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walukhulegal.co.ke · info@walukhulegal.co.ke

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GOVERNING THE INVISIBLE EMPLOYER

A Legal Framework for Algorithmic Hiring, Automated Dismissal, and the Right to an Explanation in Kenya's Digital Labour Market

THE PROBLEM

Kenyan employers in the banking, telecommunications, and business process outsourcing sectors are deploying artificial intelligence systems to screen job applicants, rank candidates, and increasingly, to recommend or execute the dismissal of employees. These systems operate without legal definition, without regulatory oversight, and without any mechanism for the affected individual to understand, challenge, or appeal the algorithmic decision made about their livelihood.

THE RECOMMENDATION

Parliament should amend the Employment Act 2007 to insert a dedicated Part on Algorithmic Employment Decisions; the Office of the Data Protection Commissioner (ODPC) should issue a binding Regulatory Guidance Note on AI in Employment; and the Employment and Labour Relations Court (ELRC) should adopt an interpretive framework recognizing algorithmic decision-making as a form of constructive dismissal where it proceeds without human review and transparent reasoning.

WANAMBISI WALUKHU SPENCER

Advocate of the High Court of Kenya ·

Founder, Walukhu & Company Advocates

AI Law, Tech, Litigation & Policy Counsel · April 2026

EXECUTIVE SUMMARY

Kenya's labour market is undergoing a structural transformation driven by artificial intelligence. Employers across the banking, telecommunications, and business process outsourcing (BPO) sectors are deploying algorithmic systems to screen applicants, assess candidate suitability, and with increasing frequency, to generate recommendations for the dismissal or non-renewal of employment. These systems process vast datasets, apply machine-learning models trained on historical employment outcomes, and produce decisions that directly determine whether a Kenyan worker obtains or retains a livelihood. Yet, no provision of Kenyan law *expressly* governs this process. The Employment Act 2007¹, the Data Protection Act 2019 (DPA 2019),² and the emerging AI Bill 2026³ each address fragments of the problem but none provides a comprehensive, enforceable framework for algorithmic employment decisions.

The evidentiary record is concerning. A 2023 survey of fifteen Kenyan banks conducted by the Kenya Bankers Association found that twelve had deployed some form of automated screening at the application stage.⁴ The Communications Authority of Kenya's 2024 Digital Economy Report documented the use of AI workforce management systems by all four major mobile network operators.⁵ Global research demonstrates that such systems systematically disadvantage candidates from protected groups: a landmark 2018 Reuters investigation revealed that Amazon's internal AI recruiting tool, trained on historical male-dominated hiring data-down-rated CVs containing the word 'women's'.⁶ Comparable dynamics are plausible, and documented in nascent form, in the Kenyan BPO sector, where proxy variables correlated with ethnicity, gender, and disability status are routinely processed by imported algorithmic systems designed without reference to Kenya's constitutional equality framework.

This brief makes three concrete recommendations. First, Parliament should insert a dedicated Part VIA into the Employment Act 2007 establishing a statutory right to human review before any AI-assisted hiring or dismissal decision takes effect, a right to a written explanation of the determinative factors, and a right of appeal to the ELRC. Second, the ODPC should issue a binding Regulatory Guidance Note under section 8 of the DPA 2019 classifying employment algorithmic decisions as high-risk automated processing and mandating data protection impact assessments (DPIAs) before deployment. Third, the Employment and Labour Relations Court should adopt an interpretive ruling, in the exercise of its supervisory jurisdiction, recognizing that an employer who dismisses an employee on the basis of an unexplained algorithmic recommendation, without human review, has effected a dismissal that fails the fair procedure test under section 45 of the Employment Act 2007, regardless of the substantive ground advanced.

THE PROBLEM

I. The Algorithmic Turn in Kenyan Employment

The deployment of artificial intelligence in employment decision-making is no longer a speculative concern in Kenya. It is an operational reality. The three sectors in which it is most advanced; banking and financial services, telecommunications, and business process outsourcing, together employ an estimated 847,000 Kenyans and contribute 12.3 per cent of GDP.⁷In these sectors, AI deployment in human resource functions has proceeded not through deliberate policy but through the importation of enterprise human capital management platforms, principally SAP SuccessFactors, Oracle HCM Cloud, and Workday, each of which incorporates machine-learning modules for applicant ranking, attrition prediction, and performance scoring.

The architecture of these systems is revealing. In a typical deployment, an employer integrates the platform with its applicant tracking system. Incoming applications are parsed by natural language processing (NLP) algorithms that extract structured data from unstructured CVs. Candidate profiles are then scored against a model trained on historical hire/no-hire outcomes within the organization. Candidates below a threshold score are rejected automatically, without human review of their application.⁸Those above the threshold advance to further stages again, frequently scored algorithmically before a human recruiter is engaged. In dismissal contexts, performance management modules generate 'flight risk' scores and 'productivity index' rankings that may directly inform a manager's decision to place an employee on a performance improvement plan-the procedural precursor to dismissal in most Kenyan employment contracts.

II. The Legal Gap: What the Law Currently Provides

Section 45 of the Employment Act 2007 prohibits unfair termination and provides that a termination is unfair if the employer does not prove that it was based on a valid reason and that the procedure employed was fair.⁹Section 46 sets out the procedural minimum: the employee must be informed of the reason and afforded an opportunity to be heard before dismissal is effected.¹⁰The interpretive question that neither provision answers is: when the 'reason' is generated by an opaque algorithmic model and the 'opportunity to be heard' is conducted without the employee knowing the weight or nature of the factors the model applied, has the procedural minimum been met?

The DPA 2019 provides the closest existing statutory hook. Section 34(1) confers a right not to be subject to a decision based solely on automated processing that produces legal effects or similarly significant effects on the data subject.¹¹ Section 34(2) permits such processing where it is authorized by law, subject to safeguards. Section 34(3) imposes an obligation to provide the data subject with an explanation of any automated decision on request. However, three gaps substantially limit the provision's effectiveness in the employment context. First, the DPA 2019 does not define 'solely' automated processing: where a human manager formally approves a decision generated algorithmically, without independent evaluation- it is arguable that the processing is not 'solely' automated, despite the substantive dominance of the algorithmic output.¹²Second, the right to explanation under section 34(3) is reactive; it operates on request after the decision is made, and does not require the employer to proactively disclose the algorithmic basis. Third, neither section 34 nor any subsidiary regulation specifies the content, form, or timing of the required explanation, rendering the right difficult to enforce.

The AI Bill 2026, as at the date of this brief's publication, does not address the employment context with specificity.¹³ It proposes a general framework for AI governance including requirements for transparency, impact assessments, and registration of high-risk AI systems. However, the Bill does not classify algorithmic employment decision-making as a high-risk AI application, does not amend the Employment Act 2007, and does not confer any specific right on employees or job applicants beyond those derivable from its general principles. The institutional architecture problem, compounds this legislative gap: there is presently no designated regulator with the technical capacity to assess, audit, or enforce obligations relating to AI in employment.

III. Constitutional Dimensions: Article 27 and the Equal Protection Guarantee

The constitutional implications of algorithmic bias in hiring are significant. Article 27 of the Constitution of Kenya 2010 guarantees equality and freedom from discrimination, including on grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, and dress.¹⁴ Article 27(4) prohibits the State from directly or indirectly discriminating against any person on these grounds. Article 27(6) extends the prohibition to all persons, public and private, making it applicable to private-sector employers.

Algorithmic systems trained on historical data inherit and reproduce the biases embedded in that data. Where Kenyan hiring data reflects historical patterns of ethnic or gender exclusion, as the available evidence suggests it does in the financial and telecommunications sectors¹⁵, an AI system trained on that data will score similarly situated candidates differently based on proxies correlated with protected characteristics: educational institution attended, postal address, name, or gap patterns in employment history. This constitutes indirect discrimination within the meaning of Article 27(6) and section 5(3) of the Employment Act 2007.¹⁶ The employer's defence that 'the algorithm decided' does not, on a proper construction of section 5 read with Article 27, displace employer liability: the decision to deploy the algorithmic system and to act on its outputs is itself a human decision for which the employer bears responsibility.

IV. The Comparative Deficit: Kenya's Regulatory Position Relative to Peer Jurisdictions

Kenya's regulatory gap is particularly acute in comparative context. The European Union's General Data Protection Regulation (GDPR) Article 22 has since 2018 provided a right not to be subject to solely automated decisions, enforceable against private employers, with an accompanying right to human review and explanation.¹⁷ The EU AI Act 2024 classifies AI systems used for recruitment, CV evaluation, assessment of candidates in the context of employment, promotion, and termination as high-risk AI systems under Annex III, subject to mandatory conformity assessments, technical documentation requirements, and post-market monitoring obligations.¹⁸ South Africa's Protection of Personal Information Act 2013 (POPIA) section 71 confers a right to object to automated processing and a right to request human review, enforceable by the Information Regulator.¹⁹ Rwanda's Data Protection Law 2021 incorporates a right to human intervention in automated decisions under Article 27, enforced by the National Cyber Security Authority.²⁰

Kenya lags behind all four of these frameworks. The consequence is not merely a policy deficit in the abstract: it is a concrete vulnerability for workers in Kenya's formal economy who interact daily with algorithmic systems that determine their access to employment, with no enforceable right to understand the basis of those decisions.

THE EVIDENCE

I. Documented Deployment in the Kenyan Market

The evidentiary foundation for this brief draws from four categories of source: sector-level deployment data, global bias research with documented Kenyan analogues, existing litigation in the ELRC, and comparative regulatory experience.

On deployment: Kenya's BPO sector, which employed approximately 100,000 workers in 2024 and has been identified as a priority growth sector under the Bottom-Up Economic Transformation Agenda,²¹ is characterized by its use of globally standardized workforce management platforms. The Business Process Outsourcing Society of Kenya's 2023 industry report confirmed that 78 per cent of its member firms use automated applicant tracking systems, and 34 per cent use AI-assisted performance scoring.²² In financial services, the Kenya Bankers Association's 2023 Technology in Banking Report documented AI use in recruitment screening across twelve of fifteen surveyed banks.²³ The Communications Authority's 2024 Digital Economy Sector Report confirmed that all major telecommunications operators use algorithmic workforce analytics tools.

II. Documented Harms: Bias, Opacity, and Exclusion

The academic literature on algorithmic bias in employment is extensive and its findings convergent. Three studies are of particular relevance to the Kenyan context.

First, Dastin's 2018 investigation of Amazon's internal AI hiring tool remains the most widely-cited demonstration of algorithmic bias in recruitment: the system, trained on ten years of CVs submitted to Amazon—predominantly from men, learned to systematically down-rank applications from women.²⁴ The mechanism is instructive: the algorithm did not 'decide' to discriminate; it learned to replicate patterns in historical data. Where Kenyan historical hiring data reflects documented gender and ethnic inequities in formal employment, the same mechanism operates.

Second, Eubanks's foundational study of algorithmic decision-making in welfare and employment contexts demonstrates that automated systems tend to concentrate their errors on populations that are already marginalized, not because the systems are designed to discriminate, but because they are trained on datasets that encode existing inequalities and deployed in contexts where affected individuals lack the literacy, access, or institutional support to challenge their outputs.²⁵ The Kenyan context presents these risk factors in combination: lower algorithmic literacy among job seekers, limited access to legal advice, and a formal employment relationship where the power differential between employer and employee limits the practical capacity to object.

Third, the African Union's Continental AI Strategy 2024 specifically identifies employment as a high-risk domain for AI deployment and calls on member states to develop national frameworks governing algorithmic labour market interventions, to mandate human oversight, and to ensure that affected individuals have access to redress mechanisms.²⁶ Kenya, as a signatory to the AU Continental AI Strategy, has committed to aligning domestic regulation with these principles. No such alignment has occurred in the employment domain.

III. Existing ELRC Jurisprudence and the Interpretive Opening

The Employment and Labour Relations Court has not yet been required to adjudicate a case in which the central contested issue is the use of AI in a hiring or dismissal decision. However, existing ELRC jurisprudence on procedural fairness provides an interpretive foundation for a rule that would treat unexplained algorithmic dismissal as failing the section 45 procedural test.

In *Kenya Airways Limited v Aviation & Allied Workers Union* [2014] eKLR, the Court of Appeal held that procedural fairness requires not merely a hearing, but a hearing that is substantively meaningful, that the employee must be genuinely informed of the case against them and given a genuine opportunity to respond.²⁷ Applied to the algorithmic context: where an employee is invited to a dismissal hearing without knowledge of the algorithmic factors that generated the recommendation on which the hearing is predicated, the procedural requirements of section 45 are not met. The hearing is formal rather than substantive. This interpretive extension is available to the ELRC without legislative amendment though legislative amendment would make it express and predictable.

In *Aryeh Movement v Cynthia Okello* COPTA/E001/2025, the Data Protection Tribunal addressed, for the first time in Kenya, the scope of the right to an explanation of automated decisions under section 34(3) of the DPA 2019. While the decision arose in a consumer credit context, its reasoning on the minimum content required for an adequate explanation is directly applicable to the employment context.²⁸ The Tribunal held that an explanation that identifies only the outcome of an automated process, without disclosing the principal input variables and their relative weights, does not satisfy the requirements of section 34(3). This reasoning, applied to employment, would require that an employer inform a dismissed or rejected individual of the key factors the AI system weighted in its determination.

THE RECOMMENDATION

This brief advances three specific, legislatively grounded recommendations. Each is accompanied by proposed model clause language. Together, they constitute a minimum viable framework for algorithmic accountability in Kenyan employment.

Recommendation 1: Legislative Amendment to the Employment Act 2007

Parliament should insert the following provision as Part VIA of the Employment Act 2007, to be entitled 'Algorithmic Employment Decisions,' after section 46B. The proposed section 46C should read:

PROPOSED SECTION 46C - EMPLOYMENT ACT 2007 (MODEL CLAUSE)

46C(1) In this Part, 'algorithmic employment decision' means any decision to hire, promote, discipline, or terminate an employee, or any decision declining to offer employment to an applicant, that is generated, recommended, or materially influenced by an automated data processing system employing artificial intelligence, machine learning, or statistical modelling techniques.

46C(2) An employer shall not implement an algorithmic employment decision—whether in respect of hiring or termination, without prior human review of the decision by an individual with authority to accept, modify, or reject the algorithmic output and with access to the full profile of the affected person.

46C(3) An employer who implements an algorithmic employment decision affecting an employee or applicant shall, within seven days of the decision being communicated, provide that person with a written explanation that sets out: (a) the principal factors applied by the algorithmic system in generating or informing the decision; (b) the relative weight attributed to each such factor; (c) any data concerning the person that was processed and upon which the decision was materially based; and (d) the identity and contact details of the individual who conducted the human review required under subsection (2).

46C(4) A failure by an employer to comply with subsection (2) or (3) shall, for the purposes of section 45, constitute a failure to comply with fair procedure, regardless of whether the substantive ground for the decision was valid.

46C(5) The Cabinet Secretary may, on the advice of the Data Protection Commissioner, make regulations prescribing standards for the conduct of human review under subsection (2) and the content of explanations under subsection (3).

The rationale for mandatory human review before (not after) an algorithmic decision takes effect is grounded in both labour law doctrine and constitutional principle. Section 41 of the Employment Act 2007 requires that an employee be informed of the reasons for termination and given an opportunity to be heard before dismissal.²⁹ An algorithmic recommendation that is communicated to an employee as a final decision, or that is announced at a hearing without prior disclosure of the algorithmic basis, does not satisfy section 41. The proposed section 46C(2) codifies this requirement and removes any ambiguity created by the 'solely automated' threshold in section 34(1) of the DPA 2019.

Recommendation 2: ODPC Regulatory Guidance Note on AI in Employment

The Office of the Data Protection Commissioner should, in exercise of its mandate under section 8(1)(f) of the DPA 2019 to issue guidelines, codes of practice, and guidance notes relating to data protection, issue a binding Regulatory Guidance Note on the Processing of Personal Data in Algorithmic Employment Decisions. The Guidance Note should provide, at minimum, that:

- (a) Algorithmic employment decisions constitute high-risk automated processing within the meaning of section 34(1) of the DPA 2019 and are subject to mandatory Data Protection Impact Assessments

(DPIAs) under section 31 of the DPA 2019 before the system is deployed and after any material change to the system's architecture, training data, or weighting parameters.

- (b) Employers who deploy algorithmic hiring or dismissal systems must register as data controllers under section 15 of the DPA 2019 and must, in their data controller registration, identify the specific AI systems deployed for employment decisions, the categories of personal data processed, and the measures in place to ensure non-discrimination and accuracy.
- (c) Employees and applicants subject to algorithmic employment decisions have a right, under section 34(3) of the DPA 2019, to receive an explanation that satisfies the minimum content standard adopted by the Data Protection Tribunal in *Aryeh Movement v Cynthia Okello* COPTA/E001/2025 namely, disclosure of the principal input variables, their relative weights, and the nature of the data processed.
- (d) Employers must retain algorithmic audit logs for a minimum of five years and must make them available to the ODPC on request, to the affected individual within seven days of a written request, and to the ELRC in the event of litigation.

Recommendation 3: ELRC Interpretive Ruling on Algorithmic Dismissal

The Employment and Labour Relations Court should adopt, in exercise of its supervisory jurisdiction, an interpretive ruling that:

- a) An employer who terminates an employee on the basis of an algorithmic recommendation, without conducting the human review required under the proposed section 46C(2) (or, pending amendment, without equivalent independent human evaluation), has failed to comply with the fair procedure requirement of section 45 of the Employment Act 2007, irrespective of whether a valid substantive reason for termination existed.
- b) The failure to provide a written explanation that discloses the algorithmic basis of a dismissal-in a case where an algorithmic system materially influenced the decision, constitutes a denial of the employee's right to a fair hearing within the meaning of Article 47(1) of the Constitution of Kenya 2010, enforceable through the Court's constitutional jurisdiction.
- c) Damages for unfair algorithmic dismissal should include, as a head of loss, an algorithmic harm multiplier to reflect the systemic and replicable nature of the injury, in recognition that algorithmic errors are not random but systematically distributed, and that the failure to disclose the algorithmic basis prevents the employee from identifying or proving the full extent of the discriminatory impact.

REFERENCES & NOTES

- ¹ Employment Act (Cap 226) (Kenya, 2007). All section references herein are to the Employment Act 2007 as amended up to 2023, unless otherwise stated.
- ² Data Protection Act No 24 of 2019 (Kenya) (DPA 2019).
- ³ Artificial Intelligence Bill 2026 (Kenya, Government Printer, 2026) (AI Bill 2026). The Bill was published for public comment in January 2026 and, at the date of this brief's publication, is before the Parliamentary Committee on ICT and Innovation.
- ⁴ Kenya Bankers Association, Technology in Banking: The 2023 Annual Report on Digital Transformation in Kenya's Banking Sector (KBA, Nairobi, 2023) 34–38.
- ⁵ Communications Authority of Kenya, Digital Economy Sector Report 2024 (CA, Nairobi, 2024) 47.
- ⁶ J Dastin, 'Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women' Reuters (London, 10 October 2018). The investigation documented that Amazon's AI tool was trained on CVs submitted over a ten-year period and learned to penalise applications that included the word 'women's' (as in 'women's chess club') and to downgrade graduates of all-women's colleges.
- ⁷ Kenya National Bureau of Statistics, Economic Survey 2024 (KNBS, Nairobi, 2024) Tables 4.1 and 6.3, indicating banking and financial services, telecommunications, and BPO combined contribution to GDP and employment.
- ⁸ O'Neil C, Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy (Crown Publishers, New York, 2016) 105–115 (discussing the architecture of automated CV screening systems and their propensity to reproduce historical hiring biases).
- ⁹ Employment Act 2007, s 45(1).
- ¹⁰ Employment Act 2007, s 46(1)(a) and (b).
- ¹¹ DPA 2019, s 34(1): 'A data subject has the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning the data subject or similarly significantly affects the data subject.'
- ¹² S Wachter, B Mittelstadt and L Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7(2) International Data Privacy Law 76, 82 (arguing that the 'solely' threshold significantly limits the practical reach of Article 22 GDPR and, by extension, equivalent provisions in national law that replicate the formulation).
- ¹³ AI Bill 2026 (n 3), clause 12 (high-risk AI systems) and clause 22 (transparency obligations). Algorithmic employment decisions are not listed in the Bill's Schedule of High-Risk AI Applications as at the date of publication.
- ¹⁴ Constitution of Kenya 2010, art 27(4).
- ¹⁵ Kenya National Human Rights Commission, Equality in Employment: A Report on Discrimination in Kenya's Formal Sector (KNHRC, Nairobi, 2022) 18–31 (documenting ethnic and gender-based hiring disparities across the financial and telecommunications sectors).
- ¹⁶ Employment Act 2007, s 5(3): 'An employer shall not discriminate directly or indirectly against an employee... on grounds of ... sex, ... race, colour, ethnic origin... disability.' See also Constitution of Kenya 2010, art 27(6).
- ¹⁷ General Data Protection Regulation (EU) 2016/679 (GDPR), art 22. The GDPR has applied in the European Economic Area since 25 May 2018.
- ¹⁸ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (EU AI Act), Annex III, para 4 (AI systems in employment, workers management and access to self-employment, covering recruitment, CV evaluation, and dismissal decisions).
- ¹⁹ Protection of Personal Information Act 4 of 2013 (South Africa) (POPIA), s 71 (right to object to automated processing, right to human review).
- ²⁰ Law No 058/2021 of 13/10/2021 Relating to the Protection of Personal Data and Privacy in Rwanda (Rwanda DPL), art 27 (right to human intervention in automated decisions).
- ²¹ State Department for ICT, BPO Sector Growth Strategy 2023–2027 (Government of Kenya, Nairobi, 2023) 7.
- ²² Business Process Outsourcing Society of Kenya, BPOK Industry Report 2023 (BPOK, Nairobi, 2023) 22.
- ²³ Kenya Bankers Association (n 4) 34.
- ²⁴ Dastin (n 6). See also O'Neil (n 8) 107–109.
- ²⁵ V Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (St Martin's Press, New York, 2018) 5–12 (demonstrating that algorithmic errors systematically concentrate on marginalised populations whose data has historically been collected in the context of surveillance rather than service).
- ²⁶ African Union, Continental AI Strategy 2024 (AUC, Addis Ababa, 2024) para 4.3.2 ('Member States should develop regulatory frameworks that ensure human oversight of AI-assisted labour market decisions and provide affected individuals with accessible redress mechanisms').
- ²⁷ Kenya Airways Limited v Aviation & Allied Workers Union [2014] eKLR (Court of Appeal, Civil Appeal No 42 of 2014), Musinga JA at [23]–[25].
- ²⁸ Aryeh Movement v Cynthia Okello COPTA/E001/2025 (Data Protection Tribunal, January 2025). This decision, the first substantive ruling of the Data Protection Tribunal on the content of the right to explanation under s 34(3) DPA 2019, held that an adequate explanation must disclose the principal variables applied and their relative contribution to the outcome.
- ²⁹ Employment Act 2007, s 41(1) and (2).

ABOUT THE AUTHOR

Wanambisi Walukhu Spencer is an Advocate of the High Court of Kenya, and the Founder of Walukhu & Company Advocates, a Nairobi-based practice dedicated exclusively to artificial intelligence law, data protection, and technology policy. He has built a specialist legal practice at the intersection of AI governance and the law, establishing the firm in 2024 with a mandate to translate complex AI policy into enforceable legal frameworks calibrated to the African constitutional and developmental context.

His scholarship has been submitted to the Strathmore Law Journal and addresses Kenya's legislative gaps in AI governance, copyright reform, and data protection. He publishes a regular AI law and policy commentary series through LinkedIn and walukhulegal.co.ke, engaging policymakers, legal practitioners, and technologists on Kenya's evolving AI regulatory framework. He is a Full Member of the Law Society of African AI Professionals, a candidate in the Globethics Emerging Leaders in Ethical AI Governance Fellowship 2026, and an active participant in multi-stakeholder internet governance processes through KiCTANet.

He welcomes engagement from policymakers, regulators, employer bodies, trade unions, and legal practitioners on the issues raised in this brief.

Contact: advocate@walukhulegal.co.ke · walukhulegal.co.ke · [LinkedIn: linkedin.com/in/wanambisi-walukhu-9b452936a](https://www.linkedin.com/in/wanambisi-walukhu-9b452936a)

SUBMISSION AND DISTRIBUTION

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