

## **Conflict within the Triangle: Mediation as a Tool to Enhance Access to Justice for Outsourced Workers in Kenya**

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### **Abstract**

*Outsourced workers in Kenya face a number of employment-related challenges including dissatisfaction due to their remuneration and other allowances, lack of access to training and facilities for upscaling their skills, and general working conditions including the way they are treated by the management of the client enterprise. Though they face issues similar to workers in standard employment relationships (SERs), access to justice for outsourced worker is sometimes hindered due to the peculiarities of the triangular employment relationship (TER). Employment laws were framed with SERs in mind, and thus trade disputes are defined as differences or apprehended differences between an employer and employee. Outsourced workers relate with two authority figures - the outsourcing company and the client enterprise - who exercise varied levels of control over the workers. The employment status, as well as the rights and obligations of the parties in outsourcing TERs, are not as clear cut as in SERs. With the rise of the practice of outsourcing in Kenya, the Employment and Labour Relations Court has had to innovate to address outsourcing TERs. An alternative solution, which would avoid trying to fit outsourcing TERs into the structure that favours the SER, is alternative dispute resolution mechanisms since they encompass greater flexibility. The objective of this paper is to assess whether mediation can offer outsourced workers access to justice, in view of the peculiarities of outsourcing TERs. This paper presents a background on the nature of triangular employment relationships, as well as an overview of the employment-related challenges faced by outsourced workers. It then considers the pros and cons of mediation in employment dispute resolution, and demonstrates the suitability of mediation to address the challenges faced by outsourced workers in Kenya. It concludes that, whereas the courts*

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*remain as a viable option to address trade disputes, mediation would be ideal to address outsourced workers' employment-related grievances because it is informal and allows for innovative ways to have win-win solutions.*

## **1. Introduction**

Outsourced workers face employment-related challenges several challenges, some of which are similar to those generally faced by employees, and some which are peculiar to outsourcing triangular employment relationships (TERs). Employees can access justice and have employment-related grievances resolved by virtue of the Constitution, employment laws, company policies and procedures, unionization and individual employment contracts. Over the years, there have been progressive attempts towards equalizing the bargaining power within the standard employment relationship (SER).<sup>1</sup> However, attempts to equalize bargaining power have not extended as much towards non-standard forms of work (NSWs).<sup>2</sup>

Outsourcing is an NSW because it involves multiple parties as compared to the SER which entails a relationship between two parties.<sup>3</sup> Outsourcing involves a labour intermediary, an outsourcing company, which hires outsourced workers and avails them to a client enterprise. This leads to a TER.<sup>4</sup> Research shows that outsourcing places workers in positions of perceived detachment from the client enterprise where they work.<sup>5</sup> This detachment can lead to feelings of discrimination due to the disparate access to training, unequal remuneration, and the lack of organizational identification.<sup>6</sup> These feelings of discrimination are more pronounced when the outsourced workers confound the day-to-day control exercised by the client enterprise with legal control, thus perceiving the client enterprise as

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<sup>1</sup> Daniel D Barnhizer, 'Inequality of Bargaining Power' (2005) 76 *University of Colorado Law Review* 139; Margaret Jane Radin, 'Market-Inalienability: Making and Selling Babies' [1987] *Harvard Law Review* 174.

<sup>2</sup> Carole Lang, Isabelle Schömann and Stefan Clauwaert, 'Atypical Forms of Employment Contracts in Times of Crisis' [2013] *ETUI* 5.

<sup>3</sup> Ilan Oshri, Julia Kotlarsky and Leslie P Willcocks, *The Handbook of Global Outsourcing and Offshoring* (3rd edn, Springer 2015) 8.

<sup>4</sup> BPS Van Eck, 'Temporary Employment Services (Labour Brokers) in South Africa and Namibia' (2010) 13 *PER: Potchefstroomse Elektroniese Regsblad* 107.

<sup>5</sup> Matthew Bidwell and others, 'The Employment Relationship and Inequality: How and Why Changes in Employment Practices Are Reshaping Rewards in Organizations' (2013) 7 *Academy of Management Annals* 61.

<sup>6</sup> *ibid.*

their employer. This is a peculiarity of the outsourcing TER that may hinder the outsourced workers' access to justice to resolve their employment-related grievances.

The main aim of this paper is to assess whether mediation can offer outsourced workers access to justice, in view of the peculiarities of outsourcing TERs. It contains results that were part of a study that analyzed the legal regulation of outsourcing TERs in Kenya.<sup>7</sup> This paper presents a background on the nature of outsourcing TERs. It then gives an overview of the employment-related challenges faced by outsourced workers. It then considers the suitability of mediation to address the challenges faced by outsourced workers in Kenya.

## **2. Nature of Outsourcing Triangular Employment Relationships**

Under outsourcing TERs, outsourced workers supply services to a client enterprise without being directly employed by it.<sup>8</sup> Outsourced workers relate with two authority figures, the outsourcing company and the client enterprise, each with varied levels of control over them.<sup>9</sup> The outsourcing company exercises legal control because of the employment contract, whereas the client enterprise exercises day-to-day control over the execution of the duties. This splitting and sharing of employer functions affects the outsourced workers' perception of employment status, as well as their employment rights.<sup>10</sup>

Outsourced workers are considered to be employees of the outsourcing companies.<sup>11</sup> The Industrial Court, which was the court of first instance, opined that Abyssinia used outsourcing as a means to circumvent recognition of the trade union.<sup>12</sup> However, quoting Murgor L.J. in *Kenya Airways v Aviation and Allied Workers Union*, the Court of Appeal emphasized that

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<sup>7</sup> Melissa Muindi, 'An Analysis of the Legal Regulation of Outsourcing Triangular Employment Relationships in Kenya' (University of Nairobi, Kenya ongoing).

<sup>8</sup> Van Eck (n 4).

<sup>9</sup> Guy Davidov, 'Joint Employer Status in Triangular Employment Relationships' (2004) 42 *British Journal of Industrial Relations* 727.

<sup>10</sup> Van Eck (n 4); Robert Buch, Bård Kuvaas and Anders Dysvik, 'Dual Support in Contract Workers' Triangular Employment Relationships' (2010) 77 *Journal of Vocational Behavior* 93; Davidov (n 9).

<sup>11</sup> *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union* [2016] eKLR (Court of Appeal).

<sup>12</sup> *Kenya Engineering Workers Union v Abyssinia Iron And Steel Ltd* [2014] eKLR (Industrial Court).

“outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs”.<sup>13</sup> The court found that, given the validity of the discharge agreements and the new contracts of employment, the workers had ceased to be employees of Abyssinia. A new employer-employee relationship had been formed between them and the outsourcing company, Jokali. This emphasized the fact that outsourced workers are employees of the outsourcing company. It should be noted though that the employment laws do not define the relationship between the outsourced workers and the client enterprise, which is not an ideal situation.

As employees of the outsourcing company, outsourced workers are entitled to an array of employment rights, as provided for under the employment laws.<sup>14</sup> In addition, outsourced workers are entitled to the constitutional rights granted in the Bill of Rights.<sup>15</sup> In particular, the Constitution of Kenya grants four basic rights to all workers.<sup>16</sup> This means that outsourced workers are entitled to the Constitutional rights to fair remuneration, to reasonable working conditions, to be unionized, to go on strike. It is argued that through this constitutionalization, workers’ rights potentially enjoy better enforcement.<sup>17</sup> However, outsourced workers still face challenges in attaining these employment rights.

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<sup>13</sup> *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR (Court of Appeal) 46.

<sup>14</sup> The Kenyan labour law framework consists primarily of the Employment Act 2007, Labour Institutions Act 2007, the Work Injury Benefits Act 2007, the Labour Relations Act 2007, the Occupational Safety and Health Act 2007 and the Employment and Labour Relations Court Act 2011.

<sup>15</sup> Constitution of Kenya 2010 ch 4. These constitutional rights include the right to be free from slavery, servitude and forced labour; the right to non-discrimination and equal protection of the law; the right to freedom of association; the right to social security; the right to fair labour practices and reasonable working conditions; the right to join, form and participate in the activities of trade unions; and the right to go on strike and to lawfully assemble, demonstrate and picket.

<sup>16</sup> Constitution of Kenya art 41.

<sup>17</sup> Vincent Kiplangat Mutai, ‘Constitutionalizing Labour Rights: “Fair Labour Practices” as a Constitutional Standard in Kenya’ (2016) 12 *The Law Society of Kenya Journal* 27.

It has also been noted with concern that some employers use outsourcing TERs and façade companies to evade employment regulations.<sup>18</sup> In *Aviation and Allied Workers Union v Kenya Airways* Rika J. disapproved the practice of outsourcing, stating *obiter* that:

“Cheap labour... results in a race to the bottom, where countries lower labour standards to have minimal labour regulatory burdens... Outsourcing of labour is contrary to the principles of fair labour practices, sustainable development, and engenders the race to the bottom. It intends to avoid regular employment relationships, employees’ social security and is a vehicle for the lowering of international labour standards.”<sup>19</sup>

Though this case was appealed and the judgement overturned, the strong views expressed by the court of first instance reflect an underlying bias against the practice of outsourcing, when the plight of outsourced workers is taken into account. Outsourced workers are viewed as vulnerable because the outsourcing TER places them in positions of perceived detachment.<sup>20</sup> In addition, the means of redressing their employment-related grievances may be inadequate. This paper addresses this gap by assessing whether mediation can offer outsourced workers access to justice to enhance the resolution of their employment-related grievances. The next section provides an overview of these employment-related grievances.

### **3. Outsourced Workers’ Employment-Related Grievances**

The challenges discussed in this section are based on a study analyzing the legal regulation of outsourcing TERs in Kenya.<sup>21</sup> The respondents were outsourced workers engaged under outsourcing TERs. The qualitative data was collected using in-depth telephone interviews.<sup>22</sup> This approach led to the uncovering of hitherto undiscovered issues, as well as interpreting a social phenomenon through the eyes of its participants.<sup>23</sup>

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<sup>18</sup> *Phillip Ateng Oguk & 27 others v Westmont Power [Kenya] Limited & another* [2015] eKLR (Industrial Court).

<sup>19</sup> *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others* [2012] eKLR (Industrial Court) [39].

<sup>20</sup> Bidwell and others (n 5).

<sup>21</sup> Melissa Muindi (n 7).

<sup>22</sup> Since the field study was conducted in 2020, the narrative collection methods were adapted to suit the coronavirus pandemic precautionary measures.

<sup>23</sup> Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012) 380.

### **3.1 Overview of employment-related grievances**

The resolution of employment-related grievances was a key aspect discussed in the field study. It was found that 88 per cent of the outsourced workers reported general dissatisfaction with some aspects of being an outsourced worker. These revolved around their working conditions, their treatment by the client enterprise's managerial staff and permanent employees, and their remuneration and other allowances. 67 per cent of the respondents complained that their remuneration was lower than that of the client enterprise's permanent workers. One outsourced worker expressed frustration with the fact that her remuneration remained the same even when she transitioned between client enterprises. She complained that outsourcing provided no growth or possibility of promotion, whereas employees integrated into a company had such possibilities.

Other dissatisfactions included lack of access to training and facilities for upscaling their skills.<sup>24</sup> Outsourced workers were also often excluded from staff meetings.<sup>25</sup> This showed a difference in the management of permanent and outsourced workers, albeit being subtle and unofficial. Another grievance related to the lack of unionization. Most outsourced workers were unaware that the constitutional right to be unionized applied to them; they perceived it a right that could only be granted to employees.<sup>26</sup> They expressed a general inability and awareness on joining trade unions.

Job insecurity was another grievance experienced because of their impermanence.<sup>27</sup> In addition, the concept of working for two different authority figures led to challenges in meeting the expectations of both authority figures.<sup>28</sup> The outsourced workers also complained of conflicting

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<sup>24</sup> It was noted that it was difficult across the board for outsourced workers to access occupational-related trainings. However, 27 per cent of the outsourced workers were able to access training from the client enterprises and 11 per cent through the outsourcing companies whereas 62 per cent took care of their own professional development based on what they could afford.

<sup>25</sup> This brought about a perceived detachment from the client enterprise. Though, it was also noted that 27 per cent of the respondents saw freedom in the exclusion from organizational bureaucracy.

<sup>26</sup> Constitution of Kenya art. 41.

<sup>27</sup> Holger Görg and Dennis Görlich, 'Offshoring, Wages and Job Security of Temporary Workers' (2015) 151 *Review of World Economics* 533; Monica Belcourt, 'Outsourcing—The Benefits and the Risks' (2006) 16 *Human resource management review* 269.

<sup>28</sup> On one end of the spectrum, the outsourcing company's roles were extensive and outsourced workers had a stable relationship with the outsourcing company. On the

policies and practices on employment matters such as overtime. Further, managerial decisions involving the outsourced workers often took a longer period of time because of the consultations between the two authority figures. These are the main employment-related grievances that outsourced workers expressed. The next section considers the challenges faced in seeking to resolve these grievances.

### **3.2 Challenges in resolving employment-related grievances under outsourcing TERs**

It was noted that 71 per cent of the outsourced workers felt uncertain about or were not confident about seeking to have their employment-related grievances resolved. As one respondent described his frustration with accessing justice after discovering he was ineligible for sick leave and medical insurance,

“There’s a lot you can’t do as an outsourced worker. I had nowhere to complain when this happened to me. It’s like most of the clauses are unenforceable. The contract was like 20 pages. I mean I could barely go through it. Then later I realized that the reason they make it so long is like they put things like they limit the amount you can sue them for. I remember after signing the contract thinking this is just dodgy. And there’s nothing I could change in the contract. And this was not the first time something like that happened to me. And the circle is so tiny. So what do you do? Do you now go and sue the people who later you will be seeking employment from? So you just leave it and accept your fate. You don’t want to be labelled as a *kichwa ngumu* (hard-headed person) who nobody can work with”

In many cases, the outsourced workers did not make their grievances known because they did not feel that the actions against them had been illegitimate or unreasonable, but instead saw them as part of the nature of working under outsourcing TERs. For example, all outsourced workers who were excluded from work meetings were unhappy with it, but did not consider the client enterprise to be wrong in doing so. 89 per cent of the outsourced workers saw less favourable treatment, detachment from the client enterprise and precariousness as intrinsic to outsourcing arrangements rather than things that they could change. As such, they did not openly complain about them.

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other end of the spectrum, the stable relationship was with the client enterprise and the outsourced company had minimal roles such as payrolling.

Outsourced workers attributed their grievances to either internal or external factors. External factors include the legal framework because it shapes what workers and employers perceive to be legitimate.<sup>29</sup> The inability of the employment legislative to adequately support outsourced workers was an impediment to them viewing these grievances as injustices.<sup>30</sup> As a result, the less favourable treatment was considered legitimate and warranted. Whereas the employment laws legitimize the interests of SER workers, outsourced workers often feel they may not have such legal support. The attribution of the employment-related grievances to either the client enterprise, the outsourcing company or external factors affected how the outsourced workers chose to resolve them. If they attributed them to external forces they were less likely to seek redress.

Another challenge in seeking to resolve employment-related grievances is the splitting and sharing of employer functions between two authority figures.<sup>31</sup> This lead to uncertainty as to the responsibilities of the authority figures for the different aspects the employment relationship. For example, issues relating to remuneration seemed difficult to attribute to either authority figure.<sup>32</sup> Though 77 per cent of outsourced workers were dissatisfied with their remuneration, they were unaware of how much the client enterprise was offering for their services and the subsequent mark-up by the outsourcing companies. They were unsure as to whether to seek redress for their perceived low remuneration with either the client enterprise or the outsourcing company.

The outsourced workers' perceptions of lack of access to justice to resolve their employment-related grievances was aggravated by the rationalization that they willingly signed into outsourcing TERs, fully aware of the contractual insecurities.<sup>33</sup> Unlike SER workers who have clearly outlined

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<sup>29</sup> ILO, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (PRODOC 2016) 2–3; Sandra E Gleason, *The Shadow Workforce: Perspectives on Contingent Work in the United States, Japan, and Europe* (WE Upjohn Institute 2006).

<sup>30</sup> This is because outsourced workers relate with two authority figures; see also Davidov (n 9).

<sup>31</sup> Van Eck (n 4); Buch, Kuvaas and Dysvik (n 10); Davidov (n 9).

<sup>32</sup> Outsourced workers' remuneration is based on the amount the outsourcing company receives from the client enterprise, less the amount the outsourcing company deducts as its fees.

<sup>33</sup> See also Thomas Prosser, 'Dualization or Liberalization? Investigating Precarious Work in Eight European Countries' (2016) 30 *Work, Employment and Society* 949;



employment rights as well as a collective voice, outsourced workers operate within a TER. 11 per cent of the outsourced workers expressed that they did not know who to go to for redress. As one outsourced worker aptly explained,

“Most times I’m like okay, who do I go to? I’m not an employee. Am I supposed to go to the human resources department and I’m not their employee? It’s not so straightforward.”

As a result, most outsourced workers preferred to suffer silently through their employment-related grievances and where this was untenable they felt compelled to terminate the job opportunity with the client enterprise. Under the SER, termination by the employee would mean resignation.<sup>34</sup> However, outsourcing TERs allow outsourced workers to leave a client enterprise without terminating their relationship with the outsourcing company. Hence, if they identified the client enterprise as the source of their grievance they could leave and seek placement with a different client enterprise. Nonetheless, this option largely depended on the outsourced workers’ perceived level of job security.<sup>35</sup> On the other hand, where they attributed the grievance to either the outsourcing company or the nature of the outsourcing TER, they were more hesitant to seek redress because it could potentially leave them jobless.

### **3.3 Outsourced worker’s access to the Employment and Labour Relations Court (ELRC)**

The employment laws provide for the resolution of employment-related disputes through litigation.<sup>36</sup> The Employment and Labour Relations Court has jurisdiction over employment-related disputes relating to or arising out

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Claudia Weinkopf, ‘Precarious Employment and the Rise of Minijobs’ in Leah F Vosko, Martha MacDonald and Iain Campbell (eds), *Gender and the Contours of Precarious Employment* (Routledge 2009).

<sup>34</sup> Employment Act 2007 ss 35 and 36.

<sup>35</sup> Their perceptions of job security related to both their security within their current roles with the current client enterprise, together with future employment prospects through the outsourcing company. The workers who perceived higher levels of job security felt more secure about seeking redress for their employment-related grievances; see also Sukti Dasgupta, *Employment Security: Conceptual and Statistical Issues* (International Labour Office 2001) 2–5.

<sup>36</sup> Employment and Labour Relations Court Act 2011; Employment Act pt XII; Labour Relations Act 2007 pt IX.

of employment between an employer and an employee.<sup>37</sup> An employee is defined as a person employed for wages or a salary and this includes an apprentice and an indentured learner.<sup>38</sup> On the other hand, an employer is defined as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.<sup>39</sup> These definitions cater for the SER, but not for the outsourcing TER.

The ELRC has been creative in enabling outsourced workers' access to justice before the court by classifying outsourced workers as employees of the outsourcing company.<sup>40</sup> However, there is no guidance as to the relationship between the outsourced worker and the client enterprise, and to whether the court's jurisdiction extends to this relationship. This paper argues that, alternative dispute resolution (ADR) mechanisms, particularly mediation, would effectively redress this gap.

#### **4. Mediation to Enhance Outsourced Workers' Access to Justice**

This section begins with a discussion on access to justice, as provided for under the Constitution of Kenya, 2010. It then considers defines mediation and thereafter discusses the advantages and disadvantages of mediation in resolving employment-related disputes. Finally, it considers the suitability of mediation to address outsourced workers' employment-related grievances.

##### **4.1 The constitutional right of access to justice**

Access to justice is a fundamental constitutional principle. Article 48 of the Constitution of Kenya, 2010 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 27 guarantees the right of equality before the law and the right to equal protection and equal benefit of the law. This equality includes the full and equal enjoyment of all rights and fundamental freedoms.<sup>41</sup>

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<sup>37</sup> Employment and Labour Relations Court Act s 12(1)(a).

<sup>38</sup> Employment Act s 2; Employment and Labour Relations Court Act s 2; Labour Relations Act s 2; Labour Institutions Act 2007 s 2.

<sup>39</sup> Employment Act s 2; Employment and Labour Relations Court Act s 2; Labour Relations Act s 2.

<sup>40</sup> *Abyssinia v KEWU* (n 11).

<sup>41</sup> Constitution of Kenya art. 27(2).

Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In addition, Article 159(1) emphasizes that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by the Constitution. In exercising judicial authority, the guiding principles include *inter alia* that justice shall be done to all irrespective of status, justice shall be administered without undue regard to procedural technicalities, and that ADR and traditional dispute resolution mechanisms (TDRM) shall be promoted.<sup>42</sup>

The Constitution recognizes ADR and TDRM as one of the means of ensuring access to justice because they meet the constitutional ideal of disputes being redressed without undue regard to procedural technicalities.<sup>43</sup> In addition, they are expeditious, non-coercive, flexible, and cost-effective.<sup>44</sup> Unlike litigation, ADR and TDRM are less adversarial and focus on resolution rather than settlement, thus leading to mutually satisfying outcomes and fostering relationships.<sup>45</sup> They are ideal for ensuring access to justice for vulnerable persons who would otherwise face challenges accessing formal litigation through courts. It is for this reason that alternative dispute resolution mechanisms are also referred to as appropriate dispute resolution mechanisms.<sup>46</sup> The author argues that, though the option of litigation remains open to outsourced workers, ADR may enhance their access to justice to resolve their employment-related grievances.

#### **4.2 Mediation as an alternative dispute resolution mechanism**

ADR refers to various dispute resolution options that exclude litigation, including early neutral evaluation, enquiry, negotiation, conciliation, expert

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<sup>42</sup> *ibid* art. 159(2)(a),(b) and (d).

<sup>43</sup> Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010' [2013] KMCO 6 <<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article>> accessed 20 April 2021.

<sup>44</sup> Kariuki Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya' (2013) 1 *Alternative Dispute Resolution* 40, 48.

<sup>45</sup> Muigua Kariuki, *Resolving Conflicts through Mediation in Kenya* (Glenwood Publishers 2012) 79–88.

<sup>46</sup> Emmah Khisa Senge Wabuke, 'Enhancing Access To Justice In Kenya: The Imperative of Adopting Alternative Dispute Resolution Mechanism' (2015) 3 *Alternative Dispute Resolution* 209, 210.

determination, mediation, and arbitration.<sup>47</sup> ADR mechanisms may be classified into three categories, namely, facilitative, evaluative and determinative processes.<sup>48</sup> In facilitative processes such as mediation, a third party assists the disputing parties in identifying their issues and coming to a suitable agreement. In evaluative processes such as early neutral evaluation, the third party takes a more active role in advising the parties about their issues and the possible outcomes. Finally, in determinative processes such as arbitration, the third party makes a determination on the matter after listening to the arguments and considering the evidence. Some scholars, however, argue that this classification does not consider negotiation, thus it may be deemed to stand as its own independent category.<sup>49</sup>

Mediation, as a facilitative process, is akin to negotiation in the presence of a third, neutral party.<sup>50</sup> It may be defined as the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power, to assist disputing parties in voluntarily reaching their own mutually-acceptable, informal resolution of the issues in dispute.<sup>51</sup> In mediation, the parties have control over the process, in that they agree upon the mediator, the forum and the outcome. It is a voluntary, flexible, confidential process in which the parties have a great level of autonomy. Mediation enhances inclusivity and promotes the efficient, quick resolution of disputes. The essence of mediation is that it encourages parties to a dispute to come to an acceptable out-of-court agreement without feeling the sense of legal obligation experienced through litigation. It therefore leads to win-win solutions as compared to litigation's win-lose settlements.<sup>52</sup>

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<sup>47</sup> Prof. Paul Musili Wambua, 'Broadening Access to Justice in Kenya through ADR; 30 Years On' (2015) 3 *Alternative Dispute Resolution* 8.

<sup>48</sup> Diana A Orago, 'Alternative Dispute Resolution in the Criminal Justice System in Kenya' (PhD Thesis, University of Nairobi 2020); Kariuki Muigua and Francis Kariuki, 'ADR, Access to Justice and Development in Kenya', *Justice and Jurisprudence: Nation Building through Facilitating Access to Justice* (2014).

<sup>49</sup> Wabuke (n 46) 211.

<sup>50</sup> Kariuki Muigua, 'Making Mediation Work for All: Understanding the Mediation Process' (2019) 7 *Alternative Dispute Resolution* 120, 121.

<sup>51</sup> Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edn, Jossey-Bass 2014) 20.

<sup>52</sup> Kariuki (n 45) 79–88.

With the introduction of court-annexed mediation (CAM) into the justice system, the judiciary has embraced mediation more actively.<sup>53</sup> CAM envisions a situation where judicial officers screen cases brought before them to assess whether they can potentially be redressed through mediation; the judges then refer the identified cases to mediation and thereafter the disputing parties move the court to record a consent agreement.<sup>54</sup> The CAM framework is supported by the Civil Procedure Act which provides that the court may direct that a dispute presented before it be referred for mediation.<sup>55</sup> This may be upon the request of the disputing parties, where the judicial officer deems it appropriate, or where the law requires it. CAM was first implemented in the Commercial and Family Divisions of the High Court in April 2016. By July 2017, a quarter of the 1,550 cases referred to CAM had been resolved within an average of two months as compared to the average two years under the normal court process.<sup>56</sup> By 2018, CAM had successfully been adopted by the ELRC.

As mentioned earlier, mediation is voluntary and the third party does not have authoritative decision-making powers.<sup>57</sup> The presence of the mediator is simply to steer the parties towards an amicable approach of resolving the dispute.<sup>58</sup> The mediator does not make decisions on behalf of the parties and the solutions arrived at are purely based on the parties' agreement. It, therefore, maintains a working relationship between the parties. This paper argues that the facilitative nature of mediation makes it most suitable for the resolution of outsourced workers' grievances.

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<sup>53</sup> Florence Karimi Shako, 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' (2016) 4 *Alternative Dispute Resolution* 130, 131.

<sup>54</sup> Kariuki Muigua, 'Court Sanctioned Mediation in Kenya-An Appraisal' 9 <<http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf>> accessed 21 April 2021.

<sup>55</sup> Civil Procedure Act s 59B.

<sup>56</sup> 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans' (*World Bank*, 5 October 2017) <<https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>> accessed 21 April 2021.

<sup>57</sup> Moore (n 51) 20.

<sup>58</sup> Muigua, 'Making Mediation Work for All: Understanding the Mediation Process' (n 50) 128.

### **4.3 Pros and Cons of Mediation in Employment Dispute Resolution**

Employment disputes resolution refers to the resolution of disputes arising from existing or terminated employment relationships.<sup>59</sup> Employment disputes are also referred to as trade disputes. The Labour Relations Act defines a trade dispute as a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union.<sup>60</sup>

Employment disputes often relate to allegations of unfair treatment or to interpersonal incidents and challenges experienced during employment and they may be emotionally-charged.<sup>61</sup> They include complaints of discrimination, unequal remuneration, the breach of health and safety entitlements, unfair termination, violation of working hours, and the deprivation of other employment rights. Though employment-related disputes may be resolved through litigation before the ELRC, there are advantages and disadvantages of resolving them through mediation.

Employment relationships feature an inherent inequality of bargaining power tilted towards the employer.<sup>62</sup> If the mediator does not adequately navigate this inequality, the disputing parties may not consensually arrive at an agreement. Relatedly, where one party is obstinate the mediation process may simply be a waste of time and effort. Another disadvantage is that mediation may not be well suited to handle grave employment grievances such as alleged harassment.<sup>63</sup> In addition, the mediation outcomes are potentially non-binding, especially if they are not recorded by the court as in CAM, thus the parties may experience difficulties in enforcing their obligations against each other.

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<sup>59</sup> Tanmeet Kaur Sahiwal, 'Employment Dispute Resolution and Mediation: An Analysis' (2019) 12 *Online Journal of Multidisciplinary Subjects* 1085, 1086.

<sup>60</sup> Labour Relations Act s 2.

<sup>61</sup> Sahiwal (n 59) 1086.

<sup>62</sup> Peter Ackers, 'Rethinking the Employment Relationship: A Neo-Pluralist Critique of British Industrial Relations Orthodoxy' (2014) 25 *The International Journal of Human Resource Management* 2608.

<sup>63</sup> Sahiwal (n 59) 1088.

A key advantage of mediation is that it promotes communication and cooperation.<sup>64</sup> The presence of the mediator ensures that the parties effectively communicate their issues, needs and interests, but in a manner that focuses on maintaining the relationship between them. Mediation has the ability to reduce hostility and continue the ongoing outsourcing TER. Another advantage is acceptability, in that mediation is voluntary thus leads to durability of the solutions arrived at.<sup>65</sup> Both the employer and employee would be willing to abide by the agreement because it is attuned to their interests and needs. In addition, mediation is less expensive than litigation and is time-saving. This section focused on the suitability of mediation in employment disputes generally. The next section focuses on employment-related grievances within outsourcing TERs.

#### **4.4. Suitability of Mediation to Address Outsourced Workers' Employment-Related Grievances**

Based on outsourced workers' experiences, legal remedies available to them to address their employment-related grievances were minimal. While they are legally protected by both national and international employment laws in their capacity as workers, in practice these entitlements were difficult to access or enforce. For example, in a claim for equal pay for work of equal value, the expectation is that the comparator would be another worker under the same employer. As such, an outsourced worker would be unable to complain about the differential remuneration in comparison to workers employed directly by the client enterprise or those engaged by a different outsourcing company. Even though they may be working together in the same premises, contractually they are not working for the same employer.<sup>66</sup> As such, outsourced workers may not have comparators to prove that there has been unequal pay.

By rationalizing that their dissatisfactions are an inherent part of the outsourcing TER, 71 per cent of the outsourced workers felt uncertain about or were not confident about seeking to have them resolved. Mediation would be useful in this respect because it enhances communication and cooperation between the parties.<sup>67</sup> Mediation would allow the outsourced workers to openly express their interests, needs and values to the client enterprise and the outsourcing company, in the presence of a neutral third party whose goal is to guide them towards a suitable agreement.

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<sup>64</sup> Moore (n 51) 25.

<sup>65</sup> *ibid* 20.

<sup>66</sup> *Abyssinia v KEWU* (n 11).

<sup>67</sup> Moore (n 51) 25.

The employment framework does not conclusively address the employment status within outsourcing TERs because it does not deal with the relationship between the outsourced worker and the client enterprise. There is no clear framework through which outsourced workers can address the employment-related grievances attributed to the client enterprise. Consequently, most outsourced workers viewed their dissatisfaction with the client enterprise as part of the nature of outsourcing TER which could not be changed.<sup>68</sup> The reality is that if the outsourced workers had the opportunity to speak up in a safe space, they could seek to have this unequal treatment redressed. Mediation can offer the outsourced workers such a safe space.

Further, litigation tends to be expensive and the options that the courts may adopt to settle the dispute may be limiting.<sup>69</sup> On the other hand, having both authority figures at the mediation table would not unduly increase the costs. The advantage of having both authority figures at the mediation table is that it would allow the mediator to ascertain which authority figure is best placed to redress the outsourced workers employment-related grievances. The mediation framework is flexible and does not bear the burden of trying to fit the agreement within the options envisaged by the litigation framework.<sup>70</sup> Mediation can therefore enhance outsourced workers' access to justice.

Mediation is a cost-effective method that leads to quick resolution of disputes.<sup>71</sup> Since mediation is not adversarial in nature, the outsourced workers' quest to have their employment-related grievances resolved would not put a strain on their relationships under the outsourcing TER.<sup>72</sup> Mediation would thus foster the continuation of an amicable relationship between the three parties. Therefore, outsourced workers would be less fearful about job losses due to the voicing of grievances.

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<sup>68</sup> For example, it was noted that 89 per cent of the outsourced workers saw less favourable treatment, detachment from the client enterprise and precariousness as an expected part of outsourcing TERs. They viewed this as intrinsic to outsourcing arrangements rather than things that they could change.

<sup>69</sup> Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya' (n 44) 42.

<sup>70</sup> Moore (n 51) 25.

<sup>71</sup> *ibid.*

<sup>72</sup> Kariuki (n 45) 79–88.



## 5. Conclusion

The advantages of using mediation, as an ADR mechanism, in employment dispute resolution cannot be overlooked. Mediation is cost-effective, saves time, and allows for win-win solutions for both the employers and employees.<sup>73</sup> Both parties stand to gain by adopting mediation, as opposed to litigation, which takes an adversarial, win-lose, settlement approach.<sup>74</sup>

This study argues that mediation would be effective in enhancing access to justice for disputes emanating from outsourcing TERs. Outsourced workers face several employment-related challenges. Their grievances include pay inequalities, lack of access to training and facilities for upscaling their skills, exclusion from meetings, job insecurity and lack of unionization. Though these employment-related grievances are similar to those that SER workers face, some are due to the nature of outsourcing TERs. For instance, outsourced workers' job security relates to both their security within their current roles with the current client enterprise, together with future employment prospects through the outsourcing company.<sup>75</sup> In addition, there is a splitting and sharing of the employer function between the outsourcing and client enterprise.<sup>76</sup>

The employment legal framework classifies outsourced workers as employees of the outsourcing company, but does not define the relationship between the outsourced worker and the client enterprise.<sup>77</sup> Though this classification enables access to justice through the ELRC, it fails to recognize that outsourcing TERs are essentially different from the SER.<sup>78</sup> This paper argues that mediation may enhance access to justice for outsourced workers because it is not bound by the rules on employment status. As such, outsourced workers would be able to seek redress for employment-related grievances that they attribute to either the outsourcing company or the client enterprise, as well as those that they attribute to the nature of the outsourcing TER itself.

Within outsourcing TERs, the option of mediation can be provided for under either the employment contract between the outsourcing company and outsourced worker, or in the service contract between the client enterprise

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<sup>73</sup> Moore (n 51) 25.

<sup>74</sup> Kariuki (n 45) 79–88.

<sup>75</sup> Dasgupta (n 35) 2–5.

<sup>76</sup> Van Eck (n 4); Buch, Kuvaas and Dysvik (n 10); Davidov (n 9).

<sup>77</sup> *Abyssinia v KEWU* (n 11).

<sup>78</sup> Van Eck (n 4); Buch, Kuvaas and Dysvik (n 10); Davidov (n 9).

and the outsourcing company. It is recommended that mediation clauses be encouraged within outsourcing TERs to enhance outsourced workers' access to justice to resolve their employment-related grievances. Alternatively, mediation may take the form of CAM at the parties' request, the judicial officer's determination or the requirement of the law.<sup>79</sup> It is recommended that, where parties to an outsourcing TER bring a dispute before court, CAM be adopted as the first dispute resolution option. However, if the outsourcing dispute is not redressed through mediation, it should proceed to litigation.

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<sup>79</sup> Civil Procedure Act s 59B.

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