement with a particular client enterprise may lead to labour market insecurity. There was no guarantee that the outsourcing company would avail similar opportunities and pay packages. There was the fear that they may endure long periods without work.

This illustrates that job security may be linked to the perception of readily available jobs, but it may also be related to the outsourced workers' possession of professional or rare skills. However, all the outsourced workers identified client enterprise insecurity as a disadvantage of outsourcing arrangements. They were acutely aware of the fact that they had no permanent ties to the client enterprise and that it could easily replace them if it so wished. 60% of the outsourced workers lamented over the ease through which they could be dismissed.

3.4.2 Resolving workplace grievances

The possibilities surrounding the resolution of workplace grievances are also a key aspect that was brought up during the interviews of the outsourced workers. There seemed to be varied means through which outsourced and SER workers felt they could deal with the problems that they experienced at work. While 40% of the outsourced workers said they would report their issues to either the outsourcing company or the management at the client enterprise, 11% said they would terminate their relationships with the client enterprise and 49% said they would persevere silently through their problematic situations because they did not see any possible means of redress. These differences in opinions could be attributed to the levels of job security that the outsourced workers felt they had. This subsection provides a discussion on how outsourced workers perceived their abilities to resolve various workplace grievances, ranging from role-related grievances to general dissatisfaction. This is followed by a discussion on whether trade unions can assist outsourced workers in their resolution of workplace grievances.

It was found that 88% of the outsourced workers reported that they had no serious workplace grievances with their work situations under their current client enterprise, but instead reported general dissatisfaction with some aspects of being an outsourced worker. 42% reported grievances based on their past placements. These dissatisfactions revolved around the general working conditions, the way they were treated by the management of the client enterprise, or their pay and other allowances. 51% of the outsourced workers expressed that they had also been dissatisfied with these or other similar issues in their previous placements with different client enterprises. Some of these were mentioned in the discussion on the perceived disadvantages of outsourcing in

section 3.2.2. These dissatisfactions included exclusion from workplace meetings and training opportunities, the differential treatment by management and permanent staff of the client enterprises, the perceived lack of employment benefits and the lack of unionization, among others.

Though the outsourced workers mentioned aspects of dissatisfaction with working within outsourcing TERs, 71% felt that these were not grave enough to warrant complaining to their employers about. It was noted that dissatisfaction, in itself, was not a sufficient determinant for workers speaking out, as the dissatisfaction may only be mild and they could rationalize that their working conditions were generally appropriate or fair. For the dissatisfaction to be grave and seemingly actionable, it had to relate to something that the worker considered illegitimate, unfair or wrong. In many cases, the outsourced workers did not make their grievances known because they did not feel that the actions against them had been illegitimate or unreasonable.

For example, all the outsourced workers who were excluded from workplace meetings were unhappy with it, but they did not perceive that the client enterprise was wrong in doing so. Though they felt aggrieved, they accepted that the client enterprise was entitled to treat them differently as compared to its directly employed staff because of their status as outsourced workers. 89% of the outsourced workers saw less favourable treatment, detachment from the client enterprise and precariousness as an expected part of outsourcing TERs. They viewed this as intrinsic to outsourcing arrangements rather than things that they could change. These grievances were viewed as minor dissatisfactions rather than injustices.

The perceived grievances could be attributed to factors that were either internal or external to outsourcing TERs. External factors included, for example, the legal framework because it shapes what workers and employers perceive to be legitimate.[310] The inadequate legislative framework to support outsourced workers from an employment perspective, compounded with their day-to-day experiences which they viewed as the norm, was an impediment to them viewing these grievances as injustices. As a result, the less favourable treatment was considered legitimate and warranted. Whereas the employment laws legitimize the interests of SER workers, outsourced workers often feel they may not have such legal support.[311]

There are two main ways in which legislation may be considered important to workers in their quest to resolve workplace grievances. First, it provides a means of external legitimization of their perceived grievances. When they are framed as legal rights, they would underpin the outsourced workers' perception of what is illegitimate or unreasonable when they are assessing whether or not to challenge either the outsourcing company or the client enterprise on their perceived workplace problems. Secondly, the legislation would provide the outsourced workers with clear mechanisms for seeking legal redress to enforce their employment rights, which would allow them to redress their grievances beyond their workplaces. With this in mind, the Kenyan legal employment framework regulating outsourcing TERs is assessed in chapter four.

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[310] The Kenyan legal framework governing the outsourcing TER is discussed in Chapter 4.
[311] See generally section 3.3, as well as chapter 4.

From the experiences of the outsourced workers, legal remedies available to them to address their workplace grievances were minimal. While they are legally protected by both national and international employment laws in their capacity as workers, in practice these entitlements were difficult to access or enforce. For example, in a claim for equal pay for work of equal value, the expectation is that the comparator would be another worker employed by the same employer. As such, an outsourced worker would be unable to complain about the differential pay in comparison to workers employed directly by the client enterprise or engaged by a different outsourcing company. Even though they may be working together on the same premises, contractually they are not working for the same employer. As such, outsourced workers may not have comparators to prove that there has been unequal pay. In such instances, both the outsourcing company and the client enterprise may attribute the pay differences to employment status, rather than to discrimination.

An example of an internal factor that would lead to grievances being viewed as dissatisfactions rather than injustices would be the perception that the outsourced workers willingly signed into outsourcing TERs, fully aware of the contractual insecurities that it posed. Their acceptance of the outsourcing contracts with the prior knowledge that they offer fewer legal protections was found to lead to a general hesitation to challenge the grievances encountered concerning employment insecurities and employment protections.

While 88% of the outsourced workers expressed that they experienced workplace dissatisfaction, 33% expressed a general hesitation to raise their workplace grievances with either of the two authority figures. Since outsourced workers relate with two authority figures, they have the opportunity to report their issues to either the client enterprise or the outsourcing company, or both. For the 56% who felt confident about raising their grievances, 27% expressed that the first point of action would be the management at the client enterprise and if it was not handled at that point, the matter would be "escalated" to the outsourcing company. Respondent 6 described it as follows,

> "I would say there are effective ways to resolve grievances as an outsourced worker. First, you can talk to your immediate manager at (*client enterprise's name omitted*). For me, that was like if I'm having technical issues, personal issues and the work is becoming too much. If they want to go beyond that, or if they keep on overstepping, I go back to (*outsourcing company's name omitted*) and I talk to my manager there. I'm like I'm having problems managing and they help sort it out."

Similarly, Respondent 31 explained that he had previously worked with a client enterprise that had very clear procedures. If someone did something to him that he considered inappropriate, he knew where he was to report the matter. Where there were clearly outlined grievance procedures, raising their workplace problems with either the client enterprise or the outsourcing company was feasible. However, three respondents mentioned that they felt that this could pose risks in that they were likely to experience adverse consequences for complaining. For example, Respondent 3 complained that his term at a previous client enterprise came to an end abruptly shortly after

complaining that his medical cover was inadequate when compared to the directly employed staff of the client enterprise.

In addition, it was noted that 11% of the outsourced workers expressed that they did not know who to go to for redress of their grievances. As Respondent 27 aptly explained,

> "You find bosses who are crude. I have experienced racist people. And then most times I'm like okay, who do I go to? I'm not an employee. Am I supposed to go to the human resources department and I'm not their employee? It's not so straightforward."

It was also observed that how outsourced workers responded to their workplace grievances was partly related to whether they viewed the grievances to be individual, semi-collective or collective. Based on 71% of the responses, it was concluded that where the grievances were viewed as collective or semi-collective then they were perceived to be minor and tolerable discomforts. On the other hand, where they were viewed as individuals, the affected persons internalized them and saw them as potentially actionable. Consequently, this study does not support the view that outsourced workers as a group are universally vulnerable and marginalized by the labour market. Though this was found to be true for a minority of outsourced workers, especially those without professional skills, 56% of them felt they could make use of the resources and structures available to them through either the outsourcing company or the client enterprise.

In addition to distinguishing workplace grievances as either dissatisfactions or injustices, the attribution of the workplace grievances to the client enterprise, the outsourcing company or external factors determined how the outsourced workers chose to resolve them. If they attributed

them to external forces they were less likely to seek to change them and would not report the problems. Outsourcing TERs had an impact on the attribution of workplace grievances. In most cases, rather than identifying the outsourcing company or the client enterprise as the source of their problems, the trend was to see them as inherent to the outsourcing TER itself or both authority figures jointly.

Under outsourcing TERs, there is a division of employer functions between two authority figures.[312] It was noted that there was uncertainty as to which authority figure would be responsible for each of the various features of the employment relationship. The control and responsibilities over the outsourced workers were split. There was also the view that their grievances were related to this splitting of employer function, rather than to the work conditions through the specific authority figures.

For example, issues relating to pay seemed difficult to attribute to either authority figure. The pay that the outsourced workers received was often based on the amount that the outsourcing company received from the client enterprise, less the amount that the outsourcing company deducted as its fees.[313] Though 77% of outsourced workers were dissatisfied with their pay, they were unaware of how much the client enterprise was offering for their services and the subsequent markup by the

[312] This was discussed in section 3.2.4.
[313] See section 2.3.3.

outsourcing companies. They were unsure as to whether to attribute their perceived low pay to the client enterprise or the outsourcing company.

Unlike SER workers who have clearly outlined employment rights as well as a collective voice, outsourced workers operate within a TER, which makes their options and means of addressing workplace grievances more complex. The various ways in which outsourced workers resolve or choose not to resolve their workplace grievances have been discussed in this subsection. These consist of raising the issue with either of the authority figures, choosing to suffer through their problems or choosing to stop working for the client enterprise.

Having a collective voice could be a useful means of redressing workplace grievances. This may be through either trade unions or other groups such as professional associations and other worker forums. In addition, outsourcing companies may assist the outsourced workers by providing a channel through which the workers can collectively address their workplace grievances. This can be facilitated through the outsourcing companies having policies that assist the outsourced workers with raising workplace grievances experienced under the client enterprise. This would reduce the fear that some outsourced workers expressed about voicing their problems. This would also manage the fears that if the outsourced workers voiced their individual or collective workplace

problems, there was the real risk that they would be terminated due to being labelled as trouble-makers.[314]

Exit from the client enterprise was mentioned as a possible solution to dealing with workplace grievances.[315] For SER employees, exit in this sense would mean resignation. However, for outsourced workers, since they have a TER, they can leave the client enterprise without terminating their relationship with the outsourcing company. So, if they identified the client enterprise as the source of their grievance they could leave and seek placement with a different client enterprise. However, though some outsourced workers saw exiting as an appropriate means of addressing workplace grievances, the majority of outsourced workers were hesitant to consider it. Overall, the means of redressing workplace grievances depended largely on the level of job security that the workers seemed to experience.

3.4.3 Termination of employment of outsourced workers

One of the key aspects of job security is the termination of employment since security essentially is the absence of fear of losing employment.[316] The outsourced workers' perceptions of their termination of employment were investigated. They were asked about the existence of a notice period before termination. They were also asked whether their contracts of employment provided

[314] For example, this fear was expressed by Respondent 33.
[315] This was mentioned by 11% of the respondents.
[316] Dasgupta (n 301) 2.

for termination and if so which parties could terminate the relationship. This was considered essential seeing as the outsourced workers relate with two authority figures.

Depending on the length of the contract, the notice before terminating the contract varied from between a week and a month. The trend was that contracts whose duration was more than six months included a one-month termination notice period, whereas those whose duration was less than six months had shorter notice periods. For the three-month contracts, the notice period was usually one or two weeks. Being short-term contracts, these outsourcing arrangements offered greater ease of termination.

When asked about the party who could terminate the relationship, it was noted that all contracts provided for termination by the outsourcing company.[317] However, the reality that the outsourced workers experienced was that the termination could come from either the outsourcing company or the client enterprise. In some cases, the contract specified that the outsourced worker was to deal with a particular client enterprise. If the client enterprise was not satisfied, it could request that the outsourced worker is replaced and in that way, the worker would be out of a job. Respondent 25 explained that,

[317] As was mentioned in section 2.3.3, the contractual employment relationship is between the outsourcing company and the outsourced worker.

> "The contract states that you deal with a specific client. If the client feels he's not satisfied, they have the right to say that you can be replaced. The termination can come from both sides."

Similarly, respondent 5 concluded that,

> "In termination, there are various things that bring that contract to be terminated like your performance, behaviour-related issues. But the person to terminate it is my employer, who is (*outsourcing company's name omitted*). But the client would have to write to them with the complaint that they have. So, both parties have to be involved."

It was noted that 49% of the outsourced workers felt that the client enterprise was their employer since that was the entity managing their day-to-day tasks.[318] The fear that the client enterprise would tell them not to report to work was distressing. Though they would revert to the outsourcing company for other potential placements, depending on their perceived level of job security, this was taken as an unregulated mode of employment termination. As Respondent 34 explained,

> "I worry about my job ending because the client is a foreign company in a foreign country. The contract states when there is no work in Kenya the contract is kind of automatically terminated. So, I keep looking at how things are going, how the work is going, the relationship between the client and the company and sometimes I get worried. There is a lot of clashing."

[318] This was discussed in section 3.2.4.

For termination of employment to be fair, there must be substantive and procedural fairness. This means that the reason for termination should relate to the worker's conduct, compatibility or capacity, or the company's organizational requirements.[319] Also, the procedure for effecting the termination must be fair. In outsourcing, contractually those requirements would be expected of the outsourcing company, as the employer, but not of the client enterprise. As Respondent 24 explained,

> "I don't have a contract with (*client enterprise's name omitted*). They just have a contract with (*outsourcing company's name omitted*) to get people. So now when you get there in case of any disciplinary issue, a normal employee would have to go for three hearings or at minimum two. One only if they're not going to fire you. One hearing is if it's very clear that what you did would not warrant dismissal. But mostly it takes time. There's a lot of *(sic)* procedures that people don't want to go through because that's opening a bag of bones. But when you look at it like now as an outsourced staff they can fire you anytime and like it doesn't even have to have procedure. It can just be, '*Huyo hapo, mwambie aende*.' ('Tell that person there to leave') So when you're outsourced you're quite scared. You just take it by the day."

When a client enterprise asks an outsourced worker not to report to work anymore or asks that the outsourcing company replaces that worker, that situation does not amount to termination as envisaged by the labour laws.[320] Yet, at that point, the outsourced worker no longer has the opportunity to provide their services in the role that they had been doing so. The client enterprise

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[319] Employment Act s 45.
[320] This is discussed in greater detail in section 4.4.

owes them no obligations in terms of substantive and procedural fairness before asking them to leave. Yet it is the authority figure in charge of their day-to-day management in terms of allocation of duties. The client enterprise provides the work and can terminate the work opportunities without any due regard for the outsourced workers' interests. Though it would be absurd to legally require the same obligations that the client enterprise has towards its SER workers, there should be a minimum threshold that still protects outsourced workers, in light of their human rights.

3.5 CONCLUSION

This chapter discussed the experiences of outsourced workers within outsourcing TERs. It addressed the first objective which was to investigate the nature of outsourcing triangular employment relationships based on the experiences of outsourced workers in Kenya. Outsourced workers relate to two authority figures: the outsourcing company and the client enterprise. This chapter sought to investigate how this affects their employment relationship, employment rights and work conditions, as well as their perceptions of job security.

It investigated the experiences of outsourced workers concerning the first dependent variable of this study, namely clarity on employment status within outsourcing TER. The outsourced workers described their perceptions of the nature of their employment. The overwhelming majority had written contracts between themselves and the outsourcing companies which expressed the nature of their work relationship. Additionally, the outsourced workers described the advantages and disadvantages that they experienced through working under outsourcing TERs.

It was found that their experiences of outsourcing TERs varied depending on the nature of their job type and reason for choosing outsourcing arrangements. As such, this study created a typology of outsourced workers in which they were categorized into three groups namely, convenience short-term outsourced workers, professionally-skilled outsourced workers and basic-skilled outsourced workers. The first category viewed outsourcing as a convenient bridge to SER opportunities as it helped them gain the required experience. On the other hand, the professionally-skilled outsourced workers were engaged in positions that required technical skills and they felt less precarious than the basic-skilled outsourced workers.

The chapter also discussed the experiences of outsourced workers about the second dependent variable of this study, namely minimum standards on benefits and working conditions for outsourced workers. The key employment rights and duties that the outsourced workers identified related to salary and other allowances, medical insurance cover and access to training. Each of these was a point of contention in that they compared their access to these in comparison to directly employed workers of the client enterprise. It was found that there was general dissatisfaction when the outsourced workers compared themselves to the directly employed workers, especially within the category of basic-skilled outsourced workers. Bearing this in mind, the human rights theory may offer reprieve to outsourced workers through ensuring that there is equality despite the exclusion of NSW workers from employment law protections.

The management styles that the client enterprises employed towards the outsourced workers were also considered. It was found that among the professionally-skilled outsourced workers, it was

common to be treated similarly to the directly employed workers because of the expertise that they brought in. However, the majority of basic-skilled outsourced workers were treated differently and they did not feel adequately integrated into the organization. The chapter also identified the desire that the outsourced workers had for a collective voice and the barriers that they faced against unionization. It was found that though outsourced workers have a right to unionization, this was barely actualized.

The chapter also discussed the experiences of outsourced workers about the third dependent variable of this study, namely the job security of outsourced workers. In evaluating their experiences, the study considered the varying levels of job security, since the outsourced workers relate to two authority figures. It was found that it is beneficial to categorize job security as either outsourcing company job security or client enterprise job security. The discussion of job security also examined the experience of the outsourced workers in resolving workplace grievances, as this was viewed to affect the possible termination of employment. It was found that the traditional concepts relating to the employment relationship, including job security, may be too narrow to incorporate the varied experience of outsourced workers within outsourcing TERs, especially in light of their perceptions of their jobs as less secure. In light of this, this study relies on the paternalism theory to advocate for increased legislative interference of outsourcing TERs in the interest of outsourced workers.

The next chapter of this study assesses the current legal framework regulating outsourcing TERs in Kenya. The chapter elucidates on whether the current employment framework takes into account

the peculiarities of outsourcing TERs. The chapter discusses the employment framework with a focus on the themes that were brought out in this chapter when evaluating the experiences of outsourced workers.

CHAPTER FOUR

THE LEGAL FRAMEWORK FOR OUTSOURCING TRIANGULAR EMPLOYMENT RELATIONSHIPS IN KENYA

4.1 INTRODUCTION

This chapter presents an overview of the current legal framework governing outsourcing TERs in Kenya. To begin with, it would be useful to identify what the law in Kenya defines outsourcing to be. The practice of outsourcing has been defined as 'the provision of outsourcing services to business for specific business functions or processes such as back office support services in human resources, finance, accounting and procurement amongst other services.'[321] It is worth noting that the focus of this definition is on the outsourcing process and there is little focus on the workers who perform the outsourced functions.

In terms of outsourcing TERs, there are no definitions within the laws in Kenya on what NSWs are or what TERs are. As such, this study relies on the definitions that were provided within the conceptual framework. One key contribution of this study is its focus on outsourcing TERs in Kenya, rather than the business-related aspects of outsourcing. In line with that, this chapter discusses Kenyan employment laws with a focus on outsourcing arrangements.

[321] Special Economic Zones Act 2015 s 2.

The case of *Wrigley v AG* defines four parameters that need to be met so that outsourcing TERs are deemed to be credible.[322] First, ordinarily, employers are expected to outsource peripheral functions, rather than their core functions. Second, outsourcing should not be used as a means to escape accrued contractual obligations to employees. Third, an employer should not transfer its employees' services to an outsourcing company without the express approval of the affected employees. In all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect. Finally, outsourcing arrangements should not be used to introduce discrimination between employees doing equal work in an enterprise. These are important considerations that the parties to outsourcing TERs should bear in mind and that ideally should be highlighted in the legal framework.

This chapter assesses the legal framework with a focus on outsourced workers in Kenya. It begins with an analysis of the employment status of outsourced workers. It considers both the legislative definitions and judicial interpretations of employment status. The discussion on the determination of employment status comes first because it is an important prerequisite to employment rights and duties. This leads to an examination of the 'worker' status as contrasted to the 'employee' status. The analysis of employment status then moves beyond the identification of who is an employee, which is the traditional approach, to also identify who an employer is. This is particularly useful

[322] *Wrigley Company (East Africa) Limited v Attorney General & 2 others & another* [2013] eKLR (Industrial Court).

because the outsourced workers relate with two authority figures who could potentially be deemed to be the employer: an outsourcing company and a client enterprise.

The second part of this chapter examines the employment rights that outsourced workers have. There is special mention of the unionization of outsourced workers because this is an issue that has been contested by several trade unions. It then investigates the employment duties that are owed by the outsourcing company as well as the duties owed by the client enterprise.

The final part of this chapter discusses the job security of outsourced workers. It investigates three possibilities through which outsourced workers' termination of employment can be achieved. First, it considers termination of employment by the outsourcing company, and second, by the client enterprise. Finally, it considers the loss of employment due to the termination of the service contract between the two corporate entities.

4.2 DETERMINATION OF OUTSOURCED WORKERS' EMPLOYMENT STATUS

It is perhaps crucial to this discussion on employment laws to first interrogate the meaning of the term employment. This is because it would enable a proper delineation of the subject matter, especially since there are other similar arrangements which may be confused with employment. Second, the delineation is important because, under the current employment legal framework in Kenya, employment protections are only granted to employees to the exclusion of independent contractors. This section offers a general overview of the statutory provisions and judicial tests that provide for the determination of employment status and thereafter applies them to outsourcing

TERs. It also investigates the worker status as contrasted with employee status, and finally defines who an employer is.

In labour law, the determination of employment status is important because it sets the basis for the granting of employment protections. It also affects the rights of other persons who deal with the parties to the contract, for example, vicarious liability. In defining employment, the labels that the parties to the contract give themselves are sometimes useful in construing the nature of their relationship. The contract may define the persons providing services as employees, or as independent contractors or consultants. However, the ascribing of employment status goes beyond the parties' categorization and is construed as a matter of law.[323]

The case of *Kenneth Kimani v Kibe Muiga* illustrates this point.[324] The respondent was a company which ran Emerald Hotel, previously known as Hotel Ravine, in Nairobi. The respondent engaged the two claimants as preopening managers: the first claimant as the Hotel Pre-Opening Food and Beverage Manager and the second claimant as the Hotel Pre-Opening General Manager. The contracts referred to both claimants as consultants and the respondent as the client, which is a feature of consultancy agreements. However, the contracts referred to the payment of salaries, which is characteristic of employment agreements. The Industrial Court opined that, when the

[323] *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014] eKLR (Industrial Court).
[324] [2014] eKLR (Industrial Court).

contract was read in its entirety, the parties intended that the contracts were to be employment contracts rather than consultancy contracts. The court held that, though the parties' intentions should not be disregarded, in determining employment status courts are not bound by the parties' descriptions of the character of the contractual arrangement.[325] Employment status is essentially determined by the law.

The determination of employment status was once thought to be an 'elephant test'; an animal that is difficult to define but easy to recognize when you see it.[326] Though there may have been a time when this description would have been considered to be accurate, it is doubtful if the same can be said of employment status in the twenty-first century.[327] In the determination of employee status, the answers to the following three questions must be positive.[328]

The first question is whether there is an agreement between the two parties. This may be defined as the combination of understanding and intention, between two or more persons, with a view of altering their respective rights and duties, or their past or future performance.[329] In other words,

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[325] *Kenneth Kimani v Kibe Muigai* (n 323) para 40.
[326] Brendan Burchell, Simon Deakin and Sheila Honey, *The Employment Status of Individuals in Non-Standard Employment* (Citeseer 1999) 19.
[327] Paul Benjamin, 'Who Needs Labour Law? Defining the Scope of Labour Protection' in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2004) 75.
[328] Andrew C Bell, *Employment Law* (Sweet & Maxwell 2006) 13.
[329] *Black's Law Dictionary* available at https://thelawdictionary.org/agreement/.

there has to be a meeting of minds by the parties over something that is being done or is yet to be done. This calls for an offer by one person and an acceptance of the offer by the other person.

The second is whether the agreement in question can be classified as a contract. This narrows the scope of the possible agreements that parties may have. A contract is an agreement to do or not do a particular thing. However, not all agreements are contracts; a contract has several elements which make it a unique agreement.[330] These unique elements include an offer, acceptance of the offer, and consideration. The latter may be defined as any benefit that is or will be conferred upon the person who has made the promise by another person, as an inducement for the promise.[331] Simply put, consideration is the exchange of one promise for another present or future promise, action or forbearance.

The third, and perhaps the most important question, is whether it is a contract of service, as distinguished from a contract for services. This question can be answered through two distinct yet related avenues.[332] The first is through legislation and the second is through judicial interpretation. The focus of labour laws concerning employment status has primarily revolved around the categorization of persons as either employees or independent contractors. From a layman's perspective, an employee works for another person. But this may often be misleading or

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[330] *Black's Law Dictionary* (n 329) available at https://thelawdictionary.org/contract/.
[331] *Black's Law Dictionary* (n 329) available at https://thelawdictionary.org/consideration/.
[332] Benjamin (n 327) 75.

inconclusive because it is possible to perform services for another person in a capacity other than an employee. To clarify this and hence move beyond the layman's perspective, the next section gives an overview of the legislative definitions, which will then be enriched by the judicial tests.

4.2.1 Legislative definitions of employment status

To understand employment status, it is important to define who is an employee because employment status essentially relates to being in an employer-employee relationship. An employee is defined under Kenyan labour laws as a person employed for wages or a salary and this includes an apprentice and an indentured learner.[333] Some of the key elements of this definition are being employed, wages and salary. Wages and salary refer to the consideration payable to an employee as per his or her contract of service.[334] The distinction between the two is that wages are paid daily or weekly whereas a salary is paid monthly. Nonetheless, there is no requirement under the law that wages or a salary be paid at predetermined intervals; they could be paid at intervals of less than one month or more than one month.[335] One major drawback of this definition of an employee is that it is somehow tautological because it defines an employee as someone who is employed, without defining what it means to be employed. It may, therefore, be difficult to apply with certainty.

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[333] Employment Act s 2; Employment and Labour Relations Court Act 2011 s 2; Labour Relations Act s 2; Labour Institutions Act 2007 s 2.
[334] National Social Security Fund Act 2013 s 2.
[335] Employment Act s 35; *Charles Getuno Omwenga v Henderson Magare t/a Henderson Magare Timber Yard* [2015] eKLR (Industrial Court).

An employee is also defined as a person who works under a contract of employment, otherwise known as a contract of service.[336] The term contract of service may be defined as an agreement to employ an employee or to serve as an employee for a certain period.[337] The agreement may be oral or written; it may also be expressed or implied. Further, contracts of service include contracts of apprenticeship and indentured learnership, but do not include foreign contracts of service. Some of the key elements from this definition are the requirements of an agreement, an employer and an employee.

A third definition of the term employee, under the National Social Security Fund (NSSF) Act, sets out three requirements.[338] First, the person must have attained the age of eighteen years. It is, however, worth noting that the Employment Act allows the restricted employment of persons aged between thirteen and eighteen years, as child employees.[339] This may imply that, though one may be a child employee, their employment would not be regulated by the NSSF Act.

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[336] Occupational Safety and Health Act s 2.
[337] Employment Act s 2.
[338] National Social Security Fund Act s 2.
[339] Employment Act s 56 allows for a child of between thirteen years of age and sixteen years of age to be employed to perform light work which is not likely to be harmful to the child's health or development, and not such as to prejudice the child's attendance at school, his participation in vocational orientation or training programmes approved by the Cabinet Secretary for Labour or his capacity to benefit from the instructions received.

The second requirement under the NSSF Act is that an employee must be employed under a contract of service in Kenya. The provision would also apply to Kenyan residents who are employed partly or wholly outside Kenya, so long as the employer's place of business is Kenya. A third alternative is that the person is ordinarily resident in Kenya and is employed under a contract of service as master or a member of the crew of any ship, or as a pilot, commander, navigator or member of the crew of any aircraft, where the owner or manager of the ship or aircraft resides in or has a place of business in Kenya. The requirement that the employment is in Kenya automatically excludes foreign contracts of service.

The third criterion in the definition under the NSSF Act is the exclusion of any person, other than an apprentice, who is undergoing full-time education or training. There is also an exclusion of any person who is not economically dependent on the employer. The exclusion criteria are a unique aspect of the NSSF Act.

Though the statutory definitions are a useful guide in determining employment status, they cannot be considered to be a conclusive litmus test. This leaves it to the courts to determine the specific aspects of a contract of service and how it is different from other types of contracts. This judicial determination is essentially a question of how courts and other arbitral bodies determine the question of who should receive employment protection. In Kenya, this question is answered primarily through the case law determined by the Employment and Labour Relations Court (ELRC), the defunct Industrial Court and common law precedents.

4.2.2 Judicial tests on employment status

The oldest judicial test on employment status is the control test. It originated in the eighteenth century and is still quite predominant despite the development of subsequent judicial tests. The test is premised on the expectation that in a contract of service a master tells the servant what to do as well as how to do it, whereas in a contract for services the master only tells the servant what to do but not how to do it.[340] This test served great importance in distinguishing between manual labourers and management, and it still does.

For example, in the *Christine Lopeiyo* case, the claimant sued for unfair termination of employment. The Industrial Court had to first determine whether or not she was an employee. The claimant was a caretaker of the respondent's property and was accommodated in one of his houses. Her duties included assigning potential tenants to the houses, collecting rent on the respondent's behalf and cleaning the compound. Applying the control test, the Industrial Court noted that, though she performed services for the respondent, he did not manage how her daily duties were undertaken. This was taken as evidence of the fact that she was not solely under his control, which warranted categorization as an independent contractor.

[340] *Yewens v Noakes* (1880) 6 QBD 530 (Court of Appeal); *Christine Adot Lopeyio v Wycliffe Mwathi Pere* [2013] eKLR (Industrial Court).

One major drawback of the control test is that it is useful when the nature of work involved is basic and the worker is relatively unskilled as in the case of many househelps, gardeners and cleaners, but it may be inapplicable to workers with specialist skills.[341] Professionals such as surgeons, pilots and engineers would be placed outside the employment framework because of their high levels of expertise. Yet, it is a fact that professional workers can be employed on contracts of service, notwithstanding the lack of control over their skills.[342]

In *Everret Aviation v Kenya Revenue Authority* (KRA), the appellant had engaged pilots who it classified as freelance pilots.[343] The bone of contention was that the KRA had classified the pilots' remuneration as salaries and then claimed pay-as-you-earn (PAYE) tax. Everett Aviation claimed that the pilots were not employees because it had no control over them; it could not force them to fly. The pilots were hired for their specialist skills such as landing a plane on a ship and training other employees. Nevertheless, the High Court acknowledged that though they were professional pilots, they were indeed employees and ordered the payment of the PAYE tax demands.

This can be contrasted to the case of *Jonathan Thuo v Bata*.[344] This case involved workers who were stationed at Bata Shoe Company's premises but whose salaries were paid by Fast Track

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[341] *Cassidy v Ministry of Health* [1951] 1 All ER 574.
[342] *Everret Aviation Limited v Kenya Revenue Authority (Through The Commissioner of Domestic Taxes)* [2013] eKLR (High Court).
[343] *Everret Aviation v KRA* (n 342).
[344] *Jonathan Karanja Thuo & 6 others v Bata Shoe Company Ltd & another* [2014] eKLR (ELRC).

Company, an outsourcing company. In addition, the dust coats that they wore while working were labelled Fast Track. The workers did not regard Fast Track as their employer because they had not signed any employment contract with the outsourcing company. Neither did they receive any supervision from the outsourcing company, but instead were supervised by Bata Shoe Company itself. They averred that Bata was their employer and Fast Track simply paid their salaries. Further, they were unaware of what the relationship between the two entities was.

When the workers were dismissed from employment, they sued both companies alleging unfair termination because they related with the two companies: Fast Track paid their salaries and they considered Bata to be their employer. The ELRC had to determine if they were employees of either of the respondents and if so, which one. The court held that the Claimants had lied about not taking leave the entire year and about being trade union members because most of them could not name the trade union. Further, the court held that, on a balance of probabilities, the Claimants did not prove employment with the Respondents.

Though the case failed because the workers did not provide evidence to support their relationship with either of the parties, the case raises important questions that are worth deliberation. In outsourcing arrangements, the client enterprise usually exercises day-to-day control over its outsourced workers' activities. Consequently, if the control test is applied to outsourcing arrangements, the outsourced workers may end up classified as employees of the client enterprise. What then would the relationship between the outsourcing company and the outsourced worker be termed as? If it is an employment relationship, then would the outsourced worker then have two

employers despite a lack of control of one of the entities? This would lead to potentially absurd results, in terms of the delineation of responsibilities.

To cure the inherent flaws in the control test, courts have developed other tests such as the integration tests, the test of mutual obligations, the economic reality test and ultimately the multi-factor test.[345] The integration test was conceived to mainly accommodate the context of professional employees; it allows for the inclusion of managerial employees and middle-class employees instead of solely focusing on lower cadre jobs. Under the integration test, one is an employee if the activities he performs are an integral part of the business enterprise instead of being merely peripheral.[346] An independent contractor runs his own business and as such is a registered taxpayer who manages his work schedule, and is usually free to perform services for several persons simultaneously and invoice each person accordingly.[347] Such payments for the invoices will not be subject to PAYE tax deductions and the independent contractor will not benefit from employment protections such as leave entitlements.

In the *Christine Lopeiyo* case, the Industrial Court applied the integration test in its determination that the claimant was an independent contractor.[348] It noted that she was not subject to any particular rules or procedures from the respondent. In addition, she would clean the premises

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[345] *Christine Lopeiyo v Pere* (n 340).
[346] *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101.
[347] *Kenya Hotels and Allied Workers Union v Alfajiri Villas (Magufa Ltd)* [2014] eKLR (Industrial Court).
[348] *Christine Lopeiyo v Pere* (n 340).

occasionally and this did not preclude her from undertaking her personal tasks. The court deemed her tasks to be merely peripheral and that she was not integrated into the respondent's business. Bearing this is mind, she was classified as an independent contractor.

The integration test also faces similar criticism to the control test; it may also be deemed overly simplistic and vague as to its application. This was exemplified in the case of *George Ndiritu v Intercontinental.*[349] The claimants were engaged as cleaners by the respondent hotel. They had a one-year contract which listed their duties and indicated the person from the hotel who was to supervise their work. The ELRC recognized that the work that the claimants performed was indeed an integral part of the hotel's business. It nevertheless found that they were independent contractors because the wording of the contract seemed to reflect that intention.

Applying the integration test to outsourcing arrangements, outsourced functions are usually peripheral rather than the core functions of the client enterprise.[350] With that in mind, outsourced workers would not be considered employees of the client enterprise. On the other hand, the tasks that they perform may also not be core activities within the outsourcing company, as was the case in *Jonathan v Bata*.[351] Fast Track had a minimal relationship with the outsourced workers. It seems that their role consisted simply of providing the outsourced workers with dust coats and processing

[349] *George Kamau Ndiritu & another v Intercontinental Hotel* [2015] eKLR (ELRC).
[350] Section 2.3.2; also Atkinson (n 100).
[351] *Jonathan Thuo v Bata* (n 344).

their remuneration. It is unclear whether the outsourced workers performed tasks that would have been considered integral to the outsourcing company. The integration test would then fail to classify the outsourced workers as employees of either the outsourcing company or the client enterprise. Due to the inconclusiveness of this test, it is important to consider other judicial tests.

The third test, the economic reality test is a test of economic dependence which focuses on identifying which party bears the chance of profit or risk of loss.[352] The test assesses whether the worker performs work on his own account as part of his own business or on behalf of another person. This test is especially useful in distinguishing between employees and self-employed persons, also referred to as independent contractors. If the worker is truly in business for his own benefit, then he is an independent contractor. This is illustrated in the *Christine Lopeiyo* case which held that the claimant was not an employee because she was not economically dependent on the respondent; her services to the respondent only accounted for a small share of her economic activities.[353] On the contrary, if the worker is economically dependent on another person then such a worker is that person's employee.[354]

The economic reality test poses special challenges for NSWs such as dependent self-employment, otherwise known as disguised employment.[355] Disguised employment refers to work arrangements

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[352] *Christine Lopeiyo v Pere* (n 340).
[353] *Christine Lopeiyo v Pere* (n 340).
[354] See e.g. *PO v Board of Trustees, AF & 2 others* [2014] eKLR (Industrial Court).
[355] ILO, *Non-Standard Employment around the World* (n 1) 34.

in which a dependent worker is classified as a self-employed person to bypass employment liabilities.[356] The economic reality test effectively misclassifies such workers as independent contractors and locks them out of labour law protections. Disguised employment can be achieved by concealing the employer's identity by, for example, engaging workers as consultants but at the same time maintaining a level of control and economic dominance over the workers that would be incompatible with them being independent contractors. [357] In this way, the workers would not be classified as employees yet they are dependent on the person for whom they provide services.

Similarly, though outsourced workers are remunerated by the outsourcing company, they are also partially economically dependent on the client enterprise. This is because the client enterprise is the one that generates the income that is used to pay the outsourcing company, and ultimately pays the outsourced workers. If remuneration is considered the sole determinant of economic dependence, then the outsourcing company might be deemed as the employer. However, if a broader interpretation is applied in which economic dependence extends to the client enterprise's role within the TER, then the economic reality test may lead to mixed results.[358] In the United States of America, the courts have proffered additional non-exhaustive factors to supplement the

[356] ILO, *Non-Standard Employment around the World* (n 1) 9.
[357] ILO, *Non-Standard Employment around the World* (n 1) 9.
[358] Llezlie L Green, 'Outsourcing Discrimination' (2020) 55 Harvard Civil Rights-Civil Liberties Law Review 915, 945–948.

economic reality test when determining the relationship between the potential joint employers and the worker.[359]

Turning now to the mutuality of obligations test, this test embodies the doctrine of consideration, which is an essential element in contracts. It requires the parties to make commitments to each other to maintain their employment relationship for an extended duration.[360] An employment contract entails an exchange of services for wages. This test presupposes mutual promises for future performance which creates a sense of stability between the parties to the contract. The mutuality of obligations is central to employment because an employment contract is not a yoke of slavery or servitude.[361] This was applied in *Geoffrey Asanyo v NAWASSCO* which held that the petitioner was the 1st respondent's employee because there was a mutual agreement that he would work as a director of the public corporation for three years.[362] Hence, the Industrial Court declared that Geoffrey was an employee, both as an appointed director and as a public officer.

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[359] The non-exhaustive list of factors in *Zheng v Liberty Apparel Co Inc Spr* [2003] USCA2 496; 355 F.3d 61 are (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means; (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to–directly or indirectly–hire or fire the worker or modify the terms or conditions of the worker's employment; (3) The degree of permanency and duration of the relationship between the putative joint employers; (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer; (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.
[360] *Christine Lopeiyo v Pere* (n 340); *Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 6 others* [2014] eKLR (Industrial Court).
[361] *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR (Court of Appeal).
[362] *Geoffrey Asanyo v NAWASSCO* (n 360).

One limitation of the mutuality of obligations test is that, applied strictly, it sets casual employees outside the employment framework due to the lack of mutual promises for future performance.[363] This was exemplified in *Bakari v Kwale International Sugar Company* in which the claimant was a casual worker at a sugarcane plantation and was paid a daily wage according to the days worked.[364] Work was not always available as he was only needed during the labour-intensive seasons. In addition, he was at liberty to choose the days that he wanted to work and could fail to turn up at work without any disciplinary consequences. He often stayed home, for example when it rained, and he was under no obligation to explain his absence. The respondent also averred that it did not have any obligation to look for him as it did not follow up on its casual workers who did not turn up because of the nature of their work. The ELRC described the level of mutuality of obligations as one which rose and fell with the sun, within 24 hours, and no more.[365] Bearing this in mind, the ELRC held that the respondent could not be asked to shoulder employment liabilities.

It should be noted though that where a casual employee works for more than one month, there may be a presumption of mutuality of obligations; such a casual worker would be deemed to be an employee.[366] A notable example of this principle is seen in *KPAWU v Kenya Agricultural &*

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[363] defines a casual employee as Employment Act s 2 a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.
[364] *Bakari Ali Mbega v Kwale International Sugar Company* [2019] eKLR (ELRC).
[365] *Bakari v KISCOL* (n 364) para 12.
[366] Employment Act s 37; As per *Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch)* [2015] eKLR (Industrial Court), this may be viewed as a move towards decasualization of labour.

Livestock Research Organization (KALRO) in which the grievant was a casual employee.[367] The Industrial Court urged public bodies to lead the way in the decasualization of labour. Disregarding KALRO's position that the grievant was engaged daily and that he missed several days of work within each month, the court presumed mutuality of obligations because he had worked for KALRO for an aggregate period of almost ten years. The Industrial Court inferred an employment relationship between the parties and upheld his unfair termination.

The mutuality of obligations test may lead to mixed results when applied to outsourcing TERs. The obligation to pay wages lies with the outsourcing company. However, the outsourced worker performs services for the client enterprise, rather than the outsourcing company. The mutuality is triangular rather than linear. It is unclear whether this may be equated to an absence of mutuality between the outsourced worker and the outsourcing company.

Likewise, it is questionable whether there is mutuality between the outsourced worker and the client enterprise. An outsourced worker should supply his services to the client enterprise, as per the service contract between the two authority figures. Yet, the client enterprise does not owe the outsourced worker the obligation to maintain the relationship for an extended duration. The termination of the service contract would essentially terminate the outsourced worker's

[367] *Kenya Plantation and Agricultural Workers Union v Kenya Agricultural and Livestock Research Organization* [2014] eKLR (Industrial Court).

relationship with the client enterprise. However, the client enterprise is not obligated to sustain the service contract for the benefit of outsourced workers, which may be viewed as a lack of mutuality. The outsourced worker may, therefore, not be classified as an employee of the client enterprise.

The final and most comprehensive test is the multi-factor test; it bears its name because it involves the application of a range of factors.[368] The first is whether the worker agrees to provide services for the master in consideration of remuneration. The second is whether the worker agrees to be subject to the other party's control to a degree sufficient enough to categorize the other party as master. The third involves an evaluation of the other elements of the contract to determine if they are consistent with the classification as a contract of service. Additional elements may include who provides the tools of the trade, who pays the worker's national insurance and pension, the possibility of delegation of work assignments, the regularity and method of payment, and the terms used by the parties themselves to describe their relationship.[369]

The multi-factor test was applied in *Stanley Khainga v Nairobi Hospital* to determine that the claimant was an employee.[370] First, the petitioner had the power to admit patients to the hospital and treat them there, using the respondent's facilities. He worked under the respondent's regulatory

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[368] *Stanley Ominde Khainga v Nairobi Hospital* [2018] eKLR (ELRC); *KHAWU v Alfajiri* (n 347); *Bernard Wanjohi Muriuki v Kirinyaga Water And Sanitation Company Limited & another* [2012] eKLR (Industrial Court); This test was originally developed in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433.
[369] *Bernard Wanjohi v KIRIWASCO* (n 368).
[370] *Stanley v Nairobi Hospital* (n 368).

control. In addition, the petitioner was paid from the funds that the patients paid to the respondent. Through the work that he performed, he did not account for his profits and losses. Further, the petitioner was referred to as a staff member, which term seemed to suggest that there was an employment relationship. Even though the petitioner was also sometimes referred to as a consultant, the ELRC held that the term consultant referred to his qualifications rather than the relationship between the parties.

The foregoing depicts that there is no 'one size fits all' test.[371] Nonetheless, the body of judicial jurisprudence focuses on the classification of 'typical' workers, that is, workers engaged under the SER. These tests do not seem to contemplate the growing grey area created by NSWs. Trying to fit NSWs into the existing framework may be metaphorically compared to putting new wine into old wineskins; it often leads to misclassification. Though the effects of misclassification often vary, they are usually detrimental to the workers; for example, the underpayment of wages, loss of benefits and exposure to risks they would not have faced if they were classified as employees. On the other hand, it would be imprudent to ignore the intricacies of each of these NSWs and why they are in the grey area in the first place. It may not be feasible to classify all workers engaged under NSWs as employees. With this in mind, the next section discusses the employment status of outsourced workers.

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[371] See e.g. *Bakari v KISCOL* (n 364); *Geoffrey Asanyo v NAWASSCO* (n 360); *KPAWU v KALRO* (n 367); *Christine Lopeiyo v Pere* (n 340).

4.2.3 Case law on the employment status of outsourced workers

Outsourced workers relate to two authority figures, namely, the outsourcing company and the client enterprise.[372] Section 3.2.4 discussed the experiences of outsourced workers concerning the division of employer function between these two authority figures. It was found that the roles that the authority figures took on within the outsourcing TERs varied. On one end of the spectrum, the outsourcing company's roles were extensive and outsourced workers had a stable relationship with the outsourcing company. On the other end of the spectrum, the stable relationship was with the client enterprise and the outsourced company had minimal roles such as payrolling. In addition, 11% of the respondents had initially worked with the client enterprise before being outsourced. The result was that 49% of the outsourced workers perceived the client enterprise to be their employer, 33% perceived their employer to be the outsourcing company and 18% were unsure.[373] The outsourced workers' perceptions inform the normative discussion on who *should* be considered the employer, especially for outsourced workers who have long-term service arrangements with the same client enterprise.[374]

It was concluded that these variations in perceptions of employer status may be because the employment framework was developed against the backdrop of the SER, which presupposes a

[372] Davidov (n 11).
[373] See table 3.2.
[374] See section 4.2.5.

linear relationship between two parties, rather than a TER. With this in mind, beyond the judicial tests discussed in the previous section, courts in Kenya have assessed the employment status of outsourced workers within outsourcing TERs. The law in Kenya generally upholds the practice of outsourcing.[375] Outsourcing contracts are often considered contracts *sui generis* in which workers agree with their outsourcing company to provide services to a client enterprise. Under such an arrangement, the outsourced worker is classified as the outsourcing company's employee.[376] This applies even though the outsourced workers are based at the client enterprise's premises.

This was depicted in the case of *Abyssinia v Kenya Engineering Workers Union* (KEWU) which involved a trade dispute where the respondent trade union alleged that Abyssinia had failed to enter into a recognition agreement so that KEWU represents Abyssinia's unionizable employees.[377] Abyssinia, however, claimed that it had outsourced all its employees to Jokali Handling Services Limited, an outsourcing company and that it did not have any unionizable employees over whom to sign a recognition agreement. During the hearing, it was established that Abyssinia had an initial workforce of 740 employees but it later outsourced 369 employees to two outsourcing companies: 289 to Jokali and 80 to Effex Company.

[375] *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR (Court of Appeal).
[376] *Abyssinia v KEWU* (n 38).
[377] *Abyssinia v KEWU* (n 38).

Abyssinia's employees who performed functions such as twisting, bending, carrying and loading of the metals had been voluntarily transferred to Jokali, as Abyssinia considered these to be non-core functions. The workers in question had signed discharge agreements and entered into six-month employment contracts with Jokali, which took up *inter alia* payment of their daily wages, statutory dues, provision of protective clothing and insurance. Under the arrangement, Abyssinia would make payments to Jokali which would then pay the workers and supervise the work that they carried out at Abyssinia's premises.

The Industrial Court, which was the court of first instance, opined that Abyssinia used outsourcing as a means to circumvent recognition of the trade union.[378] However, quoting Justice Murgor in *Kenya Airways v AAWU*, the Court of Appeal emphasized that "*outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs*".[379] Given the validity of the discharge agreements and the new contracts of employment, the workers had ceased to be employees of Abyssinia. A new employer-employee relationship had been formed between them and Jokali. This emphasized the fact that outsourced workers are employees of the outsourcing company.

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[378] *Kenya Engineering Workers Union v Abyssinia Iron And Steel Ltd* [2014] eKLR (Industrial Court).
[379] *Kenya Airways v AAWU* (n 375) 46.

The employment status of outsourced workers is, however, obfuscated when employees under the SER are converted into outsourced workers and are still based at the same premises. In Kenya, there are no statutory provisions that regulate the transfer of employment or employees.[380] Nonetheless, judicial interpretations relying on the United Kingdom (UK) and South African laws have provided guidance. An example is *AAWU v Kenya Airways*, in which Kenya Airways declared 447 of its unionizable employees redundant and offered most of them to Career Directions Limited, an outsourcing firm.[381] The employees, who were now deemed to be outsourced workers, continued to perform the same or similar tasks at Kenya Airways, except that they were now under contracts of employment with Career Directions. The roles that were targeted for outsourcing were cabin crew, cabin groomers and ground staff. These roles, though important, were considered ancillary to Kenya Airways' core functions.

Kenya Airways rationalized its decision to outsource as a cost-reduction strategy to aid its restructuring and to redress its loss-making trend. It was hoped that outsourcing would reduce the company's burdens, in terms of the roles it needed to manage. By bringing another entity on board, Kenya Airways could focus on its core functions and increase its efficiency. The claimant trade union challenged the redundancies and outsourcing arrangements. The Industrial Court opined that the restructuring exercise had led to unfair termination of employment. This, however, was later

[380] Unlike for example the United Kingdom's Transfer of Undertakings (Protection of Employment) Regulations 2006; and the South Africa Basic Conditions of Employment Act 1997.
[381] *AAWU v Kenya Airways* (n 41).

challenged and overturned on appeal.[382] The key point that came across in the appeal was the affirmation that the law upholds the practice of outsourcing, especially for those who may be involved in ancillary roles, to enable companies to focus on their core functions.[383]

When a company transfers its existing workforce to an outsourcing company, the transferred workers cease to be employees of their original companies and move to become employees of the outsourcing company. Consider, for example, the case of *Harrison Karani v Insight Management Consultants* in which some employees from Pwani Oils Limited were converted into outsourced workers.[384] Pwani Oils entered into an outsourcing service contract with Insight Management Consultants Limited, which took up the management of Pwani Oil's existing workforce and offered them six months, renewable contracts. The workers continued to work at Pwani Oil's premises and reported to their managers at Pwani Oils in the same way. However, legally under the service contract, Pwani Oils had converted from the position of an employer to a client enterprise.

The Industrial Court questioned why a company would convert permanent employees to outsourced workers on short-term contracts which included a probationary period. For example, one of the workers had been employed directly by Pwani Oils for seven years and was then placed

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[382] *Kenya Airways v AAWU* (n 375).
[383] *Kenya Airways v AAWU* (n 375) 25.
[384] *Harrison Karani v Insight Management* (n 25).

on probation for the same job he had been doing. The Industrial Court decried how the service contract between Pwani Oils and the outsourcing company had been used to alter the nature of the workers' conditions of employment, especially since the TER resulted in short-term contracts.

Further complications arise when outsourcing is equated to agency work, a different TER. In *Joan Thairu v Bata*, the Industrial Court held that the outsourcing contract was illegal since it was entered into before section 55(2) of the Labour Institutions Act (LIA) was amended.[385] The court ordered that the outsourced workers receive remuneration as though they were permanent employees of Bata Shoe Company, the client enterprise. Section 55(2) previously provided that 'No person shall - (a) carry out business as an employment agency.'[386] The amendment added the requirement of registration with the Director of Employment. The section now reads 'No person shall unless the person is registered under this Act (a) carry out business as an employment agency.'[387] The Industrial Court inferred that there was an agent-principal between the two authority figures and they were held jointly and severally liable to compensate the claimants.

A similar situation arose in *Wrigley v AG* in which the Industrial Court held that since the service contract between the petitioner and the interested party, an outsourcing company, had been entered into before the amendment of section 55(2) of the LIA, the two parties had no legal basis for

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[385] *Joan Wanjiru Thairu & 8 Others v Bata Shoe Company (Kenya) Ltd & another* [2013] eKLR (Industrial Court).
[386] The Labour Institutions Act was amended by The Statute Law (Miscellaneous Amendments) Act 2012.
[387] Labour Institutions Act s 55(2). The Labour Institutions (Private Employment Agencies) Regulations 2016 were also enacted subsidiary to the LIA to enable the practical application of section 55(2).

negotiating the outsourcing service contracts.[388] It, therefore, declared that the agreements be impugned and instead, the relationship between the two entities be deemed as one of an agent and his superior, thus imposing vicarious liability in their dealings with third parties.[389]

The main weakness of this failure to distinguish between the two TERs is that it obscures the parties' rights and obligations to each other. The LIA regulates employment agencies that act as an intermediary between employers with particular vacancies and workers who have the desired skills. The employment agencies receive a service fee or commission from the employers for the service of recruiting, documenting and placing the workers.[390] This essentially creates a principal-agent relationship. In such arrangements, the employment agency does not become the employer. The agency is simply an intermediary to link the two parties to each other. On the other hand, in outsourcing arrangements, the outsourcing company is an intermediary who has the status of an employer to the outsourced workers.

There are unique challenges in the determination of outsourced workers' employment status because the tests on employment status were developed with the SER in mind. There is a perception that the existing binary classification may be too rigid to effectively cater for NSWs.[391] The result of the traditional classification is that it may exclude certain groups of workers from

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[388] *Wrigley v AG* (n 322).
[389] *Wrigley v AG* (n 322) para 29.
[390] Labour Institutions (Private Employment Agencies) Regulations, 2016 s 7.
[391] Burchell, Deakin and Honey (n 326) 1.

employment protections. Rather than attempting to classify NSW workers as employees, a new ideology that could be considered is worker status.[392]

4.2.4 Worker status

This study refers to the term outsourced worker rather than an outsourced employee. It is worthwhile to determine what worker status involves and how it differs from employee status. An employee provides services under a written or oral contract of service.[393] On the other end of the spectrum are independent contractors who are engaged under a contract for services. Independent contractor relationships do not lead to economic dependence and they are not entitled to employment rights and benefits. They pay their own taxes and control their work schedules.[394]

Literature depicts the fact that NSW workers often have varied perceptions of their employment status and thus may not understand their employment rights.[395] Under the employment framework, access to employment rights is based on employment status, and the employment framework focuses on the binary divide between employee and independent contractor.[396] In the field study conducted, 49% of the outsourced workers felt that they were employees of the client enterprise, 33% expressed that they were employees of the outsourcing company and 18% were unsure of

[392] Burchell, Deakin and Honey (n 326) 2.
[393] Employment Act s 2.
[394] See section 4.2.2 for a discussion on the identification of employee status.
[395] See generally ILO, *Non-Standard Employment around the World* (n 1) 186–217.
[396] See sections 4.2.1 and 4.2.2.

their employment status.[397] These perceptions of employment status affected their expectations in terms of employment protections and thus 67% of the outsourced workers in this study lamented over the inadequacy of their employment rights.

A possible approach towards extending employment protections to NSWs is by adopting the broader term 'worker' instead of 'employee' as the basis for granting employment protections. The term worker is broader than the term employee; it allows for the inclusion of persons who provide their personal services to an employer under arrangements which depict dependence yet are not considered contracts of service.[398] It could, therefore, be viewed as a middle-ground status between the two traditional statuses of employee and independent contractor. This would be of benefit to outsourcing arrangements because the outsourced workers provide services to the client enterprise and may be considered to be economically dependent on it, yet their employment contract is not with the client enterprise.

The term worker is not defined under Kenyan laws. The employment laws define the term employee but not the term worker. Nevertheless, the term worker is adopted in the Constitution of Kenya in its conferment of the right to fair labour practices.[399] The key legal rights that the Constitution of Kenya grants to workers are the right to fair remuneration, the right to reasonable

[397] See table 3.2.
[398] Burchell, Deakin and Honey (n 326) 2.
[399] Constitution of Kenya art 41.

working conditions, the right to be unionized and participate in the activities of a trade union, and the right to go on strike.

In addition, the long title of the Occupational Safety and Health Act (OSHA) explains that one of the aims of the Act is to provide for the health and safety of workers while in the workplace. The Act does not restrict its application to employees, but rather it makes specific reference to workers. As such, the duties of occupiers relate to workers.[400] The Act also provides for the training and supervision of inexperienced workers; medical surveillance and medical examination of workers; and the making of rules by the Cabinet Secretary, Ministry of Labour and Social Protection (CS, Ministry of LSP) towards the minimization of bodily risk to workers.[401] It is proposed that the same approach could be extended to other statutes so that the concept of worker would be the basis for granting employment protections to outsourcing TERs.

The laws in Kenya also embrace the term workers' representative in several instances, as opposed to employees' representative. For example, the OSHA requires that two workers' representatives, nominated by the most representative workers' organization, be appointed to the National Council for Occupational Safety and Health.[402] Other bodies that include nominees from the most representative workers' organization are the NSSF Board of Trustees and the Employment and

[400] Occupational Safety and Health Act s 6.
[401] Occupational Safety and Health Act ss 99, 103 and 127(4).
[402] Occupational Safety and Health Act s 28.

Labour Relations Rules Committee.[403] The Labour Relations Act also refers to workers' organizations in its conferment to trade unions, employers' organizations and federations the right to affiliate with, and participate in the activities of international workers' organizations.[404] Similarly, the Employment Act prohibits the imposition of disciplinary measures against or dismissal of an employee due to acting as a workers' representative.[405] There seems to be an interchangeable use of the terms employee and worker, given the fact that trade unions' membership consists of employees.

The Labour Institutions Act also refers to workers when defining employment agencies. It defines employment agencies as intermediaries between employers and workers in that they procure work for workers.[406] This creates a TER in which there is a principal-agent relationship between the employer and the employment agency.[407] The Act also refers to workers in its description of the functions of the National Labour Board. It provides that one of the Board's functions is to advise the CS, Ministry of LSP on the formation and development of policies aimed at promoting paid educational leave to workers.[408] In addition, the annual reports prepared by the Commissioner for

[403] National Social Security Fund Act s 6; Employment and Labour Relations Court Act s 24.
[404] Labour Relations Act s 8.
[405] Employment Act s 46(e).
[406] Labour Institutions Act s 2.
[407] This is briefly discussed in section 4.2.3.
[408] Labour Institutions Act s 7.

Labour on the activities of its department should include statistics on the number of workers who are engaged within the inspected workplaces.[409]

Despite adopting the term worker in legislation, its scope remains unclear because the term itself is undefined. In comparison to the extensive case law on employee status, there are very few on worker status. It is not crystal clear which criteria should be used to determine worker status. While it is understandable that complete certainty in law may be unattainable, it may give rise to concern if a significant part of the workforce is unsure of its legal status. Bearing this in mind, this study investigates the possible extension of employment protections to workers such as outsourced workers, rather than being restricted to employees.

4.2.5 Defining an employer

Having examined what is meant by employee and worker, it is worth defining the term employer. It is especially important in outsourcing arrangements because in the TER the outsourced worker relates with two entities who seem to have employer functions, namely the outsourcing company and the client enterprise. Defining the term employer allows for a proper delineation of responsibilities that would be owed to the outsourced workers. The Employment Act defines an employer as 'any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or

[409] Labour Institutions Act s 42(2).

factor of such person, public body, firm, corporation or company.'[410] This definition offers a useful starting point in evaluating who bears employment responsibilities towards outsourced workers.

The first element of the definition is that an employer can be either a natural person or a body corporate.[411] In addition, the government could also be an employer.[412] The definition of an employer could also include an heir, successor, assignee, transferor, agent, director, or any person authorized to represent the employer.[413] The second element is that there must be a contract of service.[414] The definition however takes a seemingly tautological approach by defining an employer as someone who employs another person. Without a statutory definition of what it means to employ, this definition may not be applicable with certainty. Nonetheless, judicial interpretation of this definition has led to several judicial tests to determine if a person is an employer.

The first judicial test is the control test which defines an employer as a person who has the right or power to directly or indirectly control how work is performed.[415] The employment relationship is essentially an arrangement in which the employee contributes his expertise and is remunerated

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[410] Employment Act s 2; Employment and Labour Relations Court Act s 2; Labour Relations Act s 2.
[411] Interpretation and General Provisions Act 1956 s 2 defines a person to include a company or association or body of persons, corporate or incorporate.
[412] National Social Security Fund Act s 2; National Hospital Insurance Fund Act 1998 s 2.
[413] Labour Institutions Act s 2.
[414] This is defined under the Employment Act s 2 as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service.
[415] *Charles Omwenga v Magare* (n 335); *Child Welfare Society of Kenya v Margaret Bwire and Isiolo Children's Home* unreported (Nairobi Industrial Court Cause Number 684 of 2011).

for this by way of a salary or wages. In this arrangement, the employer exercises managerial control and allocates duties, packaged as a job, to the employee. An employer may also be defined as a person having control or custody of any employment, place of employment, or any employee.[416]

The control test was applied in *Kenya Petroleum Oil Workers Union* (KPOWU) *v Kinyanjui* to determine who the employer of the grievants was, in light of their claim for unfair termination of employment.[417] The grievants worked at a Kenol/Kobil service station in Changamwe. Through a dealership agreement, the respondent took up the service station and engaged the employees who were already working there. The respondent, however, argued that the grievants were not his employees because he found them there and left them there. He considered them to be employees of Kenol/Kobil. The Industrial Court noted that the dealership agreement conferred on the respondent custody of the place of work as well as the right to use Kenol/Kobil's equipment; the respondent also had the right to use the Kenol/Kobil trade name as it sells its products. The court held that the respondent was the grievants' employer because he was in the custody of the place of work and exercised managerial control over the grievants.

If the control test is applied to outsourcing arrangements, the client enterprise may be classified as the outsourced worker's employer because that is the entity that ordinarily controls the outsourced

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[416] *Kenya Petroleum Oil Workers Union v Francis Kiarie Kinyanjui T/A Suncor Gas & Petroleum* [2014] eKLR (Industrial Court).
[417] *KPOWU v Francis Kinyanjui* (n 416).

workers' day-to-day activities.[418] In the field study, it was found that the day-to-day management of 84% of the outsourced workers was primarily handled by the client enterprises. The client enterprise exercised managerial control over the outsourced workers and had custody over the place of employment. The control test would thus be considered limiting as it does not factor in the relationship with the outsourcing company. However, as was explained by respondent 29, if recruitment is considered the basis of the employment relationship then the outsourcing company would be the employer, rather than the several client enterprises that the outsourced workers interact with. This is in line with the holding in the locus classicus case of *Abyssinia v Kenya Engineering Workers Union.*[419]

It is, therefore, worthwhile to consider other judicial tests. These include the test of ownership of tools and the economic reality test. The test of ownership of tools requires that the employer provides the employees with the tools or equipment needed to perform their work, or cater for the costs that accrue from the use of the tools or equipment.[420] One criticism of this theory is that it does not apply to some occupations, such as photography, carpentry and some mechanical jobs.[421] In addition, this test may not give a clear indication as to who the employer is in outsourcing arrangements.

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[418] Green (n 358) 945.
[419] *Abyssinia v KEWU* (n 38).
[420] *Christine Lopeiyo v Pere* (n 340).
[421] *Christine Lopeiyo v Pere* (n 340).

The economic reality test requires that the employer assumes the chance of profit or risk of loss.[422] The employer is the entity that caters for operational costs such as office expenditure, employees' remuneration and benefits, as well as insurance premiums. The economic reality test may however lead to mixed results when applied to outsourcing arrangements because the outsourced worker may be deemed to be economically dependent on both the outsourcing company and the client enterprise. The client enterprise usually assumes the operational costs of the business where the outsourced worker performs his work, which means it could be classified as the employer. Nevertheless, the outsourcing company is the entity that remunerates the outsourced worker. On that basis, it may also be plausible to classify the outsourcing company as an employer.

A more comprehensive judicial test is the fourfold test.[423] The four elements that this test considers are the right to hire and fire workers; whether this person is the one who pays the workers' salaries and wages; the power to impose disciplinary sanctions and dismiss workers; finally the control of workers as to means by which they are to perform their work. In applying the test, the focus is on the existence of the right rather than the exercise of the aforementioned rights.

This test was applied in *Bernard Wanjohi v Kirinyaga Water and Sanitation Company* (KIRIWASCO) to determine whether the 1st respondent was the petitioner's employer.[424] The

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[422] *Christine Lopeiyo v Pere* (n 340).
[423] *Bernard Wanjohi v KIRIWASCO* (n 368).
[424] *Bernard Wanjohi v KIRIWASCO* (n 368).

Industrial Court noted that KIRIWASCO hired the petitioner and had the right to fire him. In addition, KIRIWASCO paid his salary and had the power to impose disciplinary measures against him. Finally, KIRIWASCO could control the petitioner on the manner and method of performance of his work. In light of the fourfold test, KIRIWASCO was the petitioner's employer.

In the field study, it was found that 95% of the outsourced workers had written contracts of employment between themselves and the outsourcing company, which meant that they were hired by the outsourcing company. In addition, 82% of the outsourced workers felt that their salary levels were determined by the outsourcing company. Further, all the contracts provided for termination by the outsourcing company. However, the day-to-day management of 84% of the outsourced workers was primarily handled by the client enterprises. In outsourcing arrangements, the fourfold test would favour the classification of the outsourcing company as the employer because it meets the first three elements of the test. Even though control may not always be predominant, this test leans more towards the identification of the outsourcing company as an employer.[425] As such, the outsourced company would have the duty to confer employment rights and benefits upon the outsourced workers.

An additional rule in the determination of employer status is that if an employer temporarily lends out an employee to provide services to another person, the employer status subsists even while the

[425] This is in line with the decision in *Abyssinia v KEWU* (n 38).

employee is temporarily working elsewhere.[426] This means that even though outsourced workers are lent out to the client enterprise, the outsourcing company is still considered the employer. This principle was applied in *Phillip Oguk v Westmont Power*, in which 28 claimants sued for unfair termination.[427] The claimants had been employed in various capacities and engaged with two sister companies who seemed to both exercise employer functions over them.

The claimants were interviewed by Westmont Power but their appointment letters were issued by another company called East African Power Management Limited (EAPM). However, both the interview letters and appointment letters were signed by the same human resource manager. They were trained for their various positions by EAPM but their work identity cards and certificates of appreciation were issued by Westmont Power. Their paychecks were sometimes issued in the name of Westmont Power and sometimes in the name of EAPM. In addition, the directors of the two companies were the same.

In the year 1997, the two companies signed a management agreement which expressed that Westmont Power was to manage the employees, as an HRM Company. However, the employees, who had now allegedly been outsourced to Westmont Power, continued to perform their duties in the same way and within the same premises as before. Later, in the year 2001, Westmont signed a

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[426] Work Injury Benefits Act 2007 s 4(2); See also *Phillip Ateng Oguk & 27 others v Westmont Power [Kenya] Limited & another* [2015] eKLR (Industrial Court).
[427] *Phillip Oguk v Westmont Power* (n 426).

new management and operations agreement with another company called Cergas Senja SDN BHD (CSSB) and the employees were offered new offers of employment. The employees claimed that they were forced to sign the new agreements, failure to which they would be out of a job. On the other hand, Westmont Power claimed that they volunteered to sign the new contracts under the promise of enhanced remuneration.

The drama ensued and in the year 2003, Westmont Power terminated the management agreement that it had with CSSB and asked the employees to reapply for their jobs. When they objected to signing new contracts, they were asked to return their work identification cards in exchange for their salaries. The employees claimed that they had been unlawfully terminated and that the dealings between the three companies served as a conspiracy to deny them their employment dues. However, the respondent claimed that the three companies were separate entities and denied the employees' claims that they had served in continuity.

The Industrial Court disregarded the alleged corporate separateness and instead found that EAPM was merely a façade company joined at the hip to Westmont Power. The court looked at the centre of decision-making in the group of companies and held that the respondent was not truly an outsourcing company; rather it was the arm of the group of companies that managed the human resource capital. The Industrial Court opined that Westmont Power and EAPM were the same economic unit, which employed the claimants. Further, the court noted that even when the contracts with CSSB were signed in 2001, the employees remained under the control of EAPM.

The Industrial Court held that EAPM remained the employer even during the period that SCCB intervened.

However, if the outsourcing company is a different economic entity, this would be considered to be a transfer of workers rather than a lending out of employees. The case of *Kennedy Akado v Bollore* is a notable example of the transfer of workers from the SER to an outsourcing TER.[428] The claimant was the 1st respondent's employee for seven years before he was placed under the 2nd respondent as part of an outsourcing agreement. The 1st respondent sought to have their name struck out of the claim. The ELRC held that it was important to retain both respondents in the suit to establish the relationship between them, as well as their relationship with the claimant.

In such situations, the outsourcing TER may be disentangled and liability apportioned based on the specific dates that each employer was in active control of the worker. Consider for example the case of *Nyamawi Gambo v Mombasa Maize Millers*, a claim for unfair termination.[429] The claimant was employed by the 1st respondent in the year 1996. Subsequently, in the year 2014, the 1st respondent entered into an outsourcing arrangement with Ready Consultancy Company Limited, an outsourcing company, which took over the management of the 1st respondent's workforce. The claimant became an employee of the outsourcing company, the 2nd respondent,

[428] *Kennedy Onyango Akado v Bollore Africa Logistics (K) Ltd & another* [2018] eKLR (ELRC).
[429] *Nyamawi Gambo v Mombasa Maize Millers Limited & Another* [2016] eKLR (ELRC).

though he continued to perform the same duties for the 1st respondent. The claimant was dismissed in the year 2015 when he requested a salary increase. The ELRC apportioned liability for the unfair termination based on the dates of active control. In terms of compensation to the claimant, the 1st respondent shouldered responsibility for the period between the years 1996 and 2014; the 2nd respondent was held liable to compensate the claimant damages for one year.

Similarly, in *Julius Charo Kazungu v Mombasa Maize Millers Limited & another* in which an outsourced worker sued for unlawful termination, the ELRC held that the arrangement was one where the employee related with two employers, rather than a principal-agent relationship.[430] The claimant was initially employed by the 1st respondent in the year 2008. Then in the year 2012, the 1st respondent entered into an outsourcing arrangement with Ready Consultancy Limited, an outsourcing company, placing the claimant under the management of the 2nd respondent. Relying on the *Nyamawi Gambo* case, the ELRC held that the TER should be disentangled so that the rights and responsibilities of each employer are delineated.[431]

This disentanglement of the TER differs from a principal-agent relationship, which would essentially involve a vertical power relationship between the two entities. Rather it recognizes that within the TER there may be different moments of active control over the outsourced worker. This

[430] *Julius Charo Kazungu v Mombasa Maize Millers Limited & another* [2017] eKLR (ELRC).
[431] *Julius Charo v MMM* (n 430) para 7.

may be viewed as a good move towards joint employment responsibility, such that both the outsourcing company and the client enterprise shoulder some level of employment responsibility. Having discussed the determination of employment status, the next section assesses the employment rights and obligations of the three parties to outsourcing TERs.

4.3 EMPLOYMENT RIGHTS AND DUTIES

4.3.1 Basic rights of outsourced workers

Outsourced workers are generally considered to be employees of outsourcing companies.[432] As such they are entitled to an array of employment rights, as provided for under the employment laws.[433] These include protection from forced labour, discrimination in employment and sexual harassment.[434] Further, they are entitled to the basic minimum conditions which apply to all employees. These include the regulation of working hours of work, statutory leave entitlements, provision of housing and house allowance, provision of water and food, as well as medical attention.[435] As employer, the outsourcing company primarily would bear the duty of meeting these basic rights.

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[432] *Abyssinia v KEWU* (n 38).
[433] Primarily in the Employment Act pt II and V.
[434] Employment Act ss 4, 5 and 6.
[435] Employment Act ss 27–34.

In addition, outsourced workers are entitled to the constitutional rights granted in the Bill of Rights.[436] These constitutional rights include the right to be free from slavery, servitude and forced labour; the right to non-discrimination and equal protection of the law; the right to freedom of association; the right to social security; the right to fair labour practices and reasonable working conditions; the right to join, form and participate in the activities of trade unions; and the right to go on strike and to lawfully assemble, demonstrate and picket.[437]

In particular, the Constitution of Kenya grants four basic rights to all workers.[438] This means that outsourced workers are entitled to these basic rights. These are the right to fair remuneration, the right to reasonable working conditions, the right to be unionized and participate in the activities of a trade union, and the right to go on strike. It is argued that placing workers' rights in the Bill of Rights essentially means that they are now constitutional rights.[439] Through this constitutionalization, workers' rights can potentially enjoy better enforcement.

It has, however, been noted with concern that sometimes employers use TERs as a means to evade employment regulations.[440] Such arrangements include the use of subcontractors, agencies, outsourcing companies and façade companies. In such situations, the courts have sought to uphold

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[436] Constitution of Kenya ch 4.
[437] Constitution of Kenya arts 27, 30, 36, 37, 41 and 43.
[438] Constitution of Kenya art 41.
[439] Mutai (n 299) 27.
[440] *Phillip Oguk v Westmont Power* (n 426).

the actualization of employment rights, rather than focusing on the arrangements between the business entities.

This was depicted in the case of *AAWU v Kenya Airways* where Justice Rika disapproved of the practice of outsourcing, describing it as part of the race to the bottom in which companies aim to save money by making labour a progressively cheaper commodity.[441] One of the facts in issue was Kenya Airways' decision to outsource some of its functions through Career Directions, an outsourcing company. Justice Rika noted *obiter* that:

> "Cheap labour is perceived to give host states a comparative advantage in the international market. This results in a race to the bottom, where countries lower labour standards to have minimal labour regulatory burdens, and the largest volume of foreign direct investments... Kenya Airways has turned to Career Directions, a labour outsourcing firm, to avoid the regulatory burdens that have been imposed by what Naikuni has characterized as tough collective bargaining outcomes. Outsourcing of labour is contrary to the principles of fair labour practices, sustainable development, and engenders the race to the bottom. It intends to avoid regular employment relationships, employees' social security and is a vehicle for the lowering of international labour standards."[442]

The strong views expressed by Justice Rika in the case of *AAWU v Kenya Airways* perhaps reflect an underlying bias against the practice of outsourcing. However, as was explained earlier, outsourced workers are employees of outsourcing companies and have the right to be afforded

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[441] *AAWU v Kenya Airways* (n 41) 25–26. See also section 2.2.2.
[442] *AAWU v Kenya Airways* (n 41) para 39.

employment protections. In addition, they also have legal protections based on their worker status. These rights include the right to join and participate in the activities of a trade union, which is the subject of the next subsection.

4.3.2 Unionization of outsourced workers

A trade union is defined as 'an association of employees whose principal purpose is to regulate the relations between employees and employers including any employers' organization.'[443] The Constitution of Kenya guarantees every worker has the right to form, join and participate in the activities of a trade union.[444] This right to unionize upholds the workers' freedom of association.[445] This freedom embodies both the freedom to associate and to dissociate.

The series of cases between the Kenya Union of Commercial Food and Allied Workers (KUCFAW) and Tusker Mattresses Limited (Tuskys) all relate to the supermarket's choice to outsource part of its workforce. In the first case, the claimant sought to restrain the respondent from declaring 25 of its unionizable employees redundant and outsourcing some of its functions to Artemis African Limited, an outsourcing company.[446] The redundancy had been declared because the company had to close its Eastleigh Branch. The claimant alleged that the respondent should have reabsorbed the employees in its other branches. The basis of this claim was that

[443] Labour Relations Act s 2.
[444] Constitution of Kenya art 41(2).
[445] Constitution of Kenya art 36.
[446] *Kenya Union of Commercial Food & Allied Workers Union v Tusker Mattresses Limited* [2015] eKLR (ELRC).

outsourcing was being used as a means to discriminate against its direct employees. On the other hand, the respondent claimed that the issues of redundancy and outsourcing were distinct. The ELRC agreed with the respondent that the redundancy complied with the law. The issue of outsourcing was, however, not investigated in the case as there was no proof to support the allegations.

KUCFAW later filed another case against Tuskys challenging the company's decision to outsource, claiming that it was discriminatory because the outsourced workers were offered lower pay than the direct employees who were doing equal work.[447] Justice Abuotha upheld the 2015 decision, emphasizing that:

> "The claimant before the court has opposed the outsourcing without demonstrating that the process could lead to job losses. The outsourced workers do still have a right to join the claimant union for those eligible. Nothing has been placed before the court to reasonably demonstrate that outsourced employees have been prevented from joining the claimant union... The claimant simply opposed the outsourcing for its own sake without demonstrating how it would prevent or hinder its right to represent such outsourced labour and negotiate on their behalf."[448]

From the foregoing, it can be inferred that outsourced workers are unionizable. In *Abyssinia v KEWU* the Court of Appeal sought to determine whether outsourcing vitiates the constitutional

[447] *KUCFAW v Tuskys (2017)* (n 40).
[448] *KUCFAW v Tuskys (2017)* (n 40) paras 13 and 14.

right to unionize.[449] The respondent trade union alleged that the claimant had failed to recognize it, despite it having recruited a simple majority of the claimant's employees as its members. On its part, the claimant averred that it had outsourced its workers to an outsourcing company, Jokali Handling Services Limited. The evidence pointed to the fact that the outsourced workers were under Jokali's control. The Court of Appeal emphasized that every worker, including those who are outsourced, has the right to unionize.[450] Such a trade union could validly be recognized by the outsourcing company if it has recruited a simple majority of the outsourced workers.[451] The appellate court held that it is the outsourcing company, and not the client enterprise, that has the obligation to recognize the trade union because the outsourced workers are employed by the outsourcing company.[452]

Once employees opt to join a trade union, the union can collect trade union dues through a check-off system in which the employer to deducts the dues from the members' salaries.[453] For outsourced workers, the case of *KUCFAW v Amicum Outsourcing Limited* established that the trade union dues are to be paid by the outsourcing companies.[454] This was a case lodged by a trade union against two outsourcing companies (the 1st and 2nd respondents) and Tuskys supermarket,

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[449] *Abyssinia v KEWU* (n 38).
[450] In accordance with the Constitution of Kenya art 41(2).
[451] Labour Relations Act s 54.
[452] *Abyssinia v KEWU* (n 38).
[453] Labour Relations Act s 49.
[454] *Kenya Union of Commercial, Food and Allied Workers v Amicum Outsourcing Limited & 2 others* [2019] eKLR (ELRC).

the client enterprise that they provided manpower to (the 3rd respondent). The claimant alleged that the respondents had denied the outsourced workers their freedom of association and had victimized them on account of their union membership. In addition, KUCFAW alleged that the respondents had failed to remit union dues from their members who had signed check-off sheets.

During conciliation, it was established that the claimant had recruited 449 employees of the 1st and 2nd Respondent, out of the total labour force of approximately 3,500 employees, which was much less than a simple majority. In addition, the ELRC opined that the claimant had failed to prove victimization and unfair termination of unionized members. As such, its claim to the denied freedom of association failed. Nevertheless, the ELRC found that the claims for trade union dues were valid and ordered the 1st and 2nd respondents to remit union dues for outsourced workers who have signed check-off forms.

In this study, though 89% of the outsourced workers were not trade union members, 87% felt that trade unions could potentially assist them with general matters, as well as issues that were specific to outsourcing. The 87% recognized the benefits of unionization to include the opportunity to benefit from collective bargaining agreements (CBAs) negotiated by trade unions. CBAs are the cornerstone of the contractual relationship between a trade union and an employer.

A prerequisite to collective bargaining is that the parties need to enter into a recognition agreement.[455] This may be defined as an agreement in writing made between a trade union and an employer, a group of employers or an employer's organization regulating the recognition of the trade union as the representative of the interests of unionizable employees employed by the employer.[456] The recognition agreement aims to identify the trade union with which the employer can collectively bargain.

To be recognized, a trade union needs to represent the simple majority of unionizable employees.[457] *KUCFAW v Sheer Logic Management Consultants Limited* held that if a trade union represents the simple majority of outsourced workers it should be recognized by the outsourcing company.[458] KUCFAW alleged that it informed the respondent outsourcing company that it had recruited its members into the union and sought recognition. However, the respondent did not agree to a meeting to sign the recognition agreement. The claimant reported a trade dispute to the CS, Ministry of LSP who appointed a conciliator. The recommendations during conciliation included *inter alia*,

> "that after going through the two parties' verbal submissions and their written memorandum, I recommend that the Union should be accorded the recognition forthwith

[455] Labour Relations Act s 54.
[456] Labour Relations Act s 2.
[457] Labour Relations Act s 54.
[458] *Kenya Union of Commercial, Food and Allied Workers v Sheer Logic Management Consultants Limited* [2020] eKLR (ELRC).

since the employees had exercised their constitutional right by joining a union of their choice and the Union had recruited the simple majority of the Companies employees."

The ELRC agreed with the recommendations of the conciliation exercise and ordered the respondent to sign a recognition agreement with the claimant trade union within 60 days. In addition, the ELRC ordered the respondent to commence the deduction of union dues as per section 48 of the Labour Relations Act, and submit them to the union.

A recognition agreement is important as it provides for reasonable access to the place of work by authorized trade union representatives or officials to pursue lawful interests of the trade union, for example, recruiting members for the trade union, holding meetings with members of the trade union and other employees, and representing members in their dealings with the employer. It should be noted that the employer has the right to impose reasonable conditions as to the time and place of the carrying out of these trade union activities and also has the right to request the officials to provide proof of their identity and credentials before being granted access.

Although the Constitution of Kenya, 2010 grants all workers the right to join a trade union and participate in its activities, the exercise of this right is not always achievable.[459] Several challenges arise in this regard. First, as outsourced workers are usually spread out over several workplaces

[459] Constitution of Kenya art. 41.

and are often temporary, trade unions may face challenges in going to many workplaces to recruit outsourced workers.[460] It may be difficult to achieve the minimum threshold required for recognition. Further, to recruit the outsourced workers as members, the trade union may need access to the client enterprise's premises, which may be denied.[461]

Another practical problem involves the person from whom recognition should be sought. Trade union recognition is granted by an employer, and with it comes the right to access the employer's premises within reasonable hours to conduct relevant trade union activities.[462] As an employer, the outsourcing company may face challenges in actualizing some of the aspects that come with recognition, such as rights to access the workplace. Even if a trade union has recruited a majority of the outsourced workers as its members, it may not get rights to access the client enterprise's premises because the client enterprise is not the employer. The identification of the outsourcing company as the employer means that such rights would be granted by the outsourcing company concerning the outsourcing company's premises. This may be problematic since the outsourced workers perform their services at the client enterprise's premises.

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[460] The study found that 88% of the outsourced workers' employment contracts did not specify the client enterprise and this was based on the presumption that the outsourced worker would be expected to work with several client enterprises on short-term bases.
[461] Respondent 42 mentioned the inability of trade unions to access to the client enterprise's premises as a practical challenge that she had experienced, which led her to conclude that trade unions could not help her and other outsourced workers.
[462] Labour Relations Act ss 54 and 56.

In principle, since the outsourcing company is deemed to be the outsourced workers' employer, trade unions would potentially deal solely with the outsourcing company on issues relating to unionization of outsourced workers.[463] This study proposes that this position could remain only if the outsourcing company can be held accountable in terms of liability for unfair labour practices. One possible challenge relates to the degree of risk borne by the outsourcing company. Despite being deemed as the legal employer, the outsourcing company does not fully take on the role of a traditional employer.[464] The client enterprise plays a great part in this role through its day-to-day control over the outsourced workers, and thus it should bear a significant portion of the risks of an employer.

Depending on the roles played by the two authority figures, the proposal is that the attribution of the nominal employer should be recognized. And depending on the situation, the nominal employer could be the outsourcing company. The Kenyan labour laws do not have provisions for joint employer status, and this would be an important addition to the employment framework to enhance the protections of outsourced workers within outsourcing TERs. This would allow the trade unions to potentially engage with either, or both, authority figures within the outsourcing TER, on behalf of the outsourced workers.

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[463] *Abyssinia v KEWU* (n 38).
[464] This was discussed in section 4.2.5.

So far this subsection has focused on the outsourced workers and the rights that are due to them. The following parts of this sub-section discuss the employment duties that are owed to outsourced workers. As per the Hohfeldian analysis of rights, the jural correlative of a right is a duty.[465] This means that when a person has a right, another person has the duty to actualize the right. It is worth establishing who, between the outsourcing company and the client enterprise, has the duty to meet the outsourced workers' employment rights. The discussion begins with the duties of outsourcing companies and thereafter moves on to the duties of client enterprises.

4.3.3 Duties of outsourcing companies

The outsourcing company, as an employer, owes the outsourced workers several employment duties.[466] It must ensure that the minimum terms and conditions of service required by the law are maintained. First, an employer has the duty to regulate the working hours of its employees, ensuring that they are granted at least one rest day each week.[467] The second duty is to grant employees statutory leave, namely, annual leave, sick leave, and depending on the gender of the outsourced worker, maternity leave and paternity leave, where necessary.[468]

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[465] Nikolai Lazarev, 'Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights' (2005) 12 Murdoch University Electronic Journal of Law.
[466] Employment Act pt V.
[467] Employment Act s 27; *James Mchovoti Nalisi v Eclipse International Limited* [2019] eKLR (ELRC); *Leah Jerotich Koech v Keiyo Teachers Co-operative Savings and Credit Society Limited (Prime Time Co-operative & Credit Society Limited)* [2016] eKLR (ELRC).
[468] Employment Act ss 28, 29 and 30; *Mumbua Kisilu & 16 others v Allied Wharfage Limited & another* [2020] eKLR (ELRC); *Kenya Shoe Leather Workers Union v Fast Track Management Consultants Limited* [2020] eKLR (ELRC).

In addition, an employer has the duty to provide reasonable housing accommodation for each employee; or in the alternative, to pay each employee an amount of money sufficient to obtain reasonable accommodation.[469] Pursuant to section 32 of the Employment Act, an employer has the duty to ensure the provision of wholesome water for the use of its employees. This duty may pose challenges in outsourcing arrangements because the entity that controls the place is work is the client enterprise and not the outsourcing company. This duty is easier to enforce in the SER because that involves a single employer and employee.

The final duty under the Employment Act, 2007 relates to medical attention. An employer has the duty to ensure that the employees have medicine during any illness and medical attention during serious illness.[470] The employer can meet this duty personally or through free Government medical treatment or prescribing to an insurance scheme which would cover the employees. An employer can meet this duty by subscribing to the National Hospital Insurance Fund framework.[471]

This study found that 67% of the outsourced workers' contracts were quite basic and just covered the scope of work that was to be done, the deliverables that were expected of the workers, the workers' remuneration and termination. These duties that the outsourcing companies owed outsourced workers were not expressly mentioned in the employment contracts. In addition, since

[469] Employment Act s 31; *Julius Ikapes Wasike v Capacity Outsourcing Limited* [2018] eKLR (ELRC).
[470] Employment Act s 34; *Mary Nangila Wacholonga v Superfoam Company Ltd & another* [2017] eKLR (ELRC).
[471] See generally the National Hospital Insurance Fund Act.

42% of the respondents perceived the client enterprise as their employer, there was the expectation that the client enterprise would bear these employment duties.

Another duty that employers have is of obtaining and maintaining an insurance policy with an insurer approved by the CS, Ministry of LSP, to cater for the liabilities that it may incur to its employees.[472] In addition, employers are liable to compensate employees who are injured while at work, except where the accident or the death was caused by the employee's misconduct.[473] In outsourcing arrangements, this duty would lie with the outsourcing company, as the employer of the outsourced workers. Challenges may arise in the application of this duty, especially since the outsourcing company does not control the work premises and it may not be in a position to put in place preventive safety measures. Since the OSH duties would lie with the client enterprise, as an occupier, extending this duty to the client enterprise is worth consideration.[474]

This was illustrated in *Kibos Sugar v Stephen Adie* in which an outsourced worker was injured while cleaning and oiling machinery at Kibos Sugar Factory.[475] The outsourced worker was employed by Rene Superclean Services, an outsourcing company, and assigned cleaning duties at the Kibos Sugar factory based on a service contract between the two companies. On the fateful

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[472] Work Injury Benefits Act s 7.
[473] Work Injury Benefits Act s 10.
[474] The duties of the client enterprise, as occupier, towards the health and safety of outsourced workers are discussed in section 4.3.4.
[475] *Kibos Sugar And Allied Industries Ltd v Stephen Otieno Adie & another* [2018] eKLR (ELRC).

day, while cleaning oil spillages and oiling the mortars of a machine, it was switched on by an employee of the factory. The machine clipped the worker's clothes and pulled him into the conveying belt, crushing his hands, legs and other body parts. The worker lost consciousness and was rushed to the hospital where he was admitted for a month. The outsourced worker testified that he had since lost his capacity to earn a living.

The outsourced worker claimed that both the outsourcing company and the client enterprise breached their duty of care towards him. He claimed that the outsourcing company had breached its duty by placing him in a risky environment without providing protective clothing such as gloves, a helmet and overalls. On the other hand, the client enterprise had vicariously breached its duty of care because it was a factory employee who had switched on the motor while he was cleaning it. Further, the client enterprise did not warn him that the motor would be switched on while he cleaned and oiled it.

The ELRC noted the duty that the law imposes on an employer to provide safe working conditions of work in a factory and if an accident occurs while the employee is working, the employer is responsible and will be required to compensate the injured employee. It then held that in outsourcing arrangements, the client enterprise also has a duty to provide a safe working

environment for its workers, including the outsourced workers.[476] The outsourcing company and the client enterprise were deemed to share the blame in equal measure.

4.3.4 Duties of client enterprises

Having discussed the duties owed by outsourcing companies to outsourced workers, this subsection assesses the duties of client enterprises. In outsourcing TERs, the client enterprise owes the outsourced workers a duty of care based on the fact that the workers perform duties at the client enterprise's premises and are lawfully present at the premises. The client enterprise is in control of the place of work which makes it an occupier.[477] The duty of care requires the occupier to ensure that persons lawfully present at the workplace are safe when they are using the premises for permitted purposes.[478] Since outsourced workers are lawfully present at the client enterprise's premises, in line with the service contract signed between it and the outsourcing company, the client enterprise owes them a duty of care. Though this was not one of the issues raised by the interviewed outsourced workers, it is worth consideration because it touches on the relationship between outsourced workers and client enterprises.

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[476] *Kibos Sugar v Stephen Adie* (n 475) para 16.
[477] The Occupational Safety and Health Act defines an occupier as 'the person or persons in actual occupation of a workplace, whether as the owner or not and includes an employer'.
[478] Occupiers Liability Act 1963 s 3; Occupational Safety and Health Act s 6.

The notable case of *Chitsaka v Rea Vipingo* affirmed that compensation to persons injured at the workplace can be made as an employer under the WIBA or as an occupier based on the OSHA.[479] The claimant was injured while at work. The respondent compensated the claimant for the injury, based on an assessment by the Director of Occupational Safety and Health. However, the respondent stated that the compensation was made in their capacity as an occupier rather than an employer. It alleged that it had an outsourcing arrangement with an entity called Kazungu Agricultural Supply, an outsourcing company, for the provision of some of its auxiliary functions.

The respondent averred that the claimant was employed by the outsourcing company. On the other hand, the claimant alleged that he was employed by the respondent but was supervised at the workplace by Kazungu. The ELRC acknowledged that both the WIBA and OSHA provide for the OSH of workers. However, based on the DOSH/WIBA 5/A which listed the respondent as the employer, the ELRC held that the compensation had been made by the respondent in its capacity as an employer rather than as an occupier.

Premised on the duty of care, the OSHA provides several duties that the client enterprise owes outsourced workers. The first duty is to ensure the OSH of all workers within its workplace, and this includes outsourced workers.[480] This duty includes ensuring that the equipment, plant and

[479] *Chitsaka Rungwa Charo v Rea Vipingo Plantations Ltd* [2017] eKLR (ELRC).
[480] Occupational Safety and Health Act s 6(1) and 6(2).

systems at the workplace are safe and do not pose any health risks to the outsourced workers. Also, substances in the workplace can be used, stored and transported safely and without health risks to the outsourced workers.[481]

The client enterprise also has the duty to provide information, instruction and training to ensure that the safety and health of the outsourced workers are maintained.[482] This includes informing the outsourced workers of imminent danger and any risks that may be posed by new technologies. In addition, the client enterprise needs to ensure that the workplace itself is maintained in a condition that is safe and that the entry and exit points should be safe and not pose risks to the outsourced workers.[483]

An additional duty relates to risk assessment.[484] The client enterprise has the duty to carry out risk assessments on the safety and health of the workers within its workplace, and based on the results of the risk assessments, to adopt relevant preventive and protective measures. In addition, for situations that would pose serious and imminent safety and health dangers, the client enterprise should immediately take steps to stop the risky operations and evacuate all persons within the workplace.[485] The client enterprise has the duty to ensure that during dangerous situations, the

[481] Occupational Safety and Health Act s 6(2)(b).
[482] Occupational Safety and Health Act s 6(2)(c).
[483] Occupational Safety and Health Act s 6(2)(d).
[484] Occupational Safety and Health Act s 6(3).
[485] Occupational Safety and Health Act s 6(5).

outsourced workers who are based at its premises should be evacuated. The study found a gap in terms of the occupational safety and health duties of client enterprises in that none of the respondents were aware of their safety rights while providing services at the client enterprises' premises. There was a lack of training in occupational safety and health.

4.4 JOB SECURITY OF OUTSOURCED WORKERS

Before moving on to the loss of employment of outsourced workers, this part of the section first discusses the contentious situations in which redundancies pave way for outsourcing arrangements.[486] Understanding redundancy is important because outsourcing arrangements have often been challenged where they are preceded by redundancies.[487] Redundancy relates to economic dismissals. This is where an employee loses their job involuntarily due to the abolition of office or their role being deemed superfluous.[488] In such cases, the employment is terminated at the initiative of the employer rather than the fault of the employee. As was noted by Justice Mbaru, Positions, and not employees, become redundant. When a position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether. The affected employee has done no wrong: neither their conduct nor their capacity is in issue; it is only that in the circumstances, the

[486] *Kenya Union of Commercial Food and Allied Workers v Agricultural Society of Kenya* [2017] eKLR (ELRC).
[487] See for example *Bakery Confectionery Food Manufacturing and Allied Workers Union (K) v Kenafric Industries Limited* [2019] eKLR (ELRC); *KUCFAW v Tuskys (2017)* (n 40); *Elizabeth Washeke & 62 Others vs Airtel Networks (K) Limited & Another* [2013] eKLR (Industrial Court); *AAWU v Kenya Airways* (n 41).
[488] Employment Act s 2; Labour Relations Act s 2.

employer feels the employee is not needed for the business. Employers have the prerogative to determine the needs of their businesses and to make positions redundant.[489]

An example of this resistance to redundancies that are combined with intended outsourcing agreements is seen in *Bakery Confectionery Food Manufacturing and Allied Workers Union (K) v Kenafric* in which the BCFMAW Union contested the respondent's redundancy notification.[490] The argument was that since the respondent intended to outsource the same functions to an outsourcing agency, it *prima facie* demonstrated that there was work to be performed by the current holders of the said position. The ELRC however found no valid reason to stop the respondent from proceeding with the redundancy, as the respondent has complied with the law and the CBA.

Similarly, in *KUCFAW v Agricultural Society of Kenya*, the claimant sought to restrain the respondent from declaring all its security staff redundant and outsourcing the function to a security services provider.[491] The respondent averred that the proposed outsourcing was a cost-cutting measure that would enable it to focus more on its core function of promoting excellence in agriculture. On the other hand, the claimant contested this move claiming that outsourcing cannot be a valid reason for redundancy. The ELRC sought to determine whether a decision by an employer to outsource the functions of an entire department qualifies as a valid reason for the

[489] *Javan Were Mbango v H Young & Co (EA) Ltd* [2012] eKLR (Industrial Court).
[490] *BCFMAW Union v Kenafric* (n 487).
[491] *KUCFAW v ASK* (n 486).

declaration of redundancy. The ELRC declared that operational reorganization was a valid reason for declaring redundancies. This means that a company can choose to reorganize itself and in doing so adopt redundancy as a means to pave the way for outsourcing.

A company's prerogative to declare redundancies can, however, be subject to judicial scrutiny, especially if there is a hidden agenda to get rid of particular employees rather than superfluous roles.[492] For the termination of employment to be deemed fair, there must be both procedural and substantive fairness; the reason given for the termination must be legitimate and the procedure valid.[493] The reasons for termination must not be based on the employee's conduct, capacity or wrongdoing, but rather on the superfluity of the worker's position.

The Employment Act provides the redundancy procedure.[494] If the employee is unionized, a one-month redundancy notice must be given to the trade union and the relevant labour officer. If the employee is not unionized, the redundancy notice should be given to the employee directly, as well as to the labour officer. It is worth reiterating that the law requires notification rather than consultation.[495] Trade unions are not expected to be part of the decision-making since ultimately economic dismissals are at the management's prerogative. Nevertheless, the managerial decision

[492] *KUCFAW v ASK* (n 486); *Wrigley v AG* (n 322).
[493] Employment Act ss 40 and 45.
[494] Employment Act s 40.
[495] *Kenya Airways v AAWU* (n 375).

to retrench must be reasonable and clothed in good faith. If the redundancy is deemed unfair the court may award compensation to the aggrieved dismissed employees.[496]

In the employer's determination of which employees are to be declared redundant, important considerations include the last-in-first-out principle and the skills, reliability and abilities of the employees. In *AAWU v Kenya Airways* Justice Rika *obiter* criticized Kenya Airways' decision to retrench and outsource employees as a strategy to avoid tough collective bargaining outcomes and other regulatory burdens.[497] Consequently, the judge opined that the outsourcing exercise was a colourable process that went against the constitutional principles of fair labour practices.[498] By transferring its workers to another employer, Kenya Airways effectively moved its unionizable employees to a non-unionized state. In addition, it was alleged that the redundancy exercise targeted certain union officials and union members who had participated in a previous strike.

Having discussed the provisions on redundancy, this section now moves on to assess the termination of employment of outsourced workers. It looks at three possibilities through which such termination can occur. First, it considers situations where the outsourcing company terminates employment. Secondly, termination by the client enterprise is discussed. Finally, it

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[496] *Kenya Union of Domestic, Hotel, Education, Institutions and Allied Workers v Rabai Road Primary School* [2010] eKLR (Industrial Court).
[497] *AAWU v Kenya Airways* (n 41) para 39.
[498] *AAWU v Kenya Airways* (n 41) para 53.

assesses the loss of employment due to the termination of the service contract between the outsourcing company and the client enterprise.

4.4.1 Termination by the outsourcing company

There is a general rule that prohibits unfair termination.[499] Unfairness is determined at two levels: substantive fairness and procedural fairness. The former is deemed to have been met if the reason for termination is based on the employee's conduct, capacity, or compatibility or based on the operational requirements of the employer. On the other hand, procedural fairness includes providing the employee with the reasons for termination of employment and the conduct of a disciplinary hearing if the termination is due to the employee's misconduct.[500]

If an employee feels that his termination was unfair, he can file a complaint with the labour officer within three months of his dismissal.[501] The labour officer is required to listen to all the parties and thereafter give his opinion as to the best way of settling the matter. It should be noted that, in addition to making a complaint to the labour officer, the employee can bring a case against the employer in the ELRC.[502] The burden of proving the unfair termination rests on the employee whereas the burden of justifying the grounds of a dismissal rests on the employer.[503] As was

[499] Employment Act s 45.
[500] Employment Act ss 41 and 43.
[501] Employment Act s 47.
[502] Employment Act s 47(3).
[503] Employment Act s 43.

established earlier, the outsourcing company is the outsourced worker's employer. This means that where the outsourcing company initiates the termination, it must comply with the aforementioned requirements on procedural and substantive fairness.

The case of *Vincent Oluyayi v Haggai* related to the termination of employment by an outsourcing company.[504] The claimant was employed by the respondent outsourcing company. The respondent had been contracted by Kapa Oil Refineries to supply it with personnel. The claimant testified that he was summoned by the respondent's manager for a meeting at the head office in Nairobi. He travelled from Nakuru, where he was based, to Nairobi but the meeting did not materialize. However, the respondent's manager informed the claimant that he was not to report back to the workplace, though no reason was given. The claimant filed for unfair termination. The ELRC held that termination of employment was unfair due to a lack of substantive and procedural fairness.

Similarly, in the case of *Sylvia Mpita v Career Directions*, the claimant's termination of employment was deemed to be unfair because no notice of termination was given.[505] The claimant had been employed by the respondent outsourcing company and assigned duty at the respondent's client enterprise, La Farge. She claimed that the respondent summarily dismissed her but did not give her reasons to justify her termination of employment. The claim was unchallenged and the

[504] *Vincent Makomere Oluyayi v Haggai Multi-Cargo Handling Services Ltd* [2016] eKLR (ELRC).
[505] *Sylvia Bindo Mpita v Career Directions [K] Limited* [2016] eKLR (ELRC).

ELRC held that the termination by the outsourcing company had been unfair. The law requires notice of termination.[506] An alternative is to pay the employee an amount commensurate to what he would have earned during the notice period, in lieu of notice.[507]

The study noted that all outsourced workers' contracts provided for termination by the outsourcing company, which made sense because the employment contract lay between the two parties. Further, depending on the length of the contract, the termination notice varied between a one-week notice period to a one-month notice period. Though there was no mention of payment in lieu of notice and no outsourced worker mentioned this as something that had happened to them, it is recognized that the possibility exists under the labour laws.[508]

4.4.2 Termination by the client enterprise

As regards termination of employment by the client enterprise, questions arise as to the validity of such termination because the client enterprise is not the outsourced worker's employer. This was illustrated in *Harrison Karani v Insight Management* which involved a client enterprise which terminated the employment relationship by asking the outsourced workers not to report to work.[509] The workers were initially employed directly by Pwani Oils Limited but were later transferred to Insight Management Consultants, an outsourcing company. It, however, seemed like their working

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[506] Employment Act s 35.
[507] Employment Act s 36.
[508] Employment Act s 36.
[509] *Harrison Karani v Insight Management* (n 25).

relationship with Pwani Oils remained the same despite the change in status from employees to outsourced workers.

In May 2013, a 14% wage increment was announced by the Government.[510] In light of this, the outsourced workers requested the Pwani Oils' management to implement the wage increment. The meeting with the client enterprise's management did not bear fruit; the workers were then asked to leave the premises and take up the matter with the management of the outsourcing company. When they reported to work the following day they were locked out and informed that other workers had taken over their duties. It was alleged that they had engaged in an illegal strike, which was viewed as gross misconduct warranting summary dismissal.

One issue that emerges from this case is that the client enterprise is the one which terminated the relationship by asking the outsourced workers not to report to work, and not the outsourcing company. Since outsourced workers are employees of the outsourcing company, the expectation would be that the outsourcing company terminates the outsourced workers' employment contracts, while ensuring the requirements of substantive and procedural fairness.[511] Even though it was felt that the workers had engaged in an illegal strike by downing their tools, the outsourcing company

[510] Through the Regulation of Wages (General) (Amendment) Order, 2013.
[511] See Employment Act ss 41, 43 and 45.

could have stepped in to be part of the matter. The Industrial Court held that the outsourcing company had mishandled the grievance and ordered it to pay damages to the outsourced workers.

This can be contrasted with the case of *Timothy Wanderi v Bata* in which the claimant sued for unfair termination alleging that he had been asked to leave the Bata premises by two persons sent to him by the Bata Engineer.[512] The claimant was well aware that though he was placed to work at Bata, he was an outsourced worker employed by Fast Track, an outsourcing company. Upon being asked to leave the premises, the claimant went to report the matter to Bata's Human Resource Manager, who asked him to report instead to his supervisor. The claimant then filed a complaint at the Industrial Court. The court held that the claimant could ascertain who his supervisor was and the fact that he did not follow up his cause using the proper channels, his departure was a sign that he deserted his place of work. The case was dismissed.

4.4.3 Loss of employment due to termination of the service contract

Having considered the termination of employment by the outsourcing company and by the client enterprise, this section now assesses the loss of employment due to the termination of the service contract between the two authority figures. With the involvement of a third party in the outsourcing arrangement, namely the client enterprise, the termination of outsourced workers' employment may have variations from the SER.

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[512] *Timothy Wanderi v Bata Shoe Company (Kenya) Limited & another* [2014] eKLR (Industrial Court).

For instance, the outsourced workers' contracts may be phrased in such a way that their employment is dependent on the continued good relationship between the client enterprise and the outsourcing company. If the service contract between the two authority figures is terminated, the outsourced workers find themselves 'out of a job.' This was illustrated in *Kenya Hotels and Allied Workers Union* (KHAWU) *v Platinum Outsourcing* in which the outsourced workers' contracts contained a clause that read as follows: 'This employment contract is valid for a period of one year... This contract is dependent on the client continuing to work with Platinum Outsourcing & Logistics (EA) Limited.'[513] Such wording essentially created a fixed-term contract which would terminate once the service contract was terminated.

Similarly, in the case of *Joan Thairu v Bata* in which Bata Shoe Company had a service contract with 4M Enterprises, an outsourcing company, for the supply of manpower.[514] The outsourced workers were engaged, paid and supervised by 4M Enterprises. They worked at Bata Shoe Company premises stitching canvas shoe uppers. The service contract between Bata and 4M Enterprises was terminated, effectively terminating the outsourced workers' contracts of employment. Though the case misclassified the arrangement between the authority figures as an

[513] *Kenya Hotels and Allied Workers Union v Platinum Outsourcing Logistices (EA) Ltd & another* [2015] eKLR (ELRC).
[514] *Joan Thairu v Bata* (n 385).

agency relationship instead of an outsourcing TER, the case is worth mentioning because it illustrates the issue at hand.[515]

There are no legal provisions that deal with the loss of employment due to the termination of the service contract. This issue is worth deliberation because failure to address it may lead to situations where the outsourced workers' rights are not taken into account. Bearing this in mind, this issue in the following chapter, in a bid to find solutions that would protect the outsourced workers in outsourcing TERs.

4.5 CONCLUSION

Through this chapter, the legal framework of outsourcing has been discussed, with a focus on the employment of outsourced workers. This chapter achieved the second objective of this study which was to assess the suitability of the current legal employment framework in protecting outsourced workers, in light of the peculiarities of outsourcing triangular employment relationships. The chapter assesses the legal framework regulating outsourcing TERs. The three independent variables feature as thematic areas.

[515] Section 2.3.3 discusses the difference between outsourcing arrangements and the principal-agent relationship brought about by the use of employment agencies.

The first independent variable is clarity on employment status within outsourcing TER. In assessing the suitability of the legal framework, this chapter first discussed the legislative definitions and judicial tests on employment status to ascertain if these conclusively answer the question of employment status within outsourcing TERs. It was found that neither the legislative definitions nor the judicial tests answer the question conclusively since they focus on the SER and do not envisage the various NSWs. The chapter discussed the laws on the employment status of outsourced workers from case law. It was found that the law classifies outsourced workers as employees of the outsourcing company. The law does not provide for the relationship between the outsourced workers and the client enterprise, which is not an ideal situation.

The chapter also discussed the worker status as compared to the employee status. This status is broader and could cover persons who are in a position of dependence but not employees as envisaged by the legislative definitions and judicial tests. This avoids the awkward situations that may be caused by trying to squeeze NSWs into the SER framework. The Constitution of Kenya, 2010 refers to workers but the worker status has not yet received much recognition in the employment laws. The chapter then considered the definition of an employer. This discussion is important because outsourced workers relate to two authority figures. The identification of the employer leads to the attribution of employment responsibilities, which was investigated in section 4.3 of this chapter.

The second independent variable is minimum standards on benefits and working conditions for outsourced workers. In assessing the suitability of the legal framework, this chapter discussed the

basic rights that the employment laws guarantee to outsourced workers. It then focused on the right of outsourced workers to unionization in light of the negative perceptions that trade unions have had towards outsourcing. The flip side of the discussion focused on the employment duties of both authority figures towards the outsourced workers.

The third independent variable is improved job security for outsourced workers. The chapter discussed the termination of employment of the outsourced workers by the outsourcing company and also by the client enterprise. In principle, if the outsourcing company is the employer, dismissal should only be at the behest of the outsourcing company. However, the reality is that there are instances where the client enterprise dismisses the outsourced workers, which causes legal dilemmas. The chapter also assessed the loss of employment due to the termination of the service contract between the authority figures.

In summary, the second objective of this study was to assess the suitability of the current legal employment framework in protecting outsourced workers, in light of the peculiarities of outsourcing triangular employment relationships. It was found that the current employment laws focus primarily on the SER and do not contemplate outsourcing TERs. The next chapter discusses the ILO labour standards, with a focus on NSWs in general and outsourcing TERs in particular. In that chapter, various ILO conventions and recommendations are discussed. These instruments not only ensure labour rights and protections for employees but also provide for the rights of outsourced workers and other NSW workers.

Through the course of its history, the ILO has sought to regulate NSWs through its various conventions and recommendations. The ILOs intentions would be that these NSWs continue to exist. However, each member state should strive to regulate NSWs in their national legislative frameworks, as per the established ILO labour standards. The labour standards which protect workers in general, and outsourced workers in particular, should be incorporated into the Kenyan labour laws.

CHAPTER FIVE

INTERNATIONAL LEGAL FRAMEWORK FOR THE REGULATION OF OUTSOURCING TRIANGULAR EMPLOYMENT RELATIONSHIPS

The previous chapter discussed the legal employment framework regulating outsourcing triangular employment relationships (TERs) in Kenya. It first highlighted the legislative definitions and judicial tests on employment status in a bid to clarify outsourced workers' employment status. The chapter highlighted the gaps in these definitions and judicial tests when applied to outsourced workers because they focus on the standard employment relationship (SER) and do not envisage outsourcing TERs. The Kenyan employment laws recognize the relationship between the outsourcing company and the outsourced workers as an employment relationship, but do not consider the relationship between the outsourced workers and the client enterprise.

The previous chapter also assessed the employment laws' provisions on the employment rights, benefits and working conditions for outsourced workers. The chapter also considered the legal provisions on job security by evaluating the termination of employment of outsourced workers. The focus of the law is on termination by the outsourcing company and does not envision situations in which the client enterprise dismisses the outsourced workers.

This chapter meets the third objective of this study, which is to review the International Labour Organization's (ILO) interventions towards the regulation of outsourcing triangular employment relationships. It begins with an overview of ILO labour standards. The fundamental rights which

are protected through the international framework, and to which all workers are entitled, are discussed. Since the ILO is an international body, the implementation of the ILO standards in different jurisdictions is then considered. In addition, there is an evaluation of how the ILO enforces its ILO conventions. Since in the previous chapter, the shortcomings of the Kenyan legal framework were identified, it is considered important to study the international legal framework for the regulation of outsourcing TERs to identify the aspects that have been adopted and secondly to identify the best practices that may inform possible reforms.

The international legal framework regulating outsourcing TERs is also premised on the principle that labour is not a commodity.[516] This is aligned with the study's theoretical framework. Finally, paternalism may be used to justify the interference with the freedom of contract within the outsourcing TER, for the benefit of outsourced workers. Recognizing the inherent inequality of bargaining power as well as the precarious nature of NSWs, the ILO has progressively made efforts towards the protection of workers who fall outside the SER.[517]

The chapter reviews the international labour standards that specifically regulate outsourcing TERs. Since outsourced workers fall outside the scope of the SER, there are specific challenges that they experience because the employment framework was developed with the SER in mind. The section

[516] Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia) art. 1.
[517] ILO, *Non-Standard Employment around the World* (n 1) 250–281.

reviews the labour standards that relate to the three variables of this study, namely, the employment status of outsourced workers, equality of treatment and job security of outsourced workers. It then provides an overview of the 1998 ILO proposed Convention concerning Contract Labour, which it was hoped would specifically protect outsourced workers. Finally, the chapter investigates the adoption of the ILO labour standards in Kenya.

Kenya is an ILO member, having joined the international organization on 13th January 1964.[518] Due to this membership, she is bound to enforce all ratified ILO conventions. In addition, premised on the principle of human rights, there is a tacit there was a tacit obligation placed on member states to adopt the principles espoused in the eight fundamental conventions into their national legislation, even where they have not ratified the ILO conventions.[519] Consequently, though Kenya has not ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (ILO C087), there is evidence that the requirements of the convention have already been incorporated into Kenya's national laws.[520] The review of the International Labour Organization's interventions towards the regulation of outsourcing TERs will contribute to developing possible interventions and strategies to address the challenges facing outsourced workers in Kenya.

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[518] ILO, 'International Labour Standards Country Profile: Kenya' (2019) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID,P11110_CONTEXT:103315,SC> accessed 18 September 2020.
[519] ILO Declaration on Fundamental Principles and Rights at Work 1998 art 2.
[520] This is evidenced in the Labour Relations Act.

5.1 INTRODUCTION

After World War I, the ILO was created through the Treaty of Versailles, as a means of ensuring harmonized labour standards.[521] The ILO is an international organization set up on a tripartite basis involving governments, trade unions and employer organizations. It specializes in promoting decent work for all workers through promulgating labour standards and developing policies. It consists of three main bodies.[522] The first is the International Labour Conference which is primarily concerned with the setting of labour standards and policies. The second is the Governing Body which operates as the executive Council of the ILO. The third is the International Labour Office which is the secretariat and offers checks and balances to the Governing Body.

The ILO creates an international framework through which workers can have their employment rights safeguarded and through which these obligations can be enforced against employers. Through the international framework of labour conventions and recommendations, these labour rights and obligations can be enforced in several countries and they can be viewed as international bare minimums. In that sense, the ILO may be seen as a global labour law regulator. Maintaining these international standards is important as it ensures a stable and healthy employer-worker relationship which consequently leads to productive and efficient economies.

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[521] Guy Standing, 'The International Labour Organization' (2010) 15 New Political Economy 307, 307.
[522] International Labour Organization, 'How the ILO Works' (2020) <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm> accessed 8 August 2020.

The ILO aims at preventing unfair competition thus promoting social justice.[523] Social justice may be viewed as the commitment by the world community to maintaining good relations between countries; an important added dimension is the world community playing an active role in ensuring the wellbeing of its economically-active citizens.[524] Reducing unfair competition also works towards producing effective labour markets in that it provides a level playing field which then produces effective global labour markets.[525] This avoids a 'race to the bottom' mentality.

The international labour standards that form the backbone of the international legal employment framework apply to all employees.[526] However, due to the deviations that NSWs have from the SER, questions arise as to whether these labour standards apply to workers in NSW arrangements, such as outsourced workers, in the same way that they apply to the SER. The ILO acknowledges that NSWs have increased significantly in the past two decades.[527] This increase in NSWs has led to a decrease in employment protections since these arrangements lead to atypical, precarious employment relationships. Further, different countries have different labour and economic structures.[528] The structure and development of various countries' legal systems can lead to

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[523] Leonardo Baccini and Mathias Koenig-Archibugi, 'Why Do States Commit to International Labor Standards: Interdependent Ratification of Core ILO Conventions, 1948-2009' (2014) 66 World Pol. 446, 450.
[524] Jasmien van Daele, Magaly Rodriguez Garcia and Geert van Goethem, *ILO Histories: Essays on the International Labour Organization and Its Impact on the World During the Twentieth Century* (Peter Lang 2010) 472.
[525] International Labour Organization, 'The Benefits of International Labour Standards' (2020) <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm> accessed 12 September 2020.
[526] Benjamin (n 327) 75.
[527] ILO, *Non-Standard Employment around the World* (n 1) 7.
[528] Paul Schoukens and Alberto Barrio, 'The Changing Concept of Work: When Does Typical Work Become Atypical?' (2017) 8 European Labour Law Journal 306.

different advantages and disadvantages being experienced by NSW workers such as outsourced workers.

According to the ILO, relevant policy considerations need to be explored to ensure that NSWs benefit all concerned parties.[529] These policy considerations can be summed up as three main questions. The first is the question of whether the increase in NSWs should be promoted, and if so, how. The second is the question of how maximum benefits can be derived from these NSWs for the workers, the employers and the whole community in general. The last question is how these NSW arrangements can be regulated without the workers themselves suffering.

As discussed later in this chapter, the ILO believes that labour rights should be available to all workers.[530] Therefore, it has created several instruments that apply to workers who may not fall within the SER; the idea being that NSW workers should not be excluded from the wide range of ILO labour standards.[531] This chapter begins with an evaluation of the international employment framework as applicable to workers generally. It then focuses on the specific measures that have

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[529] Guy CZ Mhone, 'Atypical Forms of Work and Employment and Their Policy Implications' (1998) 19 Industrial Law Journal 197.

[530] The preamble of the ILO Constitution provides that: "*And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example… the protection of the* ***worker*** *against sickness, disease and injury arising out of his employment,… protection of the interests of* ***workers*** *when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association…" (emphasis mine).*

[531] See for example the Equal Remuneration Convention (ILO C100) 1951; Discrimination (Employment and Occupation) Convention (ILO C111) 1958; Employment Relationship Recommendation.

been put in place to extent protections to workers engaged under TERs, especially outsourced workers. Finally, it determines the extent to which Kenya has adopted the ILO labour standards.

5.2 THE INTERNATIONAL LEGAL EMPLOYMENT FRAMEWORK

This chapter discusses the ILO international labour standards that form the backbone of the international legal employment framework. The ILO is an international organization which acts as the primary regulator of international labour standards. These international labour standards are upheld globally and they are expressed as international labour rights. Labour rights are embodied in several ILO conventions and recommendations. Conventions are legally-binding instruments whereas recommendations are non-binding guidelines.[532] These ILO labour standards form the backbone of the international legal employment framework. This section provides an evaluation of international labour standards and international labour rights. In addition, it investigates the implementation of these international labour standards. In other words, it discusses the adoption of these standards in national legislation. It also identifies the measures that the ILO has put in place to enforce its conventions. It then concludes with a summary of the ILO's operation mechanism.

[532] ILO (ed), *Rules of the Game: A Brief Introduction to International Labour Standards* (3. rev. ed, PRODOC 2014) 15.

5.2.1 International labour standards

International labour standards may be viewed as a measuring stick against which countries gauge their progress in addressing labour matters.[533] The international labour standards are essentially the system of conventions and recommendations that the ILO has developed, which when implemented form the international employment framework.[534] These international standards have been developed through the combined efforts of several bodies including various national governments, trade unions and employers. Their main purpose is to guarantee workers' rights and to promote decent conditions of work among the ILO member states. As each economy continues its growth and development, these universal conventions and recommendations are important because they set minimum standards and form a foundation upon which social justice and economic wellbeing can be built. International labour standards underpin the continuous improvement of national labour legislation. In addition, they also affect the enterprise level, as employers and workers seek to incorporate these best practices into CBAs.

The ILO labour standards set a floor, in that they are bare minimum entitlements.[535] A member state may improve on the standards and provide better conditions for its workers but it should not go below the agreed-upon standards. Member states, however, have control over the formulation and implementation, in that they can apply their own methods of protection in the ratification of

[533] Daele, Garcia and Goethem (n 524) 12.
[534] ILO, *Rules of the Game* (n 532) 15.
[535] Baccini and Koenig-Archibugi (n 523) 447; Daele, Garcia and Goethem (n 524) 9.

the labour standards. Though these standards are universal, they are usually worded in a manner that grants them the flexibility to adapt to whichever legal system each member country has.[536] Their universality is evidenced in the fact that the legal approaches are not so high that the developing countries cannot adopt them; neither are they too low such as to be of no use to the developed nations.[537]

It is argued that this may not necessarily be an ideal situation because the conventions and recommendations are often vaguely phrased and thus may not adequately address contemporary problems.[538] It is useful for governments to interpret labour standards in their national legislation in ways that suit the country's circumstances. Governments should, however, be wary of misinterpretations in the process; the ILO conventions and recommendations should still be interpreted in a manner that does not change their purpose or context.

On the other hand, this flexibility may also be looked at as a positive thing in that the ILO conventions and recommendations can adapt to changing circumstances, thus increasing inclusivity.[539] Even where conventions did not apply to some situations because the situations

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[536] ILO, *Rules of the Game* (n 532) 19.
[537] International Labour Organization, 'How International Labour Standards Are Created' (2020) <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> accessed 12 September 2020.
[538] Tom Feys, 'Labour Standards in Southern Africa in the Context of Globalisation: The Need for a Common Approach' (1999) 20 Industrial Law Journal 1445, 1463.
[539] Daele, Garcia and Goethem (n 524) 471.

themselves did not exist before, the conventions can be interpreted so as extend to those situations. That is especially important when it comes to NSWs, which keep mutating over the years. It may not be deemed necessary to have labour standards that are specific to each NSW, but with goodwill, the standards may be interpreted to protect all working men, women and children.

It is worth emphasizing that member states are expected to ensure that the labour standards promote workers' sense of human dignity and security. In other words, their human rights should be safeguarded.[540] This obligation in turn creates a right that workers can claim, as espoused in the ILO Constitution: "All human beings...have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."[541]

Another guiding principle of the ILO is that labour is not merely a commodity.[542] This principle was affirmed in the ILO Declaration of Philadelphia 1944, and has also been recognized in the Universal Declaration of Human Rights, 1948 (UDHR).[543] Embedded in this principle is the requirement for equal pay for work of equal value.[544] This means every worker should be entitled

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[540] The human rights theory is discussed in greater detail in section 2.2.3.
[541] International Labour Organization Constitution 1944 art 40(2)(a).
[542] The decommodification theory is discussed in section 2.2.2.
[543] Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia) art. 1; though the Universal Declaration of Human Rights does not expressly mention commodification, it emphasizes on human dignity which is a basis for decommodification arguments as was discussed in section 2.2.2.
[544] Bidwell and others (n 23).

to adequate remuneration for the work he or she has done, and this remuneration should be of a level that creates a reasonable standard of living for the worker.

The labour standards with the above objectives are important to outsourced workers and other NSW workers, in that they help create an important balance between the social and economic wellbeing of the workers. The social dimension is evidenced in the workers' social rights such as health and safety. The economic dimension is evidenced in measures that for example relate to compensation for the services rendered. The social and economic aspects go hand-in-hand, such that the development of one area can lead to positive results in the other. For example, enabling a safe working environment can contribute towards efficiency and productivity because the worker is likely to be motivated to work harder.

5.2.2 International labour rights

The international labour standards are the legal instruments which set out the basic international rights.[545] These labour standards cover a wide array of rights, including the freedom of association, collective bargaining, protection against forced labour, protection against child labour, working time, wages, equality of opportunity and treatment, occupational safety and health (OSH), vocational guidance and training, job security, maternity protection, among others.[546] The four

[545] ILO, *Rules of the Game* (n 532) 15.
[546] See generally ILO, *Guide to International Labour Standards* (International Training Centre of the ILO 2014).

fundamental rights that the ILO protects are the freedom of association, the protection from forced labour, the protection from child labour and the protection from discrimination.[547] All other labour rights supplement these fundamental rights; though this does not mean that the rest deserve less protection.

Initially, these international labour rights were not considered to be rights but rather were seen as principles.[548] A possible explanation could be that member states were under no obligation to ratify the ILO conventions. It would, therefore, have been considered unfair to label them as rights when not all member states' workers could claim them. However, over time there was a tacit obligation placed on member states, based on their membership, to adopt the principles espoused in the fundamental conventions into their national legislation, even where they have not ratified the ILO conventions.[549] In other words, a member state must grant these four fundamental rights merely by its ILO membership.

The most important employment protections that are due to all workers have been classified by the ILO as fundamental rights. The first fundamental right, freedom of association, entails the right of workers to join trade unions and participate in their activities, including the right to collective

[547] ILO Declaration on Fundamental Principles and Rights at Work.
[548] Philip Alston, 'Labour Rights as Human Rights: The Not So Happy State of Art' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005) 3.
[549] ILO Declaration on Fundamental Principles and Rights at Work art 2.

bargaining.[550] The ILO Committee on Freedom of Association within the ILO Governing Body has ruled that these conventions apply to all workers, regardless of the type of contract under which they are employed.[551] It can be deduced that these conventions apply to outsourced workers engaged under outsourcing TERs.

Protection from forced labour is the second fundamental labour right and is provided for by the Forced Labour Convention, 1930 and its 2014 Protocol, as well as the Abolition of Forced Labour Convention, 1957. Based on these two conventions, no services should be rendered by any worker if they are not done so voluntarily. The elimination of forced labour is deemed to be an important global challenge, especially since it is also linked to poverty-reduction efforts and general economic development.[552]

The right not to be subjected to child labour is the third fundamental right. One of the conventions that guarantee this right is the Minimum Age Convention, 1973 which prohibits the employment of persons who have not yet attained the age of completion of compulsory schooling or fifteen years, whichever is higher.[553] In addition, in the year 1992, the ILO formed the International

[550] This right is protected primarily by two conventions: Freedom of Association and Protection of the Right to Organise Convention (ILO C087) 1948; Right to Organise and Collective Bargaining Convention (ILO C098) 1949.
[551] ILO, '389th Report of the Committee on Freedom of Association' (ILO Governing Body 2019) 22–23.
[552] ILO, *Rules of the Game* (n 532) 34.
[553] Minimum Age Convention (ILO C138) 1973 art 3.

Programme on the Elimination of Child Labour intending to progressively eliminate child labour. This led to the development of the Worst Forms of Child Labour Convention, 1999.

The fourth fundamental right is the freedom from discrimination, which essentially is the right to equal treatment.[554] The right not to be discriminated against is also mentioned in the Employment Policy Convention, 1964.[555] The ultimate goal of these instruments is to ensure that all workers have equal opportunities for productive work, equal treatment within the employment opportunities and equal access to employment protections.

It may be noted that these four fundamental labour rights also have their origins in the human rights framework, which means they are in themselves human rights.[556] These fundamental rights are protected through both the labour law and human rights frameworks. As Alston explains,

> "Human rights and labour lawyers...tend to characterize at least some labour standards as being fundamental to human dignity and assume that the essential minimum standards will only be ensured if a strong legal regime, including national and international components, is put in place in order to encourage governments to ensure the protection of their workers' rights."[557]

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[554] The two fundamental ILO Conventions that guarantee this right are the Equal Remuneration Convention; and the Discrimination (Employment and Occupation) Convention (ILO C111).
[555] Employment Policy Convention (ILO C122) 1964 art. 1(2); this was later supplemented by the Employment Policy (Supplementary Provisions) Recommendation (ILO C169) 1984.
[556] See generally section 2.2.3.
[557] Philip Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457, 471.

In light of the Decent Work Agenda, it is desirable to consider these fundamental labour rights from a human rights perspective.[558] Further, since these labour rights are entrenched in the UDHR, they should be considered to also be human rights.[559] These fundamental rights are special since they receive worldwide recognition as human rights to ensure that protections are granted to workers, whether as citizens or employees. Consequently, it can be argued that if outsourced workers are denied employment rights then this would also violate their human rights.

The ILO has also developed standards to protect persons to whom remuneration is payable.[560] In addition, there are instruments aimed at guaranteeing job security to workers in that they provide that for dismissal to be fair there must be a valid reason and the dismissal must follow the required procedure.[561] In other words, there must be substantive and procedural fairness. Reasons that would align with substantive fairness include gross misconduct which would warrant summary dismissal and operational requirements of the employer which would warrant redundancy.[562] The ILO requires that each member state defines these substantive grounds in its legislation. On the other hand, procedural fairness includes *inter alia* informing the worker of the reason for

[558] International Labour Organization, 'Decent Work' (2020) <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> accessed 12 September 2020.
[559] Universal Declaration of Human Rights arts 2, 7, 20, 23 and 25.
[560] Protection of Wages Convention (ILO C095) 1949.
[561] Termination of Employment Convention (ILO C158) 1982; Termination of Employment Recommendation (ILO R166) 1982.
[562] Termination of Employment Convention (ILO C158) art 4.

termination, affording the worker the right to be heard by presenting his case before a disciplinary hearing and availing to the worker the opportunity to appeal the decision to a neutral body.[563]

Job security is a right that extends to all workers and is not limited to employees only. [564] Job security means that "workers have protection against arbitrary and short-notice dismissal from employment, as well as having long-term contracts of employment and having employment relations that avoid casualization."[565] A worker who enjoys job security is likely to be a happy worker who may work harder than a worker who is uncertain because he feels he may be terminated the following week. Job security promotes the productivity of businesses and the loyalty of the workers.

One aspect that could pose a problem to a worker's job security is increased flexibility within labour markets. Increasingly, competition within the market requires businesses to adapt better to customers' demands. The increased uptake of NSWs often affects workers' job security. Though the outsourcing TER offers greater flexibility as an employment model, it may directly impact the outsourced workers' job security. A balance needs to be maintained between flexibility and security so that outsourced workers are not unduly disadvantaged.

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[563] Termination of Employment Convention (ILO C158) arts 7, 8, 9 and 10.
[564] Dasgupta (n 301) 5.
[565] Dasgupta (n 301) 2.

The need for job security also aligns with the Decent Work Agenda since security is paramount to maintaining a decent standard of living. Workers need stability, especially when factors such as age and family responsibilities are considered. There may be a concern that protecting outsourced workers' job security may deter employers from hiring them because it somehow puts undue pressure. Should this materialize then the effect would be a rise in unemployment. The ILO seeks to maintain the delicate balance between workers' security and the employers' interests.

5.2.3 Implementation of international labour standards

Upon ratification of any of the ILO conventions, the particular convention becomes binding upon that member state and that member state is required to incorporate the provisions of the convention in its legislation.[566] Where a member state does not ratify an ILO convention then that convention operates as a guideline and the country is encouraged to maintain the standards prescribed in the convention. It can be viewed that the ILO aims to achieve global legislative uniformity on labour standards.

It is worth pointing out that there is no political obligation for any ILO member state to ratify any of the conventions. However, it seeks to achieve universal ratification of eight conventions that it has classified as fundamental.[567] These eight conventions cover the fundamental employment

[566] Baccini and Koenig-Archibugi (n 523) 447.
[567] The eight fundamental conventions are: Freedom of Association and Protection of the Right to Organise Convention (ILO C087); Right to Organise and Collective Bargaining Convention (ILO C098); Forced Labour Convention (ILO C029) 1930; Abolition of Forced Labour Convention (ILO C105) 1957; Minimum Age Convention;

rights and obligations, namely the freedom of association and its constituent right to collective bargaining; the freedom from forced labour; the elimination of child labour; and the freedom from employment discrimination. By ratifying these conventions, a member state may be deemed to be publicly endorsing these universally accepted expressions of human dignity.[568] However, even where these fundamental conventions have not been ratified, countries have obligations to respect, realize and promote the principles they espouse, due to their ILO membership.[569]

The ILO has largely succeeded in meeting its objectives in that member states have implemented the international labour standards due to either rationally expressive ratification or due to influence from economic competitors.[570] The first approach relates to the intrinsic normative value of the labour standards; a member state would implement them to publicly express its commitment to these conceptions of human dignity. The second is evidenced where the moral disapproval of states considered to be "peers" is a good deterrent that encourages member states to meet the minimum ILO standards.

The ILO has provided some measures to promote the implementation of ILO conventions in member states. First, the ILO commits to offer technical and advisory support to enhance the

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Worst Forms of Child Labour Convention (ILO C182) 1999; Equal Remuneration Convention; Discrimination (Employment and Occupation) Convention (ILO C111).

[568] Baccini and Koenig-Archibugi (n 523) 448.

[569] ILO Declaration on Fundamental Principles and Rights at Work art 2.

[570] Baccini and Koenig-Archibugi (n 523) 448.

implementation of ILO conventions.[571] Second, should a member state face challenges in the ratification of the conventions, the ILO will support the member state to promote the principles espoused in the conventions. Finally, the ILO assists member states in their objectives towards socio-economic development.

A follow-up to the Declaration on Fundamental Principles and Rights at Work was annexed to it to encourage member states to promote the fundamental ILO principles. The follow-up calls for two types of reports to identify areas in which the ILO can offer assistance to member states. The first involves an annual report on non-ratified fundamental conventions.[572] The follow-up annual report allows the member states to provide information on changes that they may have made to their law and practice. If they have not made any efforts, moral pressure may be applied.

The second is called the Global Report on Fundamental Principles and Rights at Work.[573] It involves an examination of the assistance that the ILO offered in the preceding period, in terms of the four fundamental ILO rights. This forms a basis on which the ILO can grow and improve in terms of its action plans and priorities. This report helps to identify shortcomings that can be addressed in the future. The obligation to submit reports is founded on the ILO Constitution.[574]

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[571] ILO Declaration on Fundamental Principles and Rights at Work art 3.
[572] ILO Declaration on Fundamental Principles and Rights at Work Annex (Revised) Follow-up to the Declaration, part II.
[573] ILO Declaration on Fundamental Principles and Rights at Work Annex (Revised) Follow-up to the Declaration, part III.
[574] International Labour Organization Constitution art. 19(5)(c).

Through this mandatory reporting requirement, pressure is placed on ILO member states to implement the ILO conventions.

Through the submitted reports, member states need to provide evidence of the steps taken to adopt the ratified conventions.[575] This includes the requirement to show that the adopted implementation measures are effective. The ILO body that analyses the reports to determine whether the member states have implemented the ratified conventions is the Committee of Experts on the Application of Conventions and Recommendations (CEACR).[576] This evaluation of reports enables the ILO to gauge the implementation levels of the ratified conventions and determine whether member states are struggling to implement them.

When the reports are submitted to the CEACR, it analyses them and responds through either observations or direct requests.[577] Observations involve critical commentaries on the effectiveness of the measures that a member state has taken towards implementing the conventions. They may identify loopholes in the member states' legal systems and suggest ways in which those gaps can be filled.[578] They may also appreciate the efforts made by the member states.

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[575] ILO, *Rules of the Game* (n 532) 102.
[576] ILO, 'Committee of Experts on the Application of Conventions and Recommendations' (2020) <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm> accessed 15 September 2020.
[577] ILO, 'Committee of Experts on the Application of Conventions and Recommendations' (n 576).
[578] ILO, *Monitoring Compliance with International Labour Standards: The Key Role of the ILO Committee of Experts on the Application of Conventions and Recommendations* (International Labour Office 2019) 19.

In 2020 the CEACR made observations concerning Kenya's obligations under the Workmen's Compensation (Accidents) Convention, 1925.[579] The CEACR noted that the government had held a high-level Social dialogue meeting to address the amendment of the WIBA on 23 September 2020 and expressed the hope that the proposed legislative developments would help the country meet its obligations under the Convention.[580] The CEACR also made observations on the Minimum Age Convention, 1973.[581] The Committee noted that child labour was a development challenge in Kenya and, therefore, strongly encouraged the country to strengthen her efforts towards improving access to education, social protection and poverty reduction.[582] The final observation that Kenya received in 2020 was on its obligations under the Worst Forms of Child Labour Convention, 1999.[583] The CEACR noted with concern that in 2018 the International Organization for Migration identified Kenya as a child trafficking source, transit and destination

[579] Kenya ratified the Workmen's Compensation (Accidents) Convention (ILO C017) 1925 in 1964.
[580] ILO NORMLEX, 'Observation (CEACR) on the Workmen's Compensation (Accidents) Convention, 1925 (No. 17) - Kenya' (2020) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4055435> accessed 19 March 2021.
[581] Kenya ratified the Minimum Age Convention in 1979.
[582] ILO NORMLEX, 'Observation (CEACR) on the Minimum Age Convention, 1973 (No. 138) - Kenya' (2020) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4056497> accessed 19 March 2021.
[583] Kenya ratified the Worst Forms of Child Labour Convention (ILO C182) in 2001.

country.[584] It urged the country to adopt appropriate measures to effectively implement and enforce the Counter Trafficking in Persons Act, 2010.[585]

Conversely, direct requests come in the form of requests for further information or they may relate to technical questions. They are sent to the relevant governments and allow for continuous dialogue over the issues in question.[586] In 2020, Kenya received eight direct requests from the CEACR. Concerning the Equal Remuneration Convention, 1951 the Committee requested the Government to provide information on the Salaries and Remuneration Commission's application of the principle of equal pay for work of equal value to avoid gender bias and gender-based discrimination.[587] Another direct request focused on the Discrimination (Employment and Occupation) Convention, 1958. The Committee requested the Government to specify the measures it had adopted to ensure that workers excluded from the scope of application of the Employment Act, 2007 were protected against discrimination in employment.[588]

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[584] ILO NORMLEX, 'Observation (CEACR) on the Worst Forms of Child Labour Convention, 1999 (No. 182) - Kenya' (2020) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4056504> accessed 19 March 2021.

[585] Counter-Trafficking in Persons Act 2010 s 3(5) provides that 'a person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life'.

[586] ILO, *Monitoring Compliance with International Labour Standards* (n 578) 19–20.

[587] ILO NORMLEX, 'Direct Request (CEACR) on the Equal Remuneration Convention, 1951 (No. 100) - Kenya' (2020) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4051679> accessed 19 March 2021.

[588] ILO NORMLEX, 'Direct Request (CEACR) on the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Kenya' (2020) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4051690> accessed 19 March 2021.

It is worth mentioning that some important documents have played a major role in the ILO's development and the promotion of member states' cooperation in the implementation of the ILO standards. One of these important documents is the Declaration and Programme of Action which was adopted by the World Summit for Social Development in 1995.[589] Through this action plan, the various heads of State and Governments committed to providing quality work and protecting the fundamental rights of workers. They also committed to formulating cross-sectoral strategies which stipulate responsibilities, time-frames and priorities.[590] The different countries, including Kenya, took it upon themselves to enforce the principles set out in the ILO conventions, with economic growth and respect for workers' rights as driving forces.[591]

5.2.4 Enforcement of ILO conventions

Once a member state ratifies a convention it is expected to apply the labour standards in its jurisdiction. [592] This means that the member state must enact legislation to implement the relevant principles of the ILO conventions. On its part, the ILO has created a means of establishing compliance with this requirement. The conventions in and of themselves would be useless on paper

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[589] ILO, 'Activities of the ILO, 1994-95' (International Labour Conference 1996) Report of the Director-General <https://www.ilo.org/public/english/standards/relm/ilc/ilc83/dg-repc.htm> accessed 15 September 2020.
[590] United Nations, 'Programme of Action of the World Summit for Social Development' (1995) A/CONF.166/9 para 83.
[591] United Nations (n 590) paras 44 and 47.
[592] This is the normal expectation. Though, as mentioned in section 5.2.2, the rights embodied on the fundamental ILO conventions may be automatically enforceable even before incorporation into the member state's national legislation.

if they were not implemented in practice. When a member state ratifies an ILO convention, then the convention is considered almost like a treaty between the member state and the ILO.

The ILO does not have a judicial body and it may seem not to have concrete enforcement mechanisms. Challenges may be experienced in enforcement, which may lead to a disparity between the ratification of the ILO instruments and their implementation within the member states.[593] In addition, offending member states do not receive sanctions that go beyond moral censure when they do not incorporate the principles of the ratified conventions into their national legislation. Effectively, what the ILO does is encourage member states and draft recommendations, as non-binding guidelines, in the hope that its conventions will be implemented.[594] Nonetheless, even without direct enforcement mechanisms, ILO's operation system is highly effective. The ILO is a toothless dog; rather it is viewed as having 'soft power' which "rests on its ability to shape the preferences of others and tends to be associated with intangible assets such as an attractive personality, culture, political values and institutions, and policies that are seen as legitimate or having moral authority."[595]

In the absence of direct enforcement mechanisms, indirect methods are often employed. Upon signing up as an ILO member, each country signs a declaration in which it commits to adopt the

[593] Daele, Garcia and Goethem (n 524) 462.
[594] Daele, Garcia and Goethem (n 524) 462.
[595] Daele, Garcia and Goethem (n 524) 474.

obligations imposed by the ILO Constitution.[596] Should the member state then fail to fulfil its obligations, it may lose the respect of the ILO and other member states, and be blacklisted, which is akin to being branded the enemy. This loss of reputation by being blacklisted may lead to a decline in cooperation with other countries which may hamper economic growth.

5.2.5 Summary of ILO's operation mechanism

The ILO's operation system can be broken down into three main parts. The first part relates to the creation of international labour standards.[597] The ILO identifies global employment-related concerns that necessitate action. It then develops an instrument that elaborates on the particular labour standard. This may be in the form of a convention or recommendation. The instrument can then be ratified by member states, after which the member states should domesticate the labour standards.

The second part may be viewed as the executive part; this is the tracking of the implementation of labour standards within member states.[598] Upon ratification of a convention, each member state is held accountable for the application of the convention in its legislation by the requirement to submit regular reports. In these reports, the member state must provide evidence that it has fulfilled its obligations of upholding the required labour standards.

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[596] ILO, *Membership in the International Labour Organization: Information Guide* (International Labour Office 2014) 6–7.
[597] ILO, *Rules of the Game* (n 532) 17–20.
[598] ILO, *Rules of the Game* (n 532) 100–119.

The Committee on the Application of Standards (CAS) is the ILO body which monitors member states' compliance.[599] Member states who do not meet their obligations as required are usually identified and called upon to report the shortcomings that they face. In such cases, the ILO may then make suggestions as to how these shortcomings may be redressed. The last case of serious failure that Kenya reported to the CAS was in 2010 when the Government expressed its inability to submit the relevant instruments to the competent authorities because of Ministry restructural changes and related logistical and administrative issues.[600] The Committee then offered Kenya the option of receiving technical assistance towards ensuring compliance with its obligations.

The third part is the availing of special programmes to ILO member states.[601] The purpose of these programmes is to assist member states in technical aspects to meet their executive and judicial needs. These special programmes, which can guide member states as they work towards implementing the instruments, ease member states' understanding of what is expected of them. With the guidance offered to member states, there are increased chances of success in terms of incorporating labour standards into their legal systems. In terms of guidance provided to Kenya,

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[599] International Labour Organization, 'Committee on the Application of Standards' (2019) <https://www.ilo.org/ilc/ILCSessions/108/committees/standards/lang--en/index.htm> accessed 15 September 2020.
[600] ILO NORMLEX, 'Case of Serious Failure (CAS) - Kenya' (2010) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2564826,103315,Kenya,2010> accessed 19 March 2021.
[601] José Manuel Salazar-Xirinachs, 'Employment for Social Justice and a Fair Globalization: Overview of ILO Programmes' (International Labour Office) <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_140940.pdf> accessed 18 December 2020.

the ILO supported the taskforce that reviewed the labour laws and recommended reforms that led to the 2007 Labour Statutes.[602] In addition, the Decent Work Country Programme has been useful in assisting Kenya to achieve the objectives of the ILO Decent Work Agenda.[603]

It appears that despite the lack of a judicial body, the ILO is still effective in enforcing the application of labour standards and calls out members who deviate from their obligations. The instruments and processes discussed in this section are essential in protecting workers' rights generally. Based on them, member states take on the obligation to enforce fair labour standards and to respect the rights of workers within their jurisdictions.

Since the international labour standards apply to all workers generally, it is expected that NSW workers, including outsourced workers, enjoy the protection of their international labour rights. However, sometimes challenges are experienced in the application of these general international labour standards to NSW workers. There are grey areas which may leave NSW workers unprotected. As a result, the ILO has undertaken to create conventions and recommendations which apply specifically to NSW workers, to extend the protections afforded to these workers. The next section reviews the labour standards that are specific to NSWs.

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[602] Olayo Julius Ochieng and Lewis Kinyua Waithaka, 'Evolution of Labour Law in Kenya: Historical and Emerging Issues' (2019) 4 International Journal of Law and Policy 1, 4.
[603] ILO, 'Kenya Decent Work Country Programme: 2013-2016' (2016).

5.3 EXTENDING EMPLOYMENT PROTECTIONS TO OUTSOURCING TERS

The ILO has progressively made efforts towards the protection of workers who fall outside the SER.[604] For example, there are ILO conventions and recommendations that have been drafted to specifically cater for defined categories of NSW workers such as gig economy workers, homeworkers, and agency workers, among others.[605] In addition, the ILO has also created programmes such as the Strategies and Tools against Social Exclusion and Poverty programme which protects excluded workers such as NSW workers.[606]

Most of the ILO conventions apply to NSW workers because they protect workers generally. However, due to a lack of ratification or implementation, the protection of NSW workers is sometimes inadequate. In addition, the low developmental levels of some countries may contribute to the challenges experienced in fulfilling their ILO obligations. This poses a great disadvantage to NSW workers who do not benefit from the protection that they deserve. For example, the ILO has noted that NSW workers are often the first to be laid off from work when the authority figures

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[604] ILO, *Non-Standard Employment around the World* (n 1) 250–281.

[605] These include the Fee-Charging Employment Agencies Convention (Revised) (ILO C096) 1949; Employment Promotion and Protection against Unemployment Convention (ILO C168) 1988; Part-Time Work Convention; Home Work Convention (ILO C177) 1996; Private Employment Agencies Convention; Domestic Workers Convention (ILO C189) 2011.

[606] ILO, 'The Step Programme: Strategies and Tools against Social Exclusion and Poverty' <https://www.social-protection.org/gimi/RessourcePDF.action;jsessionid=2HVXurGXjOaMKneMJ4kYGQZElISJ3o4xjjPa5pALLjg4OgzUvb-V!1653088929?id=4835> accessed 19 September 2020.

that they work for experience financial problems.[607] This undermines their security of service and leaves them vulnerable.[608]

The inadequate protection of NSW workers is in direct conflict with the labour standards that the ILO strives to meet. It has, therefore, progressively embraced efforts to regulate various aspects of NSW through conventions and recommendations. This involves, for example, clarifications on the nature of NSWs, the obligations of member states and the rights of NSW workers. This meets one of the goals of the ILO regulatory instruments, which is to reduce the precariousness that may be brought about by NSWs.

The measures by the ILO to address the plight of NSW workers are multi-faceted.[609] For example, it seeks to extend the labour protections that are ordinarily granted to SER employees to cover NSW workers. In this way, there is equality of treatment which has the added advantage of reducing the incentives to use NSWs as a cheaper alternative to the SER. In this way, a level playing field can be created for the various categories of persons who perform work because NSWs are not used as a means of lowering labour costs. Other useful measures include limiting the unnecessary replacement of the SER.[610]

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[607] ILO, *Non-Standard Employment around the World* (n 1) 240.
[608] For example outsourced workers may be the first to lose their jobs because they are usually form part of the periphery job functions and perform non-core tasks. In addition, the client enterprise would not incur employment liability for the termination where it involves a termination of the service contract with the outsourcing company.
[609] ILO, *Non-Standard Employment around the World* (n 1) 250.
[610] ILO, *Non-Standard Employment around the World* (n 1) 266.

This section discusses the ILO labour standards that protect outsourced workers with a focus on the three main thematic areas that were highlighted by the outsourced workers in Kenya, namely, employment status, employment rights and duties and job security. It then discusses the proposed ILO convention concerning contract labour, which would have conclusively offered protection to outsourced workers and other contract workers engaged under TERs.

5.3.1 Employment status

The ILO generally distinguishes between three types of persons who perform work: employees, workers and self-employed persons.[611] Employees refer to wage earners employed under a contract of service. The SER focuses on this category of wage earners. On the other hand, workers are a broader category that includes both employees and NSW workers. In considering the scope of protection under the ILO instruments, the distinction between these two categories may be considered negligible since most ILO instruments cater to the needs of both. This is because the term worker includes employees. The vast majority of the ILO instruments apply to both SER and NSW workers.

The significant distinction then comes in the difference between workers and self-employed persons. The most common distinguishing factors relate to socio-economic dependence and

[611] Countouris (n 61) 153.

autonomy.[612] Workers are dependent on those who provide work, both in terms of formal dependence and socio-economic dependence, whereas self-employed persons are independent. The focus of the ILO is on those who are in contractual arrangements that signify dependence. Consequently, it may be contended that the sporadic use of the term 'employee' is unwarranted, seeing as the labour standards apply to both employees and NSW workers.

The ILO standards in most ILO conventions primarily cater for 'workers', rather than the narrower category of 'employees' or 'persons employed under a contract of service.' Though some of the conventions intentionally narrow their scope, the vast majority protect the wider category of workers. Consider, for example, the first set of ILO conventions that were adopted in 1919. The first ILO convention applies to "persons employed in any public or private industrial undertaking or in any branch thereof."[613] The second ILO convention also seeks to protect workers in general by preventing unemployment.[614] Though the third ILO convention does not refer to workers, it also takes a wide approach in that it seeks to protect all women.[615] The fourth ILO convention also takes a similar wide scope of application.[616] Nonetheless, some ILO conventions narrow the scope

[612] Countouris (n 61) 153.
[613] Hours of Work (Industry) Convention (ILO C001) 1919 art. 2.
[614] Unemployment Convention (ILO C002) 1919.
[615] Maternity Protection Convention (ILO C003) 1919.
[616] Night Work (Women) Convention (ILO C004) 1919.

of their application to employed persons only.[617] This narrower scope may, unfortunately, have the effect of excluding NSWs.[618]

Nonetheless, the preferred option is towards protecting 'workers' rather than 'employees'. For example, one of the fundamental conventions, Convention No. 087, emphasizes that it applies to workers "without any distinction whatsoever."[619] Similarly, the Working Conditions (Hotels and Restaurants) Convention defines the term worker as persons "employed within establishments… irrespective of the nature and duration of their employment relationship."[620] The fact that the definition stresses that the duration of the contract is immaterial may be seen as a way to cover casual workers. Generally, in terms of determining which categories of employment relationships are included in the term 'worker', one possible definition is that it includes employees, casual workers, workers on probation and workers on fixed-term contracts.[621]

There is often a bias towards applying international labour standards only to SER employees.[622] These labour rights apply to all employees; once a person attains the status of an employee, he is entitled to a set of established rights. Employee status sets the basis for these rights and gives predominance of the SER. One of the significant measures that the ILO has taken to extend

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[617] For example the Holidays with Pay Convention (Revised) (ILO C132) 1970.
[618] Countouris (n 61) 150.
[619] Freedom of Association and Protection of the Right to Organise Convention (ILO C087) art. 2.
[620] Working Conditions (Hotels and Restaurants) Convention (ILO C172) 1991 art. 2.
[621] Countouris (n 61) 152.
[622] Cappelli and Keller (n 6) 575.

protections to NSWs has been towards addressing employee misclassification. This has mainly been done through the Employment Relationship Recommendation, 2006 (No. 198). This Recommendation acknowledges that national labour rights are often linked to the establishment of an employment relationship.[623] However, there are often situations whereby it is difficult to establish an employment relationship because the parties' obligations may not be clear, or it is disguised employment, or there are inadequacies in the existing legal frameworks, and this may lead to depriving workers of rights where they are indeed due.[624]

It is worth mentioning that the ILO has aligned its objectives to the Sustainable Development Goals (SDGs) and through the Decent Work Agenda, whose four pillars are employment creation, social protection, rights at work, and social dialogue.[625] Based on the decent work agenda, the Recommendation upholds that labour rights should be availed to all workers, especially vulnerable workers.[626] The Recommendation emphasizes that there should be no distinction between workers engaged in different types of employment relationships, which means all workers who work in the context of an employment relationship should receive equal protection.[627] The field study found that 95% of the interviewed outsourced workers had written contracts of employment between

[623] Employment Relationship Recommendation preamble.
[624] Employment Relationship Recommendation preamble.
[625] International Labour Organization, 'Decent Work' (n 558).
[626] Employment Relationship Recommendation preamble.
[627] Employment Relationship Recommendation art. 1.

themselves and the outsourcing company. It can, therefore, be presumed that employment rights apply to outsourced workers since they perform work in the context of an employment relationship.

The Recommendation calls for the formulation of national policies and, where necessary, for the clarification of the scope of national laws so that all workers who are engaged in arrangements akin to employment relationships are effectively protected.[628] In particular, these protections should apply to *inter alia* contractual arrangements that involve multiple parties and should establish who should meet those protections.[629] Outsourced workers relate to two authority figures. In line with the Recommendation, it would be beneficial to delineate the obligations that the two authority figures have in terms of guaranteeing outsourced workers' employment protections. In addition, article 5 of the Recommendation urges member states to ensure that workers who are uncertain as to their employment status are adequately protected.

The Recommendation stipulates that factors relating to the performance of the work and the payment of wages could be used to determine the existence of employment.[630] Where there is uncertainty as to employment status, there are certain factors that could be considered. One can first merely look at the circumstances under which the work is carried out, such as the control test, the integration test, the requirement of personal service, whether the work is performed for the

[628] Employment Relationship Recommendation art 1.
[629] Employment Relationship Recommendation art 4.
[630] Art 9.

benefit of the other party, whether the working hours and work-site are specified by the party requiring the work, the mutuality of obligations test and whether the tools of the trade are provided by the other party.

Secondly, aspects relating to remuneration for the work done would be considered. Is the worker financially dependent on the other party? Does the agreement allow for remuneration in kind, including the provision of transport, accommodation and food? Is the worker entitled to weekly rest and leave entitlements? Is there an absence of financial risk on the part of the worker? If most or all of these aspects are present, then one may draw the conclusion that an employment relationship exists.

The Employment Relationship Recommendation, 2006 sets the basis for the protection of workers who may be uncertain as to their employment status. It also explicitly mentions contractual arrangements involving multiple parties. However, the ILO acknowledges that the issue of TERs may not be adequately addressed through this instrument.[631] The outsourcing TER stems from an employment contract between the outsourced worker and the outsourcing company, plus a service contract between the outsourcing company and the client enterprise. Aspects such as the nature of the TER and its impact on the various parties may require explanation or clarification at the national level.

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[631] Countouris (n 61) 161.

5.3.2 Ensuring equality of treatment

Ensuring equality of treatment between outsourced workers and SER workers would be one of the aims of anti-discrimination legislation. Anti-discrimination laws help promote fairness by eliminating discrimination based on occupational status. They are also key in reducing the use of NSWs primarily as a means of acquiring cheaper labour. Two fundamental ILO instruments uphold this labour standard. The Equal Remuneration Convention, 1951 (No. 100) provides for equal pay for work of equal value. In addition, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) prohibits discrimination on several grounds. Though they do not address outsourcing directly, they offer protection to outsourced workers because the conventions protect workers in general. When applied at the national level, the ILO standards that promote equality of treatment would benefit outsourced workers in that they provide for non-discrimination between SER workers and NSW workers. This would include equal treatment before judicial bodies, which would be effective in terms of removing some of the legal barriers that outsourced workers face.

Though the labour standards on equality of treatment are useful, what may be more effective is where the instruments provide for specific NSWs.[632] As a result, the ILO has found it necessary to apply certain provisions specifically to NSW workers. As mentioned in section 2.3.2, there are

[632] ILO, *Non-Standard Employment around the World* (n 1) 255.

four broad NSW categories namely temporary employment, part-time work, disguised employment and triangular employment relationships. The ILO has several conventions that address these NSW categories directly.

Temporary employment relates to situations where workers are engaged for specific limited periods and includes fixed-term contracts, project or task-based contracts and casual work.[633] The main challenge experienced by such workers relates to their termination of employment because the employer does not need to justify the termination of the relationship, save for the fact that a specific date has been reached.[634] This study noted that 49% of the outsourced workers perceived the client enterprise to be their employer and, consequently, were distressed by the fear that the client enterprise would tell them not to report to work.[635]

The Termination of Employment Convention, 1982 (No. 158) and the accompanying Termination of Employment Recommendation, 1982 (No. 166) are instrumental in protecting temporary workers. The Convention requires the adoption of relevant safeguards to prevent the recourse to temporary employment to avoid the protections afforded by the convention.[636] Such safeguards include limiting such contracts to instances where the employment relationship cannot be open-

[633] ILO, *Non-Standard Employment around the World* (n 1) 7.
[634] Aleksynska and Muller (n 220) 4.
[635] This was discussed in section 3.2.4.
[636] Termination of Employment Convention (ILO C158) art 2.

ended because of the nature of work being performed or the interests of the worker.[637] If contracts are deemed not to fall within such situations, they would be considered open-ended. Another safeguard would be the requirement that where temporary contracts are renewed for one or more occasions, they are deemed to be open-ended.

The Part-Time Work Convention, 1994 (No. 175) addresses part-time work. It defines a part-time worker as an "employed person whose normal hours of work are less than those of comparable full-time workers".[638] It requires member states to ensure that part-time workers receive the same treatment as comparable full-time workers. The convention focuses on equal treatment concerning anti-discrimination, OSH, the rights connected to the freedom of association, remuneration, social security, leave entitlements, and termination of employment.[639] In addition, member states are required to take measures to ensure access to part-time work opportunities, and the voluntary transfer from part-time to full-time opportunities and vice-versa.[640] However, it is recommended that employers first consult workers' representatives before the introduction of large-scale part-time work and there should be written communication to the part-time workers about their terms and conditions of employment.[641]

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[637] Termination of Employment Recommendation (ILO R166) art. 3(2).
[638] Part-Time Work Convention art. 1.
[639] Part-Time Work Convention arts. 4, 5, 6 and 7.
[640] Part-Time Work Convention arts. 9 and 10.
[641] Part-Time Work Recommendation (ILO R182) 1994 arts. 4 and 5.

According to the ILO, disguised employment "lends an appearance that is different from the underlying reality, to nullify or attenuate the protection afforded by law."[642] The main challenge experienced by disguised workers relates to misclassification.[643] The main normative ILO instrument that is relevant to disguised employment is the Employment Relationship Recommendation, 2006 (No. 198), which was discussed in section 5.3.1.

Home workers are a special category within disguised employment, and are protected primarily by the Home Work Convention, 1996 (No. 177) and the supporting Home Work Recommendation, 1996 (No. 184). The Convention requires equality of treatment between homeworkers and other wage earners concerning freedom of association, anti-discrimination, remuneration, social security, maternity protection, and access to training opportunities.[644] The Recommendation provides for specific measures that member states should take to ensure equality of treatment for each of the listed rights of home workers.[645] During the covid-19 pandemic, the proportion of workers who shifted to remote working increased exponentially and it is estimated that a number of these workers may continue as teleworkers.[646]

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[642] ILO, *Non-Standard Employment around the World* (n 1) 9.
[643] Zatz (n 238); Bauer (n 244); David Bensman, 'Misclassification: Workers in the Borderland' (2014) 2 Journal of Self-Governance and Management Economics 7.
[644] Home Work Convention (ILO C177) art. 4.
[645] Home Work Recommendation (ILO R184) 1996 arts. 5-30.
[646] ILO, 'ILO Monitor: COVID-19 and the World of Work' (International Labour Organization 2021) 7th edition; ILO, 'Working from Home: Estimating the Worldwide Potential' (International Labour Organization 2020) Policy Brief.

The TER that has received the most regulatory recognition is agency work. The ILO protects agency workers through the Private Employment Agencies Convention, 1997 (No. 181). It aims to regulate private employment agencies and also protect agency workers. The Convention allows member states to prohibit employment agencies from engaging certain categories of workers as agency workers or from operating within certain sectors of the economy.[647] It also prohibits the use of agency workers to replace striking workers engaged by the user enterprise.[648] Despite its extensive protections, it has been argued that it is quite narrow in its scope of application and that it creates regulatory lacunae.[649] The Convention only applies to workers who are employed by private employment agencies or to whom the agencies provide placement services. It excludes other TERs such as those in which the intermediary is not classified as an agency, such as in the case of outsourcing companies.

As relates to OSH, the Occupational Safety and Health Convention, 1981 (No. 155) provides for collaboration in the application of the provisions of the convention between entities that engage in activities simultaneously within one workplace.[650] This provision is important for TERs because the outsourcing company may not have effective control over the client enterprise's premises in which the outsourced workers provide their services and it may not be able to ensure compliance with OSH rights. A possible challenge in its application is the argument that though the

[647] Private Employment Agencies Convention art. 2.
[648] Private Employment Agencies Convention art. 6.
[649] Countouris (n 61) 158.
[650] Occupational Safety and Health Convention (ILO C155) 1981 art. 17.

outsourcing company provides personnel, it may be questionable as to whether this can be counted as part of engaging in activities simultaneously.

To enhance the equality of treatment of outsourced workers and SER workers, one suggested solution that the ILO could adopt is the attachment of rights to the person directly, rather than through the employment relationship.[651] Though it may not be feasible for all employment rights to bypass the employment relationship, this may be possible in the case of OSH, access to vocational training and development, and access to some rights such as freedom of association and social protection.

The right to adequate compensation, leave entitlements (be they annual leave, sick leave, maternity leave or paternity leave), the freedom from discrimination, the freedom of association and right to collective bargaining and the right to safe working conditions are some of the important rights due to outsourced workers. Member states should take it upon themselves to adopt these rights into their national legislation for the benefit of outsourced workers.

[651] ILO, *Synthesis Report of the National Dialogues on the Future of Work* (Preprint edition, International Labour Office 2017) 46.

5.3.3 Job security

Termination of employment is regulated primarily by the Termination of Employment Convention, 1982 (No. 158), and the supporting Termination of Employment Recommendation, 1982 (No. 166). Though the two instruments do not specifically mention TERs in the same way that they refer to temporary employment, they are relevant to outsourcing TERs in that they apply to all employed persons. They provide for substantive and procedural fairness in the termination of employment relationships.

Substantive fairness relates to valid reasons justifying the termination, and these should be related to the worker's conduct or capacity, or the employer's operational requirements.[652] On the other hand, procedural fairness includes adherence to the relevant notice periods, the worker's right to defend himself before being terminated, the right to appeal against the termination, the provision for severance pay and other separation benefits, and the right to a certificate of employment.[653] For redundancies, the requirement is that employers consult with the relevant workers' representatives and notify the relevant competent authority of the terminations before they are carried out.[654]

[652] Termination of Employment Convention (ILO C158) arts. 4-6; Termination of Employment Recommendation (ILO R166) arts. 5 and 6.
[653] Termination of Employment Convention (ILO C158) arts. 7-12; Termination of Employment Recommendation (ILO R166) arts. 7-18.
[654] Termination of Employment Convention (ILO C158) arts. 13 and 14; Termination of Employment Recommendation (ILO R166) arts. 19-26.

These two ILO instruments provide for termination of employment where it is initiated by the employer. For outsourced workers, this provides a unique challenge in that the workers relate with two authority figures, who may both potentially terminate the relationship. Since the outsourced worker's employer is deemed to be the outsourcing company, there is a regulatory gap in terms of the termination by the client enterprise. None of the ILO instruments provides for this.

5.3.4 The ILO proposed Convention concerning Contract Labour

An important international instrument that would have been instrumental in the protection of outsourced workers is the 1998 ILO proposed Convention concerning Contract Labour. The main aim of this proposed convention was to come up with labour standards specific to TERs to ensure the protection of this category of NSW workers. Article 1 defines contract labour as:

> "work performed for a natural or legal person (referred to as a "user enterprise") by a person (referred to as a "contract worker") where the work is performed by the contract worker personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an employment relationship under national law and practice and where either: the work is performed pursuant to a direct contractual arrangement other than a contract of employment between the contract worker and the user enterprise; or, the contract worker is provided for the user enterprise by a subcontractor or an intermediary."

As noted in the definition, contract workers provide services to the user enterprise under conditions of dependency that would meet the requirements of the common law control test. However, this provision of services is not a direct contractual employment relationship; rather it is based on the contractual agreement between the intermediary and the user organization. That is the basis of the

provision of services by outsourced workers to client enterprises. In this sense, outsourced workers could be considered to be contract workers who fall within the scope of workers envisaged by the proposed Convention. Those excluded from the proposed convention are workers with a recognized employment contract with the user enterprise and agency workers.[655]

The proposed convention then defines an intermediary as "a natural or legal person who makes contract workers available to a user enterprise without becoming formally the employer of these workers."[656] The outsourcing company provides outsourced workers to client enterprises, in line with a service contract. In Kenya, as was established in the cases of *Abyssinia v KEWU* and *AAWU v Kenya Airways,* the outsourcing company is considered to be the employer of the outsourced workers; the relationship between the outsourced workers and the outsourcing company is an employment relationship. From this definition, outsourcing companies would not be considered intermediaries for purposes of the proposed convention.

It may seem then that the convention's definition of intermediaries envisages entities such as agencies since they engage workers and place them in organizations without being employers. However, article 2 is clear in its exclusion of private employment agencies from the proposed convention's scope. A private employment agency is defined as a person who provides services

[655] Proposed Convention concerning Contract Labour 1998 art. 2.
[656] Proposed Convention concerning Contract Labour art. 1.

that match employment applications with employment offers without becoming a party to the pursuant employment relationships.[657]

Perhaps, if the proposed convention was to be adopted, further clarification would need to be provided as to which entities fall within the definition of an intermediary. One may wonder though whether the intention of the convention was to that employer status be removed from entities such as outsourcing companies. Nonetheless, despite this uncertainty, the provisions of the proposed convention may be useful if they could be extrapolated to form guidelines to protect outsourced workers.

Article 3 of the Proposed Convention provides for the health and safety of contract workers. It urges member states to adopt measures that prevent accidents and health injuries to contract workers as they perform their work. Further, contract workers should be compensated when they sustain occupational injuries or diseases during the performance of their contract labour.[658] Since the jural correlative of a right is a duty, it would be useful to consider who owes these health and safety duties.[659] Since the outsourced workers relate with two authority figures, there would need to be clarity as to whether this duty would be expected of the outsourcing enterprise or the client enterprise.

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[657] Private Employment Agencies Convention art. 1.
[658] *Kibos Sugar v Stephen Adie* (n 475).
[659] Lazarev (n 465).

Article 4 of the proposed Convention highlights the right to adequate remuneration and social insurance contributions. It explains that the obligations to fulfil these responsibilities should be clearly determined. This would provide an opportunity for member states to ensure the delineation of obligations between the authority figures that the outsourced workers relate to, for remuneration and social insurance contributions. In addition, the proposed convention calls for the equal treatment of contract workers and SER workers such as the directly employed workers of the user enterprise. It requires equality in terms of freedom of association, anti-discrimination, remuneration, social security, maternity protection, working time and other working conditions, and OSH.[660]

This proposed convention drew so much criticism that it was eventually withdrawn.[661] Nevertheless, the ILO has not stopped its efforts towards seeking the protection of outsourced workers and other contract workers. Due to the controversy caused by the proposed Convention, the Committee on Contract Labour dropped the term contract labour but still made provisions for them in the workers it identified as requiring protection. To be precise, the ILO identified those in need of protection to include persons who,

> "perform work personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an

[660] Proposed Convention concerning Contract Labour arts. 5 and 6.
[661] Countouris (n 61) 161.

employment relationship under national law and practice but where the person who performs this work does not have a recognized employment relationship with the user enterprise."[662]

This definition includes outsourced workers since they may be considered to have relationships of dependence with the client enterprise yet they do not have an employment contract with the client enterprise.

5.4 ADOPTION OF ILO LABOUR STANDARDS IN KENYA

The ILO has played a key role in setting the bare minimum labour standards that protect workers globally. It has developed fundamental conventions that apply to all workers and whose rights employees are entitled to whether or not the conventions have been ratified. These fundamental rights are the freedom of association, the protection from forced labour, the protection from child labour and the protection from discrimination.[663] In addition, the ILO has adopted conventions and recommendations that specifically cater for the different NSW categories.[664] This subsection determines the extent to which Kenya has adopted the ILO labour standards in its legal system.

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[662] The Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour, *Record of Proceedings*, International Labour Conference, 86th Session, Vol II (Geneva 1998) 11.
[663] ILO Declaration on Fundamental Principles and Rights at Work.
[664] This is discussed in section 5.3.

Kenya became an ILO member state on 13th January 1964.[665] As of 2020, Kenya had ratified 50 of the ILO conventions, of which 7 were fundamental conventions. Kenya ratified three of the fundamental conventions on the day that it became an ILO member, namely, the Forced Labour Convention, 1930 (No. 29), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and the Abolition of Forced Labour Convention, 1957 (No. 105). It later ratified the Minimum Age Convention, 1973 (No. 138) on 9th April 1979. Finally, it ratified three other fundamental conventions on 7th May 2001, namely, the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Worst Forms of Child Labour Convention, 1999 (No. 182). It is yet to ratify the Freedom of Association and Protection of the Right to Organize Convention, 1948 (ILO C087). It is worth noting though that even though the country has not ratified this convention, the requirements of the convention have already been incorporated into the national laws.[666]

Kenya seems to have a clean record with the ILO in that the government provides the necessary reports and in general reports overall compliance with the ILO labour standards.[667] Kenya has attached great importance to the ILO labour standards. One illustration of this is the entrenching of the ILO labour standards in the Constitution of Kenya, 2010. Article 41 provides for the right to adequate compensation, the right to reasonable working conditions and the freedom of

[665] ILO, 'International Labour Standards Country Profile: Kenya' (n 518).
[666] This is evidenced in the Labour Relations Act.
[667] ILO, 'International Labour Standards Country Profile: Kenya' (n 518).

association. Other ILO labour standards guaranteed by the Constitution include protection from forced labour and inhuman treatment, the right to strike, and economic and social rights.[668] Freedom of association is also guaranteed under article 36 of the Constitution of Kenya, 2010.

The Kenyan labour law framework consists primarily of these main statutes: The Employment Act 2007, Labour Institutions Act 2007, the Work Injury Benefits Act 2007, the Labour Relations Act 2007, the Occupational Safety and Health Act 2007 and the Employment and Labour Relations Court Act 2011. These pieces of legislation aim to comply with the ILO labour standards as much as possible. The Kenyan government considers itself strictly bound by the conventions it has ratified and strives to fulfil the obligations arising therefrom.[669] In terms of the interpretation of legislation, this must be done to comply with the requirements of the general rules of international law.[670] The following subsections discuss the measures that Kenya has taken to adopt the four fundamental labour rights. This is followed by a discussion on Kenya's efforts to adopt labour standards specific to outsourcing TERs.

Some of the key law enforcement measures that Kenya has taken to protect workers from forced labour include the Counter Trafficking in Persons Act, No. 8 in 2010, as well as the establishment of the Counter Trafficking in Persons Advisory Committee in 2014. Additional measures that the

[668] Constitution of Kenya art 30, 37 and 43.
[669] Constitution of Kenya art 2(6).
[670] Constitution of Kenya art 2(5).

CEACR recommended in its 2019 direct request to Kenya was the repeal or amendment of section 266 of the Penal Code which classifies the offence of unlawful compulsory labour as a misdemeanour.[671] The Committee recommended that the offence attracts higher commensurate penalties.

There is an express prohibition on the worst forms of child labour in Kenya and of the employment of children below the age of thirteen years.[672] In addition, one of the key measures that Kenya has adopted in alignment with the Minimum Age Convention, 1973 (No. 138) is the provision for free and compulsory basic education.[673] The obligation of ensuring that children attend school on the parents and further there is a prohibition on the employment of children in work opportunities that prevent them from attending school.[674]

Concerning outsourcing TERs, there were three main thematic areas in terms of the challenges faced by outsourced workers, namely, employment status, employment rights and benefits, and job security. The Employment Relationship Recommendation, 2006 (No. 198) encourages member states to formulate national policies and to clarify the scope of national laws so that all workers who are engaged in arrangements akin to employment relationships, including workers

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[671] ILO NORMLEX, 'Direct Request (CEACR) on the Forced Labour Convention, 1930 (No. 29) - Kenya' (2019) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3995924:NO> accessed 25 February 2021.
[672] Employment Act ss 53 and 56; This is in line with the Worst Forms of Child Labour Convention (ILO C182).
[673] Basic Education Act 2013 s 28(1); Children Act s 7.
[674] Basic Education Act ss 30 and 38.

engaged under TERs, are effectively protected.[675] Kenya is yet to provide clarity in its legislation on the employment status of outsourced workers. Though case law has classified outsourced workers as employees of the outsourcing company, the normative question of who should be bear employer status in outsourcing TERs has not been conclusively addressed. Since the client enterprise exercises day-to-day control over the outsourced workers, ensuring adequate protection of the outsourced workers would ideally also include placing employment obligations on the client enterprise as well.

The ILO ensures equality of treatment primarily through the Equal Remuneration Convention, 1951 (No. 100) which provides for equal pay for work of equal value, and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) which prohibits discrimination on several grounds. Kenya ratified these two conventions on 7th May 2001. However, one of the gaps in terms of applying the principles embodied in these instruments to outsourced workers is that though outsourced workers are engaged in the same premises as directly employed workers of the client enterprise, they have different employers. With that in mind, it may be challenging to draw parallels in terms of comparable treatment.

Job security was the third thematic area identified as part of the peculiarities of outsourcing TERs. The ILO protects this primarily through the Termination of Employment Convention, 1982 (No.

[675] Employment Relationship Recommendation art 1.

158), and the supporting Termination of Employment Recommendation, 1982 (No. 166). Kenya has not ratified this Convention. Nonetheless, the requirements of substantive and procedural fairness have been adopted in Kenya's national laws.[676] For outsourcing TERs, there is however a lack of clarity as to the termination of employment at the behest of the client enterprise.

The Constitution of Kenya, 2010 provides that the general rules of international law shall form part of the law of Kenya.[677] Thus the ILO labour standards apply in Kenya. It is worth mentioning that Kenya has not adopted any specific legislation that is focused on outsourcing TERs aimed at protecting outsourced workers. This may partly be because the ILO itself is also grappling with the protection of outsourced workers and other contract workers. The ILO's proposed Convention concerning contract labour would have been a useful guide for the country, but the proposed convention was never adopted. Nonetheless, the country has, through case law made significant steps towards extending employment protection of outsourced workers in Kenya.[678] Additional improvements to Kenya's employment framework on outsourcing TERs may be borrowed from the best practices depicted in other jurisdictions, which are discussed in the next chapter.

[676] Employment Act part VI.
[677] Constitution of Kenya art. 2(5); Joseph Ndirangu, 'Do Articles 2 (5) and 2 (6) of the Constitution of Kenya 2010 Transform Kenya into a Monist State?' [2013] Available at SSRN 2516706.
[678] See generally chapter 4.

5.5 CONCLUSION

This chapter achieved the third objective which was to review the International Labour Organization's interventions towards the regulation of outsourcing TERs. As can be seen from this chapter, international labour standards must be maintained to achieve uniformity in the rights guaranteed to all workers and avoid a "race to the bottom" mentality. The ILO is the international body that seeks to achieve this uniformity. Four fundamental rights that the ILO seeks to protect have been identified. These fundamental rights apply to all workers. They are the freedom of association, the right to equal treatment, the protection from forced labour and the protection from child labour. Since these rights also draw their origin from the international human rights framework, they are in themselves human rights. Generally, all workers' rights deserve protection but sometimes some categories of workers, such as NSW workers do not receive adequate protection. Consequently, the ILO has progressively developed conventions and recommendations that establish labour standards that are specific to NSWs.

As set out by the ILO in various conventions and recommendations, member states must promote the human dignity of workers by adopting labour standards that enhance the quality of the workers' lives. This means that member states need to recognize and promote workers' rights to proper remuneration, equal treatment and job security, among others. The ILO encourages member states to ratify its conventions and recommendations to incorporate labour standards into their national legislation. However, without a judicial body to enforce the implementation of the labour standards, only a moral obligation rests on member states.

In addition, changing circumstances due to the increase of NSWs sometimes means that these conventions may not apply to all work situations. One such example is the emergence of outsourcing arrangements as a form of employment. As such, the ILO has developed new instruments that are particular to NSWs. For example, the Part-Time Work Convention, 1994 (No. 175) provides for the equal treatment of part-time workers.[679] Also, one of the more recent ILO recommendations, the Social Protection Floors Recommendation, 2012 (No. 202) urges member states to guarantee basic protections to all workers and to progressively grant social protection to as many people as possible.[680]

Concerning the outsourcing TER, Employment Relationship Recommendation, 2006 (No. 198) provides that employment protections should apply to *inter alia* contractual arrangements that involve multiple parties.[681] In addition, the Occupational Safety and Health Convention, 1981 (No. 155) provides for the collaboration between entities that engage in activities simultaneously in the application of the provisions of the convention.[682]

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[679] Article 6 of the Convention states that "statutory social security schemes….shall be adapted so that part-time workers enjoy conditions equivalent to those of comparable full-time workers." In addition, article 8 provides that member states should periodically review the thresholds that they have put in place.
[680] Art 1.
[681] Employment Relationship Recommendation art 4.
[682] Occupational Safety and Health Convention (ILO C155) art. 17.

However, the TER that has received the greatest regulation is agency work.[683] The ILO instrument that would have been the most relevant to the outsourcing TER is the 1998 ILO proposed Convention concerning Contract Labour. Article 1 defines contract labour as work performed for the user enterprise by a contract worker under conditions of dependency and where the contract worker is provided for the user enterprise by an intermediary. It then proceeds to provide for key employment rights that contract workers would be entitled to, such as OSH rights, adequate remuneration and social security.[684]

The novel coronavirus (covid-19) disease has posed particular challenges to NSW workers, with some being laid off from work, their contracts not being renewed, their working hours and pay being reduced significantly, or being informed by their employment agencies that work is no longer available. In light of the covid-19 pandemic, perhaps the time is ripe for countries to investigate, restructure and rebuild their systems, with a particular focus on enhancing the protections granted to NSW workers.[685]

In conclusion, both the domestic and international legal frameworks regulating outsourcing TERs address some of the challenges experienced by outsourced workers within the outsourcing TER. However, there are still gaps at both levels concerning outsourced workers' employment status,

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[683] Private Employment Agencies Convention.
[684] Proposed Convention concerning Contract Labour arts. 3 and 4.
[685] ILO Blog, 'Precarious Workers Pushed to the Edge by COVID-19' (*Work In Progress*, 20 March 2020) <https://iloblog.org/2020/03/20/precarious-workers-pushed-to-the-edge-by-covid-19/> accessed 19 September 2020.

the employment rights of outsourced workers and the job security of outsourced workers. The next chapter explores possible interventions which form the basis of the contribution this research makes to the field. It explores best practices in a bid to bridge the regulatory gap in the regulation of outsourcing TERs.

CHAPTER SIX

BRIDGING THE REGULATORY GAPS IN THE REGULATION OF OUTSOURCING TRIANGULAR EMPLOYMENT RELATIONSHIPS

The previous chapter reviewed the international framework for the regulation of outsourcing triangular employment relationships. It highlighted the labour standards that have been adopted by the International Labour Organization as minimum entitlements. The ILO is an international body that focuses on standard setting in terms of employment rights to avoid a "race to the bottom" mentality. The chapter discussed the fundamental rights that all workers are entitled to under the ILO fundamental conventions. To better understand the ILO's role in standard setting, the chapter also discussed the implementation of the international labour standards as well as the ILO's enforcement mechanism. This was important as it reviewed the labour standards that apply to all workers, in line with the principles of decommodification and human rights. The labour standards are also useful in remedying the unequal bargaining power experienced in employment relationships through paternalistic interference, in line with the theoretical framework.

The review of the international legal framework also focused on the extension of employment protections to NSWs, especially outsourcing TERs. In particular, it discussed the labour standards on employment status, ensuring equality of treatment and job security. The main provisions of the proposed Convention concerning Contract Labour were then discussed. Though this proposed convention never saw the light of day, the provisions are worth consideration as potential

guidelines towards the protection of outsourced workers. It then concluded with an analysis of the extent to which Kenya has adopted the ILO labour standards.

Some of the gaps that were highlighted included the normative question on who should be bear employer status, and whether with that in mind the client enterprise should bear employment responsibilities within outsourcing TERs. A second issue that was not conclusively addressed through the ILO labour standards was the actualization of comparable treatment between outsourced workers and directly employed workers of client enterprises because the two sets of workers are deemed to have different employers. A third gap was the inadequate regulation of the termination of the employment relationship by the client enterprise. These challenges have highlighted the sentiments that the Kenyan employment framework is inadequate to regulate the peculiarities of outsourcing TERs. Each of these regulatory gaps is discussed below, with relevant recommendations on each of them.

6.1 CLARITY ON THE EMPLOYMENT STATUS OF OUTSOURCED WORKERS

The nature of the TER has brought into question the construction of the employment relationship since the TER involves two authority figures. In connection with this, the question arose as to who is the real employer of the outsourced workers. According to Kenyan case law, the position is that the outsourcing company is the employer and that an employment relationship exists between the

outsourcing company and the outsourced worker.[686] However, in certain cases, such a construction may be impractical or it may be to the detriment of the outsourced workers.[687] The enforceability of certain employer obligations against the outsourcing company has been questioned.

To ensure that the work performed by outsourced workers under outsourcing TERs is decent, this study suggests that there be increased clarity on the employment status of outsourced workers.[688] This study suggests that client enterprises should also bear employment status to ensure that outsourced workers are not at risk when it comes to key employment rights.

In addition, courts and other judicial bodies may offer additional support to outsourced workers. For example, courts may go beyond the contractual labels that the parties give themselves within outsourcing TERs, especially where the labels are used to disguise the employment relationship.[689] In doing so, the courts can prevent employee misclassification.

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[686] *Abyssinia v KEWU* (n 38); *Kenya Airways v AAWU* (n 375).
[687] See generally section 4.2.
[688] Decent work is defined in ILO, *Non-Standard Employment around the World* (n 1) 247 as 'work that is productive and delivers a fair income, with a safe workplace and social protection, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men'.
[689] *Kenneth Kimani v Kibe Muigai* (n 323).

6.1.1 Addressing employee misclassification through outsourcing

In Kenya, as in many other jurisdictions globally, there is a binary divide between employment and self-employment.[690] The determination of employment status is central to employment law because it sets the basis for granting employment rights and other benefits that arise from the employment relationship. It is, therefore, essential to determine the nature of the relationship between parties engaged in work arrangements. Though often the parties may label their relationship as either employees or independent contractors, the determination of employment status goes beyond these labels that the parties give themselves and is construed as a matter of law.[691]

Determining the nature of employment relationships as a matter of law is important because the parties, especially the employers, may intentionally misclassify the employment relationship to evade employment obligations. In 2006, the ILO developed the Employment Relationship Recommendation (No. 198) to provide clarity on the classification of work relationships as employment relationships in a bid to curb employee misclassification.[692] The Recommendation recognizes that it is sometimes difficult to establish employment relationships because of employee misclassification and workers may be deprived of employment rights where they are

[690] This was discussed in section 4.2.
[691] *Kenneth Kimani v Kibe Muigai* (n 323).
[692] This was discussed in section 5.3.1.

indeed due. However, employee misclassification within outsourcing TERs has not been conclusively curbed through this instrument.[693]

Some of the practical measures that have been adopted globally to address the misclassification of TER workers include the adoption of the "primacy of facts" principle. This principle was alluded to in the Employment Relationship Recommendation.[694] However, in applying the judicial common law tests to outsourcing TERs, the primacy of facts principle as depicted in the control test is downplayed. Despite the day-to-day control that the client enterprise has, there is no employment relationship found to exist between it and the outsourced workers.[695]

Consequently, employers sometimes make use of outsourcing TERs to transfer employees to outsourcing companies and in doing so alter their employment status, despite maintaining control over the workers.[696] Such situations are not regulated by the employment laws in Kenya, which may leave the workers without adequate redress. For example, in this study, 11% of the respondents initially worked with the client enterprise before being outsourced. Their employment status had been converted from SER workers to outsourced workers. They were concerned about

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[693] Countouris (n 61) 161.
[694] Employment Relationship Recommendation art. 9 provides that 'For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.'
[695] *Abyssinia v KEWU* (n 38).
[696] *Harrison Karani v Insight Management* (n 25).

the change of guard because they continued in the same roles, but were reporting to a different entity.

In Australia, employee misclassification is classified as 'sham arrangements' and is prohibited through the Fair Work Act, 2009. In addition to expressly prohibiting the misrepresentation of employment relationships as independent contracting arrangements, the Act also prohibits the dismissal of employees for purposes of re-engaging them under alternate contractual arrangements to perform essentially the same work.[697] Adopting such an approach would be useful towards using outsourcing TERs as an employee misclassification tool to evade employment responsibilities.

Another interesting approach is the express limitation of outsourcing arrangements to non-core business activities. For example, Ecuador's Constitution provides that "all forms of job insecurity and instability are forbidden, such as labour brokerage and outsourcing for the company's or employer's core and usual activities…"[698] The express prohibition of outsourcing of core activities would be a useful tool to regulate companies that engage outsourced workers to provide services related to the company's essential business activities to circumvent requirements to hire its own personnel. This would also avert situations such as what was depicted in *Harrison Karani v Insight*

[697] Australian Fair Work Act 2009 ss 357 and 358.
[698] Constitution of the Republic of Ecuador 2008 art. 327.

Management Consultants in which employees from Pwani Oils Limited were converted into outsourced workers on short-term contracts.[699]

Similarly, the Indonesian Labour Code provides that companies should not use outsourced workers "to carry out their enterprises' main activities or activities that are directly related to the production process except for auxiliary service activities or activities that are indirectly related to the production process."[700] Though the Indonesian laws attribute employer status to the outsourcing company, they provide that outsourced workers are entitled to reclassification as employees of the client enterprise where outsourcing is adopted for core business activities.[701]

6.1.2 Attribution of employer status within outsourcing TERs

The question on employer status relates to who should bear the responsibility as the employer: the outsourcing company or the client enterprise. This question is of great significance in TERs since the workers relate with two authority figures who have different employer functions.[702] There are four main possibilities as to who is, or should be, considered to be the employer of the outsourced workers: the outsourcing company, the client enterprise, both or neither. The laws in various jurisdictions embody these four possibilities. This sub-section identifies the four possibilities as

[699] *Harrison Karani v Insight Management* (n 25).
[700] Act of the Republic of Indonesia Concerning Manpower 2003 art. 66.
[701] Act of the Republic of Indonesia Concerning Manpower art. 66(2) and 66(4).
[702] See generally section 4.2.5.

depicted in the laws of various parts of the world. It thereafter determines the best approach that Kenya could adopt.

A principle of common law that courts attach great value to is the need to examine the substance of a particular relationship to determine its true nature. The focus should not solely be on the wording of the contract or the description given by the parties themselves.[703] Due regard is also given to how the parties carry out their affairs under the contractual agreement. As such, the courts apply the common law tests to determine the nature of a relationship in an objective manner.[704]

Within outsourcing TERs, the outsourced workers relate with two authority figures and there is a relationship between the outsourcing company and the outsourced worker, and a relationship between the client enterprise and the outsourced worker.[705] The evaluation of these two relationships using the common law tests depicted inconsistencies. For instance, the outsourcing company often exercises minimal or no day-to-day control over the outsourced workers, yet despite not meeting this dominant test, the employment framework in Kenya holds that there exists an employment relationship between the outsourced worker and the outsourcing company.[706] Here, it seems, the law creates a fictitious employment relationship between the two parties.

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[703] *Kenneth Kimani v Kibe Muigai* (n 323).
[704] These tests, as discussed in section 4.2.2 are the control test, the integration test, the test of mutual obligations, the economic reality test and the multi-factor test.
[705] See generally sections 2.3.3 and 2.3.4.
[706] *Abyssinia v KEWU* (n 38).

The law in Kenya depicts a categorical view of the outsourcing company as the legal employer.[707] Within the TER, the outsourcing company is seen as the entity that can offer the outsourced workers a sense of stability. However, this attribution of employer status may potentially open up the door for abuse, especially where outsourcing TERs may be used as a means to alter employees' terms and conditions of employment. For instance, an employer may transfer its workers to an outsourcing company which merely offers payrolling services.[708] In this way, the outsourcing company's purpose may merely be a means through which the client enterprise pays the workers, yet they are deemed to be employees of the outsourcing company. The client enterprise would, therefore, effectively avoid its responsibilities to the workers.

To address these shortfalls, the law could still preserve the role of the outsourcing company but it should then put up significant barriers to prevent abuse through the adoption of TERs. For example, the law may restrict the use of intermediaries and the roles that they play within the TER. In France, the law restricts the length of temporary contracts to eighteen months.[709] Temporary workers cannot be placed with client enterprises for longer durations of time, which means they cannot have a semblance of permanence. A similar approach could be adopted in Kenya, through which outsourcing contracts place outsourced workers with client enterprises for short, limited

[707] As discussed in section 4.2.
[708] *Kennedy Akado v Bollore* (n 428); *Harrison Karani v Insight Management* (n 25).
[709] Code du Travail (France) 1910 art. L1242-8-1.

durations of time, to avoid a semblance of permanence.[710] It is appreciated though that this may not always be possible, depending on the nature of work that is being performed by the outsourced workers.

Relatedly, Belgium offers restrictions as to the reasons for an employer engaging workers through an intermediary.[711] The Law of 24 July 1987, provides that where temporary work is required through a TER, fixed-term contracts should be used. The law limits the nature of tasks performed under such contracts to temporary work, such as responding to a temporary increase in workload, undertaking exceptional work, or engaging the workers for a duration of up to six months after which they are directly hired by the client enterprise.[712]

A different approach that the law in some jurisdictions has adopted is geared towards protecting the affected workers by minimizing the incentives for abuse. This may be through ensuring parity in terms of pay and working conditions between the affected workers and the directly employed workers of the client enterprises. For example, the European Union laws require that the basic working conditions of temporary agency workers engaged under a TER be the same as those that

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[710] It was found in section 3.3 that the feelings of dissatisfaction with the employment terms and conditions were heightened when the outsourced workers identified with the client enterprise as employer. Reducing the semblance of permanence could be a useful measure to curb the feelings of dissatisfaction.
[711] Nicola Countouris and others, 'Report on Temporary Employment Agencies and Temporary Agency Work: A Comparative Analysis of the Law on Temporary Work Agencies and the Social and Economic Implications of Temporary Work in 13 European Countries' (International Labour Office 2016) 40.
[712] Belgian Law of 24 July 1987 on Temporary Work, art 2.

would apply if they were directly employed workers.[713] If such an approach was adopted in Kenya, then it would reduce the incentives to use outsourcing as a form of cheap labour.[714]

The second possibility when it comes to employer status is to attribute it to the client enterprise. This is especially where the TER is used to deviate from the legislative requirements. For example, in France, a TER worker is deemed to have been an employee of the client enterprise from the first day of their contract if the worker is employed through the intermediary for a duration longer than eighteen months or for an unauthorized purpose.[715] This approach is seen as an exception rather than a rule, but it is still a useful line of defence to protect TER workers.

A curious case is that of the UK, which often fails to attach legal employer status to either of the authority figures. Taking a formalistic contractual approach, the client enterprise is not considered the employer due to a lack of evidence of a contract between itself and the worker.[716] On the other hand, the position of the intermediary is not well established. Based on the nature of the specific engagement, an employment relationship may be deemed to exist.[717] However, the practice is the exclusion of an employment relationship based on the failure to attain mutuality of obligations.[718]

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[713] Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers 2002 (COM/2002/0701 final - COD 2002/0072) art. 5.
[714] This is one of the issues that was protested against in *AAWU v Kenya Airways* (n 41); also Burrows (n 39).
[715] Code du Travail (France) art. L.124–7.
[716] *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318.
[717] *McMeechan v Secretary of State For Employment* [1996] EWCA Civ 1166.
[718] *Montgomery v Johnson Underwood Ltd* (n 716).

By failing to meet the common law tests, outsourced workers would neither be considered employees of the client enterprise nor the outsourcing company.

On the other hand, some countries such as the United States have adopted a joint employer approach in which there are joint employer responsibilities between the two authority figures.[719] This approach places some employer obligations on the client enterprise, even though it does not formally attach employer status to it. For example, the overall responsibility for working conditions may be placed on the client enterprise.[720] This may relate to health and safety provisions, but it may also extend to provisions such as hours of work, holidays and rest periods. These approaches are useful measures towards protecting outsourced workers, and other TER workers in that they ensure that employer responsibilities are not evaded.

In Kenya, the outsourcing company is deemed to be the outsourced workers' employer.[721] This study holds that this position could remain only if the outsourcing company can be held accountable in terms of liability for unfair labour practices and compliance with dismissal procedures. One possible challenge relates to the degree of risk borne by the outsourcing company. Despite being deemed as the legal employer, the outsourcing company does not fully take on the

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[719] *Browning-Ferris Industries of California Inc v NLRB* [2018] USCA (US Court of Appeals for the District of Columbia Circuit); *Miller & Anderson Inc v Tradesmen International and Sheet Metal Workers International Association* [2016] National Labor Relations Board.
[720] Davidov (n 11) 733.
[721] *Abyssinia v KEWU* (n 38).

role of a traditional employer.[722] The client enterprise plays a great part in this role through its day-to-day control over the outsourced workers, and thus it should bear a significant portion of the risks of an employer. Depending on the roles played by the two authority figures, the proposal is that the attribution of the nominal employer should be recognized. And depending on the situation, the nominal employer could be the outsourcing company. The Kenyan labour laws do not have provisions for joint employer status, and this would be an important addition to the employment framework to enhance the protections of outsourced workers within outsourcing TERs.

In addition, it is argued that it may not always be practical to classify the outsourcing company as the employer, especially where it exercises virtually no control over the outsourced workers as they perform their duties. For example, as an employer, the outsourcing company would be required to guarantee the outsourced workers' freedom of association and right to collective bargaining.[723] Since collective bargaining is often specific to the workplace and the outsourced workers' place of work is the client enterprises' premises, the outsourcing company may be powerless in terms of enforcing this right. The outsourcing company cannot grant organizational rights to a trade union, to hold meetings and recruit members, because such powers lie with the client enterprise.[724]

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[722] This was discussed in section 4.2.5.
[723] Freedom of Association and Protection of the Right to Organise Convention (ILO C087); Right to Organise and Collective Bargaining Convention (ILO C098); Constitution of Kenya arts. 36 and 41; Labour Relations Act.
[724] Trade union access to employers' premises is guaranteed through the Labour Relations Act s 56.

In contrast, in the analysis of the relationship between the client enterprise and the outsourced workers, the nature of outsourcing TERs depicts that the client enterprise holds some employer functions. This is despite the lack of an employment contract between the parties. The current employment laws are thus not in line with the reality of the relationship between the parties within outsourcing TERs. Bearing this in mind, the legal framework should be altered so that some of the liabilities resting on the outsourcing company as an employer, are imposed on the client enterprise.

It is suggested that, in Kenya, employer status be attributed to client enterprises where outsourcing TERs are used by employers for purposes of avoiding their employment responsibilities.[725] For example, where regular employees are transferred to outsourcing companies, the preferred line of defence for the outsourced workers could be the attribution of employer status on the client enterprise. This would be similar to the approach adopted in France in which the *Code du Travail* attributes employer status to the client enterprise where the TER is used to evade the legislative requirements. [726]

The placement of employer status on both authority figures would be a useful protective measure, in that it would remove the incentives to use outsourcing TERs for illegitimate purposes. Extending the employer status to the client enterprise would be beneficial in that it would reflect the reality

[725] As was the case in *Harrison Karani v Insight Management* (n 25).
[726] Code du Travail (France) art. L1242-8-1.

of the relationship within outsourcing TERs and would create legal certainty. Secondly, it will remove some of the impractical responsibilities that are currently deemed to rest with the outsourcing company. Under the new status, the client enterprise will shoulder responsibilities towards granting the outsourced workers similar employment terms and conditions to its directly employed workers. Employer status would also enable the client enterprise to dismiss the outsourced workers, in the true sense of the word, and they would then bear the burden of complying with the dismissal procedures required by employment laws.[727] Imposing liability for unfair dismissal of outsourced workers on the client enterprises would help strengthen the outsourced workers' job security, as the client enterprises would not have unchecked freedoms in the context of dismissal.[728]

Although there are benefits in extending the employer status to the client enterprises, this could potentially pose disadvantages to the client enterprises. A main driving force for the growth of outsourcing is that it promotes flexibility in the labour market.[729] Through outsourcing an organization can focus on its core tasks and bring in other workers to handle the non-core elements.[730] The company can engage workers through an intermediary based on its particular needs and then let them go with minimal repercussions when their services are no longer needed.

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[727] Termination of Employment Convention (ILO C158); Termination of Employment Recommendation (ILO R166); Employment Act part VI.
[728] Additional measures on enhancing the job security of outsourced workers are discussed in section 6.3.
[729] Wabwile and Namusonge (n 106).
[730] Hakim (n 98).

If the client enterprise takes on employer responsibilities, then this may reduce the flexibility of the business model because it would then be bound by strict labour rules. Admittedly, the flexibility of the entire labour market could potentially be reduced. And as was mentioned by respondents 9 and 13, an advantage of outsourcing TERs is that they offer increased flexibility.[731]

Also, placing employer status solely on the client enterprise may affect unionization. This is because its workforce would be deemed to have 'grown' through the inclusion of outsourced workers. This can reduce the representativeness of the trade unions that have recruited members of the client enterprise. As a result, the trade unions may not be able to claim certain rights, such as recognition and the resultant benefits.[732] In addition, if the client enterprise is solely viewed as the employer then it may no longer validly be a TER, but rather would be a direct employment relationship.

One possible solution could be that the laws on employment status be amended so that the client enterprise is viewed as the employer only if the relationship involves a long duration of time, such as eighteen months, for purposes of ensuring access to employment rights and benefits. This would ensure that where there is a long-term relationship between the client enterprise and the outsourced workers, then the client enterprise shoulders the burden of granting employment rights. It is

[731] See section 3.2.2.1.
[732] Labour Relations Act part VII.

recognized that only a small percentage of workers would potentially benefit from this provision, as not all outsourced workers have long-term relationships with a single client enterprise.[733] It would, however, minimize the feelings of discrimination due to comparisons with directly employed workers since these comparisons usually arise when there are long-term relationships in which the outsourced workers identify with the client enterprise as their employer. In the study, 49% of the outsourced workers felt that the client enterprise was their employer since that was the entity managing their day-to-day tasks.[734]

It could also be argued, though, that it may not matter who is described as the employer within outsourcing TERs; what is important is that the responsibilities of the parties reflect the reality of the circumstances. This study argues that the requirements of the law should be that where a person exercises control, then that person should be held accountable for those specific situations. As such, it would be easier to determine the responsibilities and obligations of the two authority figures in outsourcing TERs based on the control aspects that they exercise within the outsourcing TERs. Although such an approach would mean that there would be specific aspects over which each of the authority figures would individually be responsible, there would also be the possibility of joint and several liability for most situations.[735] This would provide the outsourced workers with

[733] This was discussed in section 3.2.4.
[734] See Table 3.2.
[735] Marco Rocca and Ann Vrijsen, 'Climbing the Chain: The Belgian System of Joint Liability for the Payment of Wages' [2020] Praca i Zabezpieczenie Spo\leczne 11; Green (n 358); Domenico Garofalo, 'The Identification of the Employer in the Context of Organisational Fragmentation: The Italian Legal Framework' (2020) 13 Italian Labour

the freedom to choose between the two authority figures when attributing liability, or even address both parties simultaneously.

Such joint and several liability is provided for in the legislation of some jurisdictions, such as the United States.[736] It is suggested that such an approach could be adopted in the Kenyan employment framework. Under such an arrangement, the client enterprise would be held responsible for the aspects that are directly related to the outsourced workers' service delivery.[737] The client enterprise would also bear the responsibility for ensuring a safe working environment and would be held responsible for discriminatory conduct against the outsourced workers when they are on its premises.[738] On the other hand, since the outsourced worker's relationship with the outsourcing company is usually more stable, the outsourcing company would cater for the outsourced workers' long-term rights, such as a pension.[739]

In addition, it is suggested that both the client enterprise and the outsourcing company be held jointly and severally liable for any contractual terms and conditions of employment that would be

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Law e-Journal 29; Xiaohui Ban, 'Identifying Labour Relationship in the Sharing Economy: Judicial Practice in China', *Regulating the Platform Economy* (Routledge 2020); This was also alluded to in *Wrigley v AG* (n 322) para 30.

[736] Title VII of the Civil Rights Act of 1964; Green (n 358) 944.

[737] It was found that the day-to-day management of 84% the outsourced workers was primarily handled by the client enterprises. Consequently, 49% of the outsourced workers felt that the client enterprise was their employer. Through the recognition of joint employer status, the client enterprise would be liable for its role in the management of the outsourced workers' day-to-day tasks.

[738] See section 4.3.4.

[739] All the employment contracts within the study were between the outsourced workers and the outsourcing companies. The recognition of joint employer status would ensure the liability of outsourcing companies with respect to employment duties that subsist between the transitions from one client enterprise to another.

deemed contrary to the employment laws or any relevant CBAs. Such a provision would require the two authority figures to cooperate when drawing up the outsourced workers' employment contracts. This is because the two authority figures could be deemed jointly and severally liable for failure to grant outsourced workers employment rights such as leave entitlements, fair working hours and adequate remuneration.

6.2 ENSURING EQUALITY OF TREATMENT

One of the identified issues affecting outsourced workers is the less favourable employment conditions and lower pay than directly employed workers of client enterprises, who perform the same or similar work.[740] Though the wages paid to outsourced workers come from the outsourcing company, they initially come from the client enterprise's fees to the outsourcing company. After the outsourcing company makes its deductions, it pays the remainder to the workers. In principle, outsourced workers are entitled to the basic terms and conditions that are due to workers in general, but the nature of outsourcing TERs means that these rights often do not materialize.[741]

Employment contracts inevitably have unequal bargaining power which means the employees may be unable to negotiate for favourable employment terms and conditions.[742] Employment laws are a means through which this bargaining power can be levelled out.[743] Similarly, within outsourcing

[740] This was discussed in section 3.3.
[741] See section 4.3.1.
[742] Ackers (n 148).
[743] See generally chapter 3.

TERs, due to unequal bargaining power, the outsourced workers may not be able to negotiate with the two authority figures about their pay and other employment terms and conditions. If left unregulated, the unequal distribution of power within outsourcing TERs may work to the detriment of the outsourced workers.

The main aim of ensuring equality of treatment is an attempt to align, as much as possible, the labour protections of outsourced workers with that of the SER, so that outsourced workers receive a comparable level of protection.[744] Relatedly, these measures may be seen as attempts to ensure that outsourcing TERs are not used in ways that undermine their legitimate purpose, in that it is not used to unduly disadvantage this category of workers and increase their precariousness.

Since outsourced workers relate with two authority figures, this study suggests that client enterprises should also bear employer responsibilities so that outsourced workers granted employment rights such as adequate remuneration, and OSH, among others. Some of these rights are granted to all workers by the international labour standards, but this study suggests additional room for improvement in Kenya's employment framework in light of the challenges experienced by outsourced workers in Kenya.[745]

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[744] ILO, *Non-Standard Employment around the World* (n 1) 251–255.
[745] The international labour standards are discussed in chapter 5 whereas the challenges experienced by outsourced workers in Kenya are discussed in chapter 3.

This subsection investigates some of the key measures for ensuring equality of treatment between outsourced workers and SER workers. It first discusses the application of the principles of non-discrimination as a means of removing the legal barriers to equal treatment. It then identifies the rights related to freedom of association and collective bargaining. These are rights that all workers are entitled to, however, outsourced workers face practical challenges in terms of access to these rights. Two possible interventions are discussed, namely, the legislative approaches that ensure that outsourced workers can unionize, and secondly the collective responses that bridge the gap. CBAs would be an effective labour protection that can address the shortfalls in outsourced workers' access to employment rights and benefits.

6.2.1 Non-discrimination

Several jurisdictions provide for non-discrimination between workers, and by extension the equal treatment of NSW workers and SER workers. For example, in the European Union, the EU Directive on part-time work seeks to ensure that the working conditions of part-time workers are not less favourable than comparable full-time workers.[746] In addition, the EU Directive on temporary agency work seeks to ensure that the working conditions of agency workers are not less favourable than the direct workers of the user organization. These principles of non-discrimination have been applied in several other countries to protect NSW workers.

[746] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work 1997 [31997L0081].

In some countries, non-discrimination relates to the basic terms and conditions of employment. These countries include Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, France, Finland, Germany, Greece, Iceland, Hungary, India, Ireland, Israel, Italy, Republic of Korea, Latvia, Luxembourg, Mexico, Namibia, Netherlands, Norway, Peru, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, the UK and Uruguay.[747] On the other hand, in some countries, the equality of treatment primarily relates to remuneration. This includes Brazil, China, Colombia, Ethiopia, Romania, Russian Federation and Switzerland.[748]

In the UK, the Employment Relations Act 1996 and the National Minimum Wage Act 1998 provide a framework for employment rights applicable to all workers. The UK law provides that a person is entitled to receive the basic minimum wage if the individual is a worker.[749] In using the term worker the scope of protection extends beyond employees and protects NSW workers.

Though most of these laws have been effective in redressing the plight of NSW workers, this is not the case in all countries. In 2006, the Republic of Korea enacted the Act on the Protection, etc. of Fixed-Term and Part-Time Employees also referred to as the Irregular Workers Protection

[747] ILO, *Non-Standard Employment around the World* (n 1) 254.
[748] ILO, *Non-Standard Employment around the World* (n 1) 254.
[749] United Kingdom National Minimum Wage Act 1998 s 1(2).

Act.[750] The primary purpose of the Act is to redress discrimination against fixed-term and part-time employees.[751] After enacting the Irregular Workers Protection Act, the country experienced an increase in NSW workers and it seemed that there was even greater polarization. The Act introduced a discrimination correction system which between July 2007 and June 2009 handled a total of 2,152 cases. The outcome of the cases was that 32% were dismissed and 40.5% were withdrawn. The reasons for the dismissals and withdrawals were that there was no comparable employee or that the discrimination was justified.[752]

To prove that there has been discrimination, the expectation is that the worker is compared to another worker engaged in a similar position by the same employer. Similarly, if this requirement was to be applied to outsourced workers, the same challenge may be experienced since their perceptions of unequal pay are in comparison to the direct workers of the client enterprise. This study found that 71% of the outsourced workers felt that they received a lower salary than the permanent employees of the client enterprise. However, outsourced workers are employees of the outsourcing company and thus have a different employer from the directly employed workers of the client enterprise.[753] Consequently, there would be challenges in proving discrimination, despite the outsourced workers' perceptions.

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[750] The Japan Institute for Labour Policy and Training, 'Labor Policy on Fixed-Term Employment Contracts' (2010) 103.
[751] Korean Act on the Protection, etc. of Fixed-Term and Part-Time Employees 2006 art 1.
[752] The Japan Institute for Labour Policy and Training (n 750) 115.
[753] See section 4.2.3.

In addition, there are some legal loopholes within some of these laws that sometimes limited their effectiveness. For example, in India, the Contract Labour (Regulation and Abolition) Central Rules, 1971 provide for equality of the basic terms and conditions of work for SER workers and NSW workers. However, there is no requirement for the principal employer to make up for the shortfall in remuneration where non-compliance is found concerning a TER.[754] An effective means of redressing non-compliance perhaps would be a requirement for shared liability between the two authority figures.

To ensure the effective protection of outsourced workers in Kenya, the existing employment framework may need to be adapted to factor in these arrangements where the employment terms and conditions are determined by two authority figures. This would be in line with the conclusions of the Tripartite Meeting of Experts on Non-Standard Forms of Employment which expressed that:

> "Governments, employers and workers should use social dialogue to develop innovative approaches, including regulatory initiatives that enable workers in non-standard forms of employment to exercise these rights and enjoy the protection afforded to them under the applicable collective agreements. These initiatives should include the promotion of effective bargaining systems and mechanisms to determine the relevant employer(s) for the purpose of collective bargaining, in coherence with international standards, national laws and regulations."[755]

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[754] ILO, *Non-Standard Employment around the World* (n 1) 254.
[755] ILO Governing Body, 'Conclusions of the Meeting of Experts on Non-Standard Forms of Employment' (Conditions of Work and Equality Department 2015) para 7(f).

6.2.2 The concept of shared liabilities

Section 6.1.2 discussed the attribution of joint employer status to enhance the regulation of outsourcing TERs. Joint employer status is central to the concept of shared liabilities, through which outsourced workers can claim employment rights from both the outsourcing company and the client enterprise.[756] Shared liabilities would especially be important for occupational safety and health (OSH). The Occupational Safety and Health Act, 2007 requires occupiers to ensure the safety of all persons working at the workplace.[757] Thus client enterprises would be required to ensure the OSH of outsourced workers. However, as was recognized by *Chitsaka v Rea Vipingo*, compensation to outsourced workers may be made by being an employer under the WIBA or as an occupier under the OSHA.[758] This may form the basis for the concept of shared liabilities in Kenya.

In Australia, the Work Health and Safety Act places the primary duty of care on the person conducting a business or undertaking and requires such person to ensure the OSH of all workers it engages or causes to be engaged.[759] The broad definition of worker encompasses both directly employed workers and outsourced workers. In its application, this section has been applied to grant

[756] ILO, *Non-Standard Employment around the World* (n 1) 276–281.
[757] Occupational Safety and Health Act s 6; this duty of care is also emphasized in the Occupiers Liability Act s 3.
[758] *Chitsaka v Rea Vipingo* (n 479).
[759] Australian Work Health and Safety Act 2011 s 19(1).

outsourced workers a primary duty of care from both authority figures within the outsourcing TERs.[760]

The concept of shared liabilities can also be applied beyond OSH. For example, in Peru and Chile there is joint and several liability between the two authority figures for the statutory wage and social security of TER workers.[761] A similar approach has been adopted in Germany through its Minimum Wage Act.[762] This would be an important means of ensuring access to employment rights within outsourcing TERs. This would factor in the day-to-day control that client enterprises have over the outsourced workers. And even if employer obligations would primarily rest on the outsourcing company, allowing outsourced workers to seek employment rights from client enterprises may provide incentives to client enterprises to select credible outsourcing companies and to ensure that they keep the workers' interests at heart.

Systems of shared liabilities can be used together with incentives for client enterprises to ensure that outsourcing companies comply with existing employment laws to reduce their exposure to joint and several liability.[763] For example, in Israel client enterprises are held liable if the outsourcing company does provide the outsourced workers with the required employment

[760] Richard Johnstone and Andrew Stewart, 'Swimming against the Tide: Australian Labor Regulation and the Fissured Workplace' (2015) 37 Comp. Lab. L. & Pol'y J. 55, 81.
[761] ILO, *Non-Standard Employment around the World* (n 1) 278.
[762] German Act Regulating a General Minimum Wage (Mindestlohngesetz – MiLoG) 2014 ss 20 and 21.
[763] Rocca and Vrijsen (n 735); Green (n 358); Garofalo (n 735); Ban (n 735).

rights.[764] However, it may be exempted from this responsibility if it has taken reasonable steps to ensure that the rights have been granted. This essentially incentivizes client enterprises to enquire into the outsourced workers' welfare.

6.3 ENHANCING JOB SECURITY THROUGH FLEXICURITY

Some of the challenges noted in Kenya, concerning outsourcing TERs relate to the employment status of outsourced workers, access to equitable pay and employment benefits including social protection and training, as well as the termination of employment.[765] Other related challenges include freedom of association, such as outsourced workers' representation and collective bargaining. To curb the practice of the transference of business risks through outsourcing and consequently improve the working conditions of outsourced workers, it would be beneficial to improve job security through legislative intervention.[766] This would protect the outsourced workers. However, bearing in mind the economic interests of the two authority figures that the outsourced workers relate with, the measures taken should not be so rigid as to curb the flexibility offered by NSWs as this would be akin to being against NSWs.

To reconcile the interests of the multiple parties, a possible solution could be the combination of flexibility and security, otherwise known as "flexicurity." The rationale is that regulation of the

[764] Lilach Lurie, 'Labour Market and Employment Policy in Israel' [2015] European Training Foundation.
[765] This is discussed in chapter 3.
[766] ILO, *Synthesis Report of the National Dialogues on the Future of Work* (n 651) 46.

labour market does not have to lead to economic barriers; instead, certain forms of (re)regulation can be conducive to improved economic performance.[767] This concept was coined by the Netherlands in the mid-1990s and the model has since been adopted in several European countries. The model aims to offer four forms of flexibility, namely numeric flexibility, functional flexibility, wage flexibility and working-time flexibility.[768] This resonates with the model of market segmentation, which is the current reality in which there is an increasing level of NSWs such as outsourcing.

In addition, the flexicurity model aims at offering security at four different levels, namely job security, income security, employment security and combination security. Employment security, job security and income security are three similar yet slightly distinct forms of security. Though in common parlance, a distinction is rarely made between them, it may be useful to consider the conceptual distinctions. Job security involves the security of holding a specific position in which the worker uses his specific skills and qualifications.[769] Income security may refer to the security of receiving a salary, but on a broader definition may also include receiving money from the state through pension schemes or unemployment benefits, or receiving money from family sources.[770]

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[767] Wolfgang Streeck, *Social Institutions and Economic Performance: Studies of Industrial Relations in Advanced Capitalist Economies* (SAGE Publications 1992).
[768] Ton Wilthagen and Frank Tros, 'The Concept of "Flexicurity": A New Approach to Regulating Employment and Labour Markets' (2004) 10 Transfer: European Review of labour and research 166, 171.
[769] Dasgupta (n 301) 5.
[770] Dasgupta (n 301) 5.

Employment security may be defined as protection against loss of employment.[771] On the other hand, combination security refers to work-life balance; it allows workers to balance their job responsibilities and their private commitments and responsibilities.[772]

The flexicurity model is not a one-size fits all model but rather involves trade-offs between these forms of flexibility and security.[773] For example, in Germany and France, there seems to be a high level of job security, which is combined with functional flexibility. In the UK, what is depicted is high levels of numeric flexibility combined with employment security. In the Netherlands, the focus on flexicurity has led to a shift in focus from job security to employment security. And in Denmark, the predominance is numerical flexibility as combined with both employment security and income security. The beauty of the flexicurity model is that it offers many options in terms of protective models. It does not need to be transplanted between countries, but can be modified to fit varying socio-economic needs in different jurisdictions.

6.4 CONCLUSION

This chapter achieved the fourth objective which was to identify best practices that could be adopted to enhance the regulation of outsourcing triangular employment relationships in Kenya. It discusses some of the measures that have been taken in select jurisdictions to bridge the regulatory

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[771] Dasgupta (n 301) 4.
[772] Wilthagen and Tros (n 768) 171.
[773] Kongshoj Madsen, 'Flexicurity – a New Perspective on Labour Markets and Welfare States in Europe' (Informal meeting of EU Employment and Social Policy Ministers, Villach, Austria, 2003).

gaps in the regulation of outsourcing TERs. These were assessed based on three thematic areas that had been identified by the outsourced workers in Kenya during the fieldwork, namely, the employment status of outsourced workers, the employment rights of outsourced workers and the job security of outsourced workers.

The measures to provide clarity on the employment status of outsourced workers include addressing employee misclassification and rethinking the attribution of employer status within outsourcing TERs. This study recommends the adoption of joint employer status between the outsourcing company and the client enterprise. To ensure equality of treatment, this chapter discussed the application of the principle of non-discrimination, as well as the concept of shared liabilities. In addition, the chapter considered the enhancement of the job security of outsourced workers through the flexicurity model.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION

The overall objective of this study was to analyze the legal regulation of outsourcing triangular employment relationships (TERs) in Kenya to find out whether it is sufficient to protect the rights of outsourced workers in order to identify possible interventions that can enhance the protection of outsourced workers. To meet this general objective, the study specifically investigated the nature of outsourcing TERs based on the experiences of outsourced workers in Kenya. Since this objective is exploratory, a qualitative approach was adopted in which outsourced workers engaged under outsourcing TERs were interviewed.

The narratives were analyzed using a hermeneutic phenomenology approach. The peculiarities of outsourcing TERs were highlighted through the narratives related to employment status, employment rights, and job security. The independent variables are clarity on the employment status of outsourced workers within outsourcing TERs, minimum standards on the employment benefits and working conditions for outsourced workers and improved job security for outsourced workers in Kenya. These independent variables featured as thematic areas in the collection of the empirical data.

The second specific objective of the study was to assess the suitability of the current legal employment framework in protecting outsourced workers in Kenya, in light of the peculiarities of

outsourcing TERs. The data was collected through desk study and analyzed through a juridical-legal approach. The study found that both the legislative definitions and the judicial tests on employment status focus on the SER and do not envisage the outsourcing TER. However, though case law classifies outsourced workers as employees of the outsourcing company, the law does not provide for the relationship between the outsourced workers and the client enterprise, which is not an ideal situation.

In assessing the suitability of the legal framework as relates to the second independent variable, it was found that outsourced workers are entitled to the Constitutional rights granted to all workers. In addition, they are entitled to basic employment rights as employees of the outsourcing company. However, it was noted that there were gaps in terms of enforcing the rights to unionize, and the division of employer function between the two authority figures. Concerning the third independent variable, it was found that the legal framework did not provide for remedies where dismissal was at the behest of the client enterprise or due to the termination of the service contract.

The third specific objective was met through the study's review of the International Labour Organization's interventions towards the regulation of outsourcing TERs. It reviewed the labour standards that apply to all workers, in line with the principles of decommodification and human rights. The labour standards are also useful in remedying the unequal bargaining power experienced in employment relationships through paternalistic interference, in line with the theoretical framework.

Finally, the study identified best practices that can be adopted to enhance the regulation of outsourcing TERs in Kenya. The data was collected through desk research as a secondary data collection technique and was analyzed through a comparative approach. These included addressing employee misclassification and the attribution of employer status within outsourcing TERs, the application of the principles of non-discrimination and shared liabilities, as well as considerations of a flexicurity model. This proved the hypothesis that clarity on the employment status, employment rights and job security of outsourced workers will enhance the legal regulation of outsourcing triangular employment relationships in Kenya. This chapter summarizes the findings that were revealed by research and thereafter makes recommendations.

7.2 SUMMARY OF FINDINGS

This study recognized that in a bid to enhance economic growth and adapt it to the rapidly changing circumstances, new and more flexible means of service delivery were often considered essential.[774] Globally, this flexibility had been achieved through NSWs, which the ILO has classified into four categories, namely, temporary employment, part-time work, disguised employment and TERs.[775] The use of outsourcing TERs in Kenya is one of these new, flexible service delivery methods.

[774] Countouris (n 61).
[775] ILO, *Non-Standard Employment around the World* (n 1) 7.

Outsourcing is a TER which encompasses a relationship between three parties, namely, an outsourcing company, an outsourced worker, and a client enterprise.[776] Outsourced workers relate with two authority figures, unlike the standard employment relationship (SER) which involves a direct employment relationship between an employer and employee. To meet the needs of each of the parties, as well as those of society in general, outsourcing TERs should guarantee the outsourced workers reasonable and equitable employment standards; and this is best done if the outsourcing TERs are properly regulated.[777] If this is not done, this employment model which seems so promising and innovative may lead to precarious employment, to the detriment of the workers.[778] It would be unfair to adopt employment models that plunge the affected workers into precarious positions, regardless of the benefits that the NSW would have.[779]

In the absence of specific legislation that focuses on outsourcing TERs in Kenya, precisely such precarious situations have arisen in Kenya.[780] The precariousness of outsourced workers may be attributed to the lack of employment rules and regulations that factor in NSWs since the employment laws were developed with the SER in mind. As a result, outsourced labour in Kenya is often treated as a commodity, in direct contravention of the ILO international standards.[781] It may be argued that due to the absence of legislation to regulate all the relevant aspects of

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[776] Van Eck (n 11).
[777] Chapter 4 discusses the legal framework regulating outsourcing TERs in Kenya.
[778] Kalleberg (n 213); Weinkopf (n 269).
[779] ILO Blog (n 685).
[780] This was discussed in chapter 5.
[781] See chapter 5 for an overview of the ILO standards.

outsourcing TERs, Kenya may be deemed to have failed to meet the ILO's labour standards and its decent work agenda, which essentially should protect all workers.

In evaluating the peculiarities of outsourcing TERs, the lived experiences of outsourced workers were examined.[782] Three main thematic areas were highlighted, namely, the employment status of outsourced workers, the employment rights and duties of outsourced workers and the job security of outsourced workers.[783] One of the main contributions of this study was the development of a typology of outsourced workers that captured the diversity of outsourced workers in Kenya based on their job types and their reasons for choosing outsourcing arrangements. As such, outsourced workers were classified as convenience short-term outsourced workers, professionally-skilled outsourced workers and basic skilled outsourced workers.[784] It was found that the perceived advantages and disadvantages of outsourcing arrangements varied within these categories of outsourced workers.

In terms of employment rights and benefits, this study found that outsourced workers felt inadequately integrated into their workplaces.[785] They also felt a general sense of dissatisfaction

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[782] This was discussed in chapter 3.
[783] As was discussed in section 2.3, the independent variables of this study were clarity on the employment status of outsourced workers within outsourcing TERs, minimum standards on the employment benefits and working conditions for outsourced workers and improved job security for outsourced workers in Kenya. These independent variables featured as thematic areas in the collection of the empirical data.
[784] See section 3.2.3.
[785] 33% of the respondents felt that the management and SER workers looked down upon them because they were not integrated into the organization.

with their employment rights when they compared themselves to the directly employed workers of the client enterprise.[786] In addition, this dissatisfaction was more common among the basic-skilled outsourced workers. The study also found that outsourced workers desired a collective voice yet they faced barriers against unionization.[787] It was found that though outsourced workers have a right to unionization, this was barely actualized. [788]

Another significant contribution of this study was the appreciation of the varying levels of job security within outsourcing TERs since the outsourced workers relate with two authority figures. This study found the traditional concepts of job security too narrow to incorporate the experiences of outsourced workers.[789] It found it beneficial to classify job security as either outsourcing company job security or client enterprise job security.[790]

The legal framework for outsourcing TERs in Kenya was then discussed.[791] It was found that the legislative definitions of employment status, as well as the common law judicial tests, focus on the

[786] It was found that 67% of the outsourced workers in this study lamented over the inadequacy of their employment rights as compared to SER workers. The perceived inadequacies related to their salaries and allowances, access to loan facilities, access to medical insurance cover, access to training opportunities, the management styles for outsourced workers as compared to SER workers, and lack of unionization. These were discussed in section 3.3.
[787] In the study, though 89% of the outsourced workers were not trade union members, 87% felt that trade unions could potentially assist them with general matters, as well as issues that were specific to outsourcing.
[788] Constitution of Kenya arts. 36 and 41; Labour Relations Act s 4.
[789] See also Dasgupta (n 301) 2–5.
[790] This was discussed in section 3.4.
[791] This was discussed in chapter 4.

SER and do not envisage the various NSWs. [792] Nonetheless, several cases had been determined by the Kenyan courts that provided clarity on the employment status of outsourced workers in Kenya.[793] It was found that the law classifies outsourced workers as employees of the outsourcing company, but it does not provide for the relationship between the outsourced workers and the client enterprise.

Employment status sets the basis for the granting of employment rights and benefits. As such, the party that has a duty to grant employment rights is the outsourcing company.[794] However, this sometimes poses a challenge in that the client enterprise is the party that exercises day-to-day control over the outsourced workers.[795] Relatedly, the law would require the outsourcing company to ensure that the provisions on substantive and procedural fairness in the termination of outsourced workers are complied with.[796] The employment laws do not envisage situations where the employment relationship is terminated by the client enterprise or due to the termination of the service contract between the authority figures.[797] Where this happens, though the outsourced worker is out of a job, it is not deemed to be a dismissal.

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[792] Employment Act s 2; Employment and Labour Relations Court Act s 2; Labour Relations Act s 2; Labour Institutions Act s 2; *Christine Lopeiyo v Pere* (n 340) expounded on the control test, the integration test, the economic reality test and the mutuality of obligations test; *Ready Mixed Concrete case* (n 368) discusses the multi-factor test.
[793] *AAWU v Kenya Airways* (n 41); *Wrigley v AG* (n 322); *Kenya Airways v AAWU* (n 375); *Abyssinia v KEWU* (n 38); *Harrison Karani v Insight Management* (n 25).
[794] See generally section 4.3.
[795] It was found that the day-to-day management of 84% the outsourced workers was primarily handled by the client enterprises. Consequently, 49% of the outsourced workers felt that the client enterprise was their employer.
[796] See Employment Act ss 41, 43 and 45.
[797] This was discussed in sections 4.4.2 and 4.4.3.

This study also discussed the ILO labour standards which set the bare minimum rights that all workers globally are entitled to.[798] These fundamental rights are the freedom of association, the right to equal treatment, the protection from forced labour and the protection from child labour.[799] In addition, the labour standards that extend protection to outsourcing TERs were examined.[800] It was found that the key ILO instrument that would have specifically catered for outsourced workers is the 1998 ILO proposed Convention concerning Contract Labour. Though this instrument was never adopted, it can still be considered a useful guideline on relevant provisions that would apply to outsourcing TERs.[801]

Finally, the study identified best practices from other jurisdictions that would be key in bridging the regulatory gap in outsourcing TERs.[802] It was found that to provide clarity on the employment status of outsourced workers, it is important to address employee misclassification and to rethink

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[798] See generally ILO, *Guide to International Labour Standards* (n 546).
[799] Forced Labour Convention (ILO C029); Freedom of Association and Protection of the Right to Organise Convention (ILO C087); Right to Organise and Collective Bargaining Convention (ILO C098); Equal Remuneration Convention; Abolition of Forced Labour Convention (ILO C105); Discrimination (Employment and Occupation) Convention (ILO C111); Minimum Age Convention; Worst Forms of Child Labour Convention (ILO C182).
[800] Equal Remuneration Convention; Discrimination (Employment and Occupation) Convention (ILO C111); Occupational Safety and Health Convention (ILO C155); Termination of Employment Convention (ILO C158); Termination of Employment Recommendation (ILO R166); Part-Time Work Convention; Home Work Convention (ILO C177); Home Work Recommendation (ILO R184); Private Employment Agencies Convention; Employment Relationship Recommendation.
[801] This was discussed in section 5.3.4.
[802] See chapter 6.

the attribution of employer status within outsourcing TERs.[803] One possible measure that this study found essential would be the adoption of joint employer status within outsourcing TERs. Further, to ensure equality of treatment, useful measures would be the effective application of the principles of non-discrimination and shared liabilities.[804] An additional measure that was identified was the flexicurity model as a means of enhancing the job security of outsourced workers.[805]

7.3 RECOMMENDATIONS FROM THIS STUDY

In light of the findings of this study, it is clear that the current employment framework in Kenya falls short when it comes to the regulation of outsourcing TERs. The employment laws envisage the SER and do not adequately take into account NSWs such as outsourcing. This leaves leeway for the client enterprises and outsourcing companies to manage outsourcing TERs in a way that may be to the detriment of the outsourced workers, which may leave them working under precarious conditions. As a short-term measure to enhance the regulation of outsourcing TERs, this study recommends the strengthening of the existing laws to provide an enabling legislative framework for outsourcing. In the medium to long-term, it would be ideal to develop separate legislation that focuses on outsourcing TERs.

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[803] The study relied on the Australian Fair Work Act ss 357 and 358; Constitution of the Republic of Ecuador art. 327; Act of the Republic of Indonesia Concerning Manpower art. 66; Code du Travail (France) art. L1242-8-1; Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers art. 5.

[804] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work (n 746); Korean Act on the Protection, etc. of Fixed-Term and Part-Time Employees art. 1; Australian Work Health and Safety Act s 19; German Act Regulating a General Minimum Wage (Mindestlohngesetz – MiLoG) ss 20 and 21.

[805] Wilthagen and Tros (n 768) 171.

7.3.1 Inclusion of equality of treatment provisions in the Employment Act

Currently, there is no legal requirement that the outsourced workers' wages and working conditions should be the same as those that they would receive if they were directly employed workers of the client enterprise. This has a direct impact on the outsourced workers' rights to fair labour practices and their right to equal treatment, especially where outsourced workers perform tasks similar to the directly employed workers but experience differential treatment at the workplace. It is recommended that section 5(1) of the Employment Act is amended to include a provision that:

> (1) It shall be the duty of the Minister, labour officers and the Industrial Court—
> …
> (c) "to ensure that outsourced workers are afforded equal treatment with employees of the client enterprise or, as the case may be, with employees of the intermediary, for performing work which is essentially similar, under similar conditions and requiring similar qualifications."

7.3.2 Inclusion of joint and several liability provisions in the Employment Act

At present, Kenyan laws do not provide for joint and several liability for unfair dismissal. It is recommended that, as a short-term measure, section 45 of the Employment Act be amended to provide for joint and several liability for unfair dismissal within triangular employment relationships. Placing fair dismissal responsibilities on the client enterprise may reduce cases where the client enterprise breaches the substantive fairness requirements. The law may also place

a restriction on termination clauses that lead to the automatic termination of the outsourced workers' employment relationship when their dealings with the client enterprise cease.

It is also recommended that when the client enterprise and the outsourcing company attempt to disguise the nature of the employment relationship to escape their employment obligations, they should be held jointly and severally liable for it. The latter presupposes situations whereby the relationship in question has the semblance of an employment relationship, but has a different status contractually. This would comply with the Employment Relationship Recommendation, 2006, which encourages member states to prevent employers from imposing a false status on workers by way of disguised employment to evade employment legislation.

7.3.3 Regulation of Wages Orders for outsourced workers

To cover the interests of the outsourced workers, a medium-term measure could be that the appropriate wages be determined in a sectoral mode. Such sectoral determinations on minimum wages should also include provisions relating to working hours, rest periods, and leave entitlements. This would potentially curb exploitative practices through the use of outsourcing. As far as such minimum wages are concerned, as the client enterprises and outsourcing companies agree on the fees payable, they would take into account the agreed minimum wage. The drafting of such regulations could be through the issuance of Regulation of Wages Orders, which are subsidiary to the LIA. By these proposed Regulations of Wages Orders, the Kenyan laws would comply with the Equal Remuneration Convention, 1951 (No. 100) which provides that all workers

are entitled to adequate wage levels.[806] The anticipated challenges could be that this may reduce the incentives to engage workers through outsourcing TERs. It would thus be important to consider the economic situation of the labour market as a whole so that this is not adversely affected.

7.3.4 Full adoption of worker status in employment laws

In light of the increasing number of NSW workers in Kenya, a long-term measure would be the worker status is fully embraced in Kenyan employment laws. At present, worker status is recognized by the Constitution of Kenya, 2010 which grants all workers four basic rights, namely, the right to fair remuneration, the right to reasonable working conditions, the right to join a trade union and the right to go on strike.[807] To accommodate persons who are not classified as employees but who are not completely independent, the ILO has made provisions for the category designated as 'worker'.[808] The ILO requires that international labour rights, especially fundamental rights, be granted to all workers to avoid exploitation and decrease vulnerability. The latter seems to be the best solution for outsourced workers since they would continue to enjoy employment protections despite any challenges that may be faced in trying to attribute employee status.

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[806] Equal Remuneration Convention art. 2.
[807] Constitution of Kenya art. 41.
[808] See section 5.3.1.

7.3.5 Need to adopt comprehensive legislation to protect outsourced workers

A proposed long-term measure is the adoption of a comprehensive legislation to regulate outsourcing TERs in a bid to protect outsourced workers in Kenya. The legislation could be modelled after the proposed Convention on Contract Labour. It should define the terms outsourcing, outsourced worker, outsourcing company and client enterprise. It should promote adequate protection in relation to the payment of outsourced workers' wages and social insurance contributions. Additional measures include to prevent accidents and injuries occurring in the course of the provision of outsourcing services. The legislation should ensure that the responsibilities for fulfilling the above financial obligations are clearly delineated between the outsourcing company and client enterprise. The Act of Parliament should expressly require that outsourced workers receive the same employment protections as employees engaged under a SER. Adequate remedies, including penalties such as fines and imprisonment, should be imposed where the two authority figures contravene the provisions that would protect the outsourced workers' employment rights.

7.3.6 Involvement of the Judiciary

Employers should not be allowed to abuse the practice by disguising employment relationships. Doing so would conflict with the ILO Employment Relationship Recommendation, 2006. This instrument requires member states to protect the rights of workers who are in some form of an

employment relationship.[809] The wording of the instrument depicts that the protections are not limited to SER workers; the protection should also include TER workers.[810] Should an outsourcing company and client enterprise collude to deprive employees of their rights by pretending that they are not employees yet the working conditions depict otherwise, then they would have violated the labour standards as prescribed by the ILO. Should the authority figures attempt to deprive the outsourced workers of their rights, the courts should use their discretion to impose sanctions as necessary. It is commendable that Kenyan courts are already intercepting circumstances of potential abuse of outsourcing TERs.[811] In evaluating the definition of an employee, the courts generally consider outsourced workers to be employees of the outsourcing company.[812] Additional measures would be to have judicial clarification on the relationship between the outsourced worker and the client enterprise.

7.3.7 The role of trade unions

In the absence of legislation governing unionization within outsourcing TERs, it is recommended that there be agreements between all parties to outsourcing TERs which allow trade unions to enter the client enterprises' premises to represent outsourced workers. It is suggested that the control that the client enterprises exercise over outsourced workers be used as a basis for granting trade unions access rights to the workplace. The argument is that outsourced workers may be in a

[809] Employment Relationship Recommendation art. 2.
[810] Employment Relationship Recommendation art. 4.
[811] *Harrison Karani v Insight Management* (n 25).
[812] *Abyssinia v KEWU* (n 38).

vulnerable position when they are performing their services at the client enterprise's premises and this would justify the latter granting rights to trade unions to facilitate their activities towards outsourced workers. This study proposes that if a trade union has sufficient representation, it should be allowed to enter the premises where the workers are physically located, for purposes of recruitment of members or meetings with current members. Through this, it will be more likely that the outsourced workers' rights to unionize and to collective bargaining will materialize.

In addition, Kenya could also adopt a similar practice as that of the United States which adopts a "joint employer approach" which allows TER workers to be unionized in the same bargaining unit as the client enterprise employees.[813] The rationale is that the two sets of workers share a community of interests because they perform their services for the same entity.[814] Enabling outsourced workers in Kenya to collectively bargain with all relevant parties, alongside the directly employed workers of the client enterprise, would be an effective means of ensuring equality of treatment.

7.3.8 Conclusion

This section has discussed the main recommendations of this study on employment status, enhancing equitable treatment of outsourced workers and achieving job security. The ultimate

[813] *Browning-Ferris Industries of California Inc. v NLRB* (n 719).
[814] *Miller & Anderson Inc. v Tradesmen International and Sheet Metal Workers International Association* (n 719).

recommendation is that a separate piece of legislation is drafted that focuses on TERs. It should set out the necessary definitions such as what constitutes a TER, the definition of a worker and an outsourcing company, among others. It would also stipulate the obligations of the authority figures, especially in cases where joint and several liability is to be borne. The rights of outsourced workers should also be stated in clear terms, making specific reference to the employment status of the outsourced workers, adequate remuneration, unionization and termination of employment.

7.4 RECOMMENDATIONS FOR FURTHER RESEARCH

This study focused on the regulation of outsourcing TERs in Kenya, to the exclusion of other NSWs. A recommendation would be that studies be conducted on the regulation of the other NSWs in Kenya, namely, temporary employment, part-time work and disguised employment. In addition, the analysis of other TERs such as agency work and franchising would also be recommended. This would be useful towards the effective regulation of NSWs to reduce the precariousness often associated with such arrangements.

It is also recommended that further investigations are conducted on the adoption of worker status in Kenya to embrace a broader approach towards employment protections. It would be worthwhile to investigate the extent to which employment protections could attach to persons directly as human rights, and if so, which protections can be granted under such a model.

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APPENDICES

APPENDIX 1: INTERVIEW GUIDE FOR OUTSOURCED WORKERS IN KENYA

Section A: Biographical information

1. Age

2. Gender: a) Male b) Female

3. Marital status: a) Single b) Married c) Divorced/Separated d) Widow/Widower

4. Highest level of education: a) Primary school b) Form 4 c) College/University

Section B: Employment Status

1. Job Title/ Grade
2. How did you get the job?
3. Why did you decide to get a job as an outsourced worker?
4. Nature of employment: a) Casual b) Contract c) other (explain)
5. Does your employment have a pre-determined duration?
6. Work location (Name of organization)
7. Name of organization that pays your salary
8. How long have you been working in your current role?

a) Less than 1-year b) 1-2years c) 3-4 years d) 5 years or more

9. How long have you been serving through the outsourcing company?

a) Less than 1-year b) 1-2years c) 3-4 years d) 5 years or more

10. Name of organization with whom you negotiated your contract of employment
11. Do you have a written contract of employment? a) Yes b) No

If yes, what is the name of the organization which the contract indicates is your employer?

12. Who do you think of as your employer?
13. Do you feel you have the same status as directly employed staff in the organization? Explain

Section C: Evaluation of Work Situation

1. Do you think that certain groups of people are more likely to be outsourced workers? Explain
2. Do you think that you are paid the same as the directly employed staff in the organization? Explain
3. Do you have the same rights as directly employed staff in the organization? Explain
4. Do you have the same benefits as directly employed staff in the organization (e.g. insurance cover, medical cover, loan facilities, travel allowance and other allowances)? Explain
5. Do you have the same responsibilities as directly employed staff in the organization? Explain
6. Do you have the same training opportunities as directly employed staff in the organization? Explain
7. How would you describe your work environment? a) Conducive b) Not conducive

Explain

8. Do managers in the organization treat you in the same way as directly employed staff? Explain
9. Have you ever considered raising any issue about your contract as an outsourced worker or any other aspect of your job? Explain
10. What are the available mechanisms for redress of work-place grievances? Are they available to you as an outsourced worker?

Section D: Job Security

1. What level of job security do you enjoy as an outsourced worker? Explain
2. Does your contract provide for termination of the relationship? Explain
3. Do you worry about your contract coming to an end? Explain

Section E: Final Thoughts

Are there any other issues/challenges concerning your job as an outsourced worker that you feel the law can address?

APPENDIX 2: INTRODUCTORY LETTER

Dear Sir/Madam,

I am conducting a study to analyze the legal regulation of the outsourcing triangular employment relationship in Kenya. I would be grateful if you would give of your time and knowledge. If you do not wish to answer any question please say so and proceed to the next question. This is an academic exercise and the information obtained will remain confidential.

Thank you

Melissa Muindi

G80/52610/2018

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APPENDIX 3: NACOSTI ETHICS APPROVAL

REPUBLIC OF KENYA

NATIONAL COMMISSION FOR SCIENCE,TECHNOLOGY & INNOVATION

Ref No: **931188**

Date of Issue: **16/March/2020**

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