

Protection of the Family Under Kenyan Employment Law

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Abstract

Work and the family constitute important aspects of life. This article explores the manner in which employment law protects the family unit. It discusses the importance of the family unit in social and economic planning and the role that it plays in protecting vulnerable members of society. It compares relationships created within the family unit and those arising from work with a view to highlighting the nature of the challenges which arise in both domains. It discusses problems which arise based on gender, differing perceptions of family and the collapse of boundaries between home and work. It discusses several areas of employment law which play a role in supporting employees to meet their family obligations. These include granting of parental leave in the form of maternity, paternity and pre-adoptive leave to allow employees to fulfil family commitments relating to the introduction of a child into the family. It also discusses other possible areas of support such as granting employees the right to disconnect from work to prevent employers from making demands on their time outside working hours, granting additional leaves to care for family members who need support and family friendly transfer or deployment policies.

Keywords: Family, Work, Labour and Employment Law, work-life balance, Work-family conflict, Maternity leave, Paternity leave, Right to disconnect.

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1. Introduction

The Kenyan constitution recognises the importance of the family in the country's social order. Article 45(1) identifies the family as "the natural and fundamental unit of society", recognises it as "the necessary basis of social order" and stipulates that the State shall recognise and protect it. This recognition is not misplaced because the family is the most important unit where support, caring, nurturing and socialisation takes place. Jean-Jacques Rousseau described the family as the most ancient, only natural society and a model of political societies.¹ He observed that relationships in society mimic those in the family, displaying the same power relations and dependence.² Hartmann observes that in order to consolidate power, the State absorbed economic and political functions that were performed by kinship groups.³ This was achieved by shifting men's allegiance from their kin to the state and allowing them to "usurp some of the kin group's authority".⁴ The allegiance of the head of the household was thus easily transferable to the Sovereign⁵ for perpetuation of the State. **Social Contract Theory** creates a society in which individual rights are ceded for the greater good and in exchange for certain benefits like protection of the state. Rousseau notes that "the civil state can survive only so long as men's labour brings them a return greater than their needs."⁶ Most needs are met in a family setup. The family unit is important for all economic, social and other forms of planning undertaken by the government.

While the family and its activities are usually described as operating in the private domain of life, whatever happens there fundamentally affects the proper functioning of the public domain of life. Family and work are extremely important aspects of a person's life but which carry the potential of being extremely fulfilling or a significant source of stress. Our professional and personal identities are influenced by the many different hats we wear depending on whether we are at home or at work. The problems experienced in one domain eventually spill over into the other. Work contributes to a family's sustenance by facilitating the drawing of resources from the public arena to allow the family's needs to be met. It is one of the greatest sources of human dignity and provides individuals with a sense of purpose and direction in their life, as well as an avenue for exploiting and developing their full potential. Through work, individuals contribute to the economic welfare of both their family and the nation. Similar to the family, work provides an arena for socialization and connecting with other people. However, work has the potential of undermining the family by drawing a disproportionate amount of an

¹ Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right* (1762)

² Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right* (1762)

³ Hartmann, H. I. (1981). *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*. *Signs*, 6(3), 366–394, 375. <http://www.jstor.org/stable/3173752>

⁴ Hartmann, H. I. (1981). *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*. *Signs*, 6(3), 366–394. <http://www.jstor.org/stable/3173752>

⁵ Hartmann, H. I. (1981). *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*. *Signs*, 6(3), 366–394. <http://www.jstor.org/stable/3173752>

⁶ Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right* (1762)

individual's emotional, physical and other resources, thus creating stress which is absorbed by the family. The work environment and the health and well-being of an individual and their family are closely intertwined.

Through the family, people acquire their identity, attitudes, biases and values which are later injected into the workplace and other areas of public life. Both negative and positive values arising from the family unit are injected into society. Challenges in several areas of society can be traced to stress and dysfunction in the family. Researchers have established a correlation between problems in the family, weak social skills, crime, problems at work and poor health. Derzon *et al* conducted a meta-analysis into research conducted by various scholars to ascertain "the relative strength and consistency of family factors as a predictor and as a target for delinquency and crime prevention treatment."¹ They established correlations between various family factors and crime and delinquency.² Ross and Goldsteen suggest that children increase the economic hardship for families and adversely affect the health and well-being of single mothers and point to research that shows that employed mothers enjoy better health than their unemployed counterparts.³ The family therefore affects many important aspects of our lives and society's overall welfare.

The most vulnerable members of a society such as children, the elderly and the sick receive their greatest social support from the family. Per the constitution, the state has a role to play in ensuring the family is protected and its welfare guaranteed. Many interventions made by the State to provide social security for its citizens are based on the workplace, family and social communities. The most vulnerable members of society such as children, the elderly and the disabled receive their greatest support from the family. The government appreciates the fact that "children are better taken care of in families and communities" based on "evidence that children in families show better outcomes in key areas than those who are placed under residential care."⁴ Majority of the elderly who constitute 6% of the population lack health insurance and are susceptible to abuse, neglect, poverty, exclusion and dependence.⁵ The family structures which traditionally supported the elderly have disintegrated and require strengthening to provide this support.⁶ In its policy documents, the government recognises the role of the family and undertakes to protect and support it to enable it fulfil its social welfare objectives.⁷ Tangible measures can be taken under employment law to allow productive family members to balance their work-family roles.

Yet, the family is an institution which is subjected to a great deal of economic and social stress. An increase in the rate of divorce⁸ has resulted in the disintegration of families initiated through marriage. Children who are subjected to a difficult or toxic family environment often disengage from their families with adverse effects. A survey conducted by the Ministry of Social Protection indicated that many children end up on the street as a result of mistreatment, poverty and other problems in their families.⁹ Attempting to replicate the role of the family by creating other institutions produces less-than-ideal outcomes. A government report observed that "[o]nce separated from their families and communities, children in institutions are deprived of the love, attention and opportunities they need to develop and flourish."¹⁰

Practices and policies which skew the work-life balance interfere with an individual's ability to discharge their family-related responsibilities and can add unnecessary stress to the family unit. Blindness to family responsibilities can create unnecessary stress and result in discriminatory outcomes when handling employees or the loss of livelihood which the family is dependent on. This exposure of family members to economic and social risks can be prevented by understanding the ways in which labour and employment law can contribute to protecting the family. Families are sometimes forced to separate physically or psychologically because of work. Time demands placed on the employee and inflexible work schedules create a conflict between home and work.

¹ Derzon, J. (2009). The role of the family in crime and delinquency: Evidence from prior quantitative reviews. *Southwest Journal of Criminal Justice*, 6(2), 108-132.

² Derzon, J. (2009). The role of the family in crime and delinquency: Evidence from prior quantitative reviews. *Southwest Journal of Criminal Justice*, 6(2), 108-132, 125

³ Ross, C. E., Mirowsky, J., & Goldsteen, K. (1990). The impact of the family on health: The decade in review. *Journal of Marriage and the Family*, 52(4), 1059-1078.

⁴ GOK, Ministry of Public Service, Gender, Senior Citizens Affairs and Special Programmes. (2022). *National Care Reform Strategy for Children in Kenya: 2022-2032*

⁵ Mbaka, C. (n.d.). Social protection of older persons in Kenya.pptx. Retrieved May 30, 2023, from <https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2021/12/Social-protection-of-older-persons-in-Kenya.pdf>

⁶ GOK, Ministry of Labour and Social Security Services, National Policy on Older Persons and Ageing.(2014) <https://www.partners-popdev.org/ageing/docs/National_Policy_on_Older_Persons_and_Ageing_Kenya.pdf>

⁷ GOK, Ministry of Labour and Social Security Services, National Policy on Older Persons and Ageing.(2014) <https://www.partners-popdev.org/ageing/docs/National_Policy_on_Older_Persons_and_Ageing_Kenya.pdf>

⁸ Mburu, P. (2023, January 23). *Number of homes headed by divorcees rises by 16pc*. Daily Nation (Kenya). Retrieved May 23, 2023, from <https://nation.africa/kenya/news/number-of-homes-headed-by-divorcees-rises-by-16pc-4095180#>

⁹ Ministry of Labour and Social Protection. (n.d.). *2018 National Census Street Families Report*. Social Protection. Retrieved May 8, 2023, from <<https://www.socialprotection.go.ke/wp-content/uploads/2020/11/National-Census-of-Street-Families-Report-.pdf>>

¹⁰ GOK, Ministry of Public Service, Gender, Senior Citizens Affairs and Special Programmes. (2022). *National Care Reform Strategy for Children in Kenya: 2022-2032* <<https://www.socialprotection.go.ke/wp-content/uploads/2022/06/The-National-Care-Reform-Strategy-for-Children-in-Kenya-2022-2032.pdf>>

The tension presented by the duality in our work lives which are governed by labour and employment laws, and our home lives which are governed by family law is worth exploring for several reasons. First, at a personal level, we are asked to develop a “work-life” balance in order to live healthier lives. One cannot succeed in either sphere without committing resources, time and energy, yet one cannot always dedicate equal attention to both. Employees are forced to make choices about whether work or family comes first in different situations. Cases of husbands asking their wives to make a choice between the two exemplify the conflict between family and work and the effect of being cast in a particular role at home or work.¹ When women get married, they are told anecdotally to ensure that they check their degrees and workplace titles at the door of their homes to ensure harmony in the family unit. Placing a greater emphasis on family commitments may mean that work-related aspirations like career progression and improved earnings may suffer. Conversely, those who prioritise work sometimes pay the price of broken, dysfunctional families. Rules requiring employees with family commitments to dedicate long hours and energy to work should be interrogated to determine the most appropriate response to allow productive members of society to remain in the workplace without compromising their role in the family.

From an employer’s perspective, an employer who understands his legal obligations and his workers’ challenges can boost morale and productivity by implementing appropriate policies to support them by reducing the level of conflict they are subjected to. Benefits packages which are used to attract and incentivise employees may have a family component. Insurance plans, education packages, and retirement benefits impact positively on the family. Questions to do with correcting discriminatory practices and addressing gender role expectations which place a higher care-giving burden on females in society can be partially addressed through employment law.

2. Background

In traditional African societies, work was something that happened within the family or communal group. Ndege writes that “[l]abour was largely cooperative within the family and larger kin group” and that its rewards were shared “in kind and according to need.”² Many colonial era policies relating to land and labour resulted in the physical dispersion of communities and families.³ This displacement of communities, clans and other social groups created serious injustice in the allocation of land, a primary sustenance resource, and led to problems which are still being addressed. In order to manage the huge tracts of land which settlers had acquired, laws were passed to compel natives to work so as to earn money to pay taxes. The colonial State “colluded with capital” to exact labour from Africans at “poor rates of pay and under primitive conditions.”⁴ These laws resulted in migration in search of work. This movement of the primary breadwinner from the family unit, caused physical separation for long periods. Work, therefore, became a major means of sustaining families who had been displaced from their land which was a primary resource, and a reason for splitting family groups.

On the religious front, missionaries promoted the monogamous unit⁵ which was used as the basis of access to benefits such as education. Many Church missions declined to embrace polygamous people into the church⁶ because polygamy was considered a sin therefore incompatible with Christianity. Allott noted that African kinship systems had been “progressively attenuated by being stripped of those features and refinements” which distinguished them from Western systems.⁷ These structures were weakened and in some cases replaced with structures that were individualistic and primarily centered on one’s nuclear as opposed to extended family. Colonial law was accorded superiority over customary law which regulated personal law matters in accordance with a communities’ customs. The extended family form and polygamous form of marriage have proved to be resilient in the face of legal assault.

Modernity has brought with it changes regarding in the idea of family. Families living outside marriage such as cohabiting partners, single parent families and households headed by children exist. Blended families are also on the rise. Same sex unions have also caused a huge debate in the country especially because the law does not recognise them. The effect of these changes is that persons who an individual considers to be “family” are sometimes not seen as such by employers and State agencies. In *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)*⁸, the Supreme Court noted that cohabitation arrangements where the parties

¹ <https://nation.africa/kenya/counties/school-head-quits-to-save-her-marriage-1059250>

² <https://africanphilanthropy.issuelab.org/resources/19699/19699.pdf>

³ Coray, M. S. (1978). The Kenya Land Commission and the Kikuyu of Kiambu. *Agricultural History*, 52(1), 179–193. <http://www.jstor.org/stable/3742957>

⁴ Anderson, D. M. (2000). Master and Servant in Colonial Kenya. *The Journal of African History*, 41(3), 459–485. <http://www.jstor.org/stable/183477>

⁵ Bastian Becker (2022) The colonial struggle over polygamy: Consequences for educational expansion in sub-Saharan Africa, *Economic History of Developing Regions*, 37:1, 27-49, DOI: 10.1080/20780389.2021.1940946

⁶ Muthengi, J.K. *Polygamy and the Church in Africa: Biblical, Historical and Practical Perspectives* <https://biblicalstudies.org.uk/pdf/ajet/14-2_055.pdf>

⁷ Allott, A. N. (1969). Customary Law in East Africa. *Africa Spectrum*, 4(3), 12–22. <http://www.jstor.org/stable/40173502> 19

⁸ Petition. No. 9 of 2021

had no desire to marry were pervasive and noted that there was a need for Statute law to in the recognition and protection of rights of parties in family forming unions not arising from marriage. This has contributed to “unseen obligations” whenever an individual is interacting with various legally regulated social systems which confer benefits. The result is that the benefits derived from work rarely match one’s social obligations relating to care and support of vulnerable members of society. For instance, an employer who makes provision for sympathy leave may not allow an employee to benefit from it if it relates to a person who is not legally connected to them. Similarly, where children of deceased relatives are taken in and cared for by an employee, employment law may not qualify them to receive benefits as dependants. The law and policy therefore, play a role in disconnecting socially connected persons, and in the process undermine the role of the family in meeting societal welfare objectives.

2.1 Family law

Family law spells out the rights and responsibilities of members of a family as they arise in different contexts such as marriage, divorce, custody and support. It ensures that the rights of each family member are upheld by providing a framework for assigning duties and responsibilities, care and equitable treatment. It also contains rules to maintain family stability by providing mechanisms for conflict resolution and for protecting vulnerable members of the family unit.

Different concepts of the family can affect employee entitlements which are spelt out in law and the employment contract. The family is recognised and accorded protection by law despite the fact that no legal definition has been supplied. Richard Collier observes that “household structures have varied historically and that the ‘family’ can mean different things in different contexts.”¹ Black’s Law Dictionary defines a family as “[a] group of individuals related by blood, marriage, or adoption, living together under one household, and acknowledging each other’s rights, duties, and obligations.” The plurality of norms which regulate the family results in different ideas about what a family is, which in turn affects the persons who can claim protection under family law and other areas of law. These norms do not comprehensively capture what Collier describes as the ‘plurality of families’.² He states that the meaning ascribed the term ‘family’ can have far-reaching consequences.³ For families arising out of marriage, African customary law had a rich variety of marriages which served different social purposes. Most were treated as inferior to monogamy.

Discrimination against certain family forms may result in a loss of entitlements. For families arising out of marriage, there are five recognised systems of marriage. Marriages contracted under Islamic Law and African customary law are potentially polygynous. Most employers limit their benefits to a spouse and four children.⁴ Where the law is blind to families living outside marriage, members of those units are rendered vulnerable and exposed in the event that they attempt to claim work-related benefits. From his earnings, a worker can support several people whom the law does not recognise. Cohabiting partners, one’s brothers’ children who have not been legally adopted can be prevented from accessing benefits accrued in the course of the employment relationship.

2.2 Labour Law

Labour and employment law creates the framework and rules that govern the employment relationship. Deakin & Morris state that labour law spans the divide between public and private law.[1].The employment contract establishes and governs the employment relationship. It protects the right of employees and holds employers accountable for employees entitlements and work related rights. It provides the mechanism for balancing the employer’s and employee’s rights as well as enforcement mechanisms. Workers have rights from multiple sources which inform their relationship with their employer. The employment contract itself is a product of private law but public law supplies other rights that arise within the relationship. Some of the rights supplied within the framework of employment directly concern the family unit. Entitlements such as parental leave and antidiscrimination laws can be used to protect the family unit. However, there are employment related laws and practices which affect the family unit. Long working hours, lack of flexible working arrangements, remote work and inadequate parental leaves are examples of things which can stress the family unit.

Similar to the family, different concepts of work and the relationship of the parties to that arrangement can radically change their rights. The creation of a distinction between an employee and an independent contractor, the growth of atypical forms of work and the high proportion of persons working in the informal sector in the country pose challenges to regulating welfare aspects arising from work by severely limiting the scope of benefits a worker would ordinarily derive from an employer.

¹ Collier, R. (1995). *Masculinity, law and family*. Taylor & Francis Group, 50

² Collier, R. (1995). *Masculinity, law and family*. Taylor & Francis Group, 51

³ Collier, R. (1995). *Masculinity, law and family*. Taylor & Francis Group, 52

⁴ *NHIF to allow men cover multiple wives for Sh500*. (2022, October 26). Business Daily. Retrieved May 24, 2023, <<https://www.businessdailyafrica.com/bd/economy/nhif-to-allow-men-cover-multiple-wives-for-sh500-3997860#>>

3. Theoretical Framework

Relational Contract Theory

McNeil's theory views contracts as relations rather than discrete transactions. According to the theory, transactions are embedded in complex relations such that even seemingly discrete transactions have a relational element.¹ One must recognise and understand the surrounding relations that can affect a transaction before they can analyse it properly.² The express terms of a contract, therefore, acquire their correct meaning when viewed in the context of relations.³ The theory suggests that long-term relationships such as employment should not be governed solely by formal contracts, but rather, should be interpreted with the implied unstated norms that the parties apply in their relationship. The theory has been applied to both employment⁴ and marriage,⁵ although critics object to its application to the latter because it reduces marriage to a purely transactional arrangement. However, theories such as the social exchange theory on the family suggest that even within a family, people are interdependent but driven by self-interest.⁶

Family Ecological Theory:

This theory considers how external factors affect the family and addresses the complexities faced by families as a result of their interaction with different social systems.⁷ It seeks to understand individuals and their family values which reflect their ideas about "what is pragmatically useful, economically profitable, and morally correct."⁸ It draws from the human ecological theory which identifies the following virtues to advance improvement in the lives of human beings:

- Economic adequacy to ensure that life essentials are catered for
- Justice to ensure that there is equity in work, education and health
- Freedom as distinguished from confinement and coercion
- Peace as distinguished from war and conflict.⁹

Marxist theory

Marxist theories have been applied to both the family and employment relationship. The theory is concerned with the role played by law in "reproducing structural inequalities which characterise capitalist societies."¹⁰ Marx and Engels attributed the institution of private property and division of labour bases on age and sex, and the accompanying exploitation.¹¹ Hartmann notes that production within and outside the home is influenced by capitalism and patriarchy and that the unequal division of labour result in tension, conflict and change.¹² Cammack highlights the relationship between domestic and industrial production, noting that women are largely responsible for the latter.¹³ Marx and Engels viewed both production (of material things) and reproduction (biological creation of human beings through procreation) as products of social relations.¹⁴ Cammack's states that according to Marx and Engel, capital in its quest for profit, disregards human "needs and limitations" through measures such as extending the working day, and also disregarding "the health and length of life of the labourer, unless society forces it to do so."¹⁵ They attributed changes in the family to economic forces.¹⁶ Marx blamed capitalism and the bourgeoisie for adversely affecting the family and exploiting of women and children.¹⁷

¹ Campbell, D., Collins, H., & Wightman, J. (Eds.). (2003). *Implicit dimensions of contract : Discrete, relational, and network contracts*. Bloomsbury Publishing Plc., 208

² Ibid.

³ Ibid, 209

⁴ Robert C Bird, *Employment as a Relational Contract*, 8 U. Pa. J. Lab. & Emp. L. 149 (2005-2006)

⁵ Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract* Virginia Law Review, Oct., 1998, Vol. 84, No. 7 (Oct., 1998), pp. 1225-1334

⁶ Allen, K. R. (2016). *Family theories : Foundations and applications*. John Wiley & Sons, Incorporated, 197

⁷ Allen, K. R. (2016). *Family theories : Foundations and applications*. John Wiley & Sons, Incorporated, 289

⁸ Allen, K. R. (2016). *Family theories : Foundations and applications*. John Wiley & Sons, Incorporated, 298

⁹ Allen, K. R. (2016). *Family theories : Foundations and applications*. John Wiley & Sons, Incorporated, 299

¹⁰ <http://ndl.ethernet.edu.et/bitstream/123456789/27748/1/22.pdf.pdf#page=366>

¹¹ Weikart, R. (1994). Marx, Engels and the Abolition of the Family. *History of European Ideas*, Vol. 18, No. 5, 657-672 <<https://www.csustan.edu/sites/default/files/History/Faculty/Weikart/Marx-Engels-and-the-Abolition-of-the-Family.pdf>>

¹² Hartmann, H. I. (1981). The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework. *Signs*, 6(3), 366-394. <http://www.jstor.org/stable/3173752>

¹³ Cammack, P. (2020) Marx on Social Production in Historical Materialism 28.2 pp76-106 <https://brill.com/view/journals/hima/28/2/article-p76_3.xml?language=en>

¹⁴ Cammack, P. (2020) Marx on Social Production in Historical Materialism 28.2 pp76-106 <https://brill.com/view/journals/hima/28/2/article-p76_3.xml?language=en>

¹⁵ Cammack, P. (2020) Marx on Social Production in Historical Materialism 28.2 pp76-106, 88 <https://brill.com/view/journals/hima/28/2/article-p76_3.xml?language=en>

¹⁶ Weikart, R. (1994). Marx, Engels and the Abolition of the Family. *History of European Ideas*, Vol. 18, No. 5, pp. 657-672 <<https://www.csustan.edu/sites/default/files/History/Faculty/Weikart/Marx-Engels-and-the-Abolition-of-the-Family.pdf>>

¹⁷ Ibid.

The workplace and family are both susceptible to the adverse effects of power imbalances which must be carefully managed to promote societal welfare.

4. Work and Family

Research conducted by the OECD highlighted challenges faced by parents in reconciling work and family.¹ It identified the following individual and contextual factors which affect the attainment of work-life balance: conflict between the “ideal worker” and the “ideal mother”; unfavourable work schedules; long inflexible work hours; societal norms which saddle mothers with the caregiving role; time spent commuting to work and high childcare costs.² It noted that the presence of children in a family affected female employees, many who exit the workplace either permanently or temporarily, and that female sole parents experience the most labour related losses.³ Gender differences in employment outcomes were attributed to family formation periods during which employment rates for women dropped.⁴ They found that “[p]ublicly-owned companies and the public sector in general are more likely to promote family-friendly regulations than companies in the private sector.”⁵ It concluded that “[t]he key to a more gender-equitable outcome requires men to act upon the notion that work and family reconciliation is also their concern.”⁶ Public expenditure on family friendly policies through supporting parental leave and childcare services were found to alleviate the problem.⁷

Family law and employment law both deal with the relationship between individuals as they relate to society. Family law focuses on the relationship between members of a family group and defines their rights, roles and responsibilities within that setting. Employment law focuses on the relationship between the employer and employee and similarly spells out the rights and responsibilities of each. Both areas present complex similarities that require careful consideration if all parties involved are to fully enjoy their fundamental rights. Power is an important dynamic which affects the rights and roles of individuals both at work and in the family. Relationships are characterised by power disparities. Economic disparities in the family often result in abuse and loss of autonomy in family members who are dependent on economically empowered members for support. In the workplace, managerial edict usually puts an employer in a superior bargaining position to his employees. Employees are susceptible to harassment, discrimination, exploitation and other forms of abuse if the power imbalance is not properly addressed. Power imbalances at home affect an individual’s perception of their role and be transported to the workplace and manifest as lack of assertiveness or low self-esteem which in turn affects bargaining behaviour.

Apart from economic disparities, gender issues present themselves in both domains. Gender role division traditionally placed women in the home where the family is located, while men on the other hand participated in the public sphere mainly through engaging in activities described as “work”.⁸ Women perform “unseen” or “invisible” work in the home where they act as primary caregivers to the young, the sick and the elderly, and where they discharge several other roles which make it possible for other family members to integrate seamlessly in society. Invisible work refers to all the chores performed by an individual such as housework and caring for other which is not quantified in official statistics or recognised as “work”. This also affects domestic workers by depressing their earnings and benefits because work in the home tends to be less valued. This gender role division also affects the valuation of soft skills and women’s tasks in the corporate world. A report by McKinsey and Company titled ‘Women in the Workplace’ found that women are overworked and under-recognised, noting that the tasks they perform such as supporting employee well-being are not formally recognised and rewarded.⁹ Some have described these tasks as “office housework”.¹⁰ Female employees are therefore likely to be overworked both at home and at work.¹¹ Employment policies which result in women paying a motherhood penalty or other forms of indirect penalties based on their greater involvement in the family unit can serve as a deterrent to prioritising certain essential tasks involving people who they are connected to. The failure to value tasks performed by women in the corporate space results in job dissatisfaction. Because these tasks ultimately benefit the employer, the employment contract should be designed to reflect and reward

¹ OECD (2007), *Babies and Bosses - Reconciling Work and Family Life: A Synthesis of Findings for OECD Countries*, OECD Publishing, Paris, <https://doi-org.elibrarymu.remotexs.co/10.1787/9789264032477-en>.

² Ibid

³ Ibid

⁴ Ibid

⁵ OECD (2012), *The Future of Families to 2030*, OECD Publishing, <http://dx.doi.org/10.1787/9789264168367-en> 126

⁶ OECD (2007), *Babies and Bosses - Reconciling Work and Family Life: A Synthesis of Findings for OECD Countries*, OECD Publishing, Paris, <https://doi-org.elibrarymu.remotexs.co/10.1787/9789264032477-en>.

⁷ OECD (2007), *Babies and Bosses - Reconciling Work and Family Life: A Synthesis of Findings for OECD Countries*, OECD Publishing, Paris, <https://doi-org.elibrarymu.remotexs.co/10.1787/9789264032477-en>.

⁸ See Daniels, A. K. (1987). Invisible Work. *Social Problems*, 34(5), 403–415. <https://doi.org/10.2307/800538>

⁹ McKinsey and Company (2022) Women in the Workplace https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2022.pdf

¹⁰ Miller, J. (2020). We Need to Talk About Office Housework <https://www.forbes.com/sites/jomiller/2020/08/10/we-need-to-talk-about-office-housework/?sh=2fd70c4a6030>

¹¹ McKinsey and Company (2022) Women in the Workplace https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2022.pdf

every valuable contribution. Women are more likely to quit employment in search of employers who offer greater flexibility and who demonstrate commitment to employee welfare and creation of equitable workplaces.¹ Performance in the family affects work and vice versa. Overworked employees experience work-life imbalance and emotional exhaustion which results in poor performance.²

Another area for consideration is the nature of the relationships formed. Both employment and the family exhibit repeat players and thus create relationships. Conflicts between individuals within the entity (family or work) call for suitable dispute resolution rules to resolve issues as they arise. Lauren Letellier discussed the similarities between dysfunctional families and businesses, noting that both exhibit relationships in which there is a lack of trust, withheld information, anxiety and illusions of control.³ McNeil's relational contract theory appreciates the fact that rules governing continuing relationships should be interpreted in the context of that relationship. The law can play a supportive and facilitative role to promote the continued existence of relationships arising in both domains, and to facilitate practical choices when role conflicts arise between both domains. Some family obligations arise occasionally and may require the employee to prioritise family over work in the short-term. The parties to these relationships should be encouraged and allowed to restructure their arrangements wherever possible to accommodate these challenges. Although conflicts in one domain often spill over into the other, negative consequences are more likely to be felt in the home.⁴ Family responsibilities affect may affect an employee's ability to be present and productive whenever challenges arise. Pregnancy, childcare and caregiving responsibilities may affect an employee's productivity. The world bank places the dependency ratio in Kenya at 70.18%.⁵ Persons who are employed therefore carry heavy responsibilities touching on their families' and communities' welfare issues. Flexible working hours and remote work are avenues worth exploring so that employees are not forced to either be present at work or to exit the workforce based on commitments.

5. Legal Framework

The Industrial Relations Charter creates a tripartite arrangement which identifies the government, employers and employees as social partners.⁶ The social partners committed to engage in collective bargaining for worker entitlements, resolve disputes peacefully and to consult on matters affecting them.⁷ Government obtains benefits from workers through taxes while employers get profits and attainment of their organizational goals. The idea that businesses should display concern beyond profits has resulted in the growth of Corporate Social Responsibility (CSR) through which they contribute to the welfare of stakeholders. It is therefore in everyone's interest to ensure that the welfare of the family unit is upheld.

The International Labour Organization (ILO) Conventions form part of Kenyan Law.⁸ Kenya ratified the Discrimination (Employment and Occupation) Convention which promotes equality of treatment and opportunity in the workplace.⁹ It however did not cater for distinctions based on family responsibilities which necessitated supplementary standards. The ILO Recommendation 165 on Workers with Family Responsibilities was motivated by the need to create equitable workplaces for workers with family responsibilities relating to dependent children and other members of their immediate family who require care and support.¹⁰ The definition of these family members is however left to State law.¹¹ Kenya has not ratified this supplementary standard. The recommendation makes room for progressive realisation and requires members to minimise conflict between work and family responsibilities and ensure that workers with family responsibilities are not subjected to discrimination on the basis of marital status or family responsibilities.¹²

The Constitution cements the position of the family in the country's social order.¹³ It defines marriage as a heterosexual union which creates equal rights between the parties¹⁴ and mandates Parliament to enact law to recognise marriage "concluded under any tradition, or system of religious, personal or family law."¹⁵ Families

¹ McKinsey and Company (2022) Women in the Workplace https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2022.pdf

² Karatepe, O.M. (2013) "The effects of work overload and work-family conflict on job embeddedness and job performance: The mediation of emotional exhaustion", *International Journal of Contemporary Hospitality Management*, Vol. 25 No. 4, pp. 614-634.

³ Caprino, K. (2014, August 19). *The Crushing Similarities Between Family And Business Dysfunction*. Forbes. Retrieved April 17, 2023, from <https://www.forbes.com/sites/kathycaprino/2014/08/19/the-crushing-similarities-between-family-and-business-dysfunction/>

⁴ Boles, J. S., Howard, W. G., & Donofrio, H. H. (2001). An Investigation Into The Inter-Relationships Of Work-Family Conflict, Family-Work Conflict And Work Satisfaction. *Journal of Managerial Issues*, 13(3), 376-390. <http://www.jstor.org/stable/40604357>

⁵ <https://data.worldbank.org/indicator/SP.POP.DPND?locations=KE>

⁶ Industrial Relations Charter (1984)

⁷ Fayoshin, T. (2010). Collective bargaining and employment relations in Kenya, International Labour Office, Industrial and Employment Relations Department. Working Paper No.13

⁸ Constitution of Kenya, Article 2

⁹ ILO, Discrimination (Employment and Occupation) Convention, 1958 (No.111)

¹⁰ ILO (1981), R165 Workers with Family Responsibilities Recommendation, Preamble and Para 1.

¹¹ ILO (1981), R165 Workers with Family Responsibilities Recommendation, Para 1(3), 3.

¹² ILO (1981), R165 Workers with Family Responsibilities Recommendation, Para 4, 6, 7.

¹³ Constitution of Kenya, Article 45(1)

¹⁴ Constitution of Kenya, Article 45(2)&(3)

¹⁵ Constitution of Kenya, Article 45(4)

arising out of any recognised form of marriage are therefore accorded express recognition and protection. The Marriage Act defines marriage as a registered polygamous or monogamous union between a man and a woman.¹ It provides for equality of parties to the marriage as well as equality of all forms of marriage.² This corrects the anomaly of elevating certain forms of marriage over others as happened in the past.

The Constitution also protects vulnerable groups such as children, the disabled and the elderly. Children are entitled to parental care and protection in the form of provision from both parents irrespective of their parents marital status.³ Care involves providing necessities, while protection requires a child to be shielded from negative behaviour and practices.⁴ The elderly have a right “to receive reasonable care and assistance from their family and the State.”⁵ Parents and other family members are able to meet these obligations primarily through working to provide basic needs and dedicating their effort to activities relating to care and support. Work related legislation should therefore take cognisance of employees who support these categories of persons and endeavour to support them in fulfilling their roles.

The Constitution contains rights related to equality and non-discrimination and fair labour practices. Employees have successfully sued employers for unfair labour practices where they have been subjected to discriminatory treatment. Certain employment benefits are targeted at employees' family members. Parental leaves are based on one's legally defined connection to a child. Medical benefits are also usually extended to some members of an employees family. A narrow definition of family, or failure to recognise certain family forms may result in discriminatory distribution of benefits.

The Employment Act regulates the employment relationship by setting basic minimum terms and conditions of service which are automatically incorporated in every contract of service.⁶ Some of these provisions, particularly those relating to working hours, rest and leave assist workers to achieve a work-life balance. Section 57 of the Act protects children by delaying their entry into the work force so that they get time to acquire the knowledge and skills, while Section 53 shields them from the worst forms of child labour.

Various laws which govern the family unit play both a direct and indirect role in affecting the manner in which effort and labour is rewarded at home and at work. Rules which devalue one's contribution in the domestic sphere while elevating contributions made in the public sphere contribute to imbalances in wealth distribution and affect overall perception and valuation of roles based on monetary remuneration. Matrimonial property rules which consider domestic work when apportioning property (*MW v AN*) may result in parties viewing both the home and work as equally important spheres of life. Similarly, at work, rules which penalise employees for undertaking family related responsibilities can be addressed on the basis of discrimination.

6. The Right to Disconnect

Where the boundary between home and work is regularly traversed, the employee's private life and mental health is interfered with. The failure to separate work from home interferes with an employee's ability to discharge family responsibilities. It also creates unpaid labour where the employer expects one to work beyond working hours. Working hours, rest and leave periods are prescribed by the Employment Act. An employee is entitled to one rest day per week and annual leave with full pay.⁷ Other leaves provided for are maternity leave, sick leave, paternity leave and adoption leave.⁸ Despite these provisions, some employers demand availability from their workers whenever they take these breaks.

Technology has made it possible for employers to “reach” their employees wherever they are via telephone, email, and even social media apps such as Whatsapp to make work related requests. This mode of reaching the employee at home worsened during the Covid 19 pandemic since many employers put in place remote work arrangements to allow employees to work from home. Almost overnight, boundaries between work and home collapsed, requiring employees to balance their family and work lives in the home space. The problem has resulted in the suggestion to introduce a “right to disconnect” to allow employees not to engage in work related communication during their rest periods. Belgium passed legislation that allows public servants to disconnect from work related communications during their private time without fear of reprisals. The public administration minister explained that the legislation is aimed at allowing employees to achieve a work-life balance by insulating them from stress and burnout.⁹ The provisions have not been extended to private sector employers with 20 or more employees.

¹ Marriage Act, Act No.4 of 2014, Section 3(1)

² Marriage Act, Act No.4 of 2014, Section 3(2)&(3)

³ Constitution of Kenya, Article 53(1)(e)

⁴ Constitution of Kenya, Article 53(1)(c)&(d)

⁵ Constitution of Kenya, Article 57(d).

⁶ Kenya Employment Act, Cap 226

⁷ Employment Act, Cap 227, Section 27(2) and Section 28

⁸ Wmployment Act, Cap 227, Section 29, 30

⁹ Parker, J. (2022, January 31). *The Belgians getting the right to disconnect from work*. BBC. Retrieved April 23, 2023, from <https://www.bbc.com/news/world-europe-60156257>

In Kenya, there are proposed amendments to employment law to introduce the right to disconnect to help employees achieve a work-life balance. The Employment (Amendment) Bill, 2022 if enacted will prevent employers from contacting employees outside working hours unless the contact relates to an emergency.

7. Parental Leaves

i) Maternity Protection

Maternity leave is important for allowing a mother to adapt to the change of introducing a new family member. S.29(1) of the Employment Act gives a female employee three months of maternity leave with full pay. The time granted is pegged on the birth, not the number of children. It allows her to heal from delivery, breastfeed and take care of and bond with the baby. Through maternity, the workforce is repopulated and the demographic dividend which features in many of the country's policies can be harnessed for national development. There are countries where low or negative population growth rates have forced them to rely on immigration and give incentives for children born to ensure labour force repopulation. Marx and Engels considered workers as "an indispensable means of production" whose "maintenance and reproduction" is crucial for the survival of capital.¹ For capital to reap the benefits of this reproduction, it is only fair that it meets a small fraction of the cost involved in the process of raising a productive human being. This has been partially achieved by enforcing law relating to maternity rights.

In *GMV v Bank of Africa Kenya Limited*², the court recognised the value of pregnancy to society as a whole. It stated that:

"Pregnancy is an important component of the basic right of all persons to have a family under Article 45, and to the extent that the family is the natural and fundamental unit of the society, and the necessary basis of social order, an employment decision that denigrates pregnancy, is an assault on the society as a whole."

The ILO Maternity Protection Convention requires States to ensure that women are granted maternity leave of at least 14 weeks.³ It also provides that an employee should be granted leave in case of illness or complications arising from pregnancy or childbirth.⁴ It contains extensive provisions relating to the entire maternity process including payment of cash benefits⁵, employment protection⁶, non-discrimination⁷, breastfeeding breaks or reduction of work hours to facilitate breastfeeding⁸, leave when ill or experiencing complications⁹. A woman's employment should not be terminated during or after her pregnancy (for a prescribed period) unless the reason is unrelated to the pregnancy. In the event of termination, the employer carries the burden of demonstrating that the dismissal is unrelated to the pregnancy.¹⁰

Much as the Maternity Convention applies to "all employed women"¹¹, the provisions are difficult to implement for women engaged in atypical forms of work and those who are casual employees. Article 6 of the Maternity Convention requires women to be provided with cash benefits to maintain themselves and the new born, and medical assistance to be paid from compulsory social assistance and public funds, or as prescribed in National law - the employer is not individually liable unless he has agreed. As a result it is easier for women who work in the formal sector to benefit from these provisions.

Article 27(4)&(5) of the Constitution prohibits discrimination on grounds of pregnancy. S.5(3) Employment Act prohibits employers from harassing or discriminating against employees on the basis of pregnancy. Maternity leave of 3 months with full pay is granted.¹² However, when a woman's employment is terminated on grounds of pregnancy, she rarely gets her job back. The most that courts have done is to award compensation for unlawful termination on grounds of pregnancy, as well as damages for the discrimination. In *Mokaya v Kithure Kindiki*¹³, the court observed that such terminations happen when the employee is at their most vulnerable. It stated that the employee had lost her source of livelihood "at her hour of need, and when she needed those finances most, for prenatal and postnatal care" and that she "lost prospects of career progression". She was awarded Kshs.1,500,000 as exemplary damages. In *GMV v Bank of Africa Kenya Limited*¹⁴, the court stated that

¹ Capital cited in Cammack, P. (2020) Marx on Social Production in Historical Materialism 28.2 pp76-106 <https://brill.com/view/journals/hima/28/2/article-p76_3.xml?language=en>

² [2013] eKLR

³ No.183 of 2000. Article 4(1)

⁴ No.183 of 2000. Article 5

⁵ No.183 of 2000. Article 6

⁶ No.183 of 2000. Article 8

⁷ No.183 of 2000. Article 9

⁸ No.183 of 2000. Article 10

⁹ No.183 of 2000. Article 4

¹⁰ No.183 of 2000. Article 8

¹¹ No.183 of 2000. Article 1

¹² Employment Act, S.29(1)

¹³ [2021] eKLR

¹⁴ [2013] eKLR

in order to succeed in a pregnancy discrimination suit, an employee must demonstrate the nexus between the pregnancy and the adverse decision taken, and establish that she:

- Is a member of a protected class
- Qualified for the job
- An unfair decision was taken as a result of her pregnancy.

The court stated that discrimination on grounds of pregnancy interfered with several other fundamental rights of the employee (right to dignity, right to fair labour practices, socio economic rights. recognised the value of pregnancy to society as a whole. It stated that: “Pregnancy is an important component of the basic right of all persons to have a family under Article 45, and to the extent that the family is the natural and fundamental unit of the society, and the necessary basis of social order, an employment decision that denigrates pregnancy, is an assault on the society as a whole.”

Releasing an employee from work for whatever involves a cost which the convention has determined will be met through public funds or private arrangement where the employer agrees to meet such costs. These are to be paid in accordance with National law. Kenyan law has determined will largely be met by the employer. Some employers unfortunately view it as a burden. In one case, an employee’s job was terminated after being informed she was becoming an expensive employee because she was pregnant (“yet again”) and would need to proceed on maternity leave.¹ In *Esther Nduati v Ofyze Limited t/a Harris Tavern*², an employer did not pay an employee during her maternity leave and declined to let her resume work after the period. The court found that the termination was unlawful and discriminatory on the basis of pregnancy. She was awarded an amount for the discrimination. Women in some cases have been awarded varying amounts as exemplary damages for such termination,³ while in other cases, judges stick to the statutory compensation for unfair termination.

These actions have the effect of adversely affecting the mental health of the new mother through causing unwarranted stress. In *Mercy Gakii Nabea v Malindi Management Strategy Limited*⁴, the court commented on the callous manner in which an employer acted by terminating a new mother’s contract of employment while she was on maternity leave. It observed that ‘the Claimant had just come through childbirth and was lactating at home when she was served with a letter taking away her livelihood.’ Another court described the action of sending a new mother a termination letter on her hospital bed as “inhuman” but declined to separate damages for the discrimination.⁵ The courts should not be shy about meting out exemplary damages in cases where pregnancy discrimination has occurred. Essentially. The loss of livelihood affects two or perhaps more people within the family set up and creates problems which are likely to require redress throughout the legal system.

The “Linda Mama” social assistance programme is publicly funded through the National Hospital Insurance Fund (NHIF) and is designed to ensure that there is Universal Health Coverage (UHC) for maternal and child health services on the basis of need. The scheme is however dependent on political goodwill for the requisite budgetary allocations to be made.[confirm]. In order for every woman to benefit from maternity protection, the question of who meets the cost has to be comprehensively addressed. It is not enough for the state to pass laws that simply shift sole responsibility to employers since most women do not work in the formal sector.

In addition, to the above measures, employers are required to establish equipped lactation stations (separate from rest rooms) in the workplace.⁶ Employers are required to take measures to ensure that breast milk substitutes are not marketed or promoted within the lactation stations.⁷ Mothers are also entitled to nursing breaks for purposes of breastfeeding or expressing milk.⁸ The Government has also issued guidelines for the creation of work environments which are conducive to breastfeeding.⁹ The recommended six-month period for exclusive breastfeeding can only be achieved if there is support from employers since maternity leave lasts for three months.¹⁰ Breastfeeding infants benefits everyone.¹¹ Much as the policy highlights the benefits of supporting breastfeeding mothers, it does not adequately address the question of costs since setting up an equipped facility and releasing employees to nurse has financial implications. On the question of cost, the policy erroneously states that “the initial cost is usually a one-time expenditure other than costs involved with standard maintenance and the return on investment is continuous since many breastfeeding female employees can make use of the facility over a long period of time”. An employer who has to lease or set aside additional space to set

¹ G M V v Bank of Africa Kenya Limited [2013] eKLR

² [2019] eKLR

³ See *AKO v Abson Motors Limited* [2021] eKLR

⁴ [2019] eKLR

⁵ *Caroline Nyokabi Mwangi v Achellis Kenya Limited* [2021] eKLR

⁶ Health Act, Act No. 21 of 2017 , Section 71

⁷ Health Act, Act No. 21 of 2017 , Section 71

⁸ Health Act, Act No. 21 of 2017 , Section 72

⁹ Ministry of Health (2018) Guidelines for Securing a Breastfeeding Friendly Environment in the Workplace

¹⁰ Ministry of Health (2018) Guidelines for Securing a Breastfeeding Friendly Environment in the Workplace, pp 15

¹¹ Ministry of Health (2018) Guidelines for Securing a Breastfeeding Friendly Environment in the Workplace, pp 28-29

up lactation stations meets a recurring cost in terms of paying for and maintaining the station. This may lead to the perception that female employees within pose an actual or potential “burden” on a business’s bottom line. The State can do more to support and incentivise employers who are prepared to be compliant.

ii) Paternity Leave

While the role of the mother in relation to a child within the family setup has always been more readily recognised, there is growing recognition of the importance of the father in the family setup. Gender role division traditionally casts the mother as operating chiefly in the private domain while the father operated more in the “public” domain. With the increased participation of women in the workforce, roles within the home require some rebalancing. Each parent plays a distinct role in the upbringing and socialisation of a child. Male employees are entitled to two weeks of paternity leave with full pay in a period of 12 months.¹ In practice, one has to be the biological father of the child in order to qualify for paternity leave. In other countries, employees can apply for such leave if they are partners, or married to the child’s mother.² There’s no time increase if the birth produces more than one child.

The leave allows a father to play a supportive role in caring for his family and discharging family responsibilities. Paternity leave has been associated with the establishment of the parental role and greater relationship stability. [McKinsey]. It also helps to level the playing field for working mothers.³ Whereas it is biologically impossible for a woman to claim more than one maternity leave in a 12-month period, a man can. A lawsuit has been filed by a petitioner who argues that the shorter leave duration for fathers as compared to mothers under S.29 of the Employment Act is discriminatory and therefore unconstitutional.⁴

iii) Adoption Leave

S.29A of the Employment Act makes provision for pre-adoptive leave for a month from the date of placement of an adopted child. To qualify, the employee must notify the employer 14 days before the placement of the child, and produce documentation relating to the Adoption.

8. Sick Leave

An employee who is unwell is entitled to take time off work in the form of sick leave of at least seven days with full pay and thereafter seven days at half pay.⁵ However, one can only benefit from this leave after working for two consecutive months and is only entitled to such leave once a year.⁶ Because many illnesses are not timed or programmed events, it doesn’t make sense to limit time off for purposes of receiving medical treatment and recovery.

9. Other Possible Accommodations

Simon Deakin and Gillian Morris discuss other accommodations granted to employees to allow them time off to take care of children⁷ and dependants⁸, and the right to request flexible working time to discharge family responsibilities.⁹ The limitation of parental leaves to periods when a child has been born or adopted ignores the fact that children present a continuing obligation and may require parental assistance and support during their formative years. Young children may fall ill or require the parent to attend various events in school and other organizations as part of their upbringing. The parent is left with the option of expending annual leave days which ideally should be reserved for rest and rejuvenation. The European Union and UK’s approach of allowing a parent to take time off when necessary to cater for young children and other dependants demonstrates the value attached to fulfilling social welfare roles. In addition, employees who lose a child are also entitled to bereavement leave upon the death of a child who is below the age of 18 years.¹⁰

In the US, The Family Protection Bill proposed income tax deductions to parents who make savings towards their children’s education.¹¹ Organizations providing daycare services for children are also granted tax exemption status. Attorney expenses for the adoption of a child were also to be treated as an income tax deductible expense. They also proposed deductions for handicapped spouses and tax credits where the employee has a dependent aged 65 years or above. The provisions were not passed but nevertheless highlight several areas

¹ Employment Act S.29(8)

² Simon Deakin & Gillian S. Morris Labour Law (6th ed) pg 746

³ <<https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/a-fresh-look-at-paternity-leave-why-the-benefits-extend-beyond-the-personal>>

⁴ *Magare Gikenyi J Benjamin v Ministry of Labour (MoL & another; Federation of Kenyan Employers (FKE) & 4 others (Interested Party)* [2022] eKLR

⁵ Employment Act, S.30(1)

⁶ Employment Act, S.30

⁷ EU Parental Leave Directive 1996

⁸ S.57A Employment Rights Act 1999 UK

⁹ S.80(1) Employment Rights Act UK.

¹⁰ S.80EA, S.80EB, Employment Rights Act

¹¹ Family Protection Act, H.R. 3955, 97th Cong. (1981).

for improving the law to support employees with family obligations. The Family and Medical Leave Act allows employees to take leave of up to twelve weeks to take care of themselves when unwell or for family obligations such as maternity, placement of a child for adoption or foster care and caring for “immediate” family members.¹ The entitlement is however limited since the employee must have worked for a year and receives no pay during the period. It is also below the International Labour Organisation (ILO) recommended 14 week leave for maternity.² The employee, therefore, has to elect between caring for family members or working.

10. Transfer or Relocation Policies

Employers usually effect transfers on the basis of organizational interests, sometimes without considering the effect of the relocation on the employee’s family obligations and morale. The Teachers Service Commission implemented a delocalisation policy which empowered it to require teachers to work anywhere in the country. It argued that the policy was anchored in the Collective Bargaining Agreement (CBA) signed between it and the Kenya National Union of Teachers (KNUT) and that willingness to serve in any part of the country was a condition of employment.³ It had the effect of uprooting them from their communities, disrupting their family lives and lowering morale, and was ab(used) to “punish” some teachers.⁴ In the case of female teachers, it had the potential to ruin their marriages.⁵ It took the intervention of the Education Committee of Parliament for the policy to be scrapped to prevent transfer of teachers from their home areas.⁶

11. Conclusion

Kenyan employment law has made several provisions that support the work-life balance and allow employees time off to discharge their family responsibilities. Maternity, paternity and adoption leave are granted to employees upon the arrival of a new family member. However, there are no additional leaves granted to allow one to fulfil parental obligations to children. In addition, other family members who need care and assistance because they are unwell or elderly do not form the basis of leave entitlements. Employees are also not entitled to take leave to care for dependants and family members who are not recognised in law. More can be done to allow employers to support the family unit by passing and/or reinforcing legislation which:

- Allows employees to rest without unnecessary interruption from the employer. This will allow employees to attain a work-life balance and receive adequate compensation when they are required to work during their rest periods.
- Supports employers to introduce accommodative work arrangements for employees
- Expands benefits given to employers and employees who wish to structure their engagement to accommodate family commitments. Laws which require the employer to meet the costs of releasing employees from work or supporting them as they discharge family-related duties can have the unintended effect of discouraging employers from hiring employees with a high care giving burden.
- The State should consider extending tax breaks to employers who provide the desired support and employees with care giving obligations. Tax exemptions and waivers should be extended to the family unit which has been deemed important enough to warrant constitutional protection. Similar accommodations have been granted to other vulnerable classes.

Law and policy governing employment relations should be designed to minimise the friction between home and work with a view to promoting the overall health of society.

¹ Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006)

² ILO Maternity Protection Convention No. 183 and 191 of 2000

³ Teachers Service Commission (2018) *TSC Position on Delocalisation and Teacher Appraisal* <<https://www.tsc.go.ke/index.php/downloads-b/file/174-tsc-position-on-delocalisation-and-teacher-appraisal>>

⁴ Shatuma, L. (2022, November 3). *Legislators compel TSC to review delocalisation policy*. The Star. <<https://www.the-star.co.ke/news/2022-11-03-legislators-compel-tsc-to-review-delocalisation-policy/https://www.the-star.co.ke/news/2022-11-03-legislators-compel-tsc-to-review-delocalisation-policy/>>

⁵ Shatuma, L. (2022, November 3). *Legislators compel TSC to review delocalisation policy*. The Star. <<https://www.the-star.co.ke/news/2022-11-03-legislators-compel-tsc-to-review-delocalisation-policy/https://www.the-star.co.ke/news/2022-11-03-legislators-compel-tsc-to-review-delocalisation-policy/>>

⁶ Mutai, E. *MPs give TSC till Jan 31 to reverse delocalisation transfers*. (2022, December 20). Business Daily. Retrieved May 27, 2023, from <https://www.businessdailyafrica.com/bd/economy/mps-give-tsc-till-jan-31-to-reverse-delocalisation-transfers--4060568#>