



Employment Law

Case Law Update 2022

I Know My Place: Obligations and liabilities



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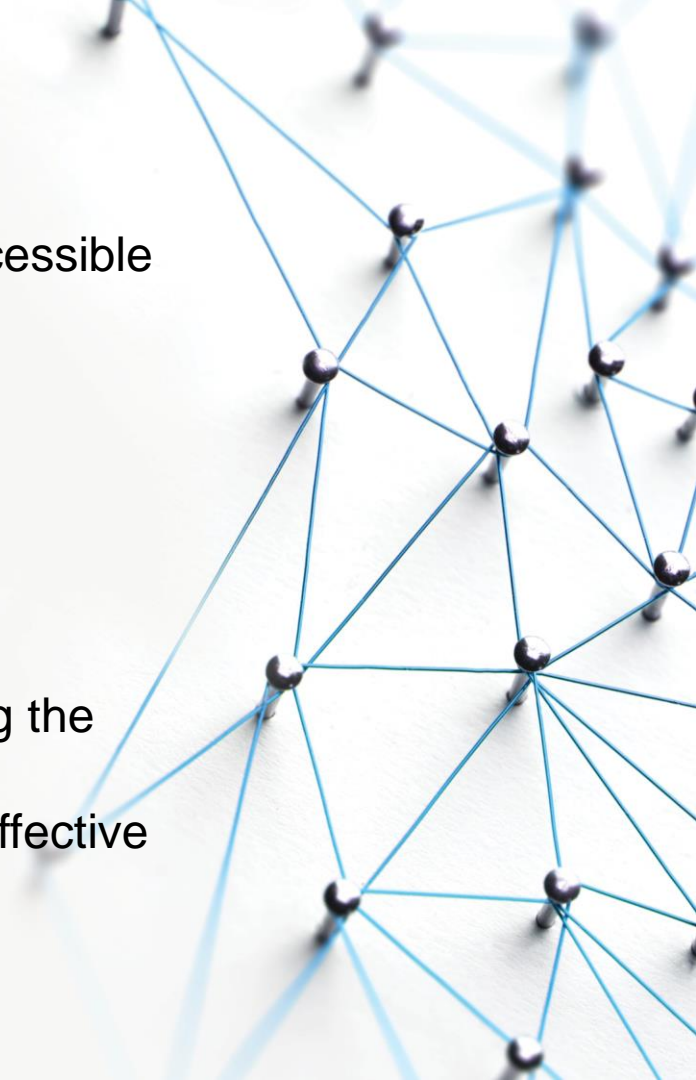
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**KNOWLEDGE
PRODUCTION, THOUGHT
LEADERSHIP AND
E-LEARNING**

Knowledge Production and Access

- create systems that store, regulate and make accessible the collective knowledge of our various practices
- classification, indexing and storing of knowledge products and documents
- this process is to avoid the situation of reinventing the wheel which results in a more efficient and cost-effective service to our clients





Thought Leadership

- committed to the pursuit of knowledge and being leaders in our industry in analysing legal information and disseminating this information publicly in a thoughtful and accessible manner
- assemble the best thinking from our lawyers and we publish well curated content weekly as well as alerts and urgent updates when applicable

- technology is an asset, and it has contributed positively in achieving our goals in respect of knowledge production, knowledge classification, and thought leadership
- E-learning saves time and costs on physical training, especially for large organisations, and is an enhancement on traditional training methods



E-Learning

E-Learning

- E-learning also ensures consistency in the quality and content of the information that is presented over time and offers clients a way to easily schedule, monitor and manage the e-learning modules
- Harassment e-learning
- Developing further e-learning tools in the employment space



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UPDATES ON KENYAN EMPLOYMENT LAW: PROBATIONARY CONTRACTS

Monica Munira Kibuchi & 6 Others v Mount Kenya University; Attorney General (Interested Party) [2021] Eklr



Whether section 42(1) of the Employment Act (2007) is constitutional.



Whether an employer has an obligation to give a valid and fair reason for termination of a probationary contract or grant such an employee an opportunity to be heard.



HOLDING

Monica Munira Kibuchi & 6 Others v Mount Kenya University; Attorney General (Interested Party) [2021] Eklr

- An employee on probation must be afforded the same safeguards as an employee already confirmed to the position.
- Section 42(1) of the Employment Act (2007) is unconstitutional to the extent that it excludes probationary contracts from the provisions of section 41.
- The law relating to unfair termination applies to probationary contracts.



IMPACT

Monica Munira Kibuchi & 6 Others v Mount Kenya University; Attorney General (Interested Party) [2021] Eklr

Manage employees on probation more proactively

- Set expectations and performance standards
- Give regular feedback
- Provide the employee with required assistance

New process of termination

- Have a fair and valid reason
- Issue a letter notifying the employee of the reasons for termination
- Invite the employee to attend a disciplinary hearing
- Hold a disciplinary hearing
- Issue a certificate of service



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Overview

Latest court decisions in Kenya on:

- **Mandatory COVID-19 vaccination for public officers**
- **Accommodating employees with disability at the workplace**



Mandatory COVID-19 Vaccination of Public Officers

Clement Koigi & the Kenya Catholic Doctors Association vs. The Head of Public Service & 3 others (ELRC Petition No. E155 of 2021).

- The case concerned the mandatory vaccination directive that the Kenyan government issued for public officers to take up the COVID-19 vaccine.
- The main issue was: **Whether the directive was constitutional**
- The court held that the directive was lawful and constitutional as it sought to protect the larger public.





Accommodation of an Employee with Disabilities

Gichuru vs. Package Insurance Brokers Limited (Petition 36 of 2019)

[2021] KESC 12 (KLR)

- The case concerned an employee with a disability who was terminated from employment.
- The employer could not demonstrate that the termination was lawful.
- The issue was: **Whether the termination amounted to discrimination against the employee.**
- Court stated that the employer was expected to introduce measures to try and accommodate the disabled employee.
- The termination was therefore discriminatory and unlawful.

EMPLOYMENT
LAW

COMMON PURPOSE VS DERIVATIVE MISCONDUCT

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COMMON PURPOSE

Employer imposes liability upon employees who act together to achieve some (unlawful) common object.



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Common purpose: Requirements

Employee must have:

1. been present at the scene of the violence;
2. been aware of the violence or misconduct;
3. intended to make common cause with those who are carrying out the violence;
4. manifested his sharing of common purpose with the perpetrators; and
5. had (criminal) intent or foreseen possibility of misconduct taking place



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DERIVATIVE MISCONDUCT

An employee is guilty on the basis of failing to disclose his/her knowledge of misconduct being carried out by other employees.



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Derivative misconduct: Requirements

1. There must have been a failure to disclose - actual failure & not implied;
2. Information withheld deliberately;
3. Duty to disclose does not depend on the seriousness of the primary misconduct & position employee holds;
4. Knowledge of misconduct will automatically trigger the duty to disclose;
5. Duty to disclose is not dependent on a request from the employer.
6. New requirement:
 - Employee safety



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PRIVACY RIGHTS: DATA PROTECTION

Introduction

- The meaning of privacy in the data protection space –
 - “the right to be left alone” – to be free of unwanted publicity.
 - the notion of autonomy, the right to make choices about what personal information you want to disclose to others.

PRIVACY RIGHTS: DATA PROTECTION

Key Test

- The key test for the protection of personal information
 - do you have a legitimate expectation of privacy?



Subjective component
The subjective expectation of privacy



Objective component
Does society recognise the expectation as objectively reasonable?

SMUTS AND ANOTHER VS BOTHA (2022) 2 SA 425 (SCA)

The facts

- Botha is a commercial farmer.
- Cyclists rode on his farm and observed the trapping of animals considered as vermin by Botha.
- Methods used to trap animals were unethical / barbaric.
- Cyclist informs Smuts – an environmental activist.
- Cyclist takes photographs → sends them to Smuts – Smuts resorts to Facebook with the disclosure of information about Botha.

SMUTS AND ANOTHER VS BOTHA (2022) 2 SA 425 (SCA)

The Facebook posts : What was disclosed by Smuts?

- Name of the farm.
- Location of the farm.
- Botha's business and home addresses.
- Botha's telephone numbers.
- A photograph of Botha with his daughter.
- WhatsApp messages between Botha and Smuts regarding Botha's permit to trap and kill vermin.
- Smuts' view was that the trapping was "heinous" and "barbaric" and "was ruinous to biodiversity".

SMUTS AND ANOTHER VS BOTHA (2022) 2 SA 425 (SCA)

Legal controversy

- Interdict proceedings went in Botha's favour. Smuts appealed.
- SCA approach –
 - it had to balance competing rights: freedom of expression (Smuts' outrage over trapping) and Botha's assertion of his right to privacy.
- Was Botha's expectation of privacy legitimate?
 - Much of the information was in the public domain already including Smuts' WhatsApp exchange and this did not render private the information already made public about Botha, by Botha himself. – "No effort was made by [Botha] to keep this information or his activities private."

SMUTS AND ANOTHER VS BOTHA (2022) 2 SA 425 (SCA)

Legal controversy continued...

- The interdicts stifled debate and censored Smuts' right to disseminate information about unethical trapping methods (public interest element).
- Appeal succeeded.

Key take away point

- Privacy invasion cases are fact specific.

PRIVACY RIGHTS

Disclosure of personal data in the pre-employment phase

- Personal data will be called for –

In the application for
employment

In the interview
stage

- General principle: a job applicant may not be under an obligation to disclose certain personal information in an interview.

PRIVACY RIGHTS

- *Swart v Greenmachine Horticultural Services (a division of Sterikleen (Pty) Ltd) 2010 31 ILJ 180 (LC)*
 - Job applicant was a pregnant woman – no obligation to disclose that status other than where required given the inherent requirements of the job or by legislation.
- *Atkins v Datacentrix (Pty) Ltd 2010 31 ILJ 1130 (CC)*
 - Job applicant not obliged to disclose he was undergoing “a gender reassignment process”.

USE OF ARTIFICIAL INTELLIGENCE (AI) TO SCREEN SOCIAL MEDIA PROFILES WHEN HIRING PROSPECTIVE EMPLOYEES

- Employers, recruiters screen social media profiles to gain access to relevant information.
- Use of AI is prevalent.
- Drawbacks? This is potentially a contentious area in our law going forward
 - It can discriminate unfairly against certain groups.
 - Possible privacy breaches.
 - Job applicants unaware that their profiles are being screened.
 - Can the AI be programmed to ensure data is fairly collected and processed?

TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS

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DATA PROTECTION AND CYBER SECURITY

APHINDILE GOVUZA

PRIVACY?

Well, it depends on who you ask. Broadly speaking, privacy is the right to be let alone, or freedom from interference or intrusion. Information privacy, other hand, is the right to have some control over how your personal information is collected and used

BUT . . . Constitutional Right (s14) – codified in POPIA.



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WHAT IS DATA PROTECTION ?

Data protection is the expression of the right to privacy and pertains to the protection of information about living natural persons and/or juristic persons. This information can be created and kept in many forms such as emails, paper, photographs, databases, registers and includes facts and opinions about natural and juristic persons.



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WHAT DATA NEEDS PROTECTION?

- Data relating to Internal Employees
- Data relating to External Suppliers
- Data relating to Customers – both natural and juristic persons



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WHAT SECURITY PROTOCOLS TO HAVE IN PLACE? REMOTE WORKING?

- Encrypt and install firewalls on all devices (employees should be requested to install security patches and update to – (i) Identify internal and external security risks; (endpoints).
- Require security access clearance to company systems i.e. VPN or restriction system access to specific networks via any device.
- Install remote-collaboration safeguards (install licensed, secure enterprise level teleconferencing and collaboration tools like Microsoft Teams).
- Take measures ii) Maintain safeguards against such risks; (iii) Regularly verify that the safeguards are effective; (iv) Continually update safeguards in response to new risks
- Enable remote IT support.

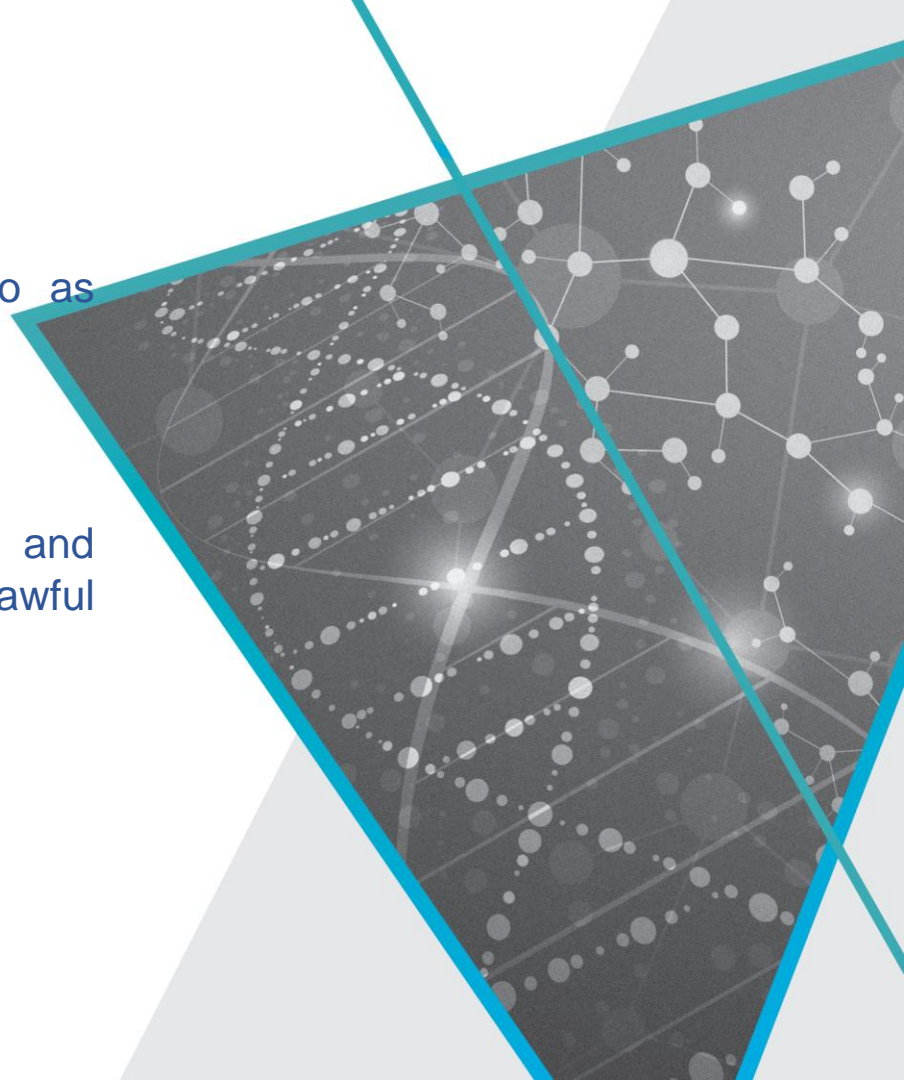
WHAT SHOULD I CONSIDER WHEN DISMISSING AN EMPLOYEE?

- Employers should consider that the employee will have access to and may be in possession of sensitive data. The employer should have clear policies and processes in place for the return of any sensitive data and ensuring the deletion of same from company and personal devices.
- Remove building access including any key card access to doors.
- Wipe company information from any employee-owned personal device that was used to access company data
- Remove access from 3rd party applications that would have been used during the normal course of business, such as GoogleDrive, Dropbox, Evernote and Slack.



CYBERCRIMES UNDER THE CYBERCRIMES ACT

- Unlawful access – commonly referred to as "hacking";
- Unlawful interception of data;
- Unlawful acts in respect of software and hardware tools – such as hacking and unlawful interception;



CYBERCRIMES UNDER THE CYBERCRIMES ACT (CONT.)

- Cyber fraud – fraud by means of data or a computer program or through any interference with data or a computer program;
- Cyber forgery – creation of false data or a false computer program with the intention to defraud; and
- Cyber uttering – being the passing-off of false data or a false computer program with the intention to defraud.



IMPACT OF THE CYBERCRIMES ACT ON BUSINESSES?

- Obligations on electronic communications service providers ("**ECSPs**") and financial institutions ("**FIs**") to *report* and *preserve*; and
- ECSPs or FIs that fail to comply are guilty of an offence and be liable on conviction to a fine not exceeding R50,000.



CYBER-SECURITY INCIDENT THAT CAUSES A BREACH ?

- The PR nightmare that comes around when one has a data breach. E.g. Experian, a consumer credit reporting company, experienced a data breach in August 2020 exposing the details of millions of consumers in South Africa such as consumer addresses, ID numbers, names and occupations **[Businessstech, 15 September 2021]**



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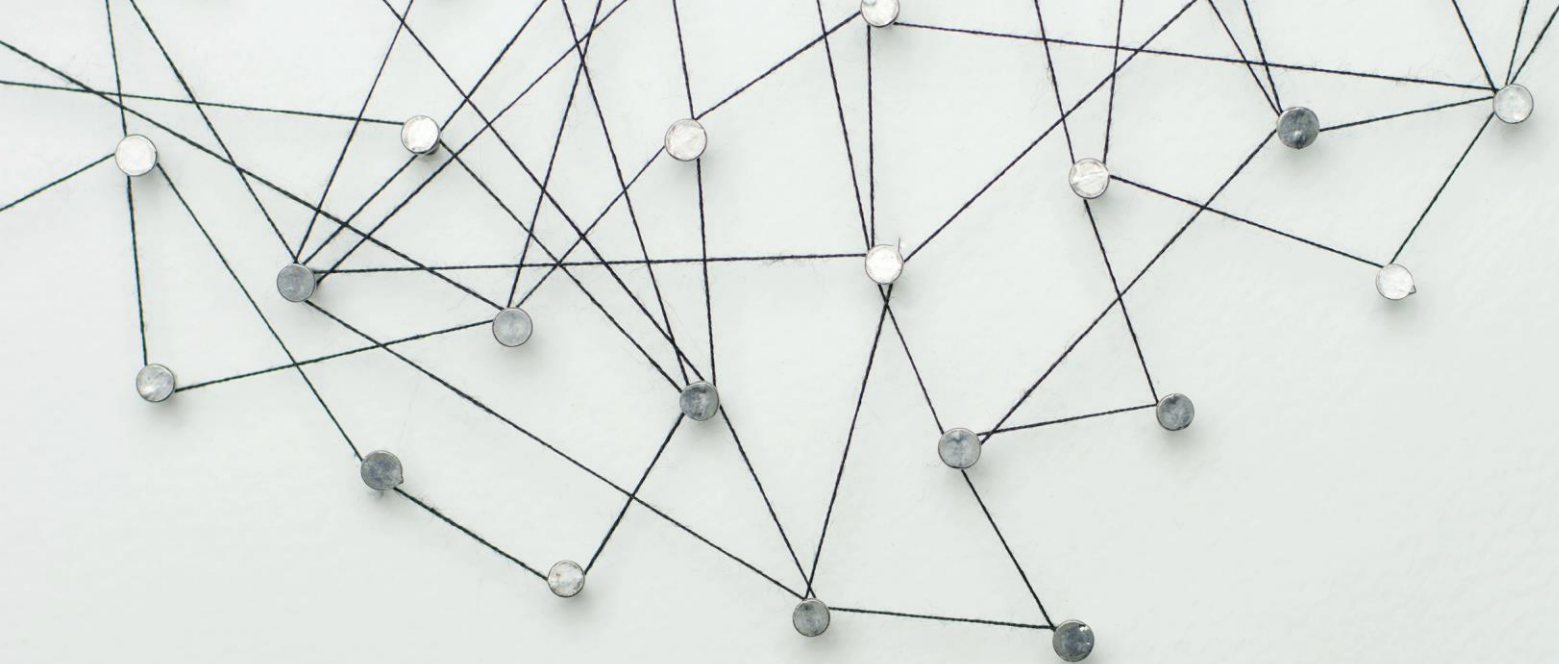
CYBER-SECURITY INCIDENT THAT CAUSES A BREACH ?

- Reporting obligations.
- Responsible Party vs Operator.



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