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ILO Prescription on Triangular Employment Relationship and the Nigerian Court of Appeal Response: A Comparative Exegesis with Selected Jurisdictions

David Tarh-Akong Eyongndi, John Oluwole A. Akintayo, Onyinye Ucheagwu-Okoye, Olariyike Damola Akintoye [*]

Abstract. Triangular Employment Relationship (TER) is a situation where an employer hire persons for the use of another. TER, is a global phenomenon as acknowledged by the International Labour Organisation (ILO). In Nigeria, its predominance is in the banking, oil and gas sectors. The main challenge with this employment practice, aside the issue of when does it exist, has always been: between the Agent and End-User employer, who is the actual employer of the employee (s) for the purposes of liability. Recently, the Court of Appeal (CA) adjudicated over this subject in Luck Guard Ltd. v. Adariku & Ors. This paper adopts comparative method juxtaposing the CA perspective to TER *vis-à-vis* the stance of the National Industrial Court of Nigeria (NICN) against the backdrop of ILO prescription to ascertain compliance level. It discusses the impact of the decision on labour and employment relations in Nigeria. On comparative basis, it examined the practice and legal framework on TER in Nigeria with South Africa, Namibia, and Ghana aimed at drawing

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lessons for Nigeria as well as interrogates the stance of the ILO towards TER. It found that the CA's decision in the Adariku's Case was reached per incuriam unlike that taken by the NICN, the position taken by the CA in the Adariku's Case is otiose to the ILO's prescription on TER as well as the practice in South Africa, Namibia and Ghana. It recommends that the CA should jettison the position in subsequent cases and an urgent review of Nigerian law to conform to international minimum best standards on regulation of TER prescribed by the ILO and practiced by progressive jurisdictions.

Keywords: *Non-standard employment, Triangular employment relationship, ILO, Ghana, South Africa, Nigeria.*

1. Introduction

Traditionally, employment contract is between two parties, the employer and its employee (s) bestowing rights and obligations *qua* parties. In fact, the definition of contract of employment under section 91 of the Labour Act[1] admits of this traditional model of employment contract.[2] However, owing to several changes precipitated by legal and socio-economic exigencies in the world of works, new forms of employment relationships have evolved and are displacing the traditional notion of employment contract globally.[3] Non-standard forms of employment are employment relationships that detract from the traditional two-party employment relationship with vagaries that make them distinct from standard

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[1] Labour Act Cap. L1 Laws of the Federation of Nigeria (LFN) 2004.

[2] T Adeshina and O Aiyepola "Re-Evaluating the Triangular Employment Model: The Potential Exposures and Mitigating Strategies" https://jee.africa/re-evaluating-the-triangular-employment-model-the-potential-exposures-and-mitigating-strategies/ accessed 1 March 2023.

[3] AL Kalleberg, "Nonstandard Employment Relations: Part-Time, Temporary and Contract Work" (2000) 26 *Annual Review of Sociology* 340-342.

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employment.[4] These non-standard employment could be in the form of outsourcing, contract staffing, casualisation or triangular employment which is the focus of this article.[5]

It has become commonplace for an employer to employ persons and have them work for another employer with concomitant roles and obligations.[6] Thus, under this arrangement, the Private Employment Agency (PEA), upon recruitment, deploys the employee (s) to another employer known as End-User (EU) to perform work or render services. This type of employment relationship is known as triangular employment relationship or ambiguously disguised triangular employment relationship.[7] In TER, there are three as opposed to the traditional two parties to the contract. It is a global phenomenon as the International Labour Organisation has recognised its global existence and disruption of traditional employment practice. In Nigeria, TER is predominant in the construction, security, banking and oil and gas sector which is the most notorious.

Interestingly, the novelty of TER makes it explicably unregulated by the Nigerian labour regulatory framework. Hence, the Federal Ministry of Labour and Employment (FMLE) under the control of the Minister of Labour and Employment (MLE), pursuant to the powers conferred on the Minister under the Labour Act, issued guidelines on contract staffing and outsourcing in the oil and gas sector which is tacitly applicable to all forms of non-standard employment practices mentioned above. Given it notoriety, the main issue associated with TER practice is, with regards to liability, who, between the Primary Employer (Agent-Employer) (PE) and End-User Employer (EE), is the employer of the employee and therefore liable to him and third parties for his/her act/omissions? This issue is front burner because the nature of TER is such that apparently seeks to veil the employer therefore requiring the piercing and uncovering of the triangular veil of disguise. The NICN by virtue of its exclusive original civil jurisdiction over labour and employment has adjudicated over the

[4] RA Danesi, "Non-Standard Work Arrangements and the Right to Freedom of Association in Nigeria" (2010) 4(4) *Labour Law Review* 1-41.

[5] CS Ibekwe, "Legal Implications of Employment Casualisation in Nigeria: A Cross-National Comparison" (2016) 7(2) *NAUJILJ* 82.

[6] H Eghwubare, "A Critical Analysis of Triangular Employment" https://www.aaachambers.com/articles/a-critical-analysis-of-triangular-employment/ accessed 24 March 2025.

[7] OM Atoyebi "An Appraisal of Triangular Employment Relationship under the Nigerian Law" https://omaplex.com.ng/an-appraisal-of-triangular-employment-relationship-under-the-nigerian-law/ Accessed 3 February, 2026.

subject of TER being a labour/employment issue therefore coming within its exclusive original civil jurisdiction.

Recently, the CA in *Luck Guard Ltd. v. Mr. Felix Adariku*[8] entertained an appeal from the NICN pertaining to TER and incidental matters. The CA, in upholding the appeal, held that the relationship between the appellant, the respondents and the third party lacked the colouration of TER despite the contrary oral evidence tendered by the respondents at the lower court. The court also held that a written employment contract is the only means of proving the existence of an employment contract and its absence means non-existence of such a relationship. As far as civil appeals from the NICN are concerned, the decision of the CA on them are final.[9] Hence, the CA is a policy making court on such matters and its decisions, aside being final, have far reaching effect and impact. Thus, what is the potential impact (s) of the CA holdings on the means of proving/establishing contract of employment and attitude towards TER in Nigeria? Does its stance accord with international best practices in labour relationships laid down by the ILO? How does its stance impact decent work and security of employment in Nigeria? Are there jurisdictions from which Nigeria can glean some lessons from the practice of TER? This paper seeks to answer these questions in reviewing this decision.

This is done by adopting doctrinal and comparative methods while placing reliance on primary data such as the Constitution of the Federal Republic of Nigeria, 1999, Labour Act, 2004, National Industrial Court Act, 2006, Caselaw and secondary data such as articles in learned journals, textbooks, online materials, ILO Conventions and Recommendations. These data were subjected to rigorous jurisprudential and content analysis revolving on the issue under discourse from where findings were made, conclusion drawn and recommendations in response to the objectives and answers to the research questions are proffered.

Regarding structure, the paper is divided into four sections. Section one contains the introduction. Section two focuses on the facts and holdings of the CA in the decision under review. Section three is an exegesis on matters arising from the decisions. Section four is a survey of the stance of ILO on TER and its practice in selected jurisdictions. Section five contains the conclusion and recommendations.

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[8] Unreported Suit No: CA/B/1061/2020 Judgment delivered 15th December 2022.

[9] *Skye Bank Plc. v. Iwu* [2017] 7 SC (Part 1) 1.

2. *Luck Guard Ltd. v. Mr. Felix Adariku* - Examined

The brief facts of the case are as follows: the first respondent i.e. (Mr. Felix Adariku) and 257 other co-workers (i.e. the Employees) as claimant instituted an action before the NICN against the appellant whom Shell E&P (End User) had outsourced some of its non-core operations to together with six of the companies as defendants (Private Employment Agency). He and the co-workers sourced by the six PEA sought for sundry declarative reliefs especially that the 1st respondent (i.e. the End User, shell E&P) was their employer, that the failure of the 1st respondent to issue him and other employees written statement after three months of being employed required by the Labour Act, 2004 evincing the terms and conditions of the employment was unlawful and an unfair labour practice and as well that the act of the 1st respondent interviewing them, employing them and thereafter contract and interpose intermediaries in the person of 2nd to 6th respondents as their employer is unlawful and an unfair labour practice that is contrary to international best labour practices and standards. They also sought damages. The 1st and 6th respondent (The PEA used by the End-User, Shell E&P) vide their statement of defence, denied any liability while the 3rd, 4th and 5th respondent did not file any defence. The case went unto trial and after trial, the trial court delivered a well-considered judgment on the 26th day of October, 2018 wherein it granted some of the reliefs sought by the Claimants.
Being aggrieved by the decision of the trial court, Shell E&P (End User) appealed the decision with Appeal No: CA/ABJ/CV/563/2020 while one of the PEA (i.e. Luck Guard Ltd.) filed a parallel appeal marked Appeal No: CA/A/1061/2020: Luck Guard Limited v. Felix Adariku & 5 Ors. to the Court of Appeal (CA). Since the issues raised in both appeal were substantially the same, the determination of one, effectively settles the other. Our analysis here is based on the decision in the Appeal No: CA/A/1061/2020: Luck Guard Limited v. Felix Adariku & 5 Ors. Although the appellant submitted four issues for the determination of the court, our discussion here is limited to only two i.e. whether the respondents/claimant placed enough oral and documentary evidence to prove that there existed a triangular employment relationship. At the CA, the respondent raised a preliminary objection to the competence of the appeal and urged the court to dismiss same for being incompetent. We shall now proceed to interrogate the issues submitted for and determined by the Court of Appeal as well as the matters arising from their determination by the Court of Appeal

3. Matters Arising from the Decision of *Luck Guard Ltd. v. Mr. Felix Adariku*

This section of the paper identifies and discusses matters arising from the decision of the court. However, it is apposite to state at this juncture that although several issues have arisen from the decision; the focus shall be limited to only two issues which are regarded as germane and fundamental. These issues are: whether a contract of employment must be in writing for it to be valid and whether from the oral evidence of the Respondents before the court, they had established the existence of triangular employment relationship.[10]

At page 21 of the judgment, the CA held that "in labour law, it is very significant to know that the contract of employment binding the employer and the employee is normally outlined in a letter of employment/appointment. In the instant case, there is no letter of employment indicating that the 2nd respondent recruited or gave employment to the 1st respondent, issues of contract of employment are definite things. They are not what one can under any guise consign to circumstantial prediction. If there is a contract of employment, there must be clear evidence of such a contract laying out clearly the terms and conditions of the contract." This finding was made in response to the Respondents/Claimants claim that they are employees of the 1st Appellant/Defendant although they tendered no written contract of employment evidencing this. The above position of the court is premised on the position taken by the Supreme Court in *Organ & Ors. v. Nigerai Liquefied and Natural Gas Ltd. & Anor*[11] wherein the apex court held that the employment letter is the substratum on which the appellants can lay claim to being employees of the respondent hence, failure to produce the letter, was fatal to their claim as existence of an employment contract, cannot be inferred. The court's tenacious insistence on the production of a written contract of employment as the only means of proving the existence of a contract of employment between the parties, made the

[10] F Kuti and E Abraye "The Concept of Triangular Employment Suffers a Blow: A Critique of the Recent Decision of the Court of Appeal in Appeal No: CA/A/1061/2020: Luck Guard Limited v. Felix Adariku & 5 Ors in Appeal No: CA/ABJ/CV/563/2020: Total E&P Nigeria Limited v. Felix Adariku & 5 Ors." https://thenigerialawyer.com/the-concept-of-triangular-employment-suffers-a-blow-a-critique-of-the-recent-decisions-of-the-court-of-appeal-in-appeal-no-ca-a-1061-2020-luck-guard-limited-v-felix-adariku-5-ors-appeal-no-ca/ Accessed 3 February, 2026.

[11] (2013) LPELR-20942 (SC).

court to hold that "the 1st respondent did not produce any documentary evidence showing that they were employees of the 2nd respondents at any time whatsoever. The 1st respondent has a duty to support their averments that they are employees of the 2nd respondent with evidence. The evidence required here is the LETTER OF EMPLOYMENT or CONTRACT OF SERVICE between the 1st respondent and the 2nd respondent. It is this document that shows the relationship between the parties and the terms governing the relationship."[12]

The above is suggestive of the fact that the only means of proving the existence of contract of employment is through the production of a written contract of employment spelling out the terms and conditions of the employment. Nothing can be farther from the truth than this. It is elementary law that a simple contract (including contract of employment), in the absence of express requirement, need not be in writing.[13] A valid contract could either be in writing, oral, or by conduct.[14] The only advantage of a written contract over others, is the fact that its terms and conditions, having been expressly spelt out, leaves no room for inferences or legal permutations by the parties/court.[15] The terms and conditions are not only clear but specific and ascertained, hence, construction becomes easy while for the others, the court may need to have recourse to circumstantial or inferential evidence to determine the terms and conditions thereof.[16] The court subsequently although, unconnectedly at page 25, Paragraph 2, admitted the fact that a contract of employment need not be in writing for it to be valid or evidence its existence when it referred to section 91 of the Labour Act, 2004 to the definition of contract of employment to mean any agreement, whether oral or in writing, express or implied whereby one person agrees to serve the employer as a worker. The operational words in this definition are oral/written, written or implied. This clearly admits that a valid contract of employment can be either in writing, oral, express or implied.[17] In fact, what the law requires is that irrespective of the form the contract takes, its validity or otherwise is determined by the presence or absence of the

[12] Unreported Suit No: CA/B/1061/2020 Judgment delivered 15th December 2022 at 23.
[13] *F.G.N. v. Zebra Energy Ltd.* [2002] 18 NWLR (Pt. 798) 211.
[14] *Ikpeazu v. A.C.B Ltd.* (1965) NMLR 374.
[15] *Saka v. Ijuh* [2010] 4 NWLR (Pt. 1184) 16.
[16] *King (Nig.) Ltd. v. B.H. Nig. Ltd.* [2011] 5 NWLR (1239) 95.
[17] O Nkanu, "Proving Oral Contracts under Nigerian Law" <https://www.mondaq.com/nigeria/contracts-and-commercial-law/899476/proving-oral-contracts-under-nigerian-law> accessed 20 February 2025.

prerequisite of a valid contract. These prerequisites are: offer, acceptance, consideration, *consensus ad idem,* and capacity to contract.[18]

It is somewhat surprising that despite the respondents uncontroverted averment as contained at pages 19 to 20 of the judgment that, after being employed by the 2nd respondent, they were not given written statement of employment in accordance with section 7 of the Labour Act, 2004 wherein they urged the court to declare the failure as an unfair labour practice which is contrary to international labour best practices, and the court's finding at page 21 that "right from the pleadings of the 1st respondent/claimant at the trial court there is no doubt as to the fact that there was no letter of appointment/employment from the 1st defendant now 2nd respondent on appeal issued to 1st respondent in this appeal," the court insisted that, to prove their case, the respondents produced written contract of employment.[19] The court unjustified insistence and requirement of the respondents to produce written contract of employment/appointment runs afoul to the established principle that the law will not require the doing of the impossible.[20] On the contrary, the court should have come to the aid of the respondents by evaluating its oral evidence on the existence of an employment contract and where it is direct, uncontroverted and cogent enough, hold that the burden of proving such had been discharged.

The CA insistence on a written contract of employment/appointment lay bare the fact that the court seems unconversant with the reality of unfair bargaining power in the process of creating a master-servant employment relationship. In Nigeria, there is an unprecedented high level of unemployment and increasing undermeployment. Thus, the doctrines of equality and voluntariness in consummation of employment contract are myths as argued by Eyongndi and Ajayi.[21] The process of "bargaining" towards fixing the terms and conditions of the employment is actually a matter of the employer unilaterally dictating to (or commandeering) the intending employee whose only option is to either accept or reject the dictated terms. Thus, where an employee, who of course is the weaker party to the "bargain" complains, his/her complaint should be attended to

[18] *Noah Bem Saka v. Daniel Ijuh* [2010] 4 NWLR (Pt. 1184) 16.

[19] Unreported Suit No: CA/B/1061/2020 Judgment delivered 15th December 2022 at pages 21, 23-24.

[20] *A.S.H.D.C. v. Emekwe* [1996] 1 NWLR (Pt. 426) 505.

[21] DT Eyongndi, and MO Ajayi, "The Principles of Voluntariness and Equality under Nigerian Labour Law: Myth or Reality?" (2015-2016) 9 *University of Ibadan Journal Private and Business Law,* 189-222.

by the court to whom he runs for dire refuge considering their vulnerability and disadvantaged position. In fact, the complaint that the respondents were not given the statement of employment contrary to section 7 of the Labour Act, 2004 should have been frowned at and the Appellant seriously deprecated in the strongest of terms by the court as a party should not be allowed or tacitly encouraged to violate the provision of any law whether sanctions are stipulated or not. The position taken by the court tantamount to permitting a person to benefit from his/her wrong doing which is not just against the law and human decency but equity and good conscience as well. This complained failure of the Respondent against the Appellant's failure to abide by the provision of section 7 of the Labour Act, 2004 and the Court of Appeal's response is an unfortunate encouragement to undermine the laws of Nigeria within a terrain that is tilted against the vulnerable which should not be left unchecked in the interest of justice and protecting the integrity and sanctity of Nigeria's laws.

It is apposite to note that based on the Supreme Court of Nigeria (SCN) decision in *Skye Bank Plc. v Iwu*[22] the CA is the final court on civil appeals from the NICN hence, it is a policy making court. The decision of the CA on civil appeals from the NICN is not only final but the law as the litigants have no chance to seek redress from the SCN. This situation should make the CA extremely cautious, meticulous and alert in making any pronouncement so as not to render a decision that would adversely affect the polity which could have been avoided. Of course, as noted by the SCN in *Adegoke Motors Ltd. v. Adesanya*[23] that they are supreme not because they are infallible but they are infallible because they are supreme. The foregoing profound position of the SCN is true of the CA with regards to appeals from the NICN. Thus, in determining such appeals, the CA must be conscious of its finality and the prospective effect of such determinations on labour and employment law in Nigeria. A negative or wrong decision handed down by a final and therefore, a policy making court can occasion gargantuan irreparable hardship and unjustifiably stiffen the polity.

Furthermore, on the issue of whether or not the trial court was right in its finding that there existed a TER between the parties; the CA held that there was none based on the doctrine of privity of contract.[24] The

[22] *Skye Bank Plc. v. Iwu* [2017] 7 SC (Part 1) 1.
[23] [1989] 13 NWLR (Pt.109) 250.
[24] Unreported Suit No: CA/B/1061/2020 Judgment delivered 15th December 2022 at 26-27.

invocation of the doctrine of privity of contract to jettison the existence of a triangular employment relationship between the parties, with the greatest respect, suggest a lack of appreciation of the phenomenon of TER by the Court of Appeal. In fact, the nature of triangular employment or the underlining philosophy precipitating employer's resort to it, is to create a smoke scream through which they can veil themselves from the scrutiny of judicial eyes aimed at abdicating from the inherent obligation(s) owed an employee by the employer. It would appear that the CA unwittingly worked into the ambush of the appellant when it invoked the doctrine of privity of contract to hold that the appellant could neither derive benefits nor incur liability from the contract. When employers create triangular employment contract, they do so being aware of the tricky problem which Davidov[25] has rightly stated thus: as to be between the agency and the end user, who should be held accountable for the responsibilities of the employer? The answer to this important question, whether it be the agent or end-user in the final analysis, there are serious implications for the employee whose interest needs protection.

Thus, a court that is called upon to adjudicate over this "novel" type of employment contract must raise the alarm: why or how come the parties especially the "employers" decided to have a radical departure from the traditional two-party contracting system universally known? This alarm, will aid the judge not to approach the issue mechanically but with judicial curiosity and eagerness being alert of possible landmines and smoke screens meant to divert judicial attention and obscure judicial sight light. A stern inquiry into the rationale for the departure, will make obvious the intendment of the parties (especially the employer) which is usually to make obscure if not, abdicate from accruing obligation to the employee who is at the centre of the disingenuous smoke screen of TER. The court must be wary and ensure that it does not fall into the landmine planted by the Agent and End-User aimed at placing the employee in a position of neither head nor tail can remedy be gotten. What the Agent and End-User often aim to achieve is to send the employee on an endless and orchestrated would-be fruitless search of who is the employer and therefore responsible. This voyage is not only strenuous but frustrating and ultimately disappointing without the intervention of the court to protect the employee.

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[25] *G Davidov, "Joint Employers Status in Triangular Employment Relationships" (2004) 42(2)* BJIR *729.*

Employers execute this somewhat mystifying type of employment contract with the cynical intention of abdicating from responsibility particularly to the employee and third parties who might suffer injury or incur liability due to the employee's act/omission. Like the corporate veil which the court would have to pierce to unveil the identity of the perpetrators of fraud in a corporate transaction, the court must be diligent, resilient, thorough and alert to review the whole relationship with a view to unmasking the employer otherwise, the employee and third party, may be left to wallow in agony due to the concealment of who the employer is. It would seem that the effectuation of triangular employment abrogates the fundamental rights of an employee. The dignity of the human person of the employee is put on the line by the act of masking who is his/her actual employer as the relationship is such that sends him/her on a wild ghost chase to discover his employer. Aside this, by practice, the Agent-employer, is usually entitled to a fraction of the salary paid by the End-user employer to the employee as a reward for 'connecting' them. It is even worrisome that in most instances, this payment is not a one off thing paid as commission but it is periodically paid for as long as the relationship subsists. The shylock Agent-employer, keeps getting paid from the salary meant for the vulnerable employee who works for the End-User. No human being should be subjected to such treatment which is inhumane and degrading. Thus, a court dealing with a case of triangular employment, must be mindful that the fundamental human/labour rights of the employee are in issue and must be guarded jealousy. Thus, the conclusion reached by the CA in the instant case based on the doctrine of privity of contract only emboldens resort to TER by employers while it fails to recognise the intricacies associated with the relationship. In fact, the CA, walked right into the trap of the employer which is that the court will invoke the doctrine of privity of contract which will enable it to remain anonymous and thereby exposing the employee to hardship culminating to an ultimate abdication from responsibility. Thus, if the CA is poised to engrained dignity, fairplay, and promote decent work/employment in Nigeria, the protecting shield of privity of contract must not be extended to TER as to do so, would mean giving vent to the sublime but dangerous expectations of the Agent and End-User in TER.

The NICN in *Petroleum and Natural Gas Senior Staff Association of Nigeria v. Mobil Producing Nig. Unlimited*[26] while acknowledging the existence of

[26] [2013] 32 N.L.L.R. (Pt. 92) 10.

various forms of non-standard employment relationships in Nigeria including triangular employment, caution that its practice must be with decency. In *Stephen Ayaogo & Ors. v. Mobil Producing Nig. Unltd. & Anor,*[27] the 1st Defendant had hired the claimant through the 2nd defendant who was described as an independent contractor. Due to restructuring, the employment of the claimant and others was terminated and they were paid redundancy benefits. However, the claimant was of the view that he was entitled to more. He sued the defendants. The 1st defendant objected to being made a party to the suit and sought to be struck out contending that he was not a party to the agreement between the 2nd defendant and him, besides, the 2nd defendant was an independent contractor and not its agent. The claimant argued that they had been working for the 1st defendant before the agreement between them (i.e. the defendants). Wherein the 2nd defendant was described as an independent contractor was made thus, same is a hoax meant to blindfold the court as to who the employer was. The court (i.e. the NICN) adopted the doctrine of primacy of fact after a holistic review and appraisal of the evidence tendered by the parties, and to have and found that the 1st defendant's application for its name to be struck out, was unmeritorious because it had a case to answer. Thus, the NICN has evolved the doctrine of primacy of fact which is that the court will carefully and clinically scrutinise the totality of the evidence presented by the parties to determine the role and stakes of the parties in the relationship.

Based on this ingenuous doctrine, the court came to the conclusion that the 1st and 2nd Defendants are co-employers of the claimants and were jointly and severally liable to them. In *Oyewumi Oyetayo v. Zenith Bank Plc. Anor*[28] where triangular employment was alleged and proved between the claimant and the defendants, the NICN held the defendants to be jointly and severally liable to the claimants as co-employers. The decision of the court was influenced by the Supreme Court of Nigeria reasoning in *Union Beverages Ltd. v. Pepsi Cola International Ltd*[29] where the court held that if it is proven that the companies are the same, then their cooperate veil can be pierced wherein they will be liable jointly and severally as the agent company or subsidiary, the main and the subsidiary or agent company, will be made to be responsible for the acts/omission of each other. The same reasoning was adopted and applied by the NICN in *Inimgba v. I.C.S.*

[27] [2013] 30 N.L.L.R. (Pt. 85) 95.
[28] (2012) 29 NLLR (Pt. 84) 370.
[29] (1994) JELR 44691 (SC).

Ltd. & Anor[30] where A employed the claimant but handed him to B to work as a teller officer. Notwithstanding the execution of a formal employment contract between the end-user and the employee, the NICN held that A and B are co-employers of the employee hence, were jointly and severally liable to him and third parties who suffer injury from his/her acts/omissions. This is because the 1st Defendant's offer letter specifically stated that the Claimant "will be employed as a transaction officer and seconded to Oceanic International Bank Plc." the same principle was adopted and applied by the NICN in *Agum v. Unicem Ltd. & Anor.*[31]
From the above, the NICN has evolved the principle of primacy of facts to hold the existence of the status of co-employer in triangular employer thereby preventing none of the employers (i.e. the Agent and End-User) to abdicate from responsibility that have legitimately accrued. Thus, the principle of being responsible jointly and severally in cases of more than one Defendants in civil cases, has been extended to triangular employment relationship by the NICN.[32] If the NICN had followed the traditional common law position without piercing the veil which the employers usually uses to cover themselves, the employee would be left chasing the wind or sent on a fruitless and endless voyage of seeking to discover who is his/her actual employer which is what the employer intends *ab initio* which unfortunately although avoidable, the Court of Appeal walked straight into in the *Adariku's Case*.
In fact, it is urgent and important for the Nigerian court (i.e. the NICN and Court of Appeal) to appreciate the complexities associated with triangular employment relationship in the way and manner it is being practiced in Nigeria. The reality is that, the justification of employers for resorting to TER which is often that they want to concentrate on core aspect of their work is only a sham. Judging from the way and manner TER is exploited by employers, it is clear that its motivations are purely financial; aimed at accessing cheap labour while maximising profit. The disguised or ambiguous nature of the relationship couple with the general reluctance by the End-User and Private Employment Agencies to accept responsibility towards the employee only shows that their aim is to exploit the employee and nothing more. In a TER, the situation of the employee

[30] (2015) 57 NLLR (Pt. 195) 268.
[31] Unreported Suit No: NICN/CA/71/2013 delivered in on March 3, 2017 by Kanyip J.
[32] OM Atoyebi, "An Appraisal of Triangular Employment Relationship under Nigerian Law" https://thenigerialawyer.com/an-appraisal-of-triangular-employment-relationship-under-nigerian-law/ accessed 4 May 2025.

is exacerbated by the prevailing unprecedented high level of unemployment and obsolete cum inadequate regulatory legal and institutional frameworks. At all material time, the practice of TER in Nigeria, is prejudicial to the employee capable of raising an army of working but economically impoverished workforce. This situation has negative multiplied effect on the economy and the nation at large. Universally, work is regarded as a means through which man meets his/her needs. Even the Holy Writ prescribes that "let him/her that will not work not eat" hence, it is said; truly and rightly so that there is dignity in labour and no food for a lazy man/woman is an aphorism that resonates with the Nigerian spirit. Regrettably, in Nigeria, TER is causing many employees to be incapable of meeting their basic needs despite working. This situation must not be allowed to persist.

It is gratifying to note that since the statutory enhancement of its status and stature by the Constitution (Third Alteration) Act, 2010, the NICN has engaged in the development of a new labour and employment jurisprudence geared towards counter-balancing the unequal power dynamics between employer sand employees which was propagated and sustained by common law doctrines and their hitherto slavish adherence by the courts. The NICN's evolving jurisprudence of 'employee protectionism' which explicates itself through adoption of ILO labour standards and best practices in labour and employment law aided by the egalitarian provisions of the Constitution (Third Alteration) Act, 2010 to mitigate harsh common law principles prejudicial to employees while creating equilibrium between capital and labour is a welcome development that must be sustained.[33]

In fact, one area of labour and employment relations which the NICN must painstakingly and unrelentingly adopt and apply employee protectionism, is in TER. The reason is simple: the potentials of TER exposing vulnerable Nigerian employees to labour abuses, marginalization, promote indecent labour and unfair labour practice is obvious and

[33] *Aloysius v. Diamond Bank Plc.* [2015] 58 NLLR (Pt. 199) 92 at P. 134, Paras. A-F, G-B.; *Petroleum and Natural Gas Staff Association of Nigeria v. Schumberger Anadrill Nigeria Ltd.* [2008] 11 NLLR (Pt. 29) 164; *Nasco Foods Nigeria Ltd. v Food, Beverage & Tobacco Senior Staff Association.* Unreported Suit No. NIC/6/2003 Judgment delivered on 16/7/2009; DT Eyongndi, and BI Oyagiri, "Paradigm Shift on Remedies for Wrongful Termination of Master Servant Employment in Nigeria" (2019) 1(3) *International Review of Law and Jurisprudence, Afe Babalola University* 37-42.; Eyongndi, D.T. & Imosemi, A. (2023) "Aloysius v. Diamond Bank Plc: Opening a New Vista on Security of Employment through the Application of International Labour Organisation Conventions" 31(1) *African Journal of International and Comparative Law* 356-376.

probable. The Court of Appeal must realised that from 2010 when the Constitution (Third Alteration) Act, 2010 was enacted and the Supreme Court of Nigeria delivered judgment in *Skye Bank Plc v Victor Anaemem Iwu*[34] it has become a policy court with regards to labour and employment matters hence, its pronouncements must take into cognizance labour realities, contending interest and the need to align Nigeria's labour and employment law with international best practice/standards. It is no longer the case of business as usual promoted and sustained by moribund and now redundant common law employment doctrines/principles.
It is apposite to note that the growing acceptance and practice of TER in Nigeria is contingent on several factors. The unprecedented high and increasing level of unemployment and underemployment in Nigeria has given impetus to the growth of TER in Nigeria as well as other forms of non-standard work arrangements being practiced in a precarious manner to the greatest chagrin of Nigeria's working population. The situation in Nigeria regarding employment is that of 'since the desirable is absent, the available becomes desirable' because it is better to be employed doing something rather than doing nothing and risk hunger and want. Thus, most Nigerians are constrained to engage in TER due to the lack of decent employment just to ensure survival and avoid acute starvation and want. Also, the existing obsolete and inadequate labour legal framework which lacks ample regulatory provisions addressing TER and other forms of non-standard works arrangements has embolden employers to aggressively and exploitatively resort to TER. Thus, TER practice in Nigeria is purely contractual with the employer always having the unfair advantage to dictate it terms and conditions which is usually at the disadvantage of the vulnerable employee. Moreso, it would seem and most likely, correctly so that the employer's inordinate desire to maximise profit and the innate desire to abdicate from responsibility is another prime factor precipitating TER in Nigeria. While the idea of TER may not be outrightly malevolent, most Nigerian employers especially the non-Nigerian ones have lashed unto TER principally to disguised their character (as employer) aimed at abdicating from the natural responsibilities that attached to the employer in an employment relationship. Of course, the concomitancy of this is 'saving' of the funds which would have been expended if the character of employer is undisguisedly worn. Also, the global move towards liberalisation and concentration on core business operation is another factor promoting and

[34] *Skye Bank Plc. v. Victor Anaemem Iwu* [2017] 7 SC (Part 1) 1.

sustaining TER in Nigeria as employers would want to have the labour world believe that concentrating on non-core business such as hiring is a distraction hence, outsourcing or contracting-out becomes an imminent alternative. While this reason seems logical, beneath is the desire to maximise profit by abdicating from the traditionally imposed obligations an employer performs towards the employee. From the Nigerian experience, based on the authors' professional experiences, the employer's desire and benefit associated from 'cheap labour' remains the main attraction of TER which is strengthened by other factors already highlighted. Unfortunately, the government, as regulator, has remained largely unconcerned and docile while Nigeria's teeming working population is exposed to sustained, brazen and acrimonious exploitation through TER by employers. In fact, TER in Nigeria, is a form of modern employment/labour slavery without physical shackles on arms and limbs of employees but placed on their dignity, remuneration, independence and career progression.

4. TER under ILO Regulation and Practise in Selected Jurisdictions

It has been pointed out that TER is a global phenomenon practised in several jurisdictions although, its regulation differs. This section of the paper, examines the law and practice on TER within the prism of the ILO and in selected jurisdictions like Ghana, United Kingdom (UK), South Africa, and Namibia with a view to drawing lessons for Nigeria.

4.1 The Position of the ILO on TER

The International Labour Organisation (ILO) is a standard setting international organisation which has a unique operational characteristic of being a tripartite organisation. By its tripartite nature, its process of making its recommendations or convention involves dialogue amongst the employer, employees and the government representatives. Thus, its convention or recommendation is a product of rigorous discussion between all three stakeholders in labour which means that none of the parties could easily renege or is even expected to renege from abiding by them once reached since they are instrumental to their creation. The ILO seems to be the only international organisation with such a unique feature and the rationale is not farfetched considering the fact that the ILO is poised toward decommodification of labour, entrenchment of decent work, protection of employers' legitimate expectations and engendering government responsiveness towards balancing the rights and interests of

employers and employees aimed at the attainment of harmonious labour relations.

While Nigeria and other member States may operate the dualist model regarding the application of international treaties, aside the fact that section 254C(2) of the CFRN, 1999 has given the NICN the power to apply ratified ILO conventions and recommendations without domestication as required by section 12 of the CFRN, 1999, the fact that all members of the ILO are actively involved in the making of ILO conventions and recommendations, from each member, there is a legitimate minimal international obligation to abide by these legal instruments.

Interestingly, regarding the practice of TER, the ILO, which Nigeria is a member has adopted many legal instruments that lay down guidelines for regulating multi-party contract of employment (triangular employment inclusive). Thus, Article 3 of the Private Employment Agencies Convention (No. 181) of 1997 allows a ratifying member state to determine how private employment practices will be regulated through its domestic legislation. Article 12 of Convention 181 empowers a ratifying member state, in accordance with domestic laws, to determine and allocate the responsibilities of both the private employment agencies and end-users enterprises in relations to several matters including but not limited to protection in the field of occupational safety and health, access to training, protection from occupational disease/accident and compensation, statutory social security benefits, collective bargaining, etc. The Private Employment Agencies Recommendation (No. 188) of 1997 which compliments Convention 181, its clause 4 obligates ratifying member states to adopt measures (such as imposition of penalties) in domestic legislation aimed at preventing and eliminating unethical practices in TER by private employment agencies which exposes employees to unfair labour practices and breach of labour rights. Clause 5 of Recommendation 181 provides that workers employed by private employment agencies as much as practicable, should have written employment contracts clearly specifying the terms and conditions of the employment. Clause 15 of the Recommendation prohibits private employment agencies from discouraging or penalising their employees from accepting employment from End-User employers. The Employment Relationship Recommendation (No. 198) of 2006 enjoins member states to ensure that in the adoption and formulation of policies, measures should be put in place that combats disguised employment relationship or adoption of any form of contractual relationship which is aimed at hiding the true legal status of the employer.

Protection of the earnings of employees in TER is clearly guaranteed by Article 7 of Convention 181 which provide that Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers. By this prescription, members' states are obligated to adopt domestic mechanisms, possibly, legislation or any other regulatory policy/programme to ensure security of the earning of this vulnerable class of employees. The implication of Article 7 above is that, where the PEA source and supply workers to the End User, the commission for offering such a service, shall not be gained through deduction made from the earning of the workers paid by the End-User. The same is applicable where the PEA retains the hire workers and second them to work for the End-User. Thus, at all-time material, the remuneration of the workers (subject to permissible deductions based on domestic laws), must not be deducted for the purpose of paying commission to the PEA who has supplied the workers to the End-User. Thus, the End-User must pay the PEA without deducting from the remuneration of the workers for the service rendered. Unfortunately, In Nigeria, the practice has been that the End-User either pays the employees directly less a deducted commission which is remitted to the PEA or pays the money to the PEA, which makes commission deduction then pays the left-over to the employees. In fact, in Nigeria, the remuneration system is best captured in this colloquial metaphorical logic of "monkey dey work, Bamboo dey chop." The expression means 'someone else is doing all the hard work, but someone else is reaping the benefits.' In this case, the employees are the Bamboo (as they are the ones doing the hard work) and the PEA is the Monkey that reaps the benefits despite not working. Regrettably, there are no robust domestic laws checkmating this quagmire to the chagrin of the vulnerable helpless and hapless employees who are largely victims of unprecedented high level of unemployment and dearth of labour regulatory framework exacerbated by continuous government docility.
Despite the glooming situation, the utilitarian value of Article 7 of Convention 181 against the backdrop of section 254C (2) of the CFRN, 1999 is far reaching. It is now settled that the NICN can and has been applying ILO conventions, recommendations and international labour best practices in the adjudication of labour and employment disputes in Nigeria as noted by Eyongndi and Imosemi.[35] In fact, the impact of this

[35] DT Eyongndi, and Imosemi, A. "Aloysius v. Diamond Bank Plc: Opening a New Vista on Security of Employment through the Application of International Labour Organisation Conventions" (2023) 31(1) *African Journal of International and Comparative Law* 356-376.

novel and profound constitution respites contained in section 254C (2) of the CFRN, 1999 which is a sledgehammer against precarious and unfair labour practices in Nigeria if creatively and purposively deployed by the NICN has been exemplified through the enforceability of collective agreement in Nigeria. Using section 254C (2) of the CFRN, 1999, the NICN in *Mr. Valentine Ikechukwu Chiazor v. Union Bank of Nigeria Plc.,*[36] pursuant to ILO Collective Bargaining Convention No. 154 of 1981, and Right to Organise and Collective Bargaining Convention No. 98 of 1949,[37] and Article 3 of the Collective Agreement Recommendation No. 91 of 1951, has held that the international standard and best practice is that once reached and signed, a collective agreement is binding and enforceable forthwith between the signatories and their lawful privies/assigns. Thus, in operating TER in Nigeria, the government has the obligation to ensure that End-User and Agent-employers do not expose employees to labour exploitation, the employment is decent and devoid of unfair terms which the current situation is contrary to. In fact, Nigeria as a member state of the ILO is obligated to put in place a robust legal framework to regulate TER, and in particulate, clearly specify the rights and obligations of the parties to the contract. Awkwardly, at the moment, there is no purpose specific legislation on TER hence, its regulation is completely within the realm of law of contract with the employers always having an undue advantage against the employees.

Thus, while the NICN as a specialised court and vanguard for the protection of labour rights and balancing of contending interests has recognised the prevalence of TER in Nigeria, there is an insignificant statutory regulation of the subject making Nigeria not to measure up to the expected minimum international expectation as far as regulation of TER is concerned. In fact, the Labour Act, 2004 has no explicit provisions on TER hence, it is absolutely left as a matter of contractual bargain between the parties with the employee being perpetually at disadvantage due to the inherent unfair advantage of the employer. It is expected that Nigeria will forthwith take necessary legislative steps to perform its obligation as an ILO member regarding the regulation of TER thereby conforming Nigeria in terms of law and practice to international best practices. Eyongndi Abangwu, Chigbo, Kolade-Faseyi, Nwambam, and Bada[38] have interrogated the super-fluidity of section 254C(2) of the

[36] Unreported Suit No. NICN/LA/122/2014 judgment delivered on July 12, 2016.
[37] ILO Conventions 87 and 98 was ratified by Nigeria on the 17th of October, 1960.
[38] DT Eyongndi, NE Abangwu, CC Chigbo, I Kolade-Faseyi, EN Nwambam, and O Bada "International Labor Organization Prescription and Enforceability of Collective

Constitution (Third Alteration) Act, 2010 which empowers the NICN to have recourse to ratified international legal instruments on labour and employment in the determination of disputes adjudicated by it. They assert that the section is a goldmine at the disposal of the NICN to internationalised labour and employment law and practice in Nigeria by ensuring that global best practices and standards are judicially mainstreamed into Nigeria labour jurisprudence.
Interestingly, the NICN, pursuant to this Constitutional leeway, have struck down several moribund common law employment doctrines that have shackled labour and employment rights in Nigeria for decades particularly the legal status and enforceability of collective agreement in Nigeria and common employment. It is expected that whenever the opportunity presents itself, to adjudicate this malevolent practice of PEA colluding with End-Users to make deductions from employees' remuneration as commission, the NICN, pursuant to section 254C (2) of the Constitution (Third Alteration) Act, 2010, will call in aid Article 7 of the ILO Convention 181 to declare that practice as an unfair labour practice thereby effectuating section 254C (1) (f) of the Constitution (Third Alteration) Act, 2010. For too long, the Nigerian employees have suffered sustained systemic egregious employment exploitation, depravation amidst surging needs with deafening silence from the government to assuage their suffering through legislative proactivity. The main anchorage of this sustained exploitation is the common law and its exploitative principles/doctrines which the Nigerian courts hitherto held onto and applied.

4.2 South Africa

The concept of triangular employment was recognised in South Africa (SA) in 1983 when the Labour Relations Act was amended and Temporary Employment Services (TES) commonly referred to as labour brokerage system was introduced. Labour brokers were "deemed" to be the employers of individuals they placed with their clients provided they were responsible for paying them their remuneration.[39] However, it should be noted that the answer to the question: who is the employer of the employee?' does not have a straightforward answer. Section 198(1) of

Agreement in Nigeria: Is there now Light at the End of the Tunnel" (2025) 14(3) *E-Journal of International and Comparative Labour Studies,* 107-141.
[39] M Brassey and H Cheadle, "Labour Relations Amendment Act 2 of 1983" (1983) 4 *ILJ* 37.

the Labour Relations Act No. 75 of 1997 (LRA, 1997) makes the labour broker the employer of the person hired.[40] This is so despite the fact that the employee usually renders services to the End-User under whose control and supervision, he works and as well, is provided tools and implement.[41] The foregoing does not exculpate the End-User (who is the deem employer) from the responsibilities emanating from the relationship. The LRA, 1997 creates a jointly and severally liability situation between the Agent and the End-User in some instances such as contravention of terms of a collective agreement, statutory obligations and arbitral awards that regulates the terms and conditions of the employment.[42] Where a broker commits an offence against the employee (such as employment discrimination) at the instance of the End-User, both of them will be jointly and severally liable under the Employment Equity Act.[43] Employees under this work arrangement are entitled to equal treatment especially equal remuneration for equal work done in accordance with section 23 of the South African Constitution 1996.[44]

4.3 Namibia

In Namibia, triangular employment is referred to as labour hire. Section 128 of Namibia Labour Act No. 11 of 2007 prohibits triangular employment by forbidding the hiring of anyone with the aim of passing unto another person to work. Any person that contravenes this prohibition, upon conviction, is liable to a fine not exceeding N$80,000.00 or to imprisonment for a period not exceeding 5 years or to both. When the potential of abuse and the impact of the same on employees and on the long run, the society in general is regarded, the likely justification for the prohibition becomes apparent. The prohibition was to take effect on the 1st of March, 2009 but on the 29th of February, 2009, the Namibian High Court (NHC), suspended its implementation in *Africa Personnel Services v Government of the Republic of Namibia*.[45] Here, the applicant had

[40] **N Mohale**, "Understanding Temporary Employment Services (TES) in South Africa and the Registration Process" **https://www.humancap.co.za/understanding-temporary-employment-services-tes-in-south-africa-and-the-registration-process/** Accessed 3 February, 2026.
[41] S 200A of the LRA; *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A).
[42] See Section S 198(4) LRA.
[43] Section 57 (2) Employment Equity Act 55 of 1988.
[44] MW Finkin, & MJ Sanford, "An Introduction to the Regulation of Leasing and Employment Agencies" (2001) 23(1) *CLLPJ* 3-4.
[45] *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 1 BLLR 15

hired a large number of persons as a labour broker to be hired to User organisations. Thus, they applied to the Court that section 128 of the Labour Act was an infringement of their constitutional guaranteed right to engage in any profession, or carry on any occupation, trade or business under Article 21(1)(j). The Court considered the Roman origin of contract of employment and found that it is basically between two parties (i.e. the employer and employee) and there was no basis for interposing a third party, i.e. the labour broker.

Aside this accepted two party hiring system, the court also found that another form of hiring which is now illegal was slavery which triangular employment/contract hiring is akin to.[46] Thus, the court held that the prohibition in section 128 stands thus, the broker could not claim a right to conduct such business under the fundamental freedom of occupation, profession, trade or business. Despite this, the court granted an interim order suspending the implementation of section 128 until the Supreme Court of Namibia had pronounced on the matter. On appeal, the Supreme Court upheld the appeal and struck down section 128 that it runs contrary to the constitution of Namibia. The court noted that despite the historical antecedent of labour hiring; evolving employment practice requires a forward-looking approach within the ambits of the law.

This prohibition is not unconnected to the general disposition that triangular employment, aside being a detraction from the traditional common law two-party model of employment relationship, has a semblance of slavery wherein a party hires another for the use of another.[47] In Namibia, the outcry against labour hire is traceable to the contract labour era of the 1900s which was characterised by unfair labour treatment.[48] The era of contract labour in Namibia represents a time when racism and discrimination, determined a person's position in the society.[49] Despite this aforementioned position, the Supreme Court of Namibia's decision above, has accommodated TER in Namibia as it accords with modern labour realities.[50] Thus, it is important to ensure that a robust

(NmS) 2(1).

[46] VE Stefan, "Temporary Employment Services (Labour Brokers) in South Africa and Namibia" (2010) 13(2) *PELJ* 107-204.

[47] C Vigneau, "Temporary agency work in France" (2001) 23(1) *CLLPJ* 2–3.

[48] B Anri, "The History of Labour Hire in Namibia: A Lesson for South Africa" (2014) 11(4) *PELJ* 509.

[49] F Raday, "The insider–outsider politics of labour-only contracting" (1999) 20(4) *CLLPJ* 1-2.

[50] J Theron, "The shift to services and triangular employment: Implications for labour market reform" (2008) 29 *ILJ* 16-17.

regulatory framework is put in place to forestall abuse of the system especially against vulnerable Namibian employees.

4.4 Ghana

Ghana is a commonwealth jurisdiction just like Nigeria and both are members of the regional body known as Economic Commission of West African States (ECOWAS). Triangular or disguised employment relationship is a phenomenon known to Ghana's labour relations. Ghana in 2003, amended and harmonised its several laws on labour and employment relations culminating in the enactment of the Labour Act No. 651 of 2003. This Act is a comprehensive labour legislation that deals with various labour and employment matters including but not limited to triangular employment. Taking cognisance of the fact that triangular employment could be surreptitiously resorted by employers to with a view to exploiting the employee especially with regards to the knotty question of who, between the Agent and End-User is the legal employer for the purposes of liability either to the worker or third parties who might suffer injury; the Act has made minimal provisions to curtail abuse. It is not unusual for persons to operate privately owned businesses where they operate as labour merchants for companies and other labour consumers. However, this practice is predisposed to several abuses. This unregistered and unregulated businesses, aside the obnoxious practice of continuously collecting huge commissions from the remuneration of those they "connect or link" with labour consumers (End-Users), are not incapable of absconding with the entitlements of those they fixed into work places.
To checkmate this ugly trend in Ghana and the possibility of its festerng, section 7(1) of Ghana's Labour Act, 2003 prohibits the establishment or operation of an unincorporated and unlicensed private employment agency. Thus, where such an agency is incorporated, a licence granted containing terms and conditions for its operation, shall be valid for a period of twelve months and may be renewed upon its expiration and application made to the Minister of Labour, for another period of twelve months.[51] The renewal of the operation licence shall be pursuant to the payment of the fees stipulated by an instrument under the hand of the Minister. A private employment agency is permitted to recruit workers in Ghana and any other country which has an agreement with Ghana on such matter for placement with persons/organisation (s) that needs

[51] Section 7(2) (3) Ghana Labour Act 651 of 2003.

labour. To ensure that workers sourced and recruited by private employment agencies are not exploited, the Act requires the agencies to submit to the Minister, not later than fourteen days after the end of every three months, returns in respect of workers recruited for employment, whether from Ghana or outside Ghana during that period.[52] An agency that fails and or ignores to file this return, shall have its licence revoked by the Minister.[53] Where a prospective employee pays a fee to an agency to secure suitable employment but the agency fails to do so, the agency is duty bound to refund 50% of the fee paid after the expiration of three months.[54] While the obligation of the agency to refund where there is failure to secure employment after the expiration of three months is commendable, the refundable amount ought to be the full sum paid or at least, 85% thereof to discourage clandestine business practices of making profit by deception. It is easy to understand that the 15% of the fee has been expended on administrative procedure and not a whopping 50%. By virtue of Section 10(a) thereof, an employee in a triangular employment relationship is entitled to equal pay for equal work done where he/she works with other classes of employees and to work under satisfactory, safe and healthy conditions.[55] Where the employment is to last for a period of six months or more, or for a number of working days equivalent to six months or more within a year, it shall be evidenced by the effectuation of a written contract of employment spelling out its terms and conditions.
While the Ghana Labour Act has copious provisions on the TER, and given its common law background, one can safely assume that its approach to the question: who is the employer in a TER would be similar if not the same as the position of the NICN or even the case-by-case basis of Britain based mainly on level of control or primacy of facts.

4.5 TER Practice in the United Kingdom

As already stated above, TER is a global phenomenon. The UK court have generally found a co-employer status between the End-User and the PEA in a TER. In *Dacas v. Brook Street Bureau (UK) Ltd*[56] Mrs. Patricia Dacas entered into a "temporary worker agreement" with Brook Street

[52] *Ibid.* 7(6).
[53] *Ibid.* 7(8).
[54] *Ibid.* 7(7).
[55] *Ibid.* 10(a).
[56] [2004] IRLR 358.

Bureau (BSB), which is an employment agency. BSB had a contract with Wandsworth Borough Council as its client, under which it provided the Council with staff. Mrs. Dacas was assigned by BSB to work as a cleaner at a hostel run by the Council. The Council paid BSB for her services, whilst BSB in turn paid Mrs. Dacas. The agreement between BSB and Mrs. Dacas made it clear that its provisions did not give rise to a contract of employment with either BSB or the Council. Mrs. Dacas worked only for the Council for a period of 4years until she was dismissed for alleged rudeness to a visitor to the hostel where she was assigned by the Council to work. Aggrieved by her dismissal, as Claimant, she brought proceedings against both BSB and the Council at the Employment Tribunal (ET) for unfair dismissal. The ET in its decision held that she was neither an employee of BSB nor the Council and had no contract with either of them hence, her claim was dismissed. Being dissatisfied with the ET decision, she appealed to the Employment Appeal Tribunal (EAT). The EAT reversed the ET decision by coming to the conclusion that the Claimant was worked under a contract of service with BSB.
On further appeal to the Supreme Court of Judicature, Court of Appeal Division ("the SC"), the SC, set aside the decision of the EAT and held that Mrs. Dacas had no contract of service with BSB because BSB had no obligation to provide Mrs. Dacas with work, and Mrs. Dacas had no obligation to accept work from BSB.[57] It further held that the fact that BSB had paid the Claimant did not make it her employer but based on the primacy of facts, there is a possibility that there exist an implied employment contract between Mrs Dacas and the Council since she works for them and under their control and they in-turn, remunerated her through BSB. In *Cable & Wireless Plc v. Muscat*[58] the issue was whether an employee in a TER qualified as an employee of the En-User or the Agency which affects entitlement to unfair dismissal claim under section 94(1) of Employment Rights Act, 1996 (ERA, 1996). In this case, the Appellant, company A, sought to overturn decisions of ET and EAT that held the Respondent, Claimant, was an employee of company A. The dispute arose after Claimant's original employer company B, reclassified him as a contractor, engaging him through a Limited Liability company. Subsequently, company B was taken over by company A, and the

[57] ***E Bassey, O Abiodun, O Alex, and N Ayantoye "A Review of the Concept of Triangular Employment in Nigeria"***
https://spaajibade.com/a-review-of-the-concept-of-triangular-employment-in-nigeria/
Accessed 3 February, 2026.
[58] [2006] IRLR 354.

Claimant continued working under company A's management. Following cases like *Ready Mixed Concrete (South East) Ltd. v. Ministry of Pensions and National Insurance*[59] and *Nethermere (St Neots) Ltd. v. Gardiner*[60] held that the key statutory requirement under the ERA, 1996 is the existence of a contract of employment which entails mutuality of control and obligation between the parties. Based on the prevailing facts, the court implied a contract of employment between the Claimant and company A since there was evidence that it exercised control, assigned an employee number, provided equipments, provided work and remunerated the claimant. The court therefore dismissed the appeal and affirmed the decision of the ET and EAT that the claimant was an employee of company A based on primacy of facts.
In fact, in the United States of America (US) the Iowa court in *Huck v. Wyeth, Inc.*[61] had, recognised but refused to apply the deep pocket jurisprudence (which requires the more buoyant party to bear responsibility towards the claimant then seek refund/set-off later from the less buoyant party) in a vicarious liability claim. However, approving the applicability of deep pocket jurisprudence in TER disputes especially in Nigeria, will further and better protect vulnerable employees. The deep pocket principle is a concept that very often refers to the idea that the liability for an injury/damage suffered should be borne by a person who is relatively in a good 'financial position' to bear same. This is achieved by imposing liability on a person/corporation who is usually relatively neutral in the transaction that led to the damage/injury.[62] The adoption and application of this jurisprudence in Nigeria will ensure that whichever party is financially buoyant, bears the liability rather than the employee scampering for relief. This jurisprudence guarantees a reverse effect of the aphorism that where two elephants (in this case, the Agent and End-User employer) fights, the outcome is that the grass (in this case, employee) suffers rather, the two elephants engaged in the fight, suffers.

5 Conclusion and Recommendations

Extrapolating from the above analysis, it is obvious that standard employment is being displaced by non-standard forms of employment including TER which is a global phenomenon. TER in Nigeria is fraught

[59] [1968] 2 QB 497.
[60] [1984] ICR 612.
[61] (850 N.W.2d 353, 380.
[62] Eghwubare (Note 6).

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by several challenges exposing the employee to multilayer labour exploitation including refusal to issue the mandatory contract of employment evincing its terms and conditions. The Court of Appeal of Nigeria insistence of a contract of employment as the only means of proving the existence of a valid and therefore enforceable contract of employment despite the respondent's complaint in the *Adariku's Case* that it demanded one but was not given amounts to requiring the doing of the impossible and antithetical to the subsisting position of the law in Nigeria. Section 91 of Nigeria's Labour Act, 2004 and the general Nigeria's labour legal framework is inadequate and obsolete in terms of regulation of nonstandard employment particularly triangular employment hence, parties have resorted to draconic common law principles to the chagrin of the employees who are often exploited. Jurisdictions like Ghana, South Africa, and the United Kingdom have reviewed their laws to make adequate regulation of TER while their courts have adopted progressive stance at adjudicating matters relating to or arising from TER aimed at safeguarding employment rights of vulnerable employees in TER. In summation, the decision of the Court of Appeal in the *Adariku's Case* apart from being reached *per incuriam,* fails to appreciate the complexities of TER, does not take into cognisance prevailing labour and employment realities and does not align with ILO prescriptions and as well as global best practices/standards.

Based on the foregoing, it is recommended that the Court of Appeal, where the opportunity presents itself subsequently, should jettison the position it took in *Luck Guard Ltd. v. Mr. Felix Adariku* as it does not aid the development of Nigeria's labour jurisprudence because, it is not in consonance with global best practice on the subject of triangular employment.

Also, the Court of Appeal should adopt the doctrine of primacy of facts evolved and applied by the NICN and applied by the South African courts in determining the question of who is the employer in a triangular employment situation while applying the doctrine of jointly and severally liable in terms of apportionment of liability between the Agent Employer and End-User Employer.

Moreso, there is an urgent need for the legislature to review and amend Nigeria's labour and employment laws like Ghana, South Africa has done with a view to making adequate provisions regulating the practice of triangular employment in Nigeria. This will ensure that it is not resorted to by unscrupulous Agent and End-Users employers to exploit employees who are constrained to enter such employment relationship due to the unprecedented high rate of unemployment in Nigeria.

Giving the importance of labour and employment to the economy of Nigeria and the ever increasing volume of cases litigated at the NICN with concomitant appeals to the Court of Appeal, it has become imperative for judges of the NICN to be elevated to the Court of Appeal since they have specialised knowledge on such matters. It is curious that since 2010 that the jurisdiction and status of the NICN was enhanced by the 1999 CFRN (Third Alteration) Act, 2010 till date (i.e. 2023), not a single judge of the NICN has been elevated to the Court of Appeal despite their eligibility. Alternatively, section 237(2) (b) of the 1999 Constitution should be amended to reflect that the composition of the Court of Appeal justices shall consist not less than six justices who are experts in labour and employment matters of which at least three shall be from the NICN. This is to ensure that appeals from NICN are heard by justices with vase knowledge of labour and employment matters just as it is contemplated for Islamic and customary law.
Furthermore, owing to the fact that aside obsolete and inadequate regulatory framework, the employer's desire to maximise profit, unprecedented high level of unemployment and increasing underemployment is a precipitant for resort to TER hence, the government should as a matter of utmost urgency, create gainful employment opportunities and as well as provide a clement weather that promotes private sector participation in the economy which can culminate in creation of gainful employment opportunities. The recurrent cosmetic and white-washed politically motivated employment creation drive of successive regimes, apart from its non-sustainability, it is incapable of engineering the desired outcome.

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