Discrimination in Employment: 
A Critical Evaluation of Section 5(3) 
(a) Employment Act, 2007, and the 
Proposed Amendment

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Abstract

Inequality and unfair discrimination remain among the most complex social problems that take different forms over the years. This has been confirmed through case law and various legislation. Legislation on this issue is complex, and exist to serve a clear intention; the need to accommodate difference, diversity and to break down discriminatory practices. Even with remarkable legal development of protection against discrimination in recent years, discrimination still persists in diverse forms in the workplace. This paper investigates the current scope of section 5(3) (a) Employment Act, 2007. It is argued that the scope remains significantly narrow in its prohibition against unfair discrimination in the employment setting. This narrow scope limits allegations of unfair discrimination to only those grounds listed therein. Other gaps and inadequacies are in the construction and wording of the same provision. A more effective wording for section 5(3) (a) Employment Act is proposed in the end.

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1. Introduction

In the ordinary sense, discrimination occurs when people are denied the rights and privileges accorded to others. All employers in Kenya have a legal obligation to promote equal opportunity in the workplace. This includes taking reasonable measures to eliminate any form of unfair discrimination in employment setting.

The paper begins by providing a brief evaluation of the Kenyan law relating to freedom from discrimination. Subsequently, I will provide a critical analysis and evaluation of section 5(3) (a) Employment Act as well as the proposed amendment to the aforesaid provision. In doing so, various points of criticism against the scope and the wording of section 5(3) (a) are highlighted. The paper observes that the current provision does not adequately protect employees and job applicants against discrimination in the workplace. In view of that, the paper provides important recommendations that if implemented, would fill some of the gaps that exist in the current provision.

2. The Current Scope of the Prohibition of Unfair Discrimination

2.1 The Constitution of Kenya 2010

Kenya is a sovereign state founded on fundamental principles entrenched in the Constitution. The Constitution is the first point of reference when determining the scope of protection against discrimination. The Constitution stipulates that every person is equal before the law and has the right to equal protection and equal benefit of the law. In fact, a strong commitment to the principles and spirit of protection from discrimination is evident throughout the Constitution. As the supreme law of the country, the Constitution prohibits unfair discrimination by the state as well as private persons on any ground, and lists a number of specified grounds. In particular, the Constitution states in mandatory terms that the State

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4 Art 27 (1) of the Constitution.
6 Art of the Constitution.
7 Art 27 (4) of the Constitution.
8 Art 27 (5) of the Constitution.

shall not discriminate directly\(^9\) or indirectly\(^{10}\) against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.\(^{11}\) Similarly, “a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated above.”\(^{12}\)

Arguably, by electing to use the word ‘discrimination’ as opposed to the more neutral word ‘differentiation’, the legislature had in mind differential treatment that is *prima facie* unjustifiable. Discrimination on any of the grounds listed in Article 27 (4) of the Constitution is unfair unless otherwise shown that the discrimination is fair. Worth noting is that all the listed grounds reflects characteristics and attributes which are linked to human identity. Interesting is to note that some of the grounds listed above relates to immutable biological attributes and other associational life of humans or a combination of these and other related features. But a common characteristic amongst all the listed grounds is the potential to degrade a person’s inherent worth as well as dignity or to affect them adversely when manipulated.

As noted above, the Constitution prohibits unfair discrimination in very general terms. In view of that, it allows for further promulgation of subordinate legislation to give effect to the realisation of equality and protection against unfair discrimination.\(^{13}\) Discrimination in the Kenyan workplace for any reason is not allowed. The Employment Act\(^{14}\) is the primary legislation enacted to give effect

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\(^9\) The Constitution does not define the term ‘direct discrimination’. Direct discrimination involves overt differential treatment against people on the basis of any ground listed in Article 27 (1) of the Constitution. An example of a direct discrimination may occur when an employer refuses to employ someone on the basis of their age because the employer thinks they are too old to learn new skills. The Kenyan National Cohesion and Integration Act 12 of 2008 attempts to define “direct” and “indirect” discrimination in the following terms: s3(2) stipulates that a person discriminates if “he applies to that other person a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but-(a) which put or would put persons of the same race or ethnic or national origins as that other person at a particular disadvantage when compared with other persons,(b) which puts that other person at that disadvantage and (c) which he cannot show to be a proportionate means of achieving a legitimate aim.”

\(^{10}\) Similarly, ‘indirect discrimination’ is not defined in the Constitution. Usually, indirect discrimination is more often difficult to prove. It may be intentional or unintentional. An example would be where the employer applies policies and practices that appears neutral on the face of it and does not expressly differentiate between two or more employees and job applicants but, when examined closely it has a disproportionate negative effect on certain individuals or group of people. For instance, weight requirement that would exclude all but small minority women.

\(^{11}\) Art 27 (4) of the Constitution.

\(^{12}\) Art 27 (5) of the Constitution.

\(^{13}\) Notably, Article 41 of Constitution entrenches several provisions relevant to labour relations.

to the Constitution in terms of protecting employees and job applicants against discrimination in the workplace. For that reason, it will be the focus of this paper.

2.2 The Employment Act

The Employment Act has been in operation for just over a decade now. The statute has significantly changed labour law in certain material respects and greatly enhanced the rights of employees. The Act was promulgated to provide amongst others the prohibition of unfair discrimination in the workplace.

Further, the Employment Act gives effect to most international standards\textsuperscript{15} and United Nations human rights treaties relevant to discrimination.\textsuperscript{16} In doing so, the Act declares and defines the fundamental rights of employees.\textsuperscript{17} It obligates the Cabinet Secretary, labour officers as well as employers to promote equality of opportunity in employment in order to eliminate discrimination in any employment policy or practice.\textsuperscript{18} Besides, the Constitution establishes the Employment and Labour Relations Court (ELRC) to specifically deal with employment disputes including disputes relating to discrimination. The ELRC has made significant pronouncements on the question of employment discrimination. Some of the ground breaking pronouncements include \textit{VMK v Catholic University of Eastern Africa}\textsuperscript{19}, \textit{Koki Muia v Samsung Electronics East Africa Limited}\textsuperscript{20} and \textit{C A S v C S Limited}.\textsuperscript{21}

Apart from their general constitutional right not to be discriminated against, employees and applicants for work are specifically offered protection against

\textsuperscript{15} For example Equal Remuneration Convention 1951 (C100) and the Discrimination (Employment and Occupation) Convention 1958 (C111). Article 1 of the Convention concerning discrimination in respect of employment and occupation (1958) defines discrimination as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.


\textsuperscript{17} See the Preamble to the Employment Act.

\textsuperscript{18} Section 5 (1) (a) and (b) section 5 (2) and (7) of the Employment Act.

\textsuperscript{19} [2013] eKLR.

\textsuperscript{20} [2015] eKLR.

\textsuperscript{21} [2016] eKLR.
discrimination under the Employment Act. In the Kenyan employment setting, the foundation of the prohibition of unfair discrimination is in section 5 (3) (a) of the Employment Act. It is therefore necessary to examine the said provision as well as the proposed amendment before providing a critical analysis of the same in more detail.

Currently, section 5 (3) (a) Employment Act provides that:

No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.

The Employment Act (Amendment) Bill, 2019, seeks to repeal the above provision to further implement the aims of the Constitution in fighting against discrimination in the workplace. The essence is to bring the provision in line with Article 27 (4) of the Constitution and tailor the right against discrimination to the workplace. The proposed provision stands in relation to the Constitution by stating that:

No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee “(a) On grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

The key elements of the above provision are that: first, unlike Article 27 (4) of the Constitution which separately prohibits discrimination by the state and by a private person; section 5 (3) (a) Employment Act prohibits unfair discrimination by all employers; second, both direct and indirect discrimination is prohibited; third, the provision seeks to protect both ‘employees’ as defined in the Employment Act as well as applicants for employment against unfair discrimination; fourth, harassment is also declared to be discrimination.
3. A Critical Analysis of the Proposed Amendment to Section 5 (3)(a) of the Employment Act and Consideration of Other Grounds Relevant to the Employment Context

The following section considers and critically evaluates the scope of the proposed section 5 (3)(a). Some of the inadequacies and gaps are highlighted and discussed with the view to address them. On the whole, the aim is to provide insights on the effective regulation against discrimination in the Kenyan workplace.

3.1 No Employer “Shall”....

It is necessary to examine the language used by the legislature in the above provision in prohibiting a conduct relating to discrimination. In many cases legislative provision outlaws a conduct and proposes the way in which it must be executed. The provision of section 5 (3) (a) of the Employment Act is explicitly phrased in mandatory terms meaning that compliance is imperative. In fact, the addition of the penalty to the prohibition is a strong indication that the provision is unconditional.\(^{22}\) While the purpose of the relevant legislation remains the deciding factor, a statutory provision that demands compliance is regarded in the rules of interpretation as peremptory, obligatory or mandatory. Failure to comply with a peremptory provision would leave the ensuing act as null and void.\(^{23}\) In *Messenger of the Magistrate’s Court, Durban v Pillay*,\(^{24}\) the South African Appellate Division held that the use of words such as “shall” or “must” with affirmative character indicates that compliance with the provision is peremptory.\(^{25}\) Similarly, in *S v Takaendesa*, the court emphasised that:\(^ {26}\)

> where a statute prohibits the doing of something *unless* something else is done as a precedent to doing the thing prescribed, it is a general rule of interpretation that the provisions of the Act are obligatory and not directory.\(^ {27}\)

However, a statutory provision requiring substantial compliance is merely directory. So, non-compliance will not result in the ensuing act as being null and
void\textsuperscript{28} and the exact compliance is not a prerequisite. Be that as it may, it may be incorrect to refer to a statutory provision as peremptory or directory since strictly speaking all statutory provisions are peremptory.\textsuperscript{29} But unfortunately in practice, the distinction between peremptory and directory has become firmly entrenched in practice and legal jurisprudence.

In spite of the negative connotation normally associated with the word ‘discrimination’, not all discrimination is necessarily unfair.\textsuperscript{30} In certain instances, employers may inevitably discriminate ‘fairly’ against an employee or job applicant on grounds accepted in law. This means, the achievement of substantive equality at the workplace may require an employer to treat certain people or category of people ‘differently’ in order to ensure that full equality with others who have not been disadvantaged is attained. Specific example is when an employer uses affirmative action\textsuperscript{31} as a justification to discriminate. Also, the Employment Act provides that it is not unfair discrimination to discriminate any person on the basis of an inherent requirement of a job.\textsuperscript{32} Although ‘inherent requirement of a job’ is not defined in the Employment Act, it may refer to a personal or physical attribute that an employee needs to possess in order to be able to perform the essential functions of the job.\textsuperscript{33} An example of this would be an instance where the employer distinguishes between two employees in the interest of privacy and decency.

Given the existence of justifications for some forms of discrimination listed under section 5 (4) (a) to (d) of the Employment Act, it is imperative that the peremptory language used by the legislature in section 5 (3) (a) of the Employment Act be repealed. Specifically, this paper proposes for the repeal of the word “shall” and instead for the insertion of the word “may”. The general rule in interpretation

\textsuperscript{28} Botha, (n 23)176.

\textsuperscript{29} Again for the simple reason that if they were not obligatory, they would not be binding but merely non obligatory suggestions for desirable conduct.

\textsuperscript{30} Discrimination on the grounds listed section 5 (4) of the Employment Act is unfair unless the employer proves on a balance of probabilities, that such discrimination did not take place as alleged or is rational and not unfair or is otherwise justifiable fair. Grogan opines for example, that certain forms of differentiation that are part of the natural order of the workplace such as different wage levels and benefits for employees of different seniority and levels of skill do not in themselves constitute unfair discrimination.

\textsuperscript{31} Article 260 of the Constitution defines “Affirmative Action” to mean “any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom.” Such measures are therefore intended to promote substantive equality in the workplace and to accurately represent the demographics of various groups in the Kenyan population.

\textsuperscript{32} Section 5 (4) (b) of the Employment Act. See also section 5 (4) (a-d) of the Employment Act.

\textsuperscript{33} Govindgee A and Van Der Walt J A, Labour Law in Context (2\textsuperscript{nd} edition, Pearson Education Cape Town, 2012) 71.
of statutes indicates that the use of permissive words such as “may” symbolises a
discretion and will therefore be interpreted as being directory, unless the purpose
of the provision generally indicates otherwise. 34 This would bring the provision
in line with the exception provided in section 5 (4) of the Employment Act. In
view of that, the paper proposes that the section should read: “No employer [may]
discriminate directly or indirectly, against an employee or prospective employee or
harass an employee or prospective employee…”

3.2 Insertion of the Word “Unfairly” Immediately Preceding the
Phrase “Discriminate Directly or Indirectly”

Evident from the discussion above is that not all forms of discrimination
are unfair. In terms of section 5 (4) of the Employment Act, certain types of
discrimination can in fact be fair. Accordingly, the paper recommends for the
insertion of the term “unfairly” immediately preceding the phrase “discriminate
directly or indirectly”. In other words, the provision should read “no employer
[may] [unfairly] discriminate directly or indirectly, against an employee or
prospective employee or harass an employee or prospective employee…”

3.3 Insertion of the Phrase “Any One or More Grounds” Immediately
After the Word “On”

The grounds listed in section 5 (3) (a) of the Employment Act are commonly
referred to as the ‘listed grounds’. However, discrimination may manifest in
many ways at the work place besides the listed grounds. From a closer reading
of the provision, one may conclude that the provision allows an employee or job
applicant to allege discrimination only on one of the listed grounds but not as
a combination. In fact, this deficiency also appears under Article 27 (4) of the
Constitution which only uses the phrase “…any person on any ground”. The
insertion of the phrase “any one or more grounds” is therefore imperative because
one set of fact may give rise to one or more or combination of several listed
grounds of discrimination. Accordingly, this recommends for the insertion of the
phrase “one or more grounds” immediately after the word “on” in the provision. In
other words, the provision should read “no employer [may] [unfairly] discriminate
directly or indirectly, against an employee or prospective employee or harass an
employee or prospective employee “(a) on [one or more grounds]…..race, sex …”

34 Amalgamated Packaging Industries v Hutt (1975) 4 SA 947 (A).
In fact the insertion of the phrase “one or more grounds” would bring the provision in line with Article 260 of the Constitution which defines “marginalised groups” to mean all those disadvantaged by discrimination on “one or more of the grounds” listed in Article 27(4) of the Constitution.\(^\text{35}\)

### 3.4 Insertion of the Word “Including” before the list of the Grounds Provided in Section 5 (3) (a) Employment Act

Notably, the list of protected grounds in Article 27 of the Constitution is indicative rather than exhaustive. The provision begins with the phrase “[t]he State shall not discriminate directly or indirectly on any ground, including…” Therefore, the use the word “including” just before the listed grounds, suggests that the list is not exhaustive and therefore making it one of the most progressive provision regulating the protection against discrimination. On the contrary, section 5 (3) (a) of the Employment Act currently contains a list of nineteen grounds on the basis of which discrimination is prohibited. A careful reading of the section 5 (3) (a) suggest that it prohibits unfair discrimination only based on the nineteen grounds. On this reading, the section appears to be significantly narrow and exhaustive rather than indicative. With this in mind, the paper recommends that the provision should be amended to insert the word ‘including’ just before the list of the grounds.

For that reason, this paper proposes that the section should read: “No employer [may] [unfairly] discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee “(a) on [one or more grounds] [including]…” Such amendment would bring the provision under study in harmony with the Constitution as the legislature intends through the current amendment Bill. Similarly, the insertion would create the possibility of referral by those suffering discrimination on grounds which are not explicitly listed in section 5 (3) (a) of the Employment Act, a possibility which is strengthened by the definition of the word “includes” provided in Article 259(4)(b). Article 259(4) (b) states that the word “includes” means “includes but is not limited to.”

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\(^\text{35}\) See also Article 27 (5) of the Constitution.
3.5 Insertion After the Phrase “Sexual Orientation” as Listed against Discrimination

Discrimination on the ground of sexual orientation may occur when employees or job applicants are treated unfairly because of their sexual orientation. Generally, a person’s sexual orientation is dependent on whether he or she is sexually attracted towards a member of own sex which would perhaps mean one is gay or lesbian or when a person is attracted to the opposite sex (heterosexual) or one is attracted to the same and the opposite sex (bisexual). This form of discrimination may take place in several ways and can be either direct or indirect. For example, in the recruitment and selection process, a direct discrimination based on sexual orientation may take place where at a job interview; a woman makes reference to her girlfriend. And based on that, the employer takes a decision not to offer her the job, notwithstanding the fact that she was the best candidate interviewed. Similarly, it may occur where a hotel owner refuses to provide a double bedroom to two men. Indirect discrimination happens when a company or an institution or an entity has a particular policy or practice that on the face of it applies equally to everyone but its application has a disproportionate effect on a particular sexual orientation or puts them at a disadvantage.

This paper observes that in spite of the existence of a progressive Bill of Rights under the Kenyan Constitution, gays and lesbians as minority members of the community have not been able to realise, enjoy and exercise their rights. Currently, the grounds listed under section 5 (3) (a) of the Employment Act do not include a number of grounds pertinent to employment law. One important ground omitted is that of ‘sexual orientation’. Like other forms of prohibited grounds, discrimination on the ground of sexual orientation has become an area of concern in the workplace and throughout the employment sector. Noteworthy is that freedom from discrimination means embracing inclusion and diversity. It requires everyone to stand up against all forms of stigma and discrimination and to the insidious role of homophobia and transphobia in fostering discrimination.36

Sexual orientation issues remain highly sensitive and topical in Kenya where homosexual conduct remains prohibited.37 It has resulted in Lesbian, Gay, Bisexual,


37 EG & 7 others v Attorney General, DKM & 9 others (Interested Parties), Katiba Institute & another (Amicus Curiae) Petition 150 & 234 of 2016.
Transsexual and Homosexual (LGBTH) employees being bullied, sexually or physically assaulted in the workplace.\textsuperscript{38} Commonly, discrimination and exclusion from the labour force and community in general is associated with perceived non-conformity with heteronormativity; in other words, the unfortunate social belief that being heterosexual is “normal”. It is also linked to a preconceived idea of how men and women are expected to appear and conduct themselves in the society. Often in the society, women who are masculine or men who are feminine in behaviour or physical appearance experience this form of discrimination. In some instances LGBTH employees are subjected to invasive questions regarding their personal lives and with some asked to explain why they are not heterosexual. In other circumstances, they are asked to “prove” their femininity or masculinity in the workplace in order to have their contribution valued.\textsuperscript{39}

In Kenya, there are several organisations that work to protect and support the rights of LGBTH persons. Some of these organisations, like Gay and Lesbian Coalition of Kenya (GALCK), work primarily on representing the rights of LGBTH.\textsuperscript{40} GALCK plays an active role in promoting the human rights of all people, irrespective of their sexual orientation and gender identity or appearance. Nonetheless, the High Court of Kenya recently upheld the criminalisation of same-sex relations in \textit{EG & 7 others v Attorney General, DKM & 9 others (Interested Parties), Katiba Institute & another (Amicus Curiae)}\textsuperscript{41} The Court was required to determine the constitutionality of section 162 and section 165 of the Penal Code.\textsuperscript{42} Section 162 (a) and (c) of the Code outlaws “carnal knowledge of any person against the order of nature.” Further, section 165 criminalises the acts of “gross indecency” between two male persons imposing liability of up to five years in prison if found guilty. It should be remembered that courts are independent creatures of statute tasked to interpret and apply the provisions of the Constitution in a manner that is progressive and that promotes the constitutional rights such as human dignity, equality and non-discrimination. Arguably, the judgment remains a major setback for the campaign to protect human rights in Kenya and sends a dangerous message about how inflexible our courts are. This paper opines that the High Court missed a great opportunity to protect the minority Kenyans community in repealing the

\textsuperscript{38} International Labour Office “Discrimination at work on the basis of sexual orientation and gender identity: Results of the ILO’s Pride Project” p 1-3.
\textsuperscript{39} International Labour Office (n 36) 1-3.
\textsuperscript{40} Available at: https://www.galck.org/ accessed on 22-7-2019.
\textsuperscript{41} \textit{EG & 7 others v Attorney General, DKM & 9 others (Interested Parties), Katiba Institute & another (Amicus Curiae)} Petition 150 & 234 of 2016.
\textsuperscript{42} The Penal Code (Cap. 63). Revised Edition 2012 [2010].
old colonial laws rooted in sections 162, 163 and 165 of the Penal Code introduced by the British colonisers about 100 years ago.

The Kenya Law Reform Commission (KLRC) and the State Department for Labour have stated that the review of the Employment Act is aimed at aligning the Act with the Constitution. In addition, the review seeks to update the Employment Act with general trends in labour laws.\(^{43}\) If this is the case, then it is an opportune time for Kenya to follow the legal position and best practices in other jurisdiction particularly Botswana and South Africa\(^{44}\) where courts have ruled that legislation banning same sex acts are unconstitutional. Notably, a few weeks after the disappointing High Court ruling, the Botswana High Court abolished colonial-era laws that criminalised homosexuality. In its ruling, the Botswana High Court emphasised that: “Sexual orientation is not a fashion statement. It is an important attribute of one’s personality. All people are entitled to autonomy over their sexual expression.”

The judgment is an important reminder for Kenya that every person enjoys the rights to dignity, autonomy, privacy and protection from discrimination irrespective of their sexual orientation. In view of that, Kenya employment law should consider recognising the right to one’s chosen sexual orientation in employment. This will influence a real societal mind-set and shift towards greater tolerance. In fact, more and more jurisdictions are enacting laws prohibiting discrimination on the ground of sexual orientation in the workplace. South Africa is a closer example. The South African Labour Court has emphasised that discrimination against gays,\(^{45}\) lesbians\(^ {46}\) and transsexuals\(^{47}\) in the context of labour law is prohibited unless the employer can, demonstrate that sexual orientation is linked to the employee’s inherent requirement of the job. Perhaps Kenya should take lead from this or perhaps seek to adopt this legal position in employment law.

Accordingly, this paper recommends that the term “sexual orientation” be inserted in the provision as one of the prohibited ground against discrimination after the ground of “colour”. Accordingly, the provision should read as follows:


\(^{44}\) In Minister of Home Affairs v Fourie (2006) 1 SA 524 (CC), the South African Constitutional Court extended the right to marry to same-sex couples, finding that ‘the exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society.

\(^{45}\) Allpass v Mookloof Equestrian Centre (2011) 32 ILJ 1637 (LC).

\(^{46}\) Langenaat v Minister of Safety & Security (1998) 19 ILJ 240 (T).

\(^{47}\) Atkins v Datacentrix (Pty) Ltd (2010) 31 ILJ 1130 (LC).
no employer [may] [unfairly] discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee “(a) on [one or more grounds] [including] …… colour, [sexual orientation] ….

3.6 **Insertion of the Phrase “Pregnancy or Intended Pregnancy or Any Reason Related to Pregnancy” as a Listed Ground in Section 5 (3) (a) Employment Act**

Section 5 (3) (a) Employment Act expressly list discrimination based on pregnancy as unfair. However, this paper observes that the scope of protection in relation to the condition of pregnancy as it is currently is not adequate.

It is common knowledge that pregnant women suffer from a variety of common natural symptoms of pregnancy including morning sickness, tiredness and fatigue. While the symptoms do not affect all women in the same way, these natural symptoms will have a negative effect on average on the way in which an employee performs their everyday jobs. As a result, the closer the pregnancy is to the due date of the delivery the less energetic the woman will become. Therefore, wording the provision section 5 (3) (a) in this manner would expand the protection to women after they have delivered their child. It would also be vital to safe guarding the interests and wellbeing of the mother and child, and applies to a reasonable time period both before and after birth.

This paper recommends that the provision of section 5 (3) (a) of the Employment Act should be amended to allow for a wider protection by inserting the phrase “intended pregnancy” or “any reason related to pregnancy.” This would allow for the protection provided within the section to encompass women that are on maternity leave. Similarly, the insertion of the phrase “intended pregnancy” would assist in guarding against the situation where an employee has expressed the desire to become pregnant, and is then treated prejudicially on this basis by the employer. The words “any reason related to her pregnancy” will cast a wider net to protect pregnant and post-pregnant employees.
3.7 Insertion of the Term [gender or Gender Identity] Immediately After the Word “Sex”

The right to equal treatment for men and women is an important objective of labour policy in Kenya. Specifically, unfair gender-based discrimination is unlawful in Kenya. Generally, the term ‘sex’ means the biological classification or difference between women and men naturally assigned at birth on account of outside appearance. Conversely, ‘gender’ includes a social and cultural difference as opposed to biological one. Discrimination based on gender or gender identity may manifest in different forms at the workplace. For instance in terms of the payment of remuneration, access to managerial positions, benefits associated with maternity and paternity leave, family responsibilities amongst others. Moreover, it has been observed in other jurisdictions that discrimination or exclusion on the basis of gender still exists in the workplace over and above stereotypes regarding the categories of work that is considered “appropriate” for men and women.

International law plays an important role in the development of Kenyan legal system. As noted above, the Constitution of Kenya expressly recognises international law as one of the sources of law in Kenya. The country is a signatory to a number of fundamental Conventions and Declarations concerned with the right to gender equality and the prohibition of discrimination. These include the Convention on Elimination of all Forms of Discrimination Against Women, 1979, the Copenhagen World Conference Programme of Action, 1980 which emphasises on the need for women to participate in the development process as both experts and beneficiaries as well as the Beijing Declaration and Platform for Action,

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50 Article 2 (5) of the Constitution. See also John Kabui Mwai v Kenya National Examination Council (2011) 6 HC, Okwanda v The Minister of Health and Medical Services (2012) HC and Re The Matter of Zipporah Wambui Mathara (2010) eKLR. Kenya has been a member of the ILO since 13 January 1964 and continues to perform its obligation as a member State.


1995 in which affirmative action is identified as an essential strategy for gender mainstreaming. Consequently, an obligation emanates from these instruments to comply with international rules through the introduction of legislation protecting individuals against discrimination as well as additional measures to progressively eliminate discrimination.

The Draft National Gender Equality and Women’s Empowerment Policy gives effect to the Constitution by promoting gender equality and the realisation of equal opportunities for women and men. This includes ensuring that both women and men have equal opportunity to contribute and benefit equally from, political, social, cultural and economic development. Consequently, the Employment Act should explicitly prohibit gender discrimination in the workplace. In the workplace, this form of discrimination may occur where an employer applies a policy or practice of paying female employees at a lower scale exclusively because they are women, whereas male employees doing the same work are salaried at a higher scale.

The paper recommends for the insertion of the word “gender or gender identity” immediately after the word “sex”. In other words, it should read as follows: “no employer [may] [unfairly] discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee “(a) on race, sex, [gender or gender identity]…”

### 3.8 Insertion of the Phrase “or on Any Other Arbitrary Ground” Immediately after the Word “Birth”

The Employment Act states firmly that the “employer shall bear the burden of proving that the discrimination did not take place as alleged and that the discriminatory act or omission is not based on any of the grounds specified in this section.” But the question is; what happens when an employee alleges discrimination on a ground not specified in section 5 (3) (a) of the Act but which is analogous to the mentioned grounds. In other words, what happens if an employee or job applicant alleges discrimination on a ground that is arbitrary in nature and which has attributes to potentially impair his or her fundamental human dignity or has the potential to affect him or her adversely in comparison with other employees

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54 Section 5 (7) of the Employment Act.
or job seekers? An arbitrary ground may include conduct which is capricious or which emanates from an irrational notion and not justifiable.

This paper proposes the insertion in the provision the phrase “on an arbitrary grounds” immediately after the word “birth” in order to give a complainant an opportunity to rely on ‘any other arbitrary ground’ not listed in section 5 (3)(a). Therefore, the provision should read as follows:

no employer [may] [unfairly] discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee “(a) on [one or more grounds]…… colour, [sexual orientation], birth or [on an arbitrary grounds].

Accordingly, any employment policy or practice which unfairly discriminates an employee or job applicant on any of the listed grounds or “any other arbitrary ground” will not be permitted.

4. Section 46 (g) Employment Act

Currently, section 46 (g) of the Employment Act stipulates that an employee’s race, colour, tribe, political opinion or affiliation, national extraction, sex, religion, nationality, social origin, marital status, HIV status or disability will not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty. This paper observes that should the amendment to section 5 (3) (a) Employment Act go through, the legislature will have to consider amending this provision as well to create consistency with 27 (4) of the Constitution.

5. Conclusion

The paper has provided a critical evaluation of section 5(3) (a) Employment Act, 2007 and the proposed amendment. It is evident from the proposed amendment that the Employment Act is still underdeveloped. The proposed amendment to section 5 of the Employment Act seeks to bring the provision in line with Article 27 (4) of the Constitution and tailor the right against discrimination in the workplace. Be that as it may, the provision still suffers the same deficiencies as those contained in Article 27 (1) of the Constitution in respect of non-inclusion of important grounds such as ‘sexual orientation’ and ‘gender’. Besides, a close reading of the above provision discloses that it has the effect of providing a closed list of grounds and in that way limits allegations of unfair discrimination to only
those grounds specified or listed therein. The insertion of terminologies such as ‘including’, ‘one or more grounds, or ‘or any other arbitrary ground’ would significantly cure the deficiencies by making it clear that the listed grounds are not intended to be exhaustive. This would widen the scope of the provision to allow employees and job applicant to allege discrimination on grounds not listed. A further problem is that although the Employment Act outlaws both direct and indirect discrimination, the Act fails to provide a definition of what ‘direct’ and ‘indirect’ means. This paper recommends that the legislature should define these key terms. Another problem is that the Employment Act does not define the term ‘unfair discrimination’. Arguably, this lacuna in law does contribute to the current fragmented protection against unfair discrimination in the workplace.

In order to further protect employees against unfair discrimination, this paper recommends that section 5 of the Employment Act should be amended in subsection (3) by deleting paragraph (a) and substituting therefor with the following more broad and all-inclusive paragraph:

No employer [may] [unfairly] discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee “(a) on [one or more grounds] [including] race, sex, [gender], pregnancy, marital status, health status, ethnic or social origin, colour, [sexual orientation], age, disability, religion, conscience, belief, culture, dress, language or birth [or any other arbitrary ground].

The paper observes that the above paragraph if accepted would represent further progress in addressing the gaps and inadequacies that currently exists in scope of protection against discrimination. Consistent with Article 261 (1) of the Constitution, the legislature should take positive action to extend protection from discrimination to a wide range of grounds in an attempt to prohibit discrimination in the workplace.55 Altogether, it is hoped that the recommendations and suggestions made in this paper will provide insight that will strengthen labour relations in Kenya. It remains to be seen how progressive the judiciary in particular the Employment and Labour Relations Court will interpret the provision. The paper hopes that the analysis has provided some insight necessary in developing the Kenyan unfair discrimination jurisprudence.

55 See also Schedule Five of the Constitution of Kenya 2010.