

LEGAL UNDERPINNINGS AGAINST WORKPLACE DISCRIMINATION – THE KENYAN STORY

Introduction

In 2015, American fast-food company McDonald's and one of its franchises in Virginia were in the headlines and this time it was for more than just its famous Big Mac™. McDonald's and the franchise owner had been accused by a section of its employees of racial discrimination (the **McDonald's case**). The employees in the McDonald's case alleged that the franchise owner decided to decrease the number of African Americans working at his restaurants and targeted them in a mass termination that impacted mostly African American employees. The employees stated that, when asked why they were being fired, the owner explained that they "didn't fit the profile" he wanted.¹ The court however did not get a chance to rule on the matter, as the parties settled the suit out of court. Looking at it from the Kenyan context, how would Kenyan law have dealt with this case and how would the plaintiffs in the McDonald's case have avoided such an incident?

The legal framework against discrimination

The Constitution of Kenya, 2010 (the **Constitution**)

The Employment and Labour Relations Court (the **ELRC**) is the court established under the Constitution to deal with employment cases such as the McDonald's case.

Article 27 of the Constitution grants women and men the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

The same article of the Constitution states that a person *shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth*. A person under the Constitution is defined to include a company, association or other body of persons whether incorporated or unincorporated.²

The Employment Act, Cap 226 (the **Employment Act**), which is the main legislation that guides the employer-employee relationship further states that an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. The Employment Act goes on to state that no employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee, on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status; in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment³.

Contravention of the provisions of the Employment Act by the employer shall result in the commission of an offence and in such proceedings, the burden of proof is on the employer to prove

¹ <https://www.eandblaw.com/employment-discrimination-blog/2016/03/23/sexual-harassment-racial-discrimination-mcdonalds/>

² Article 260, Constitution of Kenya, 2010

³ Section 5(3) Employment Act, Cap 226 laws of Kenya

that the discrimination did not take place as alleged, and that the discriminatory act or omission is based on the exceptions under the Employment Act.

It is important to note that for purposes of the provisions against discrimination in the Employment Act, the definition of an employee includes an applicant for employment and an employer includes an employment agency⁴.

Exceptions to the rule

The Employment Act has created the following instances exceptions in which an employer's actions will not be deemed to be discriminatory:

- a) taking affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;
- b) distinguishing, excluding or preferring any person on the basis of an inherent requirement of a job;
- c) employing a citizen in accordance with the national employment policy; or
- d) restricting access to limited categories of employment where it is necessary in the interest of state security.

Key decisions

The ELRC is viewed as being employee friendly with the law placing a higher threshold of proof on the employer, who has to prove that their actions were not discriminatory. Some of the landmark cases in Kenya, which could be compared to the McDonald's case are, **V M K v C U E A [2013] eKLR** (the **VMK case**) and **Koki Muia v Samsung Electronics East Africa Limited [2015] eKLR** (the **Koki Muia case**).

The claimant in the Koki Muia case claimed that her dismissal from employment by the respondent was *discriminatory and made in bad faith, sexist and racist*. She further averred that the real motivation was to get rid of her as she was resolute against the imposition of an incompetent service provider where the respondent's managing director had a vested interest. The court found in favour of the claimant and went ahead to state in its judgment that, "*from the evidence adduced in Court it seems the Respondent does not permit the ascension of Kenyans to high offices and instead sends incompetent Korean nationals to supervise and oversee more qualified Kenyans. This is clearly discriminatory and not in keeping with international labour standards*".

The Court found that the dismissal of the claimant was unfair and unlawful in the circumstances and that she was mistreated in her employment by being subjected to racial and sexual discrimination. The claimant was awarded one month's salary in lieu of notice, bonus payment duly earned and 12 months compensation for sexual and racial discrimination as well as unlawful termination amounting to approximately USD 71,000.

⁴ Section 5(8) Employment Act, Cap 226 laws of Kenya

In the VMK case, the claimant was employed on less favourable terms as compared to her colleagues of similar experience and working in similar levels, due to her HIV status.

The court found the respondent to have grossly breached the claimant's right to employment and equal treatment by subjecting her continuously to casual employment and inferior remuneration purely on the basis of her HIV status and that the decision not to employ the claimant on permanent terms, and the final decision to terminate her employment were discriminatory.

In its final analysis the court awarded the claimant a total of approximately USD 69,000; which included the difference of the sum the claimant earned as compared to her counterparts, an equivalent of 12 months gross salary, unpaid salary during the 3 months maternity leave, unpaid overtime worked and exemplary damages for the discrimination on the basis of her HIV status and gross violation of her human dignity.

Conclusion

In conclusion, assuming the McDonald's case had occurred in Kenya and that the facts were as claimed by the employees, the ELRC would be most likely to have found that the employer had unjustly terminated the employees' employment on the basis of discrimination on grounds of race and colour.

Employment laws in Kenya have made great strides in ensuring that employees are protected from discriminatory acts by the employer and the onus is therefore on employers to ensure that they set out proper policies and principles to govern their engagement with employees, to avoid falling into the pitfalls of workplace discrimination.

Employers should also ensure that recruitment and promotions are based solely on qualifications and merit and not race, sex, disability or any of the abovementioned factors that may be construed as discriminatory.

Finally, employers should set out clear dismissal policies which are in line with the Employment Act, ensuring that both procedural and substantive thresholds are met.