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**INFANT CONTRACTUAL CAPACITY AND
PROTECTION BY THE LAW, A SPECIAL STUDY
INTO CONTRACTS OF EMPLOYMENT IN KENYA**

**DISSERTATION SUBMITTED IN PARTIAL
FULFILMENT OF THE REQUIREMENTS FOR THE
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BY

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DEDICATION

This write up is dedicated to my late Father, Peter Aganyoh Kimori who passed away when I was just starting my 3rd Form. He would only punish one with words!, which still linger in my mind.

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Rest thee in peace.

**“..... the exploitation of childhood....
constitutes the evil the most hideous,
the most unbearable to the human heart...”**

**Albert Thomas
First Director of the International
Labour Office (1919-1932)**

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I. Introduction

This dissertation intends to examine the subject of infant contractual capacity and protection by the law with specific reference to contracts of employment in Kenya. It will show whether the Employment Act has room for the employment of infants and if so under what conditions. The introductory chapter starts by defining who an infant is per the Kenyan law and international standards. It will show how various statutes that deal with the issue of infants determine who are the infants differently.

We will consider the meaning of infant contractual capacity will be considered. Herein will be discussed what a contract of employment is and who has capacity to enter such a contract. It will be further stated the meaning of infant contractual capacity, which will be compared and contrasted with the United Kingdom's infant contractual capacity as the Kenyan laws borrow heavily from those of the English people. While on the infant contractual capacity, one will try to state the issue of this capacity of infants in relation to the various Kenyan statutes and acts to find out whether they have a uniform approach to infants majority age. This will have to state as to what the law states as to the marriage laws of Kenya, the Election laws, the Criminal law, the law of Registration of Persons in reference to the majority age. While on this, particular point attention will be held to the Employment Act to bring out the issues that touch on the core of our study. Besides one will still have to refer to the International World of the United Nations to be able to find out what the United Nations have put in place for the protection of infants in respect to contracts of employment.

1.2 Summary of the Chapters

This dissertation will focus on the contract of employment, with specific reference to Part IV of Employment Act, which deals with the employment of children and bring out those areas where it is felt that, though the law is in place, it is either inadequate or does not serve that which the draftsman had originally intended. The common law will be examined to bring out those areas that relate with the subject and compare them with what the Employment Act has, not forgetting African customary law on capacity to contract where applicable. All these will be compared to enable one to compare and

contrast which of each need to be applied in our Kenyan case and which one should be changed and for what reasons.

Chapter two will focus on the general law of contractual capacity. Under this chapter we will discuss what contractual capacity is, who has the capacity to contract and what conditions need to be in place for one to contract, who lacks it and why. The chapter will consider the legal and natural persons and include the reasons that make the other persons to lack contractual capacity. We will disclose who these 'persons' are and why they need special protection when they enter into contracts and what those who intend to contract with them need to know to be able to appreciate the contracts they enter into are valid and binding.

In our third chapter, we will trace the history of Infant Contractual Capacity from the origin of our laws – the British Laws. It will disclose whether minors were allowed to contract, what the law stated then the common law and the present legal system.

Our attention will be drawn to part IV of the Employment Act which is solely set aside for children. It will bring out the protection, if any, which the Act accords the minors. The chapter will disclose the enforcement, modalities and the punishment it gives the offenders.

Under the same chapter we will analyse the Children's Bill 2001. Here, our attention will be drawn to part II of the Bill which itemises the rights and protection of minors. We will try to find out whether the Bill as proposed protects the infant against contracting due to his incapacity.

At this juncture, one will state why study the topic. What reasons motivated the study and what issues it has brought out. We intend to show that the law on this issue is either not adequate in Kenya or not very clear. It lacks judicial decisions on the issue and an attempt will be hard to try and identify the loopholes in the law, try and put it together for codification someday. It will also be stated as to whether Kenyan laws as they stand or exist conforms with the International standards elsewhere in the world. A concluding summary will be done from which the recommendations will be proposed.

CHAPTER 1

1.0 Definition of Infant

The word infant appears to have the same meaning as that of a child. Collins English Dictionary defines an infant as a baby or a very young child. The Cambridge International Dictionary of English gives the meaning of an infant as a very young child.

Different societies and organizations have different definitions of a child. According to international standards, a child is defined as any human being below the age of 18 years, unless the national laws recognize the age of majority is earlier attained.¹ A child is further defined as a person below the age limit of 15 years, set by the ILO's minimum age convention.² The convention further provides through Article 2(3) that no child can be employed in any economic sector below the age designated for completion of compulsory education which should not be less than 15 years. This suggest that a child is 15 years old or under.

While the United Nations Convention on the Rights of the Child defines children as persons under the age of 18 years (unless the age of majority is attained earlier). Its Article 32(2) requires states parties to have regard to ".....the relevant provisions of other instruments" which clearly include the ILO's Conventions and Recommendations. This provision has been challenged in defining who a child is and lies at the very heart of child contractual capacity.

Thus, in several countries, the age limit is different and therefore the term 'child' varies from country to country depending on the domestic law. In the Philippines and Hong Kong for example, the age limit is 14 years and 15 years respectively. Egypt has the lowest at 12 years.³

¹ ILO, 1996 b p.7

² UNICEF, 1997 p.25

³ Introduction Speech by Martha Santos Pairs, Director, Division of Evaluation, Policy and Planning, UNICEF 1996 p.1

The convention allows developing countries whose economies and educational facilities are insufficiently developed to initially specify a minimum age of 14 years.⁴ Thus the International Instruments while not preferring a fixed definition, do provide the basic minimum ages and conditions for work which are to be applied throughout the world.

On the regional plane, the African Charter on the Rights and Welfare of the Child defines a child as any human being below the age of 18 years. A young child needs the protection of society. Human society has always taken upon itself the duty of protecting its children. Compared to adults, children are physically and mentally weak. Their limited experience in life demands that society pays special attention to them.

The age of majority which determines when an individual is no longer under legal disabilities because of his age is based on the above two considerations. The law provides an age limit above which an individual is regarded as having attained the age of majority.

To protect infants from disadvantageous or overreaching bargains, the law protects the infant against his inexperience in life which may enable an adult to take unfair advantage of him, or to induce him to enter into a contract which though in itself fair, is simply improvident, as in a case where a minor for a fair price agrees to buy something that he can not afford. This principle is the basis of the general rule that a minor is not bound by his contracts and secondly the law should not cause unnecessary hardships to adults who deal fairly with minors with the reason that they lack contractual capacity.

1.1 Infant Contractual Capacity

In Kenya the word infant has several meanings depending on what is being considered. Under the current Kenyan laws, there is no uniform definition of the word infant/child. For example, to qualify for adoption, one has to be below 18 years. To qualify for a driving license or to be granted a liquor license, one has to be at least 18 years of age.

⁴ ILO: Economically Active Population: 1950-2010 Vol.II.Africa. Fourth Ed.Geneva,1997.

On the other hand, to be legally employed, the age limit is 16 years and above, while under the Registration of Persons Act, Cap 107 Sec.(2), one qualifies for a national identity card when they reach 18 years of age. Similarly, the three main laws relating to children: The Children and Young Persons Act (CYPA), Cap 141, the Guardianship of Infants Act and the Adoption Act, Cap 143, Section (2), have different definition of a child. Both the Adoption Act and the Guardianship of Infants Act, Cap 144, Section (2), define a child as anyone under 18 years. Under the (CYPA), a child is below 14 years, a juvenile between 14 and 16 years and a young person between 16 and 18 years.

Kenya recognises five types of marriage laws: those under the Marriage Act, the African Christian Marriage and Divorce Act, Hindu law, Islamic law and African Customary laws. In each of them, the age of marriage is different. Under the Marriage Act, Cap 150 Laws of Kenya, Section (19) states that if either party to an intended marriage, not being a widower or widow, is under twenty-one years of age no licence shall be granted or certificate issued unless there is produced, annexed to the affidavit referred to in Section (ii) of this ordinance, a written consent to the intended marriage signed by the person having the lawful custody of any such party.

Under Hindu Marriage and Divorce Ordinance, Cap 157, Section 3(1) Laws of Kenya states that the bridegroom has attained the age of 18 years and the bride the age of 16 years at the time of the marriage. Section 3(1)(d) where the bride has not attained the age of 18 years, the consent of her guardian in marriage, if any, has been obtained for the marriage. This means that per the Hindu law a boy of 18 years has capacity to marry while a girl of 16 years also has the capacity. Anyone below these ages lacks the capacity and requires the consent of the parents.

Under the Islamic law, anyone from the age of puberty, which is about 9 years for girls and 13 years for boys, can legally marry. Under African Customary law, the age of marriage varies from one community to the other. Most communities allow marriage from about 13 years onwards or after initiation into adulthood.

Under the Election law one qualifies for an identity card first to be able to vote and be voted as a Councillor or Member of Parliament, while for one to be voted as a President, the person should be over 35 years.

The Penal Code Cap 63, Laws of Kenya Section (4), states that a child below 8 years is not capable of committing a crime. A child between 8 and 12 is not capable of committing a crime unless it is proved that the child knew or ought to have known that what they did was wrong. A child below 18 years who is alleged to have committed an offence will be tried in a juvenile court which is a special court for children. But when the same child is charged with manslaughter or an offence that carries death sentence or is jointly charged with an adult, he/she will be tried in the criminal courts as an adult.

The Employment Act states that anyone below 16 years cannot be employed in an industry except in working as an apprentice (a learner worker) or in a family business. It further states that they should not operate machinery, never work in an environment that puts his or her life, health or morals in danger.

Under international standards, the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the child set the age of a child at 18 years. These are internationally legally binding documents that may apply where domestic laws are silent.

The various legislations stated above, their different definitions as to who an infant is and at what age each is relieved of the infant disability lies the main issue of infant contractual capacity. Through the many statutes that are in place to protect a child, it is hard for the same child to be protected due to the inadequacy of a uniform statute to determine the age of majority.

The law provides an age limit above which an individual is regarded as having attained the age of majority but this has been shown to be spread through many statutes. The law of contractual capacity deals with, inter alia, the legal consequences of any contracts entered into by those who are infants.

1.1.2 Infant contractual capacity under:

(a) Common Law

Before the 1874 Act came into effect, the English Common Law classified contracts of minors into four categories, thus:

- (i) Contracts of necessities, where the seller had a quasi-contractual claim and there would be no ratification after full age.
- (ii) Contracts of a continuous nature like leases and partnerships. Such contracts were violable during infancy or within a reasonable time thereafter, so that the minor could and still can ratify a contract of this nature.
- (iii) Loans: These were violable at common law and there would be no ratification by the minor after full age, but a fresh promise plus new consideration like fresh advance, might bind the minor.
- (iv) Contracts of a beneficial nature: These were, and still are, binding on the minor.

All other contracts made by minors were voidable at common law, and consequently were capable of ratification after full age. The most important contracts in this class were

- (a) Minor's contract of engagement whose debts would also be ratified after full age. Under the common law rules the age of majority was 21 years which was determined as the age of 18 years with the Family Law Reform Act 1969 S.1(1). This act reduced the age of majority from 21 to 18 years.

(b) Contract Law

When a minor wants to sue someone, he does so through a next friend that he has to indemnify and he defends an action through a 'guardian ad litem' who is not liable for costs. A parent is not liable for his child's debts unless the child is an agent of the parent whereby the parent becomes liable for the transaction in question thus, the parent becomes liable for the debt the child incurs on his behalf. (**Mortimone-vs-Wright**).¹

A minor's contracts may be void, valid, voidable or unenforceable.

(a) Void Contracts

- (i) Those under the Infant's Relief Act 1874 S.(1)
- (ii) Contracts for the repayment of money lent or to be lent per (**Coutts Co.-vs-Browne-Lecky**).²
- (iii) Contracts for goods supplied, or to be supplied other than necessities.
- (iv) All accounts stated with minors and other statements of indebtedness.

¹ [1840] 6 M & W 487

² [1947] K.B. 104

- (b) Those under Section 5 of the betting and loans (Inputs) Act 1892. This act renders void any agreement made by a person after he comes of age to pay a loan contracted during minority. A minor cannot be held liable for debt repayment even though given in payment of a debt incurred for necessities supplied and delivered (per Bills of Exchange Act 1882 S.22).

From this Act, a minor can sue on the void contract except as against another minor. On the other hand a minor can not recover money paid or goods supplied under a void contract unless there has been total failure of consideration but he can obtain the property in the goods and can give a good title to third parties.

(c) Valid Contracts

These are as follows:-

- (i) (a) Executed contracts for necessities: This is defined by Section 3 of the sale of goods Act, 1979 as “goods suitable to the condition in life of the infant and to his actual requirement at the time of sale and delivery”. For necessary goods, the minor may be compelled to pay for them a reasonable price, which need not be the actual contract price. A minor not liable for goods though necessities that have not been delivered implying that a minor’s liability for necessities is quasi-contractual. The necessities are tested by utility and condition in life plus the supply of goods which he already has is relevant per **(Nash-vs-Inman)**.³ Food, clothes, lodging, educational books, medical attention, burial of minor’s wife or children and legal advice are all necessities per **(Elhington-vs-Amery)**.⁴ This rule applies to the purchase of services.

(b) Contracts for the minor’s benefit

A minor may make valid contracts if they are for his benefit but they need to be contracts of apprenticeship. Contracts of services, contracts for education or sometimes analogous thereto **(Roberts v Gray)**.⁵

³ [1908] 2 K.B. 1

⁴ [1936] 2 All.E.R.86

⁵ [1913] 1 KB 520

Although a contract may be in general for the minor's benefit it will not be enforced if the terms are onerous even if the court looks at the whole contract per **(Clements-vs-L and N.W. Railway Co.)**⁶

Trading contracts for minors are not enforceable as the minor's capital is at risk. Where his capital is not at risk, the minor may be bound where the contract is regarded as analogous to a contract of service **(Chaplain-v-Leslie Fremin publishers)**.⁷

(ii) Voidable Contracts:

Under these contracts the minor acquires an interest of a permanent nature like in leases of premises partnership contract or a holding of shares in a company. These contracts bind the minor unless he takes steps to avoid them during his minority **(Steinberg v Scala)**⁸ or within a reasonable time thereafter **(Daries v Beynon-Hamis)**.⁹

Reinforceable Contracts

S.2 of the Infants' Relief Act 1874 applies and is concerned with the effect of the minor's ratification after full age of a contract made during minority and even with fresh promises made by the minor after full age in respect of transactions which took place during minority.

4. Consequences of Contracts of Minors:

Where a minor pays money under a void contract, or a voidable one, he can repudiate the contract and disclaim all future liability but he can not recover money paid unless he proves a total failure of consideration which is, that he has received no benefit at all as per the contract and courts are usually reluctant to find that he has actually received no benefit at all **(Pearce v Brain)**¹⁰. On the other hand if there has been no benefit at all the minor will be able to recover his money **(Corpe v Overton)**¹¹ Under the infants' Relief

⁶ [1890] 45 Ch.D430
⁷ [1965] 3 All. E.R. 764
⁸ [1931] 47 T.L.R. 424
⁹ [1929] 2 KB 310
¹⁰ [1833] 10 Bing 252
¹¹ [1913] 2 KB 310

Act 1874, there is a provision that contracts other than necessities are absolutely void, but the minor can give a good title to a third party who acquires goods which have been brought by the minor but the third part must take bona fide and for value (**Stocks-v-Wilson**)¹².

Where a minor commits fraud by say, overstating his age, then the equitable doctrine of restitution of the goods is available to the tradesman assuming the goods are non-necessaries and there is no action for a reasonable price available. But mere failure by an infant to state that he is under-age is not fraud (**Stikeman-v-Dawson**)¹³.

1.4 Infant Contractual Capacity Under the Employment Law

(i) Minors/Infants

An infant who is the same as a minor is one who is under 18 years.¹⁴ Such a person is only bound by certain contracts. These are contracts of necessities and contracts of benefit or educational nature.¹⁵ Contracts of Employment or apprenticeship which enable him to earn a living are included in the latter category. An infant professional boxer held a licence from the British Boxing Board. He was disqualified from delivering a low punch and forfeited his purse. He sued claiming that his contract was not of a beneficial nature. It was held that through the penalty clause, the association was out to improve the sport standards and safety which was to his benefit. (**Boyle v While city Stadium**).¹⁶

In another case an infant porter claimed that his contract of employment was not of a beneficial character as he had foregone his rights under the Employer's Liability Act 1880 to join the Company's Insurance Scheme. It was held that his claim failed as the insurance claim covered more injuries (**Clement vs LNWR**)¹⁷

A onerous term may render a minor's contract void. In (**Olsen v Corry & Gravesend Aviation Ltd.**)¹⁸ an infant's deed of apprenticeship contained a clause which relieved his

¹² [1847] 1 De G & S.M.901

¹³ [1849] 1 De G & S.M. 90

¹⁴ Cap 141, Laws of Kenya

¹⁵ Law of Master and Servant, by Dramond A..S. pg.58

¹⁶ [1898] 2, K.B. 262

¹⁷ [1859] 3, ALL E.R. 522

¹⁸ [1922] 41 T.L.R. 242

employer from all liability for any injury caused to the infant. Such a clause was not deemed to be beneficial and the client was not bound by it.

(ii) Apprenticeships

A contract of apprentice although a contract of service is a specialized contract with certain rights and obligations. Essentially, in this type of contract, the master agrees to instruct the apprentice in a trade or calling and to maintain him.

The statute of Artificers 1562 decreed that no person could practice a trade without serving a seven-year term of apprenticeship. This provision was repealed by the Apprenticeship's Act 1814. Originally, an apprentice was a member of the family's household.

A contract of apprenticeships need not be under seal that is in the form of a deed, but it must that it be in writing. A contract of apprenticeship is regarded as both necessary and beneficial, it may nevertheless be repudiated by a minor on attaining the age of 18 or within a reasonable time afterwards. One needs to guarantee that the minor will complete his contract. A contract of apprenticeship required the apprentice to have free lodging medicine and medical attendance where necessary. The master used to have the right to chastise an apprentice moderately. He is required to serve his term of apprenticeship. He can leave without a notice but the master to sue an adult for breach of contract or sue a guarantor for compensation where one is a minor. A master may not dismiss his apprentice for ordinary misconduct but for serious cases like where he steals, refused to learn or is guilty of habitual loose living.

Under the contract of apprenticeship, both parties are required to perform their part of the contract, as such the death of one party will terminate the contract. Even illness of either party will terminate the contract., if it is of a nature and duration which prevents the performance of the contract. If the master becomes bankrupt, his part of the contract is terminated but the apprentice can request the trustee in bankruptcy to repay as much as is reasonable or alternatively to transfer the indentures to another master.

Termination of apprenticeship also occurs on the death/retirement of the partner in a partnership. The apprenticeship can only benefit if he is bound to one of the partners

specifically and not to the partnership as a whole which comes to an end on the death of one of the partners.

An apprentice is entitled to “small” benefits from his employer especially if he is dismissed on grounds other than those that are of serious misconduct. In **(Paviour and Thomas v Whittons Transport)**¹⁹ two apprentice were held to be unfairly dismissed when a receiver gave notice to a number of employees without arrangements of another employer to take them up and their contracts.

In **(Townrow v Phillip Davis)**²⁰ a solicitor ‘s clerk was held not to be unfairly dismissed when ill health forced his employer to amalgamate with another firm of solicitors, which firm refused to take the clerk.

An apprentice may bring an action for wrongful dismissal, claim in respect of loss of earnings and for loss of future prospects if only he would have completed his apprenticeship **(Dunk v Waller)**.²¹

1.4 Infant Contractual Capacity Under Customary Law

(i) Capacity

Capacity at customary law means the ease with which one can aptly participate in activities of his community. In every African community, every member had a role to play in the continuation and aggrandization of his community. Every member had obligation and duties which he was obliged to fulfill and perform, depending on his age group in society. An age group was that group that had the initiation rites at the same time. These rites were used to show that the people of a particular age group are now accepted into the larger society as mature people and would be allocated tasks to perform. There was no particular number of years that one was to have to disqualify him from the indignity of being a minor apart from having been initiated.

¹⁹ [1975] 1R LR 258

²⁰ [1977] 12 ISJ 354

²¹ [1970] 2QB 163

(ii) Initiation

Initiation per se did not qualify one to be an adult as even within an equal age group, people would still not be the same in capability though initiated. Thus, while there was no clear cut age limit under the customary law, one was allowed to perform tasks depending on his ability (individual), where we have in mind the mentally handicapped.

In some community regimes a son attained the age of “majority” which is the capacity to participate fully in community affairs on puberty and after circumcision rites. Among the Kisii for example, the father of a boy is expected (in case of a marriage contract to and often does pay, the bride price before the bride comes to the man’s home) In some cases however, the girl might be brought to the man’s home before the bride-price has been paid, but unless the bride-price is paid, the marriage contract is at best “voidable”. In such a case the court might decline to enforce an action for bride-price against the father of the boy (where the girl’s father sued for it) on grounds that both (the father of the boy and that of the girl were not party to the contract). The one who never contributed to the bride-price might lose his wife!

Similarly, in case of divorce and the young man sought the court’s help to bring to an end the marriage and recover his bride-price, would find the court refusing to give him a hearing citing lack of marriage contract between the two (if both are minors). Such a situation should not be allowed and the jurisdiction conferred on the high court by Section 3(2) of the Judicature Act should come in handy. The confusion that reigns in such a marriage contract would reduce dramatically, and all the court would be looking at is whether all customary law requirements pertaining to that marriage contract has been satisfied. This has not yet been seen operating.

(iii) Marriage

In some communities in Kenya, parental consent is necessary for a valid customary law marriage, so that even if the parties are over 18 years, their marriage will not be valid if parental consent is not obtained. In essence it can be argued that it is parental consent that gives one capacity to marry. The question that need to be addressed therefore is what relevance does customary law have on capacity, given that the age of majority is 18 years? It is the view of this thesis that it has none since it tends to defeat the purpose for which the Age of Majority Act was passed. In other words, although customary law will

apply where one or both parties are affected by it, courts will always be reluctant to apply it if to apply it would enforce a contract declared void by a written statute. A 16 year old would not be bound by a contract declared void by any, statute for the simple reason that customary law of his community has granted him capacity. As far as customary law on capacity is concerned it exists so long as it does not conflict with the statutory age of majority. In other words, it applies in so far as its application is within the statutory area of majority.

At customary law capacity to marry is determined by the fulfillment of certain initiation rites. On attaining puberty²² one is considered fit to marry. Customary marriages are recognised even for purposes of the criminal law.²³ Granted that customary marriages are recognised as valid and that one may attain puberty before the age of 18 years, it is submitted that not only do infants have capacity under customary law but also that the statutory age is no bar when it comes to an infant who wants to enforce a marriage contract under customary law.

(iv) Muslim Law

A Muslim can acquire capacity to marry even if he is under 18 years as long as he reaches puberty. Courts have accepted that one can attain puberty at the age of 15.²⁴ Except for those marrying under the Marriage Act²⁵ or the African Christian Marriage and Divorce Act, it appears that the age of majority for purposes of marriage is lower under customary law than in the foregoing statutes. This still leave a problem, if this is the case, can a man who marries a girl aged below 14 years under customary law be charged with defilement of a girl aged 14 years? In other words, when a court holds a marriage to be valid, does this on itself confer capacity to the infant as regards other transactions in which he is a party or the capacity conferred to him is only valid in respect to the marriage he has contracted? It is our humble submission that if such a marriage is

²² Report on the Commission on the Law of Marriage and Divorce 1968
²³ Evidence Act Cap.8, Laws of Kenya Sec.127-130
²⁴ In the matter of Notice of Marriage given by Fannel Lemama
²⁵ Cap 150 Laws of Kenya

valid, the husband cannot be convicted for sexual offenses committed with his own wife with her consent. There lacks a case law in this area and we await to see how the courts will treat this issue.

Other subject to:

(v) **Statute**

Section 35(2) and 37 of the Marriage Act²⁶ and Section 4 of the African Christian Marriage and Divorce Act²⁷ provides that no person may contract a marriage if he or she is under the age of 16 years otherwise the marriage would be void. But any marriage celebrated before the commencement of this subsection shall not be affected by the provisions of this subsection. There is no statutory minimum age for those marrying under customary law. The reason for fixing ages was seen as an attempt to allow for more education to the man so that he would be in a position to support his wife, gender discrimination! While on the part of the woman, it would be the age at which she may have acquired the experience needed to run a household. One can still argue that customary law continue to allow one to marry with the above requirements in mind and there is no marriage that can be allowed in cases where a man is found and proved that he is not in a position to take care of a family. The only difference between the two sets of laws (Customary and Statute Law) is that the former recognises that a man can marry even before attaining the age of 18 years so long as some relevant initiation are performed. When a man who is below 18 years can have capacity to marry, but have no capacity to enter into general contracts other than for necessities is anyone's guess. In other words, as an adult and can enforce the contract at the instance of either, but will treat the same person as an infant and hold him to have no capacity to contract (other than when contracting for necessities). Under the Marriage Act and the African Christian Marriage and Divorce Act, a married person lacks the capacity to marry while his or her former marriage is subsisting. This is not the case when parties contract a marriage under customary Christian Marriage and Divorce Act, a married person lacks the capacity to marry, while his or her former marriage is subsisting. This is not the case when parties contract a marriage under customary law. Capacity to marry is infinite and polygamous unions are allowed.

²⁶ Cap 150 Laws of Kenya

²⁷ Cap 151 Laws of Kenya

(vi) Land Matters

The position of a customary law on land was very different from that enumerated under the Registered Land Act.²⁸ Under this act, a registered proprietor of land is an absolute owner subject to the limits of his rights and privileges under the said act.²⁹ On the other hand, under customary law a holder of land is regarded as a trustee of it for the benefit of his family. In this respect, customary law does not recognize absolute ownership of land as such.³⁰ Admittedly, the capacity to alienate family property is an area best suited to a land law paper. But we mention it here all the same as land forms the basis of communal property in customary societies. Land related problems have never been easy to solve. The Magistrates Courts Act³⁰ by Section (2) confers upon the district magistrates the jurisdiction to determine civil dispute involving land held under customary tenure. But under Section (9A) of the said act, the jurisdiction of these courts is ousted in all cases involving the beneficial ownership of land, division of land held in common etc. All such matters shall be referred to a panel of elders to be solved.³¹ These two positions illustrate clearly that it is not settled as to which way to go with land held under customary law/tenure.

It is submitted that the confusion above was created by the different interpretations given to land ownership by the colonial masters who saw the village chiefs as absolute owners of land with absolute powers to dispense the same. To them capacity rested with these chiefs. On the basis of this, the British government entered into binding agreements with tribal chiefs. They then introduced a new system of land ownership which went a long way to discourage “communal ownership” existing at that time. The idea of registration and title deeds was formulated and with these changes, capacity to alienate land changed even under customary law. Initially, under customary law, land could only be passed on the time of death of the owner (*this is in relation to family land*). In very rare occasion could land be transferred outside the family.

²⁸ Cap 300 Laws of Kenya

²⁹ Helps-v-Clayton [1864] 17 CBND 553

³⁰ Kniper “African Law Chapter 3 on Land in the Making” Phillip Meyer

³¹ Cap 10 Laws of Kenya

Land was always inherited by the elder son who held it in trust for the young ones. Infants did not have capacity to alienate the family property. In most cases the father alienated the land before he died and if he died before doing so, the elder son if he was of age with the help of elders. This explains the reason why the colonial power saw it fit to introduce foreign laws in place of indigenous laws in the area of land related matters. In general, the tendency therefore has been to apply the general rules provided for under statutes relating to land ownership in Kenya viz The Government Land Act,³² The Registered Land Act,³³ The Registered Document Act,³⁴ The Land Titles Act³⁵ and the Registered Titles Act.³⁶ The effect of all these acts is that customary rules governing capacity to alienate property has been whistled down into non-existence.

Applying the law of

This appears to be good law than the previous regime which was beset with problems. It was oppressive and no one could alienate land held communally. Individual land and family land was always passed on to the other family members. No one whether he had wealth, would own land while still living under his father's roof. Infants had no capacity and could not inherit anything. Capacity was restricted. Land left to infants by their parents was always held in trust for them and they became titled to it after reaching puberty but even then they would not dispose off their land without their consulting the elders. This position is somewhat repeated in the statutes and a minor is not finally and conclusively liable for disposition done by him without the help of a guardian.³⁷

(vi) Contract

In the examination of the law relating to the capacity of infants under the Law of Contract Act,³⁸ a person ceases to be under any disability by reason of age on attaining the age of 18 years. The paper also posted that, under customary law,³⁹ a person would also cease to

³² Jurisdiction of District Magistrate Courts Limitation Sec.5 and 9

³³ Cap 280 Laws of Kenya

³⁴ Cap 300 Laws of Kenya

³⁵ Cap 285 Laws of Kenya

³⁶ Cap 282 Laws of Kenya

³⁷ Cap 23 Laws of Kenya

³⁸ Judicature Act Cap 8 Laws of Kenya

be under any disability after undergoing some relevant initiation rites. The thesis concludes therefore that by virtue of having these two conflicting views in the Kenyan laws, it would appear that there are two sets of laws operating in Kenya. One is dispensing justice through the application of the English law of contract act and the other through the application of customary law.

Whereas this seems to be the case, the situation (on a practical level) is different. The law governing contractual capacity of infants still remains the law of contract act. Incidentally, the tendency (in courts) has been to apply general rules provided for under statutes when dealing with matters calling for application of customary law. While applying the law of Contract Act in all is, generally to apply general rules provided for under statutes when dealing with matters that call for the application for customary law. At the same time the law of contract is applied in all contractual matters affecting infants.

CHAPTER 2

GENERAL LAW OF CONTRACT ON CAPACITY

2.0 Definition of Contract and Capacity of Parties in General

A contract is a legally binding agreement made between two or more parties. The agreement binds these parties. With the coming of standard form type of contracts, the idea of an agreement made between two or more parties is elusive. A contract therefore, is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognises as a duty.¹

Any person of full contractual capacity may contract the relationship of employer and employee either as an employer or employee. Some books state that a person who has already agreed to serve a master cannot, during the period of that service, bind himself to serve a second master without the consent of the first. This statement is incorrect. It is actually founded on the misrepresentations of such decisions as was held in (R.-vs-Norton).² The second contract is a valid contract of service, although like any other contract of service, it is only enforceable in damages and not by way of specific performance. If the first contract is in such a way as to render the second contract impossible to perform, the second master has his claim for damages upon an implied warranty that the servant was free to contract.³

A valid contract possesses some essential features. It should have an offer and an acceptance. There has to be consideration which is the bargain element in a contract. The parties to the contract must have had an intention to create a legal relationship which

¹ Hodgin, R.W., The Law of Contract in East Africa. pp 66-72

² [1808], East 206.

³ Supra (I).

binds the parties together and the parties to have sufficient legal contractual capacity to make a contract. One who is sane, sober and of contractual age is capable of making a valid contract. Adult citizens have full capacity to enter into any kind of contract, but certain groups of persons, and corporations or unincorporated groups, have certain disabilities in this connection. They include:-

1. Infants or minors
2. Persons of Unsound mind
3. Married women
4. Aliens or non citizens
5. Corporations
6. Cooperative Societies

2.1 Infants

An infant, a person under eighteen years of age at the time of the conclusion of a contract is bound by contracts of service or apprenticeship and agreements ancillary therefore as was held in Doyle-Vs-White City Stadium⁴ which are to his benefit. The same principles apply to an infant master as to an infant servant provided that the servant, is hired by the infant for attendance on his person or that of his family. Prima facie, an infant's contract of service or apprenticeship is beneficial to him and binding on him. This was so stated in (Cooper-vs-Simmon).⁵ On the other hand if the terms of the contract are reasonable, or of a kind usual in the trade, it is binding on the infant.

But if however, the contract as a whole and not merely as to a certain stipulation, is to the disadvantage of the infant, it is voidable at his option. As the contract is not voidable at the master's option, the contract is enforceable at law by the infant, whereby he can seek an action for damages. An agreement between an infant servant or apprentice and his

⁴ [1935] I.K.B. 110.

⁵ [1862] 7 H. & N. 707.

master rescinding a contract of service or apprenticeship is not binding on the infant unless it is for his benefit. This was held in (R.-vs-Great Wigston).⁶

The general rule at the common law is that an infant's contracts are not binding upon him and are voidable at his option. There is an exception of certain contracts on the ground that they are, for the benefit of the infant. Among such excepted contracts are contracts of service. These are those contracts which are enforceable as being, in other words as being contracts of necessities as was held in (Walter-vs-Everard)⁷ and those of apprenticeship. Contracts of service of apprenticeship, the terms of which were at the time of the agreement usual or common in the trade, the master was reasonably justified in imposing as a just a measure of protection of himself, and which provided for reasonable remuneration for the infant in return for his service, are beneficial to the infant as stated in (Leslie-vs-Fitzpatrick).⁸ This means that an infant is bound by a contract of service which is upon the usual reasonable terms upon which alone the master will employ him. This was stated in (Young-vs-Hoffman).⁹ Where the contract contains terms of usual nature, which are not for the benefit of the infant, it is voidable at his option. Therefore, where the contract provides for unusual low remuneration, or imposes a penalty or forfeiture, on an infant, or contains a covenant in restraint of trade, of unusual severity it is not binding on the infant, which was held in (Lang & Co. Ltd.-vs-Adrens).¹⁰ The issue as to whether the contract is beneficial to the infant is a question of law for the judge, once the necessary facts have been found. Even where the contract is not binding on the infant, nevertheless, the contract is valid till voided and therefore, the

⁶ [1824], 3 B. & C. 484.

⁷ [1891] 2 Q.B. 369.

⁸ [1877] 3 Q.B.D. 229.

⁹ [1907], 2 K.B. at p.651.

¹⁰ [1909], 1 Ch. 76.

infant cannot sue for the recovery of the money or premium which he had received as consideration.

The contract can be avoided by an infant during infancy or within a reasonable time after coming of age. If the infant absents himself from his duties, he does not avoid the contract, nor does the fact of his going into the service of another.

Certain statutes regulate or forbid employment of infants in some occupations.

- Where a deed of apprenticeship by which an infant contracted not to accept engagements except with the permission of the master and which had no corresponding obligation of the master to provide the infant with employment, and if further only provided for remuneration during employment and could be terminated by the master after trial if the trial failed to satisfy him was held not to be binding on the infant.¹¹
- Where a contract binds an infant to serve for a certain term but enables the master to stop the work and wages at any time during the term is voidable.
- Where an infant agreed to serve for five years at weekly wages with a provision that should the employers cease to carry on their business, or find it necessary to reduce their operations for any cause, beyond their control, they should have power to discharge the infant upon fourteen days' notice. It was held that it was not voidable since there were no other contracts with similar conditions in the same trade.
- Where an Apprenticeship Deed provided that the master should not be liable to pay wages to the infant so long as his business should be interrupted by any turn-

¹¹ [De Francesco-v-Barnum.

out and the apprentice be entitled to employ himself elsewhere was held not to be for the benefit of the infant (Meakin-vs-Morris)¹² but was enforced where the deed only suspended the payment of wages while the business was at a stand still per (Green-vs-Thomson).¹³

- A deed of apprenticeship between an infant and an aviation company, whereby the latter covenanted to teach him the profession of a ground engineer and had a clause which exempted the company from liability caused to him by their negligence, it was held that the deed was not for benefit of the infant in (Oslen-vs-Cony).¹⁴

- Where an infant ratifies a voidable promise, it is a recognition of that promise and an election not to avoid it but to be bound by that promise. No action may be brought whereby to charge any person upon any ratification, made after full age, of any contract of hiring or service made during infancy, whether there shall or shall not be any new consideration for such ratification after full age.

If a contract is not avoided by the infant within reasonable time after full age, but he continues in the service, and no new consideration is given by the master, the court may infer a ratification by the infant of the old contract. But where a new consideration is given and one or more new terms have been agreed there is a new binding contract to that extent. But where a new consideration is given and no new term is introduced, the question whether a ratification, of the old or the conclusion of a new contract is to be inferred depends upon the intention of the parties.

¹² [1884] 12 Q.B.D. 352.

¹³ [1899] 2 Q.B. 1 68.

¹⁴ [1936] 3 A.E.R. 241.

Where a new consideration is given and the intention of the parties is left in doubt, the courts will infer a new contract. The contract often as before is enforceable by the infant.

Section 2 of the Infants Relief Act makes a ratified contract unenforceable when used against an infant. But where a new contract is entered with new terms as the old one this is not affected by the above mentioned section two. New contracts must be supported by new consideration which can be say, an increase in wages.

Where an infant entered into a contract of service agreeing not to carry on the same trade, and continued in the service for eighteen months after coming of age, was held that he had ratified the contract per (Cornwall-vs-Hawkins).¹⁵

In another case where a infant, three months before coming of age, entered into a contract to serve for a year, the contract contained a covenant not to solicit his employer's customers under a penalty of Pounds 1,000. He continued to serve for a second year, receiving a higher salary. A court inferred a new contract, and assuming the provision for a penalty void, but it looked at the provisions of the old agreement to ascertain the terms of the new contract and granted an injunction in the case of (Walton-vs-Everington).¹⁶

2.2 Persons of unsound mind

Contracts made by a person of unsound mind are valid, but if the other party knew that he was contracting with a person who, by reason of the unsoundness of mind, could not understand the nature of the contract, then the contract is voidable at the option of the insane party. The person who is of unsound mind must prove:

- (i) the unsoundness of mind at the time of contract and

¹⁵ [1872], A.I. L.J. Ch. 435.

¹⁶ [1885] I.T.L.R. 396.

(ii) that the other party knew of it as was held in (Imperial Loan Co.-vs-Stone).¹⁷

A contract of necessities made by a mentally disordered person is binding upon him. Such a person has to pay a reasonable price per the sale of goods Act Section 4 (1). A reasonable price does not necessarily mean the actual price. All contracts of the mentally disordered are voidable at the option of the disordered person, if at the time of the contract was made the other person was aware of the condition of the mentally disordered. A contract made by a person while drunk can be ratified by him when he is sober, as was held in (Mathews-vs-Baxter).¹⁸ Drunken persons have a quasi-contractual liability to pay a reasonable price for necessities supplied to them.¹⁹ The mentally disordered persons can repudiate the contract within a reasonable time of the cessation of the disability, otherwise it will be binding on them. A contract made by a mentally disordered person during a lucid interval will be binding upon him. A contract made by a lunatic for the hire of servants necessary to his station in life whether the fact of lunacy was known to the person contracting with him or not as was held in (Re Rhodes).²⁰

This implies that a mentally disordered person lacks capacity to bind him to a contract as when negotiating, he is taken not to understand what he is negotiating about and there is no meeting of the minds while contracting.

2.3 Married Women

A married woman living with her husband has implied authority from her husband to bind him by contracts for the hire of servants reasonably fit for his station in life. Such

¹⁷ [1892] I.Q.B. 599.

¹⁸ [1873], L.R. 8 E.X. 132.

¹⁹ Sale of goods Act Section

²⁰ 4 Ch. D. 94.

implication of authority may be rebutted by evidence that he had expressly or implied forbidden her to pledge his credit. This was judiciary held in (Debenham-vs-Mellon).²¹

Where a married woman is separated from her husband in consequence of his cruelty or misconduct or living apart from him under an agreement by which he has agreed to pay her an allowance, which has not in fact been paid, she has by law, if she is without adequate means, the right to bind him by contract for the hire of servants reasonably fit for their station in life as was stated in (Bazeley-vs-Forder).²²

A husband is also bound by contracts of hiring entered into by his wife with persons to whom he has held her out as his agent for that purpose, and whom he has not notified of his revocation of her authority. In these cases the husband is held liable in contracts of an agent made on his behalf. A husband is only liable if there is authority, in fact or he is estopped by his conduct from disputing her authority. There is implied from the fact of cohabitation an authority to bind him by contracts entered into by her within the scope of her duties as a housekeeper, as such, such authority may be extended to hiring of domestic servants.

On the other hand the husband is by law under authority to maintain the wife, if he leaves her unprovided, she becomes an agent of necessity to pledge his credit for necessaries, including the hiring of servants suitable for her station in life.²³ These are the exceptional cases where the husband is bound by his wife otherwise he is not liable.

At common law a married woman would not enter into a contract in her own capacity. She lacked the capacity to contract. The common law view was that, a husband and wife

²¹ [1880], 6 A.C. 24.

²² [1868], L.R. 3 Q.B. 559.

²³ Ibid (21).

are one and that one was the husband. With the advent of gender awareness, the married woman has since been emancipated. She now has the same capacity as an unmarried woman (*feme sole*) or a man.

As result of the application to Kenya of paragraphs 61 and of section (1) of the Law Reforms (married women and Tortfears Act, 1935 by the Law of Contract Act, married women can sue and be sued, on contract as if they were single, women. A husband is not liable any longer for his wife's contracts unless she is his agent for the particular transaction and she can no longer be an agent of necessity in respect of domestic transactions. This is agency through conduct resulting in apparent authority. Where a husband pays the debts which his wife incurs with a local dressmaker, he may be liable to pay for an expensive article of clothing which she buys without his consent, because the husband has, by his conduct, led the dressmaker to believe that the wife has power to bind her husband in contracts of this nature. The stations of married women in the law of contract is a matter of legal history as they now have equal capacity to contract as their male counterparts.

2.4 Aliens or non Citizens

An alien is that person who is not a citizen of Kenya. They normally have full capacity to contract, can sue and be sued. Contracts with enemy aliens during the period of hostilities are illegal and void. The term alien includes not only aliens but Kenyan subjects. Voluntary residents or carrying on business in the enemy's country or in a country occupied or controlled by an enemy. The test is not nationality but the place where the person resides or carries on business. An enemy alien, that is a person resident in a country which is at war with Kenya cannot sue, but if sued can defend an action in court. The person lacks capacity to sue but he possesses the capacity to defend himself as was held in (Porter-vs-Fredenberg).²⁴

²⁴ [1951] I.K.B. 857.

Contracts made during peace with persons who later become enemy aliens by reason of outbreak of war and which require continuous business relations or are prejudicial to Kenya, like armaments contracts are treated as:

- (i) The contract gives no rights after the outbreak of war. It is cut short and enforcement of the contract will relate only to the part which was executed before the war, the executionary rights and duties being cancelled.
- (ii) The rights and duties outstanding in respect of performance before the outbreak of war are not destroyed though they cannot be enforced until hostilities cease. In this connection a debt due under a contract before the outbreak of war would survive the hostilities and be enforceable on the return of peace as was held in (Arab Bank Ltd.-vs-Barclays Bank).²⁵ Where the contract does not involve Commercial intercourse with the enemy alien or prejudice to this country, the rights and duties are merely suspended and not destroyed. In (Bevan-vs-Bevan)²⁶ a separation agreement made between husband and wife before the outbreak of hostilities, the husband would be liable after the war to pay to the wife sums falling due by way of maintenance during the period of hostilities even though the wife became an enemy alien for that period.

Foreign sovereigns and diplomats are in a privileged position since they cannot be sued at civil law or prosecuted in this country unless they submit to the jurisdiction of our courts. A certificate from Ministry of Foreign Affairs is conclusive as to the entitlement of a person to any privilege or immunity. Diplomatic privilege may be waived, though in the case of an ambassador or other head of a mission, waiver must be with consent of his sovereign. If a foreign state unilaterally appoints a diplomatic agent, that does not confer immunity in him. Until he has been accepted and received, that is, he has been

²⁵ [1954], A.C. 495.

²⁶ [1955], 2 Q.C. 227.

officially accredited to the Kenya Government, he is not immune from proceedings in the Kenyan courts as was held in (R.-vs-Pentonville Prison Governor ex parte Teja).²⁷

2.5 Corporation

A corporation may bind itself by any contract of hiring of service except such contracts as lie outside the purposes for which it was incorporated or such as are beyond its powers to make.

Corporations have another special case of capacity to contract. A corporation aggregate maybe a body incorporated by Royal Charter, one formed by a special Act of Parliament or a company registered under the Companies Act Cap 490 of Laws of Kenya or any other Acts.

The contractual capacity by a corporation is limited by:-

- (i) Natural impossibility, which arises from the fact that it is an artificial and not a natural person. Thus, it can only make contracts through an agent and in that it cannot fulfill contractual obligations of a personal nature. A corporation cannot “marry” and it cannot act a solicitor doctor, accountant, nor can it act as the treasurer of a friendly society. It was held in (Re-vs-West of England and South Wales District Bank).²⁸
- (ii) By legal impossibility, corporations are subject to ultra vires rule, this limits what they can do. A corporation can only act within the powers, and actions outside this scope of operation are called ultra vires or beyond the powers.

It is essential of course, that a contracting party should be a person recognized as such by

²⁷ [1971], 2 W.L.R. 816.

²⁸ [1879] 11 Ch. D. 768.

the law. Persons in law are not confined to individual men and women. If two or more persons form themselves into an association for the purpose of forming an enterprise, such as a club, a trade union, a partnership, or a trading company, the association is in some cases regarded by the law as an independent person, that is as a legal entity called a "corporation" which is separate from the men and women of whom it consists, but in some cases it is denied a separate personality and is called an "unincorporated association." Whether an association falls into one class or the other depends upon whether it has been incorporated by the state.

"Independent personality can be conferred upon an association by an Act of Parliament."²⁹

Unincorporated association such as a club, is not a competent contracting party. If a contract is made on its behalf, no individual member can be sued on its behalf except the person who actually made it and any other members who authorised him to do so.³⁰

Corporations can be classified into aggregate and sole. A body of several persons united together into one society, maintained by a constant succession of members, has the capacity of perpetual existence. A corporation sole consists of a single person occupying a particular office and each and several of the persons in perpetuity who succeeds him in that office, such as a bishop or a vicar of a parish.

The Law therefore was widely ordained that the person quatenus person, shall never die by making him and his successors a corporation. By which means all the original rights of the personage are preserved entire to the successor; for the present incumbent and his predecessors who lived

²⁹ Stephen Commentanes 21st ed. Vol.II p.558.

³⁰ Bradley Egg Farm Ltd.-vs-Chifford [1943] 2 ALL ER 378.

centuries ago are in law one and the same person; and what was given to the one was given to the other also.”³¹

A doctrine of ultra vires states that a statutory corporation could exercise only those powers which are expressly or implicitly conferred by the statute itself. A trading company incorporated under the Companies Act is required to have Articles of Association which regulate matters of internal administration and a Memorandum of Association which is the Charter which defines the statutory creature by stating the objects of its existence, the scope of its operations and the extent of its powers. A company so created should only pursue only those objects set out in the memorandum. Its area of corporate activity is therefore restricted, so that if, for instance, it is authorised to run buses it should not run trains. It may exercise and only exercise powers set out in the memorandum and such powers as are reasonably incidental to or consequential upon the operations that it is authorised to perform. Early in the 19th century, it was held that the transactions which went outside the scope of the powers conferred by the memorandum were ultra vires and void.³² The doctrine of ultra vires rule is a legal rule where a contract made by a company (usually by the directors on its behalf) is beyond the objects of the company as written in the company’s memorandum of association, it is beyond the powers of the company to make the contract. The contract is void, illegal and unenforceable. Such a contract cannot be ratified even by unanimous consent of all the shareholders of the company. Lord Cains observed that, such purported ratification would mean that:

The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by Act of Parliament, they were prohibited from doing.”

³¹ Blackstones S. Commentaries Vol. 1, p.470.

³² Ashburry Railway Carriage Co.-vs-Riche.

A company's objects are stated pursuant to the provisions of an Act of Parliament. It must therefore, be deduced for example that, a company whose objects have been stated to be 'gold mining' cannot engage in 'fried fish' business.

This is because:-

- (i) Prospective investors who read the objects clause realise that the company was formed to mine gold. If they bought the company's shares they did so because they intended their money to be used in pursuance of the gold mining business. They did not give the money for any other business and the company does not have their consent to use it on any other business. If the company tries to use the money on a different venture, such as frying fish and chips, they can go to court for an injunction to restrain it from doing so.
- (ii) The statutory requirement that a company must state its objects in its memorandum would be rendered purposeless if despite having stated the objects, the company was legally entitled to embark on any activity. To prevent this happening, the courts concluded that the statement of objects would be taken to mean that what is not stated as an object cannot be pursued, or undertaken, by the company. In other words, the statutory requirement that the objects are to be stated implies that what has not been stated as an object cannot become a legitimate activity of the company.

The Doctrine of ultra vires as was held in Ashburry case "ought to be reasonably, and not unreasonably, understood and applied." It was explained in Attorney General-vs-Great Eastern Railway Co. "ought to be reasonably and not unreasonably understood and applied." Lord Solborne L.C. explained that it is not necessary for a company to write down in its memorandum everything that it would or would not do in the course of its business because whatever may fairly be regarded as incidental to or consequential upon those things which have been stated in the memorandum ought not, and would not, be

held by the courts to be ultra-vires. The courts would regard such things as 'impliedly' within the company's powers unless they are expressly prohibited by the memorandum.

In the *Attorney-General-vs-Marsey Railway Co.* it was stated by Lord Buckley that, "To ascertain whether any particular act is ultra-vires, or not the powers for effecting those objects must be looked for and then, if the act is not within either the (stated) objects as described in the memorandum, the inquiry remains whether the act is "incidental to or consequential upon" the stated objects and is a thing reasonably to be done for effectuating it ..." Example, if the stated object found in the memorandum of association of a (registered) company is to establish and carry on a hotel and that express power is given to buy land at a particular place and to build and that as to anything further the memorandum of association is silent, it is quite clear that all such acts as are reasonably necessary for effecting that purpose are intra vires. The judges will not regard a transaction undertaken by a company as ultra vires merely because it is not written in the company's memorandum of association as one of the company's objects. They would regard the transaction as intra vires by implication if:-

- (i) It was reasonably incidental to any of the objects which have been written in the company's memorandum of association and;
- (ii) It was undertaken for the sole purpose of effecting or achieving the written objects, or any of them.

When deciding on whether a proposed transaction is reasonably incidental to the objects written in the Memorandum, it was stated in (*Henderson-vs-Bank of Australia*)³³ that what other companies with similar objects do may be a good guide for a company regarding its implied powers. If a transaction is decided on by the company at a board or general meeting, in the bona fide belief that its pursuit would enable the company to

³³ [1888]

“get more customers” or to do more business, the court would not regard the transaction ultra vires even though it may doubt its “reasonableness.”

From case law, it has been clarified that a trading company has implied power (authority) to:-

- (i) borrow money and mortgage its property as security for the loan.
- (ii) institute and defend legal proceedings.
- (iii) sell the company’s assets (but not the entire undertaking).
- (iv) pay gratuities and pensions to employees and ex-employees and their dependants whilst the company is a going concern.

The Doctrine of Constructive Notice

The doctrine of constructive notice is a rule of company law to the effect that a person transacting business with a company is taken to be aware of the contents of the company’s public documents. Public documents as used here are those documents which a company is required by the Companies Act to deliver to the Registrar of Companies for registration at the companies Registry. These documents include:

- (i) The Memorandum of Association.
- (ii) The Articles of Association.
- (iii) The Annual return.
- (iv) Special resolutions.

Since the Companies Registry is a “public office” the documents kept there are generally referred to as public documents as members of the public are free to inspect them on payment of a prescribed fee.

For the purpose of the ultra vires doctrine, a person transacting business with a company will be taken to have read the objects clause in the company's memorandum of association. Thus, if he concludes a contract with the company and it turns out that the contract was for a purpose which is neither expressly nor empirically within the company's objects and hence, ultra vires, he is regarded as having entered into an ultra vires contract 'knowingly' even though he was not actually aware of its being ultra vires. He cannot successfully sue the company for breach of the contract, as illustrated by the facts of and the decision in *Ashbury Railway and Carriage Company-vs-Riche*.

This is justified legally by the fact that the company's public documents in its file at the companies Registry are available for inspection by any interested member of the public, thus, one should have gone to the Registry, asked for the company's file, inspected the contents and having found the memorandum of association, read the objects clause in order to ascertain whether the proposed contract is consistent with the company's objects. The person would then have realised that the contract was not within the company's objects. If the person fails to do so, and it turns out that he concluded a contract which was neither 'expressly' or 'impliedly' within the company's objects, he would be regarded as 'having been aware' that the contract was ultra vires. He cannot therefore be allowed to enforce the contract!

The law protects those who also protect themselves. There is no moral justification for allowing a person contracting with a company to rely on his own inaction as the basis for instituting legal proceedings against the company.

On the other hand a potential contracting party who reads a company's objects will be able to make the correct legal conclusion regarding the vires of the proposed transaction, and its refusal to validate the transaction in cases where the party mistakenly believed the proposed contract to be ultra vires the company.

To be able to benefit from this vires of a company one needs to interpret the objects clause of the public documents of the company correctly.

2.6. Unincorporated Associations

A group of people may come together in order to pursue or promote a common purpose or activity but without going through the various legal procedures that ultimately result in the creation of a registered company. Where this happens the association will not be a body corporate. The legal consequences of what the people who consist of the corporation do will depend on the Act of Parliament and the general law governing the activities in question. Where the provisions of the Act are violated the law will disregard the apparent association and if necessary, make the individuals personally responsible for the things that they have done while using the name of the association. Common examples of unincorporated associations are trade unions, societies and partnerships.

2.6.1 Trade Unions

Trade unions are registered under section II of the Trade Unions Act 1952 with the primary objective of regulating the relations between employees and employers. Section 27(1) of the Act provides that a registered Trade Union may sue or be sued under its registered name. But section 23 provides that no suit or other legal proceedings shall be maintainable in any civil court against any registered trade union or an officer or member thereof in respect of an act done in contemplation or furtherance of a trade dispute.

Section (24) bars any such suits in respect of any tortious act alleged to have been committed by or on behalf of the trade union.

Section (25): a trade union is liable on any contract entered into by it or by an agent acting on its behalf.

Section (24) vests all property of a registered union on its trustees for the use and benefit of the union and its members.

Thus every Trade Union shall be liable on any contract entered into by it or by an agent acting on its behalf provided that a trade union shall not be liable on any contract which is void or unenforceable at law.

2.6.2 Co-operative Societies

These are registered under the Societies Act 1968. Section 2 (1) of the Act defines a society very broadly as including a club, company partnership or other association of ten or more people, other than a registered company. Corporation, trade union, cooperative society, registered school, bank or partnership of more than twenty persons. Examples of such societies are Welfare Societies, Amateur clubs of football.

Registration of the club or society does not confer corporate personality on the association, it actually provides legal framework for proper management of what may be loosely called the association's affairs, and the procedure for the orderly termination of those affairs.

The management and governing of the societies is done by Cap 490 of the Laws of Kenya. The Act gives the Commissioner of Co-operatives and Development wide powers of control over the affairs of the Cooperative societies, which powers include those that relate to amalgamation, financial control, appointment of staff and the audit of the club accounts and verification of the club books. Before registration a co-operative society has to apply to the Commissioner of Co-operatives. The application for Registration to be accompanied with the proposed by-laws of the society. These by-laws will inter alia, state the society's name, its area of operation, its objects, how its funds will be applied, qualification of membership and conditions for loans to its members.

2.7 Partnerships

The Partnership Act Cap 29 of the Laws of Kenya in its Section 3(1) defines a partnership as a relationship which subsists between persons carrying on a business in common with a view to profit. Therefore contracts of hiring and service made by a partner in the usual course of the kind of business carried on by the firm, are binding on the firm and his partners unless the partner so acting has in fact no authority so to bind the firm, Sec.(6) and the person with whom he contracts either knows that he has no authority or does not know or believe him to be a partner per section 3(2) of the Partnership Act.

The liability of a firm and the partners for the acts of a partner is that of a principal for the acts of the agent. This was so held in the case of (Cox-vs-Hickman).³⁴ This means that a partner's contracts bind the firm if they are made by the express or implied authority in fact given to him, or if he is held out as his partner's agent for the purpose in question, or that particular work. The partnership Deed holds a partner out by his co-partners to those who have knowledge of the partnership as their agent for the purpose of doing any acts incidental to the carrying on of that kind of business in the usual way.

Therefore, a partner may at any rate as between himself and a servant of the partnership, dismiss the servant, and if his co-partners do not forbid, the dismissal will bind the partnership. This was the decision in (Donald-vs-Williams).³⁵

On the other hand if in the course of employment an injury is done to a servant, by a partner acting in the ordinary course of the business of the firm, the partners are all liable as per section 11 of the Partnership Act.

Section (12): A person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of partnership, but cannot be made

³⁴ Supra (17) (19) [1861] 8 H.L.C. 268.

³⁵ [1833] 1, Cr. & M. 345.

personally liable for any obligation of the firm; but the share of the minor in the property of the firm is liable for the obligations of the firm.

Section (13): A person who has been admitted to the benefits of partnership under the age of majority becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice within a reasonable time of his repudiation of the partnership.

2.8 Drunkards

The contractual capacity of a drunken person appear to be the same as that of one who is mentally afflicted.^{36, 37} Decisions of this subject appear few. If A, when he contracts with B, is in such a state of drunkenness as not to know what he is doing, and if, this fact is appreciated by B, then the contract is voidable at the insistence of A. It may, for instance, be ratified by him when he regains sobriety.

A contract with a person so seriously afflicted must always be voidable for unlike the case of insanity it is almost inconceivable that the extent of this intoxication can be unknown to the other party.

A drunken person to whom necessaries are sold and delivered is under the same liability to pay a reasonable price for them as is an infant or an insane person per sec.3(5) of Sale of Goods Act.

³⁶ Gore-vs-Gibson.

³⁷ Mathews-vs-Baxter

2.8.1 Wills and Capacity

Under the law of Succession Act³⁸ Sec. 5(1) states that subject to provisions of part II and part III of the Act, any person who is of sound mind and not a minor may dispose of all or any of his free property by will and may thereby make any dispositions by reference to any secular or religious law that he chooses.

Under this Act one who can dispose off his property should be the person capable of owning the property, one who is not a minor and not a drunkard or under any mental disability. The Succession Act is good law and it protects minors from transferring property, the effect of which they may not understand.

Section 5(2) states that a female person whether married or unmarried has the same capacity to make a will as does a male person. There is no disparity in will making and property disposition between a male and female as women have been emancipated to full status with men from the common law notion of husband and wife are one and that one is the husband.

Section 5(3): Any person making a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other course, as not to know what he is doing. This section further stresses the soundness of mind before one can be able to dispose of his property to others. He has to know what he is doing to be able to make a valid transaction and possess that capacity which enables him to transfer the property to other persons.

Section (6): A person may by will appoint an executor or executors. One with power to make a will has power to appoint executors to his will who will administer his estate after

³⁸ Law of Succession Act Cap 160 Laws of Kenya.

his death. This is one who has capacity to transact and is the one who has the capacity to decide on how his estate will be divided.

Section (7): A will or any part of a will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator or has been induced by mistake is void. This section shows that a will has to be made free of any misunderstanding from the person to carry out his will/wish. He should be clear and know what he is doing.

In this chapter we have endeavoured to discuss the general law on contractual capacity, what type of persons have it and under what conditions they cease to maintain it. In our next chapter we look at the duties and obligations of an employer, employee and an apprentice. This will help us reflect on our study to be able to consider whether an infant can be able to understand and keep the duties, obligations and regulations when engaged in a form of employment either as an employer, employee or an apprentice, considering that he lacks contractual capacity.

An Apprentice

An apprentice is a servant who has agreed to serve a master for the purpose of learning and in consideration of being taught by him a trade or calling. The important point about a contract of apprenticeship is that “the master shall teach and the apprentice shall learn.” This is what differentiates a contract of apprenticeship from that of service.

Even where an apprentice is an infant, his consent is paramount and it has to be real consent. It should not be caused by undue influence as this will operate to render the contract void. There has to be an offer by the master and acceptance by the apprentice for the relationship between them to be legally binding. It has to be, a clear relationship where each party is bound by his terms of the relationship.

Under the contract law both parties to a contract need to have capacity to contract. But in case of an apprentice, one of the parties in majority cases is an infant (minor). Under such a case, the infant cannot contract on his own behalf but through a parent or guardian. Under the Children and Young Persons Act 1933 it is provided that no child under the age of twelve years may be employed. Apprenticeship will provide some form of employment, this will prevent a child of twelve years from being bound as an apprentice.

Contracts of apprenticeship need to be in writing and underhand and should be signed by the apprentice and be real and not to do that which one is not under duty to do as was stated in R.-vs-Ripon (Inhabitants).³⁹ Both form and consideration are required in cases of contracts of apprenticeship. Where the contract is not under seal, it implies that there is consideration and where an apprentice agrees to stay with his master for two years for the purpose of learning a trade, he was held not to be bound since there was no understanding on the part of the master to teach per Lees-vs-Whitcomb.⁴⁰

A contract of apprenticeship calls for personal performance and as such the death of an apprentice will end the contract as will be the death of the master. Unless there are special circumstances in which the apprentice has bound himself in specific terms to serve his master and his master's executors, successors or the like, he will not be so bound nor will the executors be bound to the apprentice as was stated in Baxter-vs-Burfield.⁴¹

Illness of a permanent nature to any of the parties to the contract can discharge the contract and either part can use that as an excuse to discharge himself from the contract.

Where a master receives a receiving order and the apprentice gives written notice of the

³⁹ [1968], IQB, 396.

⁴⁰ [1808], 9 East 295.

⁴¹ [1828], 5 Bing 34.

relationship to the trustees, the contract of apprenticeship will be completely discharged. In Re Richardson Ex parte Gould⁴², the apprenticeship was to last for five years and was to commence on March 1st, 1886. The fee was to be Pounds 100 of which Pounds 60 had been paid and the remaining Pounds 40 was to be paid later. On May 25, 1886, the apprentice was told that he was no longer to present himself for instruction because a receiving order had been made against his master the previous month. The court ordered a return of Pounds 50 out of the bankrupt property.

Where the trustee can make alternative arrangement for the apprentice to be trained, this can be arranged instead of the return of the money for apprenticeship, thus he has a right to training.

Under the master/apprentice relationships, the master reserves the right to dismiss his apprentice for misconduct which has to be stated in the formal agreement to contract. This results in cases where such conduct or behaviour amount to positive danger as where a student assistant to a chemist was too intoxicated to compound the drugs so that a shop boy had to do it per Wise-vs-Wilson⁴³, in such a case the apprentice may be dismissed. An apprentice who is a habitual thief may be dismissed but insubordination, although an embarrassment to the master, and fellow workmen alike, will not entitle the master to dismiss him per McDonald-vs-John Twiname, Ltd.⁴⁴

Having discussed the general law of contract on capacity, in our next chapter, we analyse the development of infant contractual capacity with specific emphasis on the contract of employment. In the same chapter will be analysed the present legal system as per the Employment Act in respect to infant contractual capacity and the proposals in the Children's Bill 2001.

⁴² [1747], 2 Stra. 1266.

⁴³ [1887] 35, W.R. 381.

⁴⁴ [1845], 1 Car. & Kir, 662.

CHAPTER 3

Infant Contractual Capacity Concept Under the Contract of Employment

A contract of employment as a concept came into being after the industrial revolution in England and the larger Europe. This is the period when the *laissez faire* philosophy was a justification. The employment relationship was based on exchange of a promise to work or rendition of service, which was in return for a promise to pay wages. This type of relationship has been described as a form of contract of service. This is what courts recall as that which recognise social relationships between employer and employee.

These type of contracts would be formed between employer and employee by an express oral agreement or by the conduct of the parties.¹ These terms and conditions of employment have been dynamic and cumulative in that some of the terms were settled by the employer and others by the employee which would include the use of standard form contracts. Others through collective agreements between employer and employee and trade unions, others from custom and practice in respective areas and industries, while others would be implied under the industries, and others would be implied under the rules of common law, others still were imposed by the statute.²

Under the contract of Employment, at times it is hard to prove whether there existed a contract between the parties as captured by Professor Otto Freund.

“This contract of employment which looms so large in the thinking of lawyers, is often almost invisible to the naked eye of the lay man.”

¹ 1880 6.Q.B.O. 530.

² Stevenson Jordan and Harrison vs Mac Donald & Evans (1952) ITLR 107.

The same contract of employment is described as a key cornerstone of the edifice of labour law.³

Due to the concept of free consent, the common law regarded the relationship of employer and employee as of private contract close or same as that of husband and wife or partner and child. The idea of freedom of contract came out when misgivings arose as freedom not to contract, no legal enforcement of the right to work as clearly brought out in the case of Allem vs Flood.⁴

The concept of freedom of contract has been described as high sounding by King Napoleon Bonaparte.⁵ The concept is actually a myth and an illusion due to various reasons from a social point of view, the freedom of contract was to strengthen the power of property in the employment relationship, but there was no freedom of employment. The freedom of a worker is vague by its infamous statutes against those of the employer. It is a relationship of subordination and it has no provision adequate for the employee to bargain from for his working conditions.

Employers did not treat labour as a market commodity as such their contractual relationships came out as those in the feudal notions of hierarchies, especially on the area of employee's obligations to obey the employer. This is a serious defect at the core of legal concept of contract of Employment and freedom to contract.⁶

Freedom of contract involves three aspects, the freedom of the worker and the employer, from state interference, on supply and demand, freedom of choice of contracting parties

³ Mamji vs Mzee bin (1917) 7 K.L.R. 37.

⁴ Republic of Kenya, National Vol. 1p 42 Assembly, debates.

⁵ Republic of Kenya, National Vol.2 Col. 217 of 30-7-37, Vol. 3 C&O 23/11/37.

⁶ Republic of Kenya, National

and the freedom of the private will to determine the contents of the contract. But in real cases, the employer has an upper hand as an “equal.” The contract undermines the property rights of the employer and his great economic power to dictate the terms of the contract of employment. The worker became the subject of the employer as stated by Otto K. Freud. “As a social fact that which the law calls freedom of contract may in many spheres of life (not only in labour relations) be no more than freedom to restrict or to give up ones freedom. There is obviously more freedom of contract between a buyer and a seller than between a master and servant or between an employer and one seeking employment.”

Sir Henry Maime in his book “Ancient law” states that “The movement of progressive society has hither to been a movement from status to contract.⁷ The employer due to his status derives a hard bargain, the devil’s bargain.⁸ Which led an English scholar Albert Dreer into writing that “The rights of workmen have become a matter not of contract but of status.”⁹

A sum up of the nature of contract of employment shows the exchange of a promise to work, render service in return for wages from the employer. A distinction was also made between contract of service being that where, an employee is subjected to the command of his employer as to the manner he shall do his work *id est*. What should be done, how it should be done, when and where it will be done. This is actually the control test per Yemens vs Noakes.¹⁰

⁷ Employment of Servants Ordinance 1937.

⁸ No. 16 of 1939 - Sections 30(1)-(d).

⁹ Ordinance No. 27 of 1946 s.2.

¹⁰ Republic of Kenya, National, Vol. 30 Col. 431 24/8/48 Assembly Debates.

On the other hand, under the contract of services, the “employee” is not under the control of the employer especially in the case of an independent contractor, who determines his “modus operandi.” Lord Denning formulated the “organization test”¹¹ that stated that the test of being a servant does not rest on submission to orders but it depends on whether the person is part and parcel of the organization i.e the “integration test.” One who is an independent contractor provides services under a contract for services and therefore is not part and parcel of the organization as his service is not an integral part of the enterprise.

Before there was legislation in place, there was lack of a clear legislation that dealt in infants’ capacity to enter into contracts. In those early days, the common law of that time applied. This was before the passing of the Employment of women, young persons and children ordinance of 1933. Earlier in 1910, master and servant ordinance allowed the father or a guardian of an infant power to apprentice such an infant. This was to allow the infant to learn skills inclusive of those of domestic servants. Although the ordinance had no provisions of which an infant would be employed under the 1910 ordinance, the infant would still be employed under the same ordinance as though he were an adult.

Under the employment of women and young persons and children ordinance of 1933, a young person was one who had not attained the age of maturity, which was 18 years. A child was a person under 14 years old. Under sec (4)¹² of the ordinance, a child of 12 years old could not be employed in industrial undertakings. This capacity to be employed was limited with conditions especially where it involved entry into an adit or shaft, the infant would not seek employment, he had to be employed during the day only. The Governor had authority to prohibit the employment of children in industrial undertakings.

The law creates an impression that the infant was being given a capacity to enter into

¹¹ Kenya Colony :Report of the Committee on Young Persons and Children.” 1953.

¹² Kenya Colony, Bills, P. 16, 1956.

contracts of employment even if such were in industrial undertakings. The wording of the ordinance does not appear to be for the protection of the infant. It clearly shows that there was a hidden agenda on the issue. The ordinance lowered the working age to 12 years. This enabled more infants to work in gold mines and in any other industrial undertaking. The law did not provide for the protection of infants as there were inherent dangers on the workplace.

Employment of children in agricultural work was not controlled¹³, thus exposing the young infants to stress and poor working conditions. This ordinance was repealed by that of 1948, which came into place after the 1937 one known as The Employment of servants ordinance. It was stated that it was a consolidating Act. Section (2) of this Act defined a juvenile as an Arab, a Baluchi born in Africa, a Comoro islander, a Somali or a native who had not reached the apparent age of 16 years.” This statute was to apply to all infants of the stated areas excluding the white community’s infants. This statute clearly brought out an element of racism.¹⁴ This ordinance was not for the employment of European infants but was to facilitate the exploitation of labour force within legal limits.

Section 28(3) stated that no juvenile who appeared to be below the age of 10 years would be employed or enter into a contract of service.

On the other hand an infant of over 10 years old would be allowed to enter into a contract of service who would be employed only on production of a certificate which was to show that the consent of the parent or guardian had been obtained.

¹³ Leys, Kenya 1924 at p.175 For a good understanding of colonial social and economic policies and particularly with respect to labour, see;
(i) Leys Kenya 1924 Chapter 8.
(ii) Dille, British Policy in Kenya Colony, 1939 s.44 especially Chapter 1 part 4.
(iii) Ross, Kenya from within 1st ed. See especially chapter 6.

¹⁴ The Law of Contract, 10th Ed. G.H. Tredil Sweet & Maxwell pg. 598.

Section 27 prohibited a juvenile to be employed as a trolley or rickshaw bay or any other task which was unsuitable for him. This would be determined by a government medical officer.

Section 29 had provisions under which the District Officer responsible for the District in which the juvenile is employed would cancel the contract of employment of service. Although the provisions appear innocent, on the face of it, they greatly affected the infant's capacity to contract, they actually removed with one hand what the ordinance had provided with the other, leaving the infant exposed to the inherent confusion of the ordinance.

Since the minimum age for one to be employed was only 10 years to 12 years were to do light work. But the statute does not state what light work is and how this would be monitored. It is hard to administer this provision, for one, the District Officer would not be able to know that an infant had been employed and by whom, leave alone the type of work they were to be engaged in. This statute involved a closed policy of the colonial masters to exploit African child labour and an element of racism.¹⁵ It has attempted to safeguard the juvenile from exploitation in labour and at the same time availing that labour for the colonial economy. It appears that cheap labour was the key point for the survival of the colonial economy. The exploitation of child labour was stated to be morally objectionable. A clear balance had to be looked for as in the case it tilted in favour of the colonial policy in need of protecting their economy. The capitalistic scenario which promotes material things, and the idea of racism did not promote the protection of children from any form of exploitation.

The Amendment Ordinance No. 16 of 1929 brought in new provisions regarding infant's capacity to enter into contracts of employment. The juvenile definition was amended and

¹⁵ Dalton J., Land Law pg. 193.

was defined as a person who had not attained the age of 16 years.¹⁶ It also repealed sections 27 to 30 and now a juvenile would only be employed under a verbal contract of service. This was to be on a daily basis for 30 days, work within 42 days. Sections 28 and 29 stated that a juvenile would not be subjected to penal sanctions.

Section 30 increased the powers of a district officer who was to restrict the place where the juvenile could work, the person for whom to work and the length of time. The worker (juvenile) was to possess a certificate from a District Officer before he would be engaged. The provisions applied to natives.¹⁷

These new enactments were as a result of a report of the Employment of Juveniles Committee of 1938. It also recommended that contracts of service by juveniles be verbal. This was based on two recommendations.

- that the infant will easily terminate the contract
- many native juveniles did not know how to read or write.

The committee observed the education of the natives was not compulsory and thus no justification on a distinction based on race. They claimed that this was a theoretical observation as it did not exist practically. This did not show the true picture as the whole colonial system was based on discrimination. The working of juvenile for 30 out of 42 days showed that they were to rest only on weekends and work from Monday to Friday. The report did not state the number of hours a juvenile would work each day. This left a loophole and thus would not be for the interest of the juvenile.

Where a child was only employed during the day, he/she did not require a certificate per section 30. This made the parents to take their children with them to assist with the work

¹⁶ The Amendment Ordinance No. 16 of 1929.

¹⁷ You and the Law, the Rights of an Employee in Kenya by Oketch Owiti.

making the parent to be paid for the work of the child or enabling the parent to do more work for the day. They denied the children their right to play and made good use of them.

Section 3 of the 1948 Ordinance stated that undertakings such as industrial where members of the same family were employed, the ordinance did not apply. Section 4 provided that no child would be employed in any industrial undertaking and a child would not be employed in any undertaking whereby he was engaged to attend to any machinery or any open cast workings or sub-surface workings entered by means of a shaft or adit. These provisions were not for the protection of the infant but to safeguard the interests of labour force needs.

There was a provision in section 4 that a member of the council which was responsible for labour matters would by notice in the gazette permit such employment. S.6 also allowed the Governor in council by notice to prohibit any employment agreement with an infant. On the other hand the ordinance did not have provisions regarding employment in agricultural materials at coffee and sisal estates. It is our submission that in effect the ordinance did not protect those it was meant to protect.

Section 7 of the ordinance prohibited employment of young persons of 16 years in any industrial undertaking at night. This was for the country to be in line with (ILO) conventions in the other countries. At the same time, the provisions under section 7 would be waived in cases of emergency and in interest of the public. One is left to wonder how this ordinance protected the juvenile as it did not state which cases they would be unprotected and if they would not work because of their age, how they would be able to work in emergency situation where one imagines that there will be no order and it will be survival for the fittest. If they are not allowed to work when they can be supervised, how then can they be expected to work when under an emergency when even the supervisor might not be there!

S.11 stated that no child would be employed in any ship except where the ship was a school or training ship. There was a provision for the member of the counsel responsible for labour matters to give permission. This gives double standards as to when this can be done and the protection given with one hand is taken away by the other through the provision as that member of counsel would not be there to effect it.

S.12 stated that a young person would not be employed in a ship as a stroker or trimmer, but this excluded native vessels. The provision in essence meant that the native young persons did not qualify as a young person or that the ordinance did not consider him to be one that required protection.

The ordinance No. 12 of 1956 was passed to bring the recommendations of the Slade committee recommendations in line which was mainly the integration of the requirements of the International Labour Organization Conventions regarding juvenile employment.¹⁸ This ordinance defined a child as any person under 16 years of age. A young person was one who was over 16 years but under 18 years old. This was as per the Slade committee's recommendation of the age of 21 as the maturity age.

This recommendation had a genuine concern for the children. Under it's section 2 the Minister of labour had powers to declare that certain type of employment would be excluded from the provisions relating to industrial undertaking. From the face of it, it appeared that, it was to implement the stated policy.

S.4 of the ordinance prohibited employment of children in any industrial undertaking. This section was not applicable where a lawful deed of apprenticeship had been entered into. The provisions were similar to those of the ordinance of 1948 whose section 7 was repealed and substituted, whereby a child would be employed at night in cases of emergency and was not a periodical happening.

¹⁸ Slade Committee Report of 1956.

S.7 provided for minister's authority for a young person to work in an employment place up to midnight or from as early as 5.00 a.m., this was to allow the children to work in the coffee factories when it was in peak season and involved children who were under 16 years of age. Sec. 11 of the 1948 ordinance was amended in line with the (ILO) 1948 Convention. This ordinance applied to children under 15 years only.

S.17 of the No. 12 Ordinance of 1956 stipulated that a child under 13 years would not be employed away from his parents and even when the child attains 13 years of age, he would only be employed with a special permit.

S.17(4) brought out a distinction between male and female children. It stated that female children who were over 13 years would not be employed away from their parents. This required the permission of the parent or an authorised officer.

S.17(5) allowed the parent to have more power over a child than the Authorised officer. If the parent refused the employment of his child, the powers of the Authorised officer were not above those of the parent, and as such he would not allow such a child to be employed. This appears to be what was in the slade committee's report in paragraphs 62-65. The recommendations were to the effect that though the children could not strictly speaking be employed, which was to allow them stay away from their parents it was to their benefit that they worked and be paid, thus, engage in some gainful employment. It was the committee's observation that some employers could abuse a child while some employers were viewed to be good enough and would substitute the parents duties and provide the children with proper food, that was regarded nutritious, education and bring them up with discipline. This line of thinking brought out a view that it was in the interest of the parent that their children worked. Majority of those in that committee were white men and as such had their own prejudice as to the treatment of the African children on racial grounds. They had their interests to protect in the dependence of the colonial economy and the profits were mainly from the family settlers.

S.19 of the ordinance restricted the employment of the children in certain specified cases. S.22 authorized the labour officer to both cancel contracts of employment and when need be he would prohibit them. It is only a few amendments of section 35 of the Industrial Training Ordinance that were effected otherwise the situation remained to a large extent the same till 1976 when it was repealed by Act No. 2 which is the statutory law currently, The Employment Act.

A summary overview of the employment law of infants shows that the law was out to achieve two objectives. The aim of one was to have the Kenyan economy self supporting and able to sustain itself. This idea was to be maintained at whatever cost enabling the colonial masters to change and amend rules or laws that governed the labour areas so that they would be able to have adequate cheap labour to enable the economy stand on its feet. To be able to continue to be in charge of the colony, the colonial master had to be seen to be practising that which the world over practised especially in the area of protection of the children by having ordinances which were in line with the (ILO) conventions and that not to raise eye brows from those people who would sympathise with the situation in Kenya, as that of exploitation of children.

Any attempt by the state to protect the infant failed in majority of cases due to the economic system and the policies of the government. From the set up of the whole colonial economic structure and labour needs, the socio-economic policy considerations appear to have been more than racist, as the whole economy depended on abundant cheap labour. Without the African hand labour, no single acre of land of the large agricultural lands the settlers had allocated for themselves, could be productive. The colonial administration and the civil servants would not do without the help of the African labour as well. For the whiteman,s need of the African labour, it was argued that “ --- We sent people to govern the country, who could not do it without houses or many other things that could only be built and made locally by the people of the country.”¹⁹

¹⁹ Fawcett-vs-Smethrust (1914) 84 L.J. Ch. 473.

Except for a few individuals of whom some were missionaries, the native population was regarded solely and simply as a labour force for those who had plantations and farms. The colonial policy necessitated the allocation and alienation of the African land to themselves and allotted the African the duty of working on the land. The Europeans were allocated the right to own and reap the profits of the land. These products/profits were dependent on the exploitation of labour which the colonial government adopted ways and means to ensure sufficient labour was always there to meet their needs. This was done through the introduction of structural strategy of limiting the amount of land that the Africans had access to and the role of the administration officials. The development of the Kenyan labour laws in particular, infant contractual capacity has to be seen in the context of this socio-economic policies of the colonial government.

The Present Legal System per the Employment Act in relation to infant contractual capacity.

(a) Introduction

Law must be seen in the context of the whole social, economic and political system. When Kenya got independence, there was an important stage in the country's development. This determined the country's future social, economic and political system.²⁰ This period of transition towards independence was set in such a way that the capitalistic system was entrenched and independence would not cause any changes that were radical.²¹ This post independence Kenya saw not only the continuation of the economic base but of the superstructural legal regime as well.²² This besides government of Kenya set itself with ideals which were different from those of the colonial government. This was clearly shown by the Sessional Paper No. 10 of 1965 which

²⁰ Leys, Underdevelopment in Kenya 1975 pg 51 and chapters 3 and 6.

²¹ Wasserman Politics of Decolonisation 1976.

²² Kenya Independence Order in Council (1963) L.N. 718 of 1963 S.4(1).

contained Kenya's philosophy and ideology as to what society Kenyans wanted. The legal regime has been motivated by a spirit of human equality worth and value of all persons irrespective of race.²³ Whether the present law is effective in protecting the infant from exploitation in labour will be determined by the economic system and those social economic policies of the state.

At present, the law regarding the capacity of an infant to enter into contracts of employment is contained in the Employment Act and the subsidiary legislation made in relation to employment.²⁴ These documents are what contains the terms and conditions of employment. It has the general rules which govern the relationship of parties to an employment contract. Per the Kenyan definition, there appears to be no clear distinction between the words 'terms' and 'conditions'. These two words appear to be used interchangeably to refer to all the rules put together. As stated earlier, some of these terms and conditions are already agreed upon by the parties themselves. Some are implied by the courts while others are imposed by law. This discussion in the following pages is based primarily on the requirements of law.

The terms and conditions of employment are mainly governed by four Acts of parliament viz:

- The Employment Act Chapter 226 of the laws of Kenya.
- The rules governing wages, housing, leave and rest, health and safety, the special conditions of juveniles and women and termination of employment.
- The factories Act Cap 514 of the laws of Kenya deals with the health safety and welfare of an employee who works in a factory.
- The Workmen's Compensation Act Cap 236 of the laws of Kenya provides for ways through which an employee who is injured when on duty may be compensated by the employer. This in a nutshell is what is contained in the

²³ The Kenya Constitution No. 5 of 1969 Nb S.82.

²⁴ The Employment Act Cap 225 Laws of Kenya L.N. 155 of 1977.

Employment act and controls those conditions and terms under which these people work.

(b) Summary of Sections

S. 24(1) of the Employment Act allows the employment of juveniles in industrial undertakings where only members of a family are employed. This section lays down conditions for such employment. This type of employment should not be dangerous to the infant's life, health or morals. The nature of employment and the circumstances under which it is carried out must be safe. From the Act these conditions apply only within family circles. This brings in the question of a policy of the colonial era still lingering in our statutes. It appears that the state does not have complete faith in parental or family capacity to cater for the interests of the child in the best possible manner.

S.24(2) defines industrial undertakings to mean among other things transport of passengers or goods by road, rail or inland waterway. This section expressly excludes transport by hand/head. The provision of this section is rather too wide. The same section empowers the Minister of Labour matters at the time to exempt any employer from the prohibition and has to employ his discretion to determine the fitness of the employment having regard to the nature of the work involved in such employment. It goes further to state that any undertaking in which a party only is an industrial undertaking shall not for that reason alone, be deemed to be an industrial undertaking. It is our feeling that the permission to employ infants in party industrial undertakings implies that child labour will be available in a more and complex agricultural undertakings. It would have been clear if the definition was seen as in S.25(1) which prohibits the employment of children expressly whether gainfully or otherwise in any industrial undertaking. It is submitted that the section gives a half hearted kind of spirit as regards the protection of children from dangerous employment.

S.25(2) permits children to work in industrial undertakings where this takes place under a deed of apprenticeship or indentured learnership lawfully entered into. There needs to be a way in which this leeway is checked whereby children are learning, it is hard to monitor and establish whether the conditions under which they learn are those as per the laid down rules as it is between the child and the one to apprentice him who know of the contract.

S.26 provides that such children can only be employed under verbal contracts. It also has the exception of the apprenticeship or indentured leadership which is entered into under the Industrial Training Act. Here it is noted that such verbal contract is subject to the other terms of employment contracts which include notice of termination. When the statute allows verbal contracts it in effect creates special circumstances effective in placing the infant under the mercy of the employer. If there is nothing in writing how can a child employee claim? Hence the statute created a loophole for reasons best known to the drafters. A leeway indeed.

S.27 prohibits employment of infants in two cases. One is in regard to attendance to machinery. This is governed by the provision of the Industrial Training Act in respect to services where one is an indentured learner or as an apprentice. A blanket prohibition of any employment of a child to attend to machinery is vague, and hence difficult to be observed. One can be allowed to attend to machinery which is not actually dangerous, but in the process the child due to the nature of his tender years gets hurt. What can be dangerous on the other hand, can be relative depending on the context under which it is used and the circumstances of each case.

S.27(2) prohibits employment of children in any open cast workings or sub-surface workings entered by means of a shaft or adit. It does not define what these are.

S.28(1) generally prohibits the employment of a juvenile between the hours of 6.30 p.m. and 6.30 a.m. in any industrial undertaking. Although this is a good measure to protect the children, it is subject of other conditions which allow its suspension.

In case of serious emergency and when public interest demands. For this suspension to be effective, the minister for the time being of labour must publish such suspension in the official gazette. Although there is protection given, it appears to be subject to government policy. Where there are male juveniles, a notice by the minister is not necessary. This means that such male person may be employed between 6.30 p.m. and 6.30 a.m. in cases of emergencies which were not able to be foreseen or controlled. These emergencies are those of the kind that interferes with the normal working of an industrial undertaking and such interruptions must not be of periodical nature. It can be discerned that in case of a male young person, it is the employer and the amount of work at hand that determines when and if circumstances permit the infant to work between 6.30 p.m. and 6.30 a.m. These standards of judgement are to say the least extremely subjective. Despite these provisions, sub section two empowers the Minister to authorise an employer in writing to employ a young person up to the hour of midnight or from as early as 5.00 a.m. in the morning. When such cases arise, the minister needs to have consulted with the board. The whole section shows that the infant's potential to supply labour when urgently required is allowed. The actual spirit of the section is to utilize the infant rather than protecting such an infant.

S.34(1) gives powers to the labour officer by notice to terminate or cancel any contract of service entered into by a juvenile with such an employer. The labour officer may exercise his power on the ground that in his opinion, the employer is an undesirable person or that the nature of employment is dangerous or immoral. He can cancel the contract if such employment is likely to be injurious to the health of the employee or for any other cause which may be prescribed. In this instance, the state takes upon itself to interfere with private transactions which do not concern itself on the blanket conception

of public policy. The section actually has the best intentions for the welfare of the infant. This power herein is limited with regard to deeds of apprenticeship or indentured learnership which is lawfully entered into under the Industrial Training Act.

S.34(2) adds more powers to the labour officer where he has power to prohibit a prospective employer from employing a juvenile. This can be in general or only in specified class or description of employment. Where he can prohibit on the same grounds as noted in sub section one above. Here, the notice has to be personally served on the employer or the addressee who has recourse to the subordinate court within 30 days.

S.50 empowers any labour or authorised officer to institute proceedings against any employer. Paragraph one empowers the labour officers to take into custody and to return to parents or guardian of any child employed under terms contrary to part four of the employment Act. One who contravenes this section of the Act is liable to a fine of Shs.1,000 or in the case of a second or subsequent offence, of Shs.2,000. Too little amount as fine which cannot deter.

The Employment of children rules 1977 provide that, no person should employ any child without a prior written permission of an authorised office, which permission shall not be granted in two instances. The first is where circumstances are such as would cause the child to reside away from his parents or guardian. On the other hand a parent or guardian would consent to his child being employed away from home which approval must be in writing. This authorised officer should not permit children to be employed in bars, hotels, restaurants or clubs where intoxicating liquor is sold or anywhere as a guide. The exception to this general rule is if the labour Commissioner consents in writing to such employment and the child is in possession of a copy of such consent. This permit would be renewable annually. It is a difficult situation to monitor.

Rule four stipulates that any person who employs more than ten children on a permanent basis shall designate one who will be in charge of such children. Such a person must be approved in writing by a labour commissioner. The fine for non-compliance with these rules is Kshs.4,000. Although these rules cater for the welfare of the children the penalty is peanuts and those who wish not to comply can pay out without much a do.

The above stated legislation deals mainly with infant employment in industrial undertakings. The legislation appears to show reduction in infant ability to enter into employment agreements especially as to the terms of the field he can be employed and the times or hours in which he can be employed.

A close look at the rules stipulated as regards to infant contractual capacity, one can discern some capacity accorded to an infant. Apart from industrial undertakings, the infant is completely free to enter into employment contracts. His capacity is not limited as such apart from necessary legal procedures with which he has to conform before entering into employment contracts. The infant is allowed to be employed at industrial undertakings that are purely a family affair, as well as those that are partly industrial. The minister can prohibit such employment in industrial undertakings when he deems it proper. The opportunity appear unpredictable and temporary in nature.

Actually the infant can only work between 6.30 a.m. and 6.30 p.m. which time may be expended depending on public policy and expediency, especially for male young persons. It is possible for this time to be extended to a maximum of 19 hours of each day. As stated earlier this extension of hours is not in the interests of the infant. The law prohibits infant employment to attend to machinery and in industrial undertakings generally. He cannot work in open cast or sub-surface workings. He is also generally prohibited to work from 6.30 p.m. to 6.30 a.m. Here it appears the main reason is to protect the infant from employment in any dangerous undertakings. This very attempted protection is actually half hearted as the provision can be violable as and when policy dictates. Where

it is other undertakings, the law has only very general provisions. It is herein submitted that the capacity which the law accords an infant in respect to employment appear to be motivated by two factors. First, there is the need to legalise the employment of children in certain essential sectors of the economy, while there is also the need to prohibit the employment of children in other sectors on humanitarian considerations.

In the first case the law allows the employment of infants in some cases and in other cases it is not prohibited expressly and are deemed legal. The special areas are those with respect to the case of domestic servants and the agricultural sector. This case cannot be motivated by the need to cater for the infant's welfare. Where certain employment is prohibited expressly, it is in cases that are from the humanitarian point of view, and morally objectionable. The issue here is that children who are weak human beings should not be allowed to work under conditions that are hazardous to their physical health or their morals. As stated earlier, the loopholes created by the law with regard to this second factor only shows that the intention of the law with regard to the protection of the infant is only half-hearted. The situation is however made worse by circumstances created by the present Kenyan economy. Actually infant need not be compelled to go and work by the overt use of force by the government but by individual conditions prevailing in the homesteads where these infants are born and grow. This unique characteristic mode of production is captured by Collin Ley where he says, with respect to Kenya that

--- the apparently 'natural' forces of the market for labour are sufficient to ensure that the surplus is appropriated by the capitalist²⁵ ---

The capitalistic system which is based on exploitation of man by man is such that it actually creates surplus manpower in the form of unemployment. This creates competition for new jobs that there are, and therefore the employee has no power to dictate the terms of his employment. Although legal structures always attempt to protect

²⁵ Supra 1 at p.9.

the infant from exploitation, it must always be difficult if not impossible, any protection must originate from the basis of the economic system itself. The present ground in Kenya actually tilts towards this direction. The actual situation indicates that child labour is being exploited. In the East African Standard, Saturday March 6, 1999, it was reported: **“Child Abuser found guilty.”** On January 4, 1999, the press carried a story entitled, “employer assault girl 14.” The story highlighted the plight of a girl, Esther Karungari who was employed as a maid despite being under-aged. She was deprived her wages and constantly abused by her employer who was a teacher. Following this exposure she was charged and fined Kshs.5,000 after pleading guilty for employing a child contrary to employment Act Cap 226 and failing to pay wages as prescribed for employees under 18 years.

In the same paper of March 3, 2000 **“A ten year old tortured in Kangemi by employer.”** A ten year old girl working as a house-help was seriously injured after her employer cut her head and plucked out her fingernails. Julia Chepkogei, who hails from Nandi District, sustained injuries after her employer cut her with a metal object on Sunday night. The girl, who bled profusely all night in her employer’s house in Kangemi was rescued yesterday morning by two passers-by, Mr. Martin Njoro and Mr. Vincent Shimenya. They took her to a nearby clinic and alerted the police. Apart from fresh wounds, the girl had several healing wounds all over her body while some of her fingernails had been plucked out during the beatings. The girl, Julia said she had been working for the woman, for as long as she can remember and she stated that her parents back at Nandi received Shs.400 monthly. The girl claims “she normally beats me and when I start bleeding, she orders me to clean my wounds and sleep.”

In another report of the same paper on March 20, 2000, Joyce Mkalum reported, **“CHILD ABUSE ON THE INCREASE IN KENYA.”** From the increase of reported cases of rape of minors, and battering of children by their parents and guardians, children’s rights are still being violated in Kenya. This is despite Kenya being a signatory

to the Convention on the Rights of the Child. Most communities in Kenya measure a child's worth by the amount of work the child is capable of doing.

In yet another story in the same paper, of Wednesday April 12, 2000, it carried **“One Million Women sold as sex slaves.”** America had declared war on the multi-billion dollar slave trade of women and children for the sex industry and called for global action to tackle the problem. Speaking at an international conference on “Modern day slavery” in Manila, Madeleine Albright, the American Secretary of State, called on an end to the “increasing and devastating” problem of trafficking in women and children. The trafficking is one of the fastest growing criminal enterprises in the world.” The question of enslavement and working under conditions which the worker does not appear to control appear almost worldwide as stated in this paper.

The same Standard paper of June 8, 2000, carried a report, “DC decries illiteracy in Meru North.” The DC, Mr. Paul Yatich has challenged parents and leaders in the area to ensure all children of school-going age are enrolled in school. He decried the increasing rate of illiteracy school dropouts and child labour in the district. He told the local education officers to team up with chiefs and their assistants and round up all the drop-outs and have them enrolled back and retained in school! This he said at Kathanga Primary School in Mutwati division.

Statements from high ranking government officials such as this from a DC, are to say the least blanket. They do not help the actual people much and are actually an element of misplaced public relations? The DC is the chairman of the District Education Board, he knows better why there are many school dropouts. In this statement he has not addressed the actual root cause of the problem except advising people to reduce the consumption of illegal brew and use the ‘miraa’ money to educate their children. The D.C. knows that parents are either ignorant or too poor to afford education of their children. That is why they drop out of school to be employed as child labourers. He should state the

government's stand to alleviate poverty or start programmes that can empower the people economically and enable them have their children in schools. Him as the DC, should encourage children to stay in school by having say, school feeding programmes whereby the children from the poor families can have school lunches to be able to stay on till evening. On the other hand he needs to encourage people, form cooperative societies whereby all 'miraa' sales should be channelled through to enable them have periodic incomes rather than the daily sales through middlemen who exploit and pay less, enough for illegal brew only. If the DC is sincere, he is actually the one to stamp out the illegal brew through the use of his chiefs and assistants so that the income from the community is put into proper use to develop the area rather than use the decry the rate of illiteracy, pit the district for a fact that less than thirty students from the district join universities each year. It is an area that calls for concerted effort on his part to assist in the review, recreate and reshape all existing laws touching on school dropouts which result into child labour and bring them in consonance with the needs of a particular society and its changes.

In yet another report on March 20, 2000, **“Education Sector plagued by decline in enrolment.”** Decline in enrolment and relevance of education are some of the major challenges facing the sector in the country. Dr. Davy Koech, the chairman of the Commission for Higher Education, also identified declining completion rates and financing problems as other challenges facing the sector. Quoting the Central Bureau of Statistics, Koech said “there was overall 89 percent literacy in high potential areas and 24 percent in low potential areas.” He said that the main concern was how to produce our employable labour force. These are some of those reports that are made and they are later sent to the archives to gather dust. If such reports would be used to the benefit of the country it would be proper and would advance the needs of the people. If he states clearly the rate of enrolment is low systems used to be put in place to increase the enrolment rate and others to maintain or curb the decrease of enrolment after starting school. The report needs to boost the government's plan to identify these reasons of high

dropout rates and empower people in those areas where enrolment is as low as twenty four percent so that many do not drop out of school to be in the exploited labourers group as child labourers.

In yet another report in the East African Standard of April 15, 2000 editorial, it was reported **“Shocking statistics on children’s rights.”**

The statistics are as confounding as they are frightening. The Permanent Secretary in the Ministry of Labour and Human Resource Development, Dr. Kangethe Githu on Thursday disclosed that over four million Kenyan children aged between six and sixteen do not attend school and may be involved in child labour. Githu attributed the rise of child labour to inadequate legislation, HIV-aids and breakdown of family structures. Children represent almost forty one percent of the population of the country. To condemn such a percentage to ignorance as seems to be the case today, is certainly to perpetuate poverty with all its concomitants, which is frightening. The Permanent Secretary also took issue with the country’s education system which he said should be made more relevant and affordable to check the high drop-out rate in primary schools and urged that more emphasis to be put on informal education for the sake of disadvantaged children. The educational system should not segregate people but to free a population from ignorance is a step towards freeing it from poverty. The report continued to paint a bleak state elsewhere in the world. It stated 250 million suffer from this form of exploitation. But just because it is practised elsewhere does not mean that it is right. The UN Charter on Children’s rights is clear on this matter. It states that it is illegal to employ children. In fact just because a child is underprivileged does not make it right to employ him or her to work in hazardous environments. It is the most despicable form of exploitation. Actually child labour continues unabated because of lack of legislation. The Attorney-General has been promising Kenyans a comprehensive law on the rights of the child for so long it has become a mantra. Since the children draft bill of 1995, 2000 and now 2001 it is yet to become law in the meantime it is the children who are bearing the

repercussions of this lethargy. Without strict legislation to protect the child, any move towards such a cause will be futile.

The senior labour officer in Nairobi stated that the problem of child labour exists in his jurisdiction. He however stated that the worst problem is that of enforcing the law itself. There exists no record of the juveniles employed and where employed, as per the Employment of (Children) Rules of 1977, and he admitted that he has never granted permission for any juvenile to work. Thus, he admitted was hard to know who works where and what the terms and conditions of the places they work are.

He however stated that there are three main areas where children are employed. For young girls, he stated that they were employed as “ayahs” or domestic servants. Young boys are employed as “matatu” conductors, but few boys and girls are employed in plantations that are near Nairobi. Some of these children are employed in night clubs and in dance troupes. There are very rare cases when labour officers are called upon to enforce their powers as per sec. 34 of the Employment Act. Since it is hard to enforce the law in place, sec. 50 of the Employment Act is hardly used.

Interviews with the Senior Labour officials at the Ministry of Labour Headquarters indicate that the problem of child labour is spread across the country, and thus a **national problem**. There were instances of employment of child labour in coffee, sisal and pineapple plantations in Kiambu, Taita Taveta and Thika respectively. Although orders had been made to discourage the same, the problem of child exploitation is a real one and hard to deal with. He stated that his department can only handle cases that are brought to their attention, as he has no records to show how many children are employed and by who. Those who work in the big plantations do so seasonally when the crop is in peak season and when it is over, or temporary. Those who clock in the morning and out in the evening each day. They have no permanent records of those who work each day. Those who enter, say the factory for that particular day are the “employee” of the factory for

that day. Such daily fluctuations are hard if not impossible to handle even if there were legal structures in place to deal with them. The problem is a socio-economic one.

It appears the law is not effective and has loopholes which employers use to circumvent it. The question then will be why the law is ineffective as it appears to have run out of control.

The law has failed because it is not being followed. Although juvenile workers are required to have certificates from the Labour officers or consents from their parents this is not being followed. Majority of juvenile workers work without the consent of the labour officers, thus are not privy to their contracts. Children on the other hand are preferred to adults especially as domestic servants as they are not as much informed as the parents.²⁶ Majority of the minors are forced to work due to financial problems within their families. Such requirements will be disregarded by those employers who see cheap labour in the power of the children. Although remedial actions may be put in place, they may not succeed as it is a double edged problem --- the employer in need of cheap and easy labour and a child whose employment decides between a meal for a whole family or permanent starvation. On the other hand offences that appear in the domestic servants domain, for example are difficult to prove. Some of these children have run away from home for a better life, and stay in employment.

There are problems on the enforcement of the law. It is difficult for those whose duty falls on the enforcement to move from house to house to be able to take head count. When few individual cases are reported, especially if reported by neighbours, the minors usually cooperate with the employer, they state that the person they are working for is his/her aunt and the aunt is assisting her to try and get some exposure, say, tailoring in future, hair dressing or typing. These young people have a choice of either sticking to the bad conditions of work or being thrown out of home to go back to where they came from,

²⁶ E. A. Standard , April 15, 2000 pg. 6.

face poverty and no food or change the work to turn to the streets as beggars or start child prostitution and juvenile crime.

From the reports, even those young boys employed as “matatu” touts would not cooperate with the labour officers in case they want to know how much they are paid, the terms and conditions of their employment. They do not cooperate and will always say that they are employed in an uncle/auntie’s ‘matatu’ and will not even disclose the true name of the owner! They too want to protect their employment. Where the juveniles are employed to work in plantations of coffee, tea, sisal, pineapple and other crops, a great number accompany their parents to work. It is the parents who are actually employed not the minors. Whatever work they do, it goes to boost what the parent earns for that day which goes a long way to augment the income of the whole family. In other cases, children run away from their homes and ask for work in the plantations to seek employment. In case the employer is in need of extra staff, it is hard for the labour officers to know and take action.

It appears that the developments in the Kenyan society have outwitted the law. The law needs to change and cater for the new situations and conditions when they arise. A sign of the law being dynamic not static. Labour unions which govern the collective bargaining agreements between the employees, employers and employees themselves are not known to these youngsters who do not know that there are terms and conditions of employment that need to be negotiated before one gets employed. They also do not know that employment agreements need to be governed by the law. These are young people in age and mind maturity can neither read nor write as they either left school too early or are school drop outs due to their home backgrounds. They are not aware of the conditions of employment whereby they can be exposed to hazardous chemicals or rays without them being aware of the consequences. A case in point was the Thika based factory highlighted by the Catholic church whereby, many people who worked in it ended up with chest ailments and other complications. The other case in point is the Pan Paper,

Webuye factory which is in papers time and again about the rate of infections of those who work there due to the strong chemicals the factory uses in the processing of the paper. There also lacks an effective and wide scale educational programme by which those who enter into employment can be aware of their legal rights. Mass education through chiefs' 'barazas', churches, women groups and community based organisations may awaken our people.

The Children's Bill 2001

This is an Act of Parliament to make provisions for parental responsibility, fostering, adoption, custody, maintenance guardianship, care and protection of children, to make provisions for the administration of children's institutions, to give effect to the principles of the convention on the rights of the child and the African Charter on the Rights and Welfare of the Child and for connected purposes.

Section (1): This Act may be cited as the Children's Act 2001 and shall come into operation on such date as the Minister may by notice in the Gazette appoint and different dates may be appointed for different provisions. The Bill incorporates all the areas that affect the children but it has not yet been made into law, it has not been discussed and debated by parliament as such still in draft form and cannot be used as the Law of the land as it is to protect the children who the draftsman intended it to.

In section 2(1) the Bill defines a child to mean a boy or a girl under the age of eighteen years; which means that anyone below that age is a child and lacks capacity to contract. Section 9(1)(4) states that every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. This is the section that deals with protection from child labour and armed conflict. But in sub-section 9(4) it states, that the Minister shall make regulations in respect of periods

of work and legitimate establishments for such work by children above the age of sixteen years. This Bill creates conflict in its draft state. While the same Bill clearly states that anyone below the age of eighteen years is a child, at the same time the sub-section (4) allows the same child to work with the permission of the Minister. Under this sub-section, the Minister gives away with one hand that which he intended to protect with the other.

Section 3(1) deals with what is to the best interests of the child. Here it states that the child has a right to life and the Government and the family to ensure survival and development of the child.

Section 3(2) states that in all actions concerning children undertaken by public, private or social welfare institutions, the best interests of the child shall be of primary consideration. This is to safeguard, promote, conserve and secure the welfare of the child and accord the child an opportunity to express his opinion and consider the opinion depending on the age and degree of maturity of the child.

This is a very good provision which takes into account the option that is for the best interest of the child. But in the real world these options and considerations may not be available and one has to go with that which is not necessarily the best but the only option available. Take our case of child labour, the interests of the child might not be considered where the child has no option but to work for survival.

Section (5) states that a child shall have a right to live with and to be protected by his parents, unless the court considers that it is to the best interests of the child to be separated and in case of separation the court through the government to provide ways and means of reunification of the child with his family. This is a very good law or provision but it may be tricky to implement. The case where one has a right another has a duty. If all children have rights, there will be no child to be in the streets or to work while under

age. The parents in most of the cases cannot afford to maintain the children, they have to run away to be able to take care of themselves. If all these cases end up in our courts even the courts will not be able to dispense justice as they will be too many.

Section 6(1) posits that every child shall be entitled to education provided by the Government and parents. Sub-section (2) further states that education shall be compulsory and the Government to take measures to reduce its costs and eventually provide it free, whereby the Minister shall make regulations to implement this object. Here in lies the whole issue of disparities in society. Our Kenyan economy, the way it is set up is a capitalistic one. It is a society of class, the upper, middle and lower. The proposal of free and compulsory primary education appear 'quite distant' with the current economy in 'samples' it is hard to envisage a situation where the economy can sustain such a proposal. Average private primary school fees per child per year ranges from about one hundred thousand to one hundred and fifty thousand Kenya Shillings per year. Even in Government schools the fees paid is equally high; National schools - Shs.60,000, Provincial Schools, Shs.30,000 and District schools - Shs.25,000. Considering that there are extra costs to run the school, building funds, activity fees, purchase of books and writing material. It is our humble submission that this proposal though 'genuine', cannot be implemented and as such will remain in draft form as it has been since 1995. It is this lack of proper education which results into school dropouts whereby children end up being employed when too young as they cannot be maintained in schools by the parents. Even if the education was meant to be free, the poverty level in our country cannot allow these children to go to school.

Section (8) states that every child shall have a right to health and medical care which shall be provided by the parents, extended family and the Government. On the face value, the provision appear a good one but its real impact on the family and the government is immense. In Kenya there are no good developed Health care Insurance schemes (National Hospital Insurance Fund) whereby all people can be insured and when they fall

sick they are taken care of from the National kitty. It is “each man to himself and God for us all.” This is why there are appeals for medical, burial and fund raising for such causes because these people have nowhere to turn to. It might be considered far fetched to transfer this huge health care bill to the parents, extended family and the government. The administration of such responsibility will be difficult as people fall sick now and again, with Aids scourge and road accidents.

Section (11): This section takes into consideration a disabled child. It states that the child has a right to be treated with dignity, be accorded appropriate medical treatment, special care, education and training which should be free of charge or be provided at a reduced cost. This provides for the protection of such children who have been confined to town streets to sell sweets in majority of street corners and foot paths. Those who are able to go through education and training are in most cases not catered for in employment institutions as at the moment there are very few institutions that employ them. Proposal is made to amend the Education Act and Employment Act so that these children will be engaged after school and training.

Section (12) protects the child from abuse, neglect and any other form of exploitation plus sale and trafficking or abduction by any other person. Section (2) accords appropriate treatment and rehabilitation as the Ministry may consider. On the face of it this is a good law but the only issue it may have is the practical implementation.

Section (13) accords protection from harmful cultural rites which negatively affect the child’s life, health, social welfare, dignity or physical or psychological development. This section touches on initiation rites which include circumcision. These rites form the traditional bonds of some Kenyan communities like the Bukusu, Kisii, and the Masai. To protect the children from these traditional and cultural norms will be difficult as in some tribes the tradition is deep rooted and will require time, education and sensitising before it can be wiped out.

Section (15) states that every child shall be entitled to protection from the use of hallucinogens narcotics or psychotropic drugs and from being involved in their production, trafficking and distribution. With proper means of implementation as it has affected many young people both in schools and colleges majority of whom have ended up being drug traffickers and pushers, others being employed by international drug rings whereby the users end up as ‘vegetables.’

Section (16) states that a child shall be entitled to leisure, play and participation in cultural and artistic activities. This is a good provision as all work without play makes Jack a dull boy they say.

Section (17) states that no child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty and no child shall be subjected to capital punishment or life imprisonment. Sub-section (2) states that a child offender to be separated from adults in custody. Sub-section (3) states that an arrested child and detained shall be accorded legal and other assistance as well as contact with his family. The provision is in agreement with the penal code as no children is sentenced to capital punishment but detained at the pleasure of the President. Sub-section (2) is an improvement of the penal code where when a child is jointly charged with an adult, has always been taken to the court of adults. The provision of sub-section (3) might be tricky as the development and advancement of legal aid in Kenya has not advanced and the number of children who can afford lawyers are few and the type of assistance that can be freely accorded might be minimal.

Section (18) metes out the penalties that are to be given for one who wilfully or as a consequence of capable negligence infringes any of the rights of the child as specified in part II section (4 to 17). Such a person, upon conviction to be liable to a term of imprisonment not exceeding twelve months or to a fine not exceeding fifty thousand shillings or to both imprisonment and fine.

This part II of the proposed Children's Bill 2001 contains the safeguards for the rights and welfare of the child. Having listed and itemised the rights of the child and the protection that the child needs to be accorded the penalty for one who violates the rights is peanuts. One year's imprisonment or Shillings Fifty Thousand as a punishment is to say the least inadequate. By one going against say Section (9) which protects a child from child labour and armed conflict, the child will have missed a whole generation if many children are subjected to what is prohibited in the sections, the children may not be useful anymore and would have messed them entirely. How then does the law punish the offender of such a crime to Shillings Fifty Thousand only. No, this is inadequate is our humble submission.

Section (19) deals with the enforcement procedure of the child rights as given in sections (3 to 17). It states that one has to apply to the high court whose rights has been, is being or is likely to be contravened in relation to a child. The application of such children matters to the high court may prevent many cases being brought out in respect of children in need. The matter needs to be reported to the local chiefs, the church elders, children officers, school teachers and those in the lower hierarchy of the provincial administration so that they can deal with the cases at the local and instant level. Taking the case to the high court and where the Chief Justice has to make rules with respect to the practice and procedure of the High Court. This procedure will delay majority of cases as most cases normally bend in the high court and to reach the Chief Justice to make decisions on individual cases and the high court Judges may not be practicable. This does not assist the course of the children even though the Bill has accorded them all the rights and protection, the procedure of the enforcement of those rights is not fast enough thus inadequate and will lead to delay of many cases. On the other hand per section 19(1) it should be noted that anybody who alleges that a certain child's rights are being violated should report to those people as close as possible to the child, and the case need to be sorted out at a local level. Otherwise there will be too many people to move the High court, who will meet the court fees and the issue of going to the high court will put off

majority of cases as many people who might be in a position to allege the wrongs done to children might not be eager to report to the high court. It will be a waste of time as court cases take long and one will be tied to the court and leave his work, very few cases will be reported in the present proposal. It is our humble submission that the procedure, style and process of enforcement of child rights requires a second thought before the final Bill is passed.

Having analysed the development of the contract of employment with main emphasis of the Employment Act and the Children's Bill 2001, in our last chapter we conclude our discussion, summarize the study, draw conclusions and put forth recommendations that we feel are appropriate as proposals for this dissertation.

CHAPTER 4: CONCLUSION

This study has been concerned with the protection of children who work in Kenya considering that they lack contractual capacity to contract. It also considered the intervention mechanisms and measures that have been employed to combat the practice. It was seen that the problem of child labour in Kenya is not a new phenomenon, it dates back to the period before the colonialists, though children were never employed in far off places and they were not paid as per the tradition but were to assist in the home and be prepared for their roles in future in the various societies they grew up.

The actual issue of child legislations and employment dates back to the colonial era. At that time there was no law that regulated or controlled the use of child labour within the country. Many legislations were put in place to try and regulate child labour especially in the formal sector and uniquely left out the agricultural sector in which child employment made a significant contribution to the workforce in the plantations.

The number of children who work in Kenya today has greatly increased and continues to increase each day. This is due to increase in poverty among majority of Kenyans as close to 60% of the people live below the poverty line.¹ On the other hand working children consist of about 1/4 of all those people employed in the various industrial and agricultural sectors including the domestic servants.²

The children who work in Kenya do so under harsh conditions where they are prone to various hazardous substances and chemicals in form of pesticides and herbicides of which

¹ Shivachi, E. 1996, Child Labour in the Context of Trade Unions in Kenya: Focus on Commercial Agriculture Report on Regional Seminar on Child Labour in Commercial Agriculture, Dar es Salaam Tanzania, 27-30 August, 1996, p.1.

² UNICEF, 1996. The State of the World's Children 1997, UNICEF, New York p.38.

a great number in use in Kenya have been banned in other countries. Some children work under circumstances where they are exploited, often earning less than half of their adult counterparts earn.³

From colonial period, the laws that have always been put in place have been evasive in especially the empowerment of infants in the agricultural sector and as domestic servants. The statute that mainly address the issues of employment of children in Kenya is the Employment Act and the Employment (Children) Rules promulgated therein.⁴ Ironically the act leaves out the employment in the agricultural sector and in the domestic front, making the employment of infants in this sectors not to apply. He can be concluded that child labour in Kenya is not adequately catered for despite their lacking contractual capacity.

It will not be out of ordinary if at this point we critique the law on child contractual capacity vis-a-vis the law in place and endeavour to analyse their relationships and efficacy. The present legislation on children in Kenya is a reminiscent of the colonial era. It developed not out of cultural norms, but from colonial sentiments which focused away from the family as the centre for the development and rights of the child. Ooki Ombaka rightly observed the post independence labour legislation has not radically departed from the thrust of colonial legislation.⁵

We have seen that the local legislation on child labour continues to serve the interests of the economy with minimal regard to the rights of the child. The rules promulgated by the colonial government were mainly geared towards the economic development of the

³ Ibid, p.27.

⁴ The Employment Act Chapter 226, Laws of Kenya, Legal Notice No. 155 of 1997.

⁵ Ombaka Oki (1983) *The Law and Child Labour in Kenya*. Journal of East African Research and Development No. 13 (1983) 171-178.

settlers. They were designed to protect the settler farmers by providing them with cheap labour from the Africans, including children. Thereby guaranteeing a reasonable profit margin. It has been observed that the major and controlling factor within the business industry is the profit margin. The owner in an attempt to increase his profit margin aims at reducing to the minimum, all the costs attendant in production. These include the costs of machinery, inputs and labour. The most prevalent practice is to offer increasingly low wages to workers which has some effects on the supply of labour. Hence children are recruited to replace adult labourers. They fall prey to the exploitative practices of employers such as low pay, long hours of work and unsatisfactory living conditions among others.⁶ This was the spirit behind the enactment of the Employment Ordinance and the Regulation of Wages and Conditions of Work Ordinance among others which were later adopted into the independent Kenya with minimal reforms. It is against such a backdrop that we are going to examine the child contractual capacity in Kenya vis-avis the international, regional and municipal laws.

International law is important in the framing of municipal law and policies. The Conventions and Treaties once ratified have a binding effect and are therefore mandatory in their application of the state parties. The recommendations help in guiding the State Parties in formulation of their local laws and standards. Thus legislation is essential to deal with the protection of children from work and at work: and thus there should be a harmony between the international law and the national law. It is therefore important that both regimes of law are in conformity in order to fight against all forms of child employment and to provide minimum level of protection where child employment is unavoidable.

But from the onset, there is a disparity on the definition of a child. The United Nations Convention on the Rights of the Child as we saw in earlier chapter defines a child as one

⁶ US Development of Labour, 1995: *By that Sweat and Toil of Children Vol. II. The Use of Child Labour in the US Agricultural Imports and Forced Bonded Labour*. Bureau of International Labour Affairs, Washington D.C. pp. 2-3.

below 18 years whereas the ILO's Convention No. 138 of 1973 defines a child as one who is below 15 years. The African Convention on the Rights and Welfare of the Child defines a child as one who is below 18 years. This disparity has brought a lot of confusion in the understanding of who a child is and determining when protection should start in cases of engagement in employment.

In Kenya, the situation is even worse. The question of child labour is contentious even from a legal perspective. The law as said earlier reflects the existing official understanding and concern for children. The national policy as reflected in the law, is unclear about the definition of the 'child' for the purpose of labour. However, whereas the Employment Act⁷ defines a child as one below 16 years, the Industrial Training Act⁸ defines the same to be one under 15 years and the Children and Young Persons Act⁹ defines a child as one who is below 14 years. The constitution also has its own definition of a child. It defines a child as one below 18 years, the age of maturity. However, the customary law does not make the situation any better. A child, according to the customary law is one who has not been initiated. One becomes an adult after or upon circumcision for boys and in case of girls, when they reach puberty age, which keeps on fluctuating depending on individuals and the circumstances they live in.

However, the generally and universally accepted definition is the ILO's Minimum Age Convention No. 138. This harmonises the disparity by stipulating that a child is one who has not completed primary school education, and in any case one below 15 years.

In the Kenyan context, the Employment Act and the Industrial Training Act have tried to harmonise this but the Child and Young Persons Act has not kept pace. This disparity has

⁷ Section 2 Cap 226, Laws of Kenya

⁸ Section 2 Cap 237, Laws of Kenya

⁹ Section 2 Cap 141, Laws of Kenya

in practice led to a messy situation in Kenya where the distinction between an adult and a child is misunderstood, and to some, as long as a girl has reached puberty age, she is generally an adult and as long as boys have been initiated, though their age may be lower than 15 years, they are adults. Thus they are employable even when the constitution treats them as children as they cannot register for acquisition of National Identity Cards.

The local law does not make any distinction between paid and unpaid labour. Thus children continue to work with their parents because they are not paid workers. The law further does not make any distinction between lawful and unlawful child labour. Unlawful labour is believed to be labour which is expended by children for the purposes of child prostitution or working underground in mines or other engagement in heavy work. It seems therefore, that all other forms of labour are lawful and the engagement of children for such work is provided for in law and controlled in so far as the wages and conditions of work are concerned.

Despite the above lacuna, international law defines unlawful child employment as work that is likely to interfere with the child's education, and jeopardise the health, safety, morals, spiritual or physical development of a child.¹⁰ This would include and applies to children who work in plantations, industrial and commercial agricultural sectors of the country. Thus the Kenyan law continues to be silent on lawful or unlawful child engagement, thus by omission allowing for the controlled exploitation of the children. There is therefore no legal restriction or regulation of child employment in this sector and children in Kenya continue to be exploited and exposed to hazardous working conditions. The Employment Act is silent on this sector, and is only concerned with child labour in the formal sector and thus deliberately shies away from the agricultural sector, thus not keeping pace with international law which succinctly provides for the elimination of child labour in all sectors of economy including plantations of coffee, tea, sisal and pineapple. It also sets clearly the minimum age for admission to any employment, including in the

¹⁰ ILO Convention No. 138 Article 3.

agricultural sector. It further sets out 18 years as the minimum age for employment for work that is likely to jeopardise the health, safety or morals of young persons.

However, it is most unfortunate that the two most important legislation in Kenya dealing with child employment, that is Employment Act and Regulation of Wages and Conditions of Employment Act, do not expressly set a minimum age under which children may not be employed, thus the reality is that, children as young as 9 years continue to work either on their own or with their parents. The two Acts, nonetheless, clearly provide that juveniles can work, but unfortunately, they do not set out the parameters for such engagement of children such as specific time requirements, health conditions or the express consent of a guardian and the monitoring of child labour sanctioned by law. In the contrast, the International Law clearly provides that where children are to be employed, the terms and conditions of employment, health and safety of the children must be stipulated. Again the Kenyan law is lagging behind, the reason why children continue to work in Kenyan plantations without protective garments, and for as long as 8 hours a day, without lunch breaks and with very little regard to their personal safety and health is a national issue.

The Industrial Training Act also allows children to be engaged in family business which includes agriculture. These children continue to contribute to family income, particularly children of the poor. Yet, the quality of work and its negative effects on the child are not yet a concern of the law. This is contrary to the traditional African set up. Traditionally, children were active contributors to the family income and well-being, but with the change in the socio-economic production made and the rise of the industrial and commercial agricultural sector, the law has not kept the pace and culture is now subverted out of its earlier context. Thus child labour in many agricultural sectors is now justified on the pre-industrial commercial context of today. This provides for the exploitation of children economically contrary to the dictates of international standards, which provide inter alia that each and every child has a right to be protected from economic exploitation

and from performing work that is likely to jeopardise its development.¹¹

These words were echoed by Kenya's President Moi where he said:

“Using a child for purposes of enriching oneself or for any form of personal convenience is exploitation and it denies that child the opportunity to develop skills that will make him or her a useful member of the society.”¹²

However, in practice, children continue to be exploited for the personal convenience of the employers. Children in Kenya who are under 18 years are recognised as not being of legal age, and are therefore unable in law to make decisions for themselves. Therefore, whilst the law provides that a wage earned by an individual belongs to and should be paid to the individual unless he or she expressly requires it to be paid to some other person (save for statutory deductions) the wages of a child may be paid to an adult parent or guardian. This is economic exploitation. Indeed most children who work in industries work for or on behalf of their parents and some children use their parent's National Identity Cards in order to secure employment. The law does not therefore provide for the outlawing of the peculiar habit of engaging children in the labour markets with their parents without payment.

Concerning the terms and conditions of work under Cap 229, there is a common malpractice in the wage earning agricultural sector. There is underpayment and failure to provide other terms and conditions of service such as leave with pay, overtime, health and housing facilities as provided and required under the international law. The government and the trade unions are weak in enforcement of the laws, and the children are even the more disadvantaged because they are generally not entitled to join a trade union and fight for the protection of their rights through collective bargaining agreements.

¹¹ United National Convention on the Rights of the Child, Article 32.

¹² D.T. arap Moi, President, Republic of Kenya, June 1, 2001.

They are below 16 years and hence cannot join or form a trade union. The practice in majority industries is more chaotic. These children are employed under no contract of service. They have no terms and conditions of employment. They have no leave with pay, no overtime, no health facilities and are not pensionable.

Further, under Caps 226 and 229, there is a requirement that an employee earning less than Kshs.2,000.00 per month is so employed under a contract of service. However, the contrary is true for these children who can only be engaged under a ‘verbal contract’ as the law provides.¹³ This position puts the child completely at the mercy of the employer who could repudiate a contract any time or adjust the wages downwards.

Further still, for the children who are employed under wage labour, there is no provision for entitlement to all the benefits and protection available to other employees in respect and or in the form of sickness and medical care: compensation for injury arising from work or occupational sickness and membership in and protection by trade unions.

Thus the Kenyan law does not keep pace with the reality of child labour and exploitation especially in the industries and jua kali sectors. It is indeed way behind the international law and standards. It in fact accepts the colonial policy determination that schooling, not being a compulsory issue, may be avoided as children work in industries and other sectors to earn income to themselves and their families.

The Minimum Age Convention and Compulsory Education laws are independent and enforcement of one contributes to the enforcement of the other. However, there is a discrepancy between minimum school leaving age and the minimum age for admission to employment and therefore, children who leave school at the age have to wait before they can lawfully engage in economic activity. This is very evident in many firms. Some children who have already finished their primary schooling cannot be employed because

¹³ *Supra*, Not 3 Section 26.

they have not attained the minimum age of employment. But in practice, the contrary is true and children of tender years are employed.

The law also has a serious procedural flaw. Under Cap 229 and the rules promulgated thereunder especially under Order 11, it is provided that a minor of 16 years and below shall not work for more than 6 hours a day.¹⁴ Children under wage labour work for 8 hours without break, and for those working in the task sector, they can work for up to 11 hours a day. We have also seen that there is underpayment and failure to provide good terms of service for the children. Thus the procedural nature of the law causes some deficiency. Employers are required to seek permission to employ minors from their parents or guardians. They rarely seek this permission. The law also requires that employers keep registers for persons employed who are less than 18 years. These registers are rarely kept. In case of majority industries, the registers indicate that only adults are employed and therefore no registers are kept for children. However, many children are employed in them!

Moreover, the child employment law in Kenya is discriminative. The United Nations Convention on the Rights of the Child provides against discrimination of children on any ground.¹⁵ The Kenyan Constitution also provides for the equality of all persons, but does not mention children specifically. Hence, children by constitutional right, are persons with equal rights with adults. However, children (persons under 18 years) may not own property, vote, marry without consent or sue or be sued in their own name. Thus the Employment Act in breach of the principle of equal pay for equal work allows discrimination of children solely on account of their age.

Indeed there is no comprehensive policy dealing with child labour in Kenya. The

¹⁴ Regulations of Wages and Conditions of Employment Act Cap 229. Regulation of Wages (General) Order 1982, Section 11.

¹⁵ *Supra*, Note 8, Article 2.

scattered nature of the law depicts lack of focus and a clear conceptual base, and as noted earlier, many cited statutes were enacted without the rights of children in mind, contrary to the international law especially the United Nations Convention on the Rights of the Child, Article 3, which provides that the best interest of the child be the primary consideration in all actions affecting children. Also the laws fail to focus on the family as the centre for development and rights of the child as it was under the customary law and as envisaged by the United Nations Convention on the Rights of the Child, which Kenya has ratified. Under the Convention, the international community is convinced about the conviction that the family as the fundamental group and natural environment for the growth and well-being of the children.¹⁶

However, the fact that the Kenyan personal laws attempt to accommodate various cultures and religious persuasions create confusion and contradiction. For instance sections 78 and 82 of the Constitution touching on the personal freedom and protection of discrimination respectively. In Kenya therefore, the rights of a child are determined partly by statutory law and partly by the law which governs the family in which the child is born, and especially dependent on the selected marriage systems. Thus the laws on children still have the colonial imperfections and are not in harmony with international law.

These laws also exhibit a lack of consideration of socio-economic conditions from which the children come from. For example under the Education Act¹⁷ it is not necessarily a parent's duty to educate a child. Education is neither free nor compulsory as the ILO's Convention No. 138 stipulates and envisages. There is also no single statute in Kenya that give comprehensive provisions on child labour, hence the disparity in the definition of a child, minimum ages of employment and terms and conditions of employment

¹⁶ *Ibid*, Preamble

¹⁷ Cap 211, Laws of Kenya.

contrary to the ILO's Convention No. 138, which is the internationally acclaimed convention on minimum age of admission to employment.

There is also no domestication of the United Nations Standards mostly the United Nations Convention on the Rights of the Child and the ILO's Convention No. 138. This has brought a great disparity in enforcement of the law. The international conventions provide that for the enforcement of the law, each treaty has its own monitoring mechanisms and a communication procedure. Most of these reports are submitted by the state parties themselves. This is an inherent weakness. It is true that specific statistics on child labour are rarely kept, not least because children are legally not supposed to be at work. There is indeed a strong disincentive to keep statistics that would expose a gap between the official policy and actual practice and risk unwanted international attention. The government is also reluctant even to acknowledge the problem especially in most extreme forms. Therefore, the enforcement and monitoring mechanism is a fallacy. It cannot achieve the purpose it was intended for. There are weak and ineffective linkages in the enforcement mechanisms of the international and regional laws on the one part and at the local or municipal level on the other part. The study revealed so clearly the reluctance of the authorities to divulge that they employ children leave alone giving the data and even the children do not want to reveal their employers. Thus it becomes very hard to enforce the international laws. Therefore, we need to overcome these problems on the local usage of international and regional instruments in relation to child employment.

There is also the lack of minimum age that is applicable to all forms of work. This makes the enforcement of child labour provisions impossible. This is contrary to the international standard which through ILO's Convention No. 138 have set the minimum age for all forms of employment to 15 years, but it has also a discrepancy where it provides that for work which by its nature is likely to jeopardise the development, the health, safety or morals of a child, the age of admission should not be less than 18 years.

This is a problem that needs to be corrected by harmonising the minimum age for all forms of economic activity for children.

On other minor grounds, the law also reveals a lack of philosophical appreciation of the international law standards in the Kenyan Constitution and other laws relating to child labour. Hence continued engagement of children in jua kali and industries. Therefore, we have seen that the law especially the Employment Act of 1976 and the Rules promulgated in 1977, sections 2 and 25, only prohibits employment of children in any industrial undertaking. The law therefore recognises only the formal sector. We can therefore infer that child labour is permitted in the agricultural sector, hence making it hard to enforce the law. The law also considers labour only on contract, and thus children not under any contract are not considered as workers and therefore provisions of legislation cannot be invoked to protect them, especially by labour officers from the Ministry of Labour and Manpower Development.

Therefore, when the State allows child labour Legislation to remain on statute books without reform, lacks the capacity to monitor abuse of the law, and consciously legislated discrimination of children in their earnings, then this is a licence for the unscrupulous to exploit the situation and prefer to employ children who are less likely to complain of breaches of their fundamental human rights. Thus child labour law and policy in Kenya need serious reform.

From the whole write up it has been shown that under the English law, the origin of the age of maturity was mainly how far an individual would accomplish certain tasks that society regarded important. This mode of determining the age of maturity was lost with the introduction of one age of maturity which had a negative impact on the status of some individuals.

As earlier noted, the intention to give the infant some capacity himself started as there

was no developed law of guardianship. All the same, there existed a general principle of LOQUELA REMANEBIT which protected an infant from disadvantageous bargains owing to his age. The developments that followed narrowed the scope of the loquela remanebit and the issue of capacity evolved from here to protect the infant's activities. This protected the infant in respect of real property. What determined the legal effect of his actions was other individual other than the infant's own. The withdrawal of protection under the loquela remanebit brought in the granting of capacity which applied equally in cases of employment contracts. The doctrine of capacity under English law was applied to Kenya as part of the received English law principles.

As indicated in the earlier chapter, the doctrine under African customary law has been overshadowed and phased out by the application of the English law. The issue under African customary law was quite different from that of the English people. The capacity of an infant was seen in whole life of the society under which the infant was brought up and how much such an infant was able to contribute to the welfare of the whole society. Under the African customary law, the gradual weaning of a child brought in various duties that the child was expected of people of his age at a particular time in their life in the process of initiation to adulthood. These roles were also given depending on one's intellect and how fast he/she would learn. Here we have in mind the mentally disadvantaged children whose capacity would not be granted till the parents were sure of the capability of the child. It actually took longer than other cases.

With respect to the role of the concept in employment agreements, the history of employment legislation in Kenya reveals that the infant has been seen as an instrument for the achievement of economic policies of the government. This position was manifested especially during the colonial era. Even though, on attaining independence, the economic base and structure and even the law among the other super structural features did not change. The law as it is today has certainly failed to contain the situation as children are being employed in conditions that are essentially exploitative. With these

observations in mind recommendations are advanced to ensure that the infant's welfare is catered for adequately.

RECOMMENDATIONS

The recommendations and suggested intervention measures would be wide. It requires the inclusion of all sectors of the economy to be able to curb this infant contractual capacity. Since children have to work anyway to be able to survive, there needs to be put in place systems which will encourage their weak bargaining power and protection for them to be involved in the wheels of economic development of the country. These suggested measures range from legal protection of the infant, socio-economic interventions to rehabilitation of the infants where the system has failed to protect them.

In our country, the number of children engaged in the labour sector is either not known or is 'invisible.' The children are usually observed from the public view. This makes it difficult to know the exact number of children who work. Before control measures can be put in place, leave alone suggested, the exact number of the children at risk need to be established. The country should not rely on estimates done by various organisations. A national census on child labour is necessary. This will enable all the key players to appreciate the full magnitude of the problem before looking for ways and means of alleviating it.

Since the fight against hazardous and exploitative child labour cannot be won through legislation alone, on the other hand it cannot be won without it. Laws on child labour are necessary to deal with bad cases of child labour and to provide minimum levels of protection where child labour is unavoidable. The areas where legal intervention is seen as necessary are suggested hereunder.

(a) The employment Act:¹⁸

It is the main legislation that deals with the employment law in Kenya. This Act and the Employment (Children) Rules stated under it cover the formal sectors of the economy. It does not cover the agricultural and commercial sector. Amendment to the act are recommended with a view to control and regulation of the labour in all sectors of the economy, notwithstanding the serviceband those who work in the commercial agricultural sector. It should also strive to eliminate exploitation and the working of infants under hazardous pesticides and herbicides, where such regulations are flouted the child should seek legal redress from the judicial system as a citizen.

(b) The Trade Unions Act¹⁹

Trade unions represent worker's interests. They try to regulate relationships between employees and their employers and also between employees and other fellow employees.²⁰ These trade union movement can play a major role in combating the problems experienced by child labourers.

- The Food and Allied workers Union takes care of those employed in the hotel and tourism industry, commercial banks and many other sectors of the economy.
- The Leather and shoe workers union takes care of those in the leather and shoe making industry.
- For those working in the commercial agricultural sector they would seek protection of organisations such as the Kenya Plantation Workers Union which protects those who work in coffee, tea, sisal, pineapple and majority of other

¹⁸ Ibid.

¹⁹ Trade Unions Act, Chapter 233, Laws of Kenya.

²⁰ Ibid

agricultural sector areas, while those in the sugar industry are protected by the Kenya Sugar Planters Union.

These unions would act as the custodians of the children's rights, working in these sectors to ensure that they are not engaged in exploitative or hazardous labour.

Unfortunately, the trade unions Act prohibits children aged less than 16 years from being members of trade unions.²¹ Majority of the casual labourers in the plantations are children aged less than 15 years of age.²² It is our humble submission that the Act need to be amended so as to encompass these children who would benefit from protection offered under the umbrella of trade unions.

(c) The Education Act²³

“Education is one of the keys that will unlock the prison cell of hazardous labour in which so many children are confined.”²⁴

The UN Conference for the rights of the child binds the states parties to ensure that primary education is compulsory and is made available to all.²⁵ This right has to be expressly stated in any legislation. The Education Act²⁶ should endorse this principle within its provisions. All children must, indeed be accorded the right to basic primary

²¹ Supra, note 1 p.68.

²² Supra note 6 section 28.

²³ ILO/IPEC, 1996. Child Labour in Commercial Agriculture in Africa: Working Paper No. 6. A Paper Presented at the Sub-Regional Technical Workshop on Child Labour in Commercial Agriculture for Selected English-Speaking Countries. Dar es Salaam, Tanzania 27-30 August, 1996. P.11.

²⁴ The Education Act, Chapter 211, Laws of Kenya.

²⁵ Supra, note 2 p.25.

²⁶ Article 28 (1)

education to enable them read and perhaps understand their basic rights when engaged in some form of labour.

(d) The Regulation of Wages and Conditions of Employment Act²⁷

Children are preferred in employment to adults because they can be paid less for the same amount of work done by adults. Yet the meagre amounts that they are paid are not able to cater for their basic needs, leave alone those of their families whom they work for.

The wages regulations Act should include provisions which would ensure that wages paid to child labourers are in accordance with their needs which should address;

- (i) Education and acquisition of employment skills through vocational training.
- (ii) Food and health requirements (food, shelter and clothing).

(e) The Child Bill 2001²⁸

This bill is to consolidate, amend and update the law relating to children. The bill consolidates with amendments, the major statutes on child law, namely, The Child and Young Persons Act.²⁹

As presented, the Children's bill, 2001 is a good document. It provides the safeguards for the rights and welfare of the child. It brings in the government to take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights of the child set but in part II of the draft Bill. The Bill consolidates and harmonizes all those statutes that deal with children.

²⁷ Supra note 11.

²⁸ The Regulation of Wages and Conditions of Employment Act Chapter 229, Laws of Kenya.

²⁹ Ibid.

In the definition of the child the Bill states that a child is one under eighteen years and in its section 9(4) the Bill allows a Minister to make regulations in respect of periods of work and legitimate establishments for such work by children above sixteen years. This brings a contradiction as to who is a child and who needs to be protected as here it allows a child of tender years of sixteen to be engaged in employment who lacks capacity to enter into a contract of employment of work. It is our humble submission that this age difference needs to be harmonised for the Bill to be able to protect the child.

The rights being offered to parental care, education, religious education, health care, not to be discriminated and everything to be done to the best interest of the child might not be possible in our present Kenya. It is through lack of these very rights that young children, who lack contractual capacity, end up in employment, whereby they are not protected and are paid less. There are various kinds of protection that the Bill offers the child. They include protection from child labour and armed conflict, abuse, harmful cultural rites, sexual abuse and exploitation, drugs, torture, and deprivation of liberty. On the face of it these protections are actually genuine, but they will require much more than the ease with which they are laid down.

The penalties that are meted in the Children's Bill 2001 are not those that can deter. One can flout the provisions with impunity knowing that if found he will only be given a conviction of a term not exceeding twelve months or a fine not exceeding fifty thousand shillings or both. These penalties to a large company producing many products and with a high turnover, and that which can engage a good lawyer, are not deterable. One can still engage the children in his firm and either pay the fine or walk away free.

The enforcement procedures are also not very straight. It requires one to move the high court for redress on behalf of the child. It is the High Court which will hear and determine on the case and as to the time when the case will be heard. Our proposal is that anybody should make an application to someone as near to the child as possible, which

people need to include chiefs, village elders, sub-chiefs, school teachers, children officers and those in line of the provincial administration and women groups even Maendeleo ya Wanawake, or any organized community based organizations.

These groups are close to the children and the cases need to be determined at the local level unless it is complicated and requires to be referred to the High court after it has become complicated or difficult to the Magistrates courts. The orders and direction of these cases need to be determined by the Magistrates courts and to avoid delay the Chief Justice should not make rules on practice and procedure of the High Court in relation of a case. The rules need to be laid down to be followed generally and as such result to quick justice.

(i) The Enforcement of Legislation

Proper enforcement of labour is necessary as even the best labour legislation would serve no purpose if it was not adequately enforced.

In Kenya this task belongs to the Labour Inspection Department of the Ministry of Labour which has the responsibility of coordinating and monitoring programmes concerning child labour with cooperation with other ministries and departments. These departments have employed child inspectors. Their duties include to carry out regular visits to distance industries, farms and plantations to keep track of the number of children employed in these places. These people need to be properly trained, have basic understanding on the law on child labour, have transport means to take them to and from these areas they visit, have a roster to keep track of the number of children working in these areas, when they were employed, their ages and how much they are paid, how frequent they are replaced and what their basic working environment is like. They should be able to carry out impromptu inspections so that they are able to find out whether what they have laid down as per the Act is being followed. The Ministry of Agriculture which has extension

officers “on the ground” would be used to enforce the proposed legislation on child labour especially in the agricultural sector.

(f) Socio-Economic Interventions

Issues of child labour do not exist in a vacuum but are linked to the social and economic conditions prevailing within the country. A legislation however comprehensive cannot go far in solving the problem of child labour. Social and economic measures are necessary to address the issue. These measures can be classified into two:

- (i) Preventive
- (ii) Rehabilitative.

The preventive measures are directed towards eliminating the underlying social and economic conditions that cause child labour.³⁰ These take a long term perspective. These conditions that need to be found are reasons as to why children should be employed, what drives them out of their homes. The reasons would be varied and many. Some would leave home due to poverty, death of parents, some are illegitimate and the mothers marry elsewhere, where the children are not welcome, others are born in streets and have nothing to call a home.

The rehabilitative aspect recognise that many children will continue to be employed to work in hazardous and exploitative conditions, and such work cannot be stopped.³¹ These children need protection from the detrimental effects that such work can have on them. The rehabilitative procedure is done to those already in employment, this provides them with services that are intended to protect them from hazards that they face. These services range from sensitising the children on the effects of their exposure to the places where they work. They need for example, cover their mouths and nose when working in

³⁰ The Children and Young Persons Act, Chapter 141.

³¹ The Adoption Act, Chapter 143, Laws of Kenya.

chemical and spraying industries. Cover their eyes when working in welding plants and even wear protective garments when in the firms plucking tea, picking coffee and cutting pineapples and sisal. The services are intended to protect them from the hazards they face each day.

(b) Preventive approaches

(i) Economic Development and Income Distribution

The root cause of child labour is poverty. Thus sustained economic growth is the best mode of combating the problem. An increase in per capita income would mean reduction of the number of children available for child labour in the market. In this respect, the government has a role to play in eliminating child labour by developing policies that would enhance economic growth. While on this note, the government's Poverty Eradication Programme has come at the time needed most if only it can reach the people it was meant for, at the grassroots level, the poor and be used for their benefit.

(ii) Trade Sanctions

In recent trade unions and other organizations home pressurized governments in industrial countries to resist/restrict the importation of products from low-income countries shown to be manufacturing products using child labour. Trade sanctions are seen as an effective mode to pass for a set of changes that would improve the working conditions of infants in Kenya.

Care must however be taken to guard against the effects that such an action had in Bangladesh.³² The ILO study in that country on the garment industry showed that the companies involved dismissed thousand of children in an effort to avoid trade sanctions. These children moved to worse hazardous occupations and industries. Non of them

³² The guardianship of infants Act, chapter 144, Laws of Kenya.

returned to school.³³ Here a need is suggested to remove children in a planned and phased manner that will not simply throw them out overnight, unaided and end up in a worse situation.

A different approach may be taken whereby a code of ethics may be adopted committing the suppliers of such goods not to resort to the use of child labour.

(iii) Direct Assistance

This is normally provided through non-governmental organizations and comes in the form of meals, resting places, educational and training centres, health care and general counselling and protection. This assistance is aimed at protecting children in their on-going activities or totally removing them from hazardous work and placing them in the educational system.

One such programme is the Kibera Child Centre which offers counselling, health, nutrition, vocational skills, education and recreational services to children who work as house helps and at Industrial area.

(iv) Public Information and Mobilization

The public needs to be mobilized on child labour issues. A strategy of community mobilization and public awareness should attempt to reach all sections of society through national campaigns, especially primary school teachers, government officials, chiefs, the judiciary, parliamentarians, political and religious leaders, employers, workers' organisations and actually the children themselves. It can be done by NGOs, with the assistance of the relevant government ministries and organisations such as UNICEF and KEPI.

³³ Bequele, A. and Myers, W.E. 1995: First Things First in Child Labour: Eliminating Work Detrimental to Children, ILO, Geneva, p.29

A case in point is what happened with the “Kumi kumi” brew, which killed many people in and around Nairobi last year. With the coordination of the chairperson of the Green Belt Movement, Professor Wangari Mathai, the women in and around Ngarariga in Limuru mobilised themselves, went from house to house searching for those who brewed the lethal drink. They raided the brewer’s dens. Many women were mobilized as they were hard hit as many buried their husbands due to the brew and were bitter. They raided homes, poured out the brews and “arrested” those who were found with the brew and took them to police stations. This method can work best with the assistance of chiefs at grassroots level, community based development activities and NGOs.

(h) Rehabilitative Measures

(i) Providing Protective and Rehabilitative Services

As has been observed in some areas, it is not possible to remove a child from the work he does, and leave him with nothing. With this in mind, special programmes have to be established to reduce the effects of child labour by providing basic health and educational service programmes such as those of adult education where these children can attend after their daily chores. This approach comes as a transitional phase towards the eventual elimination of child labour.

(ii) Providing Protected Work Conditions

As children have to work they need to work under safe conditions. They need to be provided with the necessary tools and equipment that will protect them from any possible hazards. The eradication, control and regulation of child labour require a multi-faceted approach which involves both legal and socio-economic intervention measures. Various organizations and institutions would also be involved such as the government, NGOs, the private sector industries, trade unions, employers’ organizations and international bodies such as ILO/IPEC and UNICEF.

One fact however, remains clear, the problem of child labour cannot wait. Children have one opportunity for growth and development. They have a right to their childhood. This is the time for action against child labour and the intricacies against child labour is not to wait for tomorrow or some future time, like the children's bill that has been in draft stage since 1995, but now.

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