

Realising Occupational Safety and Health as a Fundamental Human Right in Kenya*

Abstract

The right to safe and healthy working conditions has dramatically gained a lot of interest at the global, regional and national levels. Countries around the world have recognized the universality, inalienability, interdependency and indivisibility of the human right to safe and healthy working conditions.

In this paper, the author discusses occupational safety and health as a fundamental human right, by first outlining the international legal framework on safe and healthy working conditions and thereafter, the extent to which Kenya has respected, protected and fulfilled its international legal obligations on safe and healthy working conditions. From an international human right perspective the author puts forth the argument that since human rights are interconnected, then the right to occupational safety and health should be given the same attention as the civil and political rights. On the same note the author seeks to assess whether the right to occupational safety and healthy has been realised as a fundamental human right in Kenya.

The author notes lack of proper enforcement mechanisms, capacity challenges, emerging production techniques creating new risks as some of the main obstacles to the effective implementation of the law on occupational safety and health in Kenya as a fundamental human right. By making a succinct overview on the implementation of the Occupational Safety and Health Act¹ the author illustrates the main challenges facing occupational safety and health programs in the workplace and argues that it has not been realised as a fundamental human right in Kenya. The paper also assesses whether the Act has achieved the legislative intent, the opportunities it offers, and some of the key issues that need to be urgently addressed for occupational safety and health to be effectively and successfully managed in Kenya.

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¹ Act No. 15 of 2007, Government Printer, Nairobi.

1.0 Introduction

Occupational health and safety is a cross-cutting disciplinary area concerned with protecting the safety, health and welfare of people engaged in work or employment.² All occupational health and safety programs are therefore geared towards fostering a safe working environment. As such this area has dramatically developed a lot of interest in Kenya following the enactment of the new Constitution of Kenya³ and the Occupational Health and Safety Act No. 15⁴ which came into force on 26th October 2007, and saw many workplaces which had hitherto operated without institutional and individual capacity for health and safety management having to develop the requisite mechanisms in order to improve the safety of the working environment and escape liabilities. The corpus of law in Kenya dealing with occupational safety and health is contained in the international legal instruments which emphasise that everyone is entitled to the right to safe and healthy working conditions,⁵ the Constitution of Kenya⁶, the Occupational Safety and Health Act No.15 of 2007, and the various labour laws now in force.⁷

Seeing occupational safety and health as a fundamental human right will ensure that the vulnerable workers mostly women, the poor and the children and forming the largest population of the working class get the basic knowledge of hazards, personal protection and that they do not work for long hours in unsafe conditions without health care or insurance covers. For occupational safety and health to attain the status of a basic human right for all

² Available at, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R171>, accessed on 25/06/2011

³ The Constitution of Kenya, 2010 Government Printer, Nairobi.

⁴ Act No. 15 of 2007, Government Printer, Nairobi.

⁵ The Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights, The International Covenant on Civil and Political Rights, The Convention on the Elimination of All Forms of Discrimination Against Women, The Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Rights of the Child, The ILO Equal Remuneration Convention (No. 100), The ILO Discrimination (Employment and Occupation) Convention (No. 111), The ILO Minimum Age Convention (No. 38), The ILO Freedom of Association and Protection of the Right to Organize Convention (No. 87), The ILO Right to Organize and Collective Bargaining Convention (No. 98), The ILO Forced Labour Convention (No. 29), the ILO Employment Policy Convention (No. 122), and The ILO Indigenous and Tribal Peoples Convention (No. 169).

⁶ The Constitution of Kenya, op.cit.

⁷ The labour laws in Kenya include: The Labour Relations Act No. 14 of 2007, Government Printer, Nairobi; The Employment Act No.11 of 2007, Government Printer, Nairobi; The Labour Institutions Act No.12 of 2007, Government Printer, Nairobi; The Work Injury Benefits Act No.13 of 2007, Government Printer, Nairobi etc.

workers there is a need to ensure that the working environment protects and promotes occupational safety and health.

As noted elsewhere in this paper human rights are indivisible and interconnected and thus the improvement of one right facilitates the advancement of the others. In the same way the deprivation of one right adversely affects the others. consequently all human rights whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, they are indivisible, interrelated and interdependent. Occupational safety and health thus finds its basis from the fact that all rights are indivisible, interrelated and interdependent such that its improvement will facilitate the advancement of the other rights and vice versa.

1.1 Definition of terms

1.1.1 Health

The Act does not define the terms safety and health. The World Health Organization has defined health, thus;

“Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity”.

As this definition shows health is a very broad and wide concept which includes work related injuries and diseases, such as industrial deafness, dermatitis, occupational overuse injuries, asbestosis and occupational cancers. It could also include more general health problems like heart disease, high blood pressure and stress where the work environment and procedures could be shown to be contributing factors.⁸

1.1.2 Occupational Health and Safety

According to Professor Lee Reynolds⁹ occupational health and safety, “is the discipline concerned with preserving and protecting human and capital resources in the workplace”.¹⁰

⁸ Available at, <https://apps.who.int/aboutwho/en/definition.html>, accessed on 8/6/2011

⁹ Lee Reynolds is an Associate Professor at the department of Engineering Technology at Texas Technology University.(<http://apps.depts.ttu.edu/ceet/facstats.php>, accessed on 28/06/2011)

¹⁰ Ibid, [The office and Class Schedule for Professor Reynolds-Spring Semester of department of Engineering Technology at Texas Tech University.](#)

1.1.3 Workers Health

The term “workers health” is coterminous with “occupational health” and has been defined as follows:¹¹

“Occupational health should aim at the promotion and maintenance of the highest degree of physical, mental and social wellbeing in all occupations; the prevention amongst workers of departures from health caused by their working conditions; the protection of workers in their employment from risks resulting from factors adverse to health; the placing and maintenance of the worker in an occupational environment adapted to its physiological and psychological equipment and, to summarize: the adaptation of work to man and of each man to his job”.

In 1985, ILO in its Supplementary Recommendation 171 again stressed the cross-cutting or multidisciplinary approach and a more multisectoral collaboration in occupational health¹².

1.1.4 Occupier

The Act defines an occupier as the person or persons who are in actual occupation of a workplace either as the owner or not and includes an employer.¹³ The above definition stems from the common law position. According to Street on Torts¹⁴ at page 195, the test of occupation is given;

“...The test of occupation, then, is whether a person has some degree of control associated with, and arising from, his presence in and use of, or his activity in, the premises...”

The Kenyan Act however does not make the common law distinction between invitees and licensees. Instead the Act at sections 17 and 18 makes provision for persons who are not necessarily employees but nevertheless get exposed to risks at the workplace. Therefore the Act has gone beyond the duties imposed on an occupier under the common law and the Occupiers Liability Act¹⁵ which only applies to regulate the duty which an occupier of

¹¹ Available at, http://www.ilo.org/safework/info/publications/lang--en/docName--WCMS_110478/index.htm, accessed on 28/06/2011. This definition was rendered by the Joint Committee of WHO and ILO held in Geneva in 2003 and shows the historical interest of the United Nations in this discourse.

¹² Supra note 2

¹³ Section 2 Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi

¹⁴ John Murphy, Street on Torts, 4th ed. (Oxford University Press, Oxford, 2007), p.195

¹⁵ Cap.34 laws of Kenya, Government Printer, Nairobi

premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

1.1.5 Hazard

A hazard means anything that may result in injury or harm to the health of a person. In providing an environment where employees are not exposed to hazards, employers must consider health as well as safety. Injuries could result from the traditional range of physical safety issues such as falls, strains, being hit by objects and electric shock to the non-traditional emerging risks.

2.0 Occupational Safety and Health as a Human Right

Human rights are rights inherent to all human beings, whatever the nationality, residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination.¹⁶ These rights are all interrelated, interdependent and indivisible.¹⁷ Human rights have been said to be universal rights in that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems. They are inalienable rights in the sense that they cannot be taken away, they cannot be denied to the right holders by the duty bearers, unless under certain situations recognized by law.¹⁸

The interdependency and interconnectedness nature of human rights has been emphasised by the United Nations. It has been said that all human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.¹⁹ From an international human right perspective it is correct to say that

¹⁶ Available at, <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>, accessed on 21/06/2011

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid note 16

occupational safety and health is a fundamental human right which demands protection through national legislation and all the stakeholders concerned.

It has been rightly observed that, human rights entail both rights and obligations.²⁰ There is a correlation between the rights of the state and the individual and their corresponding duties. States assume obligations and duties under international law to respect, to protect and to fulfil human rights to all their nationals.²¹ *“The obligation to respect, to protect and to fulfil human rights to the nationals means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.”*²²

At the individual level, while we are entitled to our human rights, we should also respect the human rights of others. It is the duty of the employers to ensure workers rights are protected on the one hand and on the other hand workers should ensure their own safety and that of their colleagues at work.

3.0 The Right to Safe and Healthy Working Conditions as a Fundamental Human Right under International Law

According to **Stefano Sensi**,²³ the right to safe and healthy working conditions is part of the broader right of everyone to the enjoyment of just and favourable conditions of work, enshrined inter alia in article 23 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Economic, Social and Cultural Rights. The **Universal Declaration of Human Rights**²⁴ provides that everyone is entitled to the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.²⁵

²⁰ Ibid

²¹ Ibid

²² Ibid

²³Stefano Sensi, “The Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights.” A paper presented at a High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, held at Nairobi, November 30-December 1,2009.

²⁴A/RES/217/A (III)

²⁵ See generally Article 23 of the Universal Declaration of Human Rights.

The **International Covenant on Economic, Social and Cultural Rights**²⁶ further reiterates the right to safe and healthy working conditions. It provides all State parties to the Covenant will recognize the right of everyone to the enjoyment of just and favourable conditions of work which will ensure safe and healthy working conditions.²⁷ In the preamble to the **International Covenant on Civil and Political Rights of 1966**²⁸ the parties to that covenant outline the obligation of all States to recognize in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

The above conventions show the importance the international community has accorded to the right of all persons to safe and healthy working conditions. This being the case it is the duty of all States who are parties to these treaties to take all the necessary steps to ensure the systematic implementation of the right to safe and healthy working conditions to their citizenry.

4.0 Kenyan Perspective: Workers Health as a Basic Human Right

The Constitution of Kenya stipulates that the general rules of international law shall form part of the law of Kenya.²⁹ This article ensures that the above cited Conventions, customary international law, general principles and other sources of international law form part of the Kenyan law. Therefore international law lays down obligations for Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.³⁰

Under Part 2 of the constitution being the rights and fundamental freedoms of all persons are outlined. As already stated these rights and freedoms are interdependent and indivisible ranging from the civil and political rights to the economic, social and cultural

²⁶ Annex to UNGA Res.2200 (XXI); 6 ILM 360 (1967) (1966 ICESCR) 91

²⁷ See generally Article 7 of the International Covenant on Economic, Social and Cultural Rights.

²⁸ Annex to UNGA Res.2200 (XXI); 6 ILM 368 (1967) (1966 ICCPR) 91

²⁹ Article 2(5) of the Constitution of Kenya 2010, Government Printer, Nairobi

³⁰ Supra, see note 16

rights as covered in international legal instruments.³¹ The constitution provides that every person has a right to the highest attainable standard of health which includes the right to accessible and adequate housing, to reasonable standards of sanitation, to be free from hunger, to be free from hunger, to have adequate food of acceptable quality and to clean and safe water in adequate quantities.³² This being the case it is tenable to argue that the right of workers to a safe and clean working environment is a fundamental right in Kenya.

However, even though the constitution does recognize that every person has a right to the highest levels of attainable health; this is not the reality on the ground as workers rights continue to be trampled upon by the employers. In other regions³³ there have been arguments that due to increased globalization where the market conditions are shifting in favour of the employers as opposed to the employees, workers health has to be addressed in the broader context of a fundamental human right. This is geared towards bridging the gap in health inequality to alleviate poverty and achieve gender balance.

Industries in Kenya and all the other workplaces have to perceive occupational health and safety as an investment for economic productivity for a healthy workforce.³⁴ Seeing occupational safety and health as a fundamental human right will go a long way in ensuring that the vulnerable worker consisting of women, the poor and the children and forming the largest population of the working class get the basic knowledge of hazards, personal protection and that they do not work for long hours in unsafe conditions without health care or insurance covers.

In order to ensure that occupational health attains the status of a basic human right for all the vulnerable workers there will be a need to ensure that the working environment protects and promotes occupational health. This need to provide health for the vulnerable worker was given due recognition during the World Health Organization meeting of Parliamentarians held in New Delhi India in 1999.³⁵

4.1.1 Occupational Safety, Health and the Environment

³¹ Supra, see note 5

³² See Article 43 of the Constitution of Kenya, Op.cit.

³³ Supra see note 16

³⁴ Supra note 11

³⁵ Available at, http://www.searo.who.int/EN/Section316/Section503/Section2370_12953.htm, accessed on 28/06/2011

In providing an environment where employees are not exposed to hazards, risks and injuries to their health, employers must consider health as well as safety. In the occupational safety and health discourse, environmental matters arise in two scenarios:

- i) the working environment ; and
- ii) the impact of the industrial activities on the natural environment.

The constitution in Article 69 (1) (g) enjoins the state to eliminate processes and activities that are likely to endanger the environment.³⁶ Article 69 (1) (g) is therefore in tandem with the Environmental Management and Coordination Act³⁷ and the Occupational Safety and Health Act³⁸ which require workplaces in Kenya nowadays to come up with the necessary institutional frameworks for environmental and occupational health and safety management. The law here is geared towards improving the quality of the working environment and also escaping liabilities in the event of injuries and occupational diseases. Attaining occupational health and safety at the workplace will require the government as well as the other social partners to attach as much importance to the health of workers as to the environment in which they work.

The constitution guarantees every Kenyan the right to a clean and healthy environment. This right incorporates the principles of intra-generational and intergenerational equity with regards to the protection of the environment and the State and individual duties with respect to the environment.³⁹ By analogy then, it means that the working environment also needs to be clean and healthy to the workers. In its national report dated 7th April 2011, on migration in the health and social sectors in Kenya the, Public Services International (PSI)⁴⁰ observes that;

“A working environment that is rewarding, where workers are valued, that is safe and stress free, and that provides satisfying work and opportunities for career development will avoid putting workers in apposition to migrate”

³⁶ See Article 69 (1) (g) of the Constitution of Kenya, Government Printer, Nairobi

³⁷ Cap. 8 of 1999, Government Printer, Nairobi

³⁸ No. 15 of 2007, Government Printer, Nairobi

³⁹ See generally, Articles 42 and 70 of the Constitution of Kenya, Op.cit.

⁴⁰ See http://www.who.int/workforcealliance/members_partners/member_list/psi/en/index.html, accessed on 28/06/2011. PSI is a global federation of public service unions, representing 685 unions in 160 countries. Together, these unions represent more than 20 million public sector workers in health and social care, central government, municipal and community services and in public utilities.

Every workplace should demonstrate respect for the natural environment and occupiers should work towards achieving the goals of no accidents, no harm to people and no damage to the environment. It should be noted that most employers in Kenya have not taken it as their responsibility to ensure the working environment is safe, clean and health. Even though Workers, including foreigners and immigrants, theoretically have the right to remove themselves from situations that endanger health or safety without jeopardy to their employment; this right has not been enforced effectively, and workers are reluctant to do so due to the risk of losing their jobs.⁴¹ For example on 5th May 2007, 28 tea workers were dismissed by a Company for striking over poor working conditions. However, the Kenya Plantation Union and the Minister of Labour supported the workers, fought for their reinstatement.⁴²

It is the role of the employers to ensure the safety and health of their employees, the other stakeholders in the labour movement and the minimization of industries/factories impact on the environment. Therefore even though the law requires businesses to establish the necessary structures in environmental, health and safety management, they have not succeeded in ensuring environmental security by ensuring that their activities are within the existing legal framework on environmental matters.

5.0 The Occupational Safety and Health Act

The Occupational Safety and Health Act No.15 of 2007 repealed the Factories Act Cap 514. The Factories Act was meant to ‘make provisions for health, safety and welfare of persons employed in factories and other places of work, and for matters incidental thereto and connected therewith.’

In the year 2007, the Occupational Safety and Health Act was enacted which is seen as moving from the regulated style on safety and health to a self-regulated style of management.⁴³ It is therefore noteworthy that the enactment of the Occupational Safety and Health Act marked a big step towards moving from a reactive approach to safety and health at the work place to a more proactive attitude to workers welfare.⁴⁴ As will be seen elsewhere in this paper the activities of the labour administration in the field of occupational health and safety are based on the concept of the “duty of care”.

⁴¹ See <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154352.htm>, accessed on 28/06/2011. The 2010 Country Reports on Human Rights Practices-Kenya.

⁴² See <http://www.unhcr.org/refworld/country,,ITUC,,KEN,456d621e2,4c52ca26c,0.html>, accessed on 28/06/2011. The 2007 Annual Survey of violation of Trade Union Rights in Kenya.

⁴³ Infra, see note 46

⁴⁴ Infra, see note 46

The primary objective of the various institutions under the Act should be to create a proactive occupational safety and health risk management culture with all potential risk creators in the labour market to ensure that those who create the risks in the workplace and those who work with them have the primary duty of solving the risks rather than relying on the government as seen in the former statutory arrangements⁴⁵. What is seen in the Act is an approach combining both the reactive and proactive approaches. The Act therefore has not moved completely from the regulated style on safety and health management as will be seen later in this paper. It is worth pointing out at the outset therefore, that even though the Act sets out the legal framework with regards to safety and health at the workplace, there still exists a disconnect between what the Act says and the reality on the ground.⁴⁶

5.1 The Occupational Safety and Health Act

The Occupational Safety and Health Act 2007 aims at securing the safety, health and welfare of workers and the protection of persons other than the workers against risks to safety and health arising out of, or in connection with, the activities of persons at work.⁴⁷ The Occupational Safety and Health Act 2007 sets objectives to promote and improve occupational safety and health standards. In Part II the general duties are laid down in the Act, and are supported by other requirements in the Act, codes of practice and regulations. The general requirement for employers to consult and co-operate with safety and health representatives and other employees is part of the employer's general duty under the Act.⁴⁸

Similarly, employees are required to co-operate with employers in safety and health matters so that employers are able to meet their responsibilities.⁴⁹ The Act also provides for the election of employee safety and health representatives and the formation of workplace safety and health committees. Safety and health committees are made up of employer representatives and safety and health representatives, or employee representatives if the workplace has no safety and health representatives.⁵⁰ The Act encourages employers and employees to resolve safety and health issues in a spirit of cooperation, using procedures

⁴⁵ Infra, see note 46

⁴⁶ Kennedy Odhiambo Obiewa's Term paper on occupational health and safety management in Kenya: a case study of London Distillers Kenya Limited-International Safety Training Centre-2009

⁴⁷ Section 3 (2) Occupational Safety and Health Act.

⁴⁸ Read generally the provisions of section 13 of the Act Occupational Safety and Health Act.

⁴⁹ Section 13 (b) of the Act

⁵⁰ The Safety and Health Committees have been established under section 9 of the Act.

developed through consultation.⁵¹ The Act places emphasis on workplace consultation between employers and employees, and safety and health representatives, if the workstation has any.

The Act also provides a framework where regulations, codes of practice, workplace standards and procedures to resolve issues support the general duty of care.⁵² The general duty of care is the guiding principle for all other parts of the Act. Under the Act all parties involved with work have responsibilities for safety and health at work.⁵³ This includes employers, employees, self-employed persons and others, such as people who control workplaces, design and construct buildings or manufacture and supply plant. The duties under the Act are expressed in broad terms, under Section 6 (2) (a-g) the duties are spelt thus;

- i) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;
- ii) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- iii) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;
- iv) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;
- v) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;
- vi) Informing all persons employed of;
 - (a) any risks from new technologies; and
 - (b) imminent danger; and
- vii) Ensuring that every person employed participates in the application and review of safety and health measures.

The Act requires every workplace to be kept in a clean state, free from effluvia arising from any drain, sanitary convenience or nuisance. An occupier who contravenes these

⁵¹ See generally the duties of the employees under section 13 of the Act.

⁵² The codes are provided for in section 4 of the Act.

⁵³ These general duties have been outlined in Part II of the Act. See generally sections 6-31.

provisions on cleanliness commits an offence.⁵⁴ It also makes provision for environmental protection officers whose main purpose is to evaluate and coordinate the storage and handling of hazardous waste, the cleanup of contaminated soil or water, or other activities that affect the environment.⁵⁵ Such an outline of duties in very broad terms and without an effective enforcement mechanism raises doubt as to whether the employers or occupiers will fulfil these obligations given their lack of commitment to the same.

5.1.1 The Duty of Care

Like any other Occupational Safety and Health Act in the world the Kenyan law on occupational safety and health is based on the concept of the “duty of care”. The duties of the occupier⁵⁶, the employees,⁵⁷ designers⁵⁸, manufacturers, importers⁵⁹ are all set out in such a manner as to suggest that their respective duties are grounded on the “duty of care”. The Act imposes a general duty of care on occupiers and employers to protect persons at work from hazards and maintain safe and healthy workplaces.⁶⁰ According to the legal text, Street on Torts⁶¹ the common duty of care is defined in the following terms:

“The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there”.

In the House of Lords decision in *Donoghue v. Stevenson*⁶² Lord Atkin gave the classic definition of the duty of care in the following terms;

"A man has a Duty of Care to conduct himself in such a way as to avoid harm to others, where a reasonable man would have seen that such harm could occur".

⁵⁴ Section 47 of the Occupational Safety and Health Act No.15 of 2007, Government Printer, Nairobi.

⁵⁵ See generally Part IX of the Occupational Safety and Health Act No. 2007, op.cit.

⁵⁶ Section 6 of the Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi

⁵⁷ Ibid, Section 13.

⁵⁸ Ibid, Section 20.

⁵⁹ Ibid

⁶⁰ Section 6 (2) (d), op. cit.

⁶¹ Supra, note 14

⁶² 1932 All ER Rep 1; [1932] AC 562

Lord Atkin then gave the famous dictum in the said case in which he enunciated his seminal “neighbour principle” in trying to explain the duty of care.⁶³ The Occupational Safety and Health Act is⁶⁴ consequently based on this principle of duty of care and covers all workplaces in Kenya.

Implementing the duty of care principle means planning for the prevention of workplace accidents, injuries and illnesses.⁶⁵ The general duties of care in the Occupational Safety and Health Act 2007 are based upon the principles established under the common law. Under Common Law the employer must take reasonable care for health and safety at the work place. If the employer does not do so, then he could be held to be negligent, and can be sued under Common Law. The duty of care is a general legal duty on all individuals and organisations to avoid carelessly causing injury to persons. It requires everything ‘reasonably practicable’ to be done to protect the health and safety of others at the workplace

5.1.2 Institutions Established Under the Act

The Act establishes several institutions for the administration of the Act. The institutions include:

- i) The Directorate of Occupational Health and Safety Services
- ii) The National Council for Occupational Safety and Health
- iii) Technical Advisory Committee
- iv) Industrial court

5.1.3 The Directorate of Occupational Health and Safety Services

The office of the Director of Occupational Health and Safety Services established under the Act is responsible for the administration of the Act.⁶⁶ The Director is also a member of the National Council for Occupational Safety and Health.⁶⁷ The Act imposes a duty on the Director to conduct research either on his own or with the assistance of other

⁶³“The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question”.

⁶⁴ Act No. 15 of 2007, Government Printer, Nairobi

⁶⁵ Available at, <http://www.workcover.nsw.gov.au/healthsafety/Pages/Dutyofcare.aspx>, accessed on 8/6/11.

⁶⁶ Section 23 Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi

⁶⁷ Established under section 27 of the Occupational Safety and Health Act No. 15 of 2007, op.cit.

persons or bodies on occupational health and safety⁶⁸. The Director is then supposed to use the information collected to formulate safety and health policies to be implemented at the workplace in furtherance of the provisions of the Act. Under section 24(6) of the Act the Director is tasked with duty of setting up the Occupational Safety and Health Institute. This institute is supposed to conduct research and train occupational health and safety officers and other persons on all aspects of safety and health. It is unfortunate that hitherto the said Institute has not been established in line with section 24 of the Act.

5.1.4 The National Council for Occupational Safety and Health

The duties of this council⁶⁹ are to advise the Minister on the formulation and development of policy framework on occupational safety and health; on legislative proposals on occupational safety and health; on the strategic means of promoting the best practices in occupational safety and health; on the establishment, maintenance and development of a safety and health preventative culture; reviewing the provisions of the Act; the statistical analysis of work related deaths and injuries and such other matters affecting the quality of working life in Kenya⁷⁰. The Act further requires the Council⁷¹ to establish committees in different industries to assist it perform its duties with regards to industrial codes of practice and such other committees as it may deem fit.⁷²

5.1.5 The Role of the Industrial Court

The Constitution of Kenya⁷³ provides that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations⁷⁴. As such the Industrial Court is a superior court with the status of the High Court. It therefore has jurisdiction to settle trade disputes generally and trade disputes in essential services. It may also determine disputes arising out of employment contracts, and claims arising out of work related injuries and occupational diseases. The tripartite Industrial

⁶⁸ Section 24 Occupational Safety and Health Act No. 15 of 2007, op.cit.

⁶⁹ Supra see note 67

⁷⁰ Section 27 (1) Occupational Safety and Health Act.

⁷¹ The membership of the Council is outlined in section 28 of the Occupational Safety and Health Act.

⁷² Section 27 (4) Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi.

⁷³ The Constitution of Kenya 2010, Government Printer, Nairobi.

⁷⁴ Ibid Article 162(2).

Relations Charter is also important in that it laid the foundation for an industrial relations system already prior to Kenya's independence in 1963⁷⁵. The International labour standards, especially ILO Conventions that have been ratified by Kenya are used by the industrial court as guidelines, even though they are not binding.⁷⁶ The Work Injury Benefits Act 2007 provides that an appeal can be made to the Industrial Court by an objector aggrieved by the decision of the Director of Occupational Safety and Health Services with regards to a contravention of the matters under the Act⁷⁷.

6.0 A Health and Safety Policy⁷⁸

The Act imposes a duty on the occupier to prepare a safety and health policy statement⁷⁹. A health and safety policy is a method of action that influences and guides actions that promote effective safe working procedures, occupational hygiene and safety training. It addresses the types of hazards associated with the workplace; it discusses the active and on-going participation of employees.⁸⁰ The Act requires the policy to be amended from time to time to keep pace with the changes occurring at the workplace.

A written health and safety policy helps promote an effective Occupational, Health and Safety program. It strengthens the senior management's commitment to the health and safety of the workplace and the integration of health and safety into all workplace activities. That is to say that a health and safety policy reduces incidences of injuries and illnesses in the workplace, helps the employers to allocate resources towards health and safety, helps in identifying who is responsible for health and safety in the workplace. However, it is unfortunate that since the passing of the Act many industries have not come up with a health and safety policy⁸¹. This has partly been contributed by a lack of adequate awareness on safety and health or due to the costs of enforcing the requirements of the Act which places a heavy burden on the employers.

⁷⁵ See generally, <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/ken.htm>, accessed on 30/06/2011

⁷⁶ Ibid

⁷⁷ Section 52(2) of the Work Injury Benefits Act 2007, Government Printer, Nairobi

⁷⁸ See generally, <http://www.creek-kenya.org/health.php>, accessed on 8/6/2011.

⁷⁹ Section 7 Occupational Safety and Health Act of 2007 Act No. 15 of 2007, Government Printer, Nairobi

⁸⁰ Supra note 78

⁸¹ Supra note 46

7.0 Offences, Penalties and Legal Proceedings

The offences under the Act can be prosecuted by the occupational safety and health officer. Part XIII in section 108(1) provides that a contravention in connexion with or in relation to a workplace of the provisions of this Act, the occupier, or if the contravention is one in respect of which the owner is by or under the Act made responsible, shall be guilty of an offence. The Act makes provision for a general penalty in the event that any person commits an offence for which no express penalty is provided for⁸². The said section provides for a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three months or not. It should be noted that considering the profits made by most of the employers in their enterprises the fines stipulated in the Act are not sufficient to deter employers from contravening the provisions of the Act.

According to the 2010 Country Reports on Human Rights Practices it was reported that despite the fact that the Act had detailed provisions on environmental, health, and safety standards; the government had not effectively enforced the law. The fines were generally too low to serve as a deterrent to unsafe practices. With such a low level of penalties currently applying and the weakness in factory inspection systems, it is evident that regulation is a *necessary* but not *sufficient* mechanism for meaningful investments in occupational health practices.⁸³ the number of prosecutions on safety and health at the work place is also hampered by the fact that the majority of Kenyan workers are in the informal sector and statistical data on occupational injuries and diseases is scanty. As a consequence the number of deaths, injuries, accidents and occupational diseases contracted at the workplace are not well documented.

7.1 Other Provisions in the Act

The Act requires the Director to keep a register of all workplaces with such particulars as he may consider necessary⁸⁴. All workplaces must be registered as provided for under section 44 and can only be exempted from this provision in accordance with section 45 by the Minister by a Gazette Notice. This requirement is yet to be realized as the informal sector that employ the majority of the workforce and greatly hampered by poor coverage especially of

⁸² Section 109 Occupational Safety and Health Act of 2007, Government Printer, Nairobi

⁸³ Rene Loewenson, "Occupational health and safety in Southern Africa": ILO/SAMAT Policy Paper No.8

⁸⁴ Section 43 Occupational Safety and Health Act of 2007, Op.cit.

the small enterprises and the informal sector. Consequently the keeping of the register of all workplaces is not feasible.

Part VI of the Act then sets out the various standards by which workplaces must comply in order not to fall foul of the provisions of the Act. These provisions include matters such as maintenance of a clean work environment, prevention of overcrowding, proper ventilation in the workplace provisions on lighting, drainage of floors and consideration of gender in providing sanitary conveniences and facilities.⁸⁵ The requirements set out under this part are to be enforced by the local authority in the areas gazetted by the Minister.⁸⁶

Part VII of the Act deals with machinery safety. Sections 55-71 have detailed provisions on how machinery should be handled safely to avoid injury. These machines should also be inspected from time to time and certificates of compliance given by persons approved by the Director under part VII. Part VIII contains general provisions on safety. These provisions cover inter alia, storage of liquids, use of ladders, safe means of access to various parts of buildings, fire prevention, dealing with dangerous fumes and evacuation procedures. Part IX covers chemical safety. It contains provisions on handling, transportation and disposal of chemicals and other harmful substances. It is sad to note that despite the Act having very elaborate provisions on safety and health at the workplace; implementing and enforcing its objects is yet to be realized.

8.0 Challenges Facing Occupational Safety and Health Legislation in Kenya.

a) The Directorate of Occupational Safety and Health Services

There is a lack of strong conviction, commitment and initiation to undertake the occupational health and safety reforms as introduced by the new Act right from the Director of Occupational Safety and Health Services, the National Council for Occupational Safety and Health and even the employers themselves since the enactment of the Act. The Directorate's main mandate is to ensure compliance with the provisions of the Act⁸⁷ that seeks to promote safety and health at the workplace. The Directorate also ensures compliance with the provisions of the Work Injury Benefits Act, 2007 through prompt compensation of employees against work related injuries.⁸⁸ It should be noted that since the enactment of the

⁸⁵ See generally, section 47-52 of the Occupational Safety and Health Act of 2007, Government Printer, Nairobi

⁸⁶ *Ibid*, section 53.

⁸⁷ Section 23 Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi

⁸⁸ Section 53 Work Injury Benefits Act No. 14 of 2007, Government Printer, Nairobi

Act in 2007 the Directorate has not carried out extensive research personally or in collaboration with other organizations. Furthermore, the Directorate has hitherto not established an Occupational Health and Safety Institute. This is a huge challenge owing to the fact that it is the duty of the directorate to carry out research on workers health and safety.⁸⁹

The Directorate of Occupational Safety and Health Services does not function as a semi-autonomous government agency ensuring compliance with the provisions of the Occupational Safety and Health Act and the Work Injury Benefits Act. This has negatively impacted the enforcement of the Act in ensuring safety and health at the workplace.⁹⁰ Moreover, statistics do show that the Directorate of Occupational Safety and Health Services is understaffed. In its strategic plan for the year 2008-2012 the Ministry of Labour clearly states that the authorized establishment level of the Directorate is 170 but in-post there are only 58, creating a variance of 112.⁹¹ From the onset it was evident that the Directorate did not have the capacity to carry out the functions conferred upon as it lacked the necessary funding and human resources.

b) Cost of Compliance: A Burden to Employers

There have been complaints that the undertakings introduced by the Occupational Safety and Health Act have been loaded upon employers and as such there need to be collaboration between the employers and the government to come to a favourable compromise.⁹² The argument is that the compulsory annual safety and health audits, risk assessments and the requirement for a health and safety statement by all employers will drive out the small investors who will not be able to comply for lack of capacity as the Act requires.

c) Weak/ Backward Infrastructure

A weak infrastructure has remained as a big challenge and constraint in achieving safety and health at the workplace. There has been an increase of institutional risks and more so those related to corruption, the quantity and quality of the infrastructure. Measures geared towards strengthening and promoting strategies for risks assessment and risk management

⁸⁹ See generally, http://www.labour.go.ke/index.php?option=com_docman&Itemid=207, accessed on 30/06/2011.

⁹⁰ Ibid

⁹¹ See also, <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154352.htm>, accessed on 28/06/2011. The 2010 Country Reports on Human Rights Practices-Kenya.

⁹² As per Betty Maina, Kenya Association of Manufacturers < <http://www.kam.co.ke> >

remain as an immediate priority area where action is needed in Kenya. This can be achieved through development of the necessary institutions and capacity building.

There has been a lack of the necessary infrastructure for reporting the current magnitude and trends of occupational health diseases and injuries for the policy-makers to monitor the performance of occupational health and safety programmes. Therefore the level of monitoring and surveillance of occupational diseases and injuries in Kenya is insufficient to allow policy-makers to assess the occupational health programmes and to intervene strategically. Further there has been a lack of a comprehensive policy on occupational safety and health and this has contributed to a weak infrastructure or safety culture amongst workers and employers, and the effectual non-compliance with the national and international health and safety standards⁹³. Kenya lacks good national policies on Employment, Occupational Safety and Health, Social Protection, Industrial Training, Child labour, Industrial attachment, Incomes and wage and Labour Export Policy.

d) Composition of the National Council for Occupational Safety and Health

A clear reading of section 28 of the Act reveals that the membership of the council is mainly drawn from government officials. This is not satisfactory seeing that the council will among other things be required to advise the Minister on how to formulate and develop a national occupational safety and health policy framework. It is instructive to note also that government policy has emphasised on private partnerships at all levels and therefore having a council with a membership mainly drawn from the government defeats that purpose. Since the Act has put more emphasis on a tripartite approach involving all the stakeholders in the sector the membership needs to be widened. Its membership should be drawn from the government, the employers and the employees alike.

e) Unclear Intention and Vague Language in the Act

There are unclear intentions and vague language regarding how often employers must conduct hazard inspections, how often employers must provide employees training and evaluations and what constitutes adequate employee training and sufficient employee involvement⁹⁴. The requirements of the Act and the duties thereto are too vague to be effectively and fairly enforced. The Act gives too much discretion to the Director and the inspectors. For example section 4 of the Act provides that in providing guidance with respect to any provision of the Act and of health and safety regulations the Director after consulting

⁹³ See generally http://www.labour.go.ke/index.php?option=com_docman&Itemid=206 accessed on 21/06/2011.

⁹⁴ Section 6 of the Act depicts the use of vague language in relation to the duties of the employers.

with the council shall approve and “*issue codes of practice which are in his opinion suitable for that purpose.*”

Such an ambiguity in the law was also seen in the Work Injury Benefits Act 2007, where several sections in that Act were annulled by the High Court of Kenya⁹⁵. The annulled sections included Section 23(1) that empowered the Director of Occupational Safety and Health Services to make inquiries as are necessary to decide upon any claim or liability and sections 52(1) and (2) which permitted the Director of Occupational Safety and Health Services to review, vary or uphold his initial decision on a matter and make provision for the filing of appeals to the industrial courts by only the objector and not any affected party to the case. This nullification created a big gap in the protection of Kenyan workers’ rights to safe and favourable working conditions.

f) Inadequate Awareness on Occupational Safety and Health Issues Among the Working Population

There is a general lack of awareness by the working force of occupational safety and health issues. This has been caused by a lack of adequate funding to propell occupational safety and health programmes, lack of a proper linkage between promotion of occupational safety and health and work injury benefits and a lack of adequate research focusing on occupational safety and health in Kenya. There exists a knowledge gap in the safety and health working conditions which situation has been worsened by the lack of the necessary human resource development.

According to the Kenya Stakeholders Coalition for the Universal Periodic Review submitted on 2nd November 2009, there is a glaring gap on awareness of workers’ rights and corresponding employers’ duties by the general citizenry thus providing an avenue for exploitation of workers. The informal sector has grown from 5,716,400 in 2003 to 7,475,600 in 2009; yet the current legal framework offers no protection of the informal sector on an equal basis as the formal sector⁹⁶. This is in spite the introduction of the new labour law regime.

g) Technological Challenges

With the growing informal sector and the introduction of new technologies in the vast agricultural sector, new strategies have not been developed to make occupational safety

⁹⁵ The annulled sections included section 4, 7(1) and (4), 10(4), 16, 23(1), 25(1) and (3), 52(1) and (2) of the Work Injuries Benefits Act, 2007. (See the decision in HCCC. No.185 of 2008, Law Society of Kenya & another Versus Attorney General)

⁹⁶ The Kenya National Bureau of Statistics .See generally, <http://www.knbs.or.ke/>, accessed on 30/06/2011

and health achieve the desired impact.⁹⁷ Curbing occupational risks is made even more complex by lack of the necessary technological infrastructure to manage and develop new prevention patterns due to the changing world of work which is shaping up and creating new risks. In the area of bio-technology for example, innovation is bringing new technologies at the workplace, which in turn raises the issue of bio-safety. It should be appreciated that these are new risks to the employers, and all the other stakeholders.

h) Capacity Challenges

Human resource development and capacity building pose a big challenge not only to regulators, supervisory and advisory institutions but also to the government, employers and the workers. This problem has largely been contributed by a lack of funding, failure to recruit staff as per establishment, failure to train professionals and practitioners in occupational safety and health and provision of adequate tools and equipment which remain as some of the primary issues that hamper not only the coverage but also the impact of occupational safety and health. For instance in the year 2010 the Directorate of Occupational Health and Safety Services had a target of 4,840 inspections, but carried out 4,000 inspections and prosecuted 100 companies for violating occupational health and safety regulations⁹⁸. No actual studies have been carried out to show the extent of coverage in industries and other sectors. Inspection records, though available, may be misleading as the exact number of workplaces requiring the services is not exactly known especially with the sprawling informal sector. Due to the previous set-up of the occupational safety and health system, larger industries are better covered than small and medium-sized enterprises and other sectors⁹⁹.

9.0 Areas in Need of Reform in the Occupational Safety and Health Discourse

a) A National Policy and Programme on Occupational Safety and Health Services

There is need for Kenya to come up with a national policy and programme on occupational safety and health services. It should be a functional national policy and programme on occupational safety and health services that is fully supported by all

⁹⁷ See generally, <http://www.sheilapantry.com/cis/cis201010.html><Franklin K. Muchiri, African newsletter on Occupational Health and Safety vol.11 (2) Finnish Institute of Occupational Health (2001)>

⁹⁸ Supra note 89.

⁹⁹ Ibid

stakeholders, with adequate resources and facilities.¹⁰⁰ Such a policy will ensure effective provision of occupational safety and health services to all.

b) Creation of Adequate Awareness on Occupational Safety and Health

There is a general lack of awareness on the occupational safety and health issues among the working people in Kenya. To curb this there is a need to increase the use of electronic and print mass media, to teach safety and health issues in school curriculum at all levels, establish partnerships with key stakeholders-universities, employers and employees organizations, professional organizations and to establish the Occupational Safety Health and Work Injury Benefits Authority. There is a need also of establishing a National Institute of Occupational Safety and Health and an Occupational Safety and Health Fund.¹⁰¹

c) Employee Ownership

The management in all places of work should show a commitment in setting up structures that give their employees a sense of ownership in the working systems established to ensure their safety. Employers can effectively achieve this by creation of awareness, disclosure of vital information, involving employees in the outlining and the eventual attainment of those goals and the giving of incentives to their employees.¹⁰²

d) Safety and Health Committees

The Act through the rules established therein requires that work places should have a safety and health committee. Some have argued that this is the bedrock of the Act in that it has attempted to move the Kenyan industries from the reactive to proactive system of management.¹⁰³ It is notable that the current safety and health committee members in many workplaces have not been empowered through training to be able to carry out their functions under the rules.¹⁰⁴ Many workplaces (some studies say 65%) have violated this mandatory legal requirement on the establishment of health and safety committees.¹⁰⁵ The members need to be empowered through relevant training to be able to carry out their functions as stated in the rules. Research shows that the safety and health committees

¹⁰⁰ Supra note 89

¹⁰¹ Supra 91

¹⁰² Supra note 46

¹⁰³ Kennedy Odhiambo Obiewa, Supra note 46.

¹⁰⁴ Ibid

¹⁰⁵ A survey on management perspectives of the state of workplace health and safety practices in Kenya, by The Centre for Public Health Research, Kenya Medical Research Institute, Nairobi, Kenya.(<http://www.ncbi.nlm.nih.gov/pubmed/10384222>, accessed on 30/06/2011)

do not really comprehend their mandate under the Act and therefore prove to be of no value to the safety and health agenda.

e) Promotion of the use of a Health Risk Paradigm of Risk Assessment and Management

According to Rene Loewenson¹⁰⁶ risk management has in the main been practised in many African states by the provision of personal protective equipment, which is in fact a last line of defence. More effective risk control is obtained by giving a greater emphasis on work environment (engineering) and work organisation (administrative) controls. It has been opined¹⁰⁷ that risk assessment and management provide the foundation for reducing the risk of occupational diseases and injuries. These variables play an essential role in guiding factory inspectors and health care personnel involved in their work. Such a unified approach as adopted by the SEAR¹⁰⁸ Countries will be helpful in Kenya as it is achieved through a two-step health risk paradigm consisting of risk management and assessment. According to this unified approach adopted by the SEAR countries risk assessment will be tri-pronged involving: hazard identification, dose –response characterization and exposure assessment while on the other hand risk management strategies should focus on supporting the development and promotion of protective policy and practices through both engineering controls and biological maintenance.¹⁰⁹ On risk management we need to come up with protective policies and legislation that promotes protective practices. In other regions¹¹⁰ this has been achieved through;

- i) Provision of technical support for the formulation of a national plan based on situational analysis;
- ii) Promotion of preventive and control measures in reducing occupational risks at the workplace;
- iii) Strengthening health surveillance of workers through regular medical examination.

Health risk assessment can be achieved through supporting occupational health hazard assessment through environmental and exposure monitoring at the work place and the

¹⁰⁶ Supra note 83

¹⁰⁷ See generally, http://www.searo.who.int/en/Section23/Section1214/Section1219_11049.htm, accessed on 30/06/2011.<Regional Strategy on Occupational Health and Safety in SEAR countries>

¹⁰⁸ South East Asian Region Countries.

¹⁰⁹ Supra note 107

¹¹⁰ Supra note 107

establishment of a national data-base of occupational hazards profiles.¹¹¹ There is also need of developing standardized methods and guidelines for occupational risk characterization through establishment of sentinel surveillance monitoring trends of occupational hazards, disease and injuries; and the establishment of a database on occupational disease and injury surveillance.¹¹² Such practical, factual and pragmatic measures are what the Kenyan legislation on occupational safety and health has not offered. It should be noted that despite the fact that the Act makes provision for risk assessment and management. Such measures are only theorized and not practical.

f) An Occupational Health Network in the Nation¹¹³

The Ministry of labour should establish a functioning network where the sharing of information on norms, standards, guidelines, modules and research methods can be done. Establishing such a network will also facilitate partnerships with key stakeholders such as the International Labour Organization (ILO) and the other UN agencies; and also promote intersectoral collaboration with all relevant implementing ministries, such as the ministry of health and the environment.

g) Allocation of Appropriate Resources for Occupational Health

The activities of the various institutions have been hampered by a lack of resources. This has negatively impacted research, training and education on occupational safety and health; there has been inconsistency in the enforcement of health and safety laws which calls for intensified monitoring, inspection, and rectification measures. In a nutshell therefore lack of proper funding, means that recruitment of staff as per establishment, professional training and the provision of adequate tools and equipment will be hampered hence smothering the impact and coverage of the Act. Allocation of the necessary resources for the efficient implementation of the Act should be availed.

h) Generation of a National Information Database on the Risk and Burden of Occupational Diseases and Injuries

Due to the lack of a national database on the risks, burden of occupational diseases and injuries, and the lack of reporting mechanisms on the occurrence of occupational diseases and injuries; there is a need to ratify the relevant conventions which would assist in requiring reporting on the progress made to the International Labour Office (ILO) in accordance with

¹¹¹ Supra note 107

¹¹² Supra note 107

¹¹³ Supra see note 65

‘Article 22’ of the ILO constitution.¹¹⁴ A central database should be in place for data collection and access to information related to occupational health and safety and all stakeholders should have a means of access.¹¹⁵

i) Capacity Building

The success of the Act will definitely lie on the strengthening of the human resource necessary to propel the activities of the council, the directorate and all the other institutions established under the Act. It is therefore key to note that even though the provisions in the Act seem to display a colourful picture in dealing with occupational health and safety, this is not the position on the ground as the institutions under the Act are under-staffed. In all the key areas in this discourse, human resource development has been a consistent factor. Research, education, training, workshops and seminars are the cornerstones for strengthening the capacity of all inspectors’ health care workers under the ministry of labour in the assessment and management of risks to occupational health.

In Kenya the level of training is wanting by virtue of the fact that the plethora of training courses, duration and courses that exist are really in want of improvement. The Act in section 24 states that the Director shall conduct directly or in collaboration with other persons or bodies, research, experiments and demonstrations relating to occupational safety and health, including studies of psychological factors involved, and relating to innovative methods, techniques and approaches of dealing with occupational safety and health problems. From section 24 it is eminent that the kind of research, experiment and demonstrations envisaged therein, are dependent on the discretion of the Director. It is for this reason that Kenya should support the development of training institutes ,where the pedagogic approach applied by the universities and the specific needs of the ministry of labour and that of health should come to a compromise in developing teaching methods, curricula and courses that are of immediate use in occupational health.

Research undertaking should be an inbuilt component in the roles and responsibilities of occupational health and safety.¹¹⁶The ratio of occupational health care worker to employees should be attained if environmental monitoring, surveillance and management of

¹¹⁴ Samuel O. Afubwa, Occupational health and safety management system (OHSMS) as a “SHAMBALLA FORCE” in public health, A paper presented as a lecture in Curtin University, in 2004.

¹¹⁵ Ibid

¹¹⁶ Ibid see note 65

occupational health is to be realized. In training the occupational health care workers the training component must address the need for researchers and their distribution in the districts, county and the national levels.

j) Recognition of Occupational Safety and Health as a Business Concern

Perhaps recognising occupational safety and health as a business concern with great prospects will motivate industries and the government alike to allocate more resources to this sector. Areas such as research, education, training and the carrying out of risk assessments and management will create great opportunities for health and safety practitioners, researchers, the professionals and other stakeholders.¹¹⁷ A realization of this fact will act as a form of incentive to learning institutions such as the universities and the industries to invest a lot of finances in ensuring safety and health at the workplaces.

10.0 Conclusion

The foregoing discussion clearly illustrates that the right to safe and healthy working conditions as a fundamental human right has not been realised in Kenya. This is despite the enactment of the Occupational Health and Safety Act¹¹⁸ and the new constitution.¹¹⁹ The enactment of the Act was laudable as it was seen as a big step towards curbing occupational related diseases, injuries and harm, both to the workers and to the natural environment. However, there is a dire need of overcoming the capacity challenges in the Act in order to achieve its objects. There is a need to introduce provisions to guarantee equal treatment and opportunities to the informal sector workers. Amendments should be introduced to the Work Injury Benefits Act¹²⁰ or a redrafted Bill on Work Injury Benefits to Parliament for enactment to ensure that work injury cases are not held in abeyance before the courts.

In conclusion and in line with all the International Laws that guarantee the right to safe and favourable working conditions as a fundamental human right, Kenya needs to fill the major gaps in law relating to coverage of all workplaces, setting of clear rights and duties for tripartite co-operation, the right to refuse dangerous work, overcoming the administrative fragmentation of enforcement systems, strengthening penalties envisaged in the Act and

¹¹⁷ Ibid note 107

¹¹⁸ Supra note 1

¹¹⁹ Supra note 3

¹²⁰ Act No. 14 of 2007, Government Printer, Nairobi.

ensuring greater harmonisation of the laws on health and safety, the codes of practice and standards. With the new dawn brought by the new constitution¹²¹, the challenges outlined above have to be addressed, if occupational health and safety is to be realised as a fundamental human right in Kenya.

¹²¹ Supra note 3