

The Place and Limits of Arbitration in Resolving Employment Disputes in Kenya

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Abstract

Over the last decade, the viability of arbitration in resolving employment disputes has been a controversial issue, attracting mixed views. Proponents argue that Kenyan law neither delimits the scope of arbitrability nor expressly prohibits the use of arbitration in settling employment disputes. They assert that when parties agree to refer their disputes to arbitration, they are bound by the terms of their contracts and the agreement to arbitrate. Opponents, however, contend that employment relationships are inherently unequal. Employers, who often have more bargaining power, impose terms in an employment contract, including arbitration clauses on employees, who are often unduly influenced, to accept such one-sided terms out of necessity to secure jobs. They also argue that arbitration was intended for commercial disputes, not employment disputes. This paper examines the place and limitations of arbitration in resolving employment disputes in Kenya. It critically analyses the legal framework governing employment arbitration to demonstrate that employment disputes can be resolved through arbitration. The paper also identifies the limitations of arbitration in addressing employment disputes and proposes key considerations for courts when deciding whether to refer such disputes to arbitration. Finally, it offers recommendations to enhance the practice of employment arbitration while safeguarding employees' rights.

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I. Introduction

The Constitution of Kenya, 2010 (Constitution) entrenches arbitration as an alternative dispute resolution (ADR) mechanism.¹ However, its suitability and limits in resolving certain disputes are unclear. One of such disputes is those arising from and relating to employment relationships ('employment disputes'). By definition, employment disputes are grievances between an employee and an employer concerning the terms and conditions of employment.² These disputes include disputes over statutory rights and entitlements, and the terms of employment, such as remuneration, working conditions, performance evaluation, misconduct, communication, and termination of the employment contract.³ Ordinarily, when an employment dispute arises, an employee (who in most cases is the aggrieved party) will approach the Employment and Labour Relations Court (hereon ELRC) for reliefs against the employer, such as compensation for unfair termination, reinstatement, declarations of rights among others.⁴ Whereas the ELRC has been the primary forum for determining employment disputes, there has been a surge of arbitration clauses in individual employment contracts between employees and employers.⁵ This trend is reflected in more than 300 cases reported on the Kenyan Law Reporting website, where the disputes involve employment contracts containing arbitration clauses.⁶ These clauses require that, any dispute arising out of or relating to the employment contract, be resolved by an arbitrator, a private adjudicator appointed by the parties who issues a final and binding arbitral award (employment arbitration).⁷ Arbitration clauses may also

¹ Article 159(2)(c), *Constitution of Kenya* (2010).

² Bingham L, 'Employment Dispute Resolution: The Case for Mediation' 22(1) *Conflict Resolution Quarterly*, 2004,145.

³ Bingham L, 'Employment Dispute Resolution: The Case for Mediation',145.

⁴ Section 87(1), *Employment Act* (Act No. 11 of 2007).

⁵ Colvin A and Gough M, 'Mandatory Employment Arbitration' *The Annual Review of Law and Social Science*, 2023,132.

⁶ <<https://new.kenyalaw.org/search/?q=arbitration+clause+employment+contract&nature=Judgment&court=Employment+and+Labour+Relations+Court>> on 28 April 2025. See also Ogembo G, 'Arbitration of Employment Disputes in Kenya: Challenges & Opportunities' 16(1) *The Law Society of Kenya Journal*, 2020, 119.

⁷ Ogembo G, 'Arbitration of Employment Disputes in Kenya: Challenges & Opportunities' 119.

be inserted in employee handbooks or stand-alone agreements.⁸ Employment arbitration is often confused with labour arbitration, however, the two are different. Labour arbitration deals with the enforcement of a contract negotiated between a trade union and an employer.⁹ Therefore, it involves disputes between employers and labour unions representing employees.¹⁰ On the other hand, employment arbitration stems from an individual employment contract between an employer and employee without the involvement of a trade union.¹¹

Although arbitration clauses in employment contracts have gained traction, the suitability of employment arbitration has been subject to debate.¹² Proponents like David Sherwyn anchor its legitimacy on the doctrine of freedom of contract and contend that when an employment contract executed by both an employer and employee contains an arbitration clause, courts cannot rewrite or alter their terms and intentions.¹³ Steven Kaufmann contends that employment arbitration has numerous advantages that facilitate effective dispute resolution in employment relationships.¹⁴ He argues that employment arbitration empowers parties to select a knowledgeable and experienced employment law specialist as an arbitrator.¹⁵ In his view, this ensures the delivery of expeditious and well-reasoned decisions thus promoting efficiency.¹⁶ Kaufmann also cites other benefits of arbitration like party autonomy, limited court intervention, and finality of an arbitral award.¹⁷

On the other hand, antagonists of employment arbitration fault its proponents for their reliance on commercial arbitration principles of party

⁸ Levinson M, 'Mandatory Arbitration: How The Current System Perpetuates Sexual Harassment Cultures In The Workplace' 59(2) *Santa Clara Law Review*, 2019, 489.

⁹ Gitelman M, 'The Evolution of Labor Arbitration' 9(2) *DePaul Law Review*, 1960,181.

¹⁰ Getman J, 'Labor Arbitration and Dispute Resolution' 88 *The Yale Law Journal*,1979,916.

¹¹ Getman J, 'Labor Arbitration and Dispute Resolution' 88.

¹² Theodore A, 'Making Employment Arbitration Fair and Accessible' 12(1) *Arbitration Law Review* 2020, 1-18.

¹³ Sherwyn D, Bruce T, and Zev E, 'In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink In the Process' 2(1) *University of Pennsylvania Journal of Labour and Employment Law*,1999,147; Sherwyn D, Estreicher S, and Heise M, 'Assessing the Case for Employment Arbitration: A New Path for Empirical Research' 57(5) *Stanford Law Review*, 2005.

¹⁴ Kaufmann S and Chanin J, 'Directing the Flood: The Arbitration of Employment Claims' 10(2) *The Labor Lawyer*, 1994, 217.

¹⁵ Kaufmann S and Chanin J, 'Directing the Flood: The Arbitration of Employment Claims' 217.

¹⁶ Kaufmann S and Chanin J, 'Directing the Flood: The Arbitration of Employment Claims' 218.

¹⁷ Kaufmann S and Chanin J, 'Directing the Flood: The Arbitration of Employment Claims', 218; Colvin A, 'Empirical Research on Employment Arbitration: Clarity amidst the Sound and Fury?' 11(405) *Employee Rights and Employment Policy Journal*, 406; Estreicher S, 'Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements' 16(3) *Ohio State Journal on Dispute Resolution*, 2001.

autonomy and freedom of contract to justify its legitimacy. Specifically, Katherine Stone and Alexander Colvin argue that employment contracts are characterised by power imbalances and unequal bargaining power, which in turn affect and vitiate the voluntariness of consent.¹⁸ In most cases, employees presented with employment contracts with standard terms, including arbitration clauses, have little or no choice but to sign these contracts lest they forego the job opportunity.¹⁹ Antagonists are also reluctant to endorse employment arbitration because of public policy objectives of employment law aimed at regulating employment relationships.²⁰ These objectives are threefold. First, through legislation, the state seeks to protect workers from potential exploitation due to the bargaining power imbalance between employers and employees. This is achieved through, for instance, setting a minimum wage.²¹ Second, the state may aim to address market failures caused by factors like excessive employer market power, external costs or benefits, incomplete information, limited employee mobility, or high transaction costs in negotiating individual contracts.²² Finally, the state may want to regulate employment relationships to prohibit practices like discrimination and sexual harassment that are inconsistent with societal values.²³ Consequently, they argue that principles underlying commercial arbitration, governed by a contract, are inconsistent with the conceptual rationales of employment law.²⁴

The debate on employment arbitration has also found its way into the ELRC as far back as 2012, mainly in cases where the court is presented with an application for stay of legal proceedings and to refer parties to arbitration.²⁵ In several cases, Justice Maureen Onyango has consistently held that employment

¹⁸ Stone K, 'Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s' 73 *Denver University Law Review* 1017 (1996),1020; Colvin A, 'Mandatory Arbitration and Inequality of Justice in Employment' 35(2), *Berkeley Journal of Employment and Labor Law*, 2014, 73.

¹⁹ Wright J, 'Arbitration in the Workplace: The Need for Legislative Intervention'17 *Northwestern University Law Review*, 2022, 9.

²⁰ Spitko G, 'Exempting high-level employees and small employers from legislation invalidating pre-dispute employment arbitration agreements' Clara University School of Law Legal Studies Research Papers Series Accepted Paper Number 09-20, 2009, 601 —< <https://digitalcommons.law.scu.edu/facpubs/99/> > on 20 December 2024.

²¹ Spitko G, 'Exempting high-level employees and small employers from legislation invalidating pre-dispute employment arbitration agreements', 601.

²² Spitko G, 'Exempting high-level employees and small employers from legislation invalidating pre-dispute employment arbitration agreements', 601.

²³ Spitko G, 'Exempting high-level employees and small employers from legislation invalidating pre-dispute employment arbitration agreements', 603.

²⁴ Ogembo G, '*Arbitration of employment disputes in Kenya*',131.

²⁵ *William Lonana Shena v HJE Medical Research International Inc* (2012) eKLR- where the court upheld an arbitration clause in an employment contract. It stated that the fact that the court has unlimited jurisdiction does not defeat arbitration process which is also grounded on statute law. See also *Stephen Nyamweya & Another v Riley Services Limited* (2013) eKLR.

arbitration is unsuitable for the resolution of employment disputes. She challenges the unequal bargaining power which is imminent and common in employment relationships.²⁶ It is on this basis that the learned judge has taken the view that the ELRC Act intentionally omits reference to arbitration on provisions of referring parties to alternative dispute resolution mechanisms like mediation and conciliation.²⁷ Conversely, Justice James Rika has consistently upheld employment arbitration, holding that parties are bound by the terms of their contracts.²⁸ As such, he has often referred parties to arbitration notwithstanding objections and cost concerns raised by employees.²⁹

From the foregoing, there is widespread contention on the suitability of employment arbitration in Kenya. This paper examines its place and limitations in six parts. Part One is this introduction setting the stage for the discussion. In Part Two, the paper critically analyses the legal framework governing employment arbitration to demonstrate that employment disputes can be resolved through arbitration. Part Three evaluates the benefits, drawbacks, and limitations of employment arbitration. In Part Four, the paper proposes key considerations for courts when deciding whether to refer employment disputes to arbitration. Part Five offers recommendations to enhance the practice of employment arbitration while safeguarding employees' rights. Part Six concludes the paper.

II. Legal Framework Governing Employment Arbitration in Kenya

i. The Constitution and employment arbitration

The Constitution provides a foundation for employment relations by guaranteeing the right to fair labour practices, as well as the right to fair remuneration and reasonable working conditions.³⁰ This means that employees cannot be deprived of these minimum rights, and as a result, all employment contracts must ensure that they comply with the irreducible minimums. Cognizant of the fact that conflict is part of human nature, the Constitution recognises arbitration as a form of ADR mechanisms alongside reconciliation,

²⁶ *Jane Muthoni Mukuna v FSI Capital Ltd* (2015) eKLR; *David Kamau Ngure v Total Kenya Limited* (2021) eKLR

²⁷ *Jane Muthoni Mukuna v FSI Capital Ltd* (2015) eKLR.

²⁸ *Jeremia Mutia Kiao v Raints Kenya Ltd & another* (2017) eKLR; *Bett & others v Kenya Post Office Savings Bank* (2024) eKLR.

²⁹ *Jeremia Mutia Kiao v Raints Kenya Ltd & another* (2017) eKLR.

³⁰ Article 41(1) and (2), *Constitution of Kenya* (2010).

mediation, and traditional dispute resolution mechanisms.³¹ Courts and tribunals are required to be guided by these ADR mechanisms when exercising judicial authority.³² When interpreting this constitutional mandate, the High Court in *World Vision International v Synthesis Limited & Mavji Construction Company Limited*, observed that it requires promoting an ADR mechanism like arbitration and upholding its tenets, such as party autonomy, limited court intervention, and finality of the arbitral award.³³ Since arbitration is recognised as a constitutionally entrenched method of dispute resolution, it is arguable that it can be used to settle virtually all types of disputes, including those arising from rights and entitlements under the Constitution. This means that disputes stemming from employment relationships between employers and employees can also be resolved through arbitration. Additionally, the constitutional entrenchment of arbitration does not oust or diminish the jurisdiction of the ELRC. On the contrary, the ELRC is mandated to promote ADR mechanisms, including arbitration.³⁴

The constitutional elevation of arbitration has been persuasively interpreted by some scholars as expanding its scope and removing it from the narrow confines of being viewed merely as a statutory method of dispute resolution under the KAA.³⁵ Moreover, the Constitution does not impose limitations on the types of disputes that may be submitted to arbitration.³⁶ The Court of Appeal in *TSJ v SHSR*, held that there is nothing in the KAA or Constitution that limits arbitration to commercial disputes. In addition, the appellate court held that the Constitution has extended the scope of arbitrability beyond the commercial disputes.³⁷ It follows that employment disputes are arguably arbitrable due to the widened scope of arbitrability under the Constitution.

ii. *The Employment and Labour Relations Court Act (ELRC Act) Cap. 8E and employment arbitration*

Article 162(2) of the Constitution establishes the ELRC as a superior court with the same status as the High Court. It obligates Parliament to establish and

³¹ Article 159(2)(c), *Constitution of Kenya* (2010).

³² Article 159(2)(c), *Constitution of Kenya* (2010).

³³ *World Vision International v Synthesis Limited & Mavji Construction Company Limited* (2019) eKLR. See also *Goodison Sixty-One School v Symbion Kenya Limited* (2017) eKLR.

³⁴ Article 159(2)(c), *Constitution of Kenya* (2010).

³⁵ Kariuki F, 'Redefining 'Arbitrability': Assessment of Articles 159 and 189(A) of the Constitution' 1(1) *Alternative Dispute Resolution*, 2013, 178; Kariuki F and Sebayiga V, 'Arbitrability of Fraud in Kenya' 2(1) *NCIA ADR Journal*, 2022,14.

³⁶ *His Highness Prince Aga Khan Shia & another v Attorney General* [2016] KEHC 7731 (KLR), paras 44 and 46.

³⁷ (2019) eKLR, para 30.

delimit the ELRC's jurisdiction to hear and determine employment disputes.³⁸ In line with this constitutional mandate, Parliament enacted the ELRC Act which declares that the ELRC has exclusive original and appellate jurisdiction to hear and determine all disputes relating to employment disputes.³⁹ Most relevant to this paper is the jurisdiction to hear and determine disputes relating to or arising out of an individual employment contract between an employer and an employee.⁴⁰

Section 15(1) of the ELRC Act empowers the ELRC to adopt and implement, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.⁴¹ Subsection (4) adds that if at any stage of the proceedings, it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.⁴²

The above section of the ELRC Act has been subject to divergent judicial interpretation on the suitability of employment arbitration, reflecting a lack of consensus among judges of the ELRC. On the one hand, Justice Maureen Onyango has consistently interpreted Section 15(1) of the ELRC Act as deliberately excluding arbitration as a recognized method of alternative dispute resolution in employment matters. In *Dr. Kennedy Amubaya Manyonyi v African Medical and Research Foundation*,⁴³ she held that neither the ELRC Act, nor the Employment Act recognise arbitration as an appropriate mechanism for resolving employment disputes. Her reasoning is also based on the Employment Act which provides for the institution of employment disputes before the ELRC. It stipulates that whenever an employer or employee neglects or refuses to fulfil a contract of service; or any question, difference or dispute arises as to the rights or liabilities of either party; or touching any misconduct, neglect or ill-treatment of either party, an aggrieved party may complain to the labour officer or lodge a suit in the ELRC.⁴⁴

³⁸ Article 162(2)(a), *Constitution of Kenya* (2010).

³⁹ Section 12(1), *Employment and Labour Relations Court Act* (Act No. 20 of 2011).

⁴⁰ Section 12(1)(a), *Employment and Labour Relations Court Act* (Act No. 20 of 2011).

⁴¹ Section 15(1), *Employment and Labour Relations Court Act* (Act No. 20 of 2011).

⁴² Section 15(4), *Employment and Labour Relations Court Act* (Act No. 20 of 2011).

⁴³ (2014) eKLR; *Joao Soares v Tuegest Guerma & another* (2014) eKLR; *Jane Muthoni Mukuna v Fsi Capital Limited* (2015) eKLR.

⁴⁴ Section 87, *Employment Act* (Act No. 11 of 2007).

Justice Maureen Onyango's position has significantly influenced subsequent decisions, such as Justice Gakeri's ruling in *Okeyo v Board of Directors HHI Management Service Limited & another*.⁴⁵ Here, the court reiterated that arbitration in Kenya was principally intended to resolve commercial disputes, as opposed to employment disputes.⁴⁶ In the court's view, the ELRC has original and exclusive jurisdiction to hear and determine disputes relating to employment and labour relations.⁴⁷ Such jurisdiction cannot be ousted by an arbitration clause.⁴⁸ Further, in *Sammy Onyango Ochieng v Abno Softwares International Limited*, the court held that the ELRC has original jurisdiction to hear employment disputes that cannot be ousted by an arbitration clause.⁴⁹ Justice Mbaru, in *Kingdom Bank Limited v Timothy Mwaniki Kabiru*, held that where a term of employment is challenged, including the very agreement relating to reference to arbitration, the court is the primary forum for determining such a dispute.⁵⁰ Similarly in *Mwadime v Triggerise Kenya Limited*, Justice Mbaru held that an employee as the right-holder cannot be denied justice before the ELRC, a forum with original jurisdiction to hear and determine employment and labour relations claims.⁵¹

On the other hand, Justice Rika has consistently upheld the validity of arbitration agreements within employment contracts, asserting that where such agreements exist, the ELRC lacks jurisdiction over disputes covered by the arbitration clause.⁵² In *Nyamoringo v Honey Suckle Residents Association*, Justice Rika dismissed the suit on the grounds that it was filed prematurely, citing the arbitration clause within the employment contract. He questioned the claimant's selective approach of enforcing the contract, observing that employment agreements must be interpreted and enforced in their entirety, including clauses on arbitration.⁵³ Similarly, in *Dock Workers Union v Messina Kenya Limited*, Justice Rika struck out a petition filed by Dockworkers Union Kenya on the grounds that the court lacked jurisdiction to entertain a dispute relating to terminal dues

⁴⁵ (2024) eKLR.

⁴⁶ *Okeyo v Board of Directors HHI Management Service Limited & another* (2024) eKLR.

⁴⁷ *Okeyo v Board of Directors HHI Management Service Limited & another* (2024) eKLR. See also *John Moturi Omiti v Kenya Institute For Public Policy Research and Analysis* (2017) eKLR where the court held that the ELRC has Court exclusive original and appellate jurisdiction to hear and determined disputes relating to labour and employment.

⁴⁸ *Okeyo v Board of Directors HHI Management Service Limited & another* (2024) eKLR.

⁴⁹ (2020) eKLR; *Rono v Delish Nail & Beauty Ltd* (2023) eKLR.

⁵⁰ (2021) eKLR; *Halima Gababa Abdulahi v Lee Kinyanjui & County Government of Nakuru* (2019) eKLR.

⁵¹ [2023] KEELRC 2831 (KLR).

⁵² *Paul Chemunda Nahyanya v I. Messina Kenya Limited* (2015) eKLR; *Patrick Nthenga Kimilu v Globe Flight Kenya* (2022) eKLR.

⁵³ *Paul Chemunda Nahyanya v I. Messina Kenya Limited* (2015) eKLR; *Patrick Nthenga Kimilu v Globe Flight Kenya* (2022) eKLR.

allegedly owed to the Respondent's former employees (grievants).⁵⁴ In dismissing the petition, the court found that its jurisdiction was ousted by an arbitration agreement contained in the grievants' employment contract, under which the parties had agreed to refer any disputes to arbitration.⁵⁵ The court also found that that any dispute regarding trade union dues did not constitute a constitutional dispute and could therefore not be ventilated through a constitutional petition as had been done.⁵⁶ Further, the court rejected the union's attempt to pursue reliefs of the grievants' collectively through a constitutional petition, noting that each individual grievants' employment contract contained an arbitration clause requiring that any dispute between the employer and the individual employee be resolved through arbitration under the KAA.⁵⁷

Aggrieved by the ELRC's decision, the grievants' appealed to the Court of Appeal faulting the learned judge for, among other grounds, derogating the jurisdiction of the court as provided under the Constitution and the ELRC Act (Dock Workers Union Appeal Case).⁵⁸ The issue before the appellate court was whether the ELRC has jurisdiction to determine the dispute in light of the arbitration clause.⁵⁹ While addressing the issue, the Court of Appeal held that there was nothing in the ELRC Act to indicate that employment disputes are under the exclusive jurisdiction of the ELRC. Neither was there any express provision that indicated that arbitration is inapplicable to employment disputes.⁶⁰ Accordingly, the Court of Appeal affirmed that the ELRC court was right in holding that since the parties had agreed to refer any ensuing employment dispute, the court lacked jurisdiction, and parties could not turn around and denounce the arbitration agreement.⁶¹ Further, the court observed that parties have the freedom to choose the regime of law they want to be governed by and embody it in their contracts.⁶²

In addressing the characterisation of the dispute as a constitutional matter, the Court of Appeal held that this was not the case.⁶³ While acknowledging that all rights, such as the right to work, the right to food, the right to shelter, and

⁵⁴ (2017) eKLR.

⁵⁵ *Dock Workers Union v Messina Kenya Limited* (2017) eKLR.

⁵⁶ *Dock Workers Union v Messina Kenya Limited* (2017) eKLR.

⁵⁷ *Dock Workers Union v Messina Kenya Limited* (2017) eKLR.

⁵⁸ *Dock Workers Union Limited v Messina Kenya Limited* (2019) eKLR.

⁵⁹ *Dock Workers Union Limited v Messina Kenya Limited* (2019) eKLR.

⁶⁰ *Dock Workers Union Limited v Messina Kenya Limited* (2019) eKLR.

⁶¹ *Dock Workers Union Limited v Messina Kenya Limited* (2019) eKLR.

⁶² *Dock Workers Union Limited v Messina Kenya Limited* (2019) eKLR.

⁶³ *Dock Workers Union Limited v Messina Kenya Limited* (2019) eKLR.

other fundamental rights, are rooted in the Constitution, the court clarified that not all claims automatically qualify as constitutional issues.⁶⁴ In its view, although a claim for wages or terminal benefits may be traced to the fundamental right to work and its interrelated rights, such claims remain primarily labour disputes and do not inherently transform into constitutional matters.⁶⁵ Consequently, the court found that there was no justification in invoking the provisions of the Constitution in order to circumvent the arbitration agreement.⁶⁶ Notably, a different bench of the Court of Appeal, while addressing a similar appeal in *Talewa Road Contractors Limited v Kenya National Highways Authority*, concurred with the sentiments expressed in the *Dock Workers Union Appeal Case*, emphasising that parties who choose arbitration are bound by its processes and outcome.⁶⁷ These Court of Appeal decisions affirm Justice Rika's interpretation as the legally proper interpretation of Section 15 of the ELRC Act, which would mean that subsequent decisions of the ELRC post the Dock Workers Union Appeal Case have been disregarding binding decisions.

Similar to Justice Rika, the upholding of arbitration clauses in employment contracts and referral of parties to arbitration have also been adopted by other ELRC judges like Justice Stephen Radido,⁶⁸ Justice Linnet Ndolo,⁶⁹ and Justice Anna Mwaure.⁷⁰ From the foregoing, the ELRC is divided on the resolution of employment disputes through arbitration. It also appears that there is a contradiction between Section 15 subsection (1) and (4) of the ELRC Act. In the former, arbitration is omitted as a dispute resolution mechanism. However, in subsection (4), it is expressly mentioned as one of the dispute resolution methods for referral of parties. In the authors' view, there was an unintended omission of arbitration under Section 15(1) of the ELRC Act.⁷¹ Notwithstanding the absence of the express mention of arbitration in Section 15(1), the authors argue that that the words 'any other appropriate means of dispute resolution, including' imply that the listed forms of alternative dispute resolution mechanisms, that is, conciliation, mediation, TDRMs, are not exhaustive. Words like 'include' or 'including' introduce examples and not an exhaustive list. On the other hand, words like 'comprise' or 'consists' indicate an exhaustive list and are limited to

⁶⁴ *Dock Workers Union Limited v Messina Kenya Limited* (2019) eKLR.

⁶⁵ *Dock Workers Union Limited v Messina Kenya Limited* (2019) eKLR.

⁶⁶ *Dock Workers Union Limited v Messina Kenya Limited* (2019) eKLR.

⁶⁷ *Talewa Road Contractors Limited v Kenya National Highways Authority* (2021) eKLR.

⁶⁸ *Benjamin Oluoch Onoka v Solarnow Services Kenya Ltd* (2021) eKLR.

⁶⁹ *Arthur Kavino v Population Services International (PSI)* (2019) eKLR.

⁷⁰ *Machangi v County Government of Nyandarua & 2 others* (2022) eKLR.

⁷¹ Section 15(1) and (4), *Employment and Labour Relations Court Act*

the specific description or class of words.⁷² Therefore, the authors assert that arbitration is not prohibited under the ELRC. On the contrary, a court is still entitled to refer parties to arbitration under Section 15(1) of the ELRC Act. The import of Section 12 and Section 15 of the ELRC Act is that, while the ELRC has the primary jurisdiction to determine disputes between employers and employees, this jurisdiction is not exclusive, despite the Act's express use of the word 'exclusive.' This is evident in the fact that even Magistrate's Courts can hear and determine employment disputes.⁷³ Interpreting Sections 12 and 15(1) of the ELRC Act as excluding the resolution of employment disputes through arbitration would contradict the constitutional recognition of arbitration and the constitutional obligation on courts to promote ADR mechanisms, including arbitration.⁷⁴

iii. The Arbitration Act and employment arbitration

a. Section 3 of the Arbitration Act

The Arbitration Act of Kenya (KAA) does not specify the nature of disputes referable to arbitration. It provides a broad definition of arbitration, encompassing any arbitration process, whether or not administered by a permanent arbitral institution.⁷⁵ The KAA also broadly defines an arbitration agreement to mean an agreement by parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.⁷⁶ In *Nedermar Technology BV Limited v Kenya Anti-Corruption Commission*, the High Court, interpreting this definition, observed that the KAA does not preclude the arbitration of disputes involving allegations of fraud, bribery, corruption, or even tortious liability.⁷⁷ By analogy, if disputes involving such serious public policy concerns, often linked with potential penal sanctions, can be resolved through arbitration, then employment disputes (which may involve public policy issues) can equally be subjected to the same process.

⁷² Antonin Scalia & Bryan Garner, *Reading law: The interpretation of legal texts*, Thomson/West, Eagan, 2012, 119.

⁷³ See Section 29, *ELRC Act* (Act No. 20 of 2011). See also Section 9(b), *Magistrates' Courts Act* (Act No. 26 of 2015).

⁷⁴ Article 159(2)(c), Constitution of Kenya (2010).

⁷⁵ Section 3(1), *Arbitration Act* (Act No.4 of 1995).

⁷⁶ Section 3(1), *Arbitration Act* (Act No.4 of 1995).

⁷⁷ (2006) eKLR.

In addition, the KAA's expansive definition of an arbitration agreement suggests that employment relationships, which are both legal and contractual in nature, fall within the category of relationships whose disputes can be resolved through arbitration. This was underscored by the ELRC in *James Heather – Hayes v African Medical and Research Foundation (AMREF)* wherein it held that it would be unnatural to oust arbitration in resolving employing disputes and that if Parliament intended to expressly limit its applicability in employment disputes, it would have done so.⁷⁸ Consequently, the court held that the definition of an arbitration agreement does not oust arbitration clauses in employment contracts.⁷⁹

b. Stay of legal proceedings and employment arbitration

In majority of cases concerning employment arbitration, the ELRC has addressed its suitability conundrum at the stage of considering applications for the stay of legal proceedings under the KAA. One party wishing to rely on an arbitration agreement applies for a stay of legal proceedings, while the opposing party contends that the dispute is unsuitable for arbitration.⁸⁰ A stay of proceedings is an enforcement mechanism available to a party seeking to compel the initiator of legal proceedings to refer the dispute to arbitration in accordance with an arbitration agreement.⁸¹ Under Section 6 of the KAA, a court may grant a stay of legal proceedings upon satisfying itself that a valid arbitration agreement exists, and that the dispute falls within the scope of the arbitration agreement.⁸² The onus of proving that the matters in dispute fall within a valid and subsisting arbitration clause is on the party applying to the court for a stay of proceedings.⁸³ Once this burden has been discharged then the burden shifts to the opposing party to show why the arbitration clause should not be enforced.⁸⁴

The KAA further provides that an application for stay of proceedings must be filed not later than the time when the party enters appearance, or otherwise acknowledges the claim against which the stay of proceedings is sought.⁸⁵ Importantly, such an application cannot be disguised as a preliminary objection

⁷⁸ (2014) eKLR.

⁷⁹ *James Heather – Hayes v African Medical and Research Foundation* (2014) eKLR.

⁸⁰ Muigua K, *Settling disputes through arbitration in Kenya*, 3rd ed, Glenwood Publishers Limited, Nairobi, 2017, 53.

⁸¹ Kariuki F and Sebayiga V, 'Arbitrability of Fraud in Kenya', 14.

⁸² Section 6(1), *Arbitration Act* (Act No.4 of 1995); *Eunice Soko Mlagui v Suresh Parmar & 4 others* (2017) eKLR.

⁸³ *David Kamau Ngure v Total Kenya Limited* (2021) eKLR.

⁸⁴ *David Kamau Ngure v Total Kenya Limited* (2021) eKLR.

⁸⁵ Section 6(1), *Arbitration Act* (Act No.4 of 1995); *Charles Njogu Lofty v Bedouin Enterprises Ltd* (2005) eKLR; *Trt Investments Limited v Mwalo & 3 others* (Civil Case E223 of 2023) (2024) eKLR.

on a point of law.⁸⁶ The ELRC clarified this distinction in *Karuku & another v Gichuki*, that where a party fails to file an application for stay, and instead relies on a preliminary objection, such a party would not succeed in having the dispute referred to arbitration.⁸⁷ According to the court, there is no provision for filing a preliminary objection or seeking to strike out the suit as an alternative to an application for stay.⁸⁸ The court justified this procedural requirement, noting that while a preliminary objection is confined to pure points of law, an application for stay allows the court to address both legal and factual issues.⁸⁹

c. Challenging and setting aside an arbitral award arising from employment arbitration

The KAA defines an arbitral award as any award of an arbitral tribunal.⁹⁰ This definition is broad and encompasses all awards rendered by arbitrators, which include arbitral awards arising from employment arbitration. The KAA provides for limited grounds for challenging an arbitral award.⁹¹ An arbitral award may only be set aside if one or more of the following grounds are proved, namely: (i) incapacity of a party; (ii) invalidity of an agreement; (iii) improper notice of appointment of an arbitrator or the arbitral proceedings; (iv) where an arbitrator exceeds the scope of his or her reference; (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (v) where an award is induced or influenced by fraud, bribery, undue influence or corruption; (vi) where the dispute is not capable of settlement by arbitration under the law of Kenya; or (vii) where the arbitral award is against the public policy of Kenya.⁹² Consequently, any party aggrieved by an arbitral award arising from employment arbitration may apply to the ELRC to set it aside.

An application for setting aside an arbitral award must be made within 3 months after an arbitral award has been received.⁹³ The courts have held that an

⁸⁶ *Agip (K) Ltd v Kibutu* (1981) eKLR.

⁸⁷ (2024) eKLR.

⁸⁸ *Karuku & another v Gichuki* (2024) eKLR.

⁸⁹ *Karuku & another v Gichuki* (2024) eKLR; *Lorcan Byrne v Frontier Services Group East Africa Limited* (2019) eKLR- where the court declined to stay legal proceedings because the party had filed an application to strike out the claim, instead of an application to stay proceedings.

⁹⁰ Section 3(1), *Arbitration Act* (Act No.4 of 1995).

⁹¹ Sebayiga V, 'The right of appeal under Section 35 of the Arbitration Act of Kenya: A critique of the Supreme Court decision in *Nyutu Agrovat v Airtel Networks Limited* (2019) eKLR' 6(1) *Strathmore Law Review*, 2021,140.

⁹² Section 35(2)(a) and (b), *Arbitration Act* (Act No.4 of 1995).

⁹³ Section 35(1) and 35(3), *Arbitration Act* (Act No.4 of 1995).

arbitral award is deemed to have been received by the parties when the arbitral tribunal notifies the parties that a signed copy of the award is ready for collection, and not when payment is done.⁹⁴ Therefore, the time period starts running from the date of notification by the arbitrator.⁹⁵ The above grounds on setting aside an arbitral award are the same grounds upon which the court may refuse to recognise or enforce an arbitral award.⁹⁶

The Employment and Labour Relations Court (Procedure) Rules, 2024 (the ELRC Rules 2024) implicitly recognise employment arbitration through the recognition of the enforceability of arbitral awards. It provides that where parties are bound by an arbitral award, a party may file the award for adoption and enforcement as an order of the court.⁹⁷ Unlike the previous rules, the ELRC Rules 2024 expressly recognise arbitral awards as enforceable by the court. This development addresses the criticism against employment arbitration that the ELRC might be ceding its jurisdiction to resolve employment disputes to arbitrators. On the contrary, the court retains its supervisory jurisdiction and oversight at the recognition and enforcement stage of arbitral awards arising from employment arbitration. Thus, employment arbitration does not diminish or usurp the jurisdiction of the ELRC but rather complements its role by providing an alternative mechanism for resolving employment disputes.

In practice, the ELRC has dealt with applications seeking to set aside or contest recognition of arbitral awards arising from employment arbitration. In *Krishnamurthy v Nairobi West Hospital*, the court dismissed an application contesting recognition and enforcement of an arbitral award on account of public policy due to the failure of the applicant to identify the public policy allegedly breached and the particular portions of the award that conflict with that public policy.⁹⁸

III. The Benefits, Drawbacks, and Limitations of Employment Arbitration

In this section, the paper examines the benefits of employment arbitration, its drawbacks, and its limitations as a method of resolving employment disputes.

⁹⁴ *Lantech (Africa) Limited v Geothermal Development Company* (2020) eKLR; *National Housing Corporation v Custom General Construction Limited* (2021) eKLR; *P N Masbru Limited v Total Kenya Limited* (2013) eKLR.

⁹⁵ *Dinesh Construction Limited & KPLC Retirement Benefits Scheme v Aircon Electra Services (Nairobi) Limited* (2021) eKLR.

⁹⁶ Section 37(1), *Arbitration Act* (Act No.4 of 1995).

⁹⁷ Rule 69(1), *Employment and Labour Relations Court (Procedure) Rules* (2024). See also paragraph 7(b), *Employment and Labour Relations Court Practice Directions* 2025.

⁹⁸ (2023) eKLR.

i. *Benefits of employment arbitration*

a. Expeditious resolution of disputes

Arbitration can be faster than litigation because there is minimum emphasis on formality and strict compliance with the rules of evidence. This promotes the expeditious resolution of disputes.⁹⁹ An arbitrator considers appointment based on, inter alia, their availability and upon acceptance, they commit and dedicate the required time to determine the dispute.¹⁰⁰ On the other hand, litigation is governed by technical and detailed rules of procedure, and the resolution of cases depends on the court's packed diary thereby occasioning delays in conclusion of cases.¹⁰¹

b. Selection of an arbitrator with expertise in employment matters

Employment Arbitration allows parties to select an arbitrator with the requisite expertise and experience in employment law matters.¹⁰² A skilled arbitrator is able to cost-effectively and efficiently handle the disputes presented to them, which facilitates a more reasoned decision on the merits and promotes probable acceptance of the resultant arbitral award.¹⁰³

c. Arbitration gives parties more control over the arbitral process

Through party autonomy epitomised through words 'except as otherwise agreed by the parties,' parties are empowered to determine how their disputes will be resolved.¹⁰⁴ They may opt for a document-only procedure, instead of an oral hearing.¹⁰⁵ This flexibility allows parties to take ownership of the process and facilitate the faster resolution of disputes.¹⁰⁶

⁹⁹ Kariuki Muigua, *Settling disputes through arbitration in Kenya*, 6.

¹⁰⁰ Kariuki Muigua, *Settling disputes through arbitration in Kenya*, 6.

¹⁰¹ Kariuki Muigua, *Settling disputes through arbitration in Kenya*, 6.

¹⁰² Levinson M, 'Mandatory Arbitration', 489.

¹⁰³ Thomas R, O'Hara E and Martin K, 'Arbitration clauses in CEO employment contracts: An empirical and theoretical analysis' 63(4) *Vanderbilt Law Review*, 2010, 959, 970.

¹⁰⁴ Fagbemi S, 'The doctrine of party autonomy in international commercial arbitration: Myth or reality?' 6(1) *The Journal of Sustainable Development Law and Policy*, 2015, 239.

¹⁰⁵ Fagbemi S, 'The doctrine of party autonomy in international commercial arbitration: Myth or reality?', 239.

¹⁰⁶ Fagbemi S, 'The doctrine of party autonomy in international commercial arbitration: Myth or reality?', 236.

d. Employment arbitration enhances privacy for employees and employers

Unlike court proceedings, which may expose corporate and employee misconduct, arbitration allows parties, especially companies, to keep their wrongdoings and disputes out of the public view.¹⁰⁷ This allows parties to preserve their reputation and avoid unwanted unfavourable media attention that can decrease sales or hinder further employment opportunities.¹⁰⁸ While arbitration offers a certain level of privacy and confidentiality, it cannot guarantee full confidentiality as some private information may be divulged or revealed during setting aside and enforcement proceedings challenging the arbitral award.¹⁰⁹

e. Employment Arbitration presents a viable solution to reduce the case backlog at the ELRC

At the ELRC, disputes between employers and employees constitute the majority of pending cases.¹¹⁰ With only ten stations and twenty-eight judges nationwide, the ELRC is overburdened, creating significant delays in resolving employment disputes posing a threat to access justice because justice delayed is justice denied. To illustrate, as of 30 June 2024, the case backlog in the ELRC stood at four thousand nine hundred and twenty-seven cases while the backlog in the financial year 2022/2023 stood at seven thousand eight hundred and thirty-seven cases.¹¹¹ Notably, cases pending for over three years formed the largest share of the backlog, underscoring the systemic delays in resolving employment disputes.¹¹² Therefore, employment arbitration presents an opportunity to ease this burden by offering an alternative mechanism for faster resolution of employment disputes thereby reducing the case backlog at the ELRC.¹¹³

¹⁰⁷ Gifford A, 'Business and public policy considerations regarding mandating mandatory arbitration in the workplace' 41(2) *Mitchell Hamline Law Journal of Public Policy and Practice*, 2020, 82.

¹⁰⁸ Gifford A, 'Business and public policy considerations regarding mandating mandatory arbitration in the workplace', 84.

¹⁰⁹ Drahozal C, 'Confidentiality in consumer and employment arbitration' *Yearbook on Arbitration and Mediation*, 2015, 31.

¹¹⁰ The Judiciary of Kenya, *State of the Judiciary and the administration of justice annual report 2022/2023*, 127- where it constituted 60% followed by Miscellaneous Applications at 12%, Appeals at 10%, CBA at 7%, and the least was Reviews at 2%. See also page 50 of the Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report 2023/2024* where the Labour Disputes Causes constituted the largest percentage of all pending cases at 58%.

¹¹¹ The Judiciary of Kenya, *State of the Judiciary and the administration of justice annual report 2023/2024*, 50.

¹¹² The Judiciary of Kenya, *State of the Judiciary and the administration of justice annual report 2023/2024*, 50.

¹¹³ Kariuki Muigua, *Settling disputes through arbitration in Kenya*, 184.

ii. *The drawbacks of employment arbitration*

While employment arbitration offers numerous benefits as an alternative to litigation, it is not a flawless process. Like other forms of dispute resolution, arbitration has its own risks, drawbacks and ethical implications.

a. There exists a power imbalance between employers and employees

The relationship between an employer and an employee is inherently asymmetrical due to the significant disparity in resources and authority.¹¹⁴ Prospective employees are usually given employment contracts with mandatory and standard terms as a prerequisite for new or continued employment on a take-it-or-leave-it basis.¹¹⁵ They only get an opportunity to negotiate terms on remuneration and allowances.¹¹⁶ This imbalance frequently places employees in a precarious situation, compelling them to accept unilateral contractual terms, including mandatory arbitration clauses and employer demands or policies, even when unfavourable, in order to secure or maintain their jobs.¹¹⁷ Furthermore, the imbalance defeats the equality of arms that the ELRC maintains by providing a levelled playing field for the resolution of employment disputes.¹¹⁸

b. Arbitration involves high costs

Although arbitration is generally viewed as a cost-effective alternative for litigation, it can impose disproportionate financial burdens on employees, especially those who have recently lost their jobs and lack a stable income.¹¹⁹ In arbitration, employees are expected to cover the fees of their advocates and the arbitrator.¹²⁰ In contrast, employees do not pay judges of the ELRC for hearing and determining their cases, making litigation a more affordable option in the circumstances.¹²¹ Additionally, arbitration clauses drafted by employers may designate venues that are distant from employees' residence, resulting in additional costs for travel and accommodation.¹²² These costs create substantial

¹¹⁴ Giesbrecht-Mckee J, 'The fairness problem: Mandatory arbitration in employment contracts' *Willamette Law Review*, 2014, 259, 267.

¹¹⁵ Giesbrecht-Mckee J, 'The fairness problem', 269.

¹¹⁶ *Okeyo v Board of Directors HHI Management Service Limited & another* (2024) eKLR.

¹¹⁷ Giesbrecht-Mckee J, 'The fairness problem', 268.

¹¹⁸ *Halima Gababa Abdulahi v Lee Kinyanjui & another* (2019) eKLR.

¹¹⁹ Colvin A, 'An empirical study of employment arbitration: Case outcomes and processes' 8 *Journal of Empirical Legal Studies*, 2011, 9.

¹²⁰ *Okanya v Woodrow Communications Limited* [2023] KEELRC 2674 (KLR)

¹²¹ *Maina v Kenya Commercial Bank PLC & another* (2024) eKLR.

¹²² Gifford A, 'Business and public policy considerations regarding mandating mandatory arbitration in the workplace', 96.

barriers for employees, effectively limiting their access to justice and making arbitration less accessible for individuals in financially precarious situations.¹²³ For example, in *Nyamoringo v Honey Suckle Residents Association*, the claimant, a security guard earning a modest monthly salary of eight thousand four hundred and sixty three Kenyan shillings filed a suit against the respondent, alleging unfair and unlawful termination.¹²⁴ However, due to an arbitration clause in the employment contract, the court declined jurisdiction, stating it could only intervene after arbitration had taken place and an arbitral award was issued.¹²⁵ This paper frowns upon the subjection of low-wage employees to arbitration, as it is inherently unfair given the increasing costs that place the process beyond their financial reach.¹²⁶ Besides, some employees who have lost their jobs may not be in a position to afford arbitration.¹²⁷ Surprisingly, there have been instances where an employee is willing to resolve the dispute through arbitration, while the employer is reluctant to engage in the arbitral process.¹²⁸

c. Employees often have limited awareness and understanding of arbitration

It is a misconception that all parties who sign a contract fully understand its terms and intend to be bound by them.¹²⁹ In practice, factors such as education and exposure levels significantly influence the voluntariness of the intention and quality of consent.¹³⁰ High level management employees are more aware about arbitration due to their high literacy, exposure, and seniority levels.¹³¹ On the other hand, low level employees, especially casual workers may have no idea about arbitration and its tenets.¹³² As earlier stated, employment contracts are drafted by an employer in a standard format to be applied to all prospective employees, with minimal adjustments on job description and remuneration.¹³³ Most prospective employees have no real choice but to sign, as they are rarely in a position to

¹²³ Ogembo G, 'Arbitration of employment disputes in Kenya', 138.

¹²⁴ (2024) eKLR.

¹²⁵ *Nyamoringo v Honey Suckle Residents Association* (2024) eKLR.

¹²⁶ *Ocholla & 4 others v Construction House Company* (2024) eKLR- where the court decried the high cost of arbitration and urged the parties to consider court annexed mediation.

¹²⁷ *Abwoga v Checkups Medical Centre Ltd & another* (2024) eKLR.

¹²⁸ *Gearbox Panafrikan Network v Atsiaya* (2024) eKLR.

¹²⁹ *Stephen Nyamweya & Another v Riley Services Limited* (2013) eKLR.

¹³⁰ *Stephen Nyamweya & Another v Riley Services Limited* (2013) eKLR.

¹³¹ *Stephen Nyamweya & Another v Riley Services Limited* (2013) eKLR.

¹³² *Stephen Nyamweya & Another v Riley Services Limited* (2013) eKLR.

¹³³ *Stephen Nyamweya & Another v Riley Services Limited* (2013) eKLR.

propose alternative terms lest they lose the job offer.¹³⁴ The implication is that employees are indirectly coerced to accept an arbitration clause, which inhibits consent, the cornerstone of arbitration.¹³⁵ Many employees, particularly those in lower-level positions, have limited knowledge of arbitration, its processes, and how agreeing to it might restrict their rights.¹³⁶ This lack of awareness vitiates the element of consent in employment arbitration.¹³⁷ It follows that, where consent is not freely given, the subsequent arbitration agreement and arbitral process may be of questionable validity and substantive illegitimacy.¹³⁸

d. The ELRC already has specialised judges in employment law matters

These judges have extensive knowledge and capacity to resolve all employment disputes they are seized with, including complex disputes. Their very existence and availability directly weaken the argument that specialist arbitrators in employment arbitration offer a better alternative in addressing complex employment disputes. Notably, judges of the ELRC are selected for their professional experience and practical understanding of employment law, enabling them to effectively adjudicate complex disputes that come before the court. In *Karisa Chengo & 2 Others v Republic*, the Court of Appeal observed that, although the Constitution does not expressly stipulate the professional experience required for the appointment of judges to the ELRC, Parliament, in exercising its authority under Article 162(2) of the Constitution, has outlined the requisite qualifications.¹³⁹ Specifically, the Industrial Court Act provides that, to qualify for appointment as a judge of the ELRC, one must have at least ten years' experience as a distinguished academic or legal practitioner with substantial knowledge and expertise in employment and labour relations law and practice in Kenya.¹⁴⁰ According to the appellate court, specialised courts require judges with demonstrable experience in their specific mandates, given the unique and complex nature of the disputes they handle.¹⁴¹ The Court of Appeal's reasoning

¹³⁴ Levinson M, 'Mandatory Arbitration' 492.

¹³⁵ Robbins K, 'Ethical issues in employment arbitration', 1270.

¹³⁶ Gifford A, 'Business and public policy considerations regarding mandating mandatory arbitration in the workplace', 95.

¹³⁷ Gifford A, 'Business and public policy considerations regarding mandating mandatory arbitration in the workplace', 95.

¹³⁸ Gifford A, 'Business and public policy considerations regarding mandating mandatory arbitration in the workplace', 95.

¹³⁹ (2015) eKLR.

¹⁴⁰ Section 6, *Industrial Court Act* (Act No. 20 of 2011).

¹⁴¹ (2015) eKLR.

and findings were upheld by the Supreme Court.¹⁴² Consequently, the specialised focus of the ELRC guarantees that employment disputes are resolved fairly and with the needed depth of understanding and expertise therefore eliminating the need for employment arbitration. Notably, the authors acknowledge the widespread perception that the ELRC is employee-friendly, and often renders favourable judgments to the detriment of employers. This alleged bias may be unjust to employers, as justice must not only be done, but also be seen to be done.

e. Arbitration hinders the development of judicial precedent

Since arbitration is a private and confidential process, it limits the development of judicial precedent.¹⁴³ This is because Kenya Law, the electronic database for judgements, does not publish arbitral awards. Further, even if arbitral awards were to be published on Kenya Law, they do not form any judicial precedent as they are only binding upon the parties to it,¹⁴⁴ and not *in rem*. Moreover, if parties voluntarily comply with an arbitral award, there will be no need to approach court for recognition and enforcement, which stages usually involve the disclosure of a few details about the dispute between parties. Privacy and confidentiality, key features of arbitration, reduce opportunities for legal principles to evolve through the analysis and interpretation of similar cases and the ability of the public to benefit from the guidance provided by court decisions.¹⁴⁵ As a result, it can lead to uncertainty in how evolving employment law issues are interpreted. Therefore, the absence of open proceedings in employment arbitration diminishes the broader educational role that litigation plays in society.¹⁴⁶

f. Limited Ground of Appeal

An award can only be set aside based on the narrow grounds provided under the KAA.¹⁴⁷ Additionally, there are limited grounds of appeal in arbitration law and in practice.¹⁴⁸ As noted under Section 39 of the KAA, such appeals

¹⁴² *Republic v Chengo & 2 others* (2017) eKLR.

¹⁴³ Summers C, 'Mandatory arbitration: Privatizing public rights, compelling the unwilling to arbitrate' 6(3) *University of Pennsylvania Journal of Business Law*, 2004, 685,703

¹⁴⁴ Section 32A, *Arbitration Act* (Act No.4 of 1995).

¹⁴⁵ Bales R, 'A normative consideration of employment arbitration at Gilmer's Quinceanera' 81 *Tulane Law Review*, 2006, 368.

¹⁴⁶ Bales R, 'A normative consideration of employment arbitration at Gilmer's Quinceanera', 368.

¹⁴⁷ Section 10 and 35, *Arbitration Act* (Act No.4 of 1995).

¹⁴⁸ See Sebayiga V, 'The right of appeal under Section 35 of the Arbitration Act of Kenya'.

are limited to questions of law arising in domestic arbitration, whether in the ELRC,¹⁴⁹ or as a further appeal to the Court of Appeal.¹⁵⁰ Even where arbitrators make errors of fact or law, these do not justify challenging arbitral awards.¹⁵¹ It is, however, worth noting that appeals may lie from the ELRC to the Court of Appeal on a determination made under Section 35 of the KAA where the ELRC in setting aside an arbitral award, has stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong, and which has completely closed the door of justice to either party.¹⁵² Nevertheless, courts cannot examine the merits of arbitral awards and impose their interpretation of law.¹⁵³ Although the limited grounds of appeal are well intended to safeguard the sanctity of arbitral awards, this circumscribed avenue may allow for the commission and enforcement of awards with glaring errors that can be detrimental to the rights of employers and employees.

iii. Limitations in using employment arbitration

a. Arbitrators cannot determine disputes involving constitutional rights violations

In the landmark case of *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 Others* [2023] KESC 14 (KLR) (*Bia Tosha Case*), the Supreme Court held that the jurisdiction of an arbitrator is delineated by the arbitration agreement and does not include hearing and determining allegations and breaches of the Constitution and violations of the Bill of Rights.¹⁵⁴ According to the apex court, only the High Court and the specialised courts, namely the ELRC and the Environment and Land Court are entrusted with this mandate.¹⁵⁵ The Supreme Court therefore cautioned that a court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements.¹⁵⁶ In the recent case of *Mwai v CMA CGM (K) Limited*, the Claimant faulted the arbitral tribunal's holding that it lacked jurisdiction to determine the constitutional issues of discrimination and harassment while in

¹⁴⁹ Section 39(1) and 39(2), *Arbitration Act* (Act No.4 of 1995).

¹⁵⁰ Section 39 (3), *Arbitration Act* (Act No.4 of 1995).

¹⁵¹ *Nairobi Golf Hotels Ltd vs. Linotic Floor Company Ltd* [2015] eKLR.

¹⁵² *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR.

¹⁵³ *Elige Communications Limited v Safaricom Plc 2021 KEHC 6045 (KLR).*

¹⁵⁴ (2023) eKLR.

¹⁵⁵ *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 Others* (2023) eKLR.

¹⁵⁶ *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 Others* (2023) eKLR.

the course of his employment.¹⁵⁷ The Claimant therefore sought that the matter be referred to the Chartered Institute of Arbitrators (CI Arb) Kenya to appoint another arbitrator to determine these issues.¹⁵⁸ While dismissing the application, the court held that it lacked the jurisdiction to make an assessment of the merits and the demerits of the arbitral award based on points of law and facts.¹⁵⁹

Following the binding *Bia Tosha* decision, some ELRC judges have declined to refer cases involving allegations of constitutional breaches and violations to arbitration. For instance, in *Atandi v African Medical and Research Foundation (AMREF) Flying Doctors* [2023] KEELRC 991 (KLR), the Claimant's case involved not only allegations of unfair termination but also alleged discrimination on account of religious beliefs under Article 27 of the Constitution.¹⁶⁰ The court held that the arbitrator will not be able to determine all the issues in dispute, particularly the issues regarding the Claimant's alleged discrimination, as they fall outside the jurisdiction of arbitrators.¹⁶¹ Similarly, while relying on the *Bia Tosha* Case, the court in *Maina v Kenya Commercial Bank PLC* declined to stay proceedings, holding that since the petitioner had made several claims of alleged violation of his constitutional rights, those allegations should be considered by a court of law.¹⁶²

Following from the above, arbitration faces significant limitations in resolving certain types of employment disputes, particularly those involving constitutional and statutory rights, such as protection from discrimination.¹⁶³ Critics argue that arbitration fails to adequately support the broader policy goals of anti-discrimination laws, despite its potential use in addressing employment disputes related to economic entitlements like wages or benefits.¹⁶⁴ Arbitration's private nature hinders public accountability by not disclosing outcomes and influencing the actions of other employers.¹⁶⁵ This lack of transparency also reduces the likelihood of exposing or deterring discriminatory practices on a

¹⁵⁷ (2024) eKLR.

¹⁵⁸ *Mwai v CMA CGM (K) Limited* (2024) eKLR.

¹⁵⁹ *Mwai v CMA CGM (K) Limited* (2024) eKLR.

¹⁶⁰ (2023) eKLR.

¹⁶¹ *Atandi v African Medical and Research Foundation (AMREF) Flying Doctors* (2023) eKLR; *Alusa v Mobile Consultation Association Ltd t/a Tibu Health* (2024) eKLR; *Kalaine v Mobile Consultations Africa Limited t/a Tibu Health* (2025) eKLR.

¹⁶² (2024) eKLR. See also *Muchura v Safari Collection Limited* (2023) eKLR

¹⁶³ Bales R. 'A normative consideration of employment arbitration at Gilmer's Quinceanera', 362.

¹⁶⁴ Hylton K, 'The law and economics of agreements to arbitrate employment claims' Boston University School of Law, Working Paper Series, Law & Economics Working Paper Number 00-04, 2000, 5 —< <https://papers.ssrn.com/sol3/papers> > on 28 December 2024.

¹⁶⁵ Levinson M, 'Mandatory arbitration', 495.

broader scale.¹⁶⁶ In contrast, litigating discrimination and constitutional claims in court develops and refines legal precedent and educates the public, offering clear guidance to employers on acceptable workplace conduct and educating the public on the legality of certain employment practices.¹⁶⁷ By shaping the law, litigating employment disputes reinforces cultural norms that condemn discrimination, uphold constitutional rights, and provide employers with guidelines for appropriate conduct at the workplace.¹⁶⁸

b. Arbitrators cannot grant constitutional remedies

Since arbitrators lack the authority to interpret the Constitution or adjudicate claims involving breaches of constitutional rights, they cannot grant constitutional remedies and reliefs to uphold and enforce the Bill of Rights.¹⁶⁹ These reliefs include declaration of rights, injunctions, conservatory orders, compensatory orders, and judicial review orders.¹⁷⁰ In most cases, suits instituted by parties before the ELRC include prayers for such reliefs. Consequently, courts should decline to stay proceedings and refer parties to arbitration in such cases, as the reliefs sought by the parties may fall outside the scope of what arbitrators are empowered to grant.

c. Lack of expertise in employment law

While employment arbitration offers the advantage of having disputes resolved by an arbitrator specialised in employment law, in practice, expertise is not the sole criterion for appointment.¹⁷¹ Particularly, there is a perception that employment disputes are less technical compared to construction or complex commercial disputes, which are generally considered to require highly specialised arbitrators from the outset. As a result, an appointed arbitrator with only a generalist understanding of employment law may lack the specialised knowledge required in this dynamic and continually evolving field.¹⁷² Further, an arbitrator

¹⁶⁶ Levinson M, 'Mandatory arbitration', 495.

¹⁶⁷ Levinson M, 'Mandatory arbitration', 495.

¹⁶⁸ Levinson M, 'Mandatory arbitration', 495.

¹⁶⁹ Sebayiga V and Kiiru L, 'Addressing constitutional issues arising out of arbitrable commercial disputes: The Bia Tosha and Kenya Breweries Limited Cases' 11(4) *Alternative Dispute Resolution Journal*, 2023, 218.

¹⁷⁰ Sebayiga V and Kiiru L, 'Addressing constitutional issues arising out of arbitrable commercial disputes', 218.

¹⁷¹ Chartered Institute of Arbitrators (Kenya Branch), Arbitration Rules 2020.

¹⁷² Schwab S, 'Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?' 76(3) *Indiana Law Journal*, 2001, 31.

who is not up-to-date may fail to appreciate the unique nuances of employment law, for instance, it sometimes applies a reverse burden of proof in resolving certain disputes.¹⁷³ For example, under the Employment Act and case law, an employee is only required to present prima facie evidence of wrongful or unfair termination.¹⁷⁴ Once this is done, the burden of proof shifts to the employer to prove that the termination was lawful.¹⁷⁵ If the employer cannot substantiate the reasons for the termination, the law presumes the termination to be unlawful.¹⁷⁶

Lastly, arbitrators with deep expertise often charge higher fees and are frequently engaged in ongoing arbitral matters, making them less accessible and affordable.¹⁷⁷ Additionally, there is a risk that if seasoned arbitrators render awards unfavourable to employers, who are potential repeat clients, they may also lose future opportunities to be retained as counsel in other disputes.

d. The doctrine of exhaustion of alternative remedies is restricted to statutory remedies, and not arbitration

In most cases, courts rely on the doctrine of exhaustion of local remedies to refer parties to arbitration. However, in the *Bia Tosha* Case, the Supreme Court clarified that the exhaustion of local remedies doctrine applies only to statutory remedies, and therefore, the doctrine cannot be invoked to justify the exhaustion of arbitration (a creature of an arbitration agreement) as an alternative procedure before approaching court.¹⁷⁸ This holding by the apex court significantly undermines the utilisation of arbitration in resolving employment disputes as the Employment Act exclusively empowers the ELRC to resolve employment disputes. That said, the position taken by the Supreme Court contradicts its previous decisions that courts should not determine a constitutional issue when a matter may properly be decided on another basis, and that dispute may be fully resolved through arbitration without involving constitutional provisions.¹⁷⁹ In the

¹⁷³ *Maina v Kenya Commercial Bank PLC & another* (2024) eKLR.

¹⁷⁴ *Milano Electronics Limited v Dickson Nyasi Mubaso* (2021) eKLR.

¹⁷⁵ *Milano Electronics Limited v Dickson Nyasi Mubaso* (2021) eKLR.

¹⁷⁶ Sections 47(5) and 43, *Employment Act* (Act No. 11 of 2007); *Mwanyale v Imarika Sacco* [2022] eKLR; *Peter Otabong Ekisa v County Government of Busia* (2017) eKLR. See also the shift of the burden to the employer in discrimination cases under Section 5(7) of the Employment Act as interpreted in *Bakboya v Chane & another* [2024] KEELRC 293 (KLR).

¹⁷⁷ CI Arb Kenya, *Fee Guidelines and Recommendations*, 2024 —< <https://ciarbkenya.org/wp-content/uploads/2024/08/CIARB-Kenya-Fee-Guidelines-Recommendations-AUG-2024.pdf> > on May 2025

¹⁷⁸ (2023) eKLR.

¹⁷⁹ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. See also *Okija Omtatab Okoiti & another v Attorney General & 6 others* (2014) eKLR; *Council of County Governors v Lake Basin Development Authority & 6 others* (2021) eKLR. See *Sebayiga V and Kiiru L*,

authors' view, the Supreme Court should have provided a detailed justification for why the doctrine of exhaustion of local remedies cannot be used in favour of arbitration. Instead, it merely stated that the doctrine is limited to statutory remedies. This overly formalistic approach creates more confusion than clarity in the lower courts.

IV. Factors That Should Be Considered by the ELRC in Applications for Stay of Legal Proceedings in Favour of Employment Arbitration

As highlighted in the previous section, courts are seized with the issue of employment arbitration at the stage of determining applications for a stay of legal proceedings under the KAA. However, beyond the established factors and tests stemming from the KAA as well as case law on the stay of legal proceedings, there is a lack of comprehensive guidelines for courts to determine whether to retain jurisdiction or refer employment disputes to arbitration. This section proposes several factors that courts should consider when assessing the suitability of employment arbitration for resolving specific employment disputes. These factors provide a structured framework for evaluating each case on its merits and inform the exercise of judicial discretion, ensuring a fair and practical approach to employment arbitration.

i. Level of the employee

The level of an employee is critical in assessing the fairness of arbitration clauses in employment contracts. Although lower-level employees have significantly less bargaining power compared to their employers, high-ranking employees, such as Chief Executive Officers, Managers, and Chief Financial Officers, possess higher bargaining power.¹⁸⁰ These senior level employees, coupled with their extensive years of experience, have stronger leverage to negotiate contractual terms, including higher salaries and arbitration clauses, on a footing that, while not entirely equal, is closer to parity with their employers as they are hired to make key strategic decisions and provide leadership in achieving the company's long-term goals.¹⁸¹ Given their large compensation packages, such as high salaries, bonuses, and perks, high-level employees are

'Addressing Constitutional Issues Arising Out of Arbitrable Commercial Disputes: The Bia Tosha and Kenya Breweries Limited Cases', 218.

¹⁸⁰ Thomas R, O'Hara E & Martin K, 'Arbitration clauses in CEO employment contracts', 972.

¹⁸¹ Ogembo G, '*Arbitration of employment disputes in Kenya*', 124.

able to afford costs involved in arbitration.¹⁸² In stark contrast, subjecting lower-level employees earning low salaries and have little or no understanding of arbitration, is extremely unfair and unjust.¹⁸³ Courts should be cautious about overly relying on the principle of freedom of contract in such cases.¹⁸⁴ Doing so risks perpetuating systemic inequality and promoting procedural and substantive unconscionability, as lower-level employees are unlikely to have the knowledge, resources, or bargaining power to challenge or negotiate these clauses.¹⁸⁵ Courts should adopt a nuanced approach to recognising the inherent power imbalances in employment relationships, especially for vulnerable employees.¹⁸⁶ This may involve requiring an employer to demonstrate that they explained to an employee the nature and implication of an arbitration clause and provide evidence of voluntary consent by the employee.¹⁸⁷

ii. *The nature of allegations*

As discussed in the previous section, courts have the exclusive authority to interpret and apply the Constitution and grant constitutional remedies. Where allegations in an employment dispute involve express violations of fundamental rights under the Bill of Rights, such as the freedom from discrimination, and the right to fair labour practices, the court should decline to refer the employment dispute to arbitration. However, it must critically assess whether these constitutional violations have been pleaded with sufficient precision and clarity.¹⁸⁸ The connection between the alleged constitutional provisions and the manner of their violation must be sufficiently clear and direct.¹⁸⁹ Ultimately, the court must carefully scrutinise the pleadings and arguments to determine whether genuine constitutional issues are raised or if these references are merely included as a way to avoid arbitration.¹⁹⁰ In these circumstances, courts should undertake a *prima facie* examination of the pleadings.

Whereas the Supreme Court has held that only superior courts can interpret or apply the Constitution, this paper contends that merely referencing

¹⁸² Ogembo G, ‘*Arbitration of employment disputes in Kenya*’, 124.

¹⁸³ Ogembo G, ‘*Arbitration of employment disputes in Kenya*’, 124.

¹⁸⁴ Spitko G, ‘Exempting high-level employees and small employers from legislation invalidating pre-dispute employment arbitration agreements’, 6.

¹⁸⁵ Ogembo G, ‘*Arbitration of employment disputes in Kenya*’, 125.

¹⁸⁶ Ogembo G, ‘*Arbitration of employment disputes in Kenya*’, 125.

¹⁸⁷ Ogembo G, ‘*Arbitration of employment disputes in Kenya*’, 125.

¹⁸⁸ *Anarita Karimi Njeru v Republic* (979) KLR 154.

¹⁸⁹ *Mumo Matemo v Trusted Society of Human Rights Alliance* (2014) eKLR

¹⁹⁰ *Kenneth Maweu Kasinga v Cytonn High Yield Solutions* (2020) eKLR, para 22.

constitutional provisions does not invite the court to interpret or apply the provisions of the Constitution, as all claims can be anchored on rights enshrined under the Constitution. Thus, in appropriate cases, even when constitutional provisions are cited, the court can still refer the dispute to arbitration, provided it is satisfied that there are no genuine constitutional issues at stake, the case can be resolved without referencing the Constitution, and the constitutional provisions would not affect the merits of the dispute. The court should ask itself whether the constitutional issues are so closely intertwined with the employment claims such that the arbitrator may be compelled to address them.

That said, employment arbitration is not suitable for resolving employment disputes involving claims of discrimination and sexual harassment. There is a public policy objective in exposing and deterring such discriminatory and exploitative labour practices. Therefore, the authors disagree with the decision in *JK v P A T H & Martin Mbanu*, where the court referred the parties to arbitration despite the claimant alleging both unlawful termination and sexual harassment.¹⁹¹ These claims should fall outside the proper scope of arbitration due to their public policy implications.

iii. Remedies being sought

The court should carefully consider the nature of remedies sought by an employee when deciding whether to refer the dispute to arbitration. If an employee is seeking damages for unfair termination, wrong dismissal, or payment of outstanding dues, and no constitutional remedies are requested, the court should generally refer the matter to arbitration. Arbitration can be used to resolve monetary-related disputes of this nature arising from employment relations, as arbitrators are capable of determining and computing the amount of compensation for unlawful and unfair termination. However, where remedies sought include constitutional remedies like declarations of rights, compensatory orders for constitutional rights violations, judicial review orders, or damages for violation of the employee's right to fair labour practices, the court should instead determine the dispute. These types of remedies involve significant public policy considerations and often require a more nuanced constitutional interpretation approach, which the court is better positioned to handle.¹⁹² For this reason, the Supreme Court has held that when awarding damages in constitutional claims where rights have been violated, the courts consider the need to deter future

¹⁹¹ (2018) eKLR.

¹⁹² *Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others* (2021) eKLR.

violations, uphold the rule of law, and ensure that public authorities or private parties respect constitutional rights.¹⁹³ The rationale for awarding damages in contractual breaches is to restore the injured party to the position that they would have been had the breach not occurred.¹⁹⁴ However, in constitutional claims, the damages awarded by courts aim to address broader issues of justice and protection of fundamental rights.¹⁹⁵ Therefore, even in the absence of clear evidence to quantify the damage caused by the breach, courts may still award remedies based on the principle that the violation of constitutional rights itself warranted redress.¹⁹⁶ Consequently, arbitrators cannot grant damages to address constitutional rights violations.

iv. The wording of an arbitration clause

Arbitration is a creature of consent, and where parties have explicitly delineated the specific disputes to be resolved through arbitration, an arbitrator lacks jurisdiction to determine issues outside the scope of their mandate.¹⁹⁷ If an arbitrator proceeds to address disputes beyond this scope, they would be exceeding their authority.¹⁹⁸ It is therefore essential for the court to assess whether the dispute at hand falls within the scope of the arbitration agreement. If the dispute falls outside the arbitrator's jurisdiction, the court should decline to refer the parties to arbitration.

Further, where the wording of the arbitration clause suggests that arbitration is optional, as indicated by the use of the word 'may' rather than the more definitive 'shall,' the court could assume jurisdiction and decline to refer the dispute to arbitration. The use of 'may' implies that arbitration is not mandatory, and as such, a party has an option of going either to court or arbitration.¹⁹⁹ Therefore, the court is not precluded from resolving the dispute itself as there is no compulsion to arbitrate.²⁰⁰ In such cases, the court has the discretion to determine the matter, rather than refer to arbitration.

¹⁹³ *EPZA & 10 Others v NEMA & 3 Others* (2024) eKLR.

¹⁹⁴ *EPZA & 10 Others v NEMA & 3 Others* (2024) eKLR, para 25.

¹⁹⁵ *EPZA & 10 Others v NEMA & 3 Others* (2024) eKLR, para 25.

¹⁹⁶ *EPZA & 10 Others v NEMA & 3 Others* (2024) eKLR, para 25.

¹⁹⁷ Onyema E, *International commercial arbitration and the arbitrator's contract*, Routledge Research in International Commercial Law, London, 2010, 8.

¹⁹⁸ Onyema E, *International commercial arbitration and the arbitrator's contract*, 127.

¹⁹⁹ *GTL Infrastructure Ltd. v. Vodafone Idea Ltd* (VIL) Bombay High Court.

²⁰⁰ Born G, *International Commercial Arbitration*, 3rd ed, Wolters Kluwer, 2021, 1180; Rosenberg C, 'Henry Schein v. Archer & White: A Lesson in the Importance of Carefully Drafting an Arbitration Clause' 8(3) *American University Business Law Review*, 2020, 383.

v. *Mandatory pre-arbitration dispute resolution mechanisms*

When a dispute resolution clause requires mandatory steps such as negotiation, and mediation to be attempted before resorting to arbitration, the court may decline to refer the parties to arbitration initially if these pre-arbitration procedures have not been properly followed.²⁰¹ This is because the parties should exhaust their agreed upon prescribed steps before proceeding to arbitration. Failing to adhere to the sequence of these mechanisms can undermine the integrity of the process and the principles of fairness, as it bypasses the opportunity for resolution of the dispute through less formal means.²⁰²

However, the court should be alive to the principle of competence-competence, which empowers an arbitral tribunal to rule on its jurisdiction.²⁰³ Compliance with pre-arbitration procedures only affects the admissibility of claims but does not deprive the arbitral tribunal of jurisdiction.²⁰⁴ Admittedly, it may be commercially unfeasible to send the parties to arbitration to appoint an arbitrator (where they will incur costs) and await the arbitral tribunal's decision on compliance with these procedures and admissibility of claims, and then return to court if the arbitrator finds the claims inadmissible. Conversely, where the arbitral tribunal finds some claims admissible and others inadmissible, there is a risk of splitting and determining claims before different fora, which contradicts the parties' intention to centralise the resolution of disputes before an arbitrator. In addition, resolving claims before different fora can potentially lead to conflicting decisions stemming from the same facts and dispute between the parties thereby hindering the efficient administration of justice.²⁰⁵

vi. *Appointment of the arbitrator*

When an arbitration clause allows for the unilateral appointment of an arbitrator by the employer, the court should be hesitant about referring the parties to arbitration. Such clauses may imply a lack of consent by the employee and raise concerns about impartiality. The unilateral appointment of an arbitrator by an employer (who has higher bargaining power than the employee) is not only unfair but also undermines the fundamental principles of party autonomy and equality

²⁰¹ *Rono v Delish Nail & Beauty Ltd* (2023) eKLR.

²⁰² Mehta A and Ghosh S, 'Good Faith or Bad Faith – Analysing the Enforceability of Pre-Arbitral Negotiation Clauses' 7(2) *National Law School Business Law Review*, 2021, 2.

²⁰³ Section 17(1), *Arbitration Act* (Act No.4 of 1995).

²⁰⁴ *NWA & FSA v NVF & others* [2021] EWHC 2666 (Comm); *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm).

²⁰⁵ *Muchura v Safari Collection Limited* (2023) eKLR.

of parties. Rather than declining to refer the parties to arbitration in cases where the employer has the sole power to appoint the arbitrator, Justice Rika in *Jeremia Mutia Kiao v Raints Kenya Ltd & RA International* maintained his pro-employment arbitration. He held that the court could not assume jurisdiction in disregarding the employer's preferred dispute resolution mechanism.²⁰⁶

In that case, the arbitration clause granted the respondent company sole and absolute discretion to determine the forum, allowing it to choose whether to refer disputes to arbitration or the Kenyan courts.²⁰⁷ This clause was fundamentally unfair as it denied the employee the right to appoint an arbitrator or even to initiate legal action in court. Such imbalances create an unequal playing field necessitating the need to protect the rights of employees, especially in situations where there is a significant power disparity. The unilateral appointment of arbitrators has been condemned by the Indian Supreme Court in the case of the *Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV)*.²⁰⁸ According to the Indian Supreme Court, an arbitration clause that allows one party to unilaterally appoint a sole arbitrator, gives rise to justifiable doubts as to the independence and impartiality of the arbitrator.²⁰⁹ It also hinders equal participation of the other party in the appointment process of arbitrators.²¹⁰

vii. *The governing law and the seat of arbitration*

In cases where an employment contract involves a Kenyan citizen and is being performed in Kenya but imposes foreign law and/or a foreign seat of arbitration, the court should decline to refer the dispute to foreign arbitration. This is because the jurisdiction of the ELRC and the application of the Employment Act cannot be ousted by a contractual clause where the contract is being performed in Kenya. To illustrate, in *Joao Soares v Tuegest Guerma & Another*, Justice Onyango held that an employee cannot, by choice, be deprived of the protection provided by the applicable law. In this case, even though the employee and employer both resided in Kenya, the contract stipulated the governing law of Ethiopia. The court recognised that referring the employee to Ethiopian courts would place them at a significant disadvantage and cause undue prejudice.²¹¹ The decision underscores the importance of ensuring that employees, particularly

²⁰⁶ (2017) eKLR.

²⁰⁷ (2017) eKLR.

²⁰⁸ Civil Appeal Nos, 9486-9487 of 2019.

²⁰⁹ Civil Appeal Nos, 9486-9487 of 2019.

²¹⁰ Civil Appeal Nos, 9486-9487 of 2019.

²¹¹ (2014) eKLR.

those in vulnerable positions, are not stripped of their legal rights to access court simply due to the terms of a contract.

viii. Affordability of arbitration costs and access to justice

The cost of arbitration transcends the principle of party autonomy and directly impacts the constitutional right of access to justice.²¹² Over time, arbitration has become costly, which undermines its viability for employment disputes, as employees at lower levels cannot afford such expenses, despite its perceived efficiency and flexibility.²¹³ When determining an application for stay of legal proceedings in favour of employment arbitration, the court should consider the cost of arbitration and assess whether the employee can reasonably afford such costs. In doing so, the court may consider, among other factors, the employee's monthly salary, the allowances they receive, bank or MPESA statements, any ongoing loan repayments, the number of dependants relying on their income, estimated monthly childcare or household expenses, the cost of the proposed arbitration venue, the likely duration of the proceedings, and whether the employee can manage to pay the minimum arbitrator's hourly rate, which is currently around five thousand Kenyan Shillings, over the expected period, and the estimated difference between the cost of arbitration and litigation.

To illustrate how high costs can hinder access to justice, in *Bett & others v Kenya Post Office Savings Bank*, the court initially stayed proceedings and referred parties to arbitration.²¹⁴ However, the claimant returned to court submitting that the court should proceed with the hearing as the arbitrator was too expensive.²¹⁵ Despite the employee's plea, the court declined to entertain the case explaining that it could not assume jurisdiction on the account that the arbitrator was too expensive.²¹⁶ In this case, the court seemed unconcerned about the reality that arbitration has become so costly and unaffordable, even for low-wage employees. Similarly, the court in *Aboya v Kavle t/a Kavle Consulting LLC & another* stayed legal proceedings and referred parties to arbitration, despite the agreement specifying the venue of the arbitral proceedings to be in the United States of America, which would undoubtedly be expensive for the employee.²¹⁷

²¹² Ngotho J, 'Access to Justice in Kenya: A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya' 2(1) *Journal of Conflict Management and Sustainable Development*, 2018, 83.

²¹³ Sternlight J, 'Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, MeToo?' 51 *Harvard Civil Rights-Civil Liberties Law Review*, 2019, 183. See also *Jane Muthoni Mukuna v FSI Capital Limited* (2015) eKLR.

²¹⁴ (2024) eKLR.

²¹⁵ *Bett & others v Kenya Post Office Savings Bank* (2024) eKLR.

²¹⁶ *Bett & others v Kenya Post Office Savings Bank* (2024) eKLR.

²¹⁷ (2024) eKLR.

Courts should also consider the party who will bear the arbitration costs. If an employer elects to pay these costs, employment arbitration may be permitted, as the financial burden would not fall on the employee.²¹⁸ However, this arrangement could raise concerns about the arbitrator's impartiality.²¹⁹ To address this concern, the ELRC may refer parties to arbitration if the parties have agreed that the employer will cover the majority of the arbitration costs, for instance, 80 percent of costs such as the appointment of the arbitrator, the arbitrator's fees, and the venue expenses. The employee should also contribute a small percentage, such as 20 percent, toward the arbitrator's fees. Notably, each party should bear its own legal costs, as employees would ordinarily incur their own legal expenses even in litigation. This power to agree beforehand on cost apportionment is permitted under Section 32B of the KAA.²²⁰ In the absence of such an agreement, the costs are to be assessed and apportioned by the arbitral tribunal upon the conclusion of the arbitral proceedings.²²¹ The KAA gives the arbitral tribunal exclusive jurisdiction to assess, determine, and apportion costs of arbitration.²²² Courts and registrars do not have jurisdiction to assess and apportion costs of arbitration.²²³ As a result, it would be both improper and beyond the jurisdiction the ELRC to apportion arbitration costs when considering an application for a stay of legal proceedings.²²⁴

ix. *Compliance with Section 6 of the KAA*

The court must ensure that any party seeking to invoke arbitration has adhered to the procedural requirements for staying legal proceedings as stipulated under Section 6 of the KAA.²²⁵ A key consideration is whether the application for a stay has been made promptly, specifically at the time of entering an appearance or before filing a defence.²²⁶ Failure to file such an application within the prescribed timelines undermines procedural fairness, and in such instances, the court should decline to refer the matter to arbitration.²²⁷ It may

²¹⁸ The Dunlop Commission on the Future of Worker-Management Relations, *Final Report*, 1993, 49.

²¹⁹ The Dunlop Commission on the Future of Worker-Management Relations, *Final Report*, 1993, 57.

²²⁰ Section 32B, *Arbitration Act* (Act No.4 of 1995) Act No. 4 of 1995.

²²¹ Section 32B, *Arbitration Act* (Act No.4 of 1995) Act No. 4 of 1995.

²²² *Transworld Safaris (K) Ltd v Eagle Aviation Limited & 3 Others* (2012) eKLR.

²²³ *Transworld Safaris (K) Ltd v Eagle Aviation Limited & 3 Others* (2012) eKLR.

²²⁴ *Golden Homes (Management) Limited v Mohammed Fakeruddinn Abdullai & Another; Golden Homes Limited (Interested Party)* (2019) eKLR.

²²⁵ *Ngigi v Youth Dynamix Kenya Limited* (Cause E258 of 2021) (2024) eKLR.

²²⁶ *Ngigi v Youth Dynamix Kenya Limited* (Cause E258 of 2021) (2024) eKLR.

²²⁷ *Lipa Later Limited v Wanini* (2023) eKLR; *Total Security Surveillance Ltd v Oil Field Movers Ltd* (2022) eKLR- where the court held that a preliminary objection is not provided for as a means to contest

also signify a lack of interest in properly prosecuting the case before the arbitral tribunal.

Notably, a failure to comply with the procedural requirements of filing an application for stay of legal proceedings cannot be cured by the oxygen principle under the Civil Procedure Act and the ELRC Act. As the Court of Appeal rightly held in *Anne Mumbi Hinga v Victoria Njoki Gathara*, the KAA is a complete code, and the provisions of the Civil Procedure Act and rules do not apply to arbitral proceedings.²²⁸ Additionally, the constitutional dictate of Article 159(2) (d) of the Constitution cannot be invoked to justify non-compliance with the mandatory requirements for lodging an application for stay of legal proceedings. By recognising arbitration as a form of dispute resolution mechanism, the Constitution acknowledges that arbitration has its unique strictures and timelines that must be observed.²²⁹ Accordingly, a party who has failed to comply with the mandatory filing requirements under Section 6 of the KAA cannot seek refuge under the oxygen principle or the constitutional dictate of administering justice without undue regard to procedural technicalities.²³⁰ Moreover, the oxygen principle cannot save applications that are incompetent due to failure to adhere to prescribed timelines.²³¹

The court should also evaluate whether a valid arbitration agreement exists and confirm that the dispute falls within the reference to arbitration.²³²

V. Recommendations for Enhancing Employment Arbitration in Kenya

i. Fee guidelines for employment arbitration

Recognising the high costs associated with arbitration, CIArb Kenya (the largest membership organisation of arbitrators in Kenya) should develop comprehensive guidelines to regulate the fees charged in employment arbitration. The current fee structure, which ranges from an hourly rate of ten thousand to thirty thousand Kenyan shillings, may place a considerable financial burden

jurisdiction under the Arbitration Act.

²²⁸ (2009)eKLR.

²²⁹ See the Dissenting Opinion of former Chief Justice David Maraga in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch* (2019)KESC 11 (KLR)

²³⁰ *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR.

²³¹ *Stanley Ng'ethe Kinyanjui v Tony Ketter & 5 others* (2015)eKLR

²³² *Zaidi v Lake Turkana Wind Power Limited* (2023) eKLR.

on employees, potentially limiting their access to justice.²³³ By introducing standardised fee guidelines for employment arbitration, CI Arb Kenya could foster greater affordability and inclusivity, ensuring that employment arbitration remains a viable and equitable dispute resolution mechanism for all parties, especially employees who may already face financial constraints. Notably, CI Arb Kenya is not the only appointing authority of arbitrators. Parties and institutions like the Law Society of Kenya (LSK) and the Federation of Kenya Employers can appoint arbitrators. Therefore, there should be a stakeholder engagement to address the affordability of employment arbitration.

ii. Legislative amendments

There is an urgent need to amend the KAA to resolve the persistent issue of arbitrable and non-arbitrable disputes. The current uncertainty and lack of clear statutory guidance have led to divergent views, particularly on the arbitrability of certain disputes, such as employment disputes. Addressing this ambiguity through legislative amendments would provide the much-needed clarity once and for all. By clearly defining the scope of disputes amenable to arbitration, Parliament would have unequivocally expressed its intention, offering guidance to courts, arbitrators, practitioners, and parties alike.

The KAA and the ELRC Act should also be amended to align them with the evolving jurisprudence of the ELRC regarding employment arbitration. Incorporating these developments into the statutory framework would reflect the practical realities of employment disputes while ensuring consistency in their resolution. Furthermore, these statutes could integrate the factors proposed in this paper, offering a holistic approach to employment arbitration. Such amendments would not only clarify the law but also enhance its responsiveness to the needs of the employment sector, promoting fairness and predictability in dispute resolution.

To address the issue where low wage employees are referred to arbitration, Parliament could consider setting the minimum salary threshold below which an employee cannot be compelled to arbitrate disputes arising from their employment contract. Other relevant factors could include the amount of time the employee was given to review the proposed employment contract, the length and complexity of the proposed employment contract, any pressure placed on

²³³ CI Arb Kenya, *Fee Guidelines and Recommendations*, 2024 —< <https://ciarbkenya.org/wp-content/uploads/2024/08/CIARB-Kenya-Fee-Guidelines-Recommendations-AUG-2024.pdf> > on 15 January 2025.

them to sign it, the employee's level of education and experience, and whether they had access to legal advice during the contracting process.²³⁴

iii. Drafting and gazettment of the Employment and Labour Relations Court Arbitration Rules

Under the ELRC Act, the Chief Justice is empowered to make rules for regulating the practice and procedure of the court.²³⁵ This paper recommends the drafting and subsequent gazettment of the Employment and Labour Relations Court Arbitration Rules to regulate the practice and procedure of the court when dealing with employment arbitration. These rules could outline specific considerations, in addition to those already provided under Section 6 of the Arbitration Act, that the court should evaluate when deciding whether to refer parties to employment arbitration. By establishing such rules, the practice of employment arbitration would be enhanced, making it more predictable thus ensuring fairness and alignment with the unique dynamics of employment disputes. This will also create harmony between the KAA and the ELRC Act on employment arbitration.

iv. Specialised training for arbitrators in employment law and practice

There is an undeniable need for specialised training of arbitrators in employment law and practice. A lack of proper training can result in flawed arbitral awards, which denies parties the right to a fair trial and due process. For instance, in *Christian & Another v Direct Pay Limited t/a DPO*, the court heavily criticised the arbitrator for the limited understanding of arbitration principles.²³⁶ The arbitrator conducted the proceedings *ex parte*, excluded the respondent from participating in the process, and failed to involve them in his appointment.²³⁷ The respondent only became aware of the arbitration after being served with the final award. Moreover, the arbitrator had a clear conflict of interest, attempting to act as an advocate in the enforcement proceedings of the very award he had issued.²³⁸ Consequently, the court declared the arbitration a nullity and deemed the arbitral award incapable of recognition. It further held that the arbitrator acted with impunity and caused a miscarriage of justice by awarding himself

²³⁴ *OTO L.L.C v Ken Kho* (2019), Californian Supreme Court, 15-16.

²³⁵ Section 27, *Employment and Labour Relations Court Act* (Act No. 20 of 2011).

²³⁶ *Christian & another v Direct Pay Limited t/a DPO* (2024) eKLR.

²³⁷ *Christian & another v Direct Pay Limited t/a DPO* (2024) eKLR.

²³⁸ *Christian & another v Direct Pay Limited t/a DPO* (2024) eKLR.

twenty-nine million Kenyan Shillings for a claim involving an employee whose basic monthly salary was just twenty thousand Kenyan shillings.²³⁹ This case demonstrated that the content and structure of an arbitral award reflects the competence and experience of an arbitrator, thus necessitating regular training of arbitrators.

v. *Extensive training of ELRC judges on arbitration matters*

Lastly, there is a pressing need to intensify sensitisation and comprehensive training of judges of the ELRC on the theory and practice of arbitration. As highlighted in this paper, there are varying attitudes among judges regarding the viability of arbitration in resolving employment disputes. These attitudes are influenced by partly bias, and the limited appreciation of arbitration and its principles. The divergence has contributed to inconsistency and unpredictability in how employment arbitration is approached within the ELRC. The lack of uniformity is further compounded by instances where binding decisions from the Court of Appeal affirming the use of arbitration in employment disputes have been overlooked. This disregard for precedent not only undermines the principle of stare decisis but also threatens the predictability and integrity of the judicial system. Through equipping ELRC judges with specialised training on arbitration, including its procedural and substantive aspects, the court can foster a more cohesive and informed approach, thereby promoting consistency and adherence to the rule of law.²⁴⁰

VI. Conclusion

Employment arbitration is a game changer in employment dispute resolution. It presents numerous benefits, such as speed, finality, and the potential to reduce backlog of cases. Nonetheless, employment arbitration should not be embraced to the detriment of employees' rights given the intrinsic power imbalance and inequality in bargaining power between employers and employees. This paper has demonstrated that while the majority of employment disputes, especially those involving remunerations and financial disputes, can be resolved through arbitration, not all employment disputes are amenable to arbitration. Disputes that involve genuine and concrete constitutional issues, allegations of discrimination, and sexual harassment claims are better resolved through

²³⁹ *Christian & another v Direct Pay Limited t/a DPO* (2024) eKLR.

²⁴⁰ *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* (2013) eKLR.

litigation. This is due to public policy, which aims to expose and deter such inimical practices. To streamline and make employment arbitration acceptable, there should be safeguards to foster fairness. The factors proposed by this paper will provide guidance to courts in determining whether to refer disputants to employment arbitration. Courts should strike a balance between holding parties to their bargain to arbitrate and upholding the rights of employees to access courts in genuine cases that must be litigated. An anti-employment arbitration approach undermines access to labour justice and ignores the realities of the proliferation of arbitration clauses in employment contracts. By fostering an informed and objective approach, arbitration can offer a rights-sensitive and just method of settling employment disputes.