Strikes in Essential Services in Kenya: The Doctors, Nurses and Clinical Officers' Strikes Revisited and Lessons from South Africa

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Abstract

The right to strike is one of the fundamental rights enshrined in the *Kenyan Constitution*, 2010. Any limitation to the right involves the danger of collective bargaining. The right to strike is derived from the *Right to Organise and Collective Bargaining Convention*, 1949 that Kenya ratified on 18 July 1951. Article 2(4) of the *Constitution* emphasises that any law inconsistent with it is void.

The Kenyan *Labour Relations Act*, 2007 gives effect to the constitutional right to strike but is also subject to a number of limitations. Such limitations include the prohibition of strikes for employees who are engaged in essential services. Although the limitations to the right to strike may be justified, a number of bottlenecks exists in the current scope and application of the *Labour Relations Act*. For example, the *Labour Relations Act* does not provide mechanisms in terms of which essential service employees can lawfully embark on strikes. Unlike disputes in South Africa, those about essential services in Kenya are not preceded by consensus-seeking processes such as conciliation, mediation and arbitration. Instead, essential service disputes are referred directly to the Employment and Labour Relations Court for litigation. Consequently, the rights of employees who are employed in essential services like hospitals and patients' right to access health care services can easily be violated. Due to the lacunae in the *Labour Relations Act*, an increase in the number of strikes in essential services has been witnessed in Kenya.

This article argues that the litigation of disputes in essential services should be the option of last resort. In addition, to date, more than 11 years after the *Labour Relations Act* came into effect, no provisions have been incorporated or even suggested that employer and trade unions need to conclude minimum service agreements and designate employees to perform the minimum services. This article suggests that, trade unions and government can work together through adopting consultative and more inclusive approaches in order to establish an effective statutory framework that regulates the right to strike in essential services in Kenya.

Keywords

Constitutional right to strike; essential services; Kenya; South Africa.

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1 Introduction

The right to strike is the most visible form of collective industrial action that employees use with a view to compelling employers to come to the bargaining table and agree to their demands.[1] This article explores the nature of the right to strike in essential services, an issue that has recently bedevilled Kenya's public health sectors. In doing so, the article examines the current legal framework of strikes in essential services under the Kenyan *Labour Relations Act*, 2007 (hereinafter referred to as the *2007 LRA*).[2] Significant legislative problems and gaps still exist in Kenya, particularly pertaining to the procedure to be followed when employees in essential services wish to embark on strikes.

This article identifies some of these problems and makes recommendations based on South African labour laws on how some of the problems could be addressed. Some comparative analysis is undertaken with particular reference to the provisions of the South African *Labour Relations Act* (hereafter the *1995 LRA*)[3] dealing with strikes in essential services, the purpose being to establish what experience Kenya shares with South Africa and what lessons can be learnt from this. For example, South Africa has largely managed to curb strikes in sectors designated as essential services. Kenya could learn from this experience. Reference is also made to the salient features of the International Labour Organisation's (ILO) approach regarding the right to strike.

2 Right to strike under the ILO Conventions

Kenya became a member of the ILO on 13 January 1964 and continues to perform its obligation as a Member State.[4] The *Constitution of the Republic of Kenya,* 2010 (hereinafter the *Kenya Constitution*) recognises the

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1 Van der Walt, Le Roux and Govindjee *Labour Law in Context* 203. Also see Grogan *Collective Labour Law* 141. Section 2 of the *Labour Relations Act* 14 of 2007 (hereinafter the *2007 LRA*) defines a strike as "cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work for the purpose of compelling their employer or an employer's organisation of which their employer is a member to accede to any demand in respect of a trade dispute."

2 *Labour Relations Act* 14 of 2007.

3 *Labour Relations Act* 66 of 1995 as amended (hereinafter the *1995 LRA*).

4 ILO 2017 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110_COUNTRY_ID:103315.

relevance of international law as among the sources of law in Kenya.[5] The right to strike is a right recognised by the ILO[6] Conventions[7] and is provided in its Recommendations.[8]

While all the ILO Conventions and Recommendations are of great relevance to the interests of trade unionists, the *Freedom of Association and Protection of the Right to Organise Convention*[9] and the *Right to Organise and Collective Bargaining Convention*[10] are particularly considered as the leading instruments in the international protection of the right to strike.[11] Although neither of these Conventions specifically provides for a right to strike, the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association (CFA) recognise the importance of the right to strike. The ILO's CFA acknowledges that "the right to strike is one of the essential means through which employees and their employers' organizations may promote and defend their economic and social interests."[12] These interests, which employees seek to defend through the right to strike, include not only the achievement of better working conditions, but also the satisfaction of socio-economic needs which are of direct concern to employees.[13] Kahn-Freund is of the view that it is through the exercise of the right to strike that employees are

5 Article 2 of the *Constitution of the Republic of Kenya*, 2010 (hereinafter the *Kenyan Constitution*) is titled "Supremacy of this Constitution". Sub-article (5) recognises that the general rules of international law shall form part of the law of Kenya.

6 ILO *Freedom of Association* paras 473-475.

7 Ratified conventions give rise to legal consequences. Conventions are intended to create international obligations for the States Parties that ratify them.

8 Unlike Conventions, Recommendations are not international treaties. They establish non-obligatory guiding principles for national policy and practice. They are non-binding guiding principles that supplement the provisions of Conventions by providing detailed suggestions on how Conventions should be applied.

9 *Freedom of Association and Protection of the Right to Organise Convention* (1948).

10 *Right to Organise and Collective Bargaining Convention* (1949).

11 The right to strike is also recognised in other international and regional instruments. See A 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights* (1966); A 27 of *the Inter-American Charter of Social Guarantees* (1948); A 6(4) of *the European Social Charter* (1961)l and A 8(1)(b) of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (1988).

12 Van Niekerk *et al Law@work* 415. Also see ILO *Freedom of Association* para 522.

13 ILO *Freedom of Association* para 526.

able to attain and maintain equilibrium in industrial relations.[14] Furthermore, Kahn-Freund[15] insightfully notes that:

> No country suppresses freedom to strike in peace time, except dictatorships and countries practising racial discrimination, a legal system which suppresses the freedom to strike puts the workers at the mercy of the employers ... .

In Kahn-Freund's view, national legislation frequently places some form of limitation on the right to strike in certain activities, which are usually defined as essential services. In the Freedom of Association Digest of Decisions and Principles the ILO rightly endorses the limitation to the right to strike in the context of public services. The ILO affirms that the right to strike can be restricted or prohibited in the public service or in essential services in so far as a strike could cause serious hardship to the national community and provided that these limitations are accompanied by certain compensatory guarantees.[16] The ILO Committee of Experts has defined essential services to mean those services "the interruption of which would endanger the life, personal safety or health of the whole or part of the population."[17] In designating services as essential, the ILO urges Member States to follow the objective criteria of the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population.[18] The ILO Committee regards the hospital sector as essential services.

3 The right to strike under the *Kenyan Constitution*

The right to strike is one of the fundamental constitutional rights provided for under Article 41 of the *Kenyan Constitution*. This right is afforded to all

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14 Kahn-Freud and Hepple *Laws against Strikes* 5. Also see Grunfeld, who notes that if one group of human beings is placed in a position of unchecked industrial authority over another group, expecting the former to keep the interests of the latter constantly in mind like increasing the latter group's earnings as soon as the surplus income is available is like placing on a human being a strain that it was never designed to bear. Grunfeld *Modern Trade Union Law* 33; Davies and Friedland, in Kahn-Freund *Labour and the Law* 292 on advancing support to the necessity of the right to strike in collective bargaining. Therefore, to protect the right to strike means to recognise the fact that the limits set to the rights to strike and to lockout are one measure of the strength which each party can in the last resort bring to bear at the bargaining table. Thus, the strength of a union is bound to be related to its power and its right to call out its members, so long as any semblance of collective bargaining survives. See Wedderburn *The Worker and the Law* 245.

15 Khan-Freund *Labour and the Law* 234.

16 ILO *Freedom of Association* para 573. Also see ILO *Freedom of Association and Collective Bargaining* para 570.

17 ILO *Freedom of Association* para 860; ILO *Freedom of Association and Collective Bargaining* para 214 and Part 4B. Also see Cohen and Matee 2014 *PELJ* 1635.

18 ILO *Freedom of Association* para 581. Also see ILO *Freedom of Association and Collective Bargaining* para 159.

employees.[19] It is worth noting that Article 41 of the *Kenyan Constitution* refers to "every employee" without excluding any categories. This means that the term "worker or employee" must be broadly interpreted to include public health employees. It is an important right because in the absence of such a right to strike, collective bargaining can amount only to what Jacobs refers to as "collective begging".[20] For that reason, any form of denial or undue limitation of this right can lead to a substantial weakening of the employees' bargaining power because, they cannot bargain on an equal footing with their employer in the inevitably occurring case of a dispute. However, it is widely recognised also that under *the Kenyan Constitution* rights are not absolute and may therefore be limited in certain situations, particularly, in this context, in services where a strike is likely to harm the public.[21]

The *Kenyan Constitution* considers that the right to strike may be limited by law and under certain conditions.[22] For example, the *2007 LRA* prohibits the exercise of the right to strike by employees engaged in sectors designated as essential services.

4 The right to strike in South Africa

Like the equivalent in the *Kenyan Constitution*, section 23(2)(c) of the *Constitution of the Republic of South Africa*, 1996 accords all employees the right to strike, as elaborated under the *1995 LRA*.[23] The Constitutional Court of South Africa has emphasised that:[24]

> … it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system … .

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19 In addition to A 41(2) (d) of the *Kenyan Constitution*, A 37 states: "Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities."

20 Jacobs "Laws of Strikes and Lock-outs" 659. Also see Kahn-Freund *Labour and the Law* 292; Brand 2018 http://www.lexisnexis.co.za/pdf/Workshop_3_3_Strike_Avoidance_presented_by_John_Brand.pdf 7.

21 In terms of A 25 of the *Kenyan Constitution*, "despite any other provision the following rights and fundamental freedoms are not limited: (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial; and (d) the right to an order of *habeas corpus.*"

22 Article 24(1) of the *Kenyan Constitution*. In fact the ILO observes that the limitations should be contained in a statutory instrument or an Act of Parliament, depending on the laws of the member state.

23 Section 213 of the *1995 LRA* defines a strike as "the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory."

24 *Numsa v Bader Bop* 2003 24 ILJ 305 (CC).

For that reason the right to strike is important to the extent that a limitation of any kind to this right needs to be justified.[25]

4.1 The right to strike in essential services under the 1995 LRA

Given the prohibition of strikes in essential services, particularly in the health services, the *1995 LRA* was amended[26] in order to improve the efficiency of the process of deciding on which essential services should be protected. The amendment was the result of a protracted court case in which Eskom (the electricity utility) had refused to conclude a minimum service agreement. The Supreme Court of Appeal of South Africa finally resolved the matter in *Eskom Holdings v National Union of Mineworkers.*[27]

The *1995 LRA* gives effect to the Constitution by contemplating limitations of the right to strike in respect of those employees who are engaged in essential services.[28]

The *1995 LRA* defines an essential service to mean:

- a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
- the Parliamentary service and;
- the South African Police Services.[29]

The Constitutional Court has held that a restrictive interpretation of essential services should be adopted if possible so as to avoid impermissibly limiting

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25 Section 36 of the *Constitution of the Republic of South Africa*, 1996 contains a limitation clause. It stipulates: "the rights as contained in the Bill of Rights may be limited only in terms of law of general application." The *1995 LRA* is a good example of law of general application. Such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Also see Brand "How the Law could Better Regulate the Right to Strike" 38.

26 Among the objective of the *Labour Relations Amendment Bill*, 2012 was to review the operation, functions and composition of the Essential Services Committee and to provide for minimum service determinations. Also, to regulate dispute resolution in essential services.

27 *Eskom Holdings v National Union of Mineworkers* 2012 2 SA 197 (SCA).

28 Section 65 of the *1995 LRA*. The Essential Services Committee (ESC) established in terms of s 70 is tasked with designating a service, or any part of a service as an essential service, after conducting an investigation into whether or not such a designation should be made. Specialist panels familiar with a particular sector conduct the work of the ESC.

29 Section 213 of the *1995 LRA*.

the right to strike.[30] The court remarked that defining "essential service" too broadly would impermissibly limit the right to strike.[31]

The *1995 LRA* makes special provision for essential services under sections 70 to 74.[32] In terms of section 74(1) employees working in a designated essential service may not strike. Notably, unlike the position under the *2007 LRA* in Kenya, section 74(1) of the *1995 LRA* is not one-sided and is not phrased in mandatory terms, but makes use of the term "may not". Hence, the *1995 LRA* makes provisions for additional mechanisms which if complied with allow employees in essential services to lawfully strike. Accordingly, section 72 of the *1995 LRA* provides that parties in designated essential services may enter into a collective agreement, which intends to regulate the minimum services to be provided by employees in that essential service in the event of a strike.[33] Therefore, under the *1995 LRA* trade unions wishing to embark on strike action must make arrangements for the provision of minimum level service. The concept of minimum service under the *1995 LRA* is intended to allow certain employees in a sector designated as an essential service to strike, while at the same time, maintaining a level of production or services at which the life, personal safety or health of the whole or part of the population will not be endangered.[34] It is also a bid to prevent the declaration of an industry as an essential service from impinging unnecessarily on the right to strike.[35] Furthermore, this is a balanced way of prohibiting the employment of replacement labour and maintaining production during the strike.

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30 *SA Police Services v Police and Prisons Civil Rights Union* 2011 32 ILJ 1603 (CC).

31 *SA Police Services v Police and Prisons Civil Rights Union* 2011 32 ILJ 1603 (CC) para 31.

32 Section 70(2) of the *1995 LRA* sets out the functions of the ESC to include: conducting investigations as to whether or not the whole or part of any service is an essential service, and then to decide whether to designate the whole or part of that service as an essential service, determining essential services related disputes. S 71 provides for the ESC's powers and procedures in designating a service as an essential service.

33 When the ESC determines a service as essential, it may direct parties to negotiate a minimum service agreement within a specified period. Registered trade unions and employers are required to include within their collective agreements provisions on the maintenance of a minimum service within an essential service. If ratified by the ESC, a strike may take place in an essential service provided the minimum service is maintained. Public service healthcare workers may therefore not enter protected strike action in the absence of a minimum service level agreement. Should such an agreement be in place, only minimum services would be considered as essential.

34 *Eskom Holdings v National Union of Mineworkers* 2011 ZASCA 229 (30 November 2011) 5.

35 If such a minimum service collective agreement is reached and it is thereafter ratified by the ESC in terms of s 72, it will have the effect that the service levels agreed in the minimum service agreement will become the essential service and s 74 of the *1995 LRA* which prevents essential services employees from striking will no longer apply.

4.2 Total prohibition of the right to strike in essential service

In 2007 Kenya promulgated various forms of labour legislation, including the *2007 LRA*. The *2007 LRA* reinforces the constitutional right to strike but is subject to a number of limitations, such as those pertaining to employees who are employed in sectors designated as essential service listed under Schedule Four like healthcare. The Cabinet-Secretary for labour in consultation with the National Labour Board (the Board) is tasked with designating a service or any part of a service as an essential service.[36] In view of that, the few examples listed under Schedule Four of the *2007 LRA* do not represent an exhaustive list of essential services. This Act defines essential services to mean "a service the interruption of which would probably endanger the life of a person or the health of the population or any part of the population."[37]

The *2007 LRA* declares in peremptory terms that "no person shall take part in a strike or in any conduct in contemplation of a strike if the employee and employees are engaged in an essential service."[38] While this is to be appreciated, the blanket prohibition of strike appears to be unconstitutional because it takes away in totality the right to strike of employees working in sectors designated as essential services.[39] As such, the provisions are one-sided because they provide no framework in which essential service employees can lawfully embark on a strike.

5 Strikes in the Kenyan Essential Service sector: the case of the 2017-2018 Doctor, Nurses and Clinical Officers strike

The Kenyan public health sector has experienced a wave of strikes.[40] This article limits itself to 2017 to 2018 strikes in the public health sector. Wage disputes, squalid working conditions as well as the failure by the government as the employer to honour and/or implement the provisions of

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36 Section 81(2)(a) of the *2007 LRA*.

37 Section 81(1) of the *2007 LRA*. In the ILO context, essential services are defined as those services "whose interruption would endanger the life, personal safety or health of the whole or part of the population." See ILO *Freedom of Association* paras 540-564; and the *Right to Organise and Collective Bargaining Convention* (1949).

38 Section 81(3) read with s 78(1)(f) of the *2007 LRA* declares that there shall be no strike or lock-out in an essential service. An employer in the essential service is similarly restricted in terms of s 78(1)(f) from utilising its own bargaining power to lock employees out of the workplace to compel them to accept the employer's terms and conditions.

39 The blanket limitation of essential services employees on the right to strike has not been subjected to the constitutional test. This is because the scope under the *2007 LRA* is not clearly defined and constitutionally justified.

40 Kabale 2018 https://www.standardmedia.co.ke/article/2001275767/doctors-strike-cripples-services-at-kenyatta-national-hospital. Also see Njuguna 2015 *JHCPU* 1200-1206.

a Collective Bargaining Agreement (CBA) remain the major catalyst leading to the strikes embarked on by healthcare employees. Surprisingly, the strikes in hospitals persist even when clearly prohibited by legislation and/or court orders. Notably, the hospital sector is designated as an essential service under Schedule Four of the *2007 LRA*. However, the health sector has continuously experienced the longest strikes in the country.[41] This has raised concerns about the effectiveness of the legal framework in regulating strikes in essential services. Accordingly, recurrence of such strikes presents an opportunity to revisit the law, hold discussions, deliberate and explore new ways of addressing the gap found under the 2007 LRA that prohibits employees in the health sector from striking. Reference is made hereunder to the doctors, nurses and clinical officials' strikes in Kenya.

5.1 Doctors' strike: Robert Alai Onyango v Cabinet Secretary in charge of Health Petition No 21 of 2017 HC (eKLR)

On 5 December 2017 more than 5000 doctors in the public health sector went on strike, setting off one of the worst and longest strike in the essential services sector in Kenya.[42] The doctors demanded that a CBA which had been signed in June 2013 be implemented.[43] The government continuously refused to implement the agreement and instead used intimidation and coercive methods in its effort to end the strike. Similarly, in an attempt to weaken the doctor's capacity to fight and subsequently to put pressure on them to concede defeat, the government withheld their salaries and issued dismissal letters, while threatening to import foreign doctors from countries such as Tanzania, Cuba and India as replacements. Subsequently, seven Medical Practitioners, Pharmacists and Dentists Union (KMPDU) officials including the Secretary-General were imprisoned for one month for refusing to call off the strikes.[44] However, the doctors and their union strengthened their resolve and refused to back down on their demands. They were released days later to allow for negotiations with the government and to save the sector from further turmoil. An agreement to sign a new CBA was reached on 15 March between KMPDU, the Council of Governors and the

41 *Robert Alai Onyango v Cabinet Secretary in Charge of Health* Petition No 21 of 2017 (HC) [2017] eKLR.

42 Also in December 2011 and September 2012, doctors serving in public health sectors who were government employees went on national strikes where the doctors withdrew all their services including attending to emergency cases in hospitals.

43 The collective bargaining agreement covered *inter alia* the rationalisation of work schedules, the improvement of facilities, training, research and remuneration, the latter being the most contentious issue. The government offered extra allowances but not increase in basic salaries.

44 Odula 2017 https://www.apnews.com/9949cbf7258a4a2a90ec9e1747cb238c.

Health Ministry. This brought to an end the 100-day strike, and had far-reaching implications.[45]

5.2 Nurses strike: John Biiy v Seth Panyako 1069 of 2017 (E&LRC)

Prior to the doctors' strike, on 5 June. 2017 nurses had embarked on a strike demanding amongst other things extraneous allowances of ksh 5,000, risk allowances of ksh 15,400, and uniform allowances of ksh 50,000, up from ksh 10,000. The strike paralysed the health services in county hospitals for five months (151 days) until 2 November 2017, when an agreement was reached between the Council of Governors, the Ministry of Health and the Kenya National Union of Nurses. The Kenya National Union of Nurses Secretary General Seth Panyako expressed regret over the strike and apologised to Kenyans.[46]

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45 Due to these strikes the patients remained unattended to for many days, and some lost their lives. Many suffered because they could not access health care services. Some were forced to seek health care services from private hospitals at higher cost, incurring a heavy financial burden. The strike also led to delays in training schedules. University lecturers in all public medical schools across the country were forced to stop teaching. This had an impact in terms of delays in the production of new doctors, who were supposed to graduate from medical schools in subsequent years, exacerbating the shortage of doctors across the country. The strike also led to the imposition of heavy workloads on private health facilities, which had to deal with a greater number of patients. As a result, the facilities and their human resources were overstretched, potentially compromising the quality of the healthcare services provided. The Health Cabinet Secretary, Cleopa Mailu, apologised to the Kenyan citizenry while promising that such a situation would never happen again. See Chemweno and Ogemba 2017 https://www.standardmedia.co.ke/article/2001232717/apology-to-kenyans-as-doctors-strike-ends-with-return-to-work-formula.

46 He stated that it was not government's intention to have Kenyans suffer due to the near collapse of the health care system when the nurses embarked on their strike. Panyako urged the government to continue engaging in negotiations in order to prevent reoccurrences of the strike. Comparably, South Africa has also suffered from several healthcare employees' strikes in sectors designated as essential services (see Mle 2012 *Journal of Public Administration* 291). When strikes occur in the public sectors in South Africa, they tend to be violent, sometimes to the extent that the military has to be deployed in public hospitals to maintain basic services and prevent victimisation. This has resulted in disruptions of the provision of health care services. For example, in 2009 doctors went on strike demanding more than 50% salary increases and improved working conditions in line with international standards pursuant to government's failure to implement the occupation-specific dispensation. About 300 doctors were dismissed and 16 from KwaZulu-Natal faced disciplinary hearings after ignoring the call to life-threatening emergencies. They returned to work after both parties committed to negotiations. In July and August 2010 about 1.3-million public sector healthcare employees embarked on a 20-day strike demanding higher wages. The employees rejected government's offer of 7% and a R700 housing allowance due to the government's excessive expenditure on the 2010 Soccer World Cup. The employees demanded an 8.6% wage increase and a monthly housing allowance of R1,000. As the 2010 FIFA World Cup approached, matters remained unresolved. Afterwards both parties agreed on a 7.5% increase.

5.3 Clinical officers

In September 2017 clinical officers, led by the Kenya Union of Clinical Officers (KUCO), embarked on s strike that lasted for 21 days, protesting amongst other things against the job evaluation system used by the Salaries and Remuneration Commission to peg their salaries. The strike ended on 5 October 2017 after the Council of Governors agreed to sit at the negotiating table to explore options to resolve the dispute. The dispute was finalised only 60 days thereafter.

6 Addressing legislative problems and gaps under the *2007 LRA*

Due to the existence of legislative loopholes, Kenya has experienced strikes in public hospitals as mentioned above. These loopholes include a lack of minimum service agreements and of institutions capable of designating employees who need to perform minimum services, deal with disputes and determine what constitutes essential services.

6.1 Lack of a Minimum Service Agreement

To date, more than 11 years after the *2007 LRA* came into effect, no provision has been made for government and trade unions on behalf of their members to conclude minimum service agreements. If Kenya is to prevent the recurrence of what happened in the 2017-2018 strikes in the public health sector, perhaps there is an urgent need for legislative reforms. It is acknowledged that in many jurisdictions not all employees may be declared to be provides of essential services and this precluded from striking. This has led to the conclusion of "minimum service agreements".[47] Such agreements intend to allow certain employees in an industry designated as an essential service to strike, while at the same time maintaining services and personal safety. As alluded to above, the ILO supervisory bodies have considered minimum service agreements to be appropriate instruments for use in this context. However, two requirements have to be met. Firstly, the service required must genuinely and exclusively be a minimum service and must be limited to operations that are strictly necessary in order to meet the basic needs of the population or the minimum requirements of such services. Secondly, workers' organisations should be able to participate in defining such services, along with employers and the public authorities.[48]

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47 In terms of the ILO *Freedom of Association and Collective Bargaining* 160-162, a minimum service in essential services could also be required, instead of a total ban on strikes, in the strict meaning of the term.

48 ILO Date unknown http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm#7.

Where strikes have been prohibited, as in the case of essential services in Kenya, adequate protection should be given to the employees. As experienced in Kenya from 2017-2018 in public hospitals, the "blanket" prohibition of strikes in essential services has far-reaching implications. Upon that understanding, therefore, a solution should not be to impose a total prohibition of strikes in essential services. Instead, adequate legislative measures and inclusive processes for resolving labour disputes are necessary. For that reason, this article recommends that Kenya should take urgent legislative measures to introduce provisions that would require parties in an essential services dispute to conclude a minimum service agreement before embarking on a strike. As the ILO recommends, a minimum service is required rather than a total provision of services, the requirement of which wold lead to a prohibition of strikes.[49] Furthermore, a minimum service could be appropriate in situations where a limitation of the right to strike or a total prohibition of strike action would not appear to be justified. In allowing the right to strike to be exercised by a majority of employees, attention should be given to ensure that basic needs are met and that facilities operate safely or without interruption.[50] It must be noted that concluding, executing and enforcing the minimum service agreements is not an easy task. In some instances practical difficulties may arise in the process of negotiating such minimum services agreements. Therefore, the process requires high level of discipline, maturity, bargaining in good faith, and respect for the minimum service agreement from all parties involved.

Similarly, the *2007 LRA* should be amended to introduce provisions for the establishment of a competent body which would facilitate the negotiation of a minimum service agreement. This article suggests that the Conciliation and Mediation Commission (CMC) envisaged under section 66(1)(c) of the *2007 LRA*, if established as an independent body, should be empowered to facilitate such negotiation.[51] The CMC could develop guidelines, a framework and procedures for the negotiation of minimum service agreements. Subsequently, the bargaining parties might approach the Employment and Labour Relations Court as an independent oversight body requesting it to ratify the agreements which provide for the rendering of a minimum service. As such, parties must satisfy the court that the minimum service agreement is sufficiently detailed and well-reasoned.[52] These may

49 Gernigon, Odero and Guido *ILO Principles*.

50 Gernigon, Odero and Guido *ILO Principles*.

51 Alternatively, the Labour Board may be given such power.

52 Amongst others issues, the minimum service agreement between the employer and employees or trade union may seek to address issues such as: who will render the minimum service; i.e. the minimum number or percentage of employees required to

require the appointment of experienced experts with the necessary knowledge not only of labour law but also of the administration of justice and industry- or sector-specific experience to serve as panellists.

6.2 The designation of employees to perform minimum services

The concept of a minimum service involves a limitation of the constitutional right to strike, because the employees chosen to perform the minimum service cannot join the strike. In view of that, the sacrifice imposed on the strikers and service users must be proportional. If introduced under the *2007 LRA*, the minimum service agreement will have to specify the category of employees who must be responsible for the performance of minimum services. Thus, the number of employees who can continue to work and provide a minimum service in situations whereby there are prolonged strikes may not result in serious consequences for the public. This may yield good results because only employees who are prohibited from striking will be required to continue providing the minimum services while other employees who are not required to provide the minimum service can be allowed to embark on lawful strikes. Accordingly, the solution for Kenyan strikes in essential services should not impose a total prohibition of strikes, but should provide alternatives for designated categories of employees through negotiated minimum service agreements.

This article suggests that the *2007 LRA* should be amended to incorporate provisions and procedures which should be followed in selecting the employees who have to perform the minimum services.[53] Similarly, provisions should be introduced into the *2007 LRA* to establish a competent independent body like the CMC with jurisdiction to assist parties to elect employees who could be perform the minimum services. It could be argued that should this power be left in the hands of the government as an employer, issues of impartiality in the designation of employees may arise.

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continue working during a strike; the type of services which must be continued during strike action; whether or not there is a role for non-striking workers and members of other trade unions; the waiver of a right to engage replacement labour to provide services in excess of the minimum services. How should the "no work, no pay" rule apply? Those who strike for the benefit of those who cannot are bound to be unhappy to receive deductions in their pay when their non-striking colleagues do not. Ways to minimise the burden on strikers should be agreed, if not in minimum service agreements or addenda to them, then in intra-trade union agreements. Attempts should be made to rotate the strikers so that the burden of pay cuts is also distributed more widely and evenly. Another option is that those who cannot strike should contribute an agreed portion of their salary to a fund for distribution to those who strike on their behalf; whether the service is essential in its entirety or only partially essential, whether the service is essential at reduced service levels; what the duration of the strike will be; and what categories of employees should render the minimum service.

53 The *2007 LRA* should incorporate provisions that provide for sanctions for non-compliance by both parties, which may include dismissals.

This article emphasises that should the CMC be established, this could obviate disputes about impartiality. In other words, the CMC could set criteria and guidelines to be followed by employees who have to render the minimum service. These criteria may limit the government's managerial powers of controlling and organising employees' work during strikes.

6.3 The amicable settlement of disputes in essential services

Where a strike action is prohibited in a way that substantially interferes with collective bargaining processes, it must be replaced by the meaningful dispute resolution mechanisms commonly used in labour relations. For example, certain disputes may arise in the process of concluding minimum service agreements. Such disputes may involve questions such as what would happen if the employer and employees or trade unions are unable to agree on the terms of an agreement, to whom could the parties refer their dispute, what should be done if either party refuses unreasonably to participate in the process of negotiating for minimum service agreement, or, having participated, what will happen if either party refuses to comply with the terms and conditions set out in the agreement which creates a limitation on the right to strike. Other disputes that may arise include a dispute as to whether or not a service is an essential service and/or whether or not an employee or employer is engaged in a service designated as an essential service.

Theoretically, the *2007 LRA* clearly prohibits strikes in essential services such as hospital services. In view of that, it could be argued that the doctors, nurses and clinical officers' strikes of 2017-2018 as stated earlier were in violation of section 78 of the *2007 LRA*. The government referred the matter to the Employment and Labour Relations Court as required in terms of section 71(1)(a) of the *2007 LRA*.[54] The court declared that the strikes were illegal, citing the breach of section 78 of the *2007 LRA*. Yet that would not stop the employees from staying away. Although there is a statutory dispute resolution mechanism, it has been proved that the referral process is inefficient and inadequate for resolving disputes in essential services.

It must be remembered that the statutory imperative of expeditious social justice is one of the fundamental values that underpins statutory labour dispute resolution in any system. Although the referral to the Employment and Labour Relations Court is to be appreciated, currently it presents a series of barriers in a dispute resolution system that seeks to resolve disputes expeditiously.[55] Unlike other disputes regulated under the *2007*

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54 Section 71(1)(a) of the *2007 LRA* stipulates that any trade dispute in a service that is listed as or is declared to be an essential service may be adjudicated by the Employment and Labour Relations Court.

55 The Preamble to the *2007 LRA* sets out as one of its objectives the "encouragement of effective collective bargaining and promotion of orderly and expeditious dispute

LRA, disputes about essential services are not preceded by conciliation and arbitration as a consensus-seeking process.[56] Notably, consensus-seeking processes tend to filter out if disputes are unresolved at the early stages. Should the dispute remain unresolved, a filtered dispute can be refined for adjudication. This article observes that although arbitration is a well-established dispute resolution process in commercial and international disputes in Kenya,[57] it is yet to be established firmly in the statutory labour dispute sphere,[58] a situation increasingly at odds with the trend in the labour dispute resolution systems of other African countries, in particular in the Southern African Development Community (SADC).[59] Neither courts of law nor the legislature have actively promoted arbitration as a labour dispute resolution mechanism.[60] The *2007 LRA* does not recognise conciliation and arbitration processes as among the mechanisms for use in statutory labour dispute resolution in essential services disputes. The blatant failure by the legislature to recognise the importance of consensus-seeking processes raises serious concerns regarding the effectiveness of the current statutory labour dispute resolution framework. This gap remains a significant impediment to and contrary to the *2007 LRA*'s objective of a speedy resolution of labour disputes.[61]

This article argues further that the litigation of disputes in essential services by the Employment and Labour Relations Court should be an option of last resort. In other words, referral to the Employment and Labour Relations Court should be resorted to only once conciliation and arbitration attempts have been exhausted, or only in exceptional cases. This is in accordance with the dispute settlement mechanisms recognised under the ILO Conventions[62] and the broader principles of justice. Essentially, the CFA

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settlement." Litigation is a risky form of dispute resolution of labour disputes. It takes a long time to get a final decision on a matter and there is little flexibility in the proceedings.

56 Example of disputes preceded by conciliation under the *2007 LRA* include the dismissal or termination of an employee, redundancy, and unfair discrimination.

57 Gakeri 2011 *Int J Human Soc Sci Res* 219. Also see Muigua *Settling Disputes through Arbitration* 20; and Wambugu 2008 https://allafrica.com/stories/200806231977.html.

58 Nyakundi *Development of ADR Mechanisms in Kenya* 38.

59 For example, the CCMA in South Africa, the Directorate of Dispute Prevention and Resolution (DDPR) in Lesotho, the Conciliation Mediation and Arbitration Commission (CMAC) in Swaziland, and the Commission for Mediation and Arbitration (CMA) in Tanzania.

60 Gakeri 2011 *Int J Human Soc Sci Res* 220.

61 See the Preamble of the *2007 LRA*. Also the ILO instruments, particularly ILO *Voluntary Conciliation and Arbitration Recommendation* 92 of 1951 para 3, requiring labour dispute processes to be expeditious and to be completed within such a time limit as may be prescribed by national law or regulation.

62 *Labour Relations (Public Service) Convention* (1978) - Convention concerning protection of the right to organise and procedures for determining conditions of employment in the public service.

and the Committee of Experts both agree that when public servants are not granted the right to strike, they should enjoy sufficient guarantees to protect their interests, including appropriate, impartial and prompt conciliation and arbitration procedures to ensure that all parties participate in arbitration processes.[63] Moreover, arbitration awards should be binding on both parties and once issued should be implemented speedily and completely.[64]

The legislature needs to examine the suitability of the Kenyan legal framework on statutory conciliation and arbitration processes. The *2007 LRA* should be amended to allow referrals in essential services disputes to be prefaced by compulsory conciliation followed by arbitration should the dispute remain unresolved. The amendment may bring the *2007 LRA* in conformity with Article 159(2)(c) of the *Kenyan Constitution,* which states that alternative informal forms of dispute resolution including arbitration must be promoted. If conciliation and arbitration processes are to be embraced in resolving essential services disputes, the Employment and Labour Relations Court's workload would be reduced.[65] The structure and capacity of the Employment and Labour Relations Court as it currently stands is not sufficient to enable it to deal with essential services disputes. Consequently, adequate institutional arrangements are needed.

It must be emphasised that the independence of any dispute resolution institution is one of the cardinal principles that underpin an effective dispute resolution system. It is increasingly becoming common practice in many jurisdictions for statutory dispute resolution bodies to function independently of the state. South Africa can be cited as an example, even though the South African dispute resolution institution is financed by the state through the Department of Labour.[66] Similarly, most SADC countries have resorted to establishing institutions which are independent of the state in resolving labour disputes.[67] Under Kenyan law the responsibility of resolving statutory labour disputes is still heavily placed under the control of the government through the Ministry of Labour.[68] This arrangement remains a major

63 ILO *Freedom of Association* para 532. Also see CEACR "Report" 169-186; and Gernigon, Odero and Guido *ILO Principles*. Also see ILO *Freedom of Association and Collective Bargaining* 163-164.

64 ILO *Freedom of Association and Collective Bargaining* 164.

65 Gakeri 2011 *Int J Human Soc Sci Res* 219. Also see Wambugu 2008 https://allafrica.com/stories/200806231977.html 2.

66 Steadman *Handbook on Alternative Labour Dispute Resolution* 52.

67 For example, the SADC countries.

68 Unlike the *2007 LRA*, in terms of s 74 of the *1995 LRA* in South Africa, any party to a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service may refer the dispute in writing to a relevant bargaining council, if the parties to the dispute fall within the registered scope of that bargaining council, or to the CCMA, if there is no bargaining council that has jurisdiction. Both these institutions are independent of the government. The party which refers the dispute must satisfy the council or the CCMA that a copy of the

obstacle to the effective resolution of labour disputes, particularly due to the perceived lack of impartiality, integrity and fairness in the process and the outcomes of the decisions made. The consequence is an increases in the frequency of strikes in essential services. The establishment of a CMC as an independent dispute resolution body would alleviate if not mitigate most of the problems of strikes in essential services sectors like hospitals, as alluded to in this article.

6.4 The lack of a competent, independent institution entrusted to determine what constitutes "essential services"

Section 81(2) of the *2007 LRA* provides that the Cabinet-Secretary for Labour, after consultation with the Board,[69] shall:

- from time to time, amend the list of essential services contained in the Fourth Schedule; and

- may declare any other service an "essential service" if a strike or lock-out is prolonged as to endanger the life, person or health of the population or any part of the population.

The Board, which consists of members appointed by the Cabinet-Secretary for Labour,[70] merely plays an advisory role.[71] This means, all powers to make final decisions on matters relating to essential services remain with the Cabinet-Secretary, who is a government official. This article views this arrangement as problematic because it tends to lead to the abuse of power and raises questions of integrity, fairness and independence. In addition, the *2007 LRA* does not provide procedures to be followed in designating a service as an essential service.[72] In contrast, under the *1995 LRA* of South Africa, determining which services should be regarded as essential services has been entrusted to the Essential Service Committee (ESC). The ESC's primary functions are set out in section 70(2) of the *1995 LRA* as being:

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referral has been served on all the other parties to the dispute. The bargaining council or the CCMA must attempt to resolve the dispute through conciliation. If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the bargaining council or the CCMA.

69 Section 2 of the *2007 LRA*; "Board" means the National Labour Board, which is an institution established in terms of s 5 of the *Labour Institution Act* 12 of 2007.

70 Section 6 of the *Labour Institution Act* 12 of 2007.

71 Section 7 of the *Labour Institution Act* 12 of 2007.

72 Section 71 of the *1995 LRA* provides for the ESC's powers and procedures in designating a service as an essential service.

- to monitor the implementation and observance of essential services determinations, minimum services agreements, maintenance services agreements and determinations;

- to promote effective dispute resolution in essential services. For instance, to determine disputes as to whether employers or employees are engaged in an essential service;

- to develop guidelines for the negotiation of minimum services agreements. Also to ratify collective agreements which provide for the rendering of a minimum service in a service designated as an essential service; and

- to conduct investigations to determine whether or not the whole or a part of any service is an essential service, and then to designate it accordingly.

The ESC has proved to be successful in its functions since its establishment. Accordingly, it is important for Kenya to consider establishing a competent independent institution under the *2007 LRA* similar to the ESC of South Africa, which would have jurisdiction to deal with matters relating to essential services.

7 Conclusion

Balancing the constitutional right to strike and essential services remains a major problem in Kenyan labour relations and law. The current legal framework regulating strikes in essential services in Kenya rekindles debates and questions about whether it is adequate and effective. During the strikes mentioned above, doctors, nurses and clinical officers withdrew all their services, thus paralysing the whole health care sector in the country. No alternative provisions were put in place for emergency services. It has been revealed that there were compelling reasons for the strikes, although the response could not be justified in a constitutional democratic society based on human dignity and right to access health care services. The weaknesses and the inadequacy of the legislative framework resulted in the failure to deal with the strikes in the designated essential services sector.

The article has noted that even though the *Kenyan Constitution* firmly recognises the right to strike as an important bargaining tool for trade unions, employees who are engaged in essential services are currently grappling with the exercise of their constitutional right to strike. This emanates from the failure of the *2007 LRA* framework to regulate the right to strike in essential services, specifically in the health care services.

Remarkably, there have been no amendments to the provisions and scope of the strike law since the *2007 LRA* was promulgated. The current legal framework does not provide for mechanisms in terms of which essential service employees can lawfully embark on strike action.

This article submits that section 81(1)(3) of the *2007 LRA,* which declares in peremptory terms that "there shall be no strike in an essential service", fails to meet the standards of fair labour practice and the protection of employees' right to strike as entrenched in the *Kenyan Constitution*. It is equally important to point out that the *2007 LRA* must be aligned with the objectives of the *Constitution*. Article 2(4) of the *Kenyan Constitution* emphasises that "any law that is inconsistent with it is void". In the light of the above, this article recommends that the provisions of section 81(1)(3) of the *2007 LRA,* which read with section 78(1)(f) the *2007 LRA* place a blanket prohibition on the right to strike in sectors designated as essential services, should be revisited and amended accordingly.

Furthermore, although the *2007 LRA* provides for a mechanism in terms of which sectors can be classified as essential service, it fails to provide the mechanism for concluding minimum service agreements through collective bargaining processes. This article emphasises that addressing the deficiencies under the *2007 LRA* in dealing with strikes in essential services would entail introducing the requirement of concluding minimum services agreements in order to ensure the continuity of certain critical services during strikes. Evidently, there is a lack of balance between the right to strike in essential services and the realisation of the constitutional right to access to health care. Consequently, this right continues to be violated. As evident from the above, finding a balance between the right to strike and the right to access to health care services is vital. All deliberations about essential services should be in line with the public interest and constitutional compliance. The Hippocratic Oath taken by health care practitioners' demands that they should do no harm to the patients under their care. The oath places special obligations on public health practitioners towards their patients, including that they take necessary measures to benefit them.

As far as dispute resolution is concerned, the CMC must be established and given the authority to act as an independent body with exclusive jurisdiction over conciliation and arbitrating disputes in essential services, like the CCMA and the bargaining councils of South Africa. Referral to the Employment and Labour Relations Court should take place only as a last resort.

This article does not claim to have exhausted all the problems currently experienced in Kenya's essential services sector. It undertook to analyse

strikes in essential services in Kenya from legal, theoretical and practical perspectives. For that reason, supplementary scholarly investigation on the right to strike in Kenyan essential services is imperative. For example, a comparative analysis of employment law and practices between Kenya and other jurisdictions on the realisation of the right to strike in essential services would be relevant. Such a comparative analysis would help Kenya to draw valuable lessons from other countries which have encountered similar strike-related difficulties in essential services. There are also lessons from the ILO jurisprudence relating to the principle and application of the right to strike in essential services. Article 2(5) of the *Kenyan Constitution* recognises that the general rules of international law form part of the Kenyan law. As a Member State of the ILO, Kenya could appoint a task team under the auspices of an experienced independent ILO practitioner to work closely with the Board, the Ministry of Labour, the Social Security and Services, the trade unions and other interested stakeholders to analyse the scope of the current legislative framework relating to essential services, and to provide recommendations. Such recommendations may provide solutions and prevent the rise of hostility between employers and employees, which in the context of the health services poses risks to vulnerable patients. If effective and inclusive consultative processes were established, trade unions and government could work together to establish an effective statutory framework regulating the right to strike in essential services in Kenya.

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List of Abbreviations

CBA	Collective Bargaining Agreement
CCMA	Commission for Conciliation, Mediation and Arbitration
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
CMA	Commission for Mediation and Arbitration
CMAC	Conciliation Mediation and Arbitration Commission
CMC	Conciliation and Mediation Commission
DDPR	Directorate of Dispute Prevention and Resolution
E Afr LJ	East African Law Journal
ESC	Essential Services Committee
ILO	International Labour Organisation
Int J Human Soc Sci Res	International Journal of Humanities and Social Science
Int'l Lab Rev	International Labour Review
JHCPU	Journal of Health Care for the Poor and Underserved
KMPDU	Medical Practitioners, Pharmacists and Dentists Union
KUCO	Kenya Union of Clinical Officer

LRA	Labour Relations Act
PELJ	Potchefstroom Electronic Law Journal
SADC	Southern African Development Community