



Hidden Employment Liabilities in Kenya: How Unwritten HR Practices Create Financial Exposure.

~ You Never Agreed to It, So Why Are You Paying for It? ~

The Briefing

Walk into any boardroom in Nairobi, ask the leadership team where their employment liabilities lie, and they will invariably point to their signed contracts. There is a deeply entrenched, dangerous assumption in corporate Kenya: if an obligation isn't explicitly documented, it doesn't exist.

If only the courts agreed.

The reality is that your greatest financial exposure rarely stems from the contracts your legal team drafted. It grows quietly out of the culture your management permitted.

The Fallacy of the Written Word

Take the recent Employment and Labour Relations Court decision in ***Gichuki v. Board of Management Gachatha High School***. The employer was ordered to pay nearly KES 720,000 in gratuity to a retiring employee. The defense was, on paper, textbook: the institution relied on statutory NSSF arrangements and the absolute absence of a written gratuity clause. They thought they were untouchable. They lost.

The Court bypassed the written contract entirely. Instead, it scrutinized the operational ecosystem; historical staff treatment, industry

circulars, and established institutional habits. The judgement was very clear that your daily conduct will override your written agreements and the system you operate quietly crystallizes into the obligations you owe.

The Danger of the "Shadow Contract"

We routinely see organizations inadvertently running a "shadow contract." This is a parallel, unwritten architecture of legal obligations built on good intentions, operational shortcuts, and local HR compromises.

What your management team views as operational flexibility, a temporary allowance to appease a restive team, a relaxed approach to working hours, or matching a competitor's informal perks, the law recognizes as "custom and practice." If a decade of ad hoc decisions can conjure a massive pension liability out of thin air, astute business leaders must ask themselves: what else is hiding in our operational history?

The most dangerous part of this exposure is that your operations look perfectly healthy. Payroll clears, grievances are handled, and the business hums. Yet, every single month, you are compounding off-balance-sheet liabilities.

The Industry Echo

This vulnerability is acute in standardized sectors like hospitality, manufacturing, healthcare, and education and courts are increasingly evaluating internal disputes against the backdrop of sector-wide norms.

If your competitors routinely offer specific allowances, and your HR team quietly mirrors that practice to retain talent, you are importing external liabilities. You do not need to sign a collective bargaining agreement to be bound by industry standards; you merely need to act like them long enough for a judge to deem it your baseline.

Fixing the Problem

You cannot fix systemic legal exposure with an internal HR audit. HR professionals are operators; their mandate is harmony and keeping the business moving. When they look at informal precedents, they see "the way we've always done things." When a court looks at them, it sees a binding financial commitment.

To protect the balance sheet, leadership must pivot from passive reliance on paper contracts to proactive risk management:

- **Forensic Legal Diagnostics:** We look past the formal paperwork. We audit your operational history, past payroll anomalies, and localized HR compromises to identify exactly where implied rights have already crystallized.
- **Ring-Fencing Liability:** We analyze sector norms against your internal policies, implementing robust entire-agreement and variation mechanisms that legally insulate your P&L from industry creep.
- **Strategic Unwinding:** You cannot simply halt a dangerous precedent as doing so invites immediate

constructive dismissal claims. We design bespoke, legally sound transition frameworks that systematically unwind implied rights, resetting your operational baseline without triggering litigation.

Employment liability rarely announces itself. It accrues quietly, fueled by unchecked habits. The most critical legal question facing your business today is not what you intentionally agreed to. It is what you have unknowingly allowed to become normal.

Do not wait for a dispute to reveal gaps in your employment frameworks.

Connect with our Employment Law Practice Group for a confidential discussion on potential areas of exposure within your organization.

✉ **Contact us:** emetchambers@outlook.com ☎ +254 0115 874 378 | +254 0115 874 409

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