**Kenyatta University v Thomas & 25 others (Civil Appeal E494 of 2022) [2025] KECA 1014 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KECA 1014 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL E494 OF 2022**

**DK MUSINGA, F TUIYOTT & GV ODUNGA, JJA**

**MAY 30, 2025**

**BETWEEN**

**KENYATTA UNIVERSITY ..... APPELLANT**

**AND**

**HUMPREY NYAGA THOMAS ..... 1ST RESPONDENT**

**CHARLES KARIGI MUIRURI ..... 2ND RESPONDENT**

**JACKSON MAKOKHA ..... 3RD RESPONDENT**

**MICHAEL NDUNGU ..... 4TH RESPONDENT**

**JOSEPH MUTURI MWANGI ..... 5TH RESPONDENT**

**LAWRENCE FN GATHENYA ..... 6TH RESPONDENT**

**MARGARET WANJIRU ..... 7TH RESPONDENT**

**JACOB THUMI ..... 8TH RESPONDENT**

**WAKARINDI GATHARIKI ..... 9TH RESPONDENT**

**GEORGE NDUNG'U ..... 10TH RESPONDENT**

**MICHAEL KAARA ..... 11TH RESPONDENT**

**MARGARET NGUNJI ..... 12TH RESPONDENT**

**FRANCIS LIBECHI ..... 13TH RESPONDENT**

**S INDIMULI A GEOFFREY ..... 14TH RESPONDENT**

**STEPHEN M NUMI ..... 15TH RESPONDENT**

**PETER IRUNGU ..... 16TH RESPONDENT**

**RICHARD IBURU ..... 17TH RESPONDENT**

**AMOS MATHENGE ..... 18TH RESPONDENT**

**ESTHER NJOKI MBURU ..... 19TH RESPONDENT**

**JAMES KARANJA MUTURI ..... 20TH RESPONDENT**

**PETER OCHEMBE ..... 21ST RESPONDENT**

**VINCENT NGUNGI CHEGE ..... 22ND RESPONDENT**

**SAMUEL W NGUNGI ..... 23RD RESPONDENT**

**SIMON M KIGOTHO ..... 24TH RESPONDENT**

**KARIH WAMBUGU ..... 25TH RESPONDENT**

**AGNES KABURA NDUNG'U ..... 26TH RESPONDENT**

***(Being appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi - Milimani (Mbaru, J.) made on 10th December, 2021 in ELRC Constitution Petition Number 93 of 2018)***

## JUDGMENT

1. In this appeal we are invited to answer two substantial questions: the nature of employment in which the Kenyatta University (the appellant or University) had engaged the twenty five respondents; and whether the University had discriminated against them.

2. In constitutional proceedings filed by the respondents against the University, the case by the respondents was that the University had engaged them in employment working continuously without break, off-duty or annual leave for long periods of time ranging from 10, 11 and 20 years. Up until the year 2008, they were paid in cash at the end of every two (2) weeks. Then on, the University paid their salaries through Equity Bank accounts at a monthly salary of Kshs.28,038.00 worked at a rate of Kshs.934.60 per day but paid at the end of every month.

3. The respondents contended that in all those years of continuous service, the University never issued them with written terms and conditions of service as required by section 10 of the *Employment Act*, 2007 notwithstanding and continuously deducting statutory sums such as PAYE, NSSF and NHIF from their wages.

4. The petition was triggered by an internal memo dated 9th July 2018 in which the University's Deputy Vice-Chancellor- Administration, required all Deans of Faculties and Directors/Heads of Departments/Sections and Units to, inter alia, communicate and direct employees who were casuals to report to the graduation square on 19th July 2018 for the purpose of signing seasonal contracts. It was also communicated that only those who would sign those seasonal contracts would be paid their July 2018 salaries.

5. The respondents protested and declined to sign the seasonal contracts positing that:

    i. They were not casual employees, having worked continuously for more than 5 years.

    ii. The seasonal contracts was a mischievous way of terminating their employment as under clause 16, the contract was not renewable nor did the contract give the terms and procedure for renewal of contracts.

iii. The contract if signed would lower their salary from Kshs.23,038 to Kshs.19,233, a violation of the provisions of the *Employment Act*, in particular section 3(6).

iv. The University had, in blatant violation of *the Constitution* and *Employment Act* 2007 (the Act), failed to pay salaries for July 2018 to the time of filing of the petition.

6. In the petition, the respondents cited violation of Articles 27, 28, 29, 31 and 41 of *the Constitution* and violation of various international and regional instruments which we need not reproduce as nothing turns on them as will be apparent shortly.

7. In the end, the respondents sought the following orders:

a. A declaration that the Respondent is bound to recognize that the Petitioners are permanent and pensionable, having worked continuously for over ten years.

b. A declaration that the internal Memo to the Petitioners dated 9th July 2018 is null and void.

c. A declaration that the Respondent violated the Petitioners fundamental rights and freedoms enshrined in the Bill of Rights of the 2010 Constitution.

d. Orders suspending the internal memo dated 9th July, 2018 on signing of seasonal contracts and suspension of the seasonal contracts signed on 19th July, 2018 until the matter is determined.

e. Orders restraining the Respondent either by themselves employees, servants or agents from terminating the employment of the Petitioners members herein purportedly as casual employees as the termination would be unlawful and irreparable harm will be caused to the petitioners members and interference with their rights under *the Constitution* of Kenya 2010 particularly the rights under Article 41(1) and (2) of *the Constitution*.

f. Orders restraining the Respondent and prohibiting the Respondent from employing replacement labour or employees in the same positions to perform the same or similar work as the Petitioners members herein.

g. Orders stopping the Respondent from terminating or dismissing the petitioner's members from the Respondent employment without following the law and the terms and conditions of employment.

h. Order to convert the term and condition of service of the Petitioners members herein purportedly being casual employees in the service of the Respondent to respondent employees on term and condition of service consistent with *Employment Act* 2007.

i. Orders to pay July, August 2018 and subsequent months salaries upto the date of the Judgment and remunerations in consistent with the *Employment Act* 2007 as per Schedule A.

j. Order the Petitioners be allowed to join a trade union of their choice with immediate effect.

k. An award of Damages for Constitutional violations to be assessed by the Honourable Court.

l. An award of Damages for Pecuniary losses to be assessed by the Honourable Court.

m. Any other further and better orders as this Honourable Court may deem just and fit to grant.

8. In response the University filed a reply to petition. In it, the University averred that soon after the filing of the petition in July 2018, all the respondents left employment and had not worked for the University for the last 3 years or so, at the time of making the reply.

9. The University explained that it is a public university whose operations and infrastructure development is highly subsidised by the exchequer and the University is careful to avoid wastage of public funds. One way of doing so is that it engages only those employees who are involved in the core business of the University, being provision of education to the Kenyan public, on permanent and pensionable basis.

10. Sometimes the University has a need for employees to work on its non-core business, like infrastructure development which is not permanent. It was therefore the university policy to employ such employees as casuals and others on contract for work which was not permanent in nature. Further, the government had instructed public universities not to employ permanent and pensionable employees without concurrence of the government.

11. All the respondents were employed to work in construction as painters, electricians, plumbers, masons, carpenters when the University was engaged in massive infrastructure development which was no longer the case.

12. The University contended that it engaged the respondents as casuals, such engagement being on and off and could only be described as intermittent. Thereafter the respondents were engaged formally on a 3-months contract, depending on availability of work. Such contracts could be renewed. The University reiterated that notwithstanding referring to the respondents as casuals, the respondents, at the time the petition was filed, were working on 3-months contracts. It was asserted, for the University, that the relationship between them was going on well until 2018 when the University wanted to formalize the relationship "even more" by introducing the seasonal contract, which the respondents refused.

13. The University denied that the respondents were entitled to a monthly salary of Kshs.28,039 and contended that they were entitled to be paid for days worked in a month since the amount was not fixed.

14. The alleged violation of *the Constitution*, Statute and various international and regional instruments was denied.

15. After hearing the petition by way of affidavit evidence and written submissions, the ELRC (Monica Mbaru, J.) entered judgment in favour of the respondents in the following terms:

    a. a declaration that the petitioners' employment with the respondent is not casual but converted by operation of the law and protected with rights and benefits under the *Employment Act*, 2007;

    b. the respondent shall issue the petitioners with contracts of employment with terms and conditions similar to those issued to other employees and without placing them at a disadvantage for being or not being members of the trade union; this shall be done within the next 30 days;

    c. Further to (a) and (b) above, the respondent shall re-engage the petitioners on suitable terms and conditions and without putting them at a disadvantage for not being unionised though they are unionisable;

    d. A declaration that is hereby entered that the memo dated 9th July, 2018 is null and void and of no legal force;

    e. A declaration that the petitioners' constitutional rights have been violated by the respondent and are hereby awarded damages each at Ksh.280,380;

f. Overtime payments due and unpaid to date shall be tabulated by the respondent and paid to the petitioners within 30 days and failure to which the petitioners shall submit their tabulations for confirmation by the court;

g. The dues owed above shall be paid as directed and failure to pay the same shall accrue interests at court rate from the date due and until paid in full; and

h. The petition is found with good foundation and costs are hereby awarded to the petitioner."

16. The decision of the ELRC is impugned in a copious memorandum of appeal with 40 grounds, which in the end reveal just a handful of grievances as follows:

i. The learned judge erred in law and fact in holding that the University had discriminated against the respondents and erred in awarding damages for the alleged discrimination outside the *Employment Act*.

ii. The learned judge erred in law and fact in misapprehending the meaning and legal input of section 37 of the *Employment Act* and misapplying it to the facts of the dispute.

iii. The learned judge erred in law and fact in giving orders which are against public interest by: compelling the appellant to absorb the respondents into permanent employment even when the appellant did not need their services; and compelling the appellant to absorb such employees without scrutinising their qualifications contrary to the University's and government's employment policies.

iv. The learned judge erred in law and in fact when she purported to nullify the memo dated 9th July 2019 generally, thereby purporting to make a decision which affects thousands of persons who were not in the case before court.

v. The learned judge erred in law and in fact by directing the appellant to retrieve documents older than three (3) years and to make certain calculations based on such documents yet as a matter of law, the appellant is not obligated to keep employment records beyond three (3) years.

1. As we turn to consider the submissions and determine the issues raised, which revolve around the grounds of appeal, we are alive to our remit as a first appellate court. It is to re-evaluate, re- assess and reanalyze the evidence and draw our own conclusions. On this occasion we do not suffer any handicap of not seeing or hearing the witnesses testify as the hearing before the ELRC proceeded by way of affidavit evidence, all of which is before us.

2. On the first issue as to whether the University is guilty of discrimination, Mr Thuo, learned counsel representing the University, argued that, for there to be a finding of discrimination, there has to be comparison in the manner the respondents were treated as against the treatment of other persons. It is argued that there was no evidence as to other persons in the employ of the University who were favoured compared to the respondents despite possessing similar qualifications and performing similar duties.

19. As the respondents' claim on discrimination was an alleged violation of Article 27 of *the Constitution*, the University argued that a high standard of proof is imposed on a litigant who alleges violation of *the Constitution*, citing the decision in Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR). The burden of proof squarely rested on the respondents to prove the alleged constitutional violation (Mohammed Abduba Dida v Debate Media Limited & another [2018] KECA 642 (KLR)).

20. It was submitted on behalf of the University that the fact that some of its employees may work on "permanent and pensionable" terms while others work on "fixed term contracts" or "casual terms" does not, of itself evidence discrimination. It was further submitted that the University categorizes its functions into core and non-core, wherein the services offered by the respondents are non-core and not the type that would be needed by it on a daily basis in perpetuity.

21. Maintaining that the University had discriminated against the respondents, learned counsel Mr Museve for the 1st respondent cited section 5(2) and (3)(b) of the *Employment Act* which outlaws discrimination in employment. It was submitted that since the University engaged the respondents for a period between 10 to12 years as casual employees' contrary to the law under section 37 of the *Employment Act*, and through the University's conduct, the respondents have been denied privileges which would have accrued with conversion of their employment. The respondents added that the University being a public institution is not exempt from the provisions and operation of law, and in fact bears a greater responsibility in the public interest.

22. Adding their voice in support that there was discrimination, learned counsel Mr Thuita for the rest of the respondents submitted that discrimination entails creating a distinction based on grounds relating to personal characteristics of an individual or group, with the effect of creating disadvantages on such group or limits not available to others. It was contended that the law required that an employee who had worked for a certain period of time would no longer be considered a casual; that the University breached that requirement by labelling the respondents as casuals and non- core, which on its own demonstrated discrimination and there is no requirement for comparison. In any event, it was further argued, the records of the others to be compared with were with the University, which should have availed them at trial. The respondents sought to rely on section 10(6) and (7) of the *Evidence Act* for this proposition.

23. Before reaching the decision that the University was culpable for discrimination, the learned trial judge made reference to the decision of this Court in Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] KECA 718 (KLR). The learned judge then held against the University because, "though serving the respondent for period of between 10 to 12 years, the respondent maintained the petitioners as casual employees contrary to the law, the petitioners have been denied privileges which would have accrued with conversion of their employment". In the view of the learned judge, the matter did not end there as the University further entrenched the discriminatory practice by opting to entice the respondents with seasonal contracts.

24. The decision of this Court in Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] KECA 329 (KLR) extensively discusses the issue of discrimination in the workplace as follows:

> "Now, although the allegations levelled against the appellant happened before the promulgation of the current Constitution, arbitrary discrimination was still prohibited during the material times by section 82 of the former Constitution. Moreover, Kenya had also ratified a plethora of international instruments that prohibit racial discrimination among them the United Nations Convention on the Elimination of all forms of Racial Discrimination. Further, section 5 of the *Employment Act*, 2007 provides inter alia:
>
> "(1) (a) ....
>
> (b) ....
>
> 2. An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

2. No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee –

    a. On grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;

    b. In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment and other matters arising out of employment.

3. It is not discrimination to –

    a. take affirmative action measurers consistent with the promotion of equality or the elimination of discrimination in the workplace;

    b. distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;

    c. employ a citizen in accordance with the national employment policy; or

    d. restrict access to limited categories of employment where it is necessary in the interest of State security.

4. An employer shall pay his employees equal remuneration for work for equal value.

5. An employer who contravenes the provision of the section commits an offence.

6. In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

7. For the purposes of this section –

a. "employee" includes an applicant for employment;

b. "employer" includes an employment agency;

c. an "employment policy or practice" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration,employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment and disciplinary measures."

Further, fairness requires that people doing similar work should receive equal pay. The principle has however extended to an analogous situation requiring that work of equal value should also receive equal pay as is claimed in the present appeal. ....

In claims of this nature, where the claimant invokes the principle of equal pay for equal work the claimant must establish that the unequal pay is caused by the employer discriminating on unlawful grounds. It was observed in Louw vs Golden Arrow Bus Services (Pty) Ltd

[1999] ZALC166 that discrimination on a particular 'ground' means that the ground is the reason for the unequal treatment complained of by the claimant. As discussed by the writer, Adolph A. Landman in his article The Anatomy of Disputes about Equal Pay for Equal Work,

"The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the disparate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on."

.....The respondent had to establish that the unequal pay was caused by the employer discriminating on impermissible grounds."

25. The lesson to be drawn from the afore cited decision is that the lens through which we ought to examine whether the University discriminated against the respondents is whether the difference in treatment of respondents was on account of some impermissible ground. The University explained that it could not retain the respondents on a permanent basis because they were not employed in the core business of the university, which was the provision of education to the Kenyan public. Equally important was that the respondents were deployed in developing infrastructure projects which arose from time to time. The services of the respondents, who were electricians, plumbers, painters, masons, carpenters, would be on a need basis and their services would not be required when there was no construction of infrastructure projects. The respondents did not seriously challenge these two assertions, and that would be a concession that they belonged to a different cadre of employees from those engaged in services and duties in the core business of the University.

26. Indeed, the learned trial judge appreciated that the respondents belonged to a different category of employees. The learned Judge observed:

> " The respondent as an institution, a public university and with advantage of legal advice had the benefit of the law to choose which mode of engagement for the employment of the petitioners was best suited for their needs. Where there were infrastructure developments on-going, nothing stopped the respondents from issuing the
>
> petitioners with written terms of employment for fixed term contract or seasonal contracts, piece work contracts or as the case demanded. They opted to retain the petitioners on casual terms and which went on for period over and above what is allowed in law and the petitioners are now protected under the law, section 37 of the Act."

27. We do not understand the learned judge to be faulting the University for treating the respondents differently from other employees, but for failing to adhere to the law when engaging them in that distinct cadre.

28. On our part, we have no doubt that on the uncontroverted material, the respondents were engaged to carry out duties that were different and distinct from their colleagues who were engaged in the core business of University and there was reasonable distinction between the two groups for each to be afforded different treatment. This cannot amount to discrimination. Equality does not connote exact equal treatment. It simply means uniformity of treatment under the same or similar set of circumstances. Intrinsic in the concept of equality is the rule of differentiation. We think, and so hold, that the learned judge's finding that the appellants were culpable for discrimination was not in consonance with her observation that the respondents were distinct in the nature the engagement they undertook and the impermanent demand for their services.

29. As will be apparent, exonerating the University from the accusation of discrimination is not the same as saying that it acted in conformity with Labour laws in the manner in which it treated the respondents. This is at the heart of the second issue. In the period preceding the year 2018, were the respondents on fixed term contracts or were they in casual employment?

30. Pivotal to the appeal is the contention by the University that the trial court could not convert a fixed term contract employee into a permanent one, and the evidence before the trial court was that the respondents were on fixed term contracts long before 2018 when formal contracts were drawn and signed by some of the respondents. It was argued that there need not be a written contract signed by both parties in order for a fixed term contract to exist as such a contract may be oral or may be inferred by the conduct of the parties and the absence of a signed contract does not necessarily render the employment relationship casual (Emily Migwa v Seventh Day Adventist Church Central Kenya Conference (CKC) & another [2020] KEELRC 379 (KLR)). Further, it was submitted, that even where the parties refer to their employment relationship as casual, the court can still hold that the same is a fixed term contract if the evidence supports such a holding. Seeking to demonstrate that the evidence showed that the respondents were fixed term contract employees, the University cited the respondent's own documents which showed that the respondents were employed on 3 months contracts, which upon lapse they would notify their respective Heads of Department whether that they wished to have their contract renewed for another 3 months; and if so, the Head of Department would then write a memo to the Deputy Vice- Chancellor requesting authority to do so, and upon approval, the same would be communicated to the HR Manager and the Chairman of the Department, who would then communicate the decision to the particular respondent. In addition, we were asked to find that the breaks in the respondents' employment with the appellant was a relevant factor in determining the nature of employment.

31. For respondents, it was submitted that the right to fair labour practices takes prominence in *the Constitution* and must be jealously guarded. The respondents urged this Court to reach the same finding as the ELRC in Esther Njeri Maina v Kenyatta University [2020] KEELRC 1259 (KLR) which was upheld by this Court in Kenyatta University v Maina (Civil Appeal 261 of 2020) [2022] KECA 1201 (KLR), where on, similar facts, the Court held that it was an unfair labour practice to deny a non-permanent employee of the rights of a permanent employee. It was further submitted that the University, which admitted having engaged and enjoyed the services and labour of the respondents from the year 2008, neither complained about the quality of work nor the lack of requisite qualifications by the respondents. Relying on section 9 of the Act, the respondents argued that they were in service for a period exceeding 24 hours; their wages were paid on a monthly basis and beyond the time period allowed for a casual employee, and therefore deserved protection of the law and could no longer be considered casual employees. Lastly, on this issue, in all its correspondences and dealings with the respondents, the University termed them as casuals and cannot therefore say that the respondents were on fixed term contracts, which contracts were never produced in evidence.

32. The stance of the University was: never mind that it often referred to the respondents as casuals, a true analysis of the facts reveals that they were fixed-term contract employees. However, the University's own pleadings whittle down this defence. In the reply to the petition, the University avers:

> "It is possible that the petitioners herein had at one time or the other been engaged by the University as casuals to work as construction workers whenever the university had ongoing projects. Such engagement was on and off and could only be described as 'intermittent'. It was rather informal and involved many employees not just the petitioners."

33. In addition, while the University asserted that the respondents did not work for continuous period, the evidence on record suggests otherwise, albeit with short breaks. Take for example for Joseph Muturi Mwangi, the 5th respondent. He earned a monthly salary of Kshs.28,038.00. His tax returns for the period 1st January 2017 to 31st December 2017 shows an employment income of Kshs.268,229.40, which means he worked around 9.5 months out of 12 months. For George Ndung'u Wangie, the 10th respondent, his annual income for the same period was Kshs.310,282 and represents 11 months of work. It is not dissimilar for the others. To be deduced is that the respondents were, at least for the year 2017, virtually in continuous employment of the University, albeit with very short breaks. In addition, and this is significant, the University did not unequivocally deny having had some labour relation, whatever the nature, with the respondents spanning from 11 to 20 years.

34. Again, while we are told that the repeated reference by the University to the respondents as casuals was merely an issue of nomenclature, what is important is the context of engagement. The very purport of the controversial memorandum of 9th July 2018 was :

> " updating data and issuing individual engagement contract letters to all staff on casual terms."

The sample contract puts the engagement date as 1st July 2018 and is clear that the duration was for "three (3) months or less" depending on the tasks or purpose for the engagement. It has to be asked, if indeed the engagements prior to 1st July 2018 were for three months and that arrangement had worked well for many years, why did the University find it necessary to 'formalise' the arrangement through the written contracts? While we agree with the University that a fixed-term contract can be written, oral or by conduct, the evidence on record supports the contention by the respondents that the arrangement was one of casual employment as opposed to a fixed-term contract and the true purpose of the "formalisation" was to change the character of the employment from casual to a fixed-term contract.

35. As to whether breaks in the respondents' employment would change the outcome, we think not. Short breaks between the engagements would not change the fact that the University engaged the respondents on casual basis for considerable long periods of time, and any short breaks in between would not change the true character of the arrangement. To hold otherwise would encourage crafty employers to simply impose artificial breaks in this type of arrangement so as to go round the rigours and reality of section 37 of the Act. We therefore endorse the finding of the learned trial judge that :

> " The respondent as an institution, a public university and with advantage of legal advice had the benefit of the law to choose which mode of engagement for the employment of the petitioners was best suited for their needs. Where there were infrastructure developments on-going, nothing stopped the respondents from issuing the petitioners with written terms of employment for fixed term contract or seasonal contracts, piece work contracts or as the case demanded. They opted to retain the petitioners on casual terms and which went on for period over and above what is allowed in law and the petitioners are now protected under the law, section 37 of the Act.The issuance of seasonal contracts to the petitioners is overtaken by the law. Unless the respondent applies the provisions of section 13 of the Act and changes the employment particulars of the petitioners, to change the nature of employment without first obtaining the consent of the affected employees is to engage in unfair labour practices which is an act prohibited under *the constitution*."

36. Section 37 of the Act reads:

> " 37. Conversion of casual employment to term contract
>
> 1. Notwithstanding any provisions of this Act, where a casual employee—
>
>  a. works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
>
>  b. performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,
>
> the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
>
> 2. In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to
>
> one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
>
> 3. An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
>
> 4. Notwithstanding any provisions of this Act, in any dispute before the Employment and Labour Relations Court on the terms and conditions of service of a casual employee, the Employment and Labour Relations Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.
>
> 5. A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 86 of this Act shall apply."

37. Deploying this provision, the learned trial judge made an order converting the casual employments into term contracts and, in addition, citing subsection 4, directed the University to issue term contracts to the respondents, with terms and conditions similar to those issued to the other employees.

38. The arguments raised by the University as to the effect of section 37 of the Act are forceful. It is not to make any employee permanent, rather to allow a court to convert a casual employment to a term contract limited to the extent that the casual employee is to be paid at the end of the month instead of at the end of each day, and that the employee whose employment has been converted cannot be terminated without a month's notice as provided for under section 35 of the Act. The respondents do not see any infraction on the part of the trial court, arguing that once the ingredients for conversion were found to exist, the learned judge had no discretion but to declare a conversion as she did.

39. The primary remedy under section 37 of the Act is to be found in subsection 1: for the contract of service of a casual employee to be deemed to be where wages are paid monthly and section 35(1)(c) be applied to that contract of service. Section 35(1)(c) of the Act reads:

> "(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—
>
> (a) .....
>
> (b) .....
>
> (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing."

Upon conversion the employee enjoys the privilege of a notice before termination not available to a casual employee.

40. But there is a further layer of privilege that subsection 3 of section 37 of the Act offers. Where, like here, the employee has worked for two months or more from the date of employment as a casual employee, he shall be entitled to such terms and conditions of service that an employee would be entitled to under the Act. This would include payment of service pay upon termination where the employee is not a member of the National Social Security Fund, a registered pension or provident fund, or a gratuity or service pay scheme established under a collective agreement (section 35(5) and (6)of the Act).

41. Whilst it is true that the trial court could have power under section 37 (4) to vary the terms of service of a casual employee and in doing so declare the employee to be employed on terms and conditions of service consistent with the Act, this can only be done where circumstances so justify, and the court must give reasons for making such variation.

42. The learned trial judge having appreciated the unique tasks of the respondents vis-à-vis the core business of the University and, further, having acknowledged that "where there were infrastructure developments on-going, nothing stopped the respondents (now the appellant) from issuing the petitioners with written terms of employment for fixed term contract or seasonal contracts, place work contracts or as the case demanded" was not justified in making an order that they be engaged on terms and conditions similar to other employees. It was enough to stop at simply giving effect to section 37(1) of the Act.

43. The next issue should not be controversial at all. One of the declarations made by the trial judge was that the memo dated 9th July 2018 is null and void and of no legal force. The argument by the University is that as the petition was not a representative suit, the nullification should only apply to the parties that were before the trial court. There is merit in this argument. The respondents never sought a decision in rem and none could be granted.

44. Finally, there was an order that any overtime payment due and unpaid up to the date of the judgment should be paid to the respondents. We think and hold that in tandem with the provisions of section 53 of The *Labour Institutions Act* and section 74 of the *Employment Act*, the award should be limited to a period not exceeding three years before the petition was filed. Section 74 of the *Employment Act* reads:

> "74. Records to be kept by employer

1. An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

    a. of a policy statement under section 6(2) where applicable;

    b. specified in section 10(3);

    c. specified in section 13;

    d. specified in sections 21 and 22;

    e. of an employee's weekly rest days specified in section 27;

    f. of an employee's annual leave entitlement, days taken and days due specified in section 28;

    g. of maternity leave specified in section 29;

    h. of sick leave specified in section 30;

    i. where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;

    j. of food rations where applicable;

    k. specified in section 61;

    l. of a record of warning letters or other evidence of misconduct of an employee; and

    m. any other particulars required to be kept under any written law or as may be prescribed by the Cabinet Secretary.

    1. An employer shall permit an authorised officer who may require an employer to produce for inspection the record for any period relating to the preceding thirty six months to examine the record.

3. Where an employer who employs a child maintains a register in accordance with section 61, the employer shall be deemed to have complied with this section if the register contains in relation to each child, the particulars required to be kept by the employer under subsection (1)."

45. An important objective of a provision of limitation of time is that a defendant should not be made to meet a claim which the defendant cannot properly defend because of inability, due to passage of time, to gather and mount evidence or recall events.

46. In the end, this appeal is partially successful. We quash declaration (b) and partially declaration (d) of the judgment of 10th December 2020. Regarding declaration (d), it shall only apply to the respondents here. As to the order in (f), the dues payable shall be limited to 3 years before the petition was filed. Parties shall bear their own costs, both here and of the court below.

**DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2025.**

**D. K. MUSINGA (PRESIDENT)**

**JUDGE OF APPEAL**

**F. TUIYOTT**

**JUDGE OF APPEAL**

**F. V. ODUNGA**

**JUDGE OF APPEAL**