

JOB SECURITY IN KENYA WITH PARTICULAR  
EMPHASIS ON DISMISSALS IN THE HOTEL  
INDUSTRY.

A dissertation submitted in partial  
fulfilment of the requirements for the  
LL.B. Degree, University of Nairobi.

By

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I dedicate this humble paper to the memory of my late mother and the workers of Kenya.

LIST OF ABBREVIATIONS

- A.C. - Appeal Cases.
- All E.R. - All England Reports.
- C.D.C. - Commonwealth Development Corporation.
- Ch.D. - Chancery Division.
- C.O.T.U. - Central Organization of Trade Unions.
- D.H.W.U. - Domestic and Hotel Workers' Union.
- E.A. - East African Law Reports.
- E.A.C.A. - East African Court of Appeal.
- E.A.L.J. - East African Law Journal.
- E.A.L.Rev. - East African Law Review.
- F.K.E. - Federation of Kenya Employers.
- G.S.U. - General Service Unit.
- I.C.D.C. - Industrial and Commercial  
Development Corporation.
- K.A.N.U. - Kenya African National Union.
- K.B. - King's Bench.
- K.C.C. - Kenya Co-operative Cremaries.
- K.L.R. - Kenya Law Reports.
- K.N.U.T. - Kenya National Union of Teachers.
- K.P.U. - Kenya People's Union.
- K.T.D.C. - Kenya Tourist Development Corporation.

- M.L.R. - Modern Law Review.
- N.C.C.K. - National Christian Council of  
Kenya.
- Q.B. - Queen's Bench.
- W.L.R. - Weekly Law Reports.

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21. Nash V Inman, (1908) 2 K.B. 1.
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(1894) A.C. 535.
24. Nyali Ltd. V A.G., (1955) 1 All E.R. 646.
25. Pepper V Webb, 1 W.L.R. 513.
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(1875) L.R. 19 Eq. 162.

27. Reading V A.G., (1915) A.C. 507.
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29. Ridgeway V Hungerford Market Co., (1935)  
Ad. & El. 171.
30. Sterling Engineering Co. V Patchett, (1955)  
A.C. 534.
31. Vine V National Dock Labour Board, (1957)  
A.C. 488.

STATUTES AND ORDINANCES

Armed Forces Act, Chapter 199, Laws of Kenya.  
Contract Act, Chapter 23, Laws of Kenya.  
Contract Act, 1872. (India).  
Contracts of Employment Act, 1972 (U.K.).  
Employment Act, Cap. 226, Laws of Kenya.  
Employers' Liability Act, 1880 (U.K.).  
Employment Ordinance, Kenya.  
Employment Protection Act, 1975. (U.K.).  
Foreign Investment Protection Act, Cap. 518, Laws of Kenya.  
Industrial Relations Act, 1971 (U.K.).  
Judicature Act, No.16 of 1967, Cap 8, Laws of Kenya.  
Master and Servant Ordinance, No.8 of 1906.  
Native Registration Ordinance, 1920.  
Police Act Cap. 84, Laws of Kenya.  
Redundancy Payments Act, 1965 (U.K.).  
Rent Restriction Act, Cap. 296, Laws of Kenya.  
Trade Disputes Act, Cap. 234, Laws of Kenya.  
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Workmen's Compensation Act, 1925 (U.K.).

## INTRODUCTION

The central theme of this paper is the extent, if at all, to which the Kenyan law protects the worker in his employment. This will concern an investigation as to the existence or non-existence of job security in Kenya, the laws relating to the protection of the worker in his employment, the employment relationship itself and as a background, the political and socio-economic environment within which it operates.

In the first chapter, therefore, as an introduction political and socio-economic factors will be considered by delving into a brief study of Kenya's historical development and political economy. This is necessary because the law does not exist and operate in the air but on the ground and so it must be related to the role it plays in Kenya's socio-economic framework. It is after this that we will embark on the 'concept of job security'. An attempt will be made to give a definition to the concept as understood and applied in this dissertation, and its scope will be examined. A study of its evolution within the institution of the employment contract will be delved into and this, in turn, will necessitate a discussion of the doctrine of 'freedom of contract' upon which all contractual relations are supposed to be based. Kenya is essentially an underdeveloped capitalist country<sup>1</sup> which still embraces the theory of 'freedom of contract' whose validity has come to be critically questioned and doubted. The contract of employment and the employment relationship in Kenya are based on this doctrine. This paper will attempt to show that the basic assumption of

equality of the parties' bargaining positions is open to challenge, since there can be no contractual equality when those involved are socially and economically unequal.<sup>2</sup> Due to this glaring imbalance, there certainly will be disequilibrium in the employment relationship with the worker being the disadvantaged while the employer emerges with the upper hand.

The Government had to intervene directly to give the worker some semblance of safe-guards in his employment to avoid a situation of open oppressiveness and exploitation which could be a potential danger to the status quo. Law was used as a valve to release and diffuse some of the frustrations of the working classes, by granting piece-meal protections. Besides, the Government had made the machineries of trade unionism and collective bargaining virtually impotent by legislative and policy restrictions<sup>3</sup> and the workers had no adequate platform to air their grievances e.g. strikes, stricto sensu, have been made illegal. The Government, therefore, came in to attempt to alleviate the conditions of the worker in his employment to avert any possibility of a concerted worker movement to change the status quo; this would be a catastrophic blow to the establishment and it had to be avoided at all costs. Therefore, the question to be asked is whether the laws passed confer adequate protections to the worker and thus, whether job security exists in Kenya and if so, to what extent. I have chosen to lay particular emphasis on job security in the hotel industry as a case study, for purposes of data, interviews and to draw accurate rather than generalised conclusions. The author's interest in job security in the hotel industry was also aroused as

a result of the increase of dismissals of hotel employees from their employment in recent years and the need to find out the cause of these.

Chapter Two will cover the law relating to job security in Kenya generally. A brief outline of the history of Employment law will also be given. This will be applied in our case study, to wit, dismissals in the hotel industry and therefore, emphasis will be laid on the law pertaining to the termination of the employment, particularly dismissals and redundancy which are significant aspects of job security.

In Chapter Three, the employment contracts usually made in the hotel industry will be examined. This will entail a look at the content of the Employment contracts and nature of the employment relationships in the hotel industry. The ownership of the hotels and the aim of these enterprises ultimately affect the employment relationship and therefore, light will be thrown as to the ownership of the hotels we are dealing with and the purpose of their operations in Kenya. In this chapter also, we will study the rights and protections, if any, afforded to the workers in the hotels, the role of the relevant trade union i.e. the Domestic and Hotel Workers' Union, and finally an insight into the Industrial Court and how it handles disputes or cases from the Hotel Industry pertaining to issues that fall under job security, particularly dismissals and redundancy. Cases of dismissals will be examined to find out the practise on dismissals in the hotel industry and what factors contribute to them.

Chapter Four will be in form of a critical analysis of the Employment laws dealt with in the dissertation i.e. the shortcomings, if any, inherent in our employment laws. Proposals will be made as to what laws are defective, inadequate or irrelevant and need to be changed; whether the present legal system is best-suited for the circumstances of our country and aspirations of our people. Hence an attempt will be made to give a strategy for reforms, where they are necessary. Having examined who controls the means of production in Kenya and in what circumstances, it will be easier to comprehend the purpose of 'Law' in our society. A brief critique of the prevailing legal and socio-economic system in Kenya will also be given. Thereafter the necessary reforms, if any, will be suggested or the alternatives thereof. When one talks of reforms, this implies a desire for the continuation of the system in operation i.e. the status quo, only now there should be some concessions or bargains to pacify those aggrieved by the harshness of the law. Therefore, a question that may be posed is whether there is need for reforms and thus the continuation and perpetuation of the capitalistic strategy of "development" which the present government has chosen, or whether there is need for a change; the wholesale overhauling of the economic base and consequently the superstructure? These are the questions which are attempted to be answered in this dissertation.

#### METHODOLOGY

To give this paper concrete substance and analytical relevance, a research was undertaken. It does not claim to be exhaustive due to the difficulties

faced during the research, the limited time involved and the scope allowed for this dissertation. Data as to the ownership of some of the hotels which this paper is concerned with was collected from the Registrar of Companies in Sheria House, Nairobi. The Collective Agreement between the Hotel Keepers' and Caterers Association and the Domestic and Hotel Workers' Union (D.H.W.U.); figures as to the number of members of the Union and other relevant materials were obtained from the Union's office. The Secretary-General of the Union, Mr. Duncan Mugo was interviewed as to the role and effectiveness of D.H.W.U. Many discussions were also held with the Deputy Secretary-General of the Union, Mr. Maina Macharia who was very co-operative. Dismissal cases were obtained from the Industrial Court, the Judge of the court, Mr. Saeed Cockar being interviewed on Monday, 19th January, 1981 on the function and success or failure of the court. The Deputy Chief Industrial Relations Officer in the Ministry of Labour, Mr. Mwambanga Mwashimba was also interviewed on Wednesday, 28th January, 1981 on the work of the Ministry in industrial relations and the pre-Industrial Court procedures with regard to dismissals. Some officials of the Central Organization of Trade Unions (C.O.T.U.) were interviewed too e.g. the research officer, Mr. Cosmas Okongo Orowe was talked to on Monday, 29th December, 1980. Many employees of some of the hotels e.g. Excelsior Hotel, were interviewed by the author about their jobs and employment relationships therein. All the information gathered from these discussions have been incorporated in this paper and some of the questionnaires used in the research are attached at the back

of this dissertation. As already said, the modesty of the research is due to the problems faced during the research; for instance, the author failed to get any information from the Personnel Manager of Hotel Inter-Continental, Mr. Mwaluma who was very reluctant to help unless I had official permission from the General Manager of the hotel. When an official letter was sent to the General Manager through the General Supervisor of Dissertations, no reply was received and consequently the author did not obtain the necessary information, data, employment contracts etc. from the hotel, which would have been useful in this study.

Apart from the said interviews and collected data, this dissertation is based mainly on the statutes on employment, textbooks, articles, decided cases and personal observations during the investigation and the employment situation in Kenya. Discussions with my supervisor, some lecturers and my colleagues have been of immense help.

CHAPTER ONE

A. BACKGROUND: POLITICAL ECONOMY OF KENYA

"Kenya's Labour Laws should be read and analysed within its historical and socio-economic context."<sup>1</sup>

Within the establishment of a settler economy in Kenya the mode of production changed. The communal subsistence economies of the people living in Kenya were challenged by the European capitalist mode of production which separated the African peasants and pastoralists from their foremost means of production: their land.

The initial exploitation in Kenya took the form of erecting African reserves and European settlement areas and introducing the principles of state and private ownership of land. During the colonial period, Africans were not only prohibited from settling in certain areas but were also forced to work for their new masters, the settlers. Since most of the settlers had come to Kenya with hardly more than the money to rent or buy land from the colonial administration, they employed their workers on the cheapest possible terms: as forced labour or as squatters.<sup>2</sup>

Colonialism in Kenya brought about the imposition of British monopoly capitalism upon the Kenyan pre-capitalistic economy. The traditional economy lost its communal character as it was subjected to change so as to cater for the British capitalist interests.

From Kenya, Britain wanted raw materials and food-stuffs for her industries, a market for her manufactured goods and an area of investment for British economic surplus.

For Kenya to discharge the above function, a colonial state -, an extension of the British Bourgeoisie state was set up which was destined to live until 1963. The colonial state was erected in Kenya so that the colony could discharge her new functions in tranquility. Just as Britain had anticipated, there grew in Kenya, an export sector which facilitated the provision of raw materials and food-stuffs to British industries. White settlers were encouraged to come out farming into Kenya - hence the 'White Highlands'. After the Imperialist World Wars, land in Kenya served as a reward to the British ex-fighters. These settlers helped tremendously in the churning out of raw materials. An import sector also developed. This catered for a market of British manufactured goods. The internal domestic market expanded especially as the number of white settlers increased and Asians, Arabs together with some Africans were beginning to become affluent.

Since the attainment of political independence the above structure has remained intact and Kenya has developed on capitalistic lines. The government decided not to transform the colonial economy and this is evident from its policy statement on development strategy, Sessional Paper No.10, 1965 on African Socialism. Although this White Paper refers to socialism, it actually outlines a capitalist mode of

production. Due to this, there are certain colonial economic legacies which have continued to exist in our society. These include, inter alia, the dominance of oligopolistic foreign corporations, mainly from the United Kingdom in the major sectors of Kenya's economy; and a remarkable inequality in the distribution of wealth based on racial stratification with the Europeans at the apex, the Asians and Arabs in the middle and the Africans at the bottom.

In its development policy the Government hoped to rely upon private ownership,<sup>3</sup> the profit motive, substantial inputs of foreign resources, and indigenous entrepreneurship to increase output rapidly, with the expressed hope that, in the long-run, the increased output will permit more social welfare and enhanced social justice.<sup>4</sup> Priority was to be given to production over equality in the belief that social justice can only be achieved by sharing wealth, not poverty! For example, the policy statement specifically commits the state to uphold the right to accumulate property and wealth - in the name of 'human dignity and freedom.'<sup>5</sup> The emphasis of the development strategy is on economic growth.

To increase economic growth, the government places great importance on the inflow of foreign resources in the form of private investment, aid and skilled personnel. To attract the necessary foreign investment, the government has provided a number of guarantees and incentives. The Foreign Investment Protection Act of 1964,<sup>6</sup> constitutes in effect, a bill of rights for foreign investors, guaranteeing freedom

of repatriation of profits, interest and repayments on foreign loan capital, and denouncing expropriation without good cause.<sup>7</sup> Sessional Paper No.10 of 1965 also assures foreign investors that there would be no nationalization of assets and if so, only under unusual circumstances, and then only with full compensation.<sup>8</sup>

These policies are doubtless partly responsible for the impressive scale of foreign investment in Kenya. In the agricultural sector foreign control of the large coffee, tea and sisal estates (Brooke Bond Liebeg, Banita, Del Monte etc.) is still extensive even after an attempt at resettling landless Africans on former European land after Independence (a resettlement based on compensation to the white farmers in the Highlands, through a loan provided by Britain and to be paid by Kenya!!).<sup>9</sup> Foreign multinational corporations also control the bulk of the import-export trade and the capital intensive industrial sector. The extent of foreign control is considerable regardless of the measure one employs.<sup>10</sup>

Another important element of the capitalist development strategy is the official encouragement of indigenous capitalism in both the urban and rural areas.<sup>11</sup> The state aimed at seeing the ownership of the means of production in the hands of Africans and this was to be achieved through the provision of credit facilities, technical assistance and reservation of certain groups of government contracts to African businessmen, farmers and other small entrepreneurs. There was also a restriction of trading licences for certain type of

trades to citizens with a deliberate bias in favour of African applicants; hence the aim of the ruling elite was to foster a commercial and industrial bourgeoisie.<sup>12</sup>

In the rural areas private ownership of resources i.e. land was encouraged too. This was a continuation of the colonial policy; - private ownership as opposed to traditional communalism. Sessional Paper No.10, said that the African land-tenure was not suitable for a monetary economy (i.e. a capitalist market economy) which the KANU government had chosen to adopt. The aim of the government was the consolidation and subsequent registration of land under an individual name, who was in effect given absolute proprietorship or ownership of the land, evidenced by the title-deeds. This was in compliance with the Swynnerton plan, which had originally aimed at creating a conservative landed middle-class among the Kikuyu in Central Kenya to counter the Mau Mau nationalist movement.<sup>13</sup>

The title-deeds so acquired would in turn be used as security to obtain loans.<sup>14</sup> With land pledged as security, there was easy availability of credit from the government and the banks. This scheme which began during the colonial period was extended to the rest of the country just before Independence. This enabled Africans who had acquired considerable chunks of land to develop their land using the loans obtained from the banks. By giving loans to farmers and businessmen at high rates of interest, banks began to flourish even more and Finance capital was now here to stay.

It is no surprise, therefore, that Ahmed Mohidin, commenting on Sessional Paper No.10, 1965 said that the implications of Africanising the existing economic and social institutions are that; it is not socialists who were going to emerge from the exercise; but hard-headed capitalists.<sup>15</sup> The aim was to produce a commercial and industrial Bourgeoisie to catapult the Kenyan economy into the orbit of international capitalism or imperialism.

In effect, there are firm grounds for holding that the government of Kenya has pursued (and continues to do so) a capitalist mode of development up to today. It is on such a background that we are going to study the law of job security in Kenya. This will enable us to understand the socio-economic factors that affect and influence the existence or non-existence of job security besides the law itself. Law is a super-structural feature in society and its nature and function is influenced by the economic base, mode of production and social relations which exist in any socio-economic formation. Law exists to serve certain purposes. Having established that in Kenya we have a capitalistic system, we are going to find out the role of law, in this case; employment laws, in the society and what purpose it serves. In this connection, we will try and find out in our investigation, whether the employment laws in Kenya strive to achieve job security or protection for workers in their employment. Our findings will then have to be related and tied up with the political and socio-economic conditions that prevail in Kenya because the existence or non-existence of job security will have to find its answers in these factors.

## B. CONCEPT OF JOB SECURITY

The concept of job security involves the extent to which employees are protected in their employment, in particular this relates to the degree an employee is assured of maintaining his job and if his employment is terminated, e.g. by dismissal, what remedies he is entitled to, if at all. Job security connotes protections designed to provide certain safe-guards for employees against their rather vulnerable legal and economic position. These protections subsist not only during the employment relationship but also when it comes to an end; thus minimum terms of notice, redundancy payments, redress of wrongful and unfair dismissals etc. The reason for such security is the recognition that the employer has got the upper hand in the employment relationship and the state had to intervene through the machinery of legislation to regulate and improve labour relations.<sup>16</sup> For instance in England, the Parliament appreciated that a working man's bargaining powers was unequal to his employer's and deliberately interfered by passing the Truck Acts 1940, the Employer's Liability Acts 1880, the Workmen's Compensation Act 1925, and more recently, the Consolidating Employment Protection Act of 1975.

The most noteworthy, and in practice the most important extension of such regulatory legislation, however, is concerned with the duties it imposes upon the employer at the moment when the employment is terminated.<sup>17</sup> In England, they have now a system of statutory minimum terms of notice,<sup>18</sup> (to be given by both sides, but only on a minor scale by the employee),

and of redundancy payments<sup>19</sup> and there is also an elaborate legislation against unfair dismissals<sup>20</sup> under which an employee may be entitled to be reinstated (i.e. have his old contract restored), to be re-engaged under a new contract, or be compensated and they also have the right of a woman after absence owing to pregnancy or confinement, to return to her job.<sup>21</sup> Thus regulatory legislation in the United Kingdom has laid some essential foundations for a law of job-security, reinforced by a worker's right to a written statement of the reasons for his dismissal. It is the aim of this paper to examine whether in Kenya we have such legislations and thus whether the Kenyan worker is adequately protected in his employment, always keeping in mind the political and socio-economic conditions prevailing here.

The crucial question here is, to what extent has the state through parliament intervened to protect the employee and, therefore, does job security exist in Kenya? Rules governing labour relations are an attempt to mitigate the disequilibrium inherent in the employment relationship. The common law which we have imported and applied here,<sup>22</sup> ignores disequilibrium of power which results from normal relations, as distinct from abnormal personal conditions (infancy, mental disorder etc.). Our laws in Kenya do the same. They ignore the realities of social constraint and of economic power, they did so even during the colonial period when the employer was and the worker was not in a position to invoke the aid of the Criminal law. For instance, the Kipande introduced the force of the criminal law in the contractual relationship of the

employer and the employee.<sup>23</sup> Under the Native Registration Ordinance, 1920, the act of withholding one's labour became a criminal offence. The Master and Servant Ordinance, 1906, imposed penalties of imprisonment or fine for negligent work on workers. Although such onerous provisions are no longer expressly contained in our statutes, there are certain provisions in some of them,<sup>24</sup> which subtly echo or remain relics of colonial laws e.g. those provisions relating to the termination of employment and summary dismissal. Why have such provisions continued to pervade in our laws? The answer to this question can be found in the capitalistic system which Kenya embraces and its notions of laissez-faire, the most notorious being the doctrine of 'freedom of contract'. We are going to devote the next section to this theory of 'freedom of contract' and how it affects the contract of employment and therefore, the employment relationship.

### C. THE DOCTRINE OF FREEDOM OF CONTRACT

The doctrine of freedom of contract is the fundamental basis of all principles of the law of contract. To thoroughly understand the origin, development and purpose of the Kenyan law of contract we must trace the origin and development of that law in Britain. This is because Britain, at a particular stage of her development, imposed her law of contract on Kenya. The obvious point to start is the feudal era in Britain. Cheshire and Fifoot have written:

"The medieval common law was thus equipped to deal with a number of transactions which fall within the modern law of contract and quasi-contract. But there were serious gaps. The royal judges did not recognise an agreement to convey land, whether or not the purchase price had been paid, unless it was

under seal. They would not sanction a claim to reasonable remuneration for goods delivered or services rendered sum. Above all, some in the exceptional, if not important, case of the sale of goods, they offered no means of obtaining damages where neither party had as yet performed his part of the bargain. In technical language, they gave no sanction to executory contracts not under seal; and until this omission was supplied, it was not possible to say that a general conception of contract had been received into law. In a society where commerce was ever increasing importance this defect was serious.".....25

Because of this omission and inadequacy in the law of contract, the commerce factor was facilitated through the evolution and development of the assumpsit and the law of contract did give expression to the interests of the mercantilist era. However, after the Industrial Revolution and its consequences, the whole world economic order was bound to change. It entailed mass production of goods and services and it was no longer practical for the suppliers to deal with each and every consumer directly. Due to these, the Bourgeoisie who seized political power in Britain after the Feudalist era found the law to be clumsy and they, therefore, demanded "free" labour market, "free" play of economic forces on which capitalism was to be based for a long time. "Free" labour market meant workers who were free of feudal fetters, serf dependence and "free" of property and whom hunger would drive to the factories,<sup>26</sup> since they had been freed from their sole means of subsistence; land. This depicts the indispensability of contracts to the development of free enterprise system.<sup>27</sup>

The law of contract has ever since been governed by the doctrine of freedom of contract facilitating the exchange of goods and services on the market as demanded by the needs of a capitalist society. This doctrine has been imposed on Kenya as the basis of the Kenyan Contract Law.<sup>28</sup> As for the general principles of contract law, the Contract Act 1872, of India was imposed on Kenya by Britain via India. This Act was repealed by the Contract Act, Chapter 23 of the Laws of Kenya.<sup>29</sup> This latter Act provides that the English law of contract is our law.<sup>30</sup>

At common law, the general assumption with regard to the theory of freedom of contract is that people should be left free to enter into agreements with each other and lay down terms and conditions that are acceptable to all of them in the exchange of goods and services. It was assumed that parties to an agreement e.g. consumer and supplier, employee and employer etc. had an equal bargaining power. And the law has treated this kind of contract with much respect as if it was the outcome of mutual agreement between equals; this is depicted by the dictum of Sir. George Jessel M.R. in the case of PRINTING AND NUMERICAL REGISTRATION V SAMPSON, where he said:-

".... If there is one thing more than another which public policy require, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice."<sup>31</sup> (Emphasis added).

Thus the concept of 'contract' in the minds of the legislators and judges was that of bargains freely negotiated and freely entered into. That if the form of contract proposed by the employer is unfair to the worker, the worker's proper course is to put forward amendments to make the contract more equitable. And if the amendments are not accepted, the worker still has his freedom: he can refuse to enter into the contract of employment at all. This has been the attitude of the law-makers. That if a worker chooses to accept the employment on the terms offered, rather than do without it, he has no one to blame but himself. Hence in theory 'freedom of contract' means that the parties, consumer and supplier, employer and employee etc., come to contract together on equal footing and with equal bargaining power, therefore, each one of them has the option of either accepting or refusing the terms laid down, and once one enters into a contract, he should be bound since he had had the option of retracting in the first place. The doctrine that all agreements are sacred - the principle of sanctity of contract - is blind to the lack of bargaining equality.

How can an employer and employee be equal and have the same bargaining power when the former is economically stronger than the latter? Due to the employers' disproportionately strong economic power, they dictate terms to the weaker parties (the workers) and therefore, bargaining if any, cannot be between equals. One writer<sup>32</sup> has given an interesting illustration of how the disparities in bargaining strength can render the doctrine of freedom of contract empty and meaningless.

He traces the development of the free labour market in Britain to the decline of Feudalism in that country. The Serfs, he argues, after being freed from the fetters of serfdom were also freed from their sole means of subsistence (i.e. land). Thus, in the resulting free labour market society in Britain, although in theory having freedom to bargain with the employers, they were left with no choice but to go into wage employment even under terms dictated by the employers, in order to earn a livelihood. The talk of 'agreement' here is a misnomer. It is no use leaving a man free to make what bargain he liked if he had no bargaining power. In the words of Otto Kahn-Freund:-

"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 the freedom to restrict or to give up one's freedom."<sup>33</sup>

What is the relevance of the Law of contract and the doctrine of 'freedom of contract' on which it is supposed to be based, to the employment relationship? The legal basis of the employment relationship is usually the exchange of a promise to work in return for a promise to pay wages. The element of bargain, that is an agreement exchanging promises, means that "contract" appears to be the most appropriate legal category in which to place the relationship of employer and worker.<sup>34</sup> With regard to employment, workers are much worse off than consumers:-

"There is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment."<sup>35</sup>

In such circumstances, why do workers have to accept unfavourable or even generous terms and conditions in their contracts of employment? The truth is that the worker has no choice since he is faced with a take-it-or-leave-it ultimatum in which the only alternatives are adherence or outright rejection which in turn means being unemployed with nothing to eat or place to shelter. Secondly, from the 19th C, the individual employer has been replaced by large scale entrepreneurs and ultimately the multinational companies. Employment contracts with such companies are mainly standard form contracts. These are legal documents characterised by great details which always include exemption clauses limiting the liability of the employers. The ordinary worker is at a loss as he does not understand such contracts and this fact would be more pronounced in a country like Kenya where the majority of the ordinary people are illiterate. The situation is made more dismal by the fact that he would definitely not do anything even if he understood the contract because the companies in these cases are economically stronger and can, therefore, stand their ground especially where the companies in their quest for maximization of profits, draw up standard form contracts jointly with similar terms. The worker would have no choice but to enter into such a contract since it would make no difference which company he contracts with.<sup>36</sup> In other words, the

subjection of the worker is made even more firm by the fact that, even if he rejects the terms of one contract, he will find similar and oppressive clauses in other standard form contracts of other employers since they work in conjunction as they have common interests to safe-guard. Thus, the freedom of contract has been made even more illusory by the use of the standardised contract which will normally be drawn up by the party with more economic power and this party will have all its interests adequately spelt out in the contract, and therefore the other party has to accept those laid-down terms or leave it.

Finally, particularly in an underdeveloped capitalist country like Kenya, other socio-economic forces help to enhance the strength of the employers. Important among these is the chronic unemployment 'characteristic of developing economies'.<sup>37</sup> The employer, therefore, has no problem of shortage of employees, he can always rely on the perpetual unemployment situation which is a common feature in all capitalistic systems. An artificial unemployment situation is created so that there is always a large number of the unemployed.<sup>38</sup> This makes those who have jobs to cling to them despite the unfavourable terms and conditions, knowing well that there are thousands of others ready and willing to take their places. In such a set-up, the theory of freedom of contract is a myth.

Parliament and the courts have on occasions paid attention to the reality of subordination which lurks behind the facade of contractual equality,<sup>39</sup> but they do not normally intervene effectively to alleviate the fate of the weaker parties. It is after such a realisation that Parliament in U.K. has passed several legislations aimed to provide workers with protection which the common law had failed to achieve. In Kenya such protectionist legislations are lacking and courts, though having done their best to relieve hardship, have on the whole kept within the bounds of 'freedom of contract'. In other words, though in various ways the Industrial Court has been willing and able to do battle on behalf of the workers against the employers, they have been cautious enough not to infringe upon and overthrow the fiction of freedom of contract.

In truth, therefore, state intervention in contracts by legislations in part recognises that this equality is illusory. Trade union movements underline this basic fact as well. So is the judicial creation of the doctrine of Fundamental Breach to combat standard form contracts.<sup>40</sup> Physical freedom which the doctrine of freedom of contract emphasizes ignores the relevant consideration - the economic power of the parties to a contract. The law of contract treats unequals as equals and although the Kenyan law has tried to mitigate this, the fundamental principle still remains.

The implications of this disequilibrium of bargaining power on the employment relationship in Kenya is considerable. The main result of such a situation is the subordination of the employee to the employer on the paternalistic lines of the obsolete relationship between master and servant. The employee is forced to accept the terms and conditions laid down in the employment contract, which has been drawn up before hand, by the employer. If unchecked, unscrupulous employers could take advantage of the state of affairs to the detriment of the workers since the former have the stronger say in the employment relationship, thus leading to a state of insecurity for the workers. This in turn could bring about certain political, social and economic consequences.

It was to avert such a tendency that the Government intervened by passing legislations to regulate the employment relationship and give the employee a necessary measure of security in his job. The Kenyan Government's influence on labour relations has been wrought not only through legislative control but also at all levels of industrial relations machinery, in its quest for 'industrial peace'. The legislations passed so far include the Employment Act and the Trade Disputes Act.<sup>41</sup> The Employment Act which we are going to discuss in the next section was also passed at Independence to repeal the oppressive colonial employment laws i.e. Employment Ordinance, which only served the interests of the employers. We can now ask ourselves, to what extent has the Employment Act gone in protecting the worker in his employment and thus, has it served the purpose it was expected to achieve?

D. THE EMPLOYMENT ACT<sup>42</sup>

The Employment Act is aimed mainly at achieving policy objectives, purportedly the protection of the worker. It is not exhaustive and its application has to be supplemented and guided by the rules of the Common Law as regards interpretation.

The Act is some kind of standard form contract and sets out guide-lines to be followed in individual engagements or 'batch' contracts and terminations. The Act lays down some minimum requirements to be observed in the contract of employment, especially as concerns the terms and conditions thereof. In fact, the most important provisions in the statute and those that directly relate to our present study are those contained in sections 4 - 18 and these concern the conditions of employment which include the so-called protection of wages,<sup>43</sup> leave,<sup>44</sup> housing,<sup>45</sup> health<sup>46</sup> and welfare;<sup>47</sup> duration of notice,<sup>48</sup> summary dismissal<sup>49</sup> etc.

The Act stipulates the procedure for payment of wages e.g. that an employee shall be paid his wages directly in the currency of Kenya<sup>50</sup> and it must be done so on a working day and during working hours, etc. The Act also provides for entitlement of leave to employees, weekly rest days, housing, water, food and medical attention. These provisions are implied obligations at Common Law too and they sought to off-set the economic effect of the low wages. The standards for housing and

food are not defined further than "reasonable housing" and "properly fed". It seems that when interpreting these provisions, the court would consider the station in life of the employee as a relevant fact in determining what is "reasonable housing accommodation" and "being properly fed". Hence a "house" in Mathare Valley might be a reasonable housing accommodation for a labourer or unskilled employee.<sup>51</sup>

These provisions have been criticised as sanctioning an old paternalistic relationship when the goal should be to raise the wages of employees and their standard of living. The truth, however, is that presently with the exception of some sections of the Government and some companies, most employers do not provide housing for their workers. They do provide house allowances to some categories of workers, but such allowances, apart from the higher ranks e.g. Managers, assistant-Managers and other white-collar officials, are meagre considering the escalating house rents<sup>52</sup> and inflationary trends and this does not enable the employees to obtain reasonable housing accommodation as required by the Act. The Government has not made the provision for housing a mandatory requirement on the part of employers showing the willful abdication of the state in protecting the welfare of its subjects and the only thing done is to indicate the Government's policy on housing for workers and thus in the Kenya Development Plan 1979 - 1981, the Government said:-

"Lack of housing for workers can be a serious impediment to setting up of new industries and expanding new ones. It is the policy of the Government to encourage major industrial enterprises in urban areas to include workers' housing as part of their total investment package. The Government will look into the appropriate incentives to encourage private enterprises to invest in workers' housing."53

From the above statement, it is clear that the Government only sees the lack of housing as an impediment to industrialisation which seems to be of more importance to the Government than the welfare of the workers i.e. housing, which is merely a stepping stone to achieve the goals of the state.

The Employment Act is silent on the issue of transport facilities for employees. Some employers provide transport for their employees, to and from their place of work, especially some of the multi-national companies in Nairobi and in the rural areas e.g. Firestone, Kenya Breweries, Brooke Bond Liebeg etc.; but this is a matter of expediency. Otherwise, most workers look for their own means of reaching their places of work on time. It is common knowledge that thousands of workers in Nairobi and the other urban centres walk several kilometres to their places of work either because they cannot afford the bus and 'matatu' fares or transport is not available at all. This should not lead one to conclude that employers do not care about the welfare of their workers because this is not actually the case. Employers would like to

see their employees well housed and fed because this would ensure that the workers are healthy, strong and satisfied, enhancing their productivity which would in turn benefit the employers. It is merely a question of the extent of which employees are willing to sacrifice their profits to achieve this.

In addition to the inadequacies noted above, the efficacy of the Employment Act has been further weakened by the application of Section 1 of the Act which gives the Minister for Labour the power to exempt certain categories of workers from the provisions of the Act. Section 1, inter alia, provides:-

"...(2) The provisions of this Act shall not apply to:-

- (a) the armed forces or the reserve as respectively defined in the Armed Forces Act;
- (b) the Kenya Police, the Kenya Prison service or the Administration Police Force;
- (c) the National Youth Service; or
- \*(d) such person or class of persons, such trade or industry, or such public body, as the Minister may, by order, exempt from all or any of those provisions of this Act ..."

If Section 1 (2) (d), which is discretionary, is arbitrarily invoked, it would mean that the operation of the Act or some provisions therein, would be reduced considerably since it would remove from its ambit great numbers of workers, as shall be seen shortly.

What is the rationale for exempting the Armed Forces, Police, Navy etc. from the provisions of the Act? One reason for this exemption is that the terms and conditions of employment of these people are governed by other statutes e.g. Armed Forces Act,<sup>54</sup> Police Act<sup>55</sup> etc. and it would therefore, be superfluous if the Employment Act were to apply to them also. Another reason one may give is that, the terms and conditions of employment of the Armed Forces and the like, are taken as special due to the security aspect. There is the notion that collective bargaining and strikes are not appropriate for the Armed Forces due to the role they play in society and there is the fear that their strikes i.e. mutinies, would not be confined to the waving of placards and shouting of slogans but they would be those of guns and bullets.

Up to now the Minister has invoked the application of S.1 (2) (d) three <sup>times</sup> terms,<sup>56</sup> twice in 1976 and the third time in 1978. For the purposes of this paper we are going to analyse one of them to illustrate that if the Minister exempts certain categories of workers from the application of the provisions of the Act, the protections the Act is purporting to confer on workers would sound hollow and meaningless.

Legal Notice No.65 of 1976 announced the passing of the Employment Act (Exemption of Provisions) Order, 1976 by which the Minister, inter alia, exempted the application of Section 9 of the Act which provides for reasonable housing accommodation to certain groups of employees. The order said that Section 9 would henceforth not apply to an employee:-

- "(a) Whose contract of service contains a provision which consolidates as part of his basic wage or salary an element intended to be used by him as rent or which is otherwise intended to enable him to provide himself with housing accommodation; or
- (b) Whose contract of service is the subject matter of or is otherwise covered by a collective agreement, or
- (c) Whose average monthly wage or salary is two thousand shillings or more."

This is just one example of the kind of exemptions the Minister has made so far.

One cannot be sure about the reasons or the grounds which prompted the Minister to exempt the application of S.9 to the said categories of workers but one could suggest the possible reason for these exemptions. For the first group, which consists of those employees given some form of house allowance, the reason is rather obvious, thus they have been provided with housing allowance to enable them to acquire accommodation. For the second group, which consists of those workers who are members of trade unions which have a collective agreement with the employers; these workers could have possibly been exempted because the Minister felt that they could be adequately represented by their unions which could always reach an agreement with the employers on housing for its members; they usually do so and this is incorporated in the collective agreement.<sup>57</sup> And lastly, for the third group i.e. those whose average monthly wage or salary is Shs.2,000 or more; this group could have possibly been exempted because of the presumption that any employee (taking into

account the socio-economic conditions in Kenya) who earns Shs.2,000 or more, must be educated and, therefore, conscious of his/her rights when entering the employment contract and should be able to take care of himself/herself; or alternatively, any person earning Shs.2,000 or more, is most likely to afford housing for himself.<sup>58</sup> Another argument could be that the Government did not want to interfere with the policy of 'freedom of contract' by applying the Act to all kinds of employees and had to leave some spheres of the contract to be arranged between the parties to the employment contract. One could also submit that the Government aimed to reduce litigations and therefore, avoiding the over-burdening of the Industrial Court with too many cases. This is because most of those who earn Shs.2,000 or more, are literate, know of their rights and are therefore, bound to be more litigation-conscious.<sup>59</sup> Hence by removing the application of some provisions of the Act to them, the Government was also indirectly reducing the number of cases likely to go to the Industrial Court which, it is said, is already over-worked.<sup>60</sup>

After looking at the Employment Act generally and the extent of its application, we can only summarise at this point, that although the Employment Act confers certain commendable protections, they are by and large inadequate and on some aspects, it is completely silent and denies the employee certain safe-guards that would have been expected in his employment.

It becomes a repetition but one which is necessary to reiterate briefly that in the foregoing discussion we have discussed the political economy that exists in Kenya and a definition of the concept of job security as used in this thesis given. We have argued from the premise that Kenya being an underdeveloped capitalist country where unbridled notions of laissez-faire exist e.g. 'freedom of contract', the state had to intervene especially after Independence to improve conditions and give workers some form of protection in their employment. However, a brief analysis of the Employment Act has revealed that, in fact, the laws passed purportedly to remove the disequilibrium between employers (capital owners) and workers is piece-meal and ineffective as far as protecting the worker in his employment is concerned. Hence the Employment Act confers very little job security to workers. The subject of job security is very wide and the scope of this paper does not allow us to delve into all its aspects. For that matter, we are going to confine ourselves to the extent to which a worker is protected in his job once he has obtained it; thus to what extent is he assured that he will continue to retain his employment. This is the law relating to termination of employment and is what is meant by the law of job security in this dissertation.

CHAPTER TWO

THE LAW OF JOB SECURITY IN KENYA

A. INTRODUCTION

Security of employment represents one of the most sensitive areas in the relations between labour legislations and the promotion of employment. Any employment policy should, of course, start by protecting those who are already employed from arbitrary dismissal and the consequences of unjustified retrenchment. Some quarters, on the other hand, argue that where provisions governing the termination of employment become unduly rigid and restrictive, however, employers may encounter difficulties in adjusting the size of the work force to their requirements, and this may in turn lead them to reduce recruitment owing to their reluctance to risk saddling themselves with man-power that may prove to be excessive at a later date.<sup>1</sup> This line of argument depicts the profit motive in any employment relationship so that if at all the rate of profits goes down to slackening of production, sales etc. workers are easily declared redundant to off-set the losses; and when the situation changes and there is now a need for increased production, due to e.g. increase of demand, raw materials etc., employers can always rely on the large 'labour reserve army' composed of the unemployed, from which they can draw the additional man-power they require. The workers, therefore, become pawns in this profit-motivated game of employers, while it is actually a matter of life and death for the former.

Until 1971, there were no statutory rules in Kenya governing the conditions under which contracts of employment were to be terminated. Except for some minor reference to termination of service contracts<sup>2</sup> and situations in which an employer may summarily dismiss the employee<sup>3</sup> under the Employment Act, the issue of termination was largely left to voluntary arrangements between the parties. Having looked at the fallacy of the doctrine of freedom of contract, it is easy to discern in whose favour this arrangement would work. Since our Employment Act was based on the Master and Servant Ordinance and in interpreting it we have to refer to the Common Law, it would be prudent to study briefly, termination of employment at Common Law.

The position at Common Law can be discovered from the statement of Lord Reid in RIDGE V BALDWIN<sup>4</sup>

"The law regarding master and servant is in no doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for a breach of contract."

Thus the employer had the prerogative to "hire and fire" his employee. Several past cases in Kenya show that this is what applied before and even after Independence, where an employer could end the employment relationship at his pleasure and the worker would have almost no remedy.<sup>5</sup>

Later on, at Common Law, the requirement for notice before termination of employment, developed. This Common Law rule requires that in the absence of any express provision to the contrary; reasonable notice of termination must be given. Our Employment Act has incorporated this requirement but it is more specific, so that notice would depend on the duration of the contract e.g. where the contract is to pay wages daily, the contract is terminable at the close of the day without notice<sup>6</sup> and where the contract is to pay wages or salary periodically at intervals of or exceeding one month, the contract is terminable by either party at the end of the period of twenty-eight days following the giving of notice in writing.<sup>7</sup> But this requirement of notice has been uprooted or eroded by the statutory provision (Section 16) which provides that either of the parties to the contract may terminate the contract without notice on payment to the other party of the wages or salary which would have been earned by that other party or paid by him, as the case may be, in respect of the period of notice required. This means that an employer can easily terminate the contract of employment and pay money to the employee instead of giving notice. This actually works in favour of employers because they can always afford and are willing to make payment in lieu of notice to the workers they want to do away with. For instance, in LULUME V COFFEE MARKETING BOARD,<sup>8</sup> the plaintiff was employed as a labour and welfare officer by the Coffee Marketing Board. He was given three months' salary in lieu of notice and was required to vacate the Board's house

within seven days. It was held that this was valid and that once a contract is terminated in such a way then all benefits that would otherwise have accrued will no longer exist.

Apart from this piece-meal protection as to notice, the Kenyan employee was afforded no security in his employment and he carried out his work at the pleasure of the employer. The whole situation was worsened by the lack of a machinery to enforce the provisions of the Act. It is very difficult for the Ministry of Labour to monitor all cases of unlawful or wrongful terminations of employment without the aggrieved parties coming to them. Due to the massive illiteracy that plagues our country and the consequent ignorance of most of our people, especially the unskilled workers, very few people know of their rights, however few they might be, and they, therefore, seldom go to court to enforce them.<sup>9</sup> And also, as we have seen above, due to the exemption of certain provisions applying to certain groups of workers, the effectiveness of the Act is questionable.

The Employment Act recognises summary dismissals "for lawful cause" and this is one of the ways in which the employment relationship may come to an end. Summary dismissal is termination without notice on the part of the employer and ordinarily, is a breach of contract unless there are grounds which the law regards as sufficient to justify termination without notice.

But the Act leaves the definition of "lawful cause" to the common law though it has enumerated several matters which "may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause." An employer may summarily dismiss his employee on a ground that has not been enumerated in the Act but the dismissal may still stand if he establishes and satisfies the court that the ground constitutes a justifiable or lawful ground for such dismissal. Some of the grounds warranting a summary dismissal by the employer include; absenteeism from work without leave, being intoxicated during working hours, wilful negligence in performance of work etc. We shall deal with summary dismissals in more detail later in this chapter.

Except for the above provisions the Employment Act has nothing more on termination of employment. Thus, apart from instances of summary dismissals, the termination of employment was governed by the Common Law. This was before 1971. The legal position, prima facie, underwent a drastic change with the amendment of the Trade Disputes Act in 1971.<sup>10</sup> The new policy provides for the intervention of the Minister of Labour where there are dismissals or reductions of the work force (redundancy).<sup>11</sup> But before we come to this, we are going to look briefly, at the various ways in which the employment relationship can lawfully come to an end, both at Common Law and under the relevant legislations. Here we are concerned with the termination of the contracts of 'employees' hence excluding those of 'holders of public office', independent contractors, agents etc. There are a number of ways in which a contract of employment can come to an end.

(i) TERMINATION BY AGREEMENT.

The contract of agreement may be terminated at any time with or without notice if both parties to it agree to do so. Such an agreement may be mutually reached either at the time of making of the contract, this is common in contracts for a fixed term, or during the subsistence of the employment. It is essential that both parties should consent to the termination, otherwise it would amount to something else e.g. dismissal. There is a danger for the employee in case of a mutual termination of the contract. Not only may he not obtain damages for the breach of contract, for there is no breach, but he cannot obtain any redundancy payment either, for in order to be redundant he must be 'dismissed', and mutual agreement to terminate is not dismissal.

(ii) TERMINATION BY LAPSE OF TIME.

If the contract of employment indicates that the employment is for a specific period, then in this case, the employment determines when the period is exhausted. But this must be expressly stipulated in the contract or should be impliedly construed from the conduct of the parties and the nature of the work involved.

(iii) TERMINATION BY NOTICE.

Either of the parties to a contract of employment is ordinarily entitled to terminate the contract at any time by giving notice to the other. At Common

law, the length of notice required on either side to terminate the contract may be agreed upon expressly in the contract itself, it may be fixed as a result of a term implied in the contract or it may be fixed by a custom applicable to the particular industry, trade or occupation. In the absence of any such term or any such custom, the period of notice required by the law is a 'reasonable period of notice'. What is a 'reasonable period of notice' depends upon all the circumstances of the relationship and the nature of work. In assessing this period, the court will take account also of such factors as length of service of the employee, seniority, interval of payment etc.<sup>12</sup>

However, what we have said about the length of notice is now subject to a statutory minimum period of notice fixed by the Employment Act,<sup>13</sup> depending on the periodicity of pay (interval between payments), e.g. where the contract is to pay wages periodically at intervals of or exceeding one month, the contract shall be terminable after a notice of twenty-eight days or more.

Out Act is silent on whether any provision to oust the statutory minimum or to provide for a period of notice shorter than the one stipulated is ineffective or not, as in the case in U.K.<sup>14</sup> But Section 16 of the Act provides that a contract may be terminated without notice upon payment of wages in lieu of notice. This means that the requirement of notice can be dispensed with if the employer pays the worker a sum of money instead of giving notice. It seems that it is not necessary that the employee accepts payment in lieu of

notice so long as the employer has offered such payment in place of notice, as depicted by the decision in LULUME V COFFEE MARKETING BOARD.<sup>15</sup> This is very arbitrary on the employee and enhances the view that the Employment Act hardly gives employees any greater security of employment since the employer, who can always afford it, can at any time terminate the contract of employment and do away with the requirement of notice by paying the employee a sum of money instead of giving notice.

(iv) TERMINATION WITHOUT NOTICE.

Termination without notice, ordinarily is a breach of contract unless there are grounds which the law regards as sufficient to justify termination without notice. As we have already seen, such termination on the part of the employer would be tantamount to a summary dismissal; while it would be summary departure if it is by the employee. The latter situation, especially in Kenya, has raised relatively little difficulty because the employers never fail to find replacements from the masses of the unemployed.<sup>16</sup> Where an employer terminates the contract without notice and without any justifiable reason, this would be a breach of contract and the employee may deem the contract to be rescinded but his remedy will sound only in damages.

(v) TERMINATION BY BREACH.

As a general rule, unless there is agreement to this effect, a contract does not terminate upon its being broken, however serious the breach is, but only upon repudiation, when the innocent party decides he does not want to go on with it. This generally applies to all breaches of employment contracts except where an employee refuses to do his work or an employer refuses to pay wages, the contract subsists until either the employer sacks on the spot or the employee leaves without giving notice. But if the employer wrongfully dismisses the employee then his breach terminates the contract and the employee has no option but to leave; he has no right to choose between non-performance and going on with the contract.

(vi) TERMINATION BY FRUSTRATION.

In general, once a contract is made the parties to it have no option but to perform it or pay damages if its breach. But the circumstances existing at the making of the contract may change in such a way as to make it meaningless, and when this happens the court will sometimes treat both parties to it as discharged from their obligations, because the object of their agreement has been frustrated. Thus, by frustration is meant that there has been such a change of circumstances that the performance of the contract has become unlawful (as by the passing of a statute after the contract was made), or that events make it physically

impossible for the contract to be performed (as where the illness of the employee lasts or is likely to last for a prolonged period), or that, although performance is not physically impossible, there has been such a change as to destroy the whole object of the contract. The doctrine of frustration applies to the contract of employment as to any other contract.<sup>17</sup>

(vii) OTHER EVENTS WHICH TERMINATE.

Since the contract is always regarded as personal in nature, the death of either employee or employer will terminate it (though it will not in general affect rights which have already accrued). Similarly, the winding up of a company or the dissolution of a partnership will mean that the employees of the company or partnership will be automatically dismissed.

Having looked at the various ways in which the contract of employment can be terminated, we are now in a position to turn our attention to dismissal of employees from their employment, which is the gist of our study and which was deliberately omitted in the foregoing discussions to avoid unnecessary repetitions. Firstly, we are going to concern ourselves with the different types of dismissals and their application in Kenya. After making ourselves conversant with this, we will then turn, in the following chapter, to dismissal of workers in the hotel industry, the purported reasons for these dismissals and the actual reasons, if any; and we will also see the manner in which the Industrial Court deals with these cases. Specific cases from the hotels will be used as illustrations.

B. DISMISSALS.

Neither our Employment Act nor the Trade Disputes Act, gives a definition of the term 'dismissal'. The former legislation only lays down the situations which will justify a summary dismissal. In U.K. both the Redundancy Payments Act (R.P.A.)<sup>18</sup> and the Trade Union and Labour Relations Act, 1974 (T.U.L.R.A.)<sup>19</sup> define 'dismissal' in practically identical terms:

"... an employee shall be treated dismissed if, but only if -

- (a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice, or
- (b) where under the contract he is employed for a fixed term, that term expires without being renewed under the same contract, or
- (c) the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

In the U.K., unlike the position in Kenya, the term 'dismissal' had to be specifically defined by legislation because an employee who is dismissed from his work, whether 'unfairly' or 'wrongfully' is entitled to certain specific statutory rights e.g. redundancy compensation. Unfortunately, in Kenya such rights accruing to the dismissed employee seem virtually non-existent. In Kenya, the Industrial Court has

stated that in certain situations it sees no material difference between "termination" and "dismissal". In one case the judge observed:-

"... Once the court comes to the conclusion that it must interfere in the .... decision to terminate a worker's services then it naturally follows that the termination was not justified and was wrongful. The court must add that in this context there is no material difference in the two words 'termination and dismissal.' The court is then empowered to make necessary orders in accordance with the new section 9A of the Trade Disputes Act which was passed by Parliament last year."20 (emphasis added).

Hence according to the Industrial Court, all terminations of contract in which the Industrial Court will interfere are dismissals per se. However, the essence of a dismissal is that it is unilateral in character, the employer dismisses the employee and terminates his contract regardless of the wishes of the employee. We are now going to look at the two types of dismissals recognised by Kenyan law, their effect on the employment and the remedies thereof. These are summary dismissal and wrongful dismissal.

*but summary dismissal can be wrongful*

C. SUMMARY DISMISSAL.

This is provided for by the Employment Act but the Act gives no definition and only lays down situations when summary dismissal by the employer will be justified in law. Summary dismissal is the termination of contract by the employer without notice to the employee; to put it literally -, 'sacking on the spot'.

The Employment Act in S.17 lays down seven grounds which may amount to gross misconduct so as to justify the summary dismissal of an employee. These "lawful causes" are; absenteeism without permission, drunkenness during working hours, negligence in the performance of work, use of abusive or insulting language and insulting behaviour, disobedience, being in lawful custody for more than four days, and lastly, if the employee commits or is reasonably suspected to have committed a criminal offence against or to the detriment of his employer or his employer's property. The employer is entitled to fire the employee automatically if he finds the latter to have committed any of the above "offences". However, that is not the end of the matter; the employer may summarily dismiss the worker on any other ground not mentioned in S. 17 provided he satisfies the court that the alleged misconduct constitutes a justifiable or lawful ground for such dismissal. It is not necessary that he gives the employee notice or any reason for the summary dismissal. An employee feeling aggrieved may bring an action for wrongful dismissal to which the employer may then plead the reason for dismissal and, if that is shown to be a sufficient reason for a summary dismissal, the employer has a complete defence. Lord Denman in RIDGEWAY V HUNGERFORD MARKET CO.<sup>21</sup> said:-

"Now it is not necessary that a master, having a good ground of dismissal, should either state it to the servant, or act upon it. It is enough if it exists and if there be improper conduct in fact ...."

Summary dismissal for a sufficient reason is, therefore, valid at Common Law irrespective of the fact that no reason or the wrong reason, was given for the dismissal.

The law regarding the giving of reason for dismissal is still more antique at Common Law and our laws blindly adhere to it, almost without any qualification.<sup>22</sup>

D. RATIONALE OF SUMMARY DISMISSAL.

What are the rationales of summary dismissal of workers under S. 17 of the Employment, taking account of the socio-economic conditions prevailing in Kenya which is a neo-colonial state? We will deal with each of the grounds that purport to justify summary dismissal under the Act.

The rationale for discouraging absenteeism on the part of the employee is based on the argument that the consideration the worker gets for his labour power is wages and therefore, the number of man hours he puts in his work must correspond to it,<sup>23</sup> otherwise he does not deserve the wages given if he is not at his place of work at all times he is required there. Loss of work hours as a result of a worker's absence from work will lead to a lessening of production which in turn leads to loss of profits by the employer (capital owner). This is quite contrary to the whole purpose of the employment, at least, this is the view of the employer. The employer does not pay wages to the worker for his services merely to provide him with employment, but the whole exercise is geared towards the acquiring and accumulation of surplus value from production through the workers' labour power. The means of production,

owned by the employers (capitalists), by themselves are useless, since by themselves they cannot produce material wealth. The absence of the worker from his job, for whatever reason, will not go in anyway to the realisation of the profit-motive. Productive labour which produces surplus-value is what is sought:-

"This is wage labour which, exchanged against the variable part of capital (the part of capital spent on wages), produces not only this part of capital (or the value of its own labour power), but in addition produces surplus value for the capitalist - only that wage labour is productive which produces capital."<sup>24</sup>

The absence of an employee from his work is not in consonance with the increase of surplus value.

The rationale for drunkenness as a lawful ground for summary dismissal is similar to that of absenteeism. The argument is that, an intoxicated worker is most likely, incapable of properly performing his work because drink tends to reduce one's ability to work.<sup>25</sup> According to the employer, reduction of ability to work due to drink would result in the lessening of the productivity of the worker. This would as a consequence be an impediment to the all-important goal of maximisation of profits on the part of the employer.

An employee who neglects to perform any of his duties or who performs them carelessly or improperly would be responsible for any loss incurred by the

employer as a result of his conduct and he will be subject to summary dismissal. The inclusion of this provision in the Act and which is also an implied condition in the employee's contract is to ensure efficiency and competence in the performance of the work of the employee. Efficiency is in turn geared to ensure the maintenance of production and reduction of losses. This, once again, boils down to the maximization of the profits of the enterprise in which the employer is engaged.

An employee is not supposed to use abusive or insulting language or to behave in an insulting manner to his employer, or to any person placed in authority over him, otherwise he can also be summarily dismissed. This stipulation is based on the age-less master and servant relationship; thus the subservience of the latter to the former. The subordination of the employee, just as in the serf days, must be complete as evidenced by the present employment relationship in Kenya. This assertion holds water even more due to the silence of the Act in situations where the employer, even when not necessary (e.g. when giving commands), insults the employee by words or conduct. Although this is a common occurrence, the employee in practice has no redress against most of an employer's insulting behaviour, short of actual assault.

The justification above, for summary dismissal of the employee would also apply where an employee disobeys the 'lawful and proper command' which it was within his scope of duty to obey, issued by his employer or any person placed in authority over him by his employer. The employee who refuses to heed to such an

order will be subject to immediate dismissal. This provision is also intended to instil discipline among employees in their work. Discipline and efficiency among workers must be maintained at all times in order for the employer to realise his objective i.e. continued, if not increased production and the subsequent maximisation of surplus-value.

Any employee who is absent from his work for four days or more, as a result of any lawful arrest by the state, can be summarily dismissed. The rationale for this can be tied up with those given for absenteeism. A worker who is arrested for an offence and who is not discharged within four days, is a liability to the employer, with regard to productivity. The essence of employing the worker in the first place, was for him to provide labour power and a worker who is in a cell is useless to the employer who is, therefore, permitted by the law, to terminate the contract of such an employee on the expiry of the given period because he is now more of an incumbrance than an asset to the realisation of profits. In fact, as may have been realised by now, it is more of this accounting principle of profits rather than any other factor which influences the deliberations of most employers, particularly those engaged in production of goods and provision of services as in the hotel industry.

The employee who acts in any way that is substantially detrimental to his employer or his property will be liable to suffer summary dismissal. The provision

in the Act (S. 17(f)) is very wide and can be interpreted to cover numerous situations where the act of the employee might threaten the interests of the employer. Some examples might be drawn from the Common Law the worker is to serve his employer faithfully and his personal interest should not conflict with that of his employer i.e. he should not compete with his business otherwise this would be deemed to be substantially detrimental to his employer. The employer here is empowered by the law to protect his business interest by the immediate dismissal of the employee, if he so wishes. A case from the Hotel Industry and decided by the Industrial Court is best suited to serve as an illustration of this principle. In DOMESTIC AND HOTEL WORKERS' UNION V WATAMU BEACH HOTEL,<sup>26</sup> an employee (a receptionist) of the respondent hotel was alleged to have began running a bar which was only 200 metres away from the hotel and, therefore, competing with his employers. It was claimed by the employers that the employee engaged in the business not only while off-duty but also during his working hours and that he had solicited some of the guests of the hotel to patronize his bar. The employers purported to dismiss him on this ground and in the letter of termination they said:-

"In view of the fact that your considerable interest in the ownership and running of the bar in Watamu village is detrimental to giving your full attention and effort to your job in this hotel, and furthermore are at variance, with the loyalty in business you owe to your employers, I am, with regret obliged to terminate your services with this company ....."

The Industrial Court having considered the evidence, held that the termination of the services of the employee was wrongful since there was no clear evidence as regards the allegations made, and that, the termination was based on mere suspicion. He was given three months' salary as compensation. This case illustrates that if the employer's interest is, or seems to be threatened in any way, by his workers, especially with regard to profits, he will dismiss the worker concerned and the law sanctions this.

The employee must account for property received on behalf of his employer, for bribes and secret profits derived from the position he holds;<sup>27</sup> and if he refuses to do so, and his refusal acts substantially to the detriment of his employer or property, the employee can be summarily dismissed. Where an employee gathers knowledge during the course of his employment e.g. patent, he must divulge the information to his employer and he cannot use it himself, even if his discovery was unrelated to the business of the employer, it is presumed that he must have used the facilities at his place of work!<sup>28</sup> Once again the law comes in play to protect the interests of the employer vis-a-vis the employee. The continuity of the business of the capital owners and the protection of their property is assured by the law.

The Employment Act is silent on any implied right for the employee similar to the ones conferred on the employer. For instance, the Act does not say what the employee is entitled to, for instance, where the employer uses abusive and intolerable language. This reveals yet another deficiency in our law.

E. EFFECT OF SUMMARY DISMISSAL ON CONTRACT.

If the dismissal is lawful because there is a reason which amounts to gross misconduct so as to justify summary dismissal, the contract is terminated immediately. Even if the summary dismissal is not justified, and is therefore in law a wrongful dismissal, the employee has not got the option of continuing with the contract and claiming damages if he wishes; he must accept the fact that the contract is ended, and has only the remedy of damages.

"... if the master wrongfully dismisses the servant either summarily or by giving insufficient notice, the employment is effectively terminated."<sup>29</sup>

Such a conclusion is reached after perusal of a host of cases from the Industrial Court which shuns specific performance. The reasons for this attitude shall be seen later.

Neither the Employment Act nor the Common Law requires the employer to follow any particular procedure in summarily dismissing an employee. Not only is there no general requirement that the employee be given a chance to be heard in his own defence, or that the rules of natural justice be complied with,<sup>30</sup> but it seems that the absence of any previous warning by an employer cannot be a ground for refusing to recognise a summary dismissal as lawful.<sup>31</sup>

F. WRONGFUL DISMISSAL.

A 'wrongful dismissal' is any dismissal which is unlawful. A dismissal is lawful if it is effected in accordance with the contract of employment, whether individual (subject to the Employment Act) or collective or if the employee has broken a term in his contract; express or implied, justifying summary dismissal.<sup>32</sup> Whereas the express terms are to be found in the employee's contract, the implied terms are, as we have seen, those relating to obedience, loyalty and behaviour are also covered by S. 17 of the Employment Act.

Hence, a wrongful dismissal is a dismissal which is in breach of one or more of the conditions in the contract or the Employment Act, where it applies, or a dismissal which is purportedly a summary dismissal on a lawful ground but which actually is not justified because the employee is not guilty of any gross misconduct to warrant the summary dismissal. Instances of wrongful dismissal include; where an employer purports to dismiss an employee without notice (or by a shorter notice) contrary to the statutory minimum or the contract, as the case may be, or where an employer purports to summarily dismiss a worker on a baseless or fabricated ground or on no ground at all.

Wrongful dismissal is the most common issue in dispute in the cases that go to the Industrial Court relating to the termination of contracts. For example, in the case of KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS' V KENYA KAZI GUARD LTD.<sup>33</sup> in which an

employee's services were terminated because she had asked for maternity leave, the Industrial Court held that the complainant represented by the union had suffered a wrongful termination because she was not served with any warning letter regarding her poor and unsatisfactory work (as alleged by the respondents) and the only reason in the court's view, her services were terminated was because she had asked for maternity leave. The court stated that employers should not victimize female employees when they ask for maternity benefits that have been granted to them through legislation. In KENYA MANAGEMENT STAFF ASSOCIATION V NATION NEWSPAPERS LTD,<sup>34</sup> the Industrial Court held that the complainant's dismissal by his employer was justified and therefore, not wrongful because his conduct was so grievous that the employers had lost confidence in him as a useful member of the management and that he had not come to court with clean hands.

The Industrial Court since its inception, has developed certain principles that guide it when considering whether a termination is wrongful or not, and this may be stated at length for clarity. In the case of KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS V K.C.C. LTD,<sup>35</sup> the court ruled as follows:

"Now coming to the other point that once an employer has complied with his contractual obligations then that is the end of the matter and the workers have no further remedy. This matter, however, is not so simple as that. Over the years since

the Industrial Court was established it has made the position clear that the court has every right to satisfy itself that the order terminating the service of a worker is not passed merely to camouflage an order of dismissal for misconduct. If it is found by the court that the termination is in fact founded on misconduct, negligence, or inefficiency then the court must find out if the facts support the allegation made against the worker. In such cases the court will not, however, easily set aside the management's decision. It will interfere only:

1. When there is want of good faith;
2. When there is victimization or unfair labour practice;
3. When the management has been guilty of a basic error or violation of principles of natural justice and
4. When on the materials the finding is completely baseless or perverse.

Once the court comes to the conclusion that it must interfere in the Management's decision to terminate a worker's services then it naturally follows that the termination was not justified and was wrongful. The court is then empowered to make necessary orders in accordance with the new section 9A of the Trade Disputes Act...."

These principles have been reiterated in subsequent cases in the Industrial Court. It should be noted, however, that the principles of Natural justice do not apply to

lawful summary dismissals and they only come into play where there is a condition for notice in the contract or by virtue of the Employment Act, hence when it is a term of the contract.

The Industrial Court which is the court empowered to hear trade disputes,<sup>36</sup> has not made it clear what criteria it uses to find out any of the four points (mentioned above), on which it will base its decision to interfere with an employer's dismissal of a worker. At least this is not discernable from the court's decisions and, in fact, to some extent the record shows the contrary. In one case, DOMESTIC & HOTEL WORKERS' UNION V PANAFRIC HOTEL LIMITED,<sup>37</sup> the court ruled that there was no evidence of any victimization or unfair labour practice when, prima facie, all the facts pointed to the fact of an unfair dismissal. In fact, the Industrial Court has often been criticised for inconsistency in the awards it makes. The practice has been to publish a summary of the arguments of the parties in the Kenya Gazette; it is however, impossible to build up from the published awards a cohesive body of Industrial Court practice. While the basic arguments of the parties are presented, the judge's findings of the fact are not usually set out and often, if reasons are given for the award, they are sketchy. This failure to develop precedent in the court is a shortcoming since it may lead to uncertainty of the law due to the inconsistency of the courts' decisions.<sup>38</sup>

G. REMEDIES FOR WRONGFUL DISMISSAL.

At common law the rule has been stated in this way:

"If the master rightfully ends the contract there can be no complaint: If the master wrongfully ends the contract then the servant can pursue a claim for damages ... In a straightforward case where a master employs a servant the latter is not regarded as the holder of an office and if the contract is terminated there are ordinarily no questions affecting status or involving property rights." 39

In theory, where an employee has been wrongfully dismissed he has two alternatives, he may refuse to accept the termination and insist on continued performance of the contract, alternatively, he may accept the repudiation and bring an action for damages for wrongful dismissal. However, in practice, in the first case the Industrial Court and the civil courts in general are reluctant to enforce contracts of personal services. This tendency is a result of applying principles of equity and public policy. It is often said that the contract of employment is an exception to the rule of specific performance (enforcement of continued observation of the contract) in that its personal nature prevents it from being specifically enforced against an unwilling party. It is argued that it follows from the lack of availability of specific performance that unilateral termination (dismissal) must be accepted by the other

pay damages, they will not hesitate to terminate their workers' services as their needs require, knowing that the only thing they have to do is pay damages which can anyway be set-off quite comfortably from the profits made out of their businesses. This is the position at Common Law.

In Kenya, the remedies to wrongful dismissal are provided for by a legislation namely, the Trade Disputes Act <sup>40</sup> which also establishes the Industrial Court and empowers it to hear all disputes relating to Industrial relations. Once the Industrial Court has proved a dismissal is wrongful, the Trade Disputes Act provides for two types of awards for the wrongful dismissal, to wit, reinstatement and compensation.<sup>41</sup> Where both reinstatement and compensation are awarded together, compensation in such a case is **restricted** to the actual pecuniary loss suffered by the employee concerned as a result of the wrongful dismissal<sup>42</sup> and where only compensation is awarded, such compensation must not exceed twelve months' monetary wages.<sup>43</sup> Reinstatement thus is almost regarded together with compensation but not vice versa. The statute, however, does not give any criteria for the determination of when to award reinstatement and compensation or compensation only. It has therefore been left to the court to decide which of the remedies is suitable in a given case. How does the Industrial Court decide whether to award reinstatement and compensation or compensation alone?

Decisions from the Industrial Court show the court, guided by equitable principles has tended to concentrate on compromise, purportedly in the furtherance of 'Industrial peace', rather than enforcing the contract of employment by specific performance. It is argued that good relations between employer and employee are essential for the maintenance and promotion of Industrial peace (vital for the economic development of the nation). This, therefore, means that when it reaches a point where an employer and his employee are incompatible, it becomes necessary to remove the employee from the employer's service. The Industrial Court as part of the machinery established for the purpose of maintaining industrial peace, bases such decision on public policy. Thus, the Industrial Court having come to the conclusion that a dismissal is wrongful will look at the existing relationship between the employer and employee before deciding on which remedy to effect.

As already stated, the Industrial Court is very reluctant to award the remedy of reinstatement for the reasons given above, this is particularly so, where the relationship between the employer and employee has deteriorated so much that the court feels reinstatement would be ill-advised especially if the business of the employer is vital to the economy of the country. This is usually the case even where an employee deserves reinstatement rather than compensation as his remedy. A few cases may be given to illustrate this point. In the dispute between KENYA MANAGEMENT STAFF ASSOCIATION V COFFEE RESEARCH FOUNDATION,<sup>44</sup> the court felt that the

relationship between the complainant with his employers had deteriorated so much that reinstatement was unwise. The judge said:-

"... Under these circumstances the court feels that if Dr. Okioga is reinstated then the Coffee Research Foundation would become a battleground and not a research organisation. In the interests of Kenyan economy the court is not prepared to take such a risk."

In the dispute between KENYA LOCAL GOVERNMENT WORKERS' UNION V MOMBASA MUNICIPAL COMMISSION,<sup>45</sup> despite the fact that the complainant really deserved reinstatement the judge ruled:-

".... the court having found that the Respondents erred in terminating his services finds itself in some difficulty as to how to compensate Mr. Mchangamwe because the court does not intend to award his reinstatement for the simple reason that his relationship with K.N.U.T. has deteriorated to such an extent that he would not be able to perform his duties .. as efficiently and effectively as would be expected."

In the case of DOMESTIC AND HOTEL WORKERS' UNION V KULIA INVESTMENTS,<sup>46</sup> the court found that the twenty-six complainants were wrongfully dismissed from their work yet all the court said was that 'reinstatement would not be beneficial to either of the parties' and only gave three months' salary to each of the workers as compensation. The judge gave no reasons why he thought that reinstatement would not be beneficial to the dismissed workers, otherwise, it is obvious that the decision of the court was beneficial to the employers.

In the dispute between KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS' V KENYA KAZI GUARDS LTD,<sup>47</sup> despite the fact that the court found that the complainant was wrongfully dismissed from her job, it did not consider the issue of reinstatement at all and it awarded monetary compensation as a matter of course. The court has often stated that where the relationship between the employer and the employee has not developed into a serious problem, and the chances of solving these problems that may have arisen are still good, then the court may order reinstatement. However, during the research for this paper, it was found that such a situation has been very rare and the court has more often than not, decided against reinstatement.

Hence, as can be seen, the Kenyan law like the Common Law has refused the remedy of specific performance to the contract of employment so far as concerns a remedy by way of reinstatement. The Industrial Court despite its discretionary power, has adhered to this attitude and ineritably, it means that the only remedy as of right continues to be monetary compensation which is in most cases insufficient as a remedy. The result remains that the law still fails to afford ultimate job security. I submit that this is a failure on the part of the Industrial Court. Since the powers of reinstatement of wrongful dismissal are granted to the court through the Trade Disputes Act without any restriction on its discretion, the court should therefore, use its discretion properly by reinstating employees to their jobs in deserving cases. It is also submitted that the court should not rigidly adhere to

principles of equity to the sole detriment of one party i.e. the worker. The court should be more flexible in its decisions and qualify the common law and doctrines of equity to suit the circumstances of our country<sup>48</sup> and therefore, to reach more conscionable decisions.

Before leaving the law relating to dismissals, it would be prudent to point out that the law does not take account of and gives no redress as to the manner in which the worker is dismissed, even though it may be particularly painful to the employee or prejudicial to his chances of getting another job. In ADDIS V GRAMOPHONE CO.,<sup>49</sup> where the plaintiff's job was taken over by his replacement at the beginning of his six-month period of notice, and where the bank with which he usually conducted the firm's business was told before he was of his dismissal and consequent lack of authority to act for the firm, Lord Loreburn in the House of Lords said:

"If there be a dismissal without notice the employer must pay an indemnity, but that indemnity cannot include compensation either for the injured feelings of the servant or of the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

In this case, although the manner in which the employee was dismissed was detrimental to his reputation and was therefore, prejudicial to his future in acquiring another job, the court did not give any remedy. The next and final aspect of job security we are going to deal with is the law relating to redundancy.

H. REDUNDANCY.

The term redundancy refers to termination of services of an employee by an employer on grounds of inability on the part of the employer to continue to employ such a worker. Employers may at times experience less demand for particular category of employees mainly, for example, as a result of rises in the cost of production and the consequent reduction in consumption of products. The Kenyan Employment Act though governing the employment contract does not contain such provisions to cater for such eventualities and despite the fact that in such cases, the employee may lose his job or get lower wages. However, the Trade Disputes Act incorporates a provision to the effect that no termination of employment should be effected on the ground of redundancy before the matter has been reported to the Minister of Labour. The Section provides as follows:-

"Termination of employment through redundancy shall, whether or not there is agreement between the employer and the employee as to the terms of the redundancy, be deemed to constitute a trade dispute for the purposes of sub-section (4) of this section and termination of employment shall not be effected until the matter has been reported to the Minister under that sub-section, and the Minister may thereupon confirm the terms of the redundancy where he is satisfied that there is agreement between the employer and the employee or, in any other case, invoke the settlement procedure set out in the following sections of this part."50

No redundancy, therefore, can be valid until it has been reported to the Minister and he has taken the appropriate action or followed the procedure set out in the Act. Thus where a redundancy is declared by the employer without approval of the Minister, it will amount to a wrongful dismissal and the employee would be entitled to damages as was held in DOMESTIC AND HOTEL WORKERS' UNION V KULIA INVESTMENTS LTD/SAROVA HOTELS LTD.<sup>51</sup> The result of this position is the same as that which used to be reached before the Trade Disputes Act was amended in 1979.<sup>52</sup> Before the amendment, the Act provided that all cases of redundancy were subject to the approval of the Industrial Court otherwise, it would be a wrongful termination. So now it is merely a matter of formality or procedure because though redundancy cases are reported the Minister first, most of them end in the Industrial Court as trade disputes for settlement.

Apart from requiring that the employer should seek permission of the Minister before declaring a redundancy, the Trade Disputes Act is silent on the factors to be considered in deciding whether permission should be granted. This is a very unfortunate omission and this matter should have been considered in the legislation, so as to avoid uncertainty and also prolonging of the litigations in the Industrial Court on issues which could have otherwise, been easily settled by seeking guidance from the express provisions of the statute.

It appears in Kenya, as evidenced by the decisions from the Industrial Court, that for redundancy to arise there must have been actual termination of services. This is to say, for example, that redundancy would not arise where an employee leaves work as a result of demotion. Once again, it can be said that such a state of affairs does not afford the Kenyan worker much protection in his employment. In the United Kingdom, for instance, an employer does not need to actually tell an employee to go away because he can no longer provide him with work. It is enough that he does something which forces the employee to leave. This was illustrated in the case of MARRIOT V OXFORD AND DISTRICT CO-OPERATIVE SOCIETY LTD.<sup>53</sup> In this case, the appellant was employed by the respondents as a foreman. After some years the respondents found that there was insufficient work for the foreman and decided to offer the appellant the position of a supervisor at a reduced rate. He protested and tried to obtain work elsewhere. Later the respondents wrote to him to the effect that his wages would be reduced by £1 per week. Again the appellant protested but did not leave at once. His wages were reduced by £1 per week and after three or four weeks he left to take another job. On the question whether he was entitled to redundancy pay, it was held that the letter amounted to a termination of the appellant's contract of service unless he had accepted the terms proposed therein, since from all the circumstances including the appellant's continued protests it was clear that he had not accepted the terms despite his continuing to work for the respondents for three or four weeks; the contract had been terminated by the latter and the appellant was

entitled to redundancy pay. It was enough in this case that the appellant had been demoted and he had refused to accept such demotion. It was immaterial that the employers had not actually told him to go away.

Again in U.K. once a dismissal has been established there is a presumption that it was a redundancy and therefore, the employee is entitled to redundancy pay.<sup>54</sup> In turn, once redundancy is established there is a presumption of an unfair dismissal which if unrebutted confers on the employee certain remedies.<sup>55</sup> Such protective presumptions in favour of the worker are lacking in Kenyan law.

#### I. REMEDIES FOR REDUNDANCY.

The remedy for redundancy under Kenyan law would depend on whether the redundancy is a wrongful or a 'lawful' redundancy i.e. one which has been confirmed either by the Minister or Industrial Court. We have seen that a wrongful redundancy is one which violates the statutory requirement that all cases of redundancy should be reported to the Minister of Labour. If this statutory provision is not complied with, what results is prima facie a wrongful dismissal.

The remedies for wrongful redundancy are either reinstatement or compensation. The principles applicable in the granting of either of these remedies are similar to those applicable when granting the same remedies in wrongful dismissals and which we have exhaustively dealt

with above. On the other hand the award of a redundancy which is "rightful" or confirmed by the Minister or Industrial Court, is fifteen day's basic wage or salary for each completed year of service with the employer. The factors to be considered when an employee is declared redundant include individual merit, skill, length of service based on the principle of 'last in, first out' and domestic responsibilities and private circumstances.<sup>56</sup> The sum of money that results from such a calculation i.e. fifteen days' basic wage or salary for each completed year of service, it is submitted, is relatively little. For instance, an employee whose basic salary is Shs.800 per month, would be entitled to Shs.4,000 only after ten years of service as his redundancy pay.

In this chapter, we have seen the various ways in which the employment relationship can be terminated. Most of the laws relating to termination of employment favour the employer because, prima facie, the employer has the ultimate power to hire and sack his employees. It is submitted that the laws seen above are merely procedural since they do not give the workers any substantive rights or protection. For instance, as concerns redundancy, the Trade Disputes Act only says that any termination of employment on ground of redundancy must be reported to the Minister before it is effected.<sup>57</sup> The Act does not expressly say what remedies will accrue to a worker who is declared redundant. Even if an employer declares a worker redundant contrary to the statutory stipulations, he will only have to pay some compensation for the wrongful

termination and as can be seen, this is not a real and adequate remedy for the workers. In conclusion, it would be correct to say that, basically, the remedies available under the Trade Disputes Act are inadequate and prima facie, there is no way therefore, that the absolute powers of the employer can be mitigated. In such a situation, it is questionable whether there is real job security for workers in Kenya.

After dealing with the law relating to job security in Kenya, especially termination of employment, it is appropriate to relate these laws to our case study i.e. employment in the hotel industry. By looking at the way these laws apply on the ground or in practice, we will understand and appreciate their merits or demerits, hence, the extent to which they protect workers in their employment. This will tell us whether the conclusion reached above is a correct one or not.

For the purposes of this paper, we are going to confine ourselves to the employees of some particular hotels, thus, the big multinational hotels which mainly cater for tourists e.g. Hotel Intercontinental, Panafric, Serena etc. All these hotels we are dealing with are subscribers to the Kenya Association of Hotel Keepers and Caterers (hereafter referred to as 'the Hotelkeepers') which is an employers' association affiliated to the Federation of Kenya Employers (F.K.E.). The Hotelkeepers' association has an existing collective agreement with the Domestic and Hotel Workers' Union (hereafter referred to as D.H.W.U.) which is the trade union representing, inter alia, hotel workers who subscribe to it and are therefore, members. The D.H.W.U., like any other trade union represents its members only. Not all the hotel workers however, are members of D.H.W.U. The last annual return of D.H.W.U.<sup>1</sup> showed that it had a total of 28,019 voting members from all over the country; not all of these members are hotel workers since the Union also represents domestic workers e.g. household servants, shamba workers etc.

Those employees of hotels who are members of the Union are not wholly covered by the Employment Act due to the Collective Agreement between D.H.W.U. and the Hotelkeepers' Association. This is because, not only have they been exempted from some of the provisions of the Act (e.g. S.9 and S.5 (4)), but also

because the collective agreement between their union and their employers, which contains terms and conditions of employment is adequately exhaustive and it would be superfluous if both the Act and the Collective Agreement applied to them. Anyhow, the collective agreement incorporates certain provisions of the Act and of course, during the drafting of the collective agreement, the parties must have complied with the Act as a guide-line.

The hotel workers who are not members of D.H.W.U. will be bound by their individual contracts with the employers and in turn both would be subject to the Employment Act and the orders made thereunder. But for those employees who earn Shs.2,000 or more, Sections 9 and 5 (4) of the Act would not apply to them due to the Ministerial exemptions we saw in chapter one. However, it seems that all the workers of the hotels which subscribe to the Hotel Keepers' association, are members of D.H.W.U. because these hotels have a standard letter of appointment which refers to the collective agreement with D.H.W.U. as the contract which governs the terms and conditions of their services. What all this means is that whether a worker is a member of the Union or not, the terms of the collective agreement apply to him. This, however, excludes the management staff in these hotels because their individual contracts with the employers are specifically governed by regulations laid down by the employers due to the special nature of their jobs. The management staff

include the managers, assistant managers, accountants and in some hotels, even the supervisors. They are excluded from the collective agreement because they are considered part and parcel of the management due to the confidential nature of their positions (accessibility to hotel secrets etc.) Hence, for the majority of the hotel workers, the terms and conditions of service are contained in the collective agreement between D.H.W.U. and Hotelkeepers' association, which serves as their contract of employment.

B. CONTENT OF THE EMPLOYMENT CONTRACT

The collective agreement between D.H.W.U. and the Hotel Keepers' association is much wider than the Employment Act and its provisions attempt to secure for the worker more rights than those given in the Act. For instance, an employee whose conduct is unsatisfactory or who commits an offence (which does not warrant instant dismissal), is entitled to at least three warnings in writing before the employer can terminate his contract of employment.<sup>2</sup> The Employment Act does not mention the issue of a warning before dismissal. Some of the advantages of belonging to the trade union is that certain provisions which are not adequately provided for by the Act are agreed upon by the Union on behalf of its members and if the terms of the collective agreement are breached, the Union is ready to represent its members on their grievances. In case of a dispute with an employer,

a Union member is fully represented by the Union either at the Ministry of Labour or the Industrial Court as the case may be, by virtue of his membership of the Union. A non-member of the Union has got to fight his case alone at his own expense, besides unlike the Union, the non-unionized worker can easily be pushed around and intimidated by the employer who always has the stronger financial position. This does not necessarily mean that the D.H.W.U. has succeeded in representing its members effectively, here we are only pointing out the disadvantages inherent in being non-unionized.

The collective agreement is relatively detailed and exhaustive and it would be impossible to analyse all of its provisions within the limits of this paper. We will therefore, only deal with certain aspects of job security contained in the collective agreement and see to what extent the hotel worker is protected in his employment and whether he is any better off than a worker whose contract is governed by the Employment Act.

1. WARNINGS.

Clause 6 of the Collective Agreement contains provisions for warnings. It provides, inter alia, that an employee whose conduct is unsatisfactory or who commits an offence which in the opinion of the employer does not warrant instant dismissal should be warned

three times in writing. The first warning should be recorded in the employee's file and copied to the shop steward. When no second warning has been necessary within a period of nine months from the date of the first warning then the first warning should be cancelled from the record. The second and third warnings are to be copied to the shop steward and the branch secretary of the Union. An employee with less than ten years continuous service with the same employer, receiving a third warning may have his services terminated by notice or payment in lieu as provided in Clause 7. If an employee with three warnings recorded on his file, commits a fourth offence within a year from the date of the third warning, then the employer is entitled to summarily dismiss the employee provided he has been in the employment of that employer for less than ten years. If the employee has had ten years or more of service with the same employer and calling for a fourth warning within twelve months of the third warning then the employer is entitled to terminate the services of such an employee. If an employee completes one full year from the date of his last warning without any further offence, any warning as recorded on his file is to be cancelled. All warnings given are subject to written appeal by the employee to the management within seven days from the date of the warning and the Management is to inform the employee within seven days of the result of the appeal.

It is submitted that these provisions requiring warnings to be given to an employee before summary dismissal and a right of appeal, are very commendable because the worker is given a chance to mend his conduct in his employment. This is in consonance with the principles of natural justice to a certain degree and goes to reduce arbitrary dismissals of workers. The Employment Act has neither a provision relating to warnings nor one incorporating an aspect of natural justice, giving rise to a sorry situation for the workers who are wholly covered by the Act.

## II. TERMINATION OF EMPLOYMENT

The termination of employment is provided for by Clause 7 and it states that after the completion of the probationary period (not exceeding two months), the employment of a hotel worker is terminable by either party giving a written notice or making payment in lieu of notice. The length of notice or payment in lieu thereof, depends upon the length of service of the employee. An employee with less than five years continuous service with the employer is entitled to one month's notice or payment in lieu while an employee with five years' or more but less than ten years continuous service with the same employer, is entitled to be given two months' notice or payment in lieu. An employee with ten years or more continuous service with the employer, is entitled to three months' notice or payment instead. At the request of the

employee or the Union, the reasons for such termination is to be given in writing by the employer. There is a provision in Clause 7 which says that nothing in the Clause is to prejudice the right of either party to terminate the employment summarily as stipulated in Section 17 of the Employment Act.

The provisions in Clause 7 are also relatively fair because they secure for the employee certain safeguards that the legislations have failed to confer on workers. The Employment Act provides for notice but it is only based on the periodicity of pay (i.e. whether the salary is weekly or monthly)<sup>3</sup> and does not take account of the length of service of the employee. Surely an employee who has worked for ten years deserves to be treated more considerately at the termination of employment, than one who has served for, say three or less years? The Collective Agreement attempts to do this, pointing out the inadequacy of the law in protecting workers in their employment. Again the Employment Act, following the Common Law requires no reasons to be given for the termination of employment.<sup>4</sup> The Collective Agreement contains a provision to this effect, that the worker is to be told in writing of the reason for his dismissal from work, if he so requests. Once again this demonstrates the importance of the principles of natural justice applying at the determination of the employment relationship and which our laws have, unfortunately, failed in recognising. On the other hand, it is also

unfortunate that the D.H.W.U. has done nothing to mitigate the employer's absolute powers of summary dismissal as evidenced by the proviso to Clause 7. This, however, may be a reflection on the bargaining power of the Union in the agreement; which is certainly less than that of the employers' association.

### III. REDUNDANCY.

Redundancy is covered by Clause 9 of the Collective Agreement. It says that in the event of redundancy the employer must inform the Union in writing at least one month before the day of the intended redundancy, the reasons for and extent of redundancy. The principle to be adopted is that of "last in, first out", in the particular grade of employees affected, subject to all other factors such as skill, merit, ability and reliability being equal. The redundant employee is entitled to the appropriate period of notice or pay in lieu of such notice and any other entitlement covered by the Collective Agreement including travelling allowance. The severance pay agreed on is at the rate of twelve days' wages for each completed year of service. Where in the event of a change in management or ownership of an establishment and the incoming management or owner undertakes to continue the employment of employees, with full benefit of past service, the Collective Agreement provides that this would not be deemed to be a redundancy.

The principles applicable under the Collective Agreement when determining the issue of redundancy are very similar to those laid down by the Industrial Court and the same factors are considered. However, it seems that the rate of redundancy payment is considerably lower under the Agreement than the rates usually given by the Industrial Court. The redundancy pay here, is at the rate of twelve days' wages for each completed year of service while in the Industrial Court it is usually the wages of fifteen days for each year. This shows that the number of rights for workers acquired and incorporated in a collective agreement depends upon the bargaining power of the union concerned and it appears that on the issue of redundancy payments, the D.H.W.U. has failed to obtain higher rates of payment hence the one agreed upon falling below even that set by the Industrial Court. Once again, the operation of the 'freedom of contract' is clearly depicted.<sup>5</sup> On the last provision, where say a hotel changes ownership, Clause 9 merely provides that if the new owners undertake to continue the employment of employees without loss of full benefit of past service then this would not be deemed to be a redundancy. One fails to see the purpose of incorporating this provision since it does not acquire any right for the employee but merely states a fact which is obvious anyway. This provision should have said that when ownership changes, the new owners of a hotel should undertake to continue the employment of employees otherwise the employees would be entitled to certain remedies e.g. notice, adequate terminal benefits etc.

The redundancy clause in the Collective Agreement in its present form does not ensure the protection of an employee's rights at the termination of his employment on ground of redundancy. For instance, in the dispute between DOMESTIC AND HOTEL WORKERS' UNION V KULIA INVESTMENTS/SAROVA HOTELS LTD.,<sup>6</sup> the New Stanley Hotel changed hands in February, 1978 when Kulia Investments Ltd (owners of the Block chain of hotels and lodges) sold it to Sarova Hotels Ltd. In the process, the new owners declared twenty-six employees redundant and purported to dismiss them without referring the matter to the Industrial Court as provided in the Trade Disputes Act. It was held that these employees had suffered a wrongful termination of their services, however, the Industrial Court in its tradition refused their reinstatement and awarded monetary compensation instead, despite the fact that in the sale agreement, the new owners had agreed expressly to "keep in employment on a continuing basis all the former employees of the previous owners."

The above provisions are some of the important terms in the employment contracts of hotel workers that relate to security of employment. There is little doubt that the provisions in the Collective Agreement may have done much to concretise certain terms of employment in comparison to the legislations; although they have not gone far enough to increase the employee's security of employment as should have been expected. All the same, among hotel workers, the members of

D.H.W.U. are better off than the non-unionized workers because the Collective Agreement covers all aspects of the terms and conditions of employment and to a great extent, the provisions therein are wider than those in the Employment Act. There are various reasons why the protections conferred to workers under the law are half-hearted and why the D.H.W.U. like most other trade unions despite their good work, have failed to secure for their members absolute security in their employment. These factors relate to the bargaining powers of the parties involved and other socio-economic factors which will be discussed later.

C. THE EMPLOYMENT RELATIONSHIP

The employment relationship in the hotel industry on the face of it, has no much difference from that in the other sectors of Kenya's economy. The rights and obligations of the parties are similar to those that arise out of any employment relationship. Apart from the express terms and conditions of the contract, there are the implied rights and obligations of the employer and the employee. The implied duties of the employer include mutual respect, duty to provide work, to remunerate when there is no work, to indemnify the worker etc. On the other hand the implied obligations of the employee include fidelity to employer, obedience, good behaviour, confidence etc. Of course, all these would depend on the particular circumstances of each employment.

Be that as it may, it can be said that the employment relationship in the hotel industry in Kenya besides being similar to other relationships of its kind, is also distinct in that the relationship is one between Kenyans and foreigners. This is because most of the large hotels in Kenya are either owned or controlled by foreigners through the subsidiaries of multinational corporations. This state of affairs will give rise to certain consequences that will in turn, definitely affect the employment relationship. But before discussing how foreign ownership of the hotels affects the employment relationship in the hotel industry, it is necessary first of all, to find out who in particular, owns most of the hotels in question and why. This will also call for a look at the socio-economic factors that give rise to the same. Consideration of foreign ownership is significant not only because it assists us in understanding why our economy is developing as it is, but also because it is an issue of great social and political importance. In this study it will enable us to understand the employment relationship in the hotel industry.

#### D. OWNERSHIP OF HOTELS IN KENYA

Most of the hotels we are concerned with involve both intensive and extensive man-power organization and administration. Their accounts are enormous and complex. Most of them are either wholly foreign owned

(part of the international chain hotel systems) e.g. Hotel Intercontinental, or partly foreign owned and partly locally owned, by the Government or by local entrepreneurs. However, there are a few of these hotels which are owned by some compradors in Kenya but are managed by expatriates e.g. Hotel Milimani. It should be noted that when talking about the big hotels in Kenya it is inevitable that we have also to mention the tourism industry because these hotels mainly cater for tourists and they are part and parcel and almost synonymous with the tourist industry.

Following political independence, productive transnational capital flows increased in Kenya and virtually all growth in commerce and industry, and in the rapidly expanding hotel industry which has occurred since 1964 is foreign owned and controlled.<sup>7</sup> This, as we have already seen, was a central feature of the Kenyatta government's economic strategy, the central theme of which was the encouragement of foreign company profit reinvestment and new capital inflows from transnationals. This expansion of transnational interests and control in the hotel industry and in other sectors, involved a 'disconcerting new form of dependency' by Kenya on foreign capital.<sup>8</sup>

Transnational investment in the hotel industry in Kenya was clearly a profitable business from the investors point of view. Foreign investment in Kenyan hotels can be described as heavy, for example in 1973

the Daily Nation reported that K£1,500,000 was invested by the German owned Hobby Hotels (E.A.) Ltd, while British Electric Traction Co. (which incidentally controls the Kenya Bus monopolies in Nairobi and Mombasa) owned the United Tourist transportation operation. This was in 1973. The degree of foreign investment in the hotel industry has greatly expanded since then as is revealed by an investigation by the present author and as evidenced by the number of foreign-owned hotels sprouting up round the country. A recent study also revealed that:-

"About 70% of U.S. subsidiaries have invested in hotel and tourist operations, British multinationals have invested in hotel chains up-country and at the coast, while at least three of the largest foreign commercial subsidiaries in Kenya have diversified into tourist operations as well."9

The sole interests of foreign investment is rather obvious. This is the maximization of profits by the multinational corporations from their investments. Certain conditions must prevail for the realisation of profits and as already seen, the Kenyan government created these conditions to attract foreign investors. Besides the labour legislations; Employment Act, Trade Unions Act, Trade Disputes Act (including numerous amendments and orders) plus the Government's policies which are all geared towards ensuring 'industrial peace', stability and reduction of labour costs (e.g. control of wage levels) likely to be

incurred by the capital owners (employers). There are other laws which we also saw, intended to generate incentives for foreign investment; to wit, the Foreign Investment Protection Act which assures the investors of almost maximum repatriation of profits and security against nationalisation of their properties. This trend is given more sanctity by Section 75 of the Constitution which provides for the protection of private property of all capitalists. Therefore, one should not be surprised at the high level of foreign investment and subsequent ownership and domination inherent in Kenya's economy by Finance capital.

In this paper, research was conducted with regard to ownership of a number of hotels randomly taken and the findings are recorded in the appendix. From this research, it is easy to conclude that the major hotels and lodges are foreign owned and controlled. However, there are certain hotels which are partly owned by the Government while others are joint ventures between local capitalists and multinational firms:

"It is generally the case that the largest number of hotels are privately owned. While some smaller and older hotels are family owned, the newer and larger hotels are owned by public corporations, local private companies and transnational firms often as joint ventures."10

What effects does ownership of the hotels have on the employment relationship? The purpose of the business of the employer will to a large extent determine

the nature of the employment relationship. The major goal of the multinational companies which own the hotels in Kenya is the realisation of maximum profits in their investments. In Kenya, to achieve this they have tried to keep labour costs at a minimum level while placing exorbitant prices on their goods and services. They have succeeded in doing this through the most important formal institution for propagating interests of foreign capital, the Federation of Kenya Employers (FKE). Reduction of labour costs means, inter alia, placing a ceiling on the wage levels of workers. This has profound effect on workers because by getting relatively low wages the workers' standard of living in turn remain low; and I submit that the issue of level of wages is the total sum of the whole employment relationship in a capitalist country like Kenya because this will affect the whole life of the worker - his housing, clothing, food and in fact every aspect of his life. This will influence his life-style, personal development, ambition and attitude to life and therefore, even his attitude to his employment and performance of work therein.

Beside the downward pressure on wages, reduction of labour costs in the hotel industry is achieved by laying down strict rules of conduct for employees to instil discipline and efficiency in the performance of work. These rules range from punctuality, cleanliness to effective services to customers. The slightest misbehaviour by an employee will render him subject to

summary dismissal and any damages e.g. breaking of glasses by waiters, during performance of work is deemed to be negligence and will be deducted from the worker's salary. Thus the law relating to summary dismissal goes along way in reinforcing the interests of the employers. In fact, it may have been realised by now that the law, all along operates in favour of one class, the propertied class in which all employers are included. A waiter in one of the hotels, when interviewed said that there is a lot of impersonality and indifference in the hotel employment relationship; the emphasis being more on material rather than human considerations. This is a result of the profit motive which is the driving force behind the operation of multinational companies in our society.

#### E. PRACTISE ON DISMISSALS IN THE HOTEL INDUSTRY

It is submitted here that the ownership of hotels by multinational corporations and control thereof by foreigners, also considerably affects the practise on dismissals in these hotels. As we have already seen, the overriding interest of the multinational companies is the accumulation of profits from their investments. That being the case, they will go to great lengths to realise their goals and this includes terminating the services of workers who become 'obstacles' to the achievement of these aims. To maximise surplus value, labour costs must be reduced to a minimum and therefore workers must adhere to the regulations laid down by their employers to maintain the required high standards of efficiency.

Any worker who causes any damage to or loss of any property belonging to the employer must account for it and this is usually done by deducting a sum of money from his wages equivalent to the value of the property damaged or lost.<sup>11</sup> This is an illustration of only one of the measures sanctioned by the law to reduce the labour costs of employers as much as possible. If, however, any conduct of the employee is such that he is a liability rather than an asset to the employer, he may be dismissed. We have already seen the rationale for summary dismissal in chapter two, and the same reasons are valid here. In fact, most dismissal cases show that the reason for dismissing a worker can always be linked to the factor of profits though in some cases a worker may be dismissed for insubordination. In such a situation the law comes in to give legal expression to the action of an employer if he dismisses a worker, and the courts enforce this. The only restriction placed by the courts to this practise is procedural, thus the employer must comply with the statutory procedures for dismissal e.g. giving of notice where it is required. Apart from this, the employer has absolute powers to dismiss an employee from his employment.

At this point, a few cases may be given as illustrations of the type of dismissal and redundancy cases that come from the hotel industry. A careful study of the grounds on which hotel employees are dismissed or declared redundant will reveal the purpose of operating hotels by the employers hence acquisition

of surplus value. For instance, in the dispute between DOMESTIC & HOTEL WORKERS' UNION V HOTEL INTERCONTINENTAL,<sup>12</sup> the complainant represented by the Union was the respondent's overall bar supervisor. The Respondents terminated his services on the ground that he was the cause of bar shortages. It was alleged that he used to order the waiters to give his friends beer without writing a check for them. The employee conceded that on one occasion he had done so but he had intended to replace the beer from the bar where he had kept a bottle of brandy that he had been given by a guest and that he had told this to the barmen.<sup>13</sup> The employee was not heard during the meeting which decided to dismiss him because "there was nothing for him to discuss or explain." His appeal to the respondent's chief executive was rejected on the ground that "he had committed a very serious offence by indulging in an unauthorised practice that resulted in loss of revenue to the hotel where the Kenya Government is the major shareholder." On investigation by the Ministry of Labour, it was found that there were no justified reasons for the termination of the services of the employee and it was recommended that he be reinstated to his job without any loss of wages or benefits. The Industrial Court however, set aside this recommendation and held that the employee had not suffered any victimization and that he was guilty of gross misconduct and therefore, his services were properly terminated. The court said inter alia:-

"... the Court finds that the practice of which Mr. Mireri stands accused is indeed pernicious to the hotel industry ... The Court ... will not sympathize with workers, at whatever level, if it is proved that they undermine their employers' business. ... this sort of irregular practice can do untold harm to the hotel industry and can under no circumstances be permitted or forgiven."

The employee, consequently lost the benefits of nine years of service with the employers. It should be noted here that the Kenya Government has no single share in the ownership of Hotel Intercontinental as contended by the Respondents. Hotel Intercontinental is owned by American multinational corporations including Pan Am. (See Table V).

In the case of DOMESTIC & HOTEL WORKERS' UNION V SAFARI PARK HOTEL,<sup>14</sup> an employee's services were terminated on alleged ground that certain malpractices by the employee had taken place during a party held at the hotel by some guests; as a result of which deliberate overcharging had taken place and a falsified invoice presented to the manager with an attempt to cover misappropriation of cash sales. The investigator found adequate evidence to support this allegation and he recommended that the termination was reasonable and therefore, should stand. The Industrial Court upheld this recommendation.

In DOMESTIC & HOTEL WORKERS' UNION V SAFARILAND LODGE,<sup>15</sup> the services of two employees were terminated on the ground that the two organized an unauthorised

meeting of employees of the lodge on the premises of the employer and caused disruption of services. The investigator found in favour of the employers and recommended the upholding of the dismissals. The claimants submitted that the two employees had been victimized by the Respondents because they were trade union officials and that it was the policy of the respondents not to encourage their employees to take part in trade union activities. They further alleged that the respondents had not followed the provisions of the current collective agreement between the parties because the employees had had no previous warnings yet their records were clean and therefore, the action to dismiss them was unlawful. The claimants added that they had rejected the investigator's findings and subsequent recommendations because he had a bias in favour of the respondents because they had engaged sometime in the past, three of his friends and for this reason he had not carried out an impartial investigation. The claimants asked the court to order their reinstatement to their jobs without loss of wages or benefits. However, the Industrial Court rejected the allegations of the claimants. It was held that the two employees had not followed the proper procedure in calling for a meeting of union members and that the investigator was not an interested party in the case and thus his investigation could not be biased in favour of the hotel owners. The court held that the two employees did not suffer any wrongful

dismissal. As is usually, the case, the judge did not state the reasons for his decision and merely stated the ruling of the court. Such decisions really raise doubts and one questions the functions of the Industrial Court because prima facie, the decision in this case is not satisfactory because it tends to disregard the interest of the workers. It is submitted that to reach a more satisfactory decision, the court should expressly state the grounds on which the decision is based so that if an employee or even an employer is not happy with the judgement, he may appeal to the High Court pointing out the specific point he does not agree with or disputes. Justice must not only be done but must be manifestly and undoubtedly be seen to be done.

In the dispute between DOMESTIC & HOTEL WORKERS' UNION and KULIA INVESTMENTS LTD./SAROVA HOTELS LTD.,<sup>16</sup> during the change of ownerships of one hotel between the two respondent companies, twenty-six employees were declared redundant. The court found that the proper procedure had not been followed in declaring them redundant and therefore, they had suffered wrongful terminations of employment. However, the court refused to reinstate them to their former jobs and only awarded each one of them, three months' salary by way of compensation. Some of these workers had served the hotel for up to ten years!

F. ROLE OF THE HOTELS IN OUR ECONOMY

In 1965, the policy statement "African Socialism and its Application to Planning in Kenya", Sessional Paper No.10, suggested that rather than the expensive "buying back" of foreign equity, the Government should rather ensure that "a large share of the planned new expansion is African owned and managed."<sup>17</sup> Thus the Government agency, the Kenya Tourist Development Corporation (hereafter referred to as KTDC) was established in 1965, through which the Kenyan Government became directly involved in the financing and operating of hotels and other tourist facilities. It should be noted that in doing this, the Government was not moving towards state control: it continued to stimulate foreign and domestic private investment, but expanded the possibility of securing African private and state participation in the equity of foreign tourist enterprises.<sup>18</sup> It was also intended to give the Government a greater control over tourism investment without having to finance it fully, but the KTDC has, however, no power to control tourism enterprises including the hotels, other than that due to it just like any other shareholder.

KTDC from its inception has come to own, partly or wholly, a number of hotels in the country, however, KTDC shares in, or even complete ownership of a hotel or lodge does not determine the pattern of control nor its profits. Migot-Adholla cites the case of one large international hotel in Nairobi in which the

Government is the major shareholder, but in which a minority shareholder, an international chain, manages the hotel for handsome fees and royalties before tax, and is thus not only in control but also derives the largest benefit from the enterprise.<sup>19</sup> In 1975, for instance, the hotel declared a profit of only K£8,048, yet a remittance of K£434,000 in respect of services was made to the parent firm abroad. And although no profit was declared in 1976 and 1977, service payments amounting to K£474,800 were made in both years to the parent firm!!<sup>20</sup> Hence ownership per se, does not mean that all profits accrue to the owners as depicted by the illustration given. This shows the role and purpose of foreign investors in Kenya, which is the maximisation of profits through all possible means.

Such type of unscrupulous dealings and deceptions by the multinational companies reduce the value of these hotels and tourism in general as a foreign exchange earner to a minimum and, therefore, the industry's existence in its present form is not justified since it generates no other economic gains for the nation but to the contrary, only leads to the exploitation and consequent underdevelopment of the country.

Despite the considerable protection foreign investors are given and the other favourable conditions in their favour prevailing in Kenya, they have devised various methods of evading taxation in order to ensure maximum repatriation of their profits. It is now an open secret that most large multinational companies "over-invoice" their expenditures especially on

imported goods (in collaboration with other companies abroad), therefore, playing down their profits. Also, a number of studies have shown that the profits these companies usually have on their records is relatively minimal in comparison to the actual profits they get hence the figures put down on paper is not a true reflection of the real profits they get. Due to their maximum financial control of hotels and their successful bargaining position with the Government, the large multinational corporations generally get very favourable terms; and their size and complexity of organisation render them relatively immune from taxation.

The foregoing discussion has shown us that the hotel industry like many others in the private sectors in Kenya, is to a large extent foreign owned and controlled. This leads one to conclude that subsequently, the existing legal system which jealously protects the institution of private property and foreign investment only facilitates the exploitation of Kenya's labour and natural resources by foreign capital in alliance with the national bourgeoisie through the coercive organs of the state which the latter control.

## CHAPTER FOUR

### CRITIQUE

In the foregoing discussion, we saw a number of commendable though half-hearted laws that tend to give workers a measure of protection in their employment, however, it is submitted that our employment laws leave a lot to be desired in terms of job security for the workers. In fact, the more one talks about job security in Kenya the more one actually talks of job insecurity due to the inadequacies of the laws we have seen above. In the critique of the law relating to job security it is difficult to mention all the specific provisions that are defective, due to the scope of this paper however, a general critique will be given with emphasis on some particular aspects of job security.

#### A. SHORTCOMINGS IN THE LAW AND REFORMS THEREOF.

The premise to begin from is the lack of bargaining power between the parties to the employment contract. This is as a result of adhering to the doctrine of freedom of contract without any qualification and devoid of socio-economic factors which have rendered it a fallacy. However, the law of contract has a fundamental purpose as advanced by the doctrine of freedom of contract. Right from the beginning freedom of contract had a class content.<sup>1</sup>

Freedom of contract stripped of its ideological cloak- whereby individuals are supposed to be free to enter into contracts when they are not - means no more or less than freedom to exploit and be exploited. In a class society like ours, the parties will not have equal bargaining power except where equals are involved. In such a context the law of contract is a tool of exploitation in the hands of the ruling class. Related to Kenya, imperialist law of contract has been used to exploit and oppress the broad masses of the Kenyan people. Unless the theory of freedom of contract is completely discarded by the legislature and the courts by taking cognisance of the glaring disequilibrium of power between employers and employees, there is no way workers will feel secure in their employment.

The employment laws in Kenya as embodied in the Employment Act are sketchy and inadequate in terms of conferring necessary protections to workers. Besides, many of the provisions contained therein are obsolete and cannot be of any practical help at this stage of Kenya's development. The legal concept of the employment relationship in Kenya is still largely governed by regulations introduced before Independence and many of them have their origins at the beginning of the 20th century, if not before. Thus the law still sees the employment relationship as a paternalistic one, wherein the employer must provide the minimum needs for subsistence and not only wages. These provisions need

amendment because they were based on the Colonial Master and Servant ordinances which are not suited to the present circumstances. Furthermore, various irregular penal provisions remain in the statute. Some of these provisions are entirely defunct since the practices they regulated have disappeared; others could still be used by the employer to the detriment of the employees.

Another thing that has reduced the efficacy of certain provisions of the Employment Act is the application of Section 1 (2) (d) which gives the Minister of Labour the power to exempt certain categories of workers from being covered by the provisions of the Act and we saw how this section has been used by the Minister so far.

It is suggested that the Employment Act needs to be amended drastically because its provisions are either too sketchy or completely omit many provisions that would otherwise have been necessary to regulate employment in Kenya. Most of the provisions of the Act tend to favour the interests of the employers enhancing their already strong bargaining position even further. In fact, the Employment Act gives no effective protection to the workers and is actually a tool in the hands of the capital owners (employers) to maximise their profits. In such a situation, it is hard for one to talk of the existence of job security for workers.

The laws pertaining to termination of employment in Kenya are also very disappointing because they confer on employers excessive freedom to dismiss workers who have very little redress against this practise. This may be illustrated by the law of summary dismissal which we saw; here the employer has absolute discretion to sack an employee only subject to the statutory procedure which is directory only. It is time that our laws were unchained from the shackles of the Common Law which in most cases, only go to enhance the interests of the propertied class. Our judiciary should also be more innovative, they should realise that many of our employment laws are based on the English Common Law and the Colonial Legislations of Master and Servant. The social and economic philosophy which guided these laws are gone and have little relevance even to England where they originated let alone to an underdeveloped African state like Kenya.

The law of summary dismissal was introduced and applied in England at a time when breach of contract of service was a criminal offence. In Kenya, this concept was imported by the colonialist government to force Kenyans to work on the farms of the white settlers, therefore, at the present time it is misleading to rely on these obsolete laws in which legislators and judges were strongly influenced by the requirements of the criminal law. Our courts should be invited to distinguish and not follow cases and practise on summary dismissal for this reason;

but above all the Parliament should abolish these laws which are of no value to Kenyan workers who are consequently oppressed in their employment. The present employment laws only protect the interests of owners of the means of production (employers) to the disadvantage of workers.

Our Employment laws in many instances are one-sided, providing mainly for the rights of the employers. Once again, summary dismissal, is an example in point. The Employment Act lays down the situations in which an employer can summarily dismiss an employee but it is silent on whether an employee has an implied right similar to the ones conferred on the employer. The Act does not say when the employee is entitled not to work e.g. where the employer uses abusive language or is guilty of insulting conduct; without prejudicing his job because if he does so now, he can immediately be dismissed without any redress. This leads to a lot of injustice. Recently for example, one hundred and two workers of the East African Industries were locked-out, arrested and charged with making an illegal procession after they had threatened to strike because one white manager had persistently abused African workers. When they were released from police custody, they found that they had all been dismissed by the management and lost their jobs. The Government condemned the workers' behaviour, the trade unions were unusually silent while the East African Industries advertised for the filling of the jobs left vacant

and assured its customers that production would continue uninterrupted. The new workers would be drawn from the large numbers of the unemployed always seen idling at the gates of the factories with hope of securing a job. East African Industries is a subsidiary company of the multinational corporation, Unilever.

The law in Kenya, while adhering to principles of laissez-faire leave a lot of loop-holes which are taken advantage of by employers. For instance, the legislations have failed to recognise what is usually termed as 'constructive dismissal'. This is not because there are no instances of constructive dismissals by employers in Kenya, but it is due to the role that law plays in a system like the one that exists in Kenya i.e. the protection and facilitation of the interests of capital owners, who in alliance with the state are the ruling class.<sup>2</sup> Constructive dismissal arises where an employer deliberately creates such intolerable working conditions and attitude towards the worker that the worker is forced to leave his employment. This is usually done by the employer who wants to do away with certain workers but he avoids to terminate their contracts expressly because if he does so, he would be deemed to have dismissed them and they would be, as a consequence, be entitled to certain benefits to be paid by the employer e.g. terminal benefits. Hence to escape the liability of paying terminal benefits to the workers, the employer 'constructively' dismisses them and alleges that they actually left their jobs voluntarily

without any coercion and are, therefore, not entitled to anything since this is tantamount to repudiation of contract by the employees themselves.

Looking at the disputes on dismissals settled by the Industrial Court, it is clear that a dismissal arises where an employer either in writing or orally, but mostly in writing; asks the employee to leave his employment alleging inefficiency on the part of the employee or some form of misconduct, negligence and so forth. One would have expected that where for example an employer makes working conditions for an employee so difficult that such an employee is forced to resign, then such an employer could be answerable to such an employee for constructive dismissal. This, however, is not the position in Kenya as conceded by the judge of the Industrial Court<sup>3</sup> and there is no case in which such an issue has been raised. One fails to see why such a concept should not be part of our employment law, for there is no doubt that many employees leave work because the employers have subsequently made working conditions too unbearable to work under. But on a critical analysis of the purposes of law in Kenya, one realises that this omission is not inadvertent. This omission thus, constitutes yet another serious limitation on the protection of workers in their employment pointing once again, to the lack of job security in Kenya.

The remedies available to Kenyan workers in cases of wrongful dismissal and redundancy are inadequate and do not really redress the injustice caused by the termination of employment as discerned in the preceding chapters. The situation is made even more dismal when the Industrial Court and the civil courts too, strictly apply principles of the English Common Law and doctrines of Equity to render even the provisions of a statute, namely, the Trade Disputes Act ineffective. As we have already seen, the remedies for wrongful dismissal and wrongful redundancy under the Act are, either reinstatement or compensation. Despite the statutory provisions to this effect, the Industrial Court seldom, if at all, orders the reinstatement of employees to their employment after a wrongful dismissal or unlawful declaration of redundancy. The reasons advanced for this trend is that the contract of employment is a contract for services and personal in nature and cannot, therefore, be specifically enforced (reinstatement amounts to enforcement of the contract). In the law of Equity, the remedies of specific performance or injunction have been refused where it would lead to the "forcing" of two individuals to come together. This attitude is also based on public policy and the maintenance of amicable relations in labour; that it would be wrong and detrimental to the employment relationship which has its basis on mutuality, to enforce the contract yet there is no confidence which is necessary between the employer and employee. Due to these, the Industrial Court has

always only granted the remedy of compensation in cases of wrongful dismissal or redundancy. It is submitted that compensation alone is insufficient to redress the employee's loss and the inconvenience suffered as a result of the dismissal.

Not questioning the rationale for the equitable principles underlying the refusal to grant specific performance in the genuine cases, I submit that the Industrial Court has failed to exercise its discretion properly because the Legislature must have contemplated situations where reinstatement would be the most logical and necessary remedy for a dismissed employee. This is where, for instance, despite a misunderstanding between the parties, they have not lost confidence in each other; this is common in redundancy cases where an employer desires to terminate a worker's services not because of any misconduct but due to financial problems etc. The existence of such situations have been recognised by the law in the United Kingdom and in the case of HILL V C.A. PARSONS AND CO. LTD.<sup>4</sup> the court rightly ordered the reinstatement of an employee to his job because the confidential relationship between master and servant still existed. Our courts should take cognisance of such exceptional cases.

It is submitted in this paper that a worker has got a "property" interest in his job including his salary, seniority, reputation, pension and other

terminal benefits. The recognition of this fact by Kenyan law is long overdue. When an employee is wrongfully dismissed he loses the only means to his livelihood and in addition he loses the benefits that accrue to an employee who completes his service according to the contract. Due to this, the law in Kenya should take the issue of dismissals very seriously because if unchecked, this may have adverse effects on workers since employers may purport to dismiss them so that they may not be entitled to their terminal benefits. Until the time our law recognises and takes account of the fact that workers have got a 'property' interest in their jobs and need to be protected just like any other property e.g. that of the employer; one cannot talk of the existence of job security in Kenya. With regard to this we propose that the Parliament should take account of and pass a law adopting the 'concept of unfair dismissal' as has been done in other countries.

#### B. CONCEPT OF UNFAIR DISMISSAL

It is important to point out at the beginning that the 'concept of unfair dismissal' as it has become to be understood internationally nowadays, is completely non-existent in Kenya. Neither the Industrial Court nor the civil courts have ever considered this concept per se and have only touched on aspects of it without mentioning it at all. The concept of unfair dismissal in the countries in which it has been recognised and introduced e.g. U.K.,<sup>5</sup> is

a further step along the path towards recognition of a person's 'property' interest in his or her job. Already recognised, to some extent by the law of many of the advanced capitalist and socialist countries, this concept restricts the hitherto largely unlimited authority of an employer to dismiss his employees for whatever reason he thinks fit, as is still the case in Kenya.

The origin of this new concept was the Recommendation 119 of the International Labour Organization (I.L.O.) approved by the I.L.O. Conference at Geneva in 1963.<sup>6</sup> However, even the countries which have adopted the Recommendation in their legislations, do not yet go quite as far as the Recommendation in the protection of workers against unfair dismissal; but what is significant is the recognition of the concept of unfair dismissal in these countries because this marks the beginning of the implementation of all those parts of the Recommendation not put into effect. In Kenya, the concept is neither recognised nor even discussed in relevant circles of the government, showing the extent of the insecurity of the worker in his job. The Industrial Court usually refers to "unfair labour practice" which if established in the dismissal of a worker will warrant the intervention of the court in the decision of the employer. This does not embody any significant aspect of the concept of unfair dismissal because even the court fails to specify the manner in which it will redress the dismissal resulting out of an 'unfair labour practice'

and it merely says that it will intervene in such a situation. The common remedy, if it can be so called, in such cases is the token and insufficient monetary compensation for the unfair dismissal. What principles does the concept of unfair dismissal embody?

C. I.L.O. RECOMMENDATION 119.

The basic principle is that termination of employment shall not take place unless there is a valid reason for termination connected with the capacity or conduct of the worker or based on the operational requirements of the enterprise. Certain reasons are always to be invalid reasons for termination: participation in union activities or membership,<sup>7</sup> the taking in good faith of legal proceedings against an employer alleging a breach of some legal obligation; race, colour, sex, marital status, religion, political opinion, national extraction or social origin. Workers who feel aggrieved by an unjustifiable dismissal are to be entitled to a right of appeal. Workers given notice should be given time off from work to look for alternative employment. A dismissed worker should be entitled to receive a certificate from his employer specifying the dates of his employment and the nature of the work done, without containing anything unfavourable to the worker concerned. Dismissal for serious misconduct should take place only where the employer could not reasonably be expected to take any other course. Proper rules should be laid down for the selection of workers to be dismissed where economic necessity requires a reduction in the labour force

(redundancy). Reinstatement of workers unfairly dismissed appears to be the Recommendation's preferred solution where an invalid dismissal occurs. In the absence of reinstatement adequate compensation is to be paid.

The failure to recognise this concept in Kenya's legal system is not an accident considering the prerogatives inherent in capitalism. The powerful employers through their institution, Federation of Kenya Employers (F.K.E.) would not allow it anyway, even if the Government ever thought of implementing some aspects of the concept of unfair dismissal. The study of job security in Kenya brings one to grips with the job insecurity in existence and the enormous problems faced by the workers of this country. It is recommended here that the Government and especially the Parliament and the courts should recognise that an employee has got "job-property" rights in his employment i.e. his pay, pension, seniority rights etc. which deserve to be protected just like any other property as envisaged by section 75 of the Constitution which provides for the protection of private property, which anyway, is the cornerstone of Kenya's capitalistic system.

#### D. CONCLUSION.

In the foregoing proposals we have submitted some of the necessary reforms which are required to make our rather defective or unsuitable laws have more purpose for workers in their employment and to confer on them a reasonable measure of security

within the existing socio-economic formation which is capitalist in nature. However, amending or reforming the law alone is not enough to remove job insecurity for workers in Kenya because there are also political and socio-economic factors prevailing in the country which contribute to lack of job security.

One of these factors is the general level of high permanent unemployment rates existing in the Kenyan economy.<sup>8</sup> Unemployment seems to be a common feature of all capitalist countries and an element of the economic strategy of neo-colonialism in Kenya. As long as there is such a high rate of unemployment, as the one that exists in Kenya now, there is no way one can say that there is job security. This is because those who are employed will always cling and strive to keep their jobs however bad or unfavourable the terms and conditions of employment may be, since they know that there are thousands of unemployed people who are ready and willing to take over their jobs. Therefore, rather than complaining of their grievances or engaging in a strike to compel employers to improve the terms and conditions of their employment, hence subjecting themselves to the possibility of being dismissed; workers in Kenya tolerate onerous conditions of employment to avoid getting the sack and thus, going hungry. This passivity is a survival mechanism adopted by the workers, otherwise if they persistently demanded higher wages and better terms, they could face dismissal and the employers would have no problem in getting replacements from the masses of the unemployed and underemployed.

Unemployment is actually a very serious factor that goes a long way in giving rise to a situation of job insecurity in Kenya. However, the existence of unemployment in the country is favoured by employers in whose interest it operates and they possibly even encourage its existence. For instance, in 1971 when there was persistent demand for wage increases in Kenya, the Federation of Kenya Employers (F.K.E.) used the issue of unemployment to keep down the level of wages. The F.K.E. sent a memorandum to the Ndegwa Commission, appointed to review, inter alia, wage levels; asserting that any general increase in the level of wages beyond that justified by increased production or increases in the cost of living would result in the increase of unemployment particularly among educated young people. Due to this pressure by this powerful employers' institution, the Commission broadly endorsed this view and actually went as far as to call for constant real wages.<sup>9</sup>

Besides achieving a long-term downward pressure on wages by intimidating the Government on the possibility of the increase of unemployment if wages went up, the employers benefit by the existence of unemployment because; firstly, they are always assured of replacement of workers if their own workers leave their jobs or are dismissed and secondly, when there is an increase of demand for goods or services, and there is therefore, need for increased production, the employers can always draw casual employees from the unemployed. These casual workers may be dismissed

conveniently when there is slackening of business since their contracts are usually on a daily basis. This practise is very common in the hotel industry where employers usually require extra man-power during the peak season when tourists come to Kenya in large numbers. Casual employees may be dismissed from their work without any notice and are not entitled to any terminal benefits<sup>10</sup> and may be, that is why some employers prefer them. There is one hotel at the Coast which retained its gardeners and painters as casual workers. These employees worked for several continuous years for the hotel. Later the management dismissed them without notice or terminal benefits, asserting that they were casual employees. The Industrial Court upheld their dismissals despite the fact that the 'casual workers' had worked for the same employers for several years of continuous employment without confirmation as proper employees.<sup>11</sup> It is submitted here, therefore, that due to the rampant unemployment and underemployment (casual workers), there is very little job security, if at all, in Kenya.

Another factor which gives rise to job insecurity in Kenya is with regard to trade unions. In Kenya, we have weak, divided and ineffective trade unions, which more often than not, fail in securing for their members rights that they may have demanded, however genuine or reasonable they might be. The impotence of the trade union movement in Kenya is as a result of politics. The attitude of the government

after 1963 is that, trade unions having played a significant role in the struggle for political independence have dispensed with their duty and have no role to play in politics after attainment of independence and should let the government work for the 'public interest'<sup>12</sup> in economic development, social justice and political stability without any interference.<sup>13</sup> The Government realised from an early stage the potential of trade unionism in organizing and mobilizing the workers to achieve their demands whether economic or political. This suspicion arises from an apparent realization that union leaders historically, and in all parts of the world, have become involved in politics, and that they possess the organizational skills and the political resources to constitute potentially (if not actually) an effective political force. The government therefore, decided to closely control and foster "responsible and legitimate trade unions" by limiting them to narrowly-defined economic bargaining activities and ensuring that 'responsible' people assume union leadership.<sup>14</sup>

The F.K.E. also pressurised the government to take measures to avoid concerted action between unions in different sectors of the economy and generally to prevent militancy among them. This relationship between F.K.E., which represents the bureaucracy of the larger foreign companies and state-owned commercial

corporations; and the Government has been very important in ensuring that industrial relations developed in accordance with the needs of foreign capital. The F.K.E. succeeded in its aim of ensuring that no powerful 'omnibus' union was formed, covering more than one industry, disposing of large funds, and inclined to political action.<sup>15</sup>

After Independence, F.K.E. began to urge the government to go further and take power to control strikes, which it did by passing the Trade Disputes Act of 1965. This measure, like the Trade Unions (Amendment) Act, 1964, which had given the government extensive powers to regulate the internal affairs of unions, was directed in part against "radical" trade unionists.<sup>16</sup> The Trade Disputes Act also prohibited strikes in essential services and sympathetic strikes and closely controlled the machinery through which any strike could be made legal, empowering the government to declare a strike illegal if in its opinion the machinery for negotiations had not been exhausted. In practise, this meant that employers were able to prolong their consideration of wage claims for not merely months, but in some cases years, confident that the government would be very reluctant to legalise a serious strike merely on the ground that the machinery was working slowly, if its procedures had not been completed; and in consequence, a large proportion of disputes quickly came to be referred to the Industrial Court, either by agreement between the Unions and

and employers or at the direction of the government. Strike action fell dramatically and large-scale strikes virtually eliminated by the government's repeated indication of its willingness to declare them illegal when they seemed imminent. These activities of F.K.E. show the power and influence of capital owners in governmental decision-making.

A further demonstration of the political power of the foreign sector came with the Tripartite Agreement of 1970-71 when both the government and private sector employers agreed to an immediate 10 per cent increase in their labour forces on condition that there was a one-year wage stand-still and ban on industrial strikes by the trade unions! Such alliance between the state and capital owners has held down and stifled the political power of trade unions which presently are virtually powerless and unable to represent its members effectively. But the ultimate action which has made trade unions almost useless to their members, was when in 1966 a government-controlled Central Organization of Trade Unions (COTU) was set up and all trade unions were required to be affiliated to it. The chief officers of COTU had to be confirmed and could be dismissed by the President. It followed that COTU leaders would have to support the government. This signified a stage when trade unions lost the little autonomy they held. Hence by the use of legislations, intimidation and bribery of trade union leaders, the state has transformed trade unions from militant and effective instruments for the alleviation of the lot of the

workers or even to effect political change, to 'bread and butter' trade unions only make noise once in a while for a concession e.g. wage increase or when elections are round the corner; and then go back to their cocoon of inactivity. Our trade unions presently continue to distinguish themselves for their "pork chop mentality".<sup>17</sup>

What is the result of all these? Firstly, because of the lack of strong trade unions to represent workers effectively, this leads to job insecurity for workers since they do not have a proper vehicle to achieve their demands. The other outcome in simple terms, is the availability of cheap labour and industrial peace; two ingredients which serve as incentives to the multinational corporations which form one of the largest employers in Kenya. Strikes, stricto sensu, have been illegalised and wages kept at a minimum level. These facts depict the essence of law in society and whose interests it serves: the law is used to create a political and economic environment suitable for foreign investment by Finance Capital, in its continued quest for acquisition of maximum surplus value, which really means the exploitation of Kenya's labour and natural resources. All these are made possible by an alliance between foreign investors (agents of imperialism) and the local Bourgeoisie or compradors who control the organs of the state including the coercive ones like the army, police, G.S.U. etc.

So, as can be seen to reduce or remove job insecurity in the country, it is not enough to talk of law reforms alone. For instance, how will the 'concept of unfair dismissal' alone neutralize the contradictions that are manifestly part of a socio-economic system based on a neo-colonial underdevelopment? Law reform per se, will neither eradicate unemployment nor foreign domination of our economy and the subsequent exploitation and oppression of Kenyan workers and peasants by forces of imperialism. Advocating for reform is tantamount to changing a few superstructural features but leaving the economic base intact and unaltered. If tangible and meaningful results are to be realised, the whole system must be overhauled and it is only then that we can dream of employment legislations that have a great impact in securing absolute job protection for Kenyan workers. We may therefore, rely on Marx's analysis that:-

"With the change of economic foundation, the entire immense superstructure is more or less rapidly transformed."18

It is only after such a change that workers may hope for absolute job security in their employment and all Kenyans may be assured of the right to work as a basic and fundamental right.

A P P E N D I X

Data showing ownership and control of some  
of the hotels.

Questionnaires used in the interviews.

NAME OF HOTEL DATE OF REGISTRATION	ISSUED CAPITAL	OWNERS, NO. OF SHARES & RESIDENCE	DIRECTORS (INCL. NATIONALITY & RESIDENCE	COMMENTS
Hotel Interconti- nental (Kenya) 28.7.67	Business Names File No. 33958	Intercontinental Hotels Corporation Ltd. Incor- porated in Bermuda	William Lee Harragin William Robert McAllen Spence	
Safari Park Hotel 23.5.67	75,000 x 20	Graham Leonard William Boswell 7,438 K. Douglas Njiri Karago 392 K. Alaywell Ltd. 22,716 USA. Russell John Eric Mayers 21,932 K. Wama Ltd. 5,875 K. Samuel Njoroge Waruhiu 392 K. Olien Mathieson Chemical Corporation 8,753 USA. Theta Group of Companies Ltd. 7,500 K. Leopoldo Morales Mengotti 1 K. Tomasi Ruaki Makonnen 1 K.	John Ennenwell Francis (B) Spain. Chun Rak Won (Korean) Korea. Tomasi Ruoki Makonen (K) K. Norbert Vincent Okare (K) K. Han Sang Wol (Korean) K. Jin Hyung Lee (Korean) K. Duck-Haeng Huh (Korean) K.	

TABLE I

NAME OF HOTEL DATE OF REGISTRATION	ISSUED CAPITAL	OWNERS, NO. OF SHARES & RESIDENCE	DIRECTORS (INCL. NATIONALITY & RESIDENCE	COMMENT
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Serena Lodges and Hotels. 16.12.72	966,975 x 20			
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Tourism Promotion  
Services  
644,650 K  
KTDC 322,325 K

Gunter Brendt (German)  
West Germany.  
Richard Mbui Maina  
(K) K.  
Reuben Kiplagat Chesire  
(K) K.  
Peter Hengel (German)  
France  
Zaherally Kassamally  
Ahamed (K) K.  
Wycliffe Awuori Mutsune (K) K.  
Davis Robinson Moscrop (B) UK.

Pan Africa Hotel 22.2.65	300,000 x 20			
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Development Finance  
Company of Kenya Ltd.  
137,500 K  
British Airways  
Associated Cos.  
Ltd. 75,000 K  
KTDC 62,500 K

Peter Coombe Harris (B) K.  
Clive George Saunders (B) UK.  
Harold Oliver Baker (B) K.  
William Robert Hedley (B) K.  
Richard Herbert Clarkson  
(B) UK.  
Alexander Guthrie Deuchar  
(B) K.  
John Matere Keriri (K) K.  
Richard Mbui Maina (K) K.  
Gideon Gaturu Kago (K) K.  
Fidesius Muchira Nyaga  
(K) K.  
Wycliffe Awuori Mutsune  
(K) K.

TABLE II

NAME OF HOTEL DATE OF REGISTRATION	ISSUED CAPITAL	OWNERS, NO. OF SHARES & RESIDENCE	DIRECTORS (INCL. NATIONALITY & RESIDENCE	COMMENTS
Hilton Hotel 21.2.67	500,000 x 20	African Tours and Hotels Ltd. 500,000 K.	Richard Grahame Lloyd (B) K. John Henry Daly (Irish) K. Donald Downing (Irish) K. Richard Mbui Maina (K) K. Yuda Komora (K) K. Japheth Kimanzi Ilako (K) K. Arthur A. Moody Awori (K) K. Wycliffe Awori Mutsune (K) K.	African Tours Hotels Ltd. is a public comp owned by: Kenyan, British citizens, KTDC, 1 Canadian 3 Tanzania 1 Hong Kon Australian citizens, Americans, Standard B Stanley Holdings L and Kenya Airways.

TABLE III

Hence the majority of the share-holders are foreigners



NAME OF HOTEL  
DATE OF REGISTRATION  
ISSUED CAPITAL  
OWNERS, NO. OF SHARES  
& RESIDENCE  
DIRECTORS (INCL.)  
NATIONALITY &  
RESIDENCE  
COMMENTS

Tourism Promotion  
Services (Kenya)  
Ltd.  
16.3.76  
15,575 x 1  
Diamond Trust (Kenya)  
Ltd. 2019 K.  
Jubilee Insurance Co.  
Ltd. 323 K.  
Industrial Promotion  
Services (Kenya)  
Ltd. 1,336 K.  
Industrial Promotion  
Services S.A.  
1943 (Switzerland).  
Avis Rent A Car System  
Inc. 1,444 U.S.A.  
East African Airways  
Corp. 140 K.  
Intercontinental Hotels  
Corp. 1,444 U.S.A.  
Luftansa Commercial  
Holdings 1,444  
West Germany.

Amirali Hassanali  
Rashid (K) K.  
Ameerally Rahemtulla  
(K) K.  
Peter Hengel (Ger.)  
France.  
Gunter Berendt (Ger.)  
W. Germany.  
Harold Oliver Baker  
(B) K.  
Richard Clarkson  
(B) U.K.  
Richard M. Maina  
(K) K.  
Peter Kleinitzer  
(Ger.) W. Germany.  
Timothy Chidzengo  
(K) K.  
Nizar S. Meruani  
(Pakistan) K.  
Zaherally Kassamally  
(K) K.  
Peter Habenga (K) K.  
Wycliffe A. Mutsune  
(K) K.  
Vincent Genovese  
(Am.) U.K.

This Company  
the majority  
shareholder (K)  
of Serena Lod  
and Hotels.  
Hence as can  
seen here, Se  
Hotel is fore  
owned apart f  
the shares he  
by KTDC. Mul  
nationals com  
licate their  
ownerships  
through such  
means i.e. a  
subsidiary  
owning another  
subsidiary et  
Note:  
Intercontinen  
Hotels Corp.  
also got a su  
stantial numb  
of shares her  
Diamond Trust  
Ltd. is owned  
H.H. Aga Khan  
who incidenta  
owns a lot of  
property in K

NAME OF HOTEL  
DATE OF REGISTRATION ISSUED CAPITAL OWNERS, NO. OF SHARES & RESIDENCE DIRECTORS (INCL.) NATIONALITY & RESIDENCE COMMENTS

Development Finance Co. (Kenya) Ltd. 4,000,000 x 20

29. 2. 80

I.C.D.C. 1.5m. K.  
Nederlandse Financierings  
Maatschappij voor ont  
wikkelings-Laden NV  
(FMO) 1 m. Holland  
Deutsche Gesellschaft  
Fur Wirtschaftliche  
Zusammenarbeit  
(Entwicklungs-gesell  
schaft) bn H (Deg.)  
1 m. W. Germany.  
Commonwealth Develop-  
ment Corp. (CDC)  
0.5 m U.K.

Leonard Kabetu (K) K.  
John M. Keriri (K) K.  
Hugh de Beuviour Brock (B) K.  
Richard Kemoli (K) K.  
Nederlandse Financierings etc.  
(Dutch) Netherlands.  
I.C.D.C. (K) K.  
Jurgen de Gruyter (Ger.) West Germany.  
Manfred Lohmann (Ger.) West Germany.  
Nicholas Ng'ang'a (K) K.  
Isaac W. Njuguna (K) K.  
George William Harwood (B) K.  
Hans-Georg Hansmann (Ger.) W. Germany.  
Hans-ulrich Breuer (Ger.) K.  
Jan Piet Kleigweg de Zwaan (Dutch) K.  
John R. Ringshall (B) K.

This Company is the major shareholder Pan Africa (1/2). The major shareholder are foreign companies in multinational corporation their subsidiaries.  
The air-car also own shares in Kenyan highways is co-owner of Pan-Africa while Pan Africa owns Hotel Intercontinental

K E Y

Am.	-	American
(B)	-	British
C.D.C.	-	Commonwealth Development Corporation.
Ger.	-	German
I.C.D.C.	-	Industrial Commercial Development Corporation.
K	-	Kenya
(K)	-	Kenyan
K.T.D.C.	-	Kenya Tourist Development Corporation.
U.K.	-	United Kingdom
U.S.A.	-	United States of America.
10,000 x 20	-	K.Shs.200,000/= divided into 10,000 ordinary shares worth Shs.20/= each.

QUESTIONNAIRE FOR A LEGAL RESEARCH ON THE DOMESTIC AND  
HOTEL WORKERS' UNION:

1. When was the Domestic and Hotel Workers' Union formed?
2. Who were the founder members? Who are the Present office-bearers?
3. Why did they think that it was necessary to form it, thus what were the aims to be achieved?
4. How many members constitute the Union ar present?
5. What is the criteria for membership?
6. Why was it decided to have domestic workers and Hotel workers come under one union?
7. What Hotels are members of the Union?
8. What grade of workers are members of the Union?
9. What are the major problems which the union faces?
10. How is the relationship between the union and employers in the Hotel Industry?
11. What is the attitude of the employers in the Hotel Industry towards:-
  - (a) The Union,
  - (b) The workers?

12. How does the Union deal with Dismissals of its members from employment?
13. Are there many dismissals from the Hotels, especially in big ones?
14. What does the Union think of the laws relating to employment in Kenya? Are they adequate in safe guarding the welfare of the worker?
15. Does the Union think it has been successful in fulfilling its objectives?
16. What are the future plans and goals of the Union?

QUESTIONNAIRE FOR A LEGAL RESEARCH ON C.O.T.U. (K).

1. What is the major function of COTU?
2. What is the relations between COTU and the Domestic and Hotel Workers' Union?
3. What are the problems faced by COTU with regard to the Union?
4. What do you think are the problems of workers in the Hotel Industry?
5. How has COTU tried to resolve these problems?
6. What is the extent of the activities of the Union in comparison to other Unions?
7. What is the opinion of COTU of the Union? Do you think it has served its members successfully?
8. How does COTU deal with the dismissal of workers from their employment?
9. Are there any dismissal cases from the Hotel Industry?
10. How has COTU intervened in such cases?

FOOT NOTES

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CHAPTER ONE.

- 1 Mutunga, W. Labour Law lecture notes, LL.B. III 1980/81.
- 2 Leitner, K. Workers, Trade Unions and Peripheral Capitalism in Kenya after Independence, Peter Lang, 1977.
- 3 Section 75 of the Constitution of Kenya provides for the protection from deprivation of property. This is a cornerstone of the existing capitalistic socio-economic formation in Kenya.
- 4 Sandbrook, R. Proletarians and African Capitalism - The Kenyan Case, 1960 - 1972, Cambridge University Press, 1975. p.6.

- 5 Marris, P. Economics Is Not Enough, East African Journal, III February, 1967. pp. 14 - 15.
- 6 Chapter 518, Laws of Kenya.
- 7 This position was recently reiterated by the President, Mr. Daniel Arap Moi on the 10th anniversary of Kenya Commercial Bank, 9th December, 1980. The President reassured full government support and protection to investors. He also assured them on repatriation of their profits from investments to their countries and that nationalization of banks was a negation of development. See Daily Nation, Tuesday, 9th December, 1980. p.1.
- 8 Sessional Paper No.10 on African Socialism, pp. 26 - 27.
- 9 At Independence, one million acres of European-owned land was to be transferred through sale to African farmers. 15 million pounds were provided by the British government to conduct the transfer; the money was given as a loan to the Kenya Government which in turn gave loans to the African farmers in order to buy land from the departing Europeans in the settlement schemes. This actually means that Kenyans were buying land which really belonged to them!
- 10 Sandbrook, R. Op. cit. p.7
- 11 Sessional Paper No.10, Op. cit. p.29.
- 12 Sandbrook, R. Op. Cit. p.
- 13 Sorrenson, M.P.K. Land Reform in Kikuyu Country, Oxford University Press, Nairobi, 1967.
- 14 Sessional Paper No.10, Op. cit. pp. 10 - 11.
- 15 Mohidin, A. Sessional Paper No.10, Revisited, East African Journal, Vol.6 No.3, March 1969 at p.7. A Report of a Working Party of the National Christian Council of Kenya (N.C.C.K.), Who Controls Industry in Kenya, confirmed Mohidin's predictions. The report had this to say:

"There is a class division in Kenya which is based largely on the share of the economic wealth of the nation.

Kenya society provides a good example of the haves and have-nots .... Kenya's economy is growing very rapidly but the gaps between the classes ..... seems to be widening. There is a clear evidence of a few African political and bureaucratic elite who are slowly merging with the commercial elite to form an apex at the top ... while the majority of the Africans linger helplessly below the totem pole."

pp.258 - 259.

- 16 The state has to intervene due to necessity i.e. to play down class conflict and avert unrest and discontent which might give rise to a revolutionary situation that might jeopardise the status quo.
- 17 Kahn-Freund, Otto. Labour and the Law, second edition, London, Stevens and Sons, 1977.
- 18 Contracts of Employment Act, 1972, S.1 as amended by the Employment Protection Act, 1975, Sched. 16 Pt. II (U.K.).
- 19 Redundancy Payments Act, 1965 as amended by Employment Protection Act, Sched. 16 Pt. I.
- 20 Trade Union and Labour Relations Act, 1974, Sched. 1 Pts. II - IV.
- 21 Employment Protection Act, 1975, Ss. 48 - 51.
- 22 Judicature Act, No.16 of 1967, Chapter 8, Laws of Kenya. S. 3 (1).
- 23 Somjee, Sultan, H. Kipande, the Symbol of Imperialism (1915 - 1948): A Study in Colonial Material Culture. Staff Seminar, 12/6/80, University of Nairobi.
- 24 Employment Act, Chapter 226, Laws of Kenya.
- 25 Cheshire and Fifoot. Law of Contract, London, 1972, p.5.

- 26 Marx, K. Pre-Capitalist Economic Formation, London, 1964, p.98.
- 27 Kessler, F. Contracts of Adhesion - some Thoughts about Freedom of Contract, 43. Columbia Law Review (1943) p.629 at 629 Kessler says:-

"With the development of a free enterprise system based on unheard of division of labour, capitalistic society needed a highly elastic legal institution to safe-guard the exchange of goods and services on the market. Common lawyers, responding to this social need transformed "contract" from the clumsy institution that it was in the sixteenth century to a tool of almost unlimited usefulness and liability. Contract became the indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way ...."

- 28 Mutunga, W. Kenya: Contract Law and Society - A Study of Rivatex's Investment and Management Agreements, A paper delivered at the Workshop on 'Investment and Management Agreements', University of Warwick, October, 1979. p.6.
- 29 The Act commenced on 1-1-1961.
- 30 Vide S. 2(1) of the Act which provides that the law of contract in Kenya will be the law of contract in England. Employment contracts in Kenya are, therefore, governed by the Common Law subject to the legislations.
- 31 (1875) L.R. 19 Eq. 162 at p.165.
- 32 Mutunga, W. Commercial Law and Development in Kenya. - mimeo - A paper delivered at a Seminar on 'Law and Development' at University of Nairobi, 1975.
- 33 Kahn-Freund, O. Op. cit. p.13.
- 34 Hepple, B.A. and O'Higgins, P. Employment Law, 2nd ed. London, Sweet and Maxwell, 1976. p.42.

- 35 Per Lord MacNaghten in NORDENFELDT V MAXIM  
NORDENFELDT CO. LTD., (1894) A.C. 535 at 566.
- 36 Kessler, F. Op. cit. p. 632. In his article  
the author describes the situation with precision;  
he says that the consumer in need of the goods or  
services, is usually not able to:-
- "..... to shop around for better  
terms, either because the author  
of the standard contract has a  
monopoly (natural or artificial)  
or because all competitors use the  
same clauses. His contractual  
intention is but a subjection more  
or less voluntary to the terms  
dictated by the stronger party ....  
Thus standardised contracts are  
frequently contracts of adhesion;  
they are a 'prendre ou a' laisser."
- 37 Ray, Roberts. 'The Structure of Unemployment in Kenya'.
- 38 Gutto, S.B.O. Taking the Law into their own hands:  
The Ruling Class, the Rule of Law and the Public in  
Kenya, Staff Seminar Series, No.1 1980 - 81,  
University of Nairobi. p.17. See also Seidman, R.B.  
'The State, Law and Development', London, Croom  
Helm, 1978. Chapter 5.
- 39 Kahn-Freund, P. Op. cit. p.24.
- 40 Whitford, S.G. Doctrine of Fundamental Breach in  
East Africa, 1969, 2 E.A.L. Rev. 87.
- 41 Chapters 226 and 243 respectively.
- 42 Chapter 226, Laws of Kenya.
- 43 Sections 4 - 6.
- 44 Section 7.
- 45 S. 9.

46 S. 12.

47 Ss. 10 - 11 (Water and food respectively).

48 S. 14.

49 S. 17.

50 S. 4(1).

51 This might indicate the class content in law generally e.g. in the law of contract, where an infant enters a contract for necessaries, the court will take account of the station in life of the infant to determine whether the items he took are actually necessaries for him; so that if the son (a minor) of a shamba worker orders three-piece wollen suits from 'Sir Henry's,' this will not be a necessary, considering his economic position. See NASH V INMAN, (1908) This is also the case where a wife pledges her husband's credit; see NANYUKI TRADING STORES V MRS. PETERSON, (1948) 15 EACA, 28.

52 The Rent Restriction Act, Cap. 296, has failed in placing a ceiling to rents and workers continue to face hardships in obtaining reasonable housing accommodations while at the same time making ends meet. See, Mutunga, W. Kenya: The Rent Acts and the Exploitation of the Tenant, 1974, (mimeo), University of Nairobi.

53 Kenya Development Plan, 1979 - 1983, Part I, 5.174 p.177.

54 Chapter 199, Laws of Kenya.

55 Chapter 84, Laws of Kenya

56 Legal Notice No.65/1976, Legal Notice No.94/1976 and Legal Notice No.246/1978.

57 For instance the collective agreement between the Domestic and Hotel Workers' Union (D.H.W.U.) and the Kenya Association of Hotel Keepers and Caterers in Clause 5 provides:-

"Every employee who is not provided with free housing accommodation by his employer shall be entitled in addition to his basic minimum wage as contained in the schedule to this Agreement to a house allowance as contained in the third schedule to this Agreement. Provided always that no employee shall receive a lower allowance after completion of this Agreement than the amount already being paid."

Prima facie, this provision is much wider the specific than that in the Employment Act.

- 58 If these are really the reasons for exempting S.9 from applying to those who earn Shs.2,000 or more then they are reasons tinted with naivety. Firstly, despite the fact that someone is literate, that does not make him equal (economically) to the capital owners who have the stronger bargaining power. Secondly, it is not true that a person earning such a salary will always afford a reasonable housing accommodation particularly due to inflation which causes house rents to go up.
- 59 This argument was advanced by one of my colleagues in class during one of our numerous discussions.
- 60 Speech by H. Kinyua, Chairman of the Federation of Kenya Employers to the Annual General Meeting of the Federation at Hotel Inter-Continental, Nairobi, on Friday, 25th April, 1980. at p.3.

## CHAPTER TWO.

- 1 This is the view of many employers (capitalists) for obvious reasons i.e. to have a free hand with the control of the number of employees they are to have and this is influenced by production necessity and of more importance, its effect on profits. The reluctance of most employers to effect the "10% directive" of President Moi recently is indicative of this.

2 S. 14.

3 S. 17.

4 (1964) A. C. 40.

5 MAJOR LUXFORD V WAIBENGA WA IRORI  
(1927) 11 KLR 100.

6 S. 5 (i).

7 S. 5 (iii)

8 (1970) E.A. 155.

9 Another reason why very few ordinary 'Wanainchi' are willing to go to court is the abhorrence with which they view the Judiciary in general. This is a colonial legacy because during the colonial period, the courts played the role of enforcing the oppressive laws of the colonialists and they were equally feared and hated as the police were. This attitude has persisted even after Independence though it can be said, to a lesser degree. It is common that with the mere mention of the word 'Police' or 'Court', the ordinary 'Mwanainchi' takes a defensive attitude, albeit his innocence.

10 Chapter 234, Act No.22 of 1971, Laws of Kenya.

11 S. 4 (5), Trade Disputes Act, No.3 of 1979. This provision used to be contained in S. 9A of Trade Disputes Act No.22 of 1971 before the amendment in 1979.

12 Hepple, B.A. and O'Higgins, P. Employment Law, 2nd edition, London, Sweet and Maxwell, 1976. at p. 204.

13 S. 14 (5).

14 Contracts of Employment Act, 1972 (U.K.), S. 1 (3).

15 Supra.

16 In U.K. employers have had the temerity to sue their own employees as occurred in NATIONAL COAL BOARD V GALLEY (1958) 1 W.L.R. 16.

- 17 For instance, in MORGAN V MANSER (1948) 1 K.B. 184, the contract of employment was frustrated when the employee was called up for military service, since from that point onwards it was illegal for him to engage in ordinary work.
- 18 Redundancy Payments Act, 1965 U.K. S. 3 (1) (b).
- 19 Trade Union and Labour Relations Act, 1974 U.K. Sched. 1 para. 5 (2) (b).
- 20 KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS' UNION V KAZI GUARDS LTD, Industrial Court, Clause No.31 of 1978. Note that S. 9A of the former Act has been amended by S. 3, Act No.3 of 1979 and similar provisions are now contained in S. 4 Trade Disputes Act, 1980.
- 21 (1835) Ad. & El. 171 at p. 172.
- 22 By virtue of the Judicature Act, No.16 of 1967, Chapter 8, Laws of Kenya, S. 3 (1). This provision has been misapplied either deliberately or unconsciously by Kenya's judiciary which has been mainly composed of foreigners or judges who have a British legal training. This forces them to support the status quo - See Lord Patrick Devlin, 'Judges and Law-makers', M.L.R. 1976 p.8.
- 23 In practice, the wages of the worker never corresponds (proportionally) to the number of man hours he has put in his work:-

"... But in the capitalist system, the degree of labour productivity is that the living costs of the worker is always less than the quantity of newly created value. This means that a worker who labors for ten hours does not need the equivalent of ten hours of labor in order to support himself in accordance with the average needs of the times.

His equivalent wage is always only a fraction of his day's labor; everything beyond this fraction is surplus-value, free labor supplied by the worker and appropriated by the capitalist without an equivalent off-set. If this difference did not exist, of course, then no employer would hire any worker, since such a purchase of labor-power would bring no profit to the buyer i.e. the capitalist."

Except from 'An Introduction to Marxist Political Economy' by Ernest Mandel at p.15.

- 24 Marx, Karl. Theories of Surplus Value, Part I at p. 148.
- 25 It should not be forgotten that drunkenness or excessive drinking is a social product in any capitalist society, where the down-trodden tend to drown, at least momentarily, their frustrations and problems in drink.
- 26 Industrial Court, Cause No.3 of 1973.
- 27 READING V A.G. (1951) A.C. 507.
- 28 STERLING ENGINEERING CO. V PATCHETT (1955) A.C. 534.
- 29 VINE V NATIONAL DOCK LABOUR BOARD (1957) A.C. 488 at p. 493 per Lord Keith.
- 30 The rules of natural justice cover two main principles: (1) No one must be condemned without being told of the charge against him and without being given an opportunity to state his side of the case (audi alteram partem); (2) nobody should be judge in his own cause i.e. the person deciding on the guilt of another should not also be the person who acts as his accuser (nemo iudex causa sua).
- 31 This conclusion is valid due to the silence of S.17 of the Employment Act. This was expressly ruled in U.K. in PEPPER V WEBB, 1 W.L.R. 513.

- 32 Most collective agreements recognise summary dismissal as laid down in S.17, Employment Act.
- 33 Industrial Court, Cause No.31 of 1978.
- 34 Industrial Court, Cause No.44 of 1979.
- 35 Industrial Court, Cause No.23 of 1972.
- 36 Trade Disputes Act, Chapter 234, Laws of Kenya.
- 37 Industrial Court, Cause No.30 of 1968.
- 38 Musch, D. The Kenya Industrial Court, 1966, EALJ Vol.2 No.4, p.266.
- 39 Rideout, R: Principles of Labour Law, 3rd edition, London, Sweet and Maxwell, 1979, p.85.
- 40 S. 15.
- 41 S. 15 (1).
- 42 S. 15 (1) (i).
- 43 S. 15 (1) (ii).
- 44 Industrial Court, Cause No.3 of 1980.
- 45 Industrial Court, Cause No.18 of 1979.
- 46 Industrial Court, Cause No.27 of 1980.
- 47 Supra.
- 48 As advised in NYALI LTD. V A.G. (1955) 1 All. E.R. 646 at p.653, by Lord Denning.
- 49 (1909) A.C. 488.
- 50 Section 4 (5).
- 51 Supra.
- 52 Act No.3 of 1979 S. 3.
- 53 (1969) 3 All E.R. 1126.

- 54 Redundancy Payments Act 1965 (U.K.). S. 19 (2).
- 55 Industrial Relations Act, 1971, (U.K.). S. 24 (1).
- 56 KENYA MOTOR ENGINEERING & ALLIED WORKERS' UNION V  
MOTOR INDUSTRIES EMPLOYERS ASSOCIATION, Industrial  
Court, Cause No.17 of 1964.
- 57 S. 4 (5), Trade Disputes Act, Rev. 1980.

CHAPTER THREE.

- 1 Annual Return for 1979 taken on 31st December, 1979.  
File No. TU/18/7/240, Dept. of the Registrar General.
- 2 Clause 6 of the Collective Agreement.
- 3 S. 14 Employment Act.
- 4 VINE V NATIONAL DOCK LABOUR BOARD, (1957) A.C. 488.
- 5 Recently there is a trade union which accepted  
minimum wages below that set by the Government  
showing the weakness of trade unions in Kenya and  
the operation of the doctrine of freedom of  
contract.
- 6 Industrial Court, Cause No.27 of 1980.
- 7 Leys, C. Underdevelopment in Kenya. The Political  
Economy of Neo-Colonialism 1964 - 1971, Heinemann,  
London, 1975, pp. 118 - 122.
- 8 Migot-Adholla, S.E. 'The Tourist Industry in East  
Africa'. p.16.
- 9 Langdon, S. The Multinational Corporation in Kenya  
Political Economy, in Kaplinsky R. (Ed.), 1978, p.
- 10 Migot-Adholla, S.E. Toward Alternative Tourism in  
Kenya, IFDA Dossier 19. September/October 1980.  
p.6.

- 11 S. 6 (b), Employment Act.
- 12 Industrial Court, Cause No.6 of 1980.
- 13 It was the practice in the hotel that an employee could exchange the gifts given to him by guests for other items e.g. beer.
- 14 Industrial Court, Cause No.32 of 1978.
- 15 Industrial Court, Cause No.32 of 1973.
- 16 Supra.
- 17 at p. 30.
- 18 Migot-Adholla, S.E. The Tourist Industry in East Africa, p.17.
- 19 Ibid. p.30.
- 20 Kaplinsky, R. 'Report on Foreign Exchange Leakages, with particular reference to Transfer Pricing', (mimeo, restricted circulation, June 1978).

CHAPTER FOUR.

- 1 Mutunga, W. Kenya: Contract Law and Society - A Study of Rivatex's Investment and Management Agreements, Paper delivered at the Workshop on 'Investment and Management Agreements', University of Warwick, October, 1979, p.7.
- 2 Clemens Duff has aptly defined 'Law' to be "a system of juridical standards and prescriptions which express the will of any ruling class of a society and this will is enforced by the coercive powers of the state."
- 3 Otega, M.A. 'Jurisdiction and Powers of the Kenya Industrial Court', LL.B. Dissertation, 1975.
- 4 (1972) Ch. 305. See also, DECRO-WALL INTERNATIONAL S.A. V PRACTITIONERS IN MARKETING LTD (1971) 1 W.L.R. 361.

- 5 The concept of 'unfair dismissal' was first introduced in English and Scots law by the Industrial Relations Act 1971, and is now embodied in the First schedule to the Trade Union and Labour Relations Act, 1974 as amended by the Employment Act, 1975.
- 6 International Labour Conference, 47th Session, Geneva, 1963.
- 7 Recently President Moi, banned the Union of Civil Servants. The employees of the Union who numbered 100, have faced immense difficulties ranging from police intimidation to failure to getting fresh employment. Some of those who got employment elsewhere have consequently been dismissed when the employers discovered that they were ex-employees of the disbanded union. This is discernible from one letter to the editor of a daily newspaper which alleges that one hotel in Nairobi sacked its employee on learning that she had worked for the Union of Civil Servants. See 'Former Union employees starving', the Standard, Monday, 16th March, 1981, at p.6.
- 8 Gutto, S.B.O. Taking the Law into their own hands: The Ruling Class, the Rule of Law and the Public in Kenya, Staff Seminar, No.1 1980 - 81, University of Nairobi.
- 9 Leys, C. Underdevelopment in Kenya. The Political Economy of Neo-Colonialism 1964 - 1971, Heinemann, London, 1975. p. 233.
- 10 D.H.W.U. V WATAMU BEACH HOTEL, Industrial Court, Cause No.3 of 1973.
- 11 Ibid.
- 12 The phrase "public interest" especially the word "public" is rhetorically used in Kenya by the Government, politicians etc. and in many instances it is used to camouflage dubious activities and intentions. The term "public" is pervasively misused by the ruling class for ideological purposes and to distort the nature of class antagonisms and struggles in the society. See Gutto, S.B.O., Op. cit. p.1.
- 13 KANU Manifesto, p.5.

- 14 Sandbrook, R. 'The State and the Development of Trade Unions', in G. Hyden, R. Jackson and J. Okumu (eds.) - "Development Administration: The Kenyan Experience." Oxford University Press, Nairobi, 1970. pp.252 - 95.
- 15 Leys, C. Op. cit. p.141.
- 16 These unionists later formed the pro-socialist Kenya People's Union (K.P.U.), led by Oginga Odinga.
- 17 Amsden, Alice. International Firms and Labour in Kenya: 1945 - 70, Frank Cass & Co. Ltd., 1971, p. xi.
- 18 Marx, Karl. "Preface to a Contribution to the Critique of Political Economy" Marx and Engels. Selected Works, Vol.1, Progress Publishers, Moscow, 1973, p.504.

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