

## **Internship: A Bridge to Employment or a Trap to a Disguised Employment Relationship**

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### **Abstract**

*Internship can be and should be a vital part of the switch from edification to the workplace. This article however questions the extent to which internships are used to serve as a transition between education and employment. Though considered valuable to the host institution, many interns face high levels of job uncertainty. One key contributing factor is the existence of disguised forms of employment in the Kenyan labour market. This occurs when the true legal status of a person who is an employee is disguised in a way that hides his or her true legal status or gives it an appearance of a different legal nature. Arguably, interns have fallen victims. The current internship arrangement in Kenya poses several thorny employment law questions particularly the legal status of the intern. Arguably, the existing internship arrangement permits dishonest host institutions to take advantage of the arguably weak monitoring and enforcement system of the employment laws resulting in intern exploitation. The analysis done in this article reveals that interns are possibly employees and should thus be afforded full protection embedded under Article 41 of the Constitution as well as the Employment Act, 2007 including job security, fair remuneration and reasonable working conditions. The article emphasises that the National Employment Authority and other relevant authorities should seek to perform their mandate effectively by monitoring all placements of interns to ensure that they are not exploited or their rights violated by host institutions in which they are undertaking their internship.*

### **1. Introduction**

Over the years, the labour market has undergone colossal changes. The current world of work presents numerous types of employment relationships that are purported to be different from full-time employment. One such

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relation is the increasingly widespread phenomenon of internship.<sup>2</sup> The rising utilisation of interns in the Kenyan labour market performing the same or significantly similar work performed by full-time employees in host institutions is troubling. The increase has led to the exploitation and vulnerability of interns in workplaces. On many occasions, their vulnerability is connected to the argument that there exists no employment relationship between the host institution and the intern. This results in decreased protections of their employment as well the underpayment of salaries of interns in instances where they perform the same or similar work or work of equal value to that performed by full-time employees. This is because the scope of the law is narrowly interpreted and the employment relationship is camouflaged to hide the interns' true legal status.

## **2. Disguised form employment relationship**

It is, unfortunately, a common practice that employers attempt to disguise the employment relationship purely to avoid or circumvent their statutory duties under the employment laws, particularly the payment of minimum wage and benefits. In the Kenyan Labour market and the world over, disguised forms of employment are a significant reality. In *Laban Awando Kanyo v Susan Larsen t/an Utamaduni Craft Centre*,<sup>3</sup> the Employment and Labour Relations Court observed that "the problems employees face in unearthing the legal personalities of their employer who disguise, mutate and metamorphosis their identity."<sup>4</sup> The court further opined that

*a "disguised employment lends an appearance that is different from the underlying reality, with the intention of nullifying or weakening the protection afforded to workers by law."*

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<sup>2</sup> According to the Oxford Dictionary, an internship is defined to mean "a period of time during which a student or new graduate gets practical experience in a job." The PSC Guidelines on Management of the Public Service Internship Programme define internship as "a programme established to provide unemployed graduates with opportunities for hands-on training for skills acquisition to enhance future employability and fulfill the legal requirement for professional registration."

<sup>3</sup> [2013] eKLR, Industrial Court at Nairobi Cause Number 259 of 2012.

<sup>4</sup> *Laban Awando Kanyo v Susan Larsen t/an Utamaduni Craft Centre* [2013] eKLR para 20.

Under the Employment Relationship Recommendation<sup>5</sup> of the ILO a "disguised employment" employment relationship happens when an employer treats a person as other than an employee in a way that conceals the person's true legal status as an employee. It is therefore trite that one looks beyond the legal construction of the contract entered into between an intern and relevant host institution to determine the true nature of the employment relationship.<sup>6</sup>

### 3. Legal Framework

#### 3.1 Interns Constitutional right to fair labour practice

In 2010, Kenya adopted a new Constitution<sup>7</sup> with a more extensive Bill of Rights, including employment rights.<sup>8</sup> In the workplace context, the foundational values that strengthen a sound employment relationship are those which uphold fairness and equality. Currently, the Constitution widely casts its net of protection, as is evident from the wording used in section 41, which guarantees all employees the right to fair labour practices.<sup>9</sup> Arguably, this right remains one of if not the most vital employment right under the 2010 Constitution given its all-inclusive nature and the fulcrum upon which the workplace relationship are determined. The expansive terms used in Article 41 (1) not only reveal the scope of the right to fair labour practice but also reveals those who the right seeks to protect; that is 'every person'. The wide interpretation of the phrase 'every person' is a clear indication that the scope of protection is broad enough to cover employment arrangements besides the traditional employer-employee relationship. That is to say, 'every person' includes natural and juristic persons. Accordingly, 'every person' who falls victim to an unfair labour practice is protected by the provisions of the Constitution, including interns. Read in its proper context, even those who the Employment Act explicitly excludes from its scope of application may rely on Article 41 (1) of the Constitution for appropriate relief.<sup>10</sup>

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<sup>5</sup> R198 Employment Relationship Recommendation of 2006.

<sup>6</sup> *South African Broadcasting Corporation v McKenzie* [1998] ZALAC para 13.

<sup>7</sup> The Constitution of the Republic of Kenya, 2010.

<sup>8</sup> Article 41 of the Constitution.

<sup>9</sup> *Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute* [2013] eKLR

<sup>10</sup> See s 3 (2) of the Employment Act, 2007 for the list of category of employee excluded included.

### **3.2 Employment Act: Are 'interns' disguised employees?**

The Kenyan employment legislation and particularly the Employment Act was drafted in a way that only cares for employees in the traditional full-time employment relationship.<sup>11</sup> As a result, it remains inadequate in protecting persons engaged in new forms of non-standard employment particularly internship work arrangements. Currently, there is no direct reference to internship arrangements that exist under the Employment Act. The Employment Act does not define who an intern is even though as will be noted below, Policies such as the Internship Policy and Guidelines list the Employment Act as one legislation forming part of its Legal and Policy Framework. The question that remains is; does the meaning of "employee" as provided for in the Employment Act include interns? The answer to this question is central in determining whether indeed interns should be categorised as employees and therefore entitled to the same rights and protection given to full-time employees in the host institution.

Under the Employment Act, an employee is defined to mean "a person employed for wages or a salary..."<sup>12</sup> Notably, the definition is confined to the very important element of a contract this is a requirement. Furthermore, central to the definition lies a relationship in which an individual, regardless of the nature of employment, commits to work or render services for another (host institution) in return for remuneration. Since the Employment Act does not exclusively exclude interns, the wide scope of the definition of employee, particularly the use of the term "a person", means interns fall within the realm of the definition. For that reason, interns have full rights and protections afforded to other full-time employees in the host institution. Notably, the Employment Act lists the class of persons who are specifically excluded from its scope of application, and certainly, interns are not one of them.<sup>13</sup> As noted above, the spirit under the Internship Policy and Guidelines for the Public Service is that it seeks to incorporate the application of the

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<sup>11</sup> According to the Preamble of the Employment Act, the Act seeks to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees

<sup>12</sup> Section 2 of the Employment Act.

<sup>13</sup> The Employment Act excludes (a) the armed forces (b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force, (c) the National Youth Service and (d) an employer and the employer's dependants where the dependants are the only employees in a family undertaking.

Employment Act within its legal framework.<sup>14</sup> Besides, the Employment Act defines an employee to include an apprentice. Though Employment Act does not specifically define 'an apprentice', the Industrial Training Act provides clarity insofar as the term intern is concerned.

### **3.3 The Industrial Training Act (ITA)<sup>15</sup>**

The above legislation defines an "apprentice" to include:

*"a person who is bound by a written contract to serve an employer for such period as the Board shall determine with a view to acquiring knowledge, including theory and practice, of a trade in which the employer is reciprocally bound to instruct that person."*<sup>16</sup>

In terms of the above definition, the relationship between the parties is circumscribed to the elements right to supervise, control or instruct which are key in establishing the presence of an employment relationship. As will be seen below, these elements are usually the same as the ones incorporated in the intern contractual agreement.<sup>17</sup>

### **3.4 Interns legal status under the National Employment Authority Act (NEAA)<sup>18</sup>**

The NEAA was enacted to provide amongst others, for a comprehensive institutional framework for employment management and to enhance access to employment for youth.<sup>19</sup> It also seeks to provide a database of all Kenyans seeking employment and a framework to facilitate increased employment in government, parastatals as well as the private sector.

Worth noting is that under the NEAA, an employee is defined to mean "a person employed for wages or a salary and includes an intern." This

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<sup>14</sup> See item 1.6 of the Internship Policy and Guidelines for the Public Service p.5.

<sup>15</sup> Cap 237 of 1960.

<sup>16</sup> Section 2 of the ITA. The Board in this case refers to the National Industrial Training Board.

<sup>17</sup> Appendix IV item 6 of the Internship Policy and Guidelines for the Public Service, 2016 at p36.

<sup>18</sup> The National Employment Authority Act 3 of 2016.

<sup>19</sup> See the Preamble of the NEAA.

definition is largely similar to the one provided under the Employment Act except that, the NEAA specifically includes an 'intern' in its definition of employee.

Further, this legislation unlike the Employment Act defines a contract of service<sup>20</sup> to include an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, including a contract of internship. Therefore, this legislation seeks to treat and afford interns equal rights as full-time employees with the view to protect them from employment manipulations and exploitation through disguised employment relationships.

### **3.5 Interns under the Public Service Internship programme (PSIP) and Policy and Guidelines: An analysis of the contractual agreement between intern and the host institution**

The persistent high levels of unemployment post-graduation have been a source of concern for the Kenyan government and policymakers alike. In 2020 alone, the estimated youth unemployment rates in Kenya stood at 7.27 percent.<sup>21</sup> The statistic indicates that youth unemployment for people under 25 years is at worryingly high levels. Currently, the figure stands at about 7.3 percent.<sup>22</sup> According to the Public Service Commission (PSC) the key contributing factor to the status quo is the lack of work-based experience among the graduates.<sup>23</sup> Therefore, in an attempt to mitigate the foregoing situation, the Constitution compels the government, through the relevant departments to take reasonable measures to ensure the youth have access to training and employment opportunities.<sup>24</sup> In line with the spirit of discharging its functions and mandates, the PSC is guided by amongst others,

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<sup>20</sup> But the Employment Act completely omits the inclusion of internship in its definition of a “contract of service.”

<sup>21</sup> Available at <https://www.statista.com/statistics/812147/youth-unemployment-rate-in-kenya/>. Accessed on 4 May 2021,

<sup>22</sup> Available at

<https://data.worldbank.org/indicator/SL.UEM.1524.ZS?locations=KE> Accessed on 4 May 2021,

<sup>23</sup> Internship Policy and Guidelines for the Public Service May, 2016 p1.

<sup>24</sup> Article 55 of the Constitution, 2010 read with Arts 234, 155(3)(a), 158(2)(3) and (4), 171(2), 230(2)(b) and 236 of the Kenyan Constitution, 2010 outlines in peremptory terms the mandates of the PSC.

the Internship Policy and Guidelines, as well as Guidelines on Management of the Public Service Internship Programme, were developed in 2016 and 2019 respectively with the view to possibly create an avenue for unemployed graduates to gain work experience and enable them to have a competitive edge in their job search.<sup>25</sup> The Policy and Guidelines were also developed.<sup>26</sup> Although the Policy is drawn up for all good intent and purposes, this article observes that there exist potential problems as far as interns' legal status is concerned. The Policy is also arguably at variance with other equally important legislation such as the Constitution of Kenya, 2010, National Employment Authority Act<sup>27</sup>, and the spirit embodied in the Employment Act as discussed below.

As stated by the PSC, the Policy and Guidelines are drawn in compliance with the relevant International Conventions and other domestic legislation, including the Constitution, Employment Act, and Labour Relations Act,<sup>28</sup> with the view to enhance future employability and fulfill the legal requirement for professional registration.<sup>29</sup> Specifically, the PSC has designed a contractual agreement issued to all interns' *mutatis mutandis* and has also developed the rules and procedures for recruiting and selecting applicants who qualify to participate in internship programmes. Upon posting an intern to a selected institution, the institution hosting the intern is then required to design and supervise whatever duties an intern is required to carry out and for making sure that an intern adheres to the host's internal policies an institution's policies and procedures.

According to the Policy, an intern is defined to mean unemployed person, usually a graduate, with relevant qualifications who has entered into a contract with a government institution for a period of between three and twelve months with the intent of acquiring relevant work experience for

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<sup>25</sup> PSC, Guidelines on Management of the Public Service Internship Programme. P2.

<sup>26</sup> Internship Policy and Guidelines for the Public Service of 2016.

<sup>27</sup> National Employment Authority Act 3 of 2016.

<sup>28</sup> Labour Relations Act, 2007. See section 1.6 of the Internship Policy and Guidelines for the Public Service.

<sup>29</sup> Internship Policy and Guidelines for the Public Service May, 2016.

registration with respective professional bodies and/or to increase chances of employability.<sup>30</sup>

The PSC has developed a standard template containing the terms and conditions of the agreement between the host institution and an intern. The agreement is phrased in mandatory terms<sup>31</sup> which means that compliance is imperative in terms of the rules of statutory interpretation. Failure to comply with a peremptory provision would leave the ensuing act null and void. In *Messenger of the Magistrate's Court, Durban v Pillay*,<sup>32</sup> the South African court held that the use of words such as "shall" or "must" with affirmative character indicates that compliance with the provision is peremptory.<sup>33</sup>

#### **4 Determining whether or not a person is an employee**

Traditionally, it is understood that individuals who go work for and subordinate themselves to an employer are employees. It is through the employment relationship, however, defined that reciprocal rights and duties are created between the two or more parties to a contractual agreement. It also remains the main determinant through which employees may claim the employment rights and benefits linked to employment as well as social assistance and security.<sup>34</sup>

Looking beyond the statutory definitions, various tests have been developed over the years by our courts in evaluating who an employee is. Courts have applied these tests specifically to distinguish between an employee and independent contractor and consultants. Be that as it may, it is shown here below that a legal analogy may be drawn from these tests and can be applied

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<sup>30</sup> Internship Policy and Guidelines for the Public Service p. (xvii).

<sup>31</sup> Appendix Iv - Terms and Conditions of Internship Agreement p39.

<sup>32</sup> (1952) 3 SA 678 (A). See also *Bezuidenhout v AA Mutual Insurance Association Ltd* (1978) 1 SA 703 (A) and *S v Takaendesa* (1972) 4 SA 72 (RAD) 78C-D.

<sup>33</sup> Botha C, *Statutory Interpretation: An Introduction for Students* (Juta. Cape Town 2012) 178.

<sup>34</sup> Available at

[https://ilo.org/ifpdial/areas-of-work/labour-law/WCMS\\_CON\\_TXT\\_IFPDIAL\\_EMPREL\\_EN/lang--en/index.htm](https://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm) (accessed on 4 April 2021).



in the case of interns. In *Christine Adot Lopeyio v Wydiffe Mwathi/tere NRB*<sup>35</sup> and *Charles Juma Oleng v M/S Auto Garage Ltd & Another*<sup>36</sup> the court set out various tests to determine the character of an employer-employee relationship. They include the following:

- i. The control and supervision tests.
- ii. The integration test whereby the employee is made part of the institution and his or her work forms an integral part of the institution.
- iii. The economic or business reality tests.

#### **4.1 Presence of the element of supervision and control exercised by the host institution to the intern: A strong indication of the existence of an employment relationship**

The element of control and supervision, (determination of what should be done and how) is one of the most important tests in determining whether or not an employment relationship exists. In *Stanley Mungai Muchai v National Oil Corporation of Kenya*,<sup>37</sup> the court held that the element of control exists where an employee is subject to the command of the employer as far as his or her performance is concerned. In practice, an employee is usually subject to the employer's right of control, supervision, and command. The greater degree of supervision and control is indicative of an employment relationship. In *Ready Mix Concrete (South East) Ltd versus Minister of Pensions and National Insurance*,<sup>38</sup> the court held that a contract of service and therefore an employment relationship exists where one agrees to provide work for a wage and during the performance of work the person is under the control of the master. Thus, the control test focuses on the extent to which the employer has control over an individual worker, including the extent to which a person is subject to the command of another as to how he shall do his work. In the employment context, if one is free to report and leave as he

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<sup>35</sup> ELRC Cause No. 1688 of 2012 [2013] eKLR. See also *Jimnah Muchiri v Agricultural Society of Kenya* [2019] eKLR.

<sup>36</sup> *Charles juma Oleng v M/S Auto Garage Ltd & Another* [2014] eKLR.

<sup>37</sup> *Mungai Muchai v National Oil Corporation of Kenya* (2012) eKLR.

<sup>38</sup> *Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance*, 1968 2 QB. See also the legal analogy in *Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa) Ltd* [2014] eKLR and also in the case of *Fredrick Byakika v Mutiso Menezes International Limited* [2016] eKLR.

or she pleases, then one is unlikely to be considered as an employee. By contrast, if one is required to keep specific hours of work, complete a certain number of days or weeks and carry out specific tasks, especially if one penalised for failing to deliver the tasks assigned on time or to the necessary standard, then one is likely to be regarded as an employee.

For instance, according to the Guidelines on Management of the Public Service Internship Programme provided by PSC, an intern must be assigned a supervisor to oversee his or her work. According to the agreement, the supervisor is required to set targets for the intern and to conduct performance appraisals of the intern regularly in line with the job description and the agreement.<sup>39</sup> In fact, to control the intern, the host institution would require an intern, like any other full-time employee in the institution, to clock in before getting into their offices in the morning and clock out when they leave their offices in the evening for home. Failure to comply with that, the intern may be subjected to a disciplinary process of the host institution. In fact, in *Simmons v Heath Laundry Company*,<sup>40</sup> it was stated that the greater the direct control of the employee by the employer, the stronger the ground for holding it to be a contract of service. This article argues that the employer's right to instruct or direct an intern to do certain things and then to supervise how those things are done remains a very significant indicator of the existence of an employment relationship between the two parties. The degree of control is of the nature that 'interns' is taken as an employee of the host institution similar to the reasoning in the case of *Everret Aviation Limited v Kenya Revenue Authority*.<sup>41</sup>

#### **4.2 Element of integration into the host institution: A strong indication of the presence of the employer-employee relationship**

It is accepted jurisprudence that one of the common law tests used for determining the status of employees is the integration test.<sup>42</sup> Forming the

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<sup>39</sup> Appendix IV item 6 at p36

<sup>40</sup> *Simmons v Heath Laundry Company* [1910].

<sup>41</sup> *Everret Aviation Limited v Kenya Revenue Authority* [2013] eKLR.

<sup>42</sup> *Jimnah Muchiri v Agricultural Society of Kenya* [2019] eKLR and *Adot Lopeyio v Wydiffie Mwathi/tereNRB ELRC* [2013] eKLR. See also *Colonial Mutual Life Assurance Society Ltd v MacDonald* (1931) AD 412 435. Also see *Smit v Workmen's Compensation Commissioner* (1979) 1 SA 51 (A) 53D, *SABC v McKenzie* (1999) 20 ILJ (LAC) 589D-E, *R v AMCA Services Ltd* 1959 4 SA 207 (A) 212H.

basis of the test, which is fundamentally an analytical tool, is the extent to which an individual is employed as an integral part of the business. In other words, the integration test concerns how an individual is subject to the host institution's policies including the employer's possibility to inflict disciplinary sanction. In the workplace, this occurs for instance, where the individual is subject to the rules and procedures of the employer rather than their own command (such as independent contractors). An analysis of the interns' agreement reveals a clear indication that an intern besides being under the control and direction of the supervisor, he or she is also subjected to the rules and procedures of the host institution rather than personal command.<sup>43</sup>

The provision in the agreement requiring the host institution to train and induct an intern in the host institution's methods or other aspects of its business is generally an indication of the spirit of integration into the host institution and therefore leads to an existing employment relationship. Further, the agreement requires the host institution to provide an intern with all relevant and available information and access to relevant equipment and protective gear necessary to perform his or her duties.<sup>44</sup> Besides an element of integration exist between the two parties given that the supervisor is required to appraise an intern based on the existing performance management framework and/or assessment guidelines of the host institution, a practice which is usually done for employer's full-time employees.<sup>45</sup>

According to *Halsbury's Laws of England*,<sup>46</sup> there exists no single test for determining whether or not an individual is an employee. Whether an individual is integrated into the organisation remains only one of the relevant tests to be considered. Additional factors relevant in a particular case may, in addition to control and integration include the method of payment, any

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<sup>43</sup> *Everret Aviation Limited v Kenya Revenue Authority* (Through the Commissioner of Domestic Taxes) [2013] eKLR. See also the court's observation in *Vitalis Oliewo K'omudho v AAR Health Services Ltd* [2016] eKLR.

<sup>44</sup> The aim is to enable the intern like any other new member of staff is acquainted with and adapt to the new environment and the host's system. Usually, the Human Resource Policy and Procedures Manual of the host institution would provide guidelines on how the induction should take place.

<sup>45</sup> Section 17 of the Internship Policy and Guidelines for the Public Service, 2016.

<sup>46</sup> Volume one of the 4th edition.

obligation to work only for that employer, stipulations as to hours of work, overtime, leave days, arrangements for payment of income tax, and national insurance contribution, how the contract may be terminated and who ultimately, bears the risk of loss and the chance of profit. All these are factors manifestly present in the agreement between the host institution and intern and therefore a clear indication of the existence of a contract of service.

### **4.3 Working hours and remuneration**

The working hours and remuneration aspect form an essential aspect of a contract of service. The two factors are also key distinguishing features in determining the true nature of the working relationship between an intern and the host institution. Traditionally, an employer has total control over an individual's hours of work and remuneration. The fact that an intern receives fixed monthly payments at regular intervals which is made irrespective of the output or result is a strong indication of the existence of an employment relationship. This type of payment regime would generally be present in cases of an employer-employee relationship. The court noted in *Gilbert Sule Otieno v Seventh Day Adventist Church (East Africa) Ltd*<sup>47</sup> that "an essential factor which constitutes the fundamental right or basic conditions and terms of employment of an employee include entitlement to a wage or salary." In the context of interns, the employer must pay an intern a monthly salary although erroneously disguised as a 'stipend', as stipulated in the Government guidelines issued from time to time.<sup>48</sup>

As far as the regulation of working hours is concerned, the PSC service agreement stipulates that the intern is required to report for work daily for eight hours. He or she like any other employee is required to observe punctuality. This means generally that the normal hours of work for interns are the same as those of full-time employees in the host institution i.e. fourty hours per week. They are therefore not free to work their own hours nor at liberty to work for more than one institution at the same time. According to the agreement, the "working hours of interns shall adhere to the normal government working hours as prescribed in the Public Service Human

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<sup>47</sup> *Gilbert Sule Otieno v Seventh Day Adventist Church (East Africa) Ltd* [2014] eKLR.

<sup>48</sup> Appendix IV of the Internship Policy and Guidelines for the Public Service p35.

Resource Policies and Procedures Manual or as prescribed by the relevant regulatory body.<sup>49</sup> This is usually 40 hours of work per week from Monday to Friday and therefore the same as that which is regulated under the Labour Institution Act. Accordingly, interns work for the same set working hours as full-time employees in host institutions and therefore a strong indication of integration and the existence of employment relationships.

#### **4.4 Discipline**

The existence of the institution policies and procedures applicable to the intern, and the resulting discipline for any violations of those rules, demonstrates a level of integration and control commensurate with an employment relationship.

According to most internship agreements including the one provided by and attached to the PSC Internship Policy and Guidelines for the Public Service, the intern is expected to comply with all relevant host institution's policies during his or her employment<sup>50</sup> as well as faithfully and diligently devote his or her time only to the services of the host institution.<sup>51</sup> Like in any employment relationship where parties agree to be bound by specific rights and duties, the interns also have stipulated contractual rights and duties and where they fall short of the expectation, they may be subjected to disciplinary processes in terms of the provisions of the Employment Act and policies of the host institution.<sup>52</sup>

In the light of the above, there remains a strong indication of integration into the host institution and indeed the existence of an employment relationship between the host institution and an intern.

#### **4.5 Benefits and statutory deductions**

Usually, in practice, interns are subject to usual benefits and statutory deductions which are usually applicable to employees in host institutions.

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<sup>49</sup> Internship Policy and Guidelines for the Public Service, 2016 p26

<sup>50</sup> Internship Policy and Guidelines for the Public Service, 2016 p28. See also Appendix IV p37.

<sup>51</sup> Appendix IV of the Internship Policy and Guidelines for the Public Service, item 9, pg36 and 37.

<sup>52</sup> of the Internship Policy and Guidelines for the Public Service p28.

The inclusion in the agreement of provision for benefits such as weekly rest periods and annual leave, sick leave, compassionate leave<sup>53</sup>, and subsistence allowance when out of the station is indicative of the existence of an employment relationship.<sup>54</sup> Interns are also required to have medical insurance coverage by the National Hospital Insurance Fund (NHIF).

#### **4.6 Equipment and tools of trade or work equipment**

Generally, where tools and equipment for work are provided by the employer, an employer-employee relationship is deemed to exist but where an individual provides his or her own tools and equipment to perform the work, a contract for work is deemed to exist. In the context of interns, the host institution is obliged to provide the intern with tools and equipment to perform his or her job. And in terms of the PSC Internship Policy and Guidelines for the Public Service, the intern is required at the end of the internship period to account for tools and equipment issued to him or her.<sup>55</sup>

### **5 Duration of the internship**

Ordinarily, a true internship endures for a short duration of about one or two weeks. Accordingly, it is unlikely that such internships would trigger an employment relationship. Notably, the PSC Internship Policy and Guidelines for the Public Service stipulate that an intern is to be engaged for a period between three and twelve months. Most host institutions are at liberty to extend the internship for more than twelve months. Important is to emphasise that an internship that extends for more than one year is likely to create an interpretation that an employer is using an intern by disguising the true relationship to avoid or circumvent his statutory obligations. A closer look at the internship policy as well as the internship agreement reveals this very concern.

### **6 International context: International Labour Standards<sup>56</sup>**

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<sup>53</sup> Section 16 as well as Appendix IV - Terms and Conditions of Internship Agreement p28.

<sup>54</sup> Internship Policy and Guidelines for the Public Service, 2016 p17.

<sup>55</sup> Internship Policy and Guidelines for the Public Service, 2016. P27.

<sup>56</sup> International labour standards are legal instruments drawn up by the ILO's constituents (governments, employers and workers) and setting out basic principles and rights at work.

The Kenyan Constitution encourages an international and foreign law-friendly approach by declaring that conventions and recommendations are a major source of law in Kenya.<sup>57</sup> Although, there exist several international labour standards seeking to empower young people,<sup>58</sup> Jeannet-Milanovic observes that, "[t]here are no legal instruments adopted by the ILO to explicitly guide the regulation of internships or traineeships".<sup>59</sup> But Creighton and McCrystal opine that the eight ILO core Conventions, which Kenya is a signatory to some, generally apply to all 'workers':

that is, they apply irrespective of the kind of contractual arrangement (if any) under which individuals are engaged and, with very limited exceptions, irrespective of the sector of the economy in which they work.<sup>60</sup>

Kenya is a member of the ILO. Notably, in 2006 the ILO adopted the Employment Relations Recommendation.<sup>61</sup> The Recommendation albeit not of the binding force of a Convention enjoins member states to provide guidelines to member states to:

*"combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where*

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<sup>57</sup> Article 2 (6) of the Constitution.

<sup>58</sup> See, for example, the list of labour standards relevant to youth employment at [www.ilo.org/global/topics/youth-employment/standards/lang--en/index.htm](http://www.ilo.org/global/topics/youth-employment/standards/lang--en/index.htm) (accessed 2 April 2021).

<sup>59</sup> Jeannet-Milanovic, O'Higgins, Rosin, 2017. "Contractual arrangements for young workers" in N. O'Higgins, *Rising to the youth employment challenge: New evidence on key policy issues*, ch 6 (Geneva, International Labour Office).

<sup>60</sup> Creighton, McCrystal, 2016. "Who is a worker in international law?" *Comparative Labour Law and Policy Journal*, 37(3): 691–725.

<sup>61</sup> Recommendation concerning the employment relationship, 2006 (adopted 15 June 2006).

*contractual arrangements have the effect of depriving workers of the protection they are due.*<sup>62</sup>

ILO Recommendation 198 further recommends that an employment relationship should be determined:

*"primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."*

Further, the Recommendation states that

*"when facilitating the determination of the existence of an employment relationship, member states should provide for a legal presumption that an employment relationship exists, where one or more relevant indicators are present.<sup>63</sup> These indicators include the fact that the work is carried out according to the instructions and under the control of another party, involves the integration of the worker in the organisation, is performed solely for the benefit of another person, and must be carried out personally by the worker. The indicators referred to in the Recommendation 2006 reflect the similar tests developed by Labour Courts in South Africa."<sup>64</sup>*

## **7 How the South African Labour Relations Act, 1995 and the Labour Court practice protects the rights of interns**

The use of internships programmes in Kenya and the keen interest that is given to them by the Kenyan government state agencies has been on the rise in recent times. But the country lacks proper guidance from case law and legislation for effective implementation. Nonetheless, this article observes that the Employment and Labour Relations Court is duty-bound to develop jurisprudence in this area of law. Accordingly, Kenya can draw significant

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<sup>62</sup> Article 4(a), (b) and art 5 of Employment Relations Recommendation, 2006.

<sup>63</sup> Article 13 (a) and (b) of Employment Relations Recommendation, 2006.

<sup>64</sup> Grogan J *Workplace Law* (2013) Juta Kenwyn.



lessons from the practice in other countries.<sup>65</sup> This article considers the South African legal framework in South Africa where it is noted that the determination of whether or not an intern falls within the definition of 'employee' is by and large left to the court. In doing so, the Labour Court, the Commission for Conciliation, Mediation and Arbitration (CCMA), and the Bargaining Councils are obliged to have regard to the true nature of the relationship between the parties. This involves an investigation of the true realities of the relationship between the parties, irrespective of how the parties have chosen to describe or title their work relationship in the contract. In other words, courts endeavor to look above and beyond the form of the contract between the intern and the host institution to establish whether there is an attempt by the employer to disguise the true nature of the working relationship as well as to circumvent the regulatory obligations.

There have been instances where interns were found to be employees, based on the all-encompassing definitions of 'employee' in section 213 of the LRA<sup>66</sup> and section 1 of the BCEA<sup>67</sup> which include 'any person' or 'any other person' who in any manner assists in carrying on or conducting the business of an employer. For instance, in *Andreanis v the Department of Health*<sup>68</sup> Ms. Andreanis had been appointed as an intern by the Department of Health. Four years later she was told to vacate her post as her internship period had come to an end. She claimed that the hospital had unfairly terminated her employment on the basis that she was an employee. She further argued that the end of her internship was immaterial to her employment status. Conversely, the employer argued that Ms Andreanis was an intern and therefore not an employee. Additionally, the employer opined that in any case, Ms Andreanis had not been dismissed given that her appointment had

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<sup>65</sup> Article 2 (5) of the Constitution states that the general rules of international law shall form part of the law of Kenya.

<sup>66</sup> Labour Relations Act 66 of 1995 (LRA).

<sup>67</sup> Basic Conditions of Employment Act 75 of 1997 (BCEA). In both the LRA and the BCEA an 'employee' is defined to mean "any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration and "any other person who in any manner assists in carrying on or conducting the business of an employer." In fact, in South Africa, interns are paid in terms of the BCEA in order to empower recent graduates economically as well as eliminate pay discrimination.

<sup>68</sup> (2006) 5 BALR 461. See also *Mashaba v Cuzen & Woods* (1998) 19 ICJ 1486.

expired automatically when her internship period expired. At the CCMA, the arbitrator found that Ms Andreanis was indeed an employee as defined in section 213 of the LRA and in terms of all but one of the seven presumptions contained in section 200A of the LRA. Further, the CCMA revealed that the Department of Health had been attempting to disguise or hide behind her internship. Her dismissal was found to be unfair and she was reinstated with full back pay.

Similarly, in *South African Broadcasting Corporation v McKenzie*,<sup>69</sup> the South African Labour Appeal Court emphasised that the true legal relationship between the parties must be inferred from the realities of the relationship between them and not merely from the way the parties chose to describe it. For that reason, the court has to give effect to what the reality of the relationship between the parties and not what it purports to be. Similar analogy could be drawn from *Dewhurst v CitySprint UK Ltd*<sup>70</sup> where the Central London Employment Tribunal held that it matters not how many times an employer proclaims that he is engaging a person not as an employee if he then imposes requirements on that person which are the obligations of an employee and the person goes along with them. In that case, the true nature of the contractual relationship is that of employer and employee. This is supported by the list of rebuttable presumptions contained in section 200A of the LRA as well as section 83A of the BCEA. The presumptions are similar to those which are contained in the Employment Relations Recommendation. These presumptions are founded on the dominant impression gained from considering all relevant factors that emerge from an examination of the realities of the parties' work relationships. The presumptions state that, except where the contrary is proved, if a person is engaged to work or provide services to any other person, he or she is presumed, irrespective of the form of the contractual agreement, to be an employee should any one or more of the following circumstances be shown or proved to exist. The aggrieved party would need to show that he or she is subject to the control and direction of the employer and in this case the host organisation particularly with regards to the hours of work. The aggrieved party would also need to demonstrate that he or she has been integrated or

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<sup>69</sup> [1998] ZALAC 13.

<sup>70</sup> ET/220512/2016.

has been made 'part' of the host institution or workplace in addition to the provision of tools of trade or work equipment. The general effect of sections 213 of the LRA and 200A as is that everyone who works is an employee unless they are independent of the person to whom they are providing services.

Further, the South African Department of Labour has made remarkable progress in regulating the rights of interns. In doing so, the country has developed a Code of Good Practice for Employment and Conditions of Work for EPWP and Ministerial Determination to safeguard the effective implementation of the programme.<sup>71</sup> According to the Code, interns are afforded the full protection of the BCEA and the LRA like any employee. This is because as noted in *Andreanis v the Department of Health* above, interns satisfy the broad definition of 'employee' and also because they receive a stipend for their work, besides assisting the host institution in carrying out its core mandate. This is paid monthly and is not be less than the minimum wage. The standard working hours as is customary in the relevant employment and are capped at to 40 hours per week.<sup>72</sup>

## **Conclusion**

Disguised employment relationships through internship programmes have arguably become an increasingly common feature in the labour market. The pertinent question argued in this article concerns the legal status of the intern in Kenya and whether an internship is indeed a rite of passage to a job or a trap to a disguised employment relationship. While interns are usually new to the host institution and perhaps learning the ropes, it is important to highlight that they perform many of the same or substantially similar tasks as fellow full-time employees. True internship arrangement seeks to provide an intern with a chance to experience the real world of work. Hence, this article notes that it would be ill-advised to entirely prohibit the practice of internship. But the converse is also true, particularly where unscrupulous host institutions label the contract or use terms such as 'internship contract' with the view to disguise the true nature of work relationship and to secure cheap labour. When this happens, then questions must be raised and the

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<sup>71</sup> Available at [www.epwp.gov.za/](http://www.epwp.gov.za/) (accessed 27 January 2020).

<sup>72</sup> Department of Labour, 2011.

intern should have the right to invoke article 41 of the Constitution and claim protection. Important is to remember that in *Kennedy kimani mburu & Another v Kibe Muigai Holding Limited*,<sup>73</sup> and *Maurice Oduor Okech v Chequered Flag Limited*,<sup>74</sup> the court opined that in considering whether or not an employment relationship exists, the court is expected to look beyond the mere language used by the parties in the face of the contract. The court will endeavour to inquire into the entire spectrum of facts and the true tenets of it to establish whether an employer-employee relationship as defined in the Employment Act exists. This is because in practice the disparity between what is presented on the face of the intern's contractual agreements and the reality of the work performed by the intern would reveal a disguised employment relationship.

### **Recommendation**

Legislative intervention can and usually does play a significant role in eliminating lacunas or ambiguity in the law. As noted above, the inconsistencies that currently exist in the definitions of 'employee' as well as 'contract of service' under the National Employment Authority Act and the Employment Act are regrettable. This inconsistency does not bring certainty and equally does assist the host institutions in effectively implementing legally compliant and commercially sound internship programs. Perhaps the time has come for the legislature to revisit and reconcile the two definitions to introduce an appropriate definition with the view to eliminate possible disguised employment through internship arrangements. This article recommends that the definition of 'employee' should be amended to introduce a definition that is broad in its interpretation for compliance with the right to fair labour practice entrenched in Article 41 of the Constitution. As a result, an amendment to the definition that includes a phrase similar to that which is contained under the LRA of South Africa i.e. '*and any other person, who in any manner, assists in carrying on or conducting the business of an employer*' are recommended.

Further, this article recommends that policymakers should seek to develop effective policies that ensure equal treatment among workers regardless of

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<sup>73</sup> *Kennedy Kimani Mburu & Another v Kibe Muigai Holding Limited* [2014] eKLR.

<sup>74</sup> (2013) eKLR.

their contractual arrangement. Hence, the policymaker should adopt what this article term as 'rebuttable presumption'. In other words, presumptions that are made in law, that is, presume that person to be an employee until it can be proved that the person is not an employee. So, where a person is erroneously engaged as an intern when the person's true nature of work performed is that of an employee, the person should have a right to approach the Employment and Labour Relations Court for a declaration that he or she is an employee. Then if it is objectively found that an employment relationship exists, the person should be entitled to the minimum wage and basic entitlements and protections as set out in the employment legislation.

Currently, most internship agreements including the PSC Internship Policy and Guidelines insist that the internship shall be non-remunerative save that interns will receive a stipend. This has left the vulnerable interns underpaid and without critical job security and protection ordinary extended to full-time employees. Many have been subjected to decades of abuse in complete violation and disregard of their constitutional right to fair labour practice as they are erroneously classified as 'interns' while in reality, the true nature of work performed by them is the same as that which is performed by full-time employees in the host institution. In terms of the Employment Act, it would amount to unfair discrimination if an employer fails to pay his workers' equal remuneration for work of equal value.<sup>75</sup> Hence, this article observes that there is a need to revisit the employment policies and guidelines to align them with the ever-changing forms of work relationships in the Kenyan labour market. Although not all jobs need to be standard, regulations, and policies are needed to ensure that all jobs are 'decent', including internships, that work delivers a fair income and job security amongst others. Accordingly, this study recommends an urgent review of the current practice of host-intern relationships to put an end to what could likely be regarded as employment relationships in disguise.

In addition, although the relationship between the intern and host institution is usually characterised as 'internship agreement', it is clear that the use of terms and phrases such as 'the intern is expected to comply with all relevant host institution's policies during his or her employment, unemployed

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<sup>75</sup> Section 5 (5) of Employment Act.

graduates', 'right to discipline', annual leave, the use of employee and intern interchangeably in the agreement leads to an interpretation that an individual is an employee rather than an intern and consequently a disguised employment relationship. The use of the terms also shows the presence of important factors used by courts to test the presence of an employment relationship such as the element of integration into the host institution, control, and supervision amongst others. Therefore, miscategorising of interns as people in training rather than employees could result in the interns being deemed employees as well as attract fines and lawsuits against the host institution. This article observes that institutions hosting interns should trade cautiously as there are great legal implications if they fail to provide statutorily imposed protections to individuals that they thought were interns but who are in law, employees. The National Employment Authority should also effectively exercise its core mandate of monitoring all placements of interns to ensure that they are not exploited or their rights violated by any host institution in which they are undertaking their internship.

On the whole, based on the application of the tests discussed above, there is a sufficient legal analogy to show that interns should be considered as employees for the purposes of the Employment Act. Notably, it is the host institutions that exercise the power of employ and dismiss an intern, to pay an intern's 'salary', has the power to discipline the intern and through the contractual agreement, retained the power to control the intern with respect to the means and method by which his work was to be accomplished. Similarly, the intern depends entirely on the host institution for 'salary' and allowances. Accordingly, the definitions of employee under the Employment Act 2007, fit the relationship between the two parties as an employment contract. Above all, regard must be given to the application of principles of fairness and particularly, the fair labour practice entrenched in Article 41 of the Constitution.