

REMEDIES AVAILABLE TO A
WRONGFULLY DISMISSED WORKER

THE CASE FOR DOMESTIC AND HOTEL WORKERS UNION

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By

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A C K N O W L E D G E M E N T S

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A B B R E V I A T I O N S

- I.L.O. - International Labour Organization
- C.O.T.U. - Central Organisation of Trade Unions
- F.K.E. - Federation of Kenya Employers
- K.L.R. - Kenya Law Reports
- E.A.L.R. - East African Law Reports
- E.A.L.J. - East African Law Journal
- C.L.R. - Columbia Law Review
- E.A.J. - East African Journal
- I.C.D.C. - Industrial, Commercial and Development Corporation
- E.A.L.R. - East African Law Review^{ijw}.

T A B L E O F S T A T U T E S

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P R E F A C EUNIVERSITY OF NAIROBI
LIBRARY(i) Ageneral Frame Work.

This paper does not pretend to be exhaustive. Scholarship demands that the dark corners in this branch of law be illuminated for the benefit of mankind!

The fundamental assumptions there in are quite modest and are as follows. That wrongful dismissal is not uncommon to most of the workers in the low income bracket. That the present market economy is a function of property relations. That a life without a dependable source of income is at best intolerable and at worst dehumanising. For a wrongfully dismissed worker, it is even more worse. Invariably, one would have altered his station in life substantially, and now he has to live with the wounded pride. In an economy such as ours where several demands are made on the worker by his dependants who in most cases are not few, the situation crystalises into an absurdity.

In the words of Professor Freund,

"Management's interest in planning production and in being protected against its interruption is the exact equivalent of the workers interest in planning family's life and in being protected against an interption in his mode of existence either through a fall of his income or loss of his job. All this is palpably obvious except for a person blinded by class hatred eitherway."²

We recognise that our legal machinery does come to the aid of the victims of such "class hatred." It provides various forms of remedies, and for our purposes these are compensation and reinstatement.

To answer the question as to whether or not these remedies are adequate, we first examine how effective the institutional machinery employed in the adjudication of labour disputes relating to wrongful dismissal is.

We proceed on the premise that our present labour law can well be understood by examining how our society has evolved since 1895 which the British Government declared Kenya its protectorate. The role of labour law in the capitalist accumulation process was only second to guns in ordering the relations of production.

We then proceed to examine the so called freedom of contract in the light of post independent political economy and in the light of greave scarcity of jobs. We seek to show that the doctrine is amyth and that the employer at all times calls the tune. He can hire and fire so to speak. We then highlight what constitutes this firing in labour law.

(c) We then proceed to examine the remedies if any, available to awrongfully dismissed worker, We have taken the Domestic and Hotel Workers Union as a case study precisely because most of our poor economic brethren come within that union. Secondly, for various reasons beyond their control, many workers who would otherwise come within the ambit of the said union are technically outfit. There is practically no machinery for the articulation of their interests.

(b) The significance of a contract of service
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REMEDIES: THEIR ADEQUACY OR OTHERWISE

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CHAPTER ONE

REMEDIES: A HISTORICAL BACKGROUND

The present labour laws and relations are deeply rooted in the fact of colonial process, and therefore, an analysis of our pre-colonial societies, colonial transformation and the subsequent colonial formation of Kenya's labour processes is inevitable. To understand the present, we must understand the past. William Ochieng', a prominent Kenyan historian has argued cogently:

"Knowing what the societies have been like in the past, and the socio-economic dynamics will give clues to the factors that operate in them; and in the motives and conflicts, both general and personal that shape events."¹

(a) The pre-colonial period and the institution of labour:

In traditional African societies, each and every able bodied member of society was a worker. Exempted from work were children of tender age, the sick and the overaged. Society had a duty to maintain them with necessities for survival. Cash economy was non-existent - these being simple production economies. Non-existent also was the institution of the hired labour as the family was a major working unit. To launch an assault on nature, simple tools coupled with human exertion were

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essential. One's dignity in the community was ever present. The community was organized along communalistic lines. Each and every member had access to land - the major means of subsistence. Nobody was competent to alienate any part of it thereof, for it belong^{ed} to the society. Nyerere puts it thus:

"To us in Africa, land was always organised as belonging to the community. Each individual within our society had a right to the use of land, because otherwise, he could not earn his living, and one cannot have the right to life without also having the right to some means of maintaining life. But the African's right to land was simply the right to use it, he had no other right to it, nor did it occur to him to try and claim one."²

We have said that each able person was a worker. Members of the family or household pooled resources together for the satisfaction of their needs. If some task could not be performed by a single family, then the whole community joined hands. Such tasks included defence, hunting and boma construction. People joined and performed voluntarily and without hope for remuneration.³

Traditional contracts took the form of hunting or herding contracts, where the village elder would grant to certain persons some grazing rights on unoccupied land,⁴ but as Hydon notes, in these communities,

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the institution of family law was more developed than contract.⁵

Human dignity was in some communities violated by the practice of slave economy. True, slavery as a mode of production was not prevalent in Africa, but we agree with Rodney that it occurred where the disintegration of the society had gone furthest.⁶ At the coastal part of Kenya and in areas where the sultan of Zanzibar exercised sovereignty, slave economy was not uncommon. We are reliably informed by Clayton and Savage that the Islamic law which governed this area did permit slavery.⁷ A slave's legal status was equivalent to a chattel. The absolute property of his master.⁸

Another form of disguised slavery was the institution of the hired porter which owed its origin from the days of missionaries, explorers and military expeditions. Africans were turned into wagons. They transported merchandise and luggage of the "visitors". The penetration of the interior from the Coast was a formidable task. Tse-tse flies easily killed donkeys, hence, the ^{hiring} ~~living~~ of Africans. The porters equally suffered on the journey to the interior - loads were heavy, and the distance to be covered was long - 12 miles a day. Famine awaited

them. Dessertion was therefore not uncommon. Some regulations were enacted to supplement these personal contracts - The major one was Regulations for the Protection and Registration of Porters enacted under the E.A. Protectorate Ordinances and regulations of 1889: Under this enactment, every porter engaged in a journey for three months had to be registered; furnished with a deposit of money, and was to be paid the balance six days after the journey. An unregistered porter faced detention and non-payment of wages. The caravan leader was under a duty to report the punishment meted out to a district commissioner. The argument is that the fact of penal servitude indicates that the porter had no choice. He could not enter freely and terminate freely. Clayton writes:

"The organisers of the caravans could inflict punishments and even dismiss the porter on the journey. The D.C. did not object to this!"⁹

This happened in the name of the civilising mission, and the search for legitimate commerce.

(b) The origin of British Imperialism

For our purposes, Imperialism dismantled the traditional economy, introduced cash economy and drove Africans

into wage labour. We adapt the Marxist postulate that imperialism marked the highest stage of capitalism and that it represented the inevitability of the rotting and moribund capitalist order. That it was necessary to export the class contradiction to new outlets so as to waive off the impending doom of capitalism.¹⁰

In 1885, Britain, France, Germany and Italy assembled at Berlin with an intent to partition Africa for their own purposes. To mask the true economic intentions, resort was had to legal formalism. Wolsey contends that such spheres of influence were either for potential economic gain or were ancillary to the far East and India." The outcome of the conspiracy at Berlin was article 35 of the conference's General Act. Signatories were to ensure the establishment of an authority in the regions occupied by them at the coasts of Africa. Ghai and McAuslan write that this gave "impetus to the scramble and justification for it by the protagonists."¹²

A follow up conference came in 1890 at Brussels. Article IV of the General Act empowered the acquisitive powers to delegate sovereignty to chartered companies. The signatories however remained vicariously liable for the companies wrongs. The immediate response from Britain was ~~was~~ the formation of I.B.E.A. in 1890. This was the major guiding factor in British colonial policy. In 1890, Foreign Jurisdiction Act was enacted in Britain. The crown now had powers to exercise jurisdiction in Foreign lands, whether obtained by treaty, grant, capitulation, sufferance or any other means. Section 9 provided for the exercise of the jurisdiction as specified in the orders in councils. Under this legislation, courts were held, and legislation in the jurisdiction promulgated. Meanwhile, the I.B.E.A. continued its profit mission on behalf of the crown until 1895 when it went into liquidation.¹³ The British Government effectively moved into her shoes by declaring Kenya her protectorate on 15th June 1895.

Britain's colonial motives were primarily economic. Richard Wolff records that at this stage in her history, Britain was confronted with diminishing sources of raw materials from South America and stiff competition of her industrial exports in Germany and North America. The two countries regorously employed tarrifs and quotas to protect their infant industries.¹⁴ It follows therefore that outlets were seen in the new lands provided that a capacity to absorb the exports was created. But for the overseas lands to be self-supporting, a plantation economy was seen to be appropriate so as to give effect to Lugards fantasy of limitless openings in the colonies in respect of sisal, wax and cotton.¹⁵

Interestingly, a protectorate was a foreign country and British crown had no capacity to alienate land unilaterally. This was the position as per 1843 Foreign jurisdiction Act. This violated the needs of the time. In 1901, East African Lands Order in Council was promulgated. In effect, unused land became idle land and this capable of alienation by the crown. This disregarded the African land tenure system which gravitated upon crop rotational farming. The 1902 crown lands ordinance was enacted to apply the aforesaid order in council. In 1915 all land in Kenya became crown land by virtue of 1915 Crown Land Ordinance. The radical title was vested in the crown and natives became mere tenants at will according to Wainaina V. Murito.¹⁶ The point being made here is the centrality of title to land which was seen as an important tool in the exploitation of natural resources. But the question of who was to create value was not already settled.

(c) The centrality of cheap labour.

The projected plantation economy was to stand or fall depending on the presence of labour or otherwise. At first, the authorities thought that Africans were unsuitable for this noble task. Said Commissioner Eliot;

"Bantu people are somewhat low on the scale of civilisation with no inclination to trade and not much disposition for work of any kind"¹⁷

Asiatics of Indian extraction were tried and discarded because of the hostility from the European communities, and the Indians desire to migrate as a whole family assured of permanent residence in Kenya. An invitation was thus extended to European settlers.¹⁸ But the invitation was riddled with constraints. Settlers lacked finance, managerial skill and wage labour. Capital had to be generated from within; and so the professed goal became the extraction of surplus from the product of African labour.¹⁹ According to Smutts, this would civilise the African. Failure to utilize the natives spelt doom for the settlers who wished to lead the lives led back home, and even better ones. They had no desire to work harder than they were accustomed to.

But since the Africans were proud of their subsistence economics, and since they exercised control over their land, they were ready and willing to continue produce their own account. There was no way they were going to sell labour power on the market.²¹ Ways and means of extracting labour had to be devised.

(d) Methods used to extract labour

Settlers openly professed that labour was their right and the government had a duty to guarantee it.²² The government responded favourably. Extractive methods ranged from persuasion, coercion and open force. This was the administrative bit of it. Taxation was the second and the restructuring of the land tenure another one.

(1) The 1915 Native Followers Recruitment ordinance enabled D.C.'s to procure carrier corps through chiefs. This way, timber was cut, and journeys made.²³ Due to an apparent shortage of wage labour in 1919, Chiefs were encouraged to find more wage labour.²⁴

Consequently, the 1912 Native Authority ordinance was amended in 1920 to recruit africans by order of a D.O. for 60 days unless for 12 months, he had been occupied. Simply put, every able bodied person could be employed in public works or private firms. Recruitment of labour was also regulated by section 33-39 of Master and Servant Ordinance of 1910.²⁵ A recruit having been examined by a government doctor signed a contract whose contents he understood not. This was attested to by a magistrates who were D.O.s. However, labour agents flouted the conditions as per Birth's commission of 1912. Missionaries were also against forced labour; unless it was absolutely necessary; and even so, it had to be legalised.

(ii) Taxation was perhaps the most ideal way of generating labour. It was the only way for the African to leave his homestead, and work for a new value of exchange - money. According to the then Governor, it was the only way of increasing the cost of living to the native. Since 1901, tax was imposed on every hut; payable in kind, cash or labour. Many Africans paid their cows, and its objects failed.²⁶ Later on, tax was imposed on the number of wives an individual had and then, tax was imposed on all male adults above the age of 16. Taxation thus made wage earning inevitable. Wages were low in relation to productivity and the purchasing power of labourers. Wages were taxed at the source immediately after pay. Zwaneuberg's statistics indicate that the African was overtaxed. They contributed to 50% of the revenue. Payment of taxes was hotly resisted and evasions were not uncommon.

(iii) Perhaps the most effective way of generating labour on the farms was through the reserve system. The size of each and every locality of a native area was determined by labour needs. The theory being that land or its abundance was an obstacle to labour turn-over. By decreasing land and increasing tax burden, one creates land pressure and deterioration of its quality, and therefore, energy is freed and transferred to white farms in the form of wage employment.

Okoth-Ogendo observes that this method generated labour "in and of itself" especially when read together with the incidence of taxation policy.²⁹ To generate pressure on land, reserves were totally ignored in development, Africans were forbidden from growing cash crops,³⁰ and infrastructure was non-existent; notwithstanding the fact of heavy taxation on the part of Africans.

An interesting phenomenon about the extraction processes was that all the mechanisms employed worked simultaneously. But imperialism was not happy with the extraction process. Cheap dependable labour was the goal.

(e) The role of legislation in taming labour:

Most of the workers were target workers. They would work for sometime, get money, return to the reserve only to turn up late, or not turn up at all. This problem was overcome by the introduction of the institution of the resident labourer. A Resident Native Labour ordinance was passed. It enabled the settler to have a pool of cheap and dependable labour at all the time of the year. Ostensibly, a resident labourer worked on the Master's Plantation for 180 man days and was given a piece of land for his private use. Such rights were merely usufructory rights. When a Master sold the land to another Master, they were also passed on as chattels. The Employment of Natives Ordinance of 1919 was enacted primarily to keep labour on the farm. Any servant was subject to rigorous imprisonment if convicted of failing or refusing without lawful cause to commence the service at the stipulated time, having entered into a contract; If without leave or other lawful cause did absent himself from his employer's premises or other place proper and appointed for the performance of his work; If he refused to obey any command of his master or of any person lawfully placed by his master, which command it was his duty to obey.

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Section 48 of the same ordinance provided for a fine for a person convicted of any of the various forms of misconduct. That was to say:

1. If he shall wilfully or by wilful breach of duty, or through drunkenness do any act tending to the immediate loss, damage, or serious risk of any property placed by the employer in his charge or placed by any other person in-charge for delivery to or on account of his employer.³³
2. If being employed as a herdsman, he shall fail to report to his employer the death or loss of any animal placed in his charge he shall be liable to have died or been lost.³⁴
3. If he shall without lawful cause depart his employers service with intent not to return there to.³⁵

It is evident that farm labourers were forced to work by a formidable array of contractual obligations reinforced by criminal penalties. Master and Servant ordinance³⁶ was another ordinance of substantial notoriety. It also provided for penalties where the employee failed to work, was absent or under the influence of drink during working hours, was careless at work, or used the employers house, vehicle or property without leave of the employer. Punishment ranged from losing one months' wages, imprisonment for one month or two months imprisonment for wilful breach of duty, drunkenness, damage or loss to employers property. In R.V. Onyingo Wa Duk,³⁷ the accused had been charged and convicted under Master and Servant ordinance, but was released on the ground that he had been ill-treated, and a plea of guilty had not been entered.

The Native Registration Ordinance of 1915 which was brought into operation in 1919 was aimed at helping the enforcement of the employment contract and monitoring the movement over all adult male Africans. It was designed to root out the problem of desertion.

Lays,

Under this new ordinance, it was obligatory for every male African above the apparent age of 16 years to get himself registered at the Registration office in the district where he resided. His district, tribe, location, sub-location, circumcision age and a full set of finger impressions were taken. He was then issued with a certificate where his personal particulars and left thumb impression appeared. A copy of this document was sent to the Central Registration office in Nairobi together with the full set of finger impressions. They were filed as permanent records and when needed by or other authorities, could be used for tracing the person or for any other action.

As for the employer engaging a registered African, he was under an obligation to insert the relevant employment particulars for which 8 columns were provided on the Registration certificate. These included the name of the employer, nature of work, date of engagement, rate of wages on employment, rate of wages on discharge, if maize flour given, date of discharge, and employer's signature on discharge. The employer was required to forward to central records office at Nairobi a post-card return in respect of engagement, discharge and desertion or death of a registered African. These returns constituted a permanent record of employee's movements and were evidence of contracts entered into. The most obnoxious part of it was the obligation imposed on Africans to the effect that he had to carry the certificate or the Kipande as it was known in Kiswahili on his person, and to produce it when demanded by the police. Any male African without could be prosecuted, and none could employ him if he had no Kipande or if he had not been signed off by his previous employer. If the worker deserted there would be no such signature, and the worker would for the purposes of the ordinance, be deemed to have absconded, whereupon retrieval would follow. The worker would then be subject to penal consequences. To the colonial authorities, the Kipande ^{was} seen as a symbol of patriotism. In the words Leys,

"In Kenya, the direct obligation of the individual to the state has been driven home by the Registration Act which compells everyman to carry on his person a certificate that contains his industrial History."³⁹

Subsidiary legislation was also employed to check the movemnet of Africans from reserves to towns. The aim was to avoid overflowing the labour market. The Nairobi Municipality By Law of 1929 was one of such legislations. The by laws were vigorously enforced by the courts. In the case of Isherdas Gulbrai 1941 19(2) K.L.R. p.117, the accused was convicted for the offence of permitting natives to reside out of the native location in any area in the municipality without the permission of the town clerk contrary to section 187 of the afore-said By law.

The vagrancy rules were used ruthlessly against any wanderer. The colony out of the reserve was out of bounds for the unemployed native. In Njoroge wa Kimani, the accused who was a first offender was given a custodial sentence by the court for vagrancy.⁴⁰

Another set of rules aimed against the freedom of the indigenous people was the Native passes Rules of 1900. In Lubui Kingu and others,⁴¹ the court while interpreting Rule 1 of the said rules, said that the rules prohibited the crossing of aboundancy by a native without a pass. It held further that it was an offence to cross such aboundary without such a pass.

(f) Organised resistance: roots of decolonisation:

As early as 1919, organised resistance on the part of the peasants and workers was noticeable. Markhan Singh puts it thus: "They chose the path of resistance against this system."⁴² In 1919, the first staff Associations began to appear on the scene. Prominent among these was the Young Kikuyu Association whose leader was Harry Thuku. The demands were inter valia as follows. It championed the course of the workers education and the general education of the natives with the aim of improving the standard of living for the indigenous people.

- (i) That the increased hut tax be reduced, and that the hut tax be replaced with poll tax.
- (ii) That the Kipande system be abolished.
- (iii) That the forced labour be abolished, and labour on government projects be rewarded accordingly.
- (iv) That wages be increased.

The then settler newspaper did not think that the workers combination was a force to reckon with.

"Perhaps there is no need to take the native association so seriously for after all the native tribes men have not yet arrived at the plane of education and Higher thought properly to understand the science of political economy. we want neither czar nor Lenin in Kenya. This territory demands British rule and essentially European rule.⁴³

In 1922, there was a general strike in Nairobi. In the course of the demonstration on the 16th of March 1922, 195 people were shot down, and Harry Thuku was arrested. Markhan Singh comments:

"Thus on that historic day, the tree of Uhuru was watered by the blood of our martyrs. They were martyrs of Kenya's national movement and Trade Union movement. A new chapter in the History of Kenya had begun."⁴⁴

Back in Britain, both the liberal and clerical spheres were decidedly against any forms of forced labour. In the 1930's. World governments began to take cognizance of the voice of workers. In 1936, the I.L.O. General Conference adapted the Recruitment of Indigenous Workers convention⁴⁵ which provided some humanitarian provisions for the recruitment of labour. It championed methods of preventing recruitment by illegal pressure, misrepresentation and mistake. It championed the elimination of the process of recruitment and suggested that the market be left to the invisible forces of supply and demand. It championed the course of the workers education and the general education of the natives with the aim of improving the standard of living for the indogenous people.

In 1939, the I.L.O. came out with the penal sanctions indigenous workers convention.⁴⁶ It called upon the signatories to abolish all penal sanctions for any breach of contracts to which it applied. The convention came into force on 8th of July 1943, and Britain was signatory to it. Although penalties fell into disuse, they still remained in the law books, they were not abolished. In 1957, I.L.O. adapted the abolition of forced labour convention that forbade all forms of forced labour: Article I state among other things:

"Each member of the International Labour Organisation which ratifies this convention undertakes to suppress, and not to make use of any form of forced or compulsory labour as a method of mobilising and using labour for purposes of economic development."⁴⁷

The I.L.O. Resolutions had some impact on the development of labour law, albeit checked.⁴⁸ Britain being signatory to these conventions felt that it had an international obligation to adhere to the I.L.O. convention for the sake of good public relations. The emergence of the Labour party as a ruling party between 1924 and 1929 had important consequences. It marked a departure from the traditional hard line policy of dealing with the natives and secondly, it favoured organised labour unions in the colonies. Strong pressure groups out to champion the cause of workers also emerged in Britain. Prominent among them was the Trade Unions Congress of Britain. The International Confederation of free Trade Unions was even more influential in matters pertaining to colonial policy. A common phenomenon between these two bodies was that they were largely viable commercial enterprises, and had nothing in common with the settlers demands for cheap labour, and therefore, they were in a better position to take the colonial government to task.

In 1943, the Trade Union movement was legalised in Kenya by the promulgation of the Trade Union Ordinance.⁴⁸

However, the workers salaries still remained very low. Labour disturbances which were prevalent in the 1940's evidenced abysmally low levels of African earnings, poor standards of housing and living conditions in general, not to mention the suppression of political rights, the right to self-determination.

There were other important factors which accompanied the softening of labour relations on the part of the colonial government. The situation of persistent labour shortages began to change in the 1950's, and this was the origin of the present urban and rural unemployment problem which we shall say much about it in the next chapter. The I.L.O. report published in 1958 reveals how over population on land had led to the search of employment. It further reveals how the primary education in these days produced people who had a great appetite for white collar jobs rather than subsistence farming. With the need to pay for education, and afford the necessaries, Kenyans began to aspire for wage employment. At the time around the independence in 1963, wage employment was considered a pre-requisite for social prestige and human dignity. However,

" employment opportunities began to decline since 1960 the reduction of the workforce meant that Kenya came to Independence with ashinking workforce." 49

The argument has been that at an early stage of colonialism, a labourer was such an important asset that a Master could not afford to loose. Various statutory tools were employed to tie him to a master. It follows then that dismissal, wrongful or otherwise was non-existent. 50 For the so called worker was at best a serf and at worst a slave. It then follows that the issue of damages or remedies for awrongfully dismissed worker in so far as the indogenous people ^{were} ~~was~~ concerned was unknown to colonial law.

Capitalism is not static, Our colonial history shows how cruel it was at its infancy. As it takes roots, physical coercion in the extraction and up-keep of labour is effectively replaced with economic coercion. Brett writes thus:

(a) "In a fully capitalist system, the actual use of state power for the direction should be entirely unnecessary. Once capital has been concentrated in the hands of the minority. The corresponding inability of the majority binds them to the owner by invisible threads and ensures that they will always be available at a price which the later can afford." # 51

This in a nut shell is what colonialism sought and accomplished in Kenya; only that Kenya is a dependant capitalist state.

"Common lawyers responding to this social need transformed contract from a clumsy institution it was in the sixteenth century to a tool of almost unlimited usefulness and liability!" 2

Contracts thus once entered into, were treated by the law as sacred. Courts were only ready to enforce them. 3 The economic disability was and still is not a mitigating factor. According to Hegel, there was only one God by the name of contract, and his prophet was no other than Sir Henry Maine. 4 Maine had been pleased by the fact that progressive societies had moved from a status contract. 5

Common law obtains in our legal system by virtue of the Judicature Act; 6 and the law of contract Act of Kenya which stipulates that the English law of contract is our law. 7 Employment contracts are governed by the common law. Parties enter into a contract on their own terms subject to limitations laid down by the law. 8

CHAPTER TWO

At common law, Judges were prepared to hold that the great THE LEGAL ASPECTS OF EMPLOYMENT AND WRONGFUL DISMISSAL WITHIN THE POTICAL ECONOMY OF KENYA: contracted for them, the stronger the grounds for regarding it to be a contract of service.⁹ According to Lord

(a) The Significance of a Contract of Service

Employment relationship hinges on the exchange of a promise to work in return for a promise to pay wages. This relationship thus comes within the ambit of a contract! At common law, a contract represents the legal expression of the meeting of the minds. It rests on two assumptions. That the contract is a manifestation of a mutual agreement between the contracting parties and that it flows from their own free choice. The assumptions took shape in the hey days of laissez-fair capitalism. Capitalism needed law to safe guard the exchange of goods and services on the market. In the words of Kessler, "Common lawyers responding to this social need transformed contract from a clumsy institution because it was in the sixteenth century to a tool of almost unlimited usefulness and liability!"² Contracts thus once entered into, were treated by the law as sacred. Courts were only ready to enforce them.³ The economic disability was and still is not a vitiating factor. (According to Seagle, there was only one God by the name of contract, and his prophet was no other than Sir Henry Maine.⁴ Maine had been pleased by the fact that progressive societies had moved from status to contract.⁵ Common law obtains in our legal system by virtue of the Judicature Act;⁶ and the law of contract Act of Kenya which stipulates that the English law of contract is our law.⁷ Employment contracts are governed by the common law. Parties enter into a contract on their own terms subject to limitations laid down by the law.⁸

At common law, Judges were prepared to hold that the greater the amount of direct control exercised over the person rendering services by the person who has contracted for them, the stronger the grounds for holding it to be a contract of service.⁹ According to Lord Denning, in a contract of service, a man is employed as part of the business and his work done as an integral part of the business whereas under a contract for services, his work, although done for the business is not intergrated into it, but only accessory to it.¹⁰ The argument is that this intergration test blurs the distinction between contractors and sub-contract, and it must be supplemented with the control test. The relevant question is whether or not the servant habitually works for a particular employer.¹¹ A servant is also entitled to wages so long as he is still willing and is ready to work. This is so not withstanding the fact that he is sick for this is not his fault.¹² A worker cannot be heard to complain of being idle so long as he is paid his wages.¹³

This conceptualisation was necessary precisely because our interest lies in that class of persons who are ready and willing to offer their muscle and or mental power in consideration for pecuniary remuneration. To such, wrongful dismissal bites deep especially in the light of mass unemployment as we shall demonstrate.

(b) The Inherited Mode of Production - A colonial Legacy

On the 12th of December, 1963, Kenya ceased to be a British Colony. The people of Kenya had at all times been opposed to colonialism. The experience of investment, with the foreigner enjoying a somewhat dominant position. As the I.C.D. report has pointed out,

"The estimated share of foreign - owned manufacturing enterprises in the output of the modern

which culminated in the open violence of 1952.¹⁴ True, Kenyans at that time lost a military battle, but won victory politically. Liberal Europeans now embarked on the process of creating rulers in their own image - a situation whereby the Kenyan Africans would be the ostensible rulers charged with the continuance of colonial roles. Africans would then toil for many capitalists instead of one.¹⁵ Ahmed Muhidin observes: "Independence was granted on the basis of the continuation of the system and not on its destruction!"¹⁶ Available evidence lends support to this view. The sessional paper Number 10 on African socialism and its application to planning in Kenya published in 1965 laid down the ground work for capitalistic development. A reputable social scientist commented that it is not socialists who would emerge from the policies outlined in the paper, but hard-headed capitalists.¹⁷ In 1968, an authoritative report produced by the National Christian Council of Kenya confirmed this. Said the report:

"Kenya's economy is growing very rapidly, but the gap between the classes seems to be widening. There is a clear evidence of a few African political and bureau cratic elite who are slowly merging with the commercial elite to form an apex at the top of the social - political and economic elite, while the majority of Africans linger helplessly below the totem pole!"¹⁸ It is our contention that this analysis is still valid. The Kenyan environment is one of private investment, with the foreigners enjoying a somewhat dominant position. As the I.L.O. report has pointed out, "The estimated share of foreign - owned manufacturing enterprises in the output of the modern is the highest by world standards. That means that it is largely composed of young dependants who by the age of 15, proceed to swell the Industrial reserve army."

manufacturing sector is 57 per cent, and even higher for profits at 73 per cent; both shares are believed to be increasing.¹⁹

If we utilize Frantz Fanon's generalised model, the composition of most of African states is as follows: At the apex, we have a tiny sphere group of the representatives of the multinational forms. Secondly, the petty-bourgeoisie stratum consisting of the immigrant communities in those states that have theirs, Africans on the higher echelons of the civil service, commercial and other sectors. The African ruling class rightly belong to this category. They have a lot of faith in modern imperialism, and are its open supporters. We also have the largest section of the population consisting of the peasants and workers exploited by the international capital, and feel cheated by the petty bourgeoisie.²⁰ The argument is that exploitation of the worker is rendered possible and vigorously maintained where unemployment is rampant as we proceed to show.

(c) The Fact of Unemployment In Kenya:-

The ruling class does admit openly that ^{unemployment} is high in Kenya. Speaking to Industrial Magnets in Bonn, President Moi appealed to them to come and invest in Kenya, utilise the available cheap labour, and help solve the unemployment problem.²¹ A permanent Secretary in the Ministry of labour also conceded recently that there is high unemployment in Kenya.²²

At a rhetorical level, unemployment is blamed on automation in industries and that this militates against labour intensive methods.²³ Economists are not agreed. Some argue that our population growth of 3.9 per cent is the highest by world standards. That means that it is largely composed of young dependants who by the age of 15, proceed to swell the Industrial reserve army.²⁴

intention, courts do insert in implied terms. It follows that parties may end up with an agreement they never had in mind. The doctrine also presumes one to have chosen wisely the person he wishes to enter into a contract with; and hence, the equality of the parties. Available evidence denies this. Most of the contracts these days are standard contracts offered on a take it or leave it basis. This is to say, that the economically dominant party habitually sets the obligations of the parties therein while the weaker party only indicates his acceptance by signing it. The legal argument is thus:: Since there is no negotiation, the purchaser or seller lacks free choice and is free to reject onerous clauses; This ignores the fact of their economic pressure ^{which} propel people to enter into contracts. It is tantamount to elevating the stronger to a position of domination,²⁹ for necessitous men are not truly speaking free men.

The argument is that the virtues of the doctrine can no longer be sustained. The doctrine is a mere ploy to the unwary purchaser especially in labour relations, and like its bed fellow that every one knows that law, it is submitted that it must also be laid to rest in the museum of legal curiosities.

(e) The State and the Contract of Service:

Having recognised the explosive situations which are bound to arise when all contractual relations are left to the forces of demand and supply, protective legislations have been passed in the present century to protect the worker from unmitigated exploitation. With the first world war and the second one, together with the accompanying economic crises in the bourgeois world, the state could no longer limit itself to provide for peace, order and machinery for arbitration. It was charged with the duty of revealing the revolutionary potential vigorously.³⁰

to These ideas find room in the employment Act of Kenya.³¹ The Act defines a contract of service as any agreement to employ or to serve an employee for any period of time. This may be by word of mouth or in writing. It may be express or implied. A contract of apprenticeship and indentured learnership also comes within the meaning of statutory contracts of service.³²

The Act requires some contracts to be in writing. These are as follows: Those contracts which amounts to a period of six months or those which have a number of days in the aggregate to the equivalent of six months or more or those which cannot be reasonably expected to be completed within six months. The employee may indicate his acceptance to a written contract of service by signing his name. It would appear from the wording of this provision that the employer has the ability to influence the contents of the said contract. He prints the same and requires the employee to indicate his acceptance by his signature; where upon the contract becomes legally enforceable - this is so notwithstanding that he has not signed, for such a signature is not mandatory.

The Act is conspicuously silent on the status of a person who is to attest where an employee indicates his acceptance. It could be anybody, even one of the employees. The argument is that the employee has almost no freedom of contract. The legislation is out to protect standard form contracts in employment relationship. The standard contracts envisaged by the statute are drawn by a party with more economic muscle, and this party will have all its interests adequately spelt out in the contract. Physical freedom which the doctrine of freedom of contract emphasises ignores the relevant consideration, the economic consideration of the parties. A breach of contract. It amounts to summary dismissal on the part of the employer and it is actionable

unless it is excusable under the law. The learned authors to a contract. Mutunga observes and rightly so that; "Legal relations are fundamentally derived from economic relations. A party's legal rights are his property rights. The legal rules express basic economic factors and interests..... law of contract treats unequals as equals, and although the Kenyan law has tried to mitigate this the fundamental principle still remains."³³

Our major interests is to examine the remedies arising out of wrongful dismissal, and an issue which springs to mind is the definitive aspect of the term wrongful dismissal which we now turn to. It is significant to note that the law of contract is a fact of life.

(g) Wrongful Dismissal: A Conceptual Framework

The meaning of the term dismissal is still a matter of some difficulty and obscurity. This is largely due to the confusion between dismissal and other forms of repudiation of the contract of employment by the employer. Freedland has offered a definition which we shall adapt. Says he;

"The concept of "Dismissal" can be defined as the exclusion of the employee from further employment with the intention of severing the relationship of employer and the employee"³⁴.

It is thus clear that for an act to constitute dismissal in law, two elements must be satisfied - the objective element of the discontinuance of the exchange of work for wages, and the subjective element of the intention to end the employment relationship.

Wrongful dismissal on the other hand covers actions of the employer which the employee may treat as wrongful repudiation of the contract of employment.³⁵

At common law, either side may terminate the contract of employment by giving notice of the required length to terminate the contract.³⁶ Termination without notice is a breach of contract. It amounts to summary dismissal on the part of the employer and it is actionable

unless it is excusable under the law. The learned authors of the "Encyclopedia of Labour Relations Law" are of the opinion that the grounds of summary dismissal by the employer are not yet settled. Members of the bench have concurred in this view. The learned judge McCardie once said:

"The principles governing summary dismissal are but rarely revealed."³⁷

However, as a rule of practice, courts of law always inquire as to whether the conduct complained of by the employer is a fundamental term of the contract or whether the servant has disregarded the essential conditions of the contract of service.³⁸ It is significant to note that the employment Act provides for various fact situations which may justify summary dismissal by the employer. Section 17 stipulates:

"Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee absenteeism without leave, intoxication while on duty rendering him unable to work, performs negligently or wrecklessly, uses insulting language to his superiors, if he refuses to obey a lawful order or command, if upon arrest, is not within four days released on bail or bond or set at liberty; or commits a criminal offence to the employer."³⁹

True, these are fact situations which are open to the investigation and determination by the court, but our argument is that a lot of harm is likely to be occasioned to the employee while still pursuing his rights in the court as we shall demonstrate in the following chapter.

Unemployment is a disaster, whether sanctioned by summary dismissal or by the operation of the invisible market forces. It is a negation of human dignity and equality. The I.L.O. conventions to which Kenya is signatory attest to this fact. Of special interest is convention number 122 of 1964 which declared

thus:

"Considering that the Declaration of Philadelphia recognises the solemn obligation of the I.L.O. to further among the nations programmes which will achieve full employment, and the raising of standards of living, and that the preamble to the constitution of I.L.O. provides for the prevention of unemployment and the provision of an adequate living wage, and considering further all human beings, irrespective of race, creed, or sex, have the right to pursue both their material wellbeing and their spiritual development in conditions of freedom, and dignity of economic security and equal opportunity and considering that the Universal declaration of Human Rights provides that "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and protection against unemployment."⁴⁰

Article I of the convention then adopted the following policy guidelines in an attempt to stimulate economic growth and development, raising levels of standards of living, meeting manpower requirements and over coming unemployment and under development:

2. "The said policy shall aim at ensuring that

- (a) There is work for all who are available and seeking work.
- (b) Such work is as productive as possible.
- (c) There is freedom of choice of employment, and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in a job for which he is well suited irrespective of race, colour, sex, religion, political opinion, national extraction or social origin."

These are highly commendable and desirable ideals dehumanisation of man was had turned into commodity to be bought and sold on the market. He had become episco of equipment to be attached to the machine, tailing with the

which have only found moral acceptance in Kenya. The writer is in total agreement with Sandbrook's view that since 1963 the political aim of taking over the economy became merged consciously and in perceptibly with individual aspirations to take over jobs, life styles and positions which the economy made possible.⁴¹ It is on this premise that the dynamics of our constitution gravitate. The constitution of Kenya provides for the fundamental rights - the right to life, the freedom of movement, freedom from servitude, freedom of speech, assembly and worship and most important, the sanctity of property.⁴² From a close perusal of the constitution, it is evidently clear that whereas the right to look for employment is impliedly provided for, the right to work or to have access to the basic means of survival for instance land is neither expressly nor impliedly provided for. This is unlike the Russian Constitution which declares in no uncertain terms that the right to work is fundamental and in conformity with human dignity and self actualisation. Kenya's case is understandable in the light of its colonial and post colonial history which has greatly influenced its mode of production. The argument is that the capitalist mode of production pursues vigorously the realisation of maximum surplus value arising out of surplus labour, which surplus labour gets the reward of minimum wage. It is further argued that exploitation through the minimum wage is the basis of employment relationship, and that the human aspect of labour is relegated to the demands of capital; and hence wrongful dismissal is not something to be ashamed of Meyer writes thus:

"Marxism considered capitalist society to be the highest stage of human development reached so far. No age had witnessed such mastery by man over the forces of nature. But Industrial civilisation had brought with it the ultimate dehumanisation of manman had turned into commodity to be bought and sold on the market. He had become a piece of equipment to be attached to the machine, toiling with the

speed and rythm imported to him by the machine and being discarded on the scrap heap when he was worn out - capitalist, society was one huge market in which circulated not only dead commodities, but also human labour power, ideals emotions, friendship, love, and beauty."⁴⁴

We shall devote our attention to the various ways of aiding the man on the scrapheap by due process of law. We shall always maintain that the mode of production in a given society be it hunting, food collecting, pastoralism, capitalism or socialism greatly influences other institutions of society like law, religion and educational systemes. Karl Marx put it abundantly clear, and we reproduce his words in verbatim.

"In the social production which men carry on they enter into definite relations that are indispensible and independent of their will; these relations of production correspond to a definite stage of development of their internal powers of production.

The sum total of these relations of production constitutes the economic structure of society - in the the real foundation, on which rise legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political, and spiritual processes of life."⁴⁵

Whether or not the remedies provided by the law which is deeply anchored in property relations are the duty adequate, we proceed to examine in the next chapter. Whether or not the remedies provided by the law which is deeply anchored in property relations are the duty adequate, we proceed to examine in the next chapter. Whether or not the remedies provided by the law which is deeply anchored in property relations are the duty adequate, we proceed to examine in the next chapter.

CHAPTER III

REMEDIES - THEIR ADEQUACY OR OTHERWISE

(b) Types of remedies and their underlying principles:

This chapter examines at length how the law treats a person who without fault is displaced from his means of livelihood. We start by examining the concept of remedies with ~~the~~ respect to wrongful dismissal at common law, the types of remedies and their underlying principles. There after, we shall look at the role of the Industrial Court in the realm of remedies with respect to wrongful dismissal with special members who have found themselves faced with Industrial litigation. The law does not readily presume. They must be alleged

(a) The Concept of remedies in cases of wrongful dismissal:

At common law, employment relationship between the master and the servant were seen in terms of "service and pay"- the employer was under no continuing obligation to employ, but only to pay remuneration accrued due. The employee had no remedy against the employer in the event of wrongful dismissal.

Robinson V. Hindman finally laid down that a wrongfully dismissed worker could bring an action against his employer. In allowing the employer to file such an action, the common law, as it were, recognises the employee's interest in the continuance of his employment and gives a particular legal expression to that interest.³ The ordinary contract of employment according to the judges involved a duty upon the employer to maintain the employment relationship. This duty did not involve the right to provide actual work, but nevertheless, there was an obligation on the part of the employer to employing the employee in the sense of maintaining him in employment. This duty was over and above the duty to pay for services already rendered. In the eyes of the law, parties to the employment contract had a mutual obligation to maintain employment relationship.⁴

(b) Types of remedies and their underlying principles:

For the purposes of labour law and relations, remedies take two principal forms:- damages and re-instatement. The latter remedy is also known as specific performance.

Generally, under the head of damages, we have various subheads. We have general damages which the law presumes to follow from the wrong complained of, and which the complainant or the petitioner need not set out in his plaintiff's pleading. Special damages on the other hand are damages which the law does not readily presume. They must be alleged specifically and expressly alleged in the pleading to put the defendant on notice, otherwise any evidence purporting to establish special damage will be inadmissible and the court cannot award damages in respect thereof. Compensatory damages as the name implies are awarded as compensation for and are rewarded by the material loss suffered by the plaintiff. Exemplary damages on the other hand, are a sum of money awarded in excess of any material loss by way of solatium for an insult or other outrage to the plaintiff's feelings that is involved in the injury complained of, provide that it is committed in such a manner or in such circumstances as to constitute a grave attack upon the dignity of the plaintiff. Customarily, they are given cases of malicious, arrogant or insolent disregard of another's rights. In such a case, the court may take into consideration the defendant's conduct right up to the moment of assessment.⁵

Courts have always been reluctant to give injunctions which in effect would require specific performance of contracts of employment. Judges have always viewed employment relationship as being between two contracting parties whom the law treats as "equals". For an employee to compel an employee to remain in his service, would ^{turn} the contract from that of service to that of slavery. contract had been performed?⁸

The authority for this proposition is De Francisco V. Barnam.⁶ By the same token, it was argued that the employees should not be able to compel employers to keep their services. This was said to be in accordance with the principle of reciprocity and the need to maintain mutual confidence.⁷ This was the common law position which has undergone some modification in the face of modern economic realities.

(C) Assessment of damages at Common Law:

At common law, the measure of damages was of great consequence for it was almost the only measure of protection of security in the job at common law. The general principle underlying the assessment of damages in contract is restitution in intergrum. Basically it means putting the plaintiff in the position in which he would have been if he had not sustained the wrong. The object here being to compensate the plaintiff for damages or loss suffered. The interpretation given to the concept of restitution in intergrum is that of protecting the expectation interest and perhaps to a slight extent the reliance interest. The expectation interest is the interest the plaintiff seeks in obtaining compensation from the defendant in respect of the benefit lost or the detriment incurred as a result of non-fulfilment of the promises made by him. Whereas the reliance interest lies in obtaining compensation from the defendant in respect of benefits lost or the detriment incurred in reliance on the defendant's promise.

The much quoted words of Roche, L.T. in Ebbwvale Steel Iron Coal Company. V. Tew clearly summarise the position in respect of restitution in intergrum. Said he:

" The plaintiff must be placed, so far as money can do it, in as good a situation as if the contract had been performed."⁸

In the leading case of Hadley V. Baxendale⁹ it was finally settled that the damages arose naturally from the breach or that it arose from special circumstances as was contemplated by the parties. A rule about the remoteness of damages.

Restitutio in inter gram is rather restricted. The Court does not entertain any claims in respect to the injury of feelings and reputation while assessing damages for wrongful dismissal. The seemingly harsh position was the holding in the leading case of Addis V. Gramophone Company.¹⁰

Situations which are material in determining the assessment of damages include (a) where damages in respect of loss of earnings are limited to earnings during the period of notice required to terminate the contract. (b) Failure to compensate adequately for the loss of fringe benefits and seniority rights (c) Recovery of damages is qualified by the rules concerning the mitigation of loss, whose application results in the formulation of norms about the extent to which the employee may be expected to be occupationally or geographically mobile as to his employment. (d) There are policy grounds as to the reduction of damages by reason of the incidence of taxation or by reason of other types of collateral benefit."

In Britain it was a widely held view that ordinary Courts were unable to do full justice in disputes relating to master and servant. Most of the decisions relied on by the Courts were out of touch with the needs of the Industrial Society. Yet the unexploded legal view in England is that:-

" ... a proportion of law which forms basis of the decision in a case cannot be held to have lost its force simply because it has become obsolete.

Trade Disputes Act of 1964 established the Industrial court for the purpose of settlement of trade disputes and matters related there to.

It was composed of the president (now called Chairman), one independent member appointed by the minister of labour and two other members of workers combination and the employers combination respectively. The president was appointed by the chief justice of Kenya.

The 1964 Act was superseded by the Trade Disputes Act of 1965,¹⁶ and by virtue of the powers conferred on the President of Kenya by section 9(1) of the Act, the President of Kenya ordered the establishment of a standing Industrial Court consisting of a President (now called Chairman) of the court appointed by Chief Justice, and such other members appointed by the Minister as may be prescribed in the order of whom at least two shall be independent members who shall be Vice-Presidents. Justice Saeed Cockar reported way back in 1966 that the court had a President, two Vice-Presidents and two pannels of ten members representing employers and employees. That the additional members were found to be necessary because of the ever increasing number of trade disputes refered to the court.¹⁷ It is significant to note that when the 1965 Trade Disputes statute re-established the Industrial court, there was no break in continuity as far as acceptance of disputes were concerned. There was no change in the procedure of determining disputes. The president of the first Industrial court was re-appointed by the Chief Justice and has remained in that capacity unto this day.

(e) The Jurisdiction of the Industrial Court

We have underlined that the court was established for the purpose of the settlement of trade disputes in order that industrial peace be maintained, and that workers rights are realised. Section (2) of the Trade Disputes Act defines a trade dispute as

"- any dispute or difference between employers and employees, or between employees and employees,

This simply means that the court must be sensitive to the economic realities that exist in the process that lay down the golden eggs. Section 9 deals separately with the class of remedies. It states that "where the industrial court determines that an employee has been wrongfully dismissed by his employer, the court may order the employer to reinstate that employee in his former employment, and it is submitted that this definition is fairly comprehensive. It covers almost all possible areas of industrial conflict.

According to section 9 of the said Act, the court has no jurisdiction if in its opinion there is an adequate machinery for the determination of terms and conditions of employment in the public sector, if the trade dispute was reported to the minister and 21 days have not elapsed; the dispute is in the process of being determined, use is being made of any of the machinery, the court has not received a certificate from labour commission stating that the minister has accepted the report of the trade dispute and that all available machinery for the voluntary settlement of disputes prior to reference to court has been exhausted and for our purposes:

"Where the trade dispute solely concerns the dismissal or re-instatement of any employee, unless the court has received in addition to the certificate required by paragraph (e) of this sub-section, written authority of minister for that purpose;"¹⁹

Since the court has a duty to promote industrial peace and enhance productivity, section 10 states quite expressly that in the exercise of its powers, it shall be bound by guidelines or other directives relating to wage and salary levels, and other terms and conditions of employment that may be issued from time to time by the minister to the court.

Disputes Act that disputes be settled through the medium of reason and not muscle:

This simply means that the court must be sensitive to the economic realities lest it kills the goose that lays the golden eggs. Section 9(1) deals squarely with the issue of remedies. It enacts that

"Where the Industrial court determines that the employee has been wrongfully dismissed by his employer, the court may order the employer to reinstate that employee in his former employment, and the court may in addition to or instead of making an order for re-instatement, award compensation"

The proviso to the section are to the effect that in a case where re-instatement is ordered, the petitioner only recovers the actual pecuniary loss suffered and where he gets compensation only, he cannot receive more than 12 months monerary wages. Subsection C of the proviso enables civil debts owed by the petitioner to be recovered summarily from the compensation awarded. Sub section 3 imposes a penal fine of 2,000/- to any person without lawful excuse fails to comply with the order of reinstatement for every month or part thereof. Sub-section 4 gives the court discretionary powers to award compensation to the employee for loss suffered due to the failure on the part of the employer to comply with the re-instatement order. This compensation may be the whole fine or such part as the court may think fit. Sub section 5 provides that once compensated, one cannot be heard to say that he wants to bring a suit in any other court in respect of the same wrongful dismissal. The award given is then published in the Kenya Gazette and takes effect from the date of such publication unless it is expressly said to have a retrospective effect.

(f) The position of the court with respect to cases of wrongful dismissal.

We have said that parties to the dispute appeal for the aid of the Industrial court only as a means of last resort, for it is within the spirit of the Trade Disputes Act that disputes be settled through the medium of reason and not muscle;

frank and bold discussions among the parties and that the parties in such noble endeavours be aided by an officer of the state provided by the minister for labour. The state has an obvious interest in Industrial peace and stability.

When a dispute involving wrongful dismissal, arises, the court does not merely contend with adjudging the question of contractual rights between an individual employer and an employee with reference to particular terms and conditions of work. In Kenya Oil workers Union and Gip Ltd, the court still in its early days, was faced with a problem of deciding as to whether or not a Mr. Sayetti was wrongfully dismissed by his former employers - Messrs Agip. The court said this:-

"When a dispute between a workman and his employer regarding the termination of his service develops into an industrial dispute, other consideration apart from contractual rights having a strong bearing upon industrial relations and industrial peace come into play if it is found by the court that termination is in fact founded on misconduct, negligence or inefficiency, the court must find out if the facts support the allegations made against the worker. In cases of dismissal for misconduct, negligence or inefficiency, the court will not however easily set aside the management decision"²⁰

Like the court of equity, he who goes to the Industrial Court must go with clean hands. In the recent case of Kenya Management staff Association versus Nation Newspapers Ltd., the court while rejecting the Associations demands that the respondent do pay a former employee of the company one David Kimani, former personal Industrial relations officer 122,066/25 as compensation for wrongful dismissal. The court reiterated its often stated views on matters of termination or dismissals. Said Judge Cockar:-

"..... it would interfere with a management's decision to terminate the services of an employee only when there is want of good faith and when there is victimisation or unfair labour practice. The court would also interfere when the management has been guilty of

Such subscriptions is payable on the first day of every month. a basic error or violation of principles of natural justice²¹ of twelve months.

Before we look at the remedies which have been granted by the court to members of the Domestic and Hotel workers Union; let us examine the birth, growth and functions of this Union.

(g) A shorth History and Functions of Domestic and Hotel Workers Union:

The history of this particular Union is closely interwoven with the history of trade Union movement of this country. Chege Kiburu, a trustee of Domestic and Hotel workers Union tells us that it was born in 1948. This was against a background of labour unrest which had culminated in the deportation of Chege Kibachia and the subsequent ban of his newly formed Union, African Workers Federation. This had happened in 1947. According to Mr. Kiburu, the then colonial government, acting on the mounting pressure from trade Unionists, had invited a Mr. Patrick from England to come and advise the government and the Unionists on the dynamics and the mechanics of trade Unionism. And that it was solely due to the guidance, assistance and advice of the said Patrick a man he described as "the first open minded European to US on labour movement" that many registered trade unions took shape. Trade unions which owed their origin were nine, and prominent among them was Domestic Workers Union.

Rule Number 3(a) stipulates that Membership of the Union is open to all employees engaged in Hotels, Bars and Restaurants, private homes, clubs, private Hospitals, Educational Institutions, Religious undertakings, University and University Colleges, Bakeries, Sweets and Biscuit making factories including those employed as domestic servants with a proviso that they be above the age of 16. According to rule 3(b) every eligible person pays entrance fee of sh 10 on application for membership and on being accepted a monthly subscription of 7 shillings if he earns below 500 shillings and shs. 10/p if he earns 500/- and over.

Such subscriptions is payable on the first day of every month or in advance of 84/- and 120/- respectively for a maximum period of twelve months.

For our purposes, the relevant objects of the Union are enumerated in rule number 2 which include (a) regulation and improvement of relations between employees and employers engaged in trades specified elsewhere (c) generally to safe guard the interest of the members. (e) To endeavour to provide and seek facilities for members to obtain training in their work, undertake education of members and officials and organize members' co-operative societies; (j) to provide for members benefits in respect of relief in sickness, accidents, unemployment, victimisation or trade dispute and any assistance to member's immediate dependants as agreed by the National Executive Board.²³

We wish to assert that these are noble and commendable objectives and ideals in the workers' struggle towards human dignity. Having said so, we wish to examine the dynamics of the legal machinery which touches a dismissed worker directly; with respect to this Union and other Unions where the principles are the same. We start with the negotiating machinery as provided for by the statute. Section 4, part 4 of the Trade Disputes Act provides for the machinery of reporting, conciliation and investigation of disputes. Where a dispute arises, any party thereof may report to the minister and disclose the parties, nature of the dispute, and the reasons why it arose. There after, it is the duty of the minister, is obligated to consult a tripartite committee—a committee chaired by his representative and which comprises members of the Union and the employers. He then creates a group of advisers who look at the matter, consider it and advice, if in his opinion, the dispute complained of is covered by a collective agreement, or a recognition agreement which have not been exhausted respectively. He may then order the parties to go back sit down and follow the agreements accordingly. We submit that the fact of reporting the dispute to the minister is sound. It lends official support where collective bargaining starts showing cracks. It provides an opportunity of allowing tempers to cool.

The minister may elect to go a step further and set up a conciliation Machinery under section 6.²⁴ This enables parties to come together and continue their own negotiation. Ordinarily, he does appoint a public officer to act as a conciliator. His major work is to chair the meetings and provide guides to the negotiation. The minister may also utilize the provisions of section 7 to investigate the dispute. Investigation, whether carried on by a pannel including representatives of the parties to the dispute or by an independent appointee of the minister is important precisely because it furnishes the minister with a report which he can use to settle the dispute. However, the contents of the report are not binding on the minister, and it is perfectly in order for him to formulate his own alternative proposals.

We cite a trade dispute between the Domestic and Hotel Workers Union and Mater Misericordiae.²⁵

which clearly illustrates the dynamics of investigation with respect to wrongful dismissal. A certain Mrs. Mswaki ~~was~~ was an employee of the said hospital since 1975. She was employed as a cleaner. The management had contended that the reason of the old lady's dismissal was that she had taken 24 days leave instead of 14 days. She was dismissed on 5th of April, 1979, and at the time of dismissal, she was earning Kshs.350/= per month. She was also a widow looking after her children.

The investigator found out as a matter of fact that Mrs. Mswaki was entitled to 24 days leave according to the 1979 leave roster. It was his finding further that there was no letter showing or confirming the leave to be 14 days. Another finding was that her record of performance was clean, and that not a single warning had been conveyed to her with respect to this supposed delay on her part. In fact the dismissal letter was dated 5th April, 1979 and not 24th March, 1979, the day the management expected her to report on duty.

"It is most unfortunate that investigation report
The logical inference here was that for 12 days, the
management knew where she was. The investigator observed
that a proper warning in writing could have been in
order. That Mrs. Mawaki should not have lost her job
the way she lost, and the action taken by the
management was wrong, harsh and unjustified. His
recommendation merits attention. It read thus:

"After careful consideration of the facts in
this case, I recommend that Mrs. Muswaki be
paid six months salary as compensation for loss
of her job, and in addition, she be paid all
her terminal benefits."²⁶

Finally, I appeal to both parties to accept
the above recommendation as a way of settling
the above reported disput."

The dispute in this case had been ^{reported} and the
investigator had been named on the 30th August, 1979.
The dispute was then settled upon the payment of
2,400/= shillings on the 3rd of January, 1980. The
minister's recommendation had come out on 7th of
December.

In this case, it is readily conceded that the
investigator did not drag his feet over the recommendation
as it does happen some times. This was the case in
Domestic and Hotel Workers Union and Izaak Walton Inn,²⁷
where one Michael Kaberenga, an employee, a barman for
the respondents had been terminated from work on
5th July, 1972. The claimants had intervened and the
matter had been subject to investigation carried by
Labour Officer of ministry of labour stationed at Nyeri.
The Industrial Court while expressing its displeasure
at the speed of the investigator and the labour office,
had this to say:-

agreement for having worked in place of Mr. Pinto. The
court found out that he had failed to make arrangements
for transport, and that he had behaved in an insolent and
in subordinate manner towards the head mistress.

"It is most unfortunate that investigation report was not out for a bout a year, followed by another one year's delay before the parties could sign the notification of disputes form "A" referring the matter to the Industrial court. This has resulted in a dispute of dismissal which took place on 2/7/72 being received and registered by the court on 1/8/74. In these circumstances, it is not surprising that both the parties were considerably handicapped in presenting the case before the court. In the event, neither Mr. Kaberenge nor the Respondent's Director who dealt with the matter at the time gave evidence during the hearing."²⁸

The Industrial court while awarding compensation is always guided by what is just and equitable. This is not directly founded on contractual principle of contractual loss. The court takes judicial cognizance of public policy and rules of common acceptability. Let us demonstrate this statement by the case of Domestic and Hotel Workers Union and Kenya High School.²⁷ Here, Mr. Kibicho, an employee of the school whose duties were those of a watchman, and handling matters related to travelling, checking of purchase invoices, assisting the salaries clerk, typing, and other clerical duties, had been dismissed on the grounds that he had let the girls or students go out without the knowledge of school authority, and further that he had failed to make transport arrangements to pick three girls from the German Cultural Centre. The claimants demands were that Mr. Kibicho be reinstated to his former employment without loss of seniority, salary and other benefits. That he be paid acting allowance in accordance with clause 10 of the collective agreement for having worked in place of Mr. Pinto. The court found out that he had failed to make arrangements for transport, and that he had behaved in an insolent and insubordinate manner towards the head mistress.

The major reason as the court found was that he resented being asked to perform the duties of a watchman after having worked as a clerk all these years. The court found out that though Kibicho performed the functions of a clerk in the bursars office notwithstanding that he had been engaged as a watchman, this was for his benefit. He lacked qualification as a clerk in the civil service, and as a matter of fact, he received Shs.815/= p.m. which was more than a watchmans salary. At any rate, the school's benevolence had saved his skin from the consequences of redundancy. Having observed that Kibicho's conduct was intolerable in the circumstances, proceeded to acced to the Respondents offer of settling the dispute said the court:

"After careful consideration of all the submissions, the court finds that the Respondent's offer of paying Mr. Kibicho three months salary, and payment for any leave due and other benefits to which he may entitle to be reasonable under the circumstances and the court awards that he should get the same!"³⁰

The demand for the salary for all the time the employee had been out of employment was rejected. It is not easy to see why the court readily agreed with the Respondents proposals, even the criteria for arriving at three months salary and not otherwise is also unclear. The employee had worked for a period of ten years, at no time had he received any written warning. As a matter of fact, the management had recognised his industry and aptness, and had duly assigned to him further duties which they would have paid for rather dearly. It may be conceded that reinstatement was impracticable under the circumstances, but given that prices have rocketed, that getting another job as a clerk or watchman even though he had managed to pass o level examinations in 1976 was difficult, the court should have considered the time he had been out of employment and other benefits. After all, this is a court of equity.

The headmistress was no angel either, she had shouted at Kibicho and put him where he belonged - the performing as a watchman. This was with intent to humiliate him. It was not bonafide.

The Question of re-instatement:-

The Industrial court like other courts of law is always reluctant to award re-instatement as a remedy. Perhaps, this arises out of the fact that the Trade Disputes Act does not provide any criteria for the determination of when to award re-instatement or compensation. The court therefore has unlimited discretion to determine which of the remedies is suitable in each case. Margaret Otega has pointed out that:

"Usually, employees who have been wrongfully dismissed have asked for re-instatement as looking for jobs elsewhere is not a simple matter, but we find that re-instatement is never always a suitable remedy in every given case and so instead, the court awards compensation"³¹.

It is submitted that whether re-instatement is suitable or not should depend on the total circumstances of the case, and more important, on the nature of the job performed. In a dispute between Domestic and Hotel Workers Union and Family Planning Association Of

Kenya,³² one Gabriel Nyanjui, had been employed in 1972 as a clerk typist and subsequently re-appointed as a clerk store-keeper. His services were terminated on the 26th September, 1977. The Ministry's findings and recommendation were conveyed to the parties on 27th February, 1979. The court found out that the real reason for the termination of Mr. Nyanjui's services was his trade union activities. Therefore, according to the court, he had suffered wrongful termination. However, it declined to award re-instatement on the ground that Mr. Nyanjui had not gone to the court with clean hands said the court:

"Unfortunately for Mr. Nyanjui, his behaviour after being elected as a shop steward left a lot to be desired and this coupled with the various other allegations, though minor which have been levelled against him has made the court to rule that his reinstatement is not warranted"³³

The court then awarded compensation in accordance with ministry of labour recommendation. This included his full salary and house allowance for the month of September, 1977, one months salary and house allowance in lieu of notice, and all his contribution to the superannuation scheme and three months' salary and house allowance by way of compensation for wrongful dismissal that he had suffered. Even so, the court was reluctant to award a substantial amount of money. Judge Cocker said that "since the Respondents are not a profit making organisation, the court is not inclined to award a very heavy compensation either".

That the Industrial Court was established to promote Industrial peace - that is to say good working relations between the parties is indisputable and cannot be over emphasized. The court in exercising its discretionary powers pays great attention to the relationship which existed between the parties before termination, and if in its opinion re-instatements would occasion more hardship, then it orders compensation. This is seen in its pronouncement in the case of Kenya Management Staff Association and Chemelil Sugar Company Limited.³⁴

The court was of the opinion that the hatred that had developed between the claimant, a member of the association, had reached a point where if the employee was re-instated, then only more problems could arise to the detriment of the understanding which is so very vital to the economy. The court is thus concerned with the twin issues of peace in industry and the country's economy.

CHAPTER IV

It follows that where the interest of capital - rights of an individual come into conflict, the economic argument can be utilised effectively to champion the interest of the latter. This further explains why re-instatement is a rare commodity.

The settlement of dispute by the courts also requires maximum and competent handling of such disputes by the parties concerned - especially the unions. The court has at times castigated unions in this respect. In a dispute between the Kenya Timber and Furniture Workers and Kilindini Finishers,³⁵ the court said that unions and employers should know what is expected of them during the hearing of disputes. He described the submissions of the parties as pathetic and said that the dispute was flimsy and could have been solved with the provincial labour officer in Mombasa. This obviously discloses incompetency on the part of the labour officer. Perhaps such incompetency also explains the reason why the investigators take a long time before they make their findings and recommendations. The courts' pronouncement also casts doubt on the performance and diligence of the workers' representatives.

The argument is that since the criteria relating to the quantification of damages for wrongful dismissal is unclear, and that since the court is in most cases disinclined to award re-instatement, it follows that the existing law gives effect to the employers' interest more than a wrongfully dismissed worker. It is quite easy to the employer to get rid of a worker he does not want, and then proceed to settle the compensation which the statute specifically limits to 12 months, notwithstanding the time he has been out of his job, expenses incurred in litigation, and most important, loss of reputation - the stigmatisation of being unemployed. It is precisely for such reasons, that we would like to pay attention to possible areas of reform in the next chapter.

Another absurd provision is that dealing with the absence of the employee from his place of work without leave or reasonable ground. This is subject to abuse.

CHAPTER IV

The case of Analysated Union of Kenya Metal Workers V.Avon Rubber POSSIBLE AVENUES OF REFORM M employee was summar-

rily dismissed by the Managing Director on the aforementioned ground. The evidence adduced at the Industrial Court showed that the employee was a Shop Steward in charge of other workers welfare and at the alleged time, he was actually in the employer's office negotiating on behalf of employees. The court found that he had

(a) The law relating to employment:- not being made here

Nobody denies that employment means money and money is necessary to maintain an individual in his or her station in life. Unemployment in a market economy such as ours thus becomes adreaded cancer that nobody wishes to be associated with. Our duty therefore is to attack the legal problems associated with wrongful dismissal from the root. It is with this view in mind that we examine some provisions of the employment Act relating to summary dismissal which are not only disquiting, but are seemingly obnoxious. The views expressed in this respect are based on the interview which the writer sought and obtained from Mr. William Wahome, Assistant Secretary - General of the Domestic and Hotel Workers Union. He was uncomfortable with section 17 which stipulates grounds for summary dismissal, especially the intoxication clause. In practice, it is the employer who determines whether an employee has rendered himself incapable of performing work properly during the working hours by reason of his intoxication. An employee who is suspected to be so intoxicated is usually examined by the employer's private doctors. Such examination is bound to be devoid of impartiality. It is submitted that present practice militates against the principles of natural justice. Employers should not be allowed unfettered right to prosecute, adjudicate and execute their self-serving acts especially where one's income is involved. It is streviously suggested that a provisim be made for a neutral Medical Board which would ingur whether the employee is sick or whether he is incapable of working by reason of intoxication.

Another absurd provision is that dealing with the absence of the employee from his place of work without leave or reasonable ground. This is subject to abuse.

The case of Amalgamated Union of Kenya Metal Workers V. Avon Rubber Co. illustrates this! The employee was summarily dismissed by the Managing Director on the aforementioned ground. The evidence adduced at the Industrial Court showed that the employee was a Shop Steward in-charge of other workers welfare, and at the alleged time, he was actually in the employer's office negotiating on behalf of employees. The court found that he had suffered wrongful dismissal. The point being made here is that such heavy concentration of power in the hands of the employer is not quite in order. It is likely to be abused, and exercised unreasonably. Dismissal after a court ruling in such cases would be tolerable.

Another section which causes hardship is subsection g., which enables the employer to dismiss the employee summarily where the employee commits or is reasonably and sufficiently suspected of having committed, any criminal offence against the employer. The common justification under this subsection is stealing by servant. It is further suggested that one is presumed to be innocent until proved guilty by a competent court. An employee is entitled to a fair and impartial trial, and if proved not guilty, he should be re-instated and be compensated for the unhappy hours spent in unmeritorious litigation.

Wahome also agreed that Unions also have a role to play in the mitigation of the hardship arising out of this section. In the case of Hotel Workers, he said the Union preaches against drunkenness. It counsels employees, the union members to drink, if they must, during their free time. With respect to other members, it preaches diligence, honesty and obedience to the employers. This is sound policy, and should be encouraged precisely because the legal aid to a wrongfully dismissed worker if any, comes too late and too little.

Basically personal relations and determines when confidence leaves where it resides.

(b) Quantification of damages and Re-instatement

It is not easy to discern the formular used by the Industrial Court in the quantification of compensatory damages in respect to wrongful dismissal. The Trade Disputes Act Section 9A(i)(b) specifically states that compensation shall not exceed twelve months monetary wages. Presumably, this is a disguised form of the doctrine of mitigation in the law of contract where an employee is required as a matter of law to do everything humanly possible to minimise the liability of the employers who is in the wrong. Be it as it may, this position is unsatisfactory. The employee may still be jobless, which is not uncommon in our situation. As mentioned elsewhere, the process of negotiation is sometimes too slow. It is not unknown for files to disappear in the labour offices, neither is it unknown that the officials in the Ministry of labour ¹to delay in the presentation of their recommendations to the parties to the dispute. ² It is thus suggested that the court should determine the period the employee has been out of employment and compensate him accordingly. ³ And where professional negligence on the part of a Government Officer is manifest, the employee should have an action against the state. At present, he has to contend with the bureacratic ineptitude, and wait for the peanuts whose calculation is not only discretionary, but arbitrary.

With respect to re-instatement, the Trade Disputes Act gives the Industrial Court the mandate to order the employer to have the employee back at his job. In addition, it may also order that the employer compensate the employee the actual pecuniary loss suffered by the employee as a result of the wrongful dismissal. The practice of the court indicates something else. The court still subscribes to the old common law faith that employment relations ^{are} basically personal relations and determines when confidence leaves where it resides.

That therefore, it is repugnant to public policy to prop up such relationships. This argument is untenable in modern times, especially in large firms where the absence or presence of the employee may not be felt except for the purposes of remuneration. Macharia has argued that the Act of Parliament gives the Industrial powers of reinstatement. The court should then use these powers to champion the interests of the worker. Such powers are also an important tool in mitigating the absolute powers of the employer.

It is conceded that certain employment relations are incapable of being propped up. Where the relations between accok and his employer ^{turn} sour, the court has its hands tied. Hence ^{the} confidence is so vital. But the court should be able to award a reasonable and favourable compensation in the way underlined above.

(C) The Industrial Court and the use of Precedent.

It is a fundamental fact of law that certainty is the cornerstone of any judicial system. Way back in 1965 during the infancy of the court, there were no settled principles the court could rely on in the adjudication of disputes. According to judge Cockar, it had to start from scratch. But by 1966, precedents had been created.

"And although no two cases are on all fours with each other, and every dispute is settled on its own special circumstances and merits, interested parties can and should get a fairly good line of guidance from studying the awards of disputes." 6 =

The evidence available does confirm the above statement. In cause No.13 of 1965, the court stressed the importance of past decision and said thus.

"This matter was gone into detail by the court in cause No.6 of 1966. The parties to this dispute are advised to go through the awards carefully." 7 =

claims.

This is sound policy, and we agree with Musch that it will not only contribute to certainty, but, it will also provide the court with ample opportunity to build on its own former decisions. The precedents are of immense value to the Unions for they enable them to relate the facts to the law, and thus proceed intelligently and diligently. However, it is suggested that where a party to a dispute cites an award, and the court agrees with him or not, ~~then~~ the court should furnish the parties with specific reasons as to why it follows or refuses to follow the former award in its decision.

(d) Representation of the parties.

Parties to the dispute may appear before the court with or without an advocate. The court has the discretion to allow or disallow such advocates. This is the major thrust of section ⁶ of the Trade Disputes Act. The Union officials at Kiburi House take the view that they are competent enough to fight the industrial battle in the court. Advocates have not been of aid to them. They argue that at any rate, very few advocates are conversant with the law of Industrial relations. Their major ground for competency is their vast experience in dealing with the management and the workers. This is not without merit. When dealing with a sensitive issue like wrongful dismissal, it is sound to approach the issue from the spirit of give and take as opposed to the strict approach of either winning all or losing all. But this is no reason for dispensing with the legal services in the Industrial court completely. Industrial lawyers or lawyers well versed in Industrial relations are of invaluable service. This is important precisely because the management which is in most cases represented by the Federation of Kenya Employers is well organised. It is capable of summoning and unleashing its legal machinery against the weak and legally unrepresented claimants.

In a recent dispute between Kenya Management Staff Association and Agip Kenya Limited,¹⁰ the industrial court judge castigated a witness - one Mutungi for not telling the court the truth. Mutungi who was the claimant in a dismissal dispute had told the court that he joined the respondent firm on March 6, 1967 direct from School. But when counsel for the respondents, Mr. Sangale produced a letter saying Mutungi had worked for the bank, Mutungi said he had worked for only two days. On further questioning about the application he had made for employment with the Agip and a letter from the bank, Mutungi admitted having worked for two years. When the lawyer insisted that Mutungi tell the court the truth, he said he had worked for the bank for 3½ years.

Obviously, this shows lack of adequate preparation on the part of the Union. Unions should always be aware that their claims will not only be hotly contested, but, will also be subject to thorough scrutiny. And that no effort should be spared in fighting it out in the Industrial court. Legal aid in difficult situations should be sought as a matter of course.

(e) How Unions can better the general welfare of their members:

In an atmosphere ^{where} the interests of capital are given prominence as in Kenya, trade unions can be of aid to their members who for any reason find themselves out of employment. This can be done through the institution of workers co-operatives. The government has recognised this aspect of the trade union movement in sessional paper number ¹⁰ ~~to~~ ^{an} "African socialism and its application to planning in Kenya. It states in part that:

"Unions must concern themselves with training programmes, apprentice programmes and worker's discipline and productivity. In addition, trade unions assisted by government should take an active role in organising consumer's co-operatives, generating savings for development, promoting corporative housing development, initiating producer cooperatives and making workers aware of their contribution to the nation." * 25

The General Secretary of C.O.T.U, the apex body to which trade ^{Unions} are affiliated to, in his report of 1979 reports that C.O.T.U. is actively engaged in workers cooperatives as this is another way of helping trade union members solve some of their economic problems.

"Due in part to the backing by C.O.T.U. and its affiliated national unions, savings and credit cooperatives in Kenya now number 510 with approximately 120,000 members, and combined share capital of KShs.200 million. It is estimated that by the end of 1980, share capital will increase to at least KSh.500million." "

This move is highly commendable, and it is hoped that by C.O.T.U. guidance the established cooperatives will steer clear of the malaise and ^Mmaladministration that has eaten most of the cooperatives. It is also hoped that more attention will be focused on consumer co-operatives, and that union members will be actually trained and involved in the daily running of such cooperatives. This will go along way in mitigating the hardship a worker faces in the event of wrongful dismissal with respect to loss of remuneration.

The other important aspect which will go towards mitigating the problems of workers is the increase of the knowledge of union officials. The question of efficiency cannot be over emphasised. The C.O.T.U. worker's education institute was established in October 1974 with the assistance of A.A.L.C. The purpose of the institute was primarily to train Branch Officials and shop stewards in the principles of trade unionism. Courses taught include collective bargaining, Trade Union Organisation, Industrial Relations, Economics, Shop steward Training, How the Industrial court works, and Labour Laws of Kenya. The Institute has also developed

(f) Strike Action

Notwithstanding that strike action which is the ultimate weapon of the union power was outlawed in 1974 by a Presidential decree, strikes do still occur.

The Institute has also developed a Newsletter, "Elimu ya Wafanya Kazi" meaning Education for workers. This contains information about trade union developments within C.O.T.U. and statistical information for the general use of C.O.T.U. and officials of the affiliates. Education by itself is positive. But a fundamental shot coming of this system is that union officials merely receive bare knowledge in various disciplines. It was with this in mind that a labour college at Kisumu was constructed so as to improve through education the administration and operation of unions both at the branch and on the national level. This is a welcome move, though it is still too early to judge of its success.

But in a capitalist economy such as ours, the role of trade unions is sometimes negligible. This is reflected by their history. They took along time to develop whereas employers associations had not only grown, but also gained considerable experience. Traditionally, they have been pre-occupied in the struggle for higher wages, while on the hand, union leaders insist on unfailing payment of subscriptions on the part of union members and voting for themselves huge allowances and other economic perks. It is sandbrooks argument that Trade Unions have been hijacked to the interests of capital. In Kenya, the government has considerable influence over the unions parent body; C.O.T.U. To demonstrate this, the President of Kenya appoints its high ranking officials after the officials of individual constituent unions have elected them. He has not been bound by their choice in the past. The Minister for labour also has a representative on the major policy making bodies of C.O.T.U. while to gain official status, the unions must be registered with the Registrar of Trade Unions which necessitates his approval of the constitution.¹²

* Source: Industrial Relations Section, Ministry of Labour

(f) Strike Action

Notwithstanding that strike action which is the ultimate weapon of the union power was outlawed in 1974 by a Presidential decree, strikes do still occur. Workers have been known to resort to such industrial actions in respect of wrongful dismissal on the part of one of their

Workers have been known to resort to such Industrial actions in respect of wrongful dismissal on the part of one of their numbers. Occasionally, the press does report such strikes. Recently, a local newspaper reported a strike of about 60 workers at Nairobi's Excesior Hotel. The strike was allegedly caused by bad relations between workers and hotel general manager Robert Smith. It was also reported that trouble had been brewing at the hotel for three months, that the general secretary of the Domestic and Hotel Workers Union, Mr. Duncan Mugo had written to the Chairman of the hotel and had asked him to take urgent action to resolve the differences. It was reported further that;

"The workers are also demanding the reinstatement of Mr. Oliver Njoroge, Secretary of the works committee at the hotel. They claim he was victimised because of his union activities." * 26

This is not very uncommon for workers who may reasonably feel that their job security is in jeopardy, generally, statistics indicate that strike activity has continued to decline in the last ten years.

The number of strikes and man-days lost over the last ten years is as shown below.

<u>Years</u>	<u>Number of strikes</u>	<u>Employees Involved</u>	<u>ManDays Lost</u>
1969	124	37,641	87,516
1970	84	18,945	60,761
1971	72	17,300	162,108
1972	110	26,000	141,000
1973	83	15,834	49,053
1974	132	23,157	101,241
1975	25	4,148	9,725
1976	44	12,964	26,248
1977	45	7,288	9,227
1978	46	10,380	20,310

* Source: Industrial Relations Section, Ministry of Labour 1978 publication.

The decline can be explained as follows. First, there is the fact of increasing urban unemployment and secondly, and perhaps more important, the restrictive attitude of the government manifested in the provisions of the Trade Disputes Act.¹³

With respect to cases handled by the Industrial court which has been described by the Federation of Kenya Employers as "one of the pillars of the unique industrial relations system in Kenya,"¹⁴ statistics show that the court still views the issue of reinstatement with propound reluctance.

Classification of cases handled by the Industrial court. Cases involving Terminations/Dismissals.

	1976	1977	1978
i Reinstatement Awarded	2	1	4
ii Compensation Awarded	12	10	6
iii Both Compensation and Reinstatement rejected	4	3	8
Cases involving Termination/Dismissal	36	20	31

* Source: Industrial Court.

Statistics indicate that it is becoming increasingly difficult for a worker to make up a case for his job.

The judge of the industrial court expressed an opinion that he is satisfied with the role which the court is rendering to the nation in the field of development by harmonising relationships between the employers and employees. The employees readily concur and state thus:

"The federations members have continued to co-operate with the industrial court by willingly honoring all its awards."¹⁵

This is not very surprising. No doubt, the Industrial Court Judge is a very able Judge, and a very experienced one. Whenever a dispute arises, he has to proceed aptly and cautiously, high regard being had to the demands of the economy, and special attention being paid to the Regulations of Wages and conditions of Employment Act.¹⁶

The Act establishes minimum wage fixing machinery and procedures to be followed. Section 4 specifically empowers the minister to appoint a General Wage Advisory Board, fix basic minimum wage and other conditions of employment in respect of employees generally or in other specific areas. The argument is that a judge is basically in the service of the ruling class who have the instruments of power that is to say, the police, Army, prison and the courts at their command. At any rate, a judge's opinion is greatly influenced by his upbringing, education, and in a stratified society such as ours, his class position.¹⁷

True, The Trade Dispute Act does not specifically outlaw the strike Action, but its provisions are out of touch with the world we know, so that in practice, legal total withdrawals of labour are very rare indeed. Under the said Act, the Minister has power to declare any strike illegal if the Union has not exhausted the voluntary machinery for dispute settlement. The Government's repugnance to strikes for whatever reason is manifest in its policy paper - Sessional Paper No.10 of 1965. The paper states in Part:

"Strikes cost the nation output, the workers wages, the Companies profits and the Government taxes. Wages in excess of those warranted by productivity increase the unemployment, encourage the substitution of capital for labour, and lead to bankruptcies. In order to avoid these drags on development, legislation will be needed providing for the compulsory arbitration of major issues not resolved through the regular bargaining process.

Special legislation may be needed in sensitive industries and the Government to avoid the economic paralysis that could result from work stoppages in these areas."¹⁸

The argument is that since Trade Unions are the only vehicles through which the workers can match the massive power of capital, it is perfectly in order for them to summon all reasonable means including the traditional weapon to make the adamant employer come to his senses; and there for, the illegality provision in the Trade Disputes Act should be given a very liberal construction.

(g) Non-Unionised workers who would otherwise come within the ambit of Domestic and Hotel Workers Union.

It is common place knowledge that many workers enter into contracts of service; but have no access to the union machinery. This waiter was reliably in-formed by Mr. Wahome that the kind of domestic worker whom the union caters for is that employee employed in a person's home by an individual to serve in any or all of the following capacities - that is to say cooking, cleaning a house, making beds or taking care of the compound. In this last cartegory come those who are traditionally referred to our "Shamba Boys." The same authority proceeded to define a hotel worker for the purposes of the union as any employee employed in a hotel or a lodge to serve the guests - and includes waiters, cleaners, shambaboy, and security officers. Employees must be above the apparent age of 16 to qualify as members of the union. It is manifestly clear that most of the people employed as Ayahs, maids or house boys, the majority of whom are below the stipulated age have no representation. Most of the people serving in the mushrooming eating houses, snack houses and fish and chips shops in Kenya's towns have no access to union representation either.

Most of those exempted, especially the maids or house servants even above the apparent age of 16 do not know of the existence of the union, or even if they happen to be in possession of such knowledge, it has been argued that the nature of their jobs, and their station in life militates against their access to unions.²⁰ They fear that any attempt to enter into a union will be met by aprompt dismissal from their employers who are hostile, to unions for obvious reasons.

This position has very serious consequences. The worker is subject to all manner of exploitation and is exposed to job insecurity. Many cooks, house maids, Ayahs and others in such related jobs are not even protected by the Regulation of wages and conditions of Employment Act. Very few, if any, have ever had of the legislation. Most of them work for very long hours, are not entitled to holidays, and our remunerated below the minimum wage - their wages ranging from 80 shillings per month to 250 shillings per month. It is high time that the Domestic and Hotel workers Union extended its arm to their flock languishing in the ditch.

It is also interesting to note that field inspectors from the Labour Department of the Ministry of Labour hardly visit these workers at their places of work to ascertain whether or not the statutory minimum rates are in fact being paid;²¹ in furtherance of healthy Industrial relations. It is strenuously suggested that the machinery for enforcement of this noble piece of legislation should be strengthened.

(h) Conclusions:

We appreciate the fact that our legal regime recognises that in a market economy such as ours, workers are conditioned to wages, salaries and other forms of remuneration in exchange of labour which may be mental or physical. That it is by such remuneration that a worker orders his life, for he has no other means of production except his labour. It is on this premise that security in his job is of paramount importance, and when it is tempered with, then the legal machinery should be mobilised and provide adequate remedies accordingly.

We have delved into the history of labour law in this country, and the glaring truth there in is that labour laws were of uncton of property relations specifically designed to serve the interests of the then British Government. These interests were no other than economic interests. Under colonialism, Kenya's traditional roles took shape, were strengthened and consolidated quite effectively. On the otherhand, simple commodity production economics which obtained in pre-colonial days were mercilessly dismantled and peasants were disinherited from their land and herded to plantation farms by outright force and by subtle legal manipulations. While on the farms, they were left with no freedom. When one examines the sum total of colonial labour legislation, one comes to an inescapable conclusion that at the early stage of colonialism upto around 1920's, workers were no better than serfs and in most cases slaves of the in settler Masters. This is not strange, History records that capitalism is violent at its infancy. It then followed that for the broadmasses of the workers, dismissal was unknown under colonial law. At any rate it would have come as a sigh of relief.

But capitalism is not static. At the time of Independence whose price was blood, arising out mostly from the open violence of 1952, Kenya was faced with a diminishing workforce. The traditional economy became antiquated for the purposes of the modern monetary economy. Jobs thus become rare commodities, and the employer-employee relationship are abandoned to the invisible forces of supply and demand. The fact of high employment whose evidence we have provided in chapter two necessitate some legal protection for the worker who as we have shown is not only a weaker party when it comes to entering into contracts of service, but can at any given time get marching orders to join the class of the unemployed who constitute the majority of our population.

We then proceeded to examine various forms of remedies under the law - that is to say remedies available to such a wrongfully dismissed worker. We relied heavily on the Industrial Court remedies namely compensation and reinstatement and discovered that the formula used by the court in the computation of compensatory damages is unclear. The court has a lot of discretion as provided for in the Trade Disputes Act. It is not easy to understand how the court exercises its discretion so that one is unable to predict correctly the amount of money one would get within the stipulated 12 months period a worker remains out of his employment. Considering that the parties only resort to the court as an act of final resort, and further that at times the investigation machinery is rather slow, and that all this time, the worker actually incurs expenses with regard to protracted litigation, compensatory damages amount to peanuts.

However, it is our considered opinion that the reforms in the existing legal machinery do not go to the root of the matter. That is the right to work or its lack thereof. We recognise that the present economic base which is a capitalist mode of development is in no hurry to reform. We argued that this may be so depending on the nature of the work performed. But where, like in the majority of cases, the employer hardly meets the employee except for the purposes of remuneration, it is sound in law and in principle to reinstate the ^{worker} ~~worker~~ ^{Kenya} ~~worker~~ ^{to} ~~his~~ ^{his} ~~entitlements~~ ^{entitlements} without any qualification or diminution of his entitlements.

In Chapter four, we have attempted to explore ways of reforms in an attempt assure the worker not only his job security, but to assist him with financial or even occupational aid if and when he finds himself on a scrap heap. We have suggested that the provisions relating to summary dismissal in the Employment Act be deleted and that provisions which reflect the present economic and social realities be enacted forthwith. We have also contended that Trade Unions should now pursue hotly meaningful longterm economic interests as opposed to the traditional wage interests. In the words of Tom Mboya:

"When a worker in addition to a wage interest knows that his trade union is also a profit making agency for himself, and a source of security for his family, the association is much deeper."²²

This is a noble ideal, but we must also recognize financial, and organisational constraints which affect the bulk of our unions.

"Internal constraints on the power of unions are also considerable, in addition to financial constraint. Hardly any service other than bargaining and grievance handling are offered by the union officials. Invariably, the General Secretary of the union is the only full-time paid official, and together with his part-time colleagues, he confronts a well organised employer or group of employers combined in a trade association for negotiation."²³

We can only hope that C.O.T.U's efforts in this regard will bear fruit.

However, it is our considered opinion that the reforms in the existing legal machinery do not go to the root of the matter. That is the right to work or its lack thereof. We recognize that the present economic base which is a capitalist mode of development is in no hurry to retire. The reform measure fit in Marx's analysis of bourgeois jurisprudence.

PREFACE 62. FOOTNOTES

1. Charles Gregory in "Labour and the Law" at p.18
 states "Your very ideas are but the outgrowth of the
 conditions of your bourgeo's production and
 bourgeo's property. Just as your jurispru-
 dence is but the will of your class made law
 for all. A will whose essential character
 and direction are determined by the economic
 conditions of existence of your society."²⁴

We therefore conclude that Justice cries for
 the reform of the economic and social conditions of
 the majority of Kenyans, for law is nothing but
 areflection of peoples property relations.

and legal departments of our social
 community have been devoted chiefly to
 insuring the integrity of property, and
 to maintaining the complete freedom of its
 use. In so far as government or any sub-
 stantial part of the community has attempted
 to modify this institution of property it
 has always failed unless it could overcome
 determined opposition through great political
 superiority. This leaves out of account
 naturally the recourse to violent organised
 revolution, technique for the eradication
 of established - social institutions, well
 known in History, but still unknown for that
 purpose in our country."

The said quotation falls on all fours to the Kenyan
 situation.

2. Kahn - Freund - Labour Law

PREFACE: FOOTNOTES NOTES

1. Charles Gregory in "Labour and the Law" at p.18 states:

"An analysis of Labour problems and labour law may be made in terms of the institution of property. Certainly, the ownership and control of property has traditionally implied economic and political power over others. The political, constitutional and legal departments of our social community have been devoted chiefly to insuring the integrity of property; and to maintaining the complete freedom of its use. In so far as government or any substantial part of the community has attempted to modify this institution of property it has always failed unless it could overcome determined opposition through great political superiority. This leaves out of account naturally the recourse to violent organised revolution, a technique for the eradication of established - social institutions, well known in History, but still unknown for that purpose in our country."

The said quotation falls on all fours to the Kenyan situation.

2. Kahn - Freund Labour Law

1. Karl Marx, Capital, London, Allen and Unwin, 1946, at p.147
2. Communications from S. Fichart of the Principal Settler Organisation, to Soddler the Governor, 5th March 1906, cited in R.D. World,
3. Irungu "The Evolution of Labour law and Relations in Kenya L.L.B. Dissertation"
4. Labour circular No.1 23rd October 1919
5. Ordinance 4 of 1910

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8. Hydon op.cit at p.64
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21. Karl Marx, Capital, London, Allen and Unwin, 1946, at p.147
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25. Ordinance 4 of 1910
26. Hut Tax Regulations No.18 of 1901
27. Hut Tax ordinance of 1903 and 1907
28. Hut and Poll Tax ordinance 1910.

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- 29. Okoth - Ogendo "African Land Tenure Reform in Agricultural Development in Kenya.
- 30. Mbiyu Koinange V.R. (1951)24(2) KLR 130
In this case, an administrative officer used rules to limit classes of people to grow coffee. The court decided in favour of Mbiyu Koinange holding that the rules were intended to delimit areas within which coffee could be grown.
- 31. Resident Native(squatters) ordinance of 1918, No.33.
The ordinance destroyed all the rights on African labourer had on land by reason of histenancy.
It smacked of senfdom.
- 32. Employment of Native ordinance, 1919
- 33. Section 48(1) Ibid
- 34. Section 48(2) ibrd
- 35. Section 48(5)ibrd
- 36. Master and Servant ordinance, No.8 of 1906.
- 37. (1910) 2.E.A.L.R. p.63
- 38. Native Registration ordinance of 1919
- 39. N. Leys, Kenya suppra p.99
Irungu op.cit, records that the ordinance was a success. Of the 359 dessenters reported during 1921, 77 percent were traced and duly punished. The number of dessenters soon fell.
- 40. (1906) 2 E.A.L.R. p.22
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- 21. Daily Nation, February 14, 1980.
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21. Daily Nation, February 14, 1980.
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