

The Law and the Working Environment in Kenya*

Francis D. P. Situma**

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I . Introduction

The question of optimization of the working environment is as old as humanity. Ever since man emerged from the Stone Age, the use of metals and chemicals has come to cover a wide spectrum of his activities. Metals and chemicals are so much a part of everyday modern life that it is not easy to know where they begin and end. Metals or their ores have first to be extracted from the earth and then smelted and refined to convert them into a state suitable for fabrication. They may be combined with others

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** Professor of University of Nairobi

in the form of alloys or their salts may be chemically treated for a variety of purposes from pigments to plastics. Their manufacture or conversion into various products expose workers to the accidents of handling and the health and safety hazards of noise, vibrations, heat, dust and fumes associated with particular chemicals used or the many other substances which are essential or ancillary to the processes involved.

These health and safety hazards and problems manifest themselves also in non-metallic processes, such as food processing and other activities essential to the economic welfare of man and the development of his society. The need for the prevention of health and safety hazards and the protection of workers against these risks in their working environment is an issue that has been under active consideration by the international community and individual states for a long time.¹⁾ Indeed, the safety and health of the working environment is now a fundamental human right in both international law and the domestic laws of several states. For instance, Article 7 of the 1966 International Covenant on Economic, Social and Cultural Rights²⁾ affirms the States Parties' recognition of the right of everyone to the enjoyment of just and favourable conditions of work which ensure, inter alia, safe and working conditions.

The basic goal has been the establishment of legal and institutional frameworks that enhance the health, safety and general welfare of workers. Indeed, the working environment has received, and continues to receive,

1) The International Labour Organisation (ILO), a specialized agency of the United Nations, has, since its establishment in 1919, been involved in the improvement of the working conditions in which all human beings are able to pursue their material well-being and spiritual development in freedom and dignity, economic security and equal opportunity.

2) 993 UNTS 3. Entered into force January 3, 1976.

more and more attention from public authorities, employers and workers, first, because of the realization that man spends about three-quarters of his active life in his working environment and, second, because the working environment has complex physiological, psycho-social and economic implications on the workers.

This article gives an overview of Kenya's legal regime on the regulation of the working environment. It takes a historical approach to the development of the region.

Until 2007, the Kenyan legal regime for the control and prevention of health and safety hazards associated with the working environment was constituted mainly by the Factories Act,³⁾ as amended in 1990.⁴⁾

II . The Factories Act

First enacted in 1950⁵⁾ by the colonial government, the Factories Act was modeled upon the United Kingdom Factories Act of 1937,⁶⁾ and made provision for the health, safety and welfare of persons employed in factories and other places of work. The Act applied to all factories and other places of work including factories and other places of belonging to or in the occupation of the government or a local authority or other public body and to building operations and works of engineering construction undertaken

3) Chapter 514, Laws of Kenya (Revised Edition, 1972).

4) See the Factories Act of 1937 was itself repealed and replaced by the Factories Act, 1961 (9 & 10 Eliz. 2c.34).

5) Ordinance No. 38 of 1950.

6) The UK Factories Act of 1937 was itself repealed and replaced by the Factories Act, 1961 (9 & 10 Eliz. 2c.34).

by or on behalf of the government or local authority or their public body.⁷⁾ Section 5 of the Act gave a very comprehensive interpretation of the term “factory”. It meant any premises in which, or within the close or cartilage or precincts of which, persons were employed in manual labour in any process for or incidental to (a) the making of any article or part of any article, or (b) the altering, repairing, ornamenting, furnishing, cleaning, or washing, or the breaking up or demolition, of any article, or (c) the adopting for sale of any article. These activities must be carried in such premises by way of trade or for purposes of gain and the employer of the persons engaged in such activities must have the right of access or control over the premises. The following premises, in which persons are employed in manual labour, were also factories and other places of work for the purposes of the Act, namely,

(i) any yard or dry dock (including the precincts thereof) in which ships or vessels are constructed, reconstructed, repaired, refitted, finished or broken up;

(ii) any business in which the business of washing or filling bottles or containers or packing articles is carried on incidentally to the purposes of any factory;

(iii) any premises in which the construction, reconstruction or repair of locomotives, vehicles or other plant for use for transport undertaking or other industrial or commercial undertaking, not being any premises used for the purpose of housing locomotives or vehicles where only cleaning, washing, running repairs or minor adjustments are carried out;

(iv) any premises in which printing by letterpress, lithography, photogravure or other similar process or bookbinding, is carried on by

7) Supra, note 3, section 2(2).

way of trade or for purposes of gain or incidentally to another business so carried on;

(v) any premises in which mechanical power is used in connection with the making or repair of articles of metal or wood incidentally to any business carried on by way of trade or for purposes of gain;

(vi) any premises in which articles are made or prepared incidentally to the carrying on of building operations or works of engineering construction, not being premises in which operations or works are being carried on;

(vii) any premises in which persons are regularly employed in or in connection with the generating, transformation or transmission of electrical energy or motive power of any kind for supply by way of trade, or for supply for the purposes of any industrial or commercial undertaking or of any public building or public institution, or for supply to streets or other public places;

(viii) any premises in which mechanical power is used for the purposes of or in connection with a public water supply;

(ix) any sewage works in which mechanical power is used, and any pumping station used in connection with any sewage works.

Premises operated and/or managed by local authorities and state corporations, such as the Kenya Railways Corporation workshops, Kenya Meat Commission, Kenya Ports Authority and the Export Processing Zones Authority also came within the ambit of the Act.

Certain other places were deemed to be part of a factory or a separate factory for purposes of the Act. Any line or siding (not being part of a railway) which was used in connection with and for the purposes of a factory was deemed to be part of the factory, and if such place was made in connection with more than one factory belonging to different occupiers,

then the line or siding would be deemed to be a separate factory.⁸⁾ Besides, any workplace in which two or more persons were permitted by the owner or occupiers to carry on any work which would constitute their workplace a factory if the persons working therein were in the employment of the owner or occupier would be deemed to be a factory for the purposes of the Act.⁹⁾ Further, the Act made it clear that premises in which the above activities were carried on would not be excluded from the definition of a factory by reason only that they were open air premises,¹⁰⁾ thereby bringing under the regime for the control and prevention of health and safety hazards, the informal sector, popularly known as “jua kali”.

The Act was then set out in a number of substantive parts that dealt with registration of factories, health, safety, welfare in general and special provisions, and administration and enforcement.

1. Registration of Factories

Section 7 of the Act required the chief inspector of factories to keep a register of factories in which would be entered such particulars in relation to every factory as he considered necessary or desirable. Occupiers of existing factories at the date of commencement of the Act, that is, 1st September 1952, were required to apply for registration within one month after such commencement, by submitting to the chief inspector information in the prescribed form.¹¹⁾ Before any premises which were not previously

8) Ibid., section 5(2).

9) Ibid., section 5(3).

10) Ibid., section 5(6).

11) Ibid., section 8.

used or occupied as such were to be used or occupied as a factory, the user or occupier was required to apply to the chief inspector of factories, in the prescribed form, for registration.¹²⁾ It was an offence to occupy for use as a factory any premises which were not so registered.¹³⁾

With effect from the 1st January 2006, the provisions of the Act relating to the registration of factories were amended so as not to apply to small or medium size enterprises, defined to mean factories whose number of employees did not exceed fifty.¹⁴⁾

2. Health at Work

The general requirement regarding the health of workers was that every factory must be kept in a clean state and free from effluvia arising from any drain, sanitary convenience or nuisance.¹⁵⁾ In particular, accumulations of dirt and refuse were to be removed daily by a suitable method from the floors and benches of workrooms, staircases and passages; the floor of every workroom was to be cleared at least once every week by washing or by sweeping or any other method, if the latter was effective and suitable; and all inside walls and partitions, and all ceilings or tops of rooms, and all walls, sides, and tops of passages and staircases were required to be washed with hot water and soap once every year, repainted or revarnished at least once every five years where they were kept painted with oil paint or varnished, and in other cases whitewashed or colourwashed at least once

12) *Ibid.*, section 9(1).

13) *Ibid.*, section 9(2).

14) See The Statute Law (Miscellaneous Amendments) Act, No. 2 of 2006.

15) *Supra*, note 3, section 13.

in every year.¹⁶⁾

A factory was not, while work was carried on, to be so overcrowded as to cause risk of injury to the health of the workers therein.¹⁷⁾ A factory was deemed to be overcrowded if the number of persons employed at a time in any workroom was such that the amount of cubic space allowed for every person employed was less than ten cubic meters.¹⁸⁾

Effective and suitable provision was made for securing and maintaining adequate ventilation of each workroom.¹⁹⁾ Further, effective provision was required to be made for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of a factory in which persons were working or passing.²⁰⁾

Where any process was carried on which rendered the floor liable to be wet to such an extent that the wet was capable of being removed by drainage, effective means were to be must be provided and maintained for draining off the wet.²¹⁾ Besides, sufficient and suitable sanitary conveniences, affording proper separate accommodation for persons of each sex, must be provided, maintained and kept clean for use by the factory workers; and effective provisions were to be made for lighting the conveniences.²²⁾

16) Ibid.

17) Ibid., section 14(1).

18) Ibid., section 14(2).

19) Ibid., section 15(1).

20) Ibid., section 16(1).

21) Ibid., section 17.

22) Ibid., section 18.

3. Safety at Work

The essence of the provision of the statute was to ensure that the owner or occupier of a factory provided a safe workplace and that the tools, plant and other equipment used by the workers were not only suitable for the task, but were also safe. The general requirement was that every dangerous machinery or part of any machinery must be securely fenced unless it was in such a position or of such construction as to be safe to every person employed or working in the factory as it would be if securely fenced. Detailed provisions were made regarding the safety of different types of machinery, such as water wheels, turbines, transmission machinery shafts and sumps.²³⁾

Special precautions were required where work was to be carried out in places where dangerous fumes were liable to be present or where explosives or inflammable gas or dust was likely to accumulate.²⁴⁾ There was to be provided adequate means of egress from places where dangerous fumes were liable to be present and persons working there were not only to wear suitable breathing apparatus, but also had to be provided with suitable reviving apparatus. More importantly, persons were to enter such places only with the written authorization of the occupier, a requirement that imposed a contractual obligation on the occupier to ensure the safety of the workers. Where explosive or inflammable dust or gas was produced during any grinding, sieving or other process, all practicable steps were to be taken to prevent explosion by enclosure of the plant used in the process and by removal or prevention of accumulation of the dust, and by exclusion

23) *Ibid.*, sections 21–32, inclusive.

24) *Ibid.*, sections 35 and 36.

or effective enclosure of possible sources of ignition. It should be noted, though, that the use of words “all practicable steps” means that the duty of the owner or occupier of the factory was not absolute. He had to weigh, on the one hand, the time, the inconvenience, the trouble and the expense of discharging that duty against the risks involved and the nature and scope of the obligations, on the other. Besides, the duty was only to be performed against the background of current knowledge and technology which the employer had or was expected to have.

The statute contained provisions regarding the construction, fittings, and use of steam boilers, steam receivers and steam containers, as well as air receivers and their attachments and accessories and cylinders for compressed, liquefied and dissolved gases, to ensure the safety of their operators and other workers.²⁵⁾

In every factory, there was to be provided and maintained readily accessible adequate and suitable means for extinguishing fire; persons trained in the correct use of such means were to be present during all working periods.²⁶⁾ Detailed provisions were specified in relation to the storage, labeling, conveying, and treatment of highly inflammable liquids.²⁷⁾ The essence of the provisions was to prevent fire outbreaks and to provide adequate and safe means of escape in the event of a fire outbreak. Where an accident occurred in a factory, premises, and place of work or location resulting in the disablement of any person for more than three days or causing loss of life, notice of such an accident was to be sent in writing to an inspector forthwith.²⁸⁾ Where the disabled person died subsequent

25) Ibid., sections 37–39A.

26) Ibid., section 41.

27) Ibid., section 42.

to the notification, the employer was to notify the inspector, in writing, of such death as soon as it came to his knowledge.²⁹⁾ Also be notified to the inspector were specific dangerous occurrences, whether or not they resulted in disablement or death.³⁰⁾ These occurrences included bursting of a revolving vessel, wheel, grindstone or grinding wheel moved by mechanical power, collapse or failure of a crane, derrick, winch, hoist or other appliance used in raising or lowering persons or goods; explosion or fire causing damage to the structure of any room or place or to any plant or machine resulting in the complete suspension of ordinary work therein or thereat for at least five hours; explosion of a receiver or container used for the storage of any gas or gases; and the accidental or other escape or leakage of dangerous toxic gases, fumes, liquids or substances injurious to health. These occurrences were to be notified to the inspector of factories because their effect was to render the environment unsafe for the workers and other people lawfully present on the premises.

4. Welfare at Work

Besides health and safety, the welfare of workers is critical to their dependability and productivity in their workplace. For the welfare of workers, the statute required that there must be provided and maintained adequate supplies of wholesome drinking water, whether laid on or contained in vessels. In the latter case, the supply was to be renewed at least daily and the water and vessel must be preserved from contamination.³¹⁾ There

28) *Ibid.*, section 43(1).

29) *Ibid.*, section 43(2).

30) *Ibid.*, section 44.

were to be provided and maintained adequate washing facilities, which were to be not only conveniently accessible, but also kept in clean and orderly condition.³²⁾

There was to be provided and maintained adequate and suitable accommodation for clothes not worn during working hours and for changing clothes where necessary.³³⁾ Rest facilities were to be provided, with suitable arrangements for sitting of all female workers whose work was done standing, sufficient to enable them to take advantage of opportunities for resting in their course of their employment.³⁴⁾ Further, there was to be provided, maintained and made readily accessible, a first aid box or cupboard of the prescribed standard (and an additional one where there were more than one hundred and fifty workers), equipped with appliances or requisitions for first aid and placed under the charge of a responsible person readily available during working hours, save where an ambulance room was provided at the factory for immediate treatment of injuries occurring therein.³⁵⁾

5. Special Health, Safety and Welfare Provisions

Generally, these provisions were designed to cater for the ambient environment rather than for the factory premises only. Activities within the factory premises are liable to have deleterious effects on the general environment. Accordingly, section 51(1) of the statute required that where any dust or fumes or other impurity of such a character and to such an

31) Ibid., section 46.

32) Ibid., section 47.

33) Ibid., section 48.

34) Ibid., section 49.

35) Ibid., section 50.

extent as to be likely to be injurious to workers, or any substantial quantity of any dust was produced or given off in connection with any process carried on in a factory, the same “shall not be allowed to enter into the atmosphere without undergoing appropriate treatment to prevent air pollution or other ill-effect to life and property”.

Persons would not be permitted to partake food or drink in any room where any poisonous or otherwise injurious substance was so used as to give rise to any dust or fume.³⁶⁾ Containers filled with hazardous substances were to be plainly painted, marked or labeled in a distinctive manner so as to be readily identifiable; they were also to be accompanied with instructions for safe handling of their contents.³⁷⁾

In factories where workers were employed in processes involving exposure to wet or to any injurious or offensive substance, suitable personal protective clothing and appliance were to be provided and maintained for the use of such workers to protect them from risks to their health or safety.³⁸⁾ This statutory requirement received judicial interpretation in the case of *East Africa Oil Refineries Ltd vs. Republic*.³⁹⁾ The appellant was convicted by the magistrate’s court of causing death of a worker through contravention of sections 53 and 75 of the statute. The conviction was upheld by the High Court and its appeal to the Court of Appeal was dismissed. The facts were that on the night of March 27/28, 1979, an employee of the appellant at its oil refinery in Mombasa died as a result of inhaling hydrogen sulphide while working at the top of the slop (or waste) tank about 11 meters high.

36) Ibid., section 52.

37) Ibid., section 52A.

38) Ibid., section 53.

39) [1981] KLR 108.

The death was alleged to have occurred as consequence of the failure of the appellant to provide the deceased with a breathing appliance in contravention of its duty under section 53 of the statute. The deceased was engaged in dip testing the air tank, a periodical task that was carried out at regular intervals when the automatic gauge was not working or had to be checked. The task involved opening the hatch cover on top of the tank and doing a dip test of the contents thereof and recording the results in a note book, a ten minute task. There was evidence that all the employees had been trained not only in maintaining safe working conditions, but also in the knowledge that hydrogen sulphide is found in crude oil in small quantities and when found in amounts in excess of 20 ppm it is dangerous and can be lethal.

The question before the Court of Appeal was whether the deceased was employed in any process involving exposure to any injurious substances and whether suitable breathing apparatus was provided and maintained for the use of the deceased as required by section 53 of the statute. The Court of Appeal held that where the question was whether, for the purposes of factory legislation, a machine was dangerous or a structure was unsafe or a process was accompanied by a risk of injury, the test was one of foreseeability. It stated:

The test is objective and impersonal. The question is not whether the occupier of the factory or anyone else knew that the process was dangerous or thought it was safe; nor whether previous accidents had occurred; nor whether the victim of the accident had, or had not, been contributorily negligent. The question is ... to be approached by an examination of the process and of the plant and its working.

Applying the test, the Court reached the conclusion that the appellant owed a duty to the deceased employee under section 53 of the statute.

With respect to second limb of the question, the Court found that the appellant had provided and maintained breathing apparatus, but that the same could not be used without a supervisor's knowledge or authority and that the workers were not to use breathing apparatus for dipchecks in a "safe" area. The court held that the appellants had complied with section 53 save for the prohibition: a safety appliance is not deemed to be provided if its use is prohibited or is subject to certain restrictions.

Where workers were engaged in processes such as dry grinding of metals, turning of non ferrous metals or cast iron, welding or cutting of metals by means of an electrical or oxyacetylene or similar process, the chipping or scaling of boilers or ships' plates, or breaking or dressing of stone, concrete or slag, using hand tools or other portable tools, their employer was to provide suitable goggles or effective screens to protect the workers' eyes.⁴⁰⁾ Screening or other suitable means was to be provided in any factory where electric arc welding was carried on in order to prevent workers from being exposed to the electric arc flash.⁴¹⁾

6. Administration and Enforcement

The overall responsibility for supervising and administering the law in the working environment lay with the chief inspector of factories, although the enforcement of the Act relating to the sanitary conveniences was the responsibility of the local authorities.⁴²⁾ The chief inspector was assisted

40) *Supra*, note 3, section 54(1).

41) *Ibid.*, section 54(2).

by several inspectors appointed under the Act.⁴³⁾ The chief inspector and other inspectors had several powers, for the purposes of giving effect to the statutory provisions, including powers to:

(a) enter, inspect and examine, at any time, a factory and any part thereof when he had reasonable cause to believe that any person was employed therein, and by day, any place which he had reasonable cause to believe was a factory and any part of any building of which a factory formed part and which he had reasonable cause to believe that explosive or highly inflammable materials were stored or used;

(b) take with him a police officer if he had reasonable cause to apprehend any serious obstruction in the execution of his duty;

© require production registers, notices, certificates and documents kept pursuant to the Act and to inspect, examine and make copies of the same;

(d) make such examination and inquiry as would be necessary to ascertain compliance with the Act; and

(e) require any person found in a factory to give such information regarding the occupier of the factory.

The inspector was also empowered to serve improvement notices in cases of contravention of the statute, or prohibition notices where activities carried on or about to be carried on in a factory involved or were likely to involve a risk of serious personal injury.⁴⁴⁾ Further, an inspector was empowered to prosecute, conduct or defend before a magistrate's court any charge, information, complaint or other proceeding under the statute or in the

42) Ibid., section 67.

43) Ibid., section 68.

44) Ibid., section 69A & 69B.

discharge of his duty as inspector.⁴⁵⁾

Further, the statute required every factory which regularly employed at least twenty workers to have a safety and health committee on which both the employer and the workers were represented.⁴⁶⁾ The Minister did, in 2004, promulgate rules prescribing the organization, function and activities of the safety and health committees. It is apparent that such committees played an important role in the implementation and enforcement of the provisions of the statute through the creation of awareness of the respective rights and duties of the employers and workers in fostering health, safety and welfare in the working environment. The composition of the committees encouraged mutual consultations over a wide range of issues that would lead to the making and maintenance of arrangements for effective co-operation in the promotion and development of measures to ensure the health and safety at work of employees and checking the effectiveness of those measures. Besides facilitating the provision of health and safety information, the committees would also be instrumental in the planning and organization of health and safety training, the health and safety consequences of new technologies and working arrangements, the investigation of potential hazards and dangerous occurrences in the workplace, as well as the investigation of complaints by employees relating to their health, safety or welfare at work. Furthermore, the committees would also sensitize the workers in respect of their statutory duties not to willfully interfere with or misuse any means, appliances, convenience or other thing provided for securing the health, safety or welfare of workers in the factory, to use the

45) *Ibid.*, section 70.

46) *Ibid.*, section 65A and The Factories and Other Places of Work (Safety and Health Committees) Rules, 2004; Legal Notice No. 31 of 2004.

means or appliance provided to secure their health or safety, and not to willfully and without reasonable cause do anything likely to endanger themselves or other persons while at work.

Any contravention or violation of the provisions of the statute amounted to an offence punishable by the imposition of a fine or imprisonment or both.⁴⁷⁾ The general penalty was a fine of not more than ten thousand shillings (approximately USD 100) and a jail term of not more than three months, and, if the contravention in respect of which the person was convicted continued after the conviction, the person would be guilty of a further offence and liable in respect thereof to a fine not exceeding one thousand shillings (USD 10) for each day on which the contravention continued.⁴⁸⁾

Where any person was killed, died, or suffered any bodily injury due to the contravention of the statute by the occupier or owner of a factory, then, without prejudice to any other penalty, the occupier or owner would be liable to a fine not exceeding twenty thousand shillings (USD 200) or, in default of payment, to imprisonment for a term not exceeding six months.⁴⁹⁾

Several categories of subsidiary legislation were promulgated for the better implementation of the statute. The legislation applied to factories in which woodworking material and cellulose materials were used;⁵⁰⁾ the process of loading, unloading, moving and handling goods in, on or at any dock;⁵¹⁾ the provision of first-aid boxes or cupboard and contents thereof in every factory;⁵²⁾ the provision of suitable protective eye gear for workers

47) *Supra*, note 3, section 72.

48) *Ibid.*, section 73.

49) *Ibid.*, section 75.

50) The Factories (Wood Working Machinery) Rules; Legal Notice No. 431 of 1959.

51) The Factories (Docks) Rules, Legal Notice No. 306 of 1962.

engaged in specific activities and processes;⁵³⁾ and permissible noise levels in certain factories, premises, places and operations.⁵⁴⁾

7. The Occupational Safety and Health Act, 2007

In October 2007, Parliament enacted the Occupational Safety and Health Act⁵⁵⁾ that provided for the safety, health and welfare of workers and all persons lawfully present at workplace. The Act also established a National Council for Occupational Safety and Health.⁵⁶⁾ The Act is broader in scope than the Factories Act, that it repealed and replaced, as it extends to every workplace, including land, vessels, offices and academic institutions.⁵⁷⁾ Its stated purpose is two-fold, namely, first, to secure the safety, health and welfare of persons at work and, second, to protect persons other than persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work.⁵⁸⁾ The Act establishes codes of practice for use at workplaces, specifies obligations placed on employers, employees, self-employed persons, designers, manufacturers and importers with regard to articles and substances used at work in order to ensure a safe and healthy workplace.⁵⁹⁾ The substantive provisions, with respect to

52) The Factories (First Aid) Rules; Legal Notice Nos. 666 of 1963, 160 of 1970, and 11 of 1984.

53) The Factories (Protection of the Eyes) Rules; Legal Notice No. 44 of 1978.

54) The Factories and Other Plans of Work (Noise Prevention and Control) Rules; Legal Notice No. 296 of 1996.

55) Act No. 15 of 2007.

56) *Ibid.*, section 27.

57) *Ibid.*, section 2.

58) *Ibid.*, section 3.

59) *Ibid.*, section 12–18 and 21.

the registration of workplaces, health, safety and welfare are, practically, the same as those of the repealed Factories Act. However, special provisions are made in respect of machinery safety, chemical safety, and special applications, all of which were designed to bring the law in tune with the current developments and improve the terms and conditions of workers.⁶⁰⁾

Part III of the Act containing the administrative provisions, establishes the institution of the Director of Occupational Safety and Health Services who is responsible for the administration of the statute,⁶¹⁾ and the National Council for Occupational Safety and Health.⁶²⁾ The Council, whose membership is drawn from various stakeholders, is tasked with, *inter alia*, advising the government on the formulation and development of a national occupational safety and health framework, and on legislative proposals on occupational safety and health, including ways and means to give effect to ILO Conventions and other international legal instruments relating to occupational safety, health, compensation and rehabilitation services.⁶³⁾ The Council, which is the successor to the National Advisory Committee on Occupational Health and Safety that existed under the former statute, became operational in January 2008. Although its jurisdiction is basically advisory, the Council has worked with the Safety and Health Committees to create awareness by promoting education and training in occupational safety and health.

60) *Ibid.*, sections 55–72, 83–90 inclusive, and the Sixth, Seventh and Eighth Schedules.

61) *Ibid.*, section 23.

62) *Ibid.*, section 27.

63) *Ibid.*

III. Other Legislation Affecting the Work Environment

There are other statutory provisions that directly and indirectly impact the working environment in Kenya. We only highlight the relevant provisions.

Under Chapter XVII of the Penal Code⁶⁴⁾ headed “Nuisances and Offences Against Health and Convenience”, there appear provisions which clearly touch on the working environment and have prohibition against common nuisances in or around dwelling and business premises, spreading of infections or substances noxious to health, and fouling of water and air.⁶⁵⁾

The Radiation Protection Act⁶⁶⁾ provides for the protection of the public and workers from the health risks associated with the use of devices or materials capable of producing ionizing radiation. The Act provides that the standards of radiation protection to be observed for the purposes of the statute shall be either those publicized under it or “any guidelines established and publicized by the International Commission of Radiological Protection, the International Atomic Energy Agency or the World Health Organization”.⁶⁷⁾ The statute creates a licensing procedure, administered by the Radiation Protection Board, for the manufacture, ownership, sale, purchase, acquisition, importation, exportation, storage, use or disposal of irradiating devices, radioactive materials, or any other source of ionizing radiation,⁶⁸⁾ and imposes duties on a licensee with respect to the management and use of such devices and materials with a view to protecting public

64) Chapter 63, Laws of Kenya (Revised Edition, 1985).

65) *Ibid.*, sections 175, 186 and 191–193, inclusive.

66) Chapter 243, Laws of Kenya (Revised edition, 1985).

67) *Ibid.*, section 3(3).

68) *Ibid.*, section 11.

health and safety from radiation hazards.⁶⁹⁾ Besides, the owner of a radiation facility is required to appoint a radiation safety officer who is responsible for safety and health within the facility and to ensure, *inter alia*, that all persons using, working or employed in the facility are given proper instructions on safety measures, supplied with protective equipment, and receives biannual medical check-ups.⁷⁰⁾

The Radiation Protection (Standards) Regulations⁷¹⁾ have set specific dose equivalent limits, monitoring and medical surveillance requirements in order to facilitate the implementation of the principal legislation. There are different dose equivalent limits in respect of radiation workers, women in reproductive capacity, members of the public, students and teaching staff and technicians in educational institutions.⁷²⁾

The Occupiers Liability Act⁷³⁾ amends the common law in respect of the liability of the occupier and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there. Section 6 of the Act is particularly relevant because, generally, workers will be present on an owner's or occupier's premises pursuant to a contract of employment. Under the provisions of this section, the duty owed to the workers in respect of dangers to the state of the premises or any fixed or movable structures thereon is the common duty of care. Accordingly, if the worker had prior warning of the danger, the occupier will be absolved from liability only if it can be proved that in all the circumstances, the

69) *Ibid.*, section 12(1)

70) *Ibid.*, section 12(2).

71) Legal Notice No. 54 of 1986.

72) *Ibid.*, Regulations 4-5 and 8-11, inclusive.

73) Chapter 34, Laws of Kenya (Revised edition, 1980).

warning was enough to enable the workers to be reasonably safe. If, on the other hand, the danger was due to the fault of an independent contractor, the occupier will not be answerable if, in all the circumstances, he had acted reasonably in entrusting the work to the independent contractor and had taken such reasonable steps to satisfy himself that the contractor was competent and that he had done the work properly.

The Public Health Act⁷⁴⁾ defines nuisances on land and premises and empowers public health authorities, including local authorities, to deal with such conditions. Such nuisances include noxious matter or waste water being discharged in water courses, pollution of water sources and supplies meant for domestic consumption, smells or effluvia emanating from factories or trade premises and which are offensive or injurious or dangerous to health, and smoke sent forth from chimneys in such quantity or manner to be offensive or injurious or dangerous to health.⁷⁵⁾ In so far as these provisions deal with pollution arising from factories, industrial or manufacturing establishments, they impact the working environment. The prevention or control of the nuisances will entail changes in the structural set-up of the establishment or their *modus operandi*. It is the duty of local authorities and the Minister to maintain cleanliness and prevent nuisances and to prevent or remedy danger to health from unsuitable dwellings and factory or trade premises.⁷⁶⁾

The Employment Act 2007⁷⁷⁾ does, *inter alia*, define the fundamental rights of employees and provides basic conditions of employment of

74) Chapter 242, Laws of Kenya (Revised edition, 1986).

75) *Ibid.*, section 118(1).

76) *Ibid.*, sections 116 and 117.

77) Act No. 11 of 2007.

employees. The provisions relating to hours of work, annual leave, maternity leave, sick leave, housing, as well as the requirements for the provisions of weekly rent, sufficient supplies of wholesome potable water at the place of work, food (where expressly agreed to in the contract of service), and medical attention,⁷⁸⁾ have the essence of creating a conducive working environment.

The Regulation of Wages and Conditions of Employment Act⁷⁹⁾ establishes wages advisory boards and wages councils for the regulation of remuneration and conditions of employment. The basic function of the boards is to enquire, at the minister's behest, into matters of the minimal wages, regulation of wages and other conditions of employment with respect to any or all categories of employees, either generally or in such areas as may be specified by the Minister.⁸⁰⁾ The wages councils are established by the Minister where he is of the opinion that no adequate machinery exists for the effective regulation of the remuneration or other conditions of employment of the employees in any trade, industry or occupation. The powers and functions of the councils may, as provided in the statute, be exercised in relation to employees in any trade, industry or occupation, either generally or in any area of Kenya and in relation to any class of such employees,⁸¹⁾ save those in the civil service.

A perusal of the statute and the several sets of subsidiary legislation promulgated thereunder shows, however, that the basic concern of the statute is matters related to minimum wages, housing allowance, hours of work,

78) Ibid., sections 27-34, inclusive.

79) Chapter 229, Laws of Kenya (Revised edition, 1989).

80) Ibid., section 5.

81) Ibid., section 7.

overtime, holidays with pay, annual leave, sick leave, maternity leave and redundancy rather than the quality of the environment in which the various categories of employees carry out their work.

The Shop Hours Act⁸²⁾ regulates shop hours and the employment of shop assistants by making provision for matters such as hours of employment,⁸³⁾ annual leave of absence for shop assistants,⁸⁴⁾ seats for female employees,⁸⁵⁾ closing of shops on weekly half holiday,⁸⁶⁾ Sunday and public holiday closing,⁸⁷⁾ as well as exemption of certain trades and businesses from the provision of the Act.⁸⁸⁾

The Work Injury Benefits Act, 2007,⁸⁹⁾ makes provision for compensation to employees for work related injuries and diseases contracted in the course of their employment. For purposes of the Act, an employee is a person who has been employed for wages or a salary under a contract of service and includes an apprentice or indentured learner.⁹⁰⁾ The Act imposes a duty on every employer to obtain and maintain an insurance policy in respect of any liability that the employer may incur to any of his employees.⁹¹⁾

The Act also requires every employer carrying on business in Kenya to register with the Director of Occupational Safety and Health Services.⁹²⁾

82) Chapter 231, Laws of Kenya (Revised edition, 1983).

83) *Ibid.*, section 5.

84) *Ibid.*, section 6.

85) *Ibid.*, section 7.

86) *Ibid.*, section 8.

87) *Ibid.*, section 9.

88) *Ibid.*, section 19.

89) Act No. 13 of 2007.

90) *Ibid.*, section 5(1).

91) *Ibid.*, section 7(1).

92) *Ibid.*, section 8.

Detailed provisions are made regarding the right to compensation, reporting of accidents, the scope, nature and procedure for compensation as well as the quantum, depending on whether the employee has suffered temporary total or partial disablement or permanent disablement.⁹³⁾ Special provision is made for death resulting from an accident in the course of employment.⁹⁴⁾ Compensation is provided for in the event of an employee contracting an occupational disease, such as poisoning by lead, manganese, arsenic, mercury, benzene and nickel.⁹⁵⁾ Other occupational diseases include anthrax, heat cataract, tuberculosis, asbestosis, and silicosis.⁹⁶⁾

The Use of Poisonous Substances Act⁹⁷⁾ makes provision for the protection of persons against the risks of poisoning by substances or classes of substances declared by the Minister to be poisonous.⁹⁸⁾ Where the Minister has made such declaration, he is empowered to promulgate regulations for the purpose of protecting persons against the risks of poisoning arising from the use of those substances; employment of persons at places in or on which those substances are being or have been used; and the storage, transport, sale and disposal of those poisonous substances.⁹⁹⁾ Such regulations may, inter alia, (i) impose restrictions or conditions as to the purposes for which, the circumstances in which, or the methods or means by which a poisonous substance may be used, including restrictions or conditions involving a general prohibition on the use thereof; (ii) impose

93) Ibid., sections 28–37, inclusive.

94) Ibid., section 34.

95) Ibid., sections 38–42, inclusive.

96) Ibid., section 38 and Second Schedule.

97) Chapter 247, Laws of Kenya (Revised edition, 1983).

98) Ibid., section 9.

99) Ibid., section 3(1).

restrictions or conditions on the importation, sale, disposal, storage, transport or use of poisonous substances; (iii) require the provision, and the keeping available and in good order, of protective clothing and equipment, of facilities for washing and cleaning and of other equipment and appliances from contamination or for removing sources of contamination therefrom; (iv) secure intervals between or limitations of periods of exposure to risk of poisoning; and (v) require the provision, of, and submission to, instruction and training in the use of things provided in pursuance of the rules and in the observance of precautions.¹⁰⁰⁾ The Act also prohibits the willful interference with or misuse of any appliance, clothing, equipment, facilities or other thing provided in pursuance of the provisions of the Act, or any willful doing and without reasonable cause of anything likely to cause risk of poisoning by a poisonous substance to oneself or others.¹⁰¹⁾ It should be noted that the Act does not indicate the category of poisonous substances whose use is prohibited and persons protected against the risks of poisoning of the same. Instead, it empowers the Minister to declare a substance or class of substances to be poisonous if he is satisfied that the use of such substances or class of substances involves or is likely to involve substantial risk of poisoning to persons.¹⁰²⁾ Undoubtedly, reliance on the Minister's discretion can be both treacherous and unpredictable.

The Pest Control Products Act,¹⁰³⁾ regulates the importation, exportation, manufacture, distribution and use of products used for the control of pests and of the organic function of plants and animals. Under this Act, "pest"

100) *Ibid.*, section 3(3)..

101) *Ibid.*, section 4(1).

102) *Ibid.*, section 9.

103) Chapter 346, Laws of Kenya (Revised edition, 1985).

is defined to mean any injurious, noxious or troublesome insect, fungus, bacterial organism, virus, weed, rodent or other plant or animal pest, and includes any injurious, noxious or troublesome organic function of a plant or animal.¹⁰⁴⁾ The definition is, apparently, wide enough to encompass the chemicals, such as fungicides, rodenticides, and herbicides, used in the agricultural sector. The Act then establishes the Pest Control Products Board¹⁰⁵⁾ and inspectors and analysts¹⁰⁶⁾ for the enforcement and implementation of its provisions. The functions of the Board are to assess and evaluate pest control products in accordance with the Act and to advise the Minister on registration of pest control products and on all matters relating to the enforcement of the Act.¹⁰⁷⁾ Inspectors are empowered to enter premises, examine any pest control product, require production of any documentation for inspection, and seize and dispose of any pest control product in enforcement of the Act.¹⁰⁸⁾

Under the Pest Control Products (Licensing of Premises) Regulations 2006,¹⁰⁹⁾ every person who owns, operates or is in charge of premises used for the manufacture, formulation, packaging and storage of pest control products must ensure that, during the operation, the persons working in the premises wear adequate protective clothing, the premises well supplied with first-aid facilities to cater for accidental poisoning, the general health of the persons working on the premises is adequately catered for, and the quality of the products is within the prescribed limits.¹¹⁰⁾

104) Ibid., section 2.

105) Ibid., section 5.

106) Ibid., section 8.

107) Ibid., section 6.

108) Ibid., sections 9 & 10.

109) Legal Notice 124 of 2006.

The framework Environmental Management and Co-ordination Act¹¹¹⁾ provides the legal and institutional framework for the management of the environment, without directly addressing the working environment. However, Part VII thereof on “Environmental Quality Standards” has provisions that impact the working environment.¹¹²⁾ The provisions on discharge of effluents by the owners or operators of trade or industrial undertakings, occupational air quality standards, waste management, noise pollution standards applicable to industrial and commercial activities, and control and abatement of noxious smells, have significant bearing on the working environment.¹¹³⁾ They are meant to ensure that the health, safety and welfare of workers engaged in activities leading to these phenomena are not negatively affected.

In 2009, the Minister promulgated the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations¹¹⁴⁾ that provide for the control of excessive vibrations and noise, from various sources. The Regulations set permissible levels of vibrations and noise, taking into account factors such as the time of the day, proximity of the source to residential areas, the recurrence or intermittence and constance of the noise, and the level and intensity of the noise.¹¹⁵⁾

A number of activities are exempted from the Regulations.¹¹⁶⁾ These include the emission of noise for the purpose of alerting persons to the

110) Ibid., Regulation 6.

111) Act No. 8 of 1999.

112) Ibid., sections 70–107, inclusive.

113) Ibid.

114) Legal Notice No. 61 of 2009.

115) Ibid., Regulations 3, 4 and 5.

116) Ibid., Regulation 7.

existence of an emergency, the emission of noise in connection with the protection of health and safety of residents or their property during emergency conditions, as well as parades and national celebrations.¹¹⁷⁾

IV. Concluding Remarks

Due to rapid industrialization and urbanization, coupled with the diversification of economic activities, the state of the working environment must be an important concern of everyone. Dust, fumes, smoke, chemicals and other emissions from several places of work characterize the environments of most urban centres in Kenya. The legal regime for addressing these phenomena is, apparently, although fairly modern and extensive, largely fragmented, ineffective and, in a number of cases, unenforceable. Accordingly, the level of compliance is low and the Kenyan worker has not benefitted from the rights conferred by the laws. This is attributable to a number of factors. First, the legal regime creates a multiplicity of agencies and, hence, causes overlaps in the statutory mandates. Each Act of Parliament creates a distinct and separate enforce agency, without a framework for co-ordination and/or harmonization of their mandates for better implementation. For instance, the Noise Prevention and Control Rules¹¹⁸⁾ promulgated under the repealed Factories and Other Places of Work Act are enforced by the Director of Occupational Safety and Health. Those promulgated under the Environmental Management and Co-ordination Act in 2009 are enforced by the National Environment Management

117) Ibid.

118) Supra, note 55.

Authority.¹¹⁹⁾ The latter make no reference to the former and differ from them in several material aspects. Second, the narrow range of technologies available does not facilitate effective compliance and enforcement. For instance, the regulations on noise pollution and air quality standards have suffered from ineffective enforcement due to lack of the requisite technology and skilled personnel. Without noise dosimeters and personnel trained in their use, the environmental regulatory agency has been unable to enforce the noise pollution regulations, through monitoring the decibels generated from various sources, in order to determine compliance with the set permissible levels. Besides, the regulations fail to address a key factor in determination of the health and environmental consequences of noise, namely, the length of exposure to and duration of the noise.¹²⁰⁾ Third, the legal regime has been especially ineffective in the agricultural sector, the industry that employs more Kenyans than any other. It is noteworthy that both the Use of Poisonous Substance Act¹²¹⁾ and the Post Control Products Act¹²²⁾ make no provision on the regulation of the handling and use of these substances and products by workers in the agricultural sector, with a view to ensuring that the health and safety of the workers are not at risk. Besides, no adequate personnel have been recruited and trained on the safe handling and use of these substances and products. For instance,

119) *Supra*, note 115.

120) This factor is addressed in the 1996 Rules where it is clearly stated that noise in a work place shall not exceed 90 dB(A) and that no worker shall be exposed to noise level in excess of the continuous equivalent of 90 dB(A) for more than 8 hours within any 24 hours duration. No exposure to continuous or intermittent noise in excess of 115 dB(A) for more than 15 minutes is allowed without personal protection.

121) *Supra*, note 98.

122) *Supra*, note 104.

in early 2013, the Ministry of Agriculture was reported to state that the country has only fifty-one (51) trained persons, in both private and public sectors, in the identification, assessment and safekeeping of obsolete pesticides.¹²³⁾ Yet, this is the sector that uses relatively more poisonous substances and pest control products, quantitatively, than any other single sector. Lack of legislative intervention has led to exposure of the workers on several agricultural plantations to various gaseous, liquid and solid pollutants, some of which are carcinogenic. For instance, research carried out on some of the flower farms has revealed human reproductive complications and disorders attributed to occupational exposure to chemicals used on the farms. The regime has favoured the manufacturing sector almost to the total exclusion of the agricultural sector and other sectors where Kenyans eke out their livelihoods.

In the premises, there is need to revisit the legal regime on the working environment for purposes of consolidation and harmonization in order to facilitate effective implementation and better compliance.

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Key Words : working environment, noise pollution regulation, environmental regulatory agency, the Factories Act, the Occupational Safety and Health Act, the Public Health Act, the Employment Act

123) See, The Standard Extra (Nairobi), Friday February 1, 2013, 7쪽.

[국문초록]

케냐의 근로환경과 법

Francis D. P. Situma*

이 글은 사업장에서 근로자의 건강과 안전을 확보하기 위한 케냐 법제도의 역사와 현황에 관하여 상세히 서술하고 있다. 영국에서 1937년에 제정된 공장법(The Factories Act)을 참고하여 케냐 식민지정부는 1950년에 공장법을 제정하였는데, 이 법률은 공장 등에 고용된 근로자의 건강, 안전, 복지를 보장하기 위한 내용을 규정하였다. 2007년에는 공장법보다 적용범위가 훨씬 광범위한 산업안전보건법(The Occupational Safety and Health Act)이 제정되면서 공장법은 폐지되었다. 동 법률에 따르면 농장, 선박, 사무실, 학교 등의 모든 근로작업장이 적용대상이 되어 모든 근로자의 건강, 안전, 복지가 보장되어야 한다. 이를 위하여 사업장 차원에서의 안전보건위원회(safety and health committee)뿐만 아니라 전국적 차원에서 전국산업안전보건위원회(National Council for Occupational Safety and Health)가 설치·운영되도록 규정되어 있다. 이 외에도 형법(The Penal Code), 방사선보호법(The Radiation Protection Act), 사용자책임법(The Occupiers Liability Act), 공중보건법(The Public Health Act), 고용법(The Employment Act of 2007), 상점시간법(The Shop Hour Act), 산업재해보상법(The Work Injury Benefits Act), 유독물질 취급에 관한 법률(The Use of Poisonous Substances Act) 등의 일부 규정도 해당 분야와 관련한 근로자의 보호를 위한 규정을 두고 있다. 급속히 산업화·도시화되고 다양한 경제활동에 힘입어, 근로환경의 보호는 모두에게 더 없이 중요한 사안이 되었다. 그러나 법률은 준수되지 않는

* 케냐 나이로비대학 교수

경우가 많으며, 근로자의 권리는 법률에 의하여 보장되지 않는 경우가 많다. 특히 다른 산업보다 많은 수의 근로자가 종사하는 농업 분야가 법제도의 적용에서 배제되고 있다. 전반적으로, 케냐에서는 근로환경과 관련한 효과적인 권리의 실현과 준법행동이 필요하다.

주제어 : 근로환경, 소음공해규정, 환경규제위원회, 공장법, 산업안전보건법, 공중보건법, 고용법