The looming danger upon the Kenyan legal profession

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A Profession's most valuable asset is its collective reputation and the confidence it inspires. The practice of law is regarded as one of the oldest professions in the world and its origins are traced back to the Roman Empire Age. Lawyers, economists and other social scientists have found occupational and professional regulation to be a provocative topic of study. The development of the legal profession has received a lot of attention from eminent scholars such as Peter Coss and Roscoe Pound among others.

The legal profession in Kenya was introduced by the colonialists and is thus an English tradition and not indigenous. It was not until 1949, that lawyers achieved a measure of self-regulation through the enactment of the Law Society of Kenya Act of 1949. This led to the establishment of a professional association that enabled it to discipline its own members. Currently, the profession is regulated by the Law Society of Kenya Act, Advocates Act, Legal Education Act and the Kenya School of Law Act.

In the year 2012, the legal profession in Kenya faced a major transformation and this was initiated by the case of Okenyo Omwansa George & another v Attorney General & 2 others which centered on two issues but I shall concentrate on the first issue for the purposes of this paper. The petitioners on the first prayer challenged Section 32 of the Advocates Act as being unconstitutional as it contravenes various Articles of the Constitution (Article 25, 30) and should therefore be declared as such. To expound on the above, the petitioners submitted that the said Section subjected 'young' advocates to forced labour, 21st century slavery and servitude which are protected under Article 25 of the Constitution as being the Fundamental Rights and freedoms that may not be limited.

Justice Majanja however on the 29th day of March, 2012 over-ruled the said contention and held that the provisions of Section 32 can hardly be termed as slavery or forced labour for the reason that the pursuit of a legal career is a voluntary act and those who choose to join the legal profession do so out of choice and therefore agree to abide by the terms of engagement which are regulated by statute. These terms include regulation of training, qualification and practice to prepare a newly admitted advocate to discharge their calling, hence the said Section cannot be said to be in violation of Article 30 of the Constitution.

However, Justice Majanja's judgment on this issue was short-lived.

A few months later, Section 32 of the Advocates Act was repealed by the Legal Education Act. Previously, private practice was limited as a newly admitted advocate had to yet again undergo a two-year salaried tutelage under an advocate of more than five years standing with an objective to equip newly admitted advocates with critical skills of practice.

My cause of unrest arises from this recent development in the regulation of the Kenyan legal profession. As is stands, newly admitted advocates may immediately establish private practices. At first glance, this may seem like a progressive development which embraces new entrants into the profession without placing stringent measures.

Honestly, I must admit that this current state of affairs is double-edged. As a pupil, I am thrilled at the idea that having spent five years six months in my quest to qualify as an advocate, the possibility of self-employment has come sooner than I thought. Previously, I would have to work under another advocate for two years and truth be told, often with a not so handsome pay cheque before establishing my own practice. Failure to abide by this two-year period would previously cause one to be on the wrong side of the law as was witnessed in the case of Harbans Singh Soor v Mathew Ouma Oseko t/a Oseko & Company Advocates where an advocate was acting on his own behalf before completion of the said period.

However, I have come to the realization that the law is not taught in a classroom. I have no intention of demeaning the pivotal role played by universities, but, unless one intends on embarking on academia, the practical aspect is what makes the profession what it is. In historical times, law was a profession learnt through apprenticeship. The nature of an apprenticeship is one of specialized instruction and training in a particular skill for a period of time. Some of the most respected members of this profession such as Senior Counsel Paul Muite did not go through university training but mastered the law through apprenticeship. In this profession, practice makes perfect!

As it stands, the law has considered six months training adequate time to enable a newly admitted advocate act on his own behalf. This begs the question, is this period enough time to learn all that there is to know in becoming a skilled advocate? Some may argue that this period is sufficient and beneficial as it empowers newly admitted advocates to create for themselves employment opportunities and at the same time curb against what was termed as ‘slavery ‘in the Okenyo case. Now the flood-gates have been opened! We shall witness firms spring up like fast-food restaurants managed by advocates who haven’t been properly trained on ‘how to cook’!

The training period is the most critical process in this profession. In fact, you are bound to be as good as your master. If you learn mediocrity during your training, then your destiny is to become

a mediocre advocate, if you learn excellence, then you are destined for success. In this light, it would be prudent to be careful on how we regulate the training period. Surely, six months is definitely not enough time to produce a polished advocate!

Not only, is such a situation dangerous to the profession but also to the public. The training process is a holistic process which enables newly admitted advocates to learn a wide range of skills ranging from professional conduct, court processes, managing accounts, and client relations among others. Lawyers are very powerful people, if you think talk is cheap, try hiring a lawyer! A lawyer with his briefcase can steal more than a hundred men with guns! Sadly, these stereotypes about lawyers are not entirely untrue. We have an onerous task as members of the legal profession to serve the public and enable justice to be obtained. It is in itself an act of injustice to release to the unsuspecting public substandard professionals. The public has a right to obtain high quality legal services and we have a duty to satisfy that right.

Therefore, advocates need proper training and supervision before they can go out to discharge their calling on their own. Quoting the firm judgment of the Court of Appeal in Kogo vs Nyamogo & Nyamogo Advocates, it was held that an advocate is not liable for any reasonable error of judgment or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice. The training process is a time to learn and make mistakes because you have a master who takes charge and constantly guides you on the right way.

If we objectively analyze the bigger picture of this legislation with foresight, its effect may be detrimental to the Kenyan legal profession. Allowing substandard advocates to practice on their own behalf will only increase complaints made against advocates for gross negligence, and all sorts of professional misconduct before Disciplinary Tribunals which in turn will grossly affect the confidence that the public has in this profession. Integrity, probity and trustworthiness are the pillars of the legal profession. We stand to erode these values if we do not review this law. Let us make amends before it is too late!