

# LEGAL DIGEST SPRING 2019

## Preamble

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The Legal Division continues to discharge its mandate to keep the university informed on topical legal issues. This is done on a quarterly basis through the Legal Digest: the Digest is a brief analysis of the latest developments in the legal and regulatory landscape with emphasis on the impact of the said developments on the University as a corporate entity as well as on its constituents as citizens and/or residents in Kenya. It is worth noting that the Courts have been instrumental in shaping the legal scene by rendering decisions that keep not only Parliament in check but other government agencies as well. This was recently demonstrated in the case of the NGO Coordination Board where the court restated the right of freedom of association of gay and lesbian persons in Kenya. Another apt example is the petition filed by the Kenya Human Rights Commission (KHRC) against the collection of personal information under the NIIMS system which has generated a lot of debate on the right to privacy and data protection. The Judiciary, in this sense, has justly been keen on discharging its role as the implementer of the law.

The Digest is arranged into 3 sections. In the first section, we examine Acts of Parliament. The second section reviews the changes in the regulatory and legislative environment by examining pending Bills while the third section looks at court decisions. In each of the sections, there's a brief summary of the impact of these developments on the university or its constituents, where applicable.

Happy Reading!

## A. Acts of Parliament

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### 1. Statute Law (Miscellaneous Amendments) Act No. 18 of 2018

This Act was assented to on 31<sup>st</sup> December, 2018 and commenced on 18<sup>th</sup> January, 2019. The Act makes amendments to various laws including the Universities Act No. 42 of 2012. The Act amends section 35 of the Universities Act by restructuring the processes and procedures for appointment of Vice Chancellors, Deputy Vice Chancellors, Principal and Deputy Principals of public universities. Previously, the University Councils interviewed and made recommendations for appointment of persons to these positions, but this role has now been shifted to the Public Service Commission of Kenya. This is due to the fact that the process of appointment of these senior officials in public universities has lacked transparency, evidenced by the disputed appointment of

the Vice Chancellor of Moi University in 2017 and Deputy Vice Chancellors in University of Nairobi in 2018.

The Act provides that in the case of public universities, appointment of Vice Chancellor, Deputy Vice Chancellors and Principals and Deputy Principals of Constituent Colleges, will be done by the University Council in consultation with the Cabinet Secretary, after a competitive process conducted by the Public Service Commission.

**Impact:** This law is not applicable to private universities such as USIU but underscores the importance of transparency and accountability in appointment of senior officers in Universities which is a principle that applies across the board in both public and private universities.

## **2. Energy Act, 2019**

In March 2019, the President assented into law the Energy Bill 2017. The Energy Act 2019 sets out to consolidate the laws relating to the various sources of energy in Kenya and to define functions allocated to the National and County governments regarding the resource.

The law repeals the Energy Act, the Kenya Nuclear Electricity Board No 12 of 2006 Order, 2013 and the Geothermal Resources Act and further, establishes the Energy and Petroleum Regulatory Authority, the Rural Electrification and Renewable Energy Corporation and the Nuclear Power and Energy Agency. The Energy and Petroleum Regulatory Authority will be mandated to regulate generation, importation, exportation, transmission, distribution, supply and usage of electrical energy with the exception of licensing of nuclear facilities. The Rural Electrification and Renewable Energy Corporation shall be responsible for among other things to oversee the implementation of the Rural Electrification Programme, manage the Rural Electrification Programme Fund and also source for additional funds for the Rural Electrification Programme and renewable energy. The Nuclear Power and Energy Agency will under the new law be mandated to propose policies and legislation necessary for the successful implementation of a nuclear power programme.

**Impact:** The Act provides for the licensing of other electricity distributors and retailers in a move that aims to increase competition and improve the quality of service. This is especially from the recognition that electricity distribution and retailing is monopolized in Kenya by state corporations, hence at times compromising on the quality of the services delivered to Kenyans. Competition in the sector could also result in competitive prices for consumers which would be a step in the right direction, particularly for USIU as a corporate: our current expenditure on electricity is Kshs. 80 million per annum.

### **3. Petroleum Act, 2019**

The Petroleum Bill was assented into law (Petroleum Act) by the President in March 2019. The Act repeals the Petroleum (Exploration and Production) Act (Cap. 308) and provides a framework for contracting, exploring, developing and producing petroleum, providing a much-needed update to the law governing the petroleum sector given the discovery of oil and gas reserves in the country that necessitated setting out of parameters related to development of these resources. The new law would also be used to formulate national petroleum policy and conduct petroleum operations. It will be a reference point in the establishment of petroleum institutions. Under the new law, the national government, county governments and local communities shall receive a fair share of benefit from revenues emanating from petroleum operations. A county government is to receive a share equivalent to 20% of the national government's share while local communities will receive a share equivalent to 5% of the national government share.

**Impact:** This law has the most impact for Turkana residents where oil was discovered as it addresses the issue of contracting, exploring, developing and producing petroleum in the country. It explains how revenue from oil ought to be shared. The law however also impacts the rest of the country which is supposed to benefit from the proceeds of the oil exploration. It is important for the law to stipulate revenue sharing because without it, there is bound to be conflict, like that witnessed in oil producing countries in Africa such as Nigeria and Sudan.

## **B. Bills (Proposed laws)**

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### **1. The Law of Contract (Amendment) Bill, 2019**

The principal object of this Bill is to amend section 3 of the Law of Contract Act, Cap. 23. It proposes to amend the law so that in case of a default by the principal borrower, the creditor should first realise the assets of the principal borrower before proceeding to realise the assets of the guarantor.

**Impact:** This amendment in the Law of Contract Act seeks to safeguard the rights of a guarantor in a contract for a loan facility. Previously a guarantor was treated in the same way as borrower which made many shy away from guaranteeing loans. However this Bill is set to change that position, which will especially impact those who borrow loans from Saccos which require guarantors.

## **2. The Institute of Directors of Kenya Bill 2019**

The objective of this Bill is to establish the Institute of Directors of Kenya. The Bill provides for the registration and regulation of their conduct. The Institute is to issue certificates of registration to its members annually as a form of quality assurance to the public bodies, entities, enterprises and companies on whose boards its members are to be appointed.

It will be noted that the Institute of Directors Kenya was set up in 2004 as an initiative of the Centre for Corporate Governance (the Centre is a company limited by guarantee which was established by a private sector initiative for corporate governance in 1999 to foster the highest standards of corporate governance and excellence in all types of corporations) as a membership organization of practicing and aspiring directors drawn from both the private and the public sectors of the economy. The government now wishes to establish the Institute of Directors of Kenya as a state corporation through the Bill.

**Impact:** The Institute of Directors of Kenya exists to represent Kenyan directors and to advocate for their interests, the Bill expounds on this role of the Institute. The University does not have a Board of Directors but the University Council, which is its equivalent, the university can therefore borrow from the provisions of the Bill on regulation of Directors. Under the Bill, the Institute is supposed to come up with a code of conduct for Directors which would be a useful tool for all types of boards both in private and public sector.

## **3. The Persons with Disabilities (Amendment) Bill 2019**

The Bill proposes to bestow upon the County Executive Committee Member for the time being in charge of matters relating to persons with disabilities the responsibility to advise on and put in place measures to ensure the socio-economic development of persons with disabilities in the county. The Bill further proposes to review the membership of the National Council for Persons with Disabilities in order to make the workings of the Council more efficient and representative.

**Impact:** It will be important to interrogate the provisions of this Bill, to see how some of the proposals can be implemented at the University in view of the fact that the University is now seeking to recruit a Principal Officer-Differently Abled and Special Needs Office. Some of the roles bestowed upon the county executive committee which can be adopted by the University for the Differently Abled and Special Needs Office include:-

- i). Advising on the appropriate measures and interventions to be put in place for the protection of persons with disabilities in the county;
- ii). Developing mechanisms for the identification of persons with disabilities;

- iii). Establishing a database of persons with disabilities residing within the respective county containing the following information regarding the persons with disability- the name, age and place of residence of the person; the type of disability of the person; the education level of the person; the health needs of the person; the employment status of the person; and any interventions made in relation to the person;
- iv). Coordinate programs on- awareness creation; provision of assistive devices and services; accessibility and reasonable accommodation; employment; preferential procurement; health and education of persons with disabilities.

#### **4. The Employment (Amendment) Bill, 2019**

The proposed amendments, if/when passed will effect these changes to the Employment Act:

The phrase ‘piece rate work’ is removed from the definition of a casual worker since a piece rate worker is paid in accordance with the amount/units of work done. Such a worker is not considered a casual employee since a casual employee is one who is paid at the end of the day and who is not engaged for more than twenty-four hours at a time.

Employee is defined as ‘a person works in the service of the employer under an express or implied contract of service, under which the employer has right to direct and control the details of work performance and excludes contract for services.’ The previous definition read ‘an employee means a person employed for wages or a salary and includes an apprentice and indentured learner’.

The lengthy definition of a labour officer, which detailed persons/offices appointed to act as labour officers is deleted in favour of the simpler ‘a labour officer means a person appointed as a labour officer’.

Aligning the definition of ‘disability’ with that found in the “Persons with disability Act, 2003.

‘Contract of service’ is described in the Act as an agreement, whether oral/written/expressed/implied, to employ one for a period of time, and includes a contract of apprenticeship & indentured learnership but does not include a foreign contract of service. The Bill proposes adopting this definition ‘an agreement for a specified piece rate of work’.

Newly introduced definitions:

‘Part-time employee’ means an employee whose normal hours of work, are less than the normal hours of work of a comparable full-time employee and who is not a full-time employee with reduced hours.

‘Term contract’ means contractual relationship between an employee and an employer for a specified period. i.e. ‘fixed contract’.

‘Overtime’ means any hours of work in excess of the normal hours of work.

Replacing ‘Minister’ with ‘Cabinet Secretary’ and giving proper monikers to armed units of the Kenyan police/army in accordance with Article 244 of the Constitution.

The fine for forced compulsory labour is amended to 5years imprisonment and not just 2.

An employer is disallowed from employing a foreign national whose residency status has not been regularized as per the Kenya Citizenship & Immigration Act or other relevant laws.

Employers with more than 5 employees will be required to put in place a Sexual Harassment Policy, this previously applied for employers 20 or more employees.

Amendments propose voiding of any clause in a contract of service whose effect is to restrict an employee from using knowledge and skills gained during employment upon termination. However, a clause prohibiting disclosure of confidential information for a reasonable & specified period of time is lawful.

All employers will be mandated to have disciplinary rules & procedures. The Act only mandates this for those with 50 or more employees.

Introduction of rules on transfer of undertaking, ensuring that employees of the transferred business automatically become employees of the transferee.

The present Act only deals with death of an employee, the amendments recommend that where an employer dies, the employees will be considered terminated on account of redundancy.

Employers will be required to provide transport, safety equipment, security etc. for employees working at night, i.e. 10 pm to 6 am. Such an employee will have a right to be transferred if it’s proven that the night work has adverse effects on his/her health.

Employees will be allowed to apply for flexible working hours which an employer may only deny if it proves impractical to reorganize work duties to accommodate the request. The bill specifies grounds under which an employer may reject a flexi-hour request. The Cabinet Secretary may gazette regulations to govern this provision.

Leave: To afford pre-adoptive leave to parents who apply for the adoption of children who are not their natural children born to them by birth. The Bill seeks to provide for pre-adoptive three consecutive months leave to prospective adoptive parents who unlike their counterparts who are accorded three months leave when they naturally bring forth a child are not provided with an opportunity to bond with and understand their new child.

One month maternity leave will be issued to mothers who have stillbirths; and two months leave for parents of children born via surrogacy. 10 days leave for employees enrolled for a course in a recognized learning institution and sick leave increased to 30 days with a further 15 days half-pay.

Reasons for dismissal must be written and the new rate for tabulating gratuity is 15 days’ pay for each year worked. Suspension pending investigations is limited to 14 days. A retired employee must be issued with a certificate of retirement. The Bill recognizes constructive dismissal caused by an employer who creates an intolerable working environment.

**Impact:** Including the phrase ‘piece rate of work’ in the definition for contract of service will cause further ambiguity. However, distinguishing a piece rate workers with casual workers is important since casual workers have entitlements from the employer; meanwhile a piece rate worker is under obligation to produce/complete the units of work agreed upon – regardless of time taken to do so.

It is also important to note the inclusion ‘part-time employees’. This characterization offers employers a wider range of services they can seek while remaining legally compliant e.g. hiring a person to work for reduced hours, giving another specific work to do (piece rate), contracting for specific rate/unit of work etc.

The Bill proposes that while employees may work overtime, they cannot work more than 12 hours a day. Employers would need to comply and monitor their employees to ensure this provision is not violated.

The employer’s duty to ensure its foreign employees obtain work permits has been re-emphasized. The sexual harassment policy requirement being lowered to 5 employees also shows the wave shifting to take such cases more seriously.

Employers would be prohibited from restricting an employee from using/possessing knowledge and skills gained during employment upon termination. However, they can prohibit disclosure of confidential information but they must specify a reasonable period of such prohibition. Non-compete clauses are presently enforced via the Contracts in Restraint of Trade Act, the amendment would void provisions of that act.

The rules on transfer of undertaking will protect employees in the event of a business transfer, ensuring employees do not lose their experience or rights. Additionally, transferors will be mandated to consult affected employees beforehand.

The inclusion of pre-adoptive leave, surrogacy leave, stillbirth leave, education leave, increase of sick leave and introduction of flexi-work hours are exciting proposals which is passed will improve the quality of workers’ lives and mental health. It is not clear whether this Bill takes into consideration the earlier Bill (2015) on when adoption order is given by the High Court. If the 2015 Bill is also passed into law then it means an adoptive parent will be entitled to leave twice, the pre-adoptive leave and adoptive leave, which would prove disruptive for employers. However if the 2019 Bill is passed into law, employers have to comply and amend their Human Resource Policies accordingly.

The bill was gazetted for public opinion/participation in April 2019 and shall thereafter be tabled before parliament for discussion.

## 5. Industrial Training (Amendment) Bill 2019

The Bill proposes to make amendments to the Industrial Training Act Cap 237. The Bill proposes to have the Commissioner General of KRA as the person in charge of collecting training levies from employers. Under the Industrial Training Act this role is given to the National Industrial Training Authority (NITA). As it is presently, NITA is unable to properly exercise this function as it has no proper mechanisms for collection of the training levies. The Bill proposes to have the training levy of Kshs. 100/= per employee paid at the time the employee's salary is payable and the same shall be remitted not later than the 5<sup>th</sup> day of the month following the month when the levy falls due. The provisions of the Income Tax Act and the KRA Act on assessment of levy, filing returns, penalties for non-payment and record keeping shall apply to the collection of the training levy by KRA. The Bill proposes to distribute the levies collected thus:

- i). 60% -reimbursement to employers for training costs incurred including costs and wages of interns;
- ii). 20%-for funding establishment and operation of technical and vocational education and training institutions;
- iii). 10%-to the Higher Education Loans Board (HELB) for funding training of students in TVET institutions ; and
- iv). 10% -for such other expenditure related to training as the National Industrial Training Board may approve.

It is however not stipulated if the amount collected in the Training Levy Fund will be made public especially to employers who will be the contributors. This is because if employers are supposed to get 60% of the total amount, it will not be ascertained whether the amount they receive is actually 60% or less. It is also not stated whether all the employers will receive the same amount regardless of the size of the organization.

**Impact:** The Bill if passed into law will see the cost for employers rise as the Bill stipulates that 100/= has to be paid for each employee and the levy will not be deducted from the employees' salary. The University should be keen on following this proposed amendment as there will be need for budgetary allocation for this function.



## **6. The Breastfeeding Mothers Bill, 2018**

This is a National Assembly Bill that proposes an enactment of legislation, to make provision for the breastfeeding mothers; to provide for employers' obligations towards breastfeeding working mothers in the workplace; to provide for baby changing facilities for use by the public; and for connected purposes. The Bill provides that every employer shall establish a lactation place where mothers can breastfeed, the lactation places ought to have, among others, a fridge for storing expressed milk, be private with a lockable door. The Bill stipulates that an employer who does not comply with this provision shall be guilty of an offence and be liable upon conviction to a fine not exceeding 500,000/= or to imprisonment of not more than a year or both. Under the Bill, an employer also ought to have a baby changing facility and a reasonable break for mothers to breastfeed.

It will be noted that in 2017 there was a similar Bill which was not passed into law. The 2018 Bill has however improved on the 2017 Bill by adding the provisions on flexible working hours for a breastfeeding mother. The flexible working arrangement will include: the number of hours the employee is to work, the type and number of assignments and the exact location of where the employee is to work.

**Impact:** If this Bill is passed into law, USIU, as an employer will be keen to comply with the provisions so as not to incur penalties. Even if the Bill is not passed into law it will be important to implement the proposed changes as they reflect best practice which has been already adopted by some companies. It will also be noted that if the Bill is passed into law there may be cost implications on implementation as the lactation stations and baby changing facilities will require to be constructed.

## **7. Kenya National Blood Transfusion and Organ Transplantation Bill**

This Bill is yet to be tabled before Parliament and is still under review by experts. The Bill, if successful, will permit organ donation upon death. The Bill will help operationalize the Health Act (No. 21 of 2017) which already permits Kenyans, either via a written will or an oral statement, to donate their bodies/body parts upon death.

**Impact:** The Bill will make it the default position to harvest organs from cadavers, especially where the deceased did not leave explicit instructions against donation. This will positively impact the close to 4,300 Kenyans undergoing dialysis in 151 centers across the country (according to NHIF). Kenyatta National Hospital completes 15 transplants a year against the 2,000 Kenyans who

are on the waiting list for transplants. There could also be negative impact by the Bill as the same might encourage harvesting of organs for the black market.

## C. Hot from the Bench

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### 1. Republic v National Hospital Insurance Fund Board of Management & Another Ex Parte Law Society of Kenya [2019] eKLR

The NHIF Board, through its Chief Executive Officer issued a directive/notice that it shall no longer recognize and accept Affidavits commissioned by qualified Advocates showing proof of marriage. This therefore has led to such Affidavits being rejected unless they have been commissioned by Magistrates. The LSK moved to court to seeking Judicial Review Orders of Certiorari to quash that directive, Mandamus to compel the Respondents to accept Affidavits of marriage commissioned by Advocates and Prohibition forbidding the issuance of further similar unlawful orders. Justice Mativo allowed the application by the LSK and granted an order of Certiorari to quash the directive issued by NHIF disregarding marriage affidavits commissioned by Advocates and an order of Mandamus compelling the NHIF to accept affidavits of marriage commissioned by Advocates. The court found that NHIF had acted outside their legal mandate because a proper construction of the impugned decision and the NHIF Act as read together with the clear provisions of the Oaths and Statutory Declarations Act show that the impugned decision was tainted with illegality and could not be read in a manner consistent with the enabling statute.

*Impact:* A person can now go to an Advocate who is a Commissioner for Oaths to commission an Affidavit of Marriage; one does not have to go only to a magistrate for commissioning as earlier directed by NHIF. It will however be noted that the AG had already issued a directive stating that all marriages should be registered and Affidavits will no longer be sufficient proof of marriage.

### 2. Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019] eKLR

In this case the NGO Coordination Board appealed a decision of the High Court which had allowed the Petitioner, Eric Gitari, to register an NGO whose main objective would be advocating for the protection of rights of gay and lesbian people. The NGO Coordination Board was arguing that homosexuality is outlawed under the Penal Code of Kenya and therefore an NGO advocating such rights is illegal. The Court of Appeal dismissed the appeal and upheld the decision of the High

Court. The court in a majority decision of 3-2 upheld the freedom of association and right to non-discriminatory practices for gay and lesbian persons.

**Impact:** Gay and lesbian persons are free to form NGOs to advocate their rights under the Constitution. This is a step towards recognition of gay and lesbian rights in the country which have for a long time been sidelined.

### **3. Petitions No. 56, 58 & 59 of 2019-Kenya Human Rights Commission & 2 Others-vs-AG & 6 Others**

In this case, the Petitioners sued the AG, the Cabinet Secretary Ministry of Interior and Coordination of National Government, the Director of National Registration, the ICT CS, the Speaker of the National Assembly and the Kenya Law Reform Commission, contesting the amendments made to the Registration of Persons Act Cap 107 Laws of Kenya. The impugned amendments were introduced by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018 where the National Integrated Information Management System (NIIMS) was introduced. NIIMS is intended to be a platform where all personal information of all Kenyan citizens as well as foreigners resident in Kenya can be found. The Petitioners argued that the information sought to be stored in the NIIMS system by the government is in violation of the right to privacy guaranteed under the Constitution. On 1<sup>st</sup> April, 2019, the High Court issued a temporary order suspending the inclusion of DNA and GPS as one of the information to be collected and stored in NIIMS pending the hearing and determination of the Petitions. The court further ruled that pending the hearing of the Petitions, the government shall not compel any member of the public to participate in the collection of personal information and data in NIIMS.

**Impact:** The court gave interim orders in this matter to prevent the government from denying anyone services on the basis of lack of a Huduma Number (the number obtained after registration on NIIMS). It will however be noted that recently the Immigration Department issued a directive stating that persons who have not obtained a Huduma Number will not be entitled to obtain a Passport. This directive was in direct violation of the court order. The court also ordered that registration for the Huduma Number will not include information on DNA and GPS. The main concern surrounding the Huduma Number is that without proper data protection laws in the country, the information stored in NIIMS could be misused to the detriment of the people. This is why most activists are fighting for enactment of proper data protection laws before rolling out the NIIMS system. It will however be noted that the government is still undertaking registration of persons under the NIIMS system and has even set a deadline of May 2019.

#### **4. Ann Njoki Kumena -vs- KTDA Agency Ltd (2019) eKLR**

The Plaintiff in this case filed a case claiming that KTDA had used her photograph in its marketing brochure without her consent. KTDA argued that the Plaintiff was not entitled to royalties for the proceeds made from the use of her photograph because she did not own copyright in the same. They also denied that it was the Plaintiff who was on the brochure and alleged that if at all she was the one, then she had given consent for the photo to be used. The court found that KTDA had taken a photograph of the Plaintiff without her consent and used it for commercial purposes. The court ruled in favour of the Plaintiff and declared that KTDA had infringed the Plaintiff's right to privacy and protection from deprivation of property without compensation. The court awarded the Plaintiff Kshs. 1.5 million in damages for violation of her rights.

**Impact:** The University uses images of students and other persons in its brochures and other forms of advertisement, it will be important for the University to obtain express written consent from the subjects of the photographs used in the marketing tools. Compensation for breach of a person's image rights is costly as seen from the Kshs. 1.5 million award in this case.

#### **5. Petition No. 17 of 2014-FIDA-K & Another-vs-Cabinet Secretary for Ministry of Interior and Coordination & AG**

The matter was lodged by NSA, a mother of 2 children born out of wedlock and FIDA, which joined the petition in public interest. The petitioners primarily sought a declaration that enforcement of section 12 of the Births & Deaths Registration Act be prohibited since the section violates the right to equality and dignity for children born out of wedlock and their unmarried mothers.

Section 12 of the Act stipulates that a father's name shall be entered into the birth certificate only upon joint request of both the child's father & mother or upon production of proof that the parents are legally wed. The petitioners also sought to have section 2(b) of the Children's Act where 'relative' is defined. The definition states that where a man acknowledges the paternity of a child born out of wedlock and contributes towards the child's maintenance, the man is considered the father of the child as if the child was actually born inside marriage. Section 3(a)(b) of the Succession Act that defines a father as a male person who expressly recognizes or accepts a child as his own or where he voluntarily assumes permanent responsibility.

The petitioners cited the constitutional rights infringed by these definitions & denial of recognition as the right to equality (Article 27), right to dignity (Article 28), a child's right to a name from

birth & to parental care (Article 53), and the right of unmarried mothers for the child's father to have equal parental responsibility (Article 53).

The court determined that the definition of relative/father under Article 2(b) of the Children's Act to be unconstitutional. The Hon. Judge Njagi stated that a parent's responsibility to their child is mandatory and not discretionary. He declared that Section 3 of the Law of Succession Act was equally unconstitutional because it contravenes Article 53 (1) (e) of the Constitution requiring parents to provide for their children whether they are married or not.

The court also recognized that the unconstitutionality of Section 12 of the Births and Deaths Registration Act had been determined by Lady Justice Mumbi Ngugi in *L.N.W v Attorney General & 3 others* [2016] eKLR. In that matter, the court invalidated the section for being inconsistent with the right to equality and rights of children under Articles 27 & 53 and declared that all children born out of wedlock shall have the right and or liberty to have the names of their fathers entered in the births registers.

**Impact:** Unwed mothers, or children born out of wedlock now need not seek the consent/permission of the child's father for his name to be included in the birth register. The judgement will also affect the question of paternity with regard to the Children's Act and Law of Succession. A man need not expressly acknowledge paternity or voluntarily contribute towards the child's maintenance to be considered a father. It also provides children born under such circumstances the privilege of an extended family/identity since the definition of 'relative' has been expanded. However, with the removal of this provision it would be difficult to ascertain if the name indicated in the birth certificate is indeed the name of the father; the provision could be subject to abuse by some mothers. This is why it is important for the AG to come up with proper regulations and guidelines, as directed by court, on how to facilitate the entry into the birth register of the names of the fathers of children born outside wedlock. The regulations have not been gazetted.

#### **6. George Wambugu Thumbi v Republic [2019] eKLR**

In this case the appellant appealed the decision of a lower court convicting him of an offence of driving under the influence of a drink contrary to section 44(1) as read with s. 45(1) of the Traffic Act Cap 403 Laws of Kenya. The lower court fined the accused Kshs. 100,000 in default, one year in prison and additionally suspended his PSV license for a period of 6 months. The Accused then appealed to the High Court was charged with the offence of driving. The Court ruled that merely having alcohol in your system is not an offence. The offence crystallizes when you cannot control the vehicle you are driving.

**Impact:** This case would be of interest to motorists in the country. It is noteworthy that there are many police roadblocks at night to test alcohol limits of motorists through the breathalyzer. The Court clarified the position which should see fewer arrests for the offence of driving under the influence of alcohol.

**7. Boniface Oduor v Attorney General & another; Kenya Bankers Association & 2 others (Interested Parties) [2019] eKLR**

In this case, the Petitioner brought a suit against the CBK and the AG; where the Kenya Bankers Association, the Consumer Federation of Kenya and the National Assembly of Kenya were joined as interested parties. The Petition sought a declaration that Section 33B of the Banking Act which introduced the capping of bank interest rates was unconstitutional.

The court ruled that Section 33B (1) and (2) of the Banking Act, providing for CBK to regulate how much lenders can earn from customers, was vague. It was stated that Section 33B (1) and (2) of the Banking Act is vague, imprecise, ambiguous and indefinite. The Court also declared Section 33(B) of the Act discriminatory against banks' CEOs, for providing a punishment in the event they breached the interest rate caps law which provision violates Articles 29 and 50 of the Constitution. Article 29 (a) of the Constitution guarantees a person the right not to be deprived of freedom arbitrarily or without just cause. Article 50 provides for the right to fair hearing.

**Impact:** The Court however noted that there would be possible ramifications and disruption on existing contractual relationships between banks and their customers, and therefore suspended the effect of the declaration for 12 months from the date of this decision to give the National Assembly an opportunity to reconsider the provisions.

**8. Eliud Waweru Wambui v Republic [2019] eKLR**

This matter was a second appeal at the Court of Appeal by the appellant, Eliud Waweru Wambui, who had been convicted and sentenced to 15 years imprisonment for defilement, contrary to section 8(1)(4) of the Sexual Offences Act. The appellant alleged that it had not been proved that the complainant was a minor as the birth certificate produced in court was a copy and not an original. He also contended that the complainant had presented herself as a mature adult and that she indeed testified that she and he were married. The Prosecution on the other hand alleged that the offence had been proved because the appellant impregnated the complainant and so it is

obvious defilement occurred. The complainant was still school going and so incapable of giving consent.

The Court of Appeal found merit in the appellant's contention that in all the circumstances of the case he reasonably believed that the complainant was over the age of 18 years. The Court also stated that whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It is also germane to point out that a child need not deceive by way of actively telling a lie that she is over the age of 18 years. The appeal was allowed and the conviction quashed and sentence set aside.

The Court further stated that it is time for the National Assembly to consider lowering the age of consent and amendment of the Sexual Offences Act. The Court opined that where to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion. The court called for a candid national conversation on this sensitive yet important issue and indicated that the challenges of maturing, morality, autonomy, protection of children and the need for proportionality are long overdue. They noted that prisons are now teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age.

**Impact:** Lowering of the age of consent from 18 years as proposed in this case will have serious ramifications particularly for school going children. This may increase cases of pregnancies in schools and essentially means the legalization of child marriages. While the judge's opinion was that there were many men accused of statutory rape in jail in cases where there was consent; lowering of the age of consent cannot stop cases of defilement.

#### **9. Constitutional Petition No. 2 Of 2017 Legal Resources Foundation Trust Vs The Attorney General And 2 Others**

The Legal Resources Foundation Trust (LRF) filed a suit against the Attorney General, Inspector General of Police and Cabinet Secretary Ministry of Health claiming the illegal, unlawful and unfair levying of fees on members of the general public for acquiring or filling statutory P3 Forms to enable access to justice for victims of assault, sexual harassment, violence, torture and police brutality. The Petitioner contended that the AG, the IG of Police and the CS Ministry of Health had arbitrarily introduced, allowed, ignored and/or refused to curb and stop the illegal levying of costs on police forms in contravention of Articles 48 and 50 of the Constitution. Articles 48 and

50 of the Constitution provide for the rights to access to justice and fair hearing respectively. The Petitioner's argument was that the fee charged for issuance and filing of the P3 form which ranges between 300/= and 3,000/= shillings is an impediment to justice for most Kenyans who may not afford these charges. The Court ruled in favour of the Petitioner and found that the levy charged was unconstitutional and declared that the P.3 form or any form required or issuable to victims of crime is free of charge and that no levy shall be imposed. The Court also made an order prohibiting the government or any medical officers in charge of public health facilities at both levels of government from levying fees for issue or for filling of the Medical Examination Forms (P.3s).

**Impact:** The judgment in this case will now make it easier for a person to obtain a P3 form. Previously, some people have shied away from taking P3 forms on the basis that they cannot afford the levy charged to obtain one. It is noteworthy that medical information from the P3 form is very crucial evidence in cases of assault. The fact that the courts have made it easier to obtain the P3 form means that it will be that much easier for the victims to access justice.

#### **10. Civil Suit No. 136 of 2016 Hezekiah Wang'ombe Gichohi v Peter Ndaa [2019] eKLR**

The Plaintiff and the Defendant were both co/joint Receiver Manager of the Grand Regency Hotel. On 2<sup>nd</sup> October, 2004 the Plaintiff wrote to the Co-operative Bank to inform them that by dint of a court recorded consent, the Defendant had been replaced as a joint Receiver Manager. The Defendant thereafter, on 4<sup>th</sup> October 2004 wrote a letter to the same bank addressing advocates involved in the issue alleging that the Plaintiff acted fraudulently, attached a consent not duly recorded by court, and had forged his signature. He also wrote a memo to the hotel management on the same day making the same allegations. The Defendant claimed that the letters were qualified privileged communication and were not defamatory.

The court was asked to determine whether the letter & memo by the Defendant was false/malicious and defamatory; whether it could be considered qualified privileged communication in the honest belief that the statements were true and whether the Plaintiff was entitled to damages.

The court determined that the letter & memo were indeed published by the Defendant, facts which he did not deny. The court considered the contents of the letters, each captioned "Fraudulent instructions and forged signature with regard to change of Bank signatories for Grand Regency Hotel" and "Bank signatory mandates", and deemed them defamatory. The court also acknowledged that the defendant failed to prove his defence of qualified communication. He failed to show fraudulent misrepresentation and/or malice in the letter written by the Plaintiff. The Plaintiff was therefore awarded Kshs. 200,000 in exemplary damages and general & aggravated damages amounting to Kshs. 800,000.



**Impact:** This judgement brings to the fore the importance of work conduct and the reach of the law. Communication sent out in the line of duty, both internally (memos, emails etc.) and externally (letters to 3<sup>rd</sup> parties) need to be mindful of reputation. Defamation need not be done in a large scale or to a wide audience, but defamatory statements made within an organization to a small group of people, if proven, will entitle the maligned party to damages. Qualified privileged communication also ought to be made only by a person with a duty to make them and addressed to a person with a corresponding duty to receive such information. It must be crafted in a manner that is not malicious and the maker of the statement believes to be true the statements which he makes.

## **International Matters**

### **1. Herdeman v. Monsanto case**

In this case the San Francisco Federal Court found that exposure to glyphosate, a key active ingredient in the weed killer, Roundup, caused Mr Edwin Herdeman to contract non-Hodgkin's lymphoma, which is a type of cancer. The court went ahead to award damages of \$114 million (about Sh11.4 billion) to Mr. Herdeman.

**Impact:** The judgment is likely to have an impact in Kenya and may lead to a plethora of lawsuits since the chemical is widely used by farmers here. Mr. Eric Ogumo, the chairman of the Society of Crop Agribusiness Advisers of Kenya, said the development must be taken seriously to ensure that local farmers do not suffer similar consequences as Mr. Herdeman.