

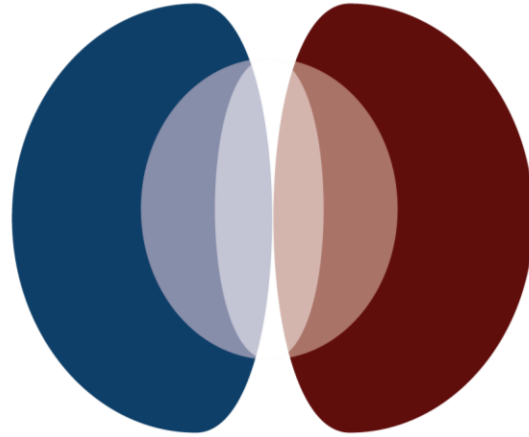
# ONG'ANYA OMBO

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# ONG'ANYA OMBO ADVOCATES

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# TERMINATION & DISMISSAL

# INTRODUCTION

- In an Employer-Employee Relationship (EER), there is undoubted possibilities of termination of the EER for various reasons, which include:
  - **Poor Performance**
  - **Gross Misconduct**
  - **Insolvency of the Company**
  - **Restructuring of the Company**
  - **Social Factors**
  - **Political Factors**

# LAWS CONCERNING TERMINATION

- The Constitution of the Republic of Kenya
  - The Bill of Rights
- The Fair Administrative Action Act, 2015
  - Procedural Factors
- The Employment Act, 2007
  - Part VI – Termination & Dismissal.
- **There are many laws that can come into effect, for instance, Sexual Offences Act, Penal Code, Ethics & Anti-corruption Act, 2011, etc.**



# THE CONSTITUTION

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# WHY THE CONSTITUTION?

- The Constitution is similar to a wireframe that needs to be fixed with other materials or a skeleton that needs organs and muscles for it to function.
- The Constitution is at the top of the hierarchy then followed by other laws of the Republic of Kenya.
- The Employment Act, 2007 is or ought to be as per the Constitution's wireframe capabilities.
- If a law is not as per the Constitution, it is declared unconstitutional.

# COURT APPLIES THE CONSTITUTION

- Stare decisis, obiter dicta & ratio decidendi.
- It is important to be up to date with the current developments at the Court level.
- Reasonable Court decisions are used repeatedly to address cases that have similar questions of law or facts.





# CONT....

## **Public Sector:** *Nasibo Dabaso Jillo v Commander Kenya Army & another* [2015] eKLR

- The Petitioner's services were terminated by bundling her into a truck and dropping her at Eldoret Town. She had successfully trained at the Recruits Training School.
- She filed a Petition & Civil Suit for her Constitutional Rights having been violated.
- She was awarded KES. 3,000,000.00

## **Private Sector:** *G M V v Bank of Africa Kenya Limited* [2013] eKLR

- The Employee was terminated on grounds of pregnancy.
- It was declared her Constitutional Rights were violated.
- She was awarded KES. 4,473,006.00

# THE CONSTITUTION OF KENYA

## Article (26 – 33)

Right to Life.

Equality and Freedom from  
Discrimination.

Human Dignity.

Freedom and Security of Persons.

Slavery, Servitude and Forced  
Labour.

Privacy.

Freedom of Conscience,  
Religion, Belief and Opinion.

Freedom of Expression.

- *Volenti non fit injuria*: *Securex Agencies (K) Limited v Bernard Ochieng Olute* [2009] eKLR.

- *Racial Discrimination*: *OI Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR

- *Pregnancy Discrimination*: *Tracy Wangechi Mugambi v Windsor Golf Hotel and Country Club* [2019] eKLR

# THE CONSTITUTION OF KENYA

## Article (35 – 43)

Access to Information.

Freedom of Association.

Assembly, Demonstration,  
Picketing and Petition.

Political Rights.

Protection to Right to Property.

**Labour Relations.**

Environment.

Economic and Social Rights.

- *Intellectual Property Rights: Iys and Tees Limited v Everlyne Madegwa & Another* [2009] eKLR

- *Safe Working Environment: Kibos Sugar And Allied Industries Ltd v Stephen Otieno Adie & another* [2018] eKLR

# THE CONSTITUTION OF KENYA

## Article (44 - 55)

Language and Culture.

Family.

**Fair Administrative Action.**

Access to Justice.

**Fair Hearing.**

Persons with Disability.

Youth.

- Application of Fair Administrative Action: *Mohammed Sheria & 2 others v Simon Kipkorir Sang & 5 others* [2018] eKLR

# FAIR ADMINISTRATIVE ACTION ACT, 2015

(FAAA, 2015)



# APPLICATION OF FAAA, 2015

- The Promulgation of the Constitution of Kenya changed the landscape on how a number of legal issues are addressed, including application of Administrative Law.
- Pre-August 27, 2010, the repealed Constitution and or application of laws only applied Administrative Law towards the public sector and not private sector.
- The reading of Article 21, 22, & 47 of the Constitution makes it clear that the Bill of Rights (which includes Fair Administrative Action) applies to both public and private entities.

# CONT....

- The FAAA, 2015 provides, under s 3, that the FAAA, 2015 applies to both State and non-State actors. That simply means that it applies to the Public Sector and Private Sector.
- According to the FAAA, 2015, Administrative Action ought to be:
  - **Expeditious;**
  - **Efficient;**
  - **Lawful;**
  - **Reasonable; and**
  - **Procedurally fair.**

# CONT....

## Sections 4 of the FAAA, 2015

Adequate notice (ideally 14 days).

Opportunity to be heard.

Right to appeal (internally).

Detailed and clear reasons as to why the action was taken.

Right to legal representation.

Right to cross examine.

Access to evidence or any material to be relied upon.

Right to attend proceedings.

## If s 4 of the FAAA, 2015 is breached?

Judicial Review application is filed at the Judicial Review Division of the High Court.

There are two possibilities in reference to law suits. One emanates from **Judicial Review** as provided for under Part III of the FAAA, 2015 while the other is a **Civil Suit**, which is as per Employment Act – it will be addressed shortly.

# COURT APPLIES FAAA, 2015

*Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others [2018] eKLR*

*Mohammed Sheria & 2 others v Simon Kipkorir Sang & 5 others [2018] eKLR*

- In the case, the Petitioner filed a case on Judicial Review on grounds that he had been directed to take compulsory leave.
- He lost the case on grounds that the administrative process had not been completed yet.
- The Respondent's argued that FAAA does not apply to them as private persons' but the court decided that it does apply.
- The case involves private persons or as per the FAAA, 2015 "a non-State" actor.

# **PART VI – TERMINATION & DISMISSAL, EMPLOYMENT ACT, 2007**



# EMPLOYMENT ACT, 2007

- The Employment Act, 2007 provides for the bare minimum that ought to be in place under the EER.
- For purposes of the Presentation, we will focus on Termination & Dismissal only.



# TERMINATION NOTICE

## s 35 of the EA

- Pay Daily Wages?
- Pay wages in intervals of less than a month?
- Pay wages/salary on intervals of or exceeding one month?
- Where the contract provides better terms?
- Where the employee does not understand the notice?
- Service pay?

## Cont.

Does not apply to an employee who is a member of:

- a registered pension or provident scheme under the Retirement Benefits Act (RBA).
- a gratuity or service pay scheme established under a collective agreement.
- any scheme by the employer that has favourable terms than what the law provides.
- **National Social Security Fund**

## s 36, 37, 38 & 39 of the EA

- Payment in lieu of notice?
- Conversion of casual employment to term contract (its relation to s 87)?
- Waiver of notice by employer?
- Contract expiring on a journey may be extended?



# CONT....

## • Redundancy

- Where an employee is a member of trade union?
- Where an employee is not a member of trade union?
- Issues to factor: seniority (time & skill), ability and reliability?
- Terminal benefits?
- Leave days?
- Salary in lieu?
- Severance pay?

- Termination on grounds of misconduct (poor performance and physical incapacity)?

- Termination of probationary contracts?

- Reasons for termination?

# CONT....

- **Summary Dismissal**

- **Office absenteeism (without leave or lawful reasons).**
- **Degree of intoxication during working hours.**
- **Neglects or improperly/carelessly performs a work duty assigned to him as per contract.**
- **Abusive/ insulting conduct towards persons having authority over him.**
- **Insubordination.**
- **Arrest over cognizable offence that is punishable by way of imprisonment and remains in custody for more than 14 days.**
- **Having committed a criminal offence against the Employer or his/its property.**



# CONT....

## Unfair termination

- If the reason for termination is not valid.
- **If it does not relate to employee's conduct, capacity or capability.**
- If it does not fit the requirements of the employer.
- If the procedure was not followed.

## Unfairly Terminated

An employee, as of right, will complain for having been unfairly terminated if s/he had served the employer for at least 13 months.

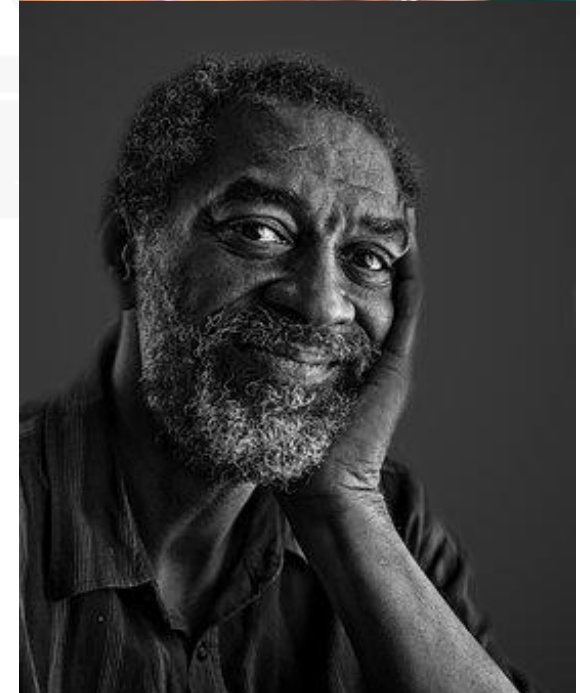




## CONT....

Issues that do not constitute fair reasons for termination/disciplinary measures:

- **Female employee's pregnancy or anything related to it.**
- **Seeking Leave.**
- **Membership or proposed membership to trade union.**
- **Taking part in trade union activities.**
- **Employee seeking office/ to participate at a trade union.**
- **Refusal to join or withdrawal from a trade union.**
- **Discrimination.**
- **Employee's intent to file a case.**
- **Participation in a lawful strike.**



# REMEDIES FOR WRONGFUL DISMISSAL

## Remedies?

- Wages for notice period.
- **Wages/salary not exceeding 12 months.**
- Reinstatement/reengage the employee (**not common**).
- **Leave Days.**
- All payments will be exclusive of any statutory deductions.

## What to look into? (Labour Officer)

- Demands by the ex-employee.
- Circumstances of the termination.
- Practicability of reinstatement/reengagement.
- Length of service.
- Reasonable expectations of the employee.
- Opportunities available to the employee with other employers.
- Severance pay (Applicable on Redundancy Claims).
- Expenses incurred by the employee as a result of the termination.

## Cont....

- The conduct of the employee.

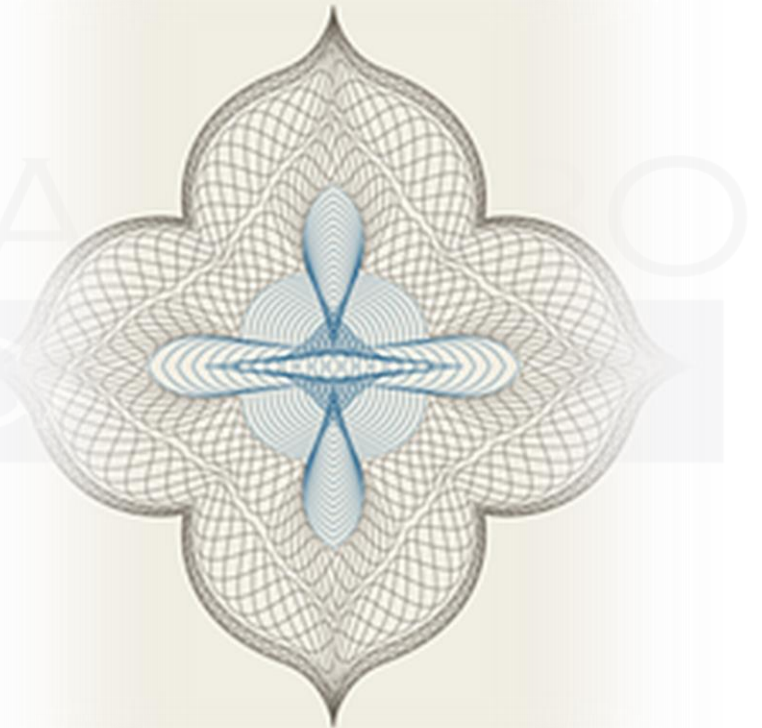


# CERTIFICATE OF SERVICE

The employer is required to issue an employee with a Certificate of Service (CoS) save where the employee served for period less than four weeks. The CoS will not entail testimonials or anything to do with character or performance. The CoS will entail:

- name of employer and postal address;
- name of employee;
- commencement of employment;
- nature and place of employment;
- date of termination; and
- such other prescribed information.

It is an offence to deny the employee a Certificate of Service. In addition, if issued, any inclusion of misleading or unlawful information will result to a fine of KES. 100,000 or six month imprisonment or both.



# CONSTRUCTIVE DISMISSAL

- Constructive Dismissal occurs when the employer creates an environment that pushes the employee to terminate their EER. In certain instance, if not all, even when the employer tells the employee to terminate the EER instead of the Employer doing it, it can amount to Constructive Dismissal.

*“The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer’s behaviour must be shown to have destroyed or seriously undermined trust and confidence.”*

**- Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR**





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**Q & A**  
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**THE END.**

**THANK YOU!**

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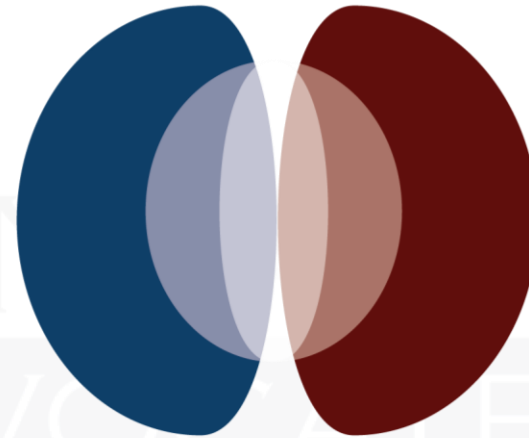
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