TALKING POINTS BY MRS. JACQUELINE MUGO, EXECUTIVE DIRECTOR & CEO FKE PRESENTED DURING THE OPENING CEREMONY OF THE 2024 ELRC JUDGES ANNUAL CONFERENCE – 21ST MARCH, 2024.

WHO WE ARE

“FKE as a stakeholder and player in the development of jurisprudence in ELRC and national economic development and promotion of international labour standards and acceptable conditions of work”.

Salutations and Protocols

➢ Hon. Justice Martha K. Koome, EGH, Chief Justice & President of the Supreme Court of Kenya.
➢ Hon. Florence Bore, Cabinet Secretary, Ministry of Labour & Social Protection.
➢ Hon. (Dr) Justice Smokin Wanjala, CBS, Supreme Court Judge & Director of Kenya Judiciary Academy (KJA).
➢ Hon. Mr. Justice Daniel K. Musinga, CBS, FCIArb, President, Court of Appeal.
➢ Hon. Mr. Justice Byram Ongaya, Principal Judge of the ELRC
➢ The Hon. Judges of ELRC
➢ Dr. Francis Atwoli, NOM (DZA) EBS, Secretary General, COTU (K)
➢ Distinguished Guests, Ladies & Gentlemen.

INTRODUCTORY REMARKS

➢ I am honored and privileged to have this opportunity to engage with esteemed colleagues and share insights at this ELRC Judges Annual Conference. This is a unique opportunity for us to delve into critical legal discussions and collectively contribute to the future we desire. It is indeed a significant occasion that underscores our commitment to the continuous improvement of our system of administration of justice.
About FKE

The CJ, Honourable Judges,

➢ The Federation of Kenya Employers (FKE) is committed to advancing fair labour practices and driving sustainable economic development. We represent enterprises of all shapes and sizes from all sectors of the economy, serve as a pivotal force in the labor market.

➢ FKE actively engages in shaping labour employment and Social Policy and laws working closely with our Social Partners legislative bodies and stakeholders to ensure that our laws and regulations are balanced, practical, and support economic growth.

➢ By fostering meaningful social dialogue, the Federation aims to create a harmonious industrial relations climate that supports both the welfare of the workforce and the competitiveness of enterprises, ultimately contributing to the nation’s prosperity.

The focus of the Conference

This conference discussions will traverse key areas and address current issues affecting the world of work. It promises to be a significant platform for learning, sharing
and setting the course for a progressive judicial approach in the labour and employment sector.

HISTORICAL BACKGROUND

Ladies & Gentlemen

• The Constitution of Kenya 2010 changed what was then a Tribunal in the MOL into a full-fledged Court with the status of a High Court within the Judiciary. Both FKE & COTU fought for this transformation and elevation of this Court to its current status.
• With the passing of the 5 principal Labour Laws in 2007, it became clear that it would only be a matter of time before the Court would be called upon to be more vibrant and transformative in the way it enforced the laws, International Labour Standards and Social Justice.
• The inclusion of Fair Labour practices as a Constitutional right in Article 41 of the COK, 2010 would trigger a journey of reforming the Tribunal as an oasis of judicial respite where human rights as well as constitutional rights and obligations would be subsumed with international labour standards and the progressive labour laws to create a new order in the World of Work in Kenya.
• The last 12 years has seen ELRC pronounce itself on diverse labour and Employment matters including the pandemic, the fast-changing business models including outsourcing, embracing technology at the workplace and working from home, just to name a few.

Innovation
  ❖ Although we do not have a statutory framework on new business models like outsourcing, the ELRC has come out boldly to put in place policy parameters to address this.
  ❖ The ELRC has made tremendous progress in adopting technology to ensure justice continues to be served despite the challenges posed by IT systems. We commend you for this.

Proportionate Dispute Resolution

Hon. CJ, Hon Judges, Ladies & Gentlemen,

❖ The competing interests between employers and employees often cause friction in the labour market. We rely on you, the ELRC to provide guidance by promoting proportionate dispute resolution and encouraging social dialogue at the shop floor level.
In this regard, the Punitive sanctions meted out by the ELRC need to take into account the realities of the global and national economy which continues to hamper enterprise performance for example the award of maximum 12 months compensation and damages even on administrative issues such as issuance of certificates of service remains a matter of concern. Another example is where employers are made to pay damages for withholding terminal benefits for employees who fail to clear with the employers as required by its internal policies.

Social Dialogue in resolving disputes.

We appreciate the role played by the ELRC towards embracing ADR as a form of resolution of disputes through the established statutory conciliation process at the Ministry of Labour and Social Protection as well as the Court-Annexed Mediation as a way of resolving industrial disputes.

We trust that the ELRC will continue to leverage on this and insist that labour disputes be subjected to ADR before the Court’s intervention. Conciliation often leads to win-win
outcomes and the Courts should encourage this to maintain the spirit of Industrial Relations.

**Jurisprudence**

- The Labour sector has provided the ELRC with an opportunity to be **novel and creative** in these changing times when we are experiencing the **IT revolution** the world over.

- There are several areas where the **labour laws do not or inadequately provide guidance**. For example, work from home arrangement, work rotation model, termination of employment and payment of terminal benefits occasioned by redundancy, platform work, among others.

- We were recently glad to see internal capacity building being done through the **ITC-ILO** who conducted sessions with the ELRC Judges here in Kenya. We believe this was timely and the beginning of good things to come in terms of developing our jurisprudence against the backdrop of our uniquely Kenyan economic situation.
Unionisation

❖ One challenging area is that of unionization; Employers should be free to express themselves and enjoy their managerial rights as provided for under Art. 24 of the Constitution. FKE also supports the right of employees to join a union of their choice as envisaged in law. FKE is however aware that Kenya has a low level of union representation which cannot be resolved by having a multiplicity of unions. Instead, this weakens the fabric of labour relations.

❖ The inter-play on these multiple affiliations should as a matter of principle, be within the context of the constitutional Bill of Rights on the one hand and yet be purposive in the way social dialogue is tailored on the other hand. The question of whether the proliferation of several trade unions protects the interest of workers, is an issue that we all need to consider particularly on their disruptive nature. The emerging trend where the level of union demarcation and intra-union disputes is taking centre stage as opposed to protecting the interest of workers. Employers are often caught in the middle of the feuds. This does not work in the best interest of anyone in my humble view.
Constitutionality of the World of Work.

❖ Supreme Court Petition. No. E004 of 2013 as consolidated with Pet. No. E002 of 2023 – KTGA & 2 Others vs. Board of Trustees of NSSF & 13 Others, where FKE was also cited as the 13th Respondent, restated the law as we have always construed it; that one cannot dichotomize social justice and constitutional underpinnings in the world of work by stating that ELRC had jurisdiction to delve into the constitutionality of matters arising from contracts of service.

❖ Even as you breathe life into the constitution and other statutory provisions, we urge you not to forget that Kenya is a growing economy. It requires the contribution of all sectors to help it grow. This we can do by not strangling businesses through burdensome laws and regulations.

New Work and Workspace

The landscape of work and the workspace has been rapidly evolving, driven by technological advancements, changing workforce demographics, and shifts in organizational culture. These changes have led to the emergence of Platform Work and the gig economy which has significantly transformed the landscape of employment and the workspaces.
**Platform work**, also known as digital platform work or online platform work, refers to a form of employment where individuals utilize digital platforms to offer their services or labor to clients or customers. This type of work is facilitated through online platforms or apps that match service providers with consumers, often on a temporary or project basis. In Kenya, *Uber, Bolt, Glovo, Jumia food* among others are some of the classic examples of platform work. Platform work therefore offers opportunities for flexibility and autonomy but also presents challenges related to income stability, benefits, and regulatory concerns. As the digital economy continues to evolve, platform work is likely to remain a prominent feature of the labour market, influencing the way people work and earn a living.

**The gig economy** on the other hand refers to a labor market characterized by short-term, freelance, or temporary work arrangements, often facilitated by digital platforms. Examples of gig economy in Kenya includes freelance work, Ajira Digital, jiji among others. The gig economy presents a range of benefits for both workers and businesses, including flexibility, autonomy, skill development, access to opportunities, work-life balance, entrepreneurship, cost savings, and scalability. However, it is essential to address the challenges and risks associated with gig
work, such as income instability, lack of benefits, and regulatory concerns, to ensure that all participants can fully reap the benefits of this evolving employment model.

(The government of Kenya has placed significant emphasis on the digital economy as a means of creating jobs for the youth and fostering economic growth. According to Ministry of Information, Communications, and the Digital Economy's 2023-2027 Strategic Plan, the government has laid out an ambitious goal to provide employment prospects for up to 3.5 million young people by 2027 through e-commerce and startups. Among the top priorities of the plan is economic transformation through increased digital job creation, inclusive growth and keeping the public informed about critical legislation and access to public services. Some of the initiatives and policies put in place by the Government to support this agenda includes putting in place the Ajira digital program, digital literacy program, promotion of ICT innovation Hubs and promotion of digital entrepreneurship. The gig economy therefore represents a significant shift in how work is organized and performed, offering both opportunities and challenges for workers, businesses, and policymakers in the digital age.)
In summary, the new work and workspace paradigm is characterized by flexibility, collaboration, and a focus on employee well-being. These changes call for further discourse among the key players. As technology continues to advance and workforce preferences evolve, organizations must adapt their work practices and workspace designs to attract and retain top talent in an increasingly competitive landscape. Looking at the trends, it is evident that platform work and the gig economy have reshaped the way people work and the spaces they work in, emphasizing flexibility, autonomy, and the integration of digital technologies into the workspace.

IN CONCLUSION

❖ Balancing the rights of employers and employees requires an environment where all parties who approach the Court respect the authority of our Courts and are assured of a fair hearing and speedy determination.

❖ This is the surest way we can attract investors and create a thriving economy and a sector that upholds decent work.
❖ FKE is happy to be associated with the ELRC and will always be willing to play our role as a key stakeholder so that the Court cuts a niche for itself in the administration of justice in Kenya.

❖ Going forward, we want to see an assertive ELRC, alive towards its contribution to the economic development of this country. The Court should always be cognisant of the fact that we are a developing economy which needs to attract investors and support SMEs who form the bulk of the economy.

❖ Finally. Let me end with the words of Mahatma Gandhi, “There is a higher Court than Courts of Justice and that is the Court of Conscience. It supercedes all other Courts”.

Thank you!!

Jacqueline Mugo, EBS.
EXECUTIVE DIRECTOR & CEO