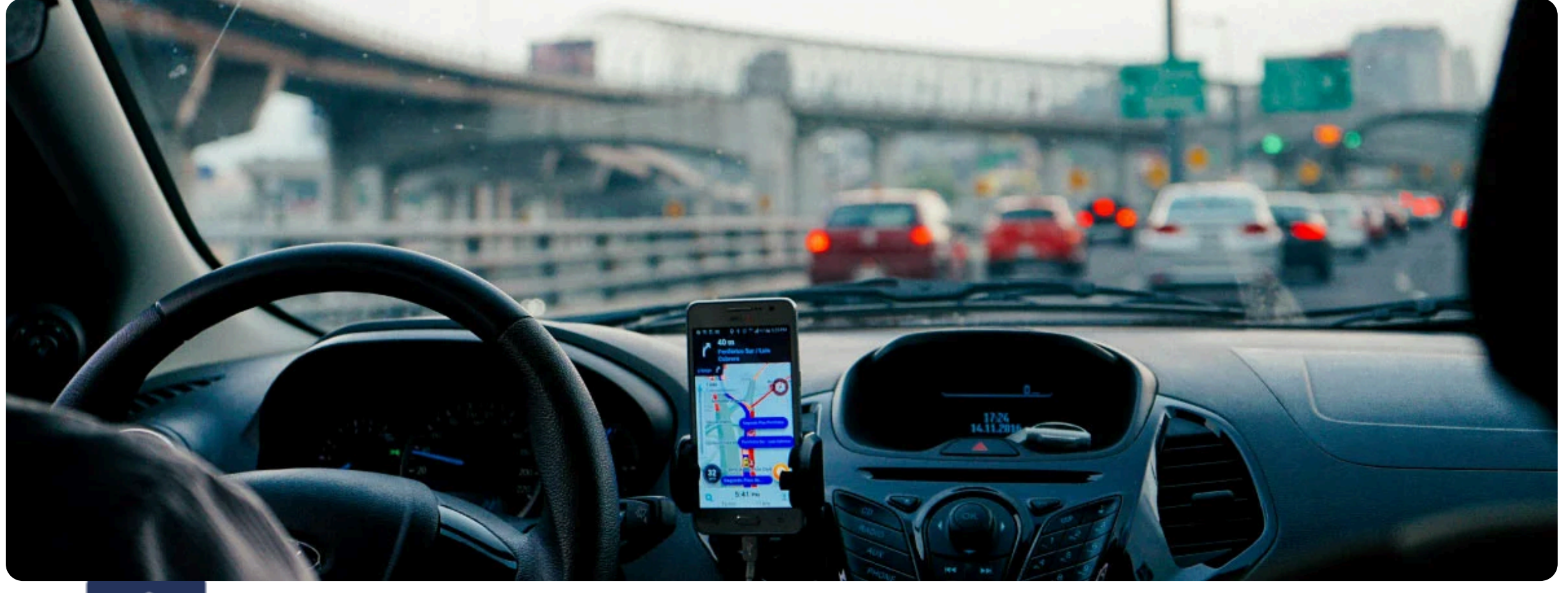


# Behind the Wheel: Are Uber Drivers Employees or Independent Contractors in Kenya's Legal Landscape?

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This commentary spirals from the decision of the Supreme Court of the United Kingdom in **Uber BV and others v Aslam and others [2021] UKSC 5**.

## Introduction

The advent of the Internet and mobile apps has significantly transformed business activities and consumer engagement in the Kenyan economy. A notable example of this transformation is the “*sharing economy*” which involves using peer-to-peer networks to temporarily access products and services as needed. This is the case in the transport sector, particularly the online taxi businesses, food deliveries and online shopping.

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## Understanding the Sharing / Gig-Economy.

The *gig-economy*, which typically refers to a labor market where people earn money from providing temporary, contract, and freelance work or services is an example of this *sharing economy*.

In this discussion, we will mainly focus on the transport industry which is an instrumental part of the economy. Notably, the Economic Impact Report indicated that Uber contributed to an estimate Ksh. 14.1 Billion to the Kenyan economy in 2023.

Focusing on the main debate arising from the online model of doing business, we have the never-ending dilemma of distinguishing whether key players such as drivers in this sector are employees or independent contractors.

## The Distinction between An Employee and an Independent Contractor

Essentially, employment law provides a number of safeguards to workers classified as employees that are not available to workers classified as independent contractors.

An employee is generally one who “***works under the direction of a supervisor, for an extended or indefinite period of time, with fairly regular hours, receiving most or all of his income from that one employer.***” Section 2 of the Employment Act, 2007 defines an employee as: - *a person employed for wages or a salary and includes an apprentice and indentured learner.*

On the other hand, an independent contractor typically has the bargaining power “***to negotiate a rate for the use of [a special] skill.***” An independent contractor also “***serves multiple clients, perform[s] discrete tasks for limited periods, and exercises great discretion/control over the way the work is actually done.***”

The distinction primarily serves to balance the bargaining power disparity between employees and independent contractors. In essence, it aims to safeguard workers. Initially, the law established this distinction to limit tort liability for worker negligence.

## The Legal Framework of the Control Test

In order to know whether Uber drivers are employees or independent contractors, we must answer one crucial question; Who has control?

Suffice, in ***Performing Right Society, Limited v. Mitchell and Booker (Palais de Danse), Limited [1924] 1 KB 762***, McCaig J opined that the final distinguishing test between employees and independent contractors is the **nature and degree of detailed control over the person alleged to be a servant.**

The aspect of liability is also crucial in this distinction where, at common law, the legal principle of respondeat superior holds an employer or principal legally responsible for the wrongful acts of an employee or agent, if such acts occur within the scope of the employment or agency, but not for the negligence of their independent contractors. At the heart of it, this is what such arrangements seek to benefit from.

While laying out a distinction on the latent characteristics that may or may not classify the players in this sector as employees or independent contractors, we will be guided by the decision in ***Uber BV and others v Aslam and others [2021] UKSC 5*** which held that Uber drivers are not independent contractors but workers of Uber who are entitled to all accruing employment rights. The court appreciated the following distinct arguments: -

## Arguments in favour of Uber Drivers being Employees

- Control over the Uber driver's work:** Drivers are subject to stringent screening procedures by Uber, which extends to ride acceptance rates and ratings to track driver performance.
- Fare Setting:** Uber implements surge pricing and sets ride costs unilaterally and without consultation. As such, the drivers are unable to bargain for their own rates.
- The Structure of Payment:** After deducting its commission, Uber pays drivers directly, making them financially reliant on the company rather than functioning on their own.
- Drivers as the Integral Part of Uber's Business:** The drivers are essential to Uber's primary business of passenger transportation; the company could not operate without them. The drivers are essentially part of employer's operations.

## Arguments Suggesting Uber Treats Drivers as Independent Contractors

- Flexibility in Work Hours** whereby the drivers to decide on the working hours.
- The Use of Own Equipment whereby the drivers are in charge of fuel, upkeep, and insurance for the rides they take in their own cars.
- The drivers have no Fixed wage/salary.
- Ability to Accept or Reject Rides thus indicating operational autonomy.

## Conclusion

From the foregoing, it can be arguably summarized that neither category adequately describes Uber's relationship with its drivers. But based on the information above, we may say that Uber has too much control over its drivers to allow them to operate as independent contractors. It is therefore suggested that a third legal category, such as the UK's “worker” classification, or a mixed employment model could be more suitable for this Uber situation in order to cogently protect the rights of the workers. To this end, and noting the advancement of the tech business, we recommend that the parliamentarians should amend the Employment Act, 2007 and related policies to expressly include and safeguard interests of gig-workers and/or freelancers who work with Tech Companies such as Fiverr, Uber, Jumia, and Glovo among others.

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