# Towards Effective Labour Disputes Resolution In Kenya: A Case For Entrenchment of Alternative Dispute Resolution Mechanisms

*By:* ***Kibet Brian & Kasidhi Valentine****

***Abstract***

*This paper examines the positive role of alternative dispute resolution mechanisms can play in labour disputes resolution system in Kenya. Consequently, the paper is going to address the various pitfalls that are presented by resorting to litigation as a mechanism of solving labor related disputes. The study argues that, while most workers and workers' unions turn to the courts for judicial redress, the interests and the rights of workers in Kenya are still not given primacy that they deserve. The study also investigates the current Alternative Dispute Resolution (ADR) Framework and its interplay in labour relations. Additionally, comparative study reveals that, in South Africa, the inculcation of ADR in the labour dispute resolution system has promoted access to justice by workers. The study, therefore, argues for the Kenyan legal framework to embrace the role of alternative dispute resolution mechanisms in ensuring expeditious resolution of trade disputes and to promote access to justice by the Kenyan workers.*

**Key Words**; Alternative Dispute Resolution, Labor Disputes, Kenya, South Africa.

## 1. Introduction

The constitution of Kenya, 2010 contemplates a justice delivery process that is non-discriminatory and fast; It goes ahead to call for the promotion of Alternative Dispute Resolution in the administration of justice. However, this is yet to be seen in the labor and employment sphere where litigants are yet to see the fruits of the "transformative" constitution of Kenya 2010 and

* ***Kibet Brian & Kasidhi Valentine are students at the University of Nairobi Faculty of Law. They both believe that justice must be delivered expeditiously if it is to be seen as done and not only done. Kibet can be reached at kibetbrian001@students.uonbi.ac.ke while Kasidhi Can be reached at kasidhiv@gmail.com***

therefore remain shackled in the old dispensation where justice was delayed and, in some instances, denied.[1]

Whilst appreciating the significant progress made by the Employment and Labor Relations Court, this paper makes a case for the entrenchment Alternative Dispute Resolution in Kenya particularly in employment and labor related disputes as encapsulated in the Constitution and in order to ensure that justice is served expeditiously. It begins by giving an introduction to the foundations of the ADR framework in Kenya. It goes ahead to enumerate the immense benefits such an approach would yield.

Next, it offers insights into the state experience of South Africa which has incorporated the designs of ADR in the resolution of labour disputes. It proceeds to relate the experience in South Africa with the existing Kenyan Framework. It then offers recommendations based on the state experience in South Africa and the lessons drawn from it. It then concludes.

All through it contends that the mainstreaming of ADR mechanisms in dispute resolution processes in the labour sector is the panacea to the plethora of problems that bedevil dispute resolution processes in this field of law.

## 2. The Aegis and Merits of ADR in the Kenyan Legal Framework: A Background for the Mainstreaming of ADR mechanisms in Labour Disputes

The Constitution of Kenya, 2010 grants every Kenyan the right to access justice in a way that is not impeded in any way by amongst others, costs. In a bid to ensure full enjoyment of this right, the constitution broadens the available forums for the pursuit of justice to include Alternative Disputes Resolution mechanisms which include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

[1] Gathongo JK, "Labour Dispute Resolution in Kenya: Compliance with International Standards and a Comparison with South Africa" <https://core.ac.uk/download/pdf/188177779.pdf> accessed October 30, 2021

It is noteworthy that the constitution uses the transitive verb "including" before listing the methods it contemplates as forming part of Alternative Dispute Resolution Mechanisms.[2] The verb "including" has been defined to mean "to contain within".[3] This shows that the list is not exclusive but merely inclusive.[4] As such, the Constitution cogitates that the organs mandated with facilitating the enjoyment to access to justice can, when they feel this will improve the enjoyment of this right, create, develop and operationalize alternative dispute resolution mechanisms other than the ones mentioned in the constitution.

With such an enabling constitutional framework that is so receptive to alternative dispute resolution to the point that it offers scholars and practitioners the latitude to develop and apply Alternative Dispute Resolution mechanisms other than those mentioned in the Constitution, this paper contends that the time is nigh for Alternative Dispute Resolution Mechanisms to be mainstreamed into dispute resolution processes as envisioned by the Constitution. It should no longer be seen as a concept whose role is to be discussed in dissertations and academic theses but as the endgame to case backlogs and a system that is a means to achieving individualized justice to parties that approach the same. This will yield multiple benefits.

Firstly, the entrenchment of ADR in the labour law regime promotes the laborer's right of access to justice.[5] As enunciated by Lord Hewart CJ, "Not only must justice be done, it must also be seen to be done".[6]Access to justice

[2] Article 159 (2) ( c ) of Constitution of Kenya, 2010
[3] Black's Law Dictionary. 8th ed. St. Paul, MN: Thomson/West, 2004.
[4] See also Paragraph 107 of *George Bala V Attorney General* (2017) EKLR where Justice George Odunga finds that the term including as used in Article 10 of the Constitution is not exhaustive but there exists other values and principles of governance that are not expressly mentioned in the Constitution that are binding on those exercising public authority. The decision is available at http://kenyalaw.org/caselaw/cases/view/130164/ and accessed on 08/06//2021
[5] Muigua K, "Access to Justice and Alternative Dispute ... - Kmco.co.ke" <http://kmco.co.ke/wp-content/uploads/2018/09/access-to-justice-and-alternative-dispute-resolution-mechanisms-in-kenya-23rd-september-2018-1.pdf> accessed October 30, 2021
[6] R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep 233

is an essential characteristic of any judicial system. Access to justice is also considered as one of the key tenets in promoting the rule of law.[7] Moreover, access to justice is one of the pillars of the Constitution of Kenya. Article 22 (1) of the Constitution provides for the right of an individual to institute court proceedings where he or she contemplates that their rights have been denied, infringed, violated or threatened.[8] Moreover, Article 22 (3) empowers the Chief Justice to formulate rules for the proceedings contemplated in this article, the rules should ensure the following benchmarks are met: formalities as to court proceedings are minimized and, if necessary, the court can entertain proceedings on the basis of informal documentation.[9]Article 48 obliges the State to ensure access to justice for all, and the imposition of any court fees should not impede anyone from instituting court proceedings. [10]However, a cursory look at the current fees tells otherwise.[11] The import of Article 22(3) and Article 48 is buttressed by Article 159 (2)(d) which provides for the administration of justice without undue regard to procedural technicalities.[12] The spirit of article 159 is also replicated by Article 27 which guarantees an individual's right of equal protection and equal benefit of the law. [13]

Therefore, access to justice, and consequently, the recognition of ADR and traditional dispute resolution mechanisms, is predicted on the following principles of justice and fairness: equal opportunity, expedition, party autonomy, objectivity of the process, party satisfaction, effective redress and cost effectiveness.[14] However, if the foregoing provisions and yardsticks are anything to go by, then litigation has failed miserably to attain the requisite

[7] JK Gathongo (*Core.ac.uk*, 2021) <https://core.ac.uk/download/pdf/188177779.pdf> accessed 10 June 2021.
[8]Constitution of Kenya 2010, Article 22 (1)
[9] Ibid, Article 22(3)
[10] Ibid Article 48
[11] See generally Joseph Wangui, *Kenyans face expensive justice as court fees rise*, Available at *https://www.businessdailyafrica.com/bd/economy/kenyans-face-expensive-justice-as-court-fees-rise-3542322* Accessed on 31/10/2021
[12] Ibid Article 159
[13] Ibid Article 27
[14] Kariuki Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya'.

threshold. The failure of litigation to attain the accessibility criteria can be attributed to the following factors: complex court rules and procedure, exorbitant court fees, the use of legalese and unfavorable geographical location.[15] Conflict resolution through the courts may at times take years due to resource limitations and limitations imposed by civil procedure. Thus, court settlement becomes slow and expensive, subsequently losing the credibility and expedition required in the corporate world. This inconvenience significantly violates the rights of the laborers of access to justice. The conclusive determination of disputes whereby unfair termination of employment is an issue, implies that the aggrieved laborer has to endure a lengthy court battle that would significantly drain his or her earnings, thanks to the high court fees and the extortive legal fees. This delay of justice denotes deprivation of justice as ensconced in Article 159 of the Constitution.

The above shortcomings of litigation highlight the necessity of recognizing ADR and traditional dispute resolution mechanisms in order to promote access to justice. If the high number of case backlog in the country is anything to go by, people have over-relied on the courts in pursuit of personal remedies that could be settled comfortably through ADR. It is also noteworthy, that the high number of cases recorded in the court daily is an indication of the breakdown of the social institutions such as family, religion, kinship and neighborhood. As a result of this breakdown, people have overburdened the court system with disputes that would have otherwise been resolved through ADR or traditional dispute resolution mechanisms.

Scholars have posited that litigation is a forum for winning arguments; it is not a forum for resolution of conflicts.[16] The core objective of any litigation proceedings is to arrive at a settlement. Court proceedings are characterized by power contests, whereby each party strives to assert their dominance, and

[15] Muigua K and Francis K, "ADR, Access to Justice and Development in Kenya" <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf> accessed October 30, 2021

[16]JK Gathongo (*Core.ac.uk*, 2021) <https://core.ac.uk/download/pdf/188177779.pdf> accessed 10 June 2021.

the losing party is forced to live with inauspicious terms. Settlements are utterly predicated on interests. They narrowly address all the angles of the dispute by inadequately considering factors such as the parties' relationships, emotions and perceptions. Thus, failure to address these factors provide fodder for future conflicts, the social fiber holding the parties is irrevocably dented. In this case, the employer-employee professionally amicable relationship is adversely affected, and this frosty relationship may affect general performance of the organization or the company.

Power struggles have defined the court battles between the workers' unions and the employers which have led to the strained relationship between both parties.[17] This antagonistic mood between these parties clouds any incentive for progressive resolution of trade disputes, as the workers' unions and the employers are stuck in an almost infinite loop of power struggles and guerillaesque retaliation tactics, hence the need to entrench ADR and traditional dispute resolution mechanisms in the progressive resolution of labour disputes.[18]

The above-mentioned scenarios characterized by court proceedings are contrary to the principles of ADR which advocate for speedy, amicable, and party-directed conflict management process. Thanks to party autonomy, employers and workers are able to amicably direct the course of the conflict resolution process with the help of an arbiter or a mediator. Founded on the principle of party satisfaction, this type of dispute resolution process discards power struggles and embraces mutually satisfying, non-coercive, durable outcomes.[19]

## 3. The Current Structure and Governing Framework for ADR practice in the labour law sector in Kenya

The legal framework of ADR is predicated on Article 159 which imposes the courts and tribunals, that in the exercise of their judicial authority, they

[17] Zack "Conciliation of labour court disputes" 2006 26 *Comparative Labour Law & Policy Journal* 408 410

[18] Ibid

[19] Kariuki Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya'.

are required to embrace alternative dispute resolution mechanisms. The same provision additionally enjoins the judiciary to ensure that justice is done to all, is not delayed and shall be administered without undue regard to technicalities.[20]The spirit of ADR equally prevails in Article 189 (4) which provides for the enactment of legislation that provides the settlement of inter-governmental disputes through ADR.[21] These constitutional provisions have elevated the importance of ADR and TDRM in resolving conflicts in the Kenyan context, with the main aim of promoting access to justice as provided for in Article 48. In the light of this, the utilization of ADR and TDRM is vital in the resolution of labour disputes.

Kenya currently has a dual system of labour dispute resolution; individual disputes are handled by the Labour Officer, as provided for in the Employment Act 2007[22], while collective disputes are resolved by a conciliator appointed by the Cabinet Secretary in charge of Labour, as envisaged in the Labour Relations Act 2007.[23]Both government officers mentioned above are burdened with the momentous task of resolving trade disputes, and it remains to be seen whether this dual setup is effective as compared to an independent ADR body with the jurisdiction to resolve labour disputes.

Collective disputes are brought before the Ministry of Labour, Social Security and Services. As earlier stated, the department is empowered by the Labour Relations Act. Section 58 of the Act allows for conciliation or arbitration of any category of trade disputes identified in the collective agreement by an independent arbitrator or conciliator.[24] The above provision highlights the centrality of ADR in the resolution of trade disputes and goes ahead to provide requirements and procedures as to how the ADR processes are to be undertaken. Section 65 (1) further enumerates that upon the expiry of the twenty-one days required to report a trade dispute as specified in

[20] Article 159, Constitution of Kenya
[21] Ibid, Article 189 (4)
[22] Section 87 1(c), Employment Act
[23] Section 65 (1), Labour Relations Act
[24] Section 58 (1), Labour Relations Act

Section 62, the Cabinet Secretary may appoint a conciliator to resolve the dispute.[25]

Section 67(2) expounds on the powers of the appointed conciliator, the conciliator or the conciliation committee may: mediate between the parties, conduct a fact-finding exercise, and make recommendations or proposals to the parties for settling the dispute.[26] In the event of a successful conciliation, the agreement is recorded in writing, signed by the parties and the conciliator, and the copy registered with the Cabinet Secretary as soon as practicable. [27]

However, if a dispute is deemed unresolved as per section 69 the conciliator issues a certificate declaring that the trade dispute has not been resolved by conciliation.[28] Additionally, section 70 empowers the Cabinet Secretary to appoint a conciliator in public interest if he or she is satisfied that it is in the public interest that the dispute is resolved or the same needs to be curtailed from arising.[29]

While collective disputes are handled by the Cabinet Secretary, individual disputes are resolved by the Labour Officer. Section 25(2) of the Employment Act empowers the Labour Officer to handle any complaint pertaining wrongful deduction or withholding of remuneration.[30]Besides, with regards to complaints of summary dismissal and unfair termination, section 47 sanctions the labour officer to recommend the best means of settling the dispute.[31] Though not express in indication, the above provision alludes to the utilization of ADR, in particular conciliation.

An examination of the above framework reveals a lot of frailties and loopholes. To begin, the Labour Relations Act vests lot of powers to the

[25] Ibid, Section 65
[26] Ibid, Section 67(2)
[27] Ibid, Section 68 (1)
[28] Ibid, Section 69
[29] Ibid, Section 70
[30] Section 25 (2), Employment Act
[31] Ibid, Section 47

Cabinet Secretary; these powers are unchecked. For instance, it may not be wise empower the Cabinet Secretary to appoint a conciliators or conciliation team to preside over a matter where the CS is an interested party. Most importantly is also the issue of accessibility.

The current framework does not embody the principles of access to justice as elucidated in the case of *Dry Associates v Capital Markets Authority*[32]; the process is long and laborious, while the accessibility of the offices in charge of conflict resolution highly questionable. As such, the conflict resolution process may be detrimental to the business interests of the affected parties, as a long process translates to a costly venture. In addition, the Conciliation and Mediation Commission referred to in section 66 (c) of the Labour Relations Act has since been defunct; hence exposing the inadequacy of the institutional framework.

## 4. A Comparative State Experience with the Republic of South Africa

The labor related disputes resolution framework of South Africa has been described as 'efficient and effective' and with a framework that is 'well established and well-trusted'. [33] The country is also a leader in the entrenchment of Alternative dispute resolutions in its labor disputes resolution regime in Africa and many countries across the globe are draw inspiration from it.[34]

The South African Labor Relations Act, 1995 sets out the framework for the resolution of labor disputes through the creation of; specialized labor courts which are the labor high court and the Labor Appeals Court, Bargaining and Statutory Councils and the Commission for Conciliation, Mediation and

[32] Petition no. 328 of 2011

[33] JK Gathongo (*Core.ac.uk*, 2021) <https://core.ac.uk/download/pdf/188177779.pdf> accessed 10 June 2021.

[34]Bamu and Mudarakiwa "Social Regionalism in the Southern Africa Development Community: Transnational, Regional and National Interplay of Labour Alternative Dispute Resolution Mechanisms" in Blakette *Research Handbook on Transnational Labour Law* (2015

Arbitration (CCMA).[35] This section concerns itself with the role, procedures and the special place of the CCMA in the South African setting.

The CCMA is established under section 114 of the Labor Relations Act, 1995 and enjoys jurisdiction over all the provinces of the Republic of South Africa.[36] Its independence is enunciated by the Act in Section 113 and has powers to make rules governing its operations. It has since identified its mission as 'To give effect to everyone's Constitutional rights and freedom' and has a mission of becoming 'A world-class institution that promotes labour stability, social justice and job security'.[37]

The CCMA has a governing body which is its supreme decision making organ.[38] It consists of five persons who are appointed by the minister responsible for labor affairs.[39] The requirement for appointment as commissioners of the CCMA has been set as supposed to be "adequately qualified".[40] Those who are appointed as commissioners are offered the opportunity to serve for a fixed period of time either on a full time or part time basis; as such they do not enjoy security of tenure.[41] The CCMA has

[35] See Generally The Preamble of The South African Labor Relations Act, 1995 Available at *https://www.gov.za/sites/default/files/gcis_document/201409/act66-1995labourrelations.pdf* Accessed on 15/06/2021

[36] The functions of the CCMA have been enumerated in Section 115 (1) of Labor Relations Act,1995 to include; (a)attempt to resolve, through conciliation, any dispute referred to it in terms of this Act; (b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if- (i) this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or (ii) all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission; (c) assist in the establishment of workplace forums in the manner contemplated in Chapter V; and (d) compile and publish information and statistics about its activities.

[37] Values and Goals of CCMA Available at https://www.ccma.org.za/About-Us/Vision-Mission-Values Accessed on 15/06/2021

[38] CCMA Governing Body *http://www.ccma.org.za/About-Us/Our-People/GoverningBody*

[39] The body consists of an independent chairperson, a director, three persons nominated by organized business, three persons nominated by organized labour and three persons nominated by the state

[40] Section 117 (1) of the Labor Relations Act, 1995

[41] Section 117 (2) of the Labor Relations Act, 1995

also been given the powers to recruit its own staff in order to enhance its efficiency.[42] This gives it some autonomy from its parent ministry.

A code of Conduct guides the performance of the commissioners in the course of their duties. This code of conduct is developed pursuant to section 117 of the act and any acts or omissions by a commissioner that contravene the code of conduct may warrant the dismissal of a commissioner from the commission.[43] On access, the commission has branches in all the nine provinces of South Africa and offers its services free of charge.[44] However, an individual who wants to access the services of the commission must do so within the province where the matter arose. However this requirement may be waived on application to a Senior Commissioner at the headquarters which is in Johannesburg, Gauteng Province.[45] The process for the adjudication of a dispute trough the CCMA aegis depends on the mode of dispute resolution chosen by the parties to the dispute. These mechanisms are either, conciliation, mediation or arbitration.

Conciliation means bringing two opposing sides together to reach a compromise.[46] As a dispute resolution process, it involves the availing of an opportunity to disputants to reach an agreement through a process facilitated by a third party in this case a CCMA commissioner. This opportunity may take the form of mediation, fact-finding and recommendations and in some cases an advisory arbitration award.[47] The advantages of considering conciliation is that that conciliation offers the parties to the dispute a chance

[42] Section 120 of the Labor Relations Act, 1995

[43] See Section 117 (2) of the Labor Relations Act, 1995 which provides that; The governing body may remove a commissioner from office for- (a) serious misconduct; (b) incapacity; or (c) a material violation of the Commission's code of conduct

[44] JK Gathongo (*Core.ac.uk*, 2021) <https://core.ac.uk/download/pdf/188177779.pdf> accessed 10 June 2021

[45] See generally Rule 24(1) of the CCMA Rules.

[46]West's Encyclopedia of American Law, edition 2

[47] Mercel Garber, *Alternative Dispute Resolution In The Brics Nations: A Comparative Labour Law Perspective*., University of Western Cape LLM Thesis Available at https://etd.uwc.ac.za/bitstream/handle/11394/6996/gerber_m_law_2019.pdf?sequence=1&isAllowed=y accessed on 15/06/2021

to work out a mutually acceptable settlement amongst themselves as opposed to arbitration where a third party will make a final award resulting in a winner and a loser.[48]

Conciliation is initiated under CCMA when one of the parties duly fills a CCMA dispute form called Form 7.11 and proceeds to serve the same on CCMA and the other party.[49] The CCMA will then inform both parties of the matter to be conciliated and communicate the date and time when the matter will be conciliated as well as the venue for the same. The CCMA should appoint a commissioner to oversee the conciliation process and who is obliged to dispense with the matter within thirty days from the date the matter was referred to the CCMA. However parties may elect to have the time extended by another thirty days. The conciliator, like all persons mandated to resolve a dispute under the CCMA framework, has many powers including the power to call expert to give evidence that is relevant to the resolution of the dispute.[50]

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[48] Mercel Garber, *Alternative Dispute Resolution In The Brics Nations: A Comparative Labour Law Perspective*., University Of Western Cape Llm Thesis Available at *https://etd.uwc.ac.za/bitstream/handle/11394/6996/gerber_m_law_2019.pdf?sequence=1&isAllowed=y accessed on 15/06/2021*

[49] Jordaan B, Kantor P & Bosch C Labour Arbitration: With a Commentary on the CCMA Rules 2 ed (2011) 89

[50] See Generally Section 142 of Labor Relations Act, 1995 which gives commissioners appointed to resolve disputes the powers to; (a) subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute; (b) subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the commissioner to be questioned or to produce that book, document or object; (c) call, and if necessary, subpoena, any expert to appear before the commissioner to give evidence relevant to the resolution of the dispute; (d) call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the dispute; (e) administer an oath or accept an affirmation from any person called to give evidence or be questioned; (f) at any reasonable time, but only after obtaining the necessary written authorization- (i) enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the dispute is to be found or is suspected on reasonable grounds of being found there; and (ii) examine, demand the production of, and seize any book, document or object that is on or in

In the event that the conciliation process fails to result in an outcome that is agreeable to the parties, the commissioner is expected to issue a certificate of outcome indicating that the proceedings were not successful and therefore the parties can therefore proceed to other proceedings, which is in most cases, arbitration.[51] Such a scenario results in a dispute resolution model that has been termed as Con-Arb.

Con-Arb has been defined as process in which an independent third party first conciliates the dispute between parties and if conciliation fails to resolve the dispute, the arbitration begins immediately.[52] In such a process, the conciliator who had initially handled the case handles the matter as the arbitrator.[53] However, a new commissioner can be appointed as arbitrator if they feel their impartiality has been dented due to their involvement in the conciliatory process.[54] At the end of the process, an arbitration award is given. This award is akin to a decision of the Labor Courts in its enforceability can only be varied or rescinded in special circumstances. Such a circumstance may be when an award contains an ambiguity or an obvious error or omission.[55]

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those premises and that is relevant to the resolution of the dispute; and (iii) take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement, and (g) inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the Commission.'

[51] Mercel Garber, *Alternative Dispute Resolution In The Brics Nations: A Comparative Labour Law Perspective*., University Of Western Cape Llm Thesis Available at *https://etd.uwc.ac.za/bitstream/handle/11394/6996/gerber_m_law_2019.pdf?sequence=1&isAllowed=y* accessed on 15/06/2021

[52]Jordaan B, Kantor P & Bosch C Labour Arbitration: With a Commentary on the CCMA Rules 2 ed (2011) 89

[53] JK Gathongo (*Core.ac.uk*, 2021) <https://core.ac.uk/download/pdf/188177779.pdf> accessed 10 June 2021

[54] Zack "Conciliation of labour court disputes" 2006 26 *Comparative Labour Law & Policy Journal* 408 410

[55] JK Gathongo (*Core.ac.uk*, 2021) <https://core.ac.uk/download/pdf/188177779.pdf> accessed 10 June 2021. Other reasons for the varying of an arbitration award include when, the award was erroneously sought or granted in the absence of any person affected by the award and when If an award was granted as a result of a mistake common to both parties to the proceedings.

Arbitration is another dispute resolution process available under CCMA. Arbitration has been defined as "process whereby the parties make presentations to a mutually agreed neutral third party, known as an arbitrator, and commit them to abide by that arbitrator's decision as final and binding".[56] In case parties to a dispute choose this method of dispute resolution, the Labor Relations Act, sets a deadline that the case must be resolved within ninety days from the date when it was registered.[57]

Arbitration proceedings initiated under the auspices of CCMA operate outside the provisions of The South African Arbitration Act, 1965.[58] Under Section 191 (5A) of the Labour Relations Act, 1995, arbitration enjoys exclusive primary jurisdiction over all matters that are unresolved and concern; the dismissal of an employee for any reason relating to probation and any unfair labour practice relating to probation.

The arbitration proceedings begin by the arbitrator introducing themselves and establish who is appearing for each of the involved parties as well as explain to the parties how they intend to proceed with the proceedings.[59]

They must also show the jurisdiction of the CCMA to the matter. After the introductory and preliminary stage, the arbitrator affords every party an opportunity to make their respective cases.[60] Pursuant to Section 132 of the Labor Relations Act, 1995 parties may call witnesses in support of their case and question the witnesses of the opposing party. However, this is at the discretion of the arbitrator.[61]

[56] As defined by World Intellectual Property Organization available at https://www.wipo.int/amc/en/arbitration/what-is-arb.html Accessed on 15/06/2021
[57] JK Gathongo (*Core.ac.uk*, 2021)
<https://core.ac.uk/download/pdf/188177779.pdf> accessed 10 June 2021
[58] Section 156 of the Labor Relations Act, 1995
[59] Section 138 of the Labor Relations Act, 1995
[60] Section 136 of Labor Relations Act, 1995
[61]Section 138(2)of the Labour Relations Act, 1995

The arbitrator, after considering the case as presented by each party makes a decision on the matter. This decision is known as an arbitration award.[62] This award is binding and final and can be appealed to the Labour Court which can review the award.[63] No appeals are allowed beyond this court.[64]

Mediation has been defined as "the use of an independent individual who acts in his or her capacity as a neutral person with the aim to mediate or facilitate a possible solution in a dispute".[65] This third neutral person is called a mediator and facilitates discussions between the disputing parities so that they can each understand the issues arising in the dispute so that they can develop possible solutions to them in their own terms. The parties eventually come to a mutually acceptable settlement and if not, they can make use of any dispute resolution mechanisms such as litigation in the labor court and arbitration or Con-Arb.[66]

As seen above South Africa boasts of a robust Alternative Dispute Resolution framework that ensures a quick and expeditious resolution of disputes in the labor sector. This ensures that the right of South Africans to "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum" is realized.[67]

## 5. Inspirations from South Africa; Potential Legal Reforms

Drawing from the South African experience, this work advances for the formation of a statutory body that operates like the CCMA of South Africa.

[62] Kariuki Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya'
[63] Section 145 of The Labour Relations Act, 1995
[64]Jordaan B, Kantor P & Bosch C Labour Arbitration: With a Commentary on the CCMA Rules 2 ed (2011) 100.
[65] Maclons W Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System, LLM thesis, University of the Western Cape, 2014
[66] Maclons W Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System, LLM thesis, University of the Western Cape, 2014
[67] Section 34 of the Constitution of the Republic of South Africa, 1996

Given the Kenyan Constitutional framework that only recognizes the courts and tribunals as the bodies mandated to exercise judicial authority,[68] it can take the form of a tribunal that appoints conciliators, arbitrators and mediators to matters that the public raise for hearing and determination. Appeals from this tribunal can lie in the Employment and Labor Relations Court and no further appeals should be allowed beyond the Employment and Labor Relations Court. The appellate powers of the Employment and Labor relations court in arbitration cases should also be limited.

As an improvement to the South African model, the Kenyan version of the CCMA, the minimum qualifications to serve in it should be succinctly set out in the enabling Act and should not be as tentative as the South African one where the qualification has been set as one should be 'adequately qualified". The members of the Kenyan version should also be accorded security of tenure like the judges of the superior courts of Kenya.

This work also recommends that in Con-Arb proceedings, when a certificate is issued that the dispute did not come to a mutually acceptable settlement after Conciliation, the conciliator should be automatically barred from appointment as an arbitrator in the ensuing arbitration proceedings. This will ensure that the arbitration proceedings are impartial in the eyes of the parties involved thus facilitating access to justice.

## 6. Conclusion

This work has critically analyzed the Kenyan legal framework as an enabler and promoter of Alternative Dispute Resolution mechanisms in the quest to ensure the right to access to justice is enjoyed by all Kenyans. It has gone ahead to make a case for the entrenchment of ADR mechanisms in the resolution of labor related disputes. It has shown, through a comparative analysis with the South African approach, that this will yield expeditious dispute resolution framework and decongest our courts. It has finally made recommendations for the adoption of the South African model in Kenya though with modifications and improvements which it has set out.

[68] Article 1 (3) ( C ) of Constitution of Kenya,2010

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