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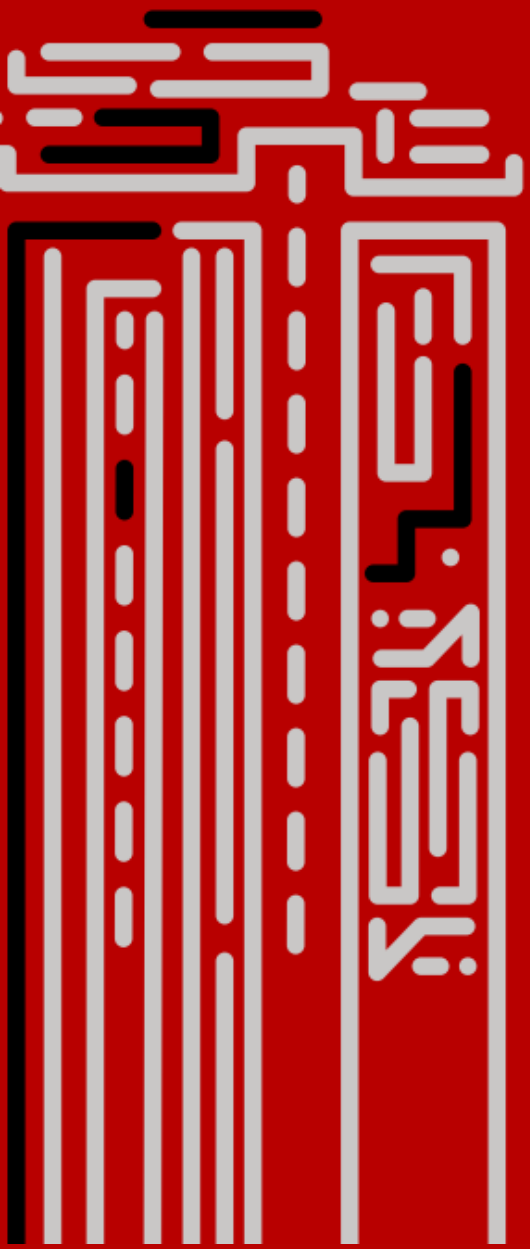
# Legal update:

# Employment Laws in the 'Gig' Economy' – Analysis and possible implications of the UK's February 2021 Supreme Court's Uber judgment



*“Who says you can’t drive an Uber in the morning, design websites all afternoon, and cater your own food company at night? The old economy would lead you to believe that you should pick one job, work hard for the next 40 years at that company, and then retire. Not the new economy…”*

*(Brian Rashid, The Rise of The Freelancer Economy)*

## The "gig"/freelance economy

The job market is changing tremendously particularly due to what is now commonly known as the "gig economy". The most common understanding of gig economy (from an online perspective) is that of collection of markets that match providers to consumers on a gig (a job) basis with on-demand companies providing services to the companies' clients. Prospective clients request services through an internet-based technological platform or smartphone applications that allow them to search for providers or to specify jobs. Gig economy can also be off-line.

Fulltime employment has been on the decline for years especially in the western world. This trend is expected to continue. Research conducted in 2019 revealed that independent contractors contributed to more than $1.3 trillion of the U.S. economy and they made up more than 40 % of the entire U.S. workforce.

At the local level, a report by Mercy Corps shows that as at 2019, the online gig economy was valued at $109 million and employed a total of 36,573 workers. According to the report, the ride-hailing ($ 45 million) and online professional work platforms ($55 million) account for the largest portion of the online gig economy by both value and number of workers. The report adds that online rentals and blue-collar matchmaking platforms accounted for $5 million and $3 million respectively.

It further adds that the total size of the offline Kenyan gig economy was 5.1 million workers and accounted for $19.6 billion in 2019 across six key sectors, namely agriculture, manufacturing, trade & hospitality, construction, transport & communication and community, social & personal services. Together, the report notes that the online and offline gig economy accounted for $19.7 billion and employed 5.13 million workers.

One of the sectors that has experienced tremendous growth under the gig economy both locally and internationally has been in ground transportation industry. This has seen the emergence and growth of Uber, Lyft, and Little Cab among other such firms.

Several factors are said to be responsible for the growth of the gig economy. One major factor is digitization and technological advancement. In this digital age, there is mobility of the workforce such that work can be done from any location. Digitization has also led to a decrease in jobs as technology has taken over certain types of work and others take much less time. The entrance of *"Millennials"* into the workforce is also said to be responsible for the rise of the gig economy. This young generation are attracted to the flexibilities of the gig economy.

The increased use of technology in the COVID-19 pandemic era globally from 2020 to date (2021) has also seen a heightened growth of the gig economy. Notable in Kenya during this period has been the increased use of courier and delivery services such as Glovo, Sendy, Bolt etc.

There has been a lot of debate the world over, on whether workers in the gig economy should be classified within the old conventional dichotomy of independent contractor vis a vis an employee.

The United Kingdom's Supreme Court in **Uber BV and others v Aslam and others [2021]** UKSC 5 rendered a decision regarding Uber drivers on 19th February 2021 which is considered to have far reaching implications on this debate. We analyse pertinent aspects of that decision below, but first we will analyse the position under Kenyan legal framework.

## *An employee and independent contractor under Kenyan law*

The Employment Act 2007 defines *"employee"* to mean "*a person employed for wages or a salary and includes an apprentice and indentured learner"* while an "*employer"* is defined as "*any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company*".

This Act also defines "*Contract of Service*" to mean "*an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of the Act applies.*"

Independent contractors/self-employed persons are not governed by the labour laws and do not enjoy certain statutory protections and benefits such as leave, work injury compensation, collective bargaining, overtime and minimum wage, among other benefits that are available employees. In cases where there is a dispute as to whether a relationship falls within either of this categories, our Kenyan courts have applied a four-fold English common law test as follows;

a) The control test; A servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work. The common law holds that *"the principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done."* This marked the very initial test for control test by the Privy Council in the case of **Regina v. Walker (1858) 27 L.J.M.C. 207** which has been relied by Kenyan court.

In the case of **Ready Mix Concrete vs Minister of Pensions [1968] 2 QB 497** which has been followed in several Kenyan judicial precedents, questions arose as to what constituted control and the court stated that *"control includes the power of deciding the thing to be done, the means to be employed in doing it, the time when and the place where it shall be done."*

b) The integration test; it examines if the service provided by the worker, is performed as an integral part of the business, or done on behalf of the business but not integrated into that business. The work done by the employee must not be accessory to the business. The employee is part of the business and his or her work is primarily part of the business. It is however possible that independent contractors may as well perform duties integral or primarily part of the business when in fact, they are not employees.

c) The chance of profit/ risk of loss test (also referred to as the economic or business reality test) which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit. This test requires that the employer alone assumes the responsibility for any profits and losses the business may sustain. The employee does not assume any responsibility and must be paid his salary at the end of the agreed period.

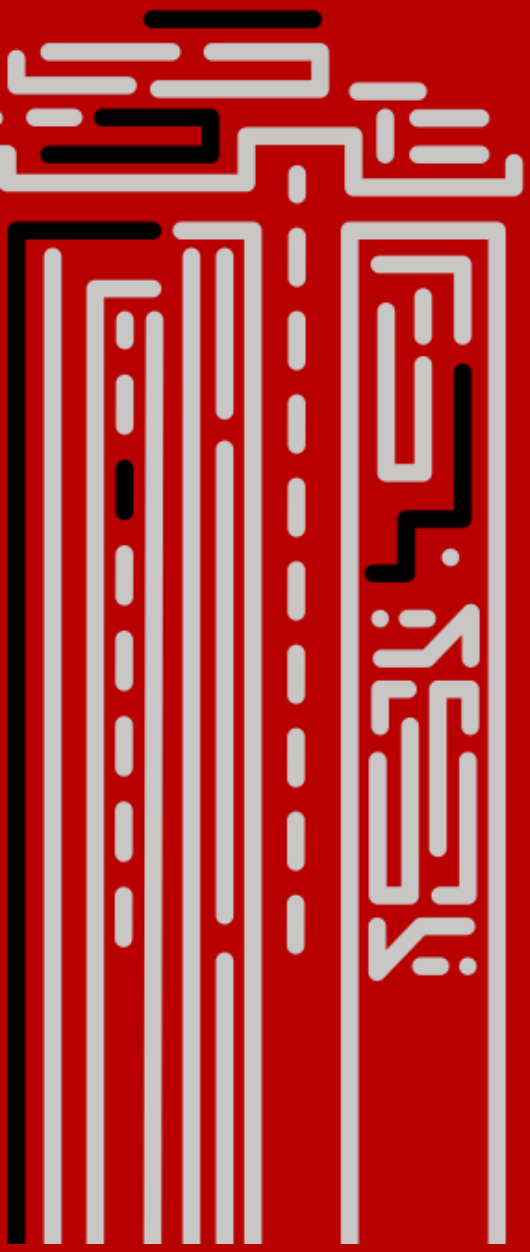
d) Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties.

The Kenyan courts have recognized that none of the foregoing tests can resolve the issue decisively on their own. In many cases the issue will be resolved by examining the whole of the various elements which constitute the relationship between the parties. The tests serve as a guide as each case is to be decided on the basis of its own facts. Some English cases on the issue state that the courts in determining the matter should *"identify the essential nature of the contract"* and that *"the question in every case should be what the true agreement between the parties is".*

Questions are now being raised as to whether the current laws appreciate and deal with the realities of the changing job market. Several challenges have been made world over against misclassification of employees as independent contractors within the gig economy set up. There have been many challenges but we will at this point refer to the recent legal challenge against Uber in the United Kingdom.

## United Kingdom's Supreme Court's decision against Uber: Uber BV and others v Aslam and others [2021] UKSC 5

In a ruling delivered on 19th February 2021, the United Kingdom's Supreme Court ruled that drivers using the Uber app are *"workers"* and are entitled to among other benefits, minimum wage and holiday pay. The dispute originated before the Employment Tribunal (the Tribunal), then escalated to the Employment Appeals Tribunal, and further escalated to the Court of Appeal and finally was determined by the Supreme Court. Uber lost at each of these levels. You can get the decision here.



In its judgment, the UK's Supreme Court recognized that new ways of working as organised through digital platforms pose pressing questions about the employment status of the people who do the work involved.

The central question on the appeal was whether the Tribunal was entitled to find that Uber drivers whose work is arranged through Uber's smartphone application *("the Uber app")* work for Uber under workers' contracts and so qualify for the national minimum wage, paid annual leave and other workers' rights; or whether, as Uber contended, the drivers do not have these rights because they work for themselves as independent contractors, performing services under contracts made with passengers through Uber as their booking agent.

The Uber decision centered on whether or not the Uber drivers were workers within the meaning of section 230 (3) of the United Kingdom Employment Rights Act, 1996 which provides as follows;

> *"In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> *a) a contract of employment, or*
> *b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
> *and any reference to a worker's contract shall be construed accordingly."*

The focus was on section 230(3) (b), referred to in the decision as the "limb (b) contract".

The decision also considered the definition of *"contract of employment"* under section 230(2) of the same Act, which means *"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."* Also considered was the definition of an *"employee"* under section 230 (1) which means an individual who has entered into or works under a contract of employment. The court noted that the terms *"employer"* and "*employed"* are defined under the Act more broadly to refer to the person by whom an employee or worker is (or was) employed under a worker's contract.

## Comparison of UK and Kenyan laws on classification of workers and employees

It should be noted that the definitions under the UK Act are much wider than those in our Kenyan statutes. Our statutes only recognize employees employed under contracts of service who are governed by labour laws. The other dichotomy is independent contractors who are not defined by statute but are considered independent contractors under common law.

The UK statute is couched in terms that make distinctions between three categories of people as was noted by the Supreme Court in the Uber decision, namely;

a. Those employed under a contract of employment;

b. Those self-employed people who are in business on their own account and undertake work for their clients or customers; and

c. An intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else.

According to the UK's Supreme Court, the UK statute not only protects employees who work under contracts of employment but also extends to *"workers"* who are not employees but are governed by the *"limb (b) contract"*. In explaining the rationale for extending protection to this other category of workers, the Supreme Court cited with approval the Employment Appeal Tribunal's decision in the case of **Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667 i**n which it was stated as follows;

> *"[T]he policy behind the inclusion of limb (b) … can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus, the essence of the intended distinction must be between, on the one hand, workers whose degree of*

*dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."(Emphasis added).*

The Uber decision was thus based on specific UK's legislation which although similar to our labour laws to a certain extent, is also different from our Kenyan law in certain respects. The decision however, centered on aspects of the four-fold common law test discussed above which is applied by our courts especially the control and the integration tests.

## Control, subordination and dependency tests

The gist of the Uber decision was that the drivers were workers and not independent contractors because they are dependent and subordinated to Uber in their work. The court noted that unlike an independent contractor, an employment relationship implies the existence of a hierarchical relationship between the worker and his employer. An independent contractor on the other hand, operates at an arm's length and at an independent position.

The court considered the correlation of subordination and/or dependency to the control exercised by an employer over the employees working conditions and remuneration. The court noted that the more the work life of a person is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace.

## A written contract by itself is not a determinant of the nature of the relationship

The Supreme Court was categorical that a written contract by itself should not be the starting point in determining whether an individual falls within the definition of a *"worker*". The court noted that an employer is often in a position to dictate contract terms and the individual performing the work has little or no ability to influence those terms. The court held that the law would be seriously undermined if a putative employer could by the way in which the relationship is characterized in the written contract determine, whether or not the other party is to be classified as a worker.

The court upheld the approach of looking beyond the terms of any written agreement so as to determine the *"true agreement"* as "*a purposive approach to the problem".* The court added that the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. The court further stated that there are no legal presumption that a contractual document contains the whole of the parties' agreement and there is no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. The court concluded that it is necessary to take account of the objective situation of the individual concerned and all the circumstances of his or her work. The wording of the contractual documents, while relevant, is not conclusive. It is also necessary to have regard to how relevant obligations are performed in practice.

Unlike our Kenyan labour legal framework, the UK Act expressly provides that any provision in a contract purporting to contract out of the UK Employment Act is void. To this end, the Supreme Court stated provisions in the contracts between Uber and the drivers which purported to exclude the Uber drivers from the ambit of employment laws were ineffective,, as it is for the courts and not the parties to determine the legal effect of a contract and whether it falls within one legal category or another.

It is common practice for contracts for services/independent contractors contracts to contain provisions that exclude the application of labour laws. Notwithstanding that our Kenyan legislation do not have similar provisions that prohibit contracting out, a similar approach of looking beyond the terms of a written contract has been taken by the Kenyan courts. For instance in **Kenneth Kimani Mburu & Another vs. Kibe Mugai Holdings [2014] eKLR** Rika J held that he was not bound by the label given by the parties for a written contract or the contents of such contracts, and held that;

*"The Court in determining the first question is not bound by the Parties' respective declarations on the character of these contracts, but should not disregard the Parties' intention. Even with the hybrid wording in the contracts, the intention of the Parties, and the wording in large portions of the two agreements persuade the Court these were employer-employee relationships."*

1. The remuneration paid to drivers for the work they did was fixed by Uber and the drivers had no say in it (other than by choosing when and how much to work). The court also noted that Uber fixed the amount of its own *"service fee"* which it deducts from the fares paid to drivers. Uber's control over remuneration further extends to the right to decide in its sole discretion whether to make a full or partial refund of the fare to a passenger in response to a complaint by the passenger about the service provided by the driver.

2. The contractual terms on which drivers perform their services are dictated by Uber. Not only are drivers required to accept Uber's standard form of written agreement but the terms on which they transport passengers are also imposed by Uber and drivers have no say in them.

3. In as much as the drivers have the freedom to choose when and whereto work, their choice about whether to accept requests for rides is constrained by Uber once logged onto the Uber app. The court also noted that control is exercised by monitoring the driver's rate of acceptance (and cancellation) of trip requests, with attendant sanctions of warnings, being logged-off the system and deactivation in cases of cancellations. The court held that these aspects of Uber's control over the drivers made them subordinated to Uber.

4. The court noted that Uber exercises a significant degree of control over the way in which drivers deliver their services. Although the drivers provide their own car, Uber vets the types of car that may be used. Moreover, the technology which is integral to the service is wholly owned and controlled by Uber and is used as a means of exercising control over drivers. Thus, when a ride is accepted, the Uber app directs the driver to the pick-up location and from there to the passenger's destination.

The court noted that a further potent method of control is the use of the ratings system whereby passengers are asked to rate the driver after each trip and the failure of a driver to maintain a specified average rating will result in warnings and ultimately in termination of the driver's relationship with Uber.

The court held that the ratings are used by Uber purely as an internal tool for managing performance and as a basis for making termination decisions where customer feedback shows that drivers are not meeting the performance levels set by Uber. The court held that is a classic form of subordination that is a characteristic of employment relationships.

5. The court noted that Uber restricts communication between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride.

Taking the above factors together, the Supreme Court concluded that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Furthermore, the court noted that the service is designed and organized in such a way as to provide a standardized service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill. From the drivers' point of view, the same factors - in particular, the inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers – according to the court, meant that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice, the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance.

In the end, the Supreme Court dismissed Uber's appeal and held that the Employment Tribunal was entitled to conclude that, by logging onto the Uber app a driver came within the definition of a *"worker"* by entering into a contract with Uber London whereby he undertook to perform driving services for Uber London.

## Is it time for the law to catch up? What next?

Perhaps what needed to have been considered is whether the definitions of *"workers"* and *"contract of employment"* as applied by the Tribunal, the Court of Appeal and the Supreme Court are adequate to apply to the changing job market. The same consideration should be had of our own Kenyan laws governing employees and independent contractors.

The Uber decision in the UK is not the first decision on classification of workers in the gig economy. There have been decisions in other countries but the UK decision appears to have the greatest impact globally. Soon after the decision, there were media reports that Uber, Bolt and Little cab drivers in Kenya called on the Cabinet Secretary in charge of Labour Cabinet to begin formulation of laws that would bring them within the ambit of employees.

With advancement of technology and growth of the gig economy, the lingering question has been whether the emerging work relationships fit within the existing legal definitions of *"employee"* (and/or *"worker"* as is the case in the UK) and "independent contractor". The laws that currently apply may not have envisaged and anticipated the changes we now experience. For instance the control test referred to above may arguably be held to have applied in an office setting but not to a Little Cab, Uber, Sendy, Glovo drivers and riders. Is it not time to recognize the difficult in applying the existing legal principles to the work relationships in the new economy? Where as noted by the UK Supreme Court in the Uber decision, the *"gig economy workers"* have enhanced flexibilities and independence which are not characteristic to the conventional employee worker category, but at the same time they are dependent and subordinate to the technology platform provider, such as Uber in this case.

**Perhaps it is time for the law to catch up with the changes in the job market in order to give room to innovation and not to stifle it.**

Some suggestions have been made for a creation of a new category of workers; which will be a hybrid of the two existing categories of the subordinated worker/employee on the one hand and an independent contractor on the other hand, as a middle ground that will have features of both employment and independent contracting. The Hamilton Project (United States of America) in their publication "*A proposal for Modernizing Labor Laws in the Twenty First Century Work: The "Independent Worker" propose a new legal category known as "the independent worker":* ~~propose a new legal category known as "the independent worker"~~ propose a new legal category known as "*the independent worker".* They propose the extension of certain legal benefits and protections available to employees to "independent workers" but at the same time allow some flexibility arising from independent contracting.

Cherry, Miriam A. and Aloisi, Antonio (2017) in *"Dependent Contractors" In the Gig Economy: A Comparative Approach," American University Law Review:* Vol. 66: Iss. 3 discusses the proposed third hybrid category of workers denominated as "dependent contractors." The author notes that the proponents of this new category contend that it is necessary for the modern economic and technological realities of the gig economy. They also suggest that a third category should be a novel innovation, appropriately crafted and tailor-made for the era of digital platform work.

It may be time for the law to support the growing gig economy rather than diminish it. How the legislature and the courts not only in Kenya but globally will respond to the Uber decision and generally the changes in the job market will remain to be seen.

*Disclaimer: Kindly note that this write-up does not constitute legal advice and is provided free of charge for information purposes only. If you have any specific inquiries on the subject, please contact the undersigned.*

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