



REPUBLIC OF KENYA



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**Judicial Service Commission v Mayieka & 22 others (Civil Appeal
58 of 2019) [2025] KECA 1220 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1220 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 58 OF 2019
JM MATIVO, PM GACHOKA, JM MATIVO & GV ODUNGA, JJA
JULY 11, 2025**

BETWEEN

JUDICIAL SERVICE COMMISSION APPELLANT

AND

LUCY GICHUKI 1ST RESPONDENT
NICHOLAS MAYIEKA 2ND RESPONDENT
CAROLINE MENIN 3RD RESPONDENT
RUTH KIHURIA 4TH RESPONDENT
RUTH ABIR 5TH RESPONDENT
CATHERINE NG'ANG'A 6TH RESPONDENT
AGNES NDANU 7TH RESPONDENT
HANNAH GITHUKU 8TH RESPONDENT
ERIC WALALA 9TH RESPONDENT
CAROLINE KAMAU 10TH RESPONDENT
PATRICIA JOSEPH 11TH RESPONDENT
PERIS WANJOHI 12TH RESPONDENT
RUTH YATOR 13TH RESPONDENT
EVLYN MUCHOKI 14TH RESPONDENT
KWAMBOKA KAINGOI 15TH RESPONDENT
LILIAN MUTHONI 16TH RESPONDENT
JACKIE KIBOGY 17TH RESPONDENT



JAMES NDUNG’U	18 TH RESPONDENT
KIARA CRISPUS NABASENGE	19 TH RESPONDENT
ANGELA OМУYA	20 TH RESPONDENT
CAROLINE KITUKU	21 ST RESPONDENT
PETER KEYA	22 ND RESPONDENT
SARAH WAIGWE NYOIKE	23 RD RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court of Kenya at Nakuru (M. Mbaarua, J.) delivered on 17th January 2019 in ELRC Petition No. 260 of 2016)

JUDGMENT

1. The dispute before us involves the interpretation of employment contracts. As a Court, we are reminded to interpret contracts in their ordinary meaning. Sir Charles Newbold, P, in the case of Damodar Jinabhai & Co Ltd vs. Eustace Estates Ltd [1967] EA 153 echoed the following cogitations when confronted with interpretation of contracts and this Court shall take the same approach:

“The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above – Globe Motors Inc and Others v. TRW Lucas Electric Steering Ltd and Others (supra) – Lord Justice Beatson stated as follows:

“Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.”

2. The Judicial Service Commission, the appellant herein, is a creature of statute. It is established under Article 171 of the Constitution. Article 172 of the Constitution delineates its functions in promoting and facilitating the independence and accountability of the judiciary towards the administration of justice. In that regard, it is mandated to review and make recommendations on the conditions of service of inter alia, the staff of the judiciary. It is also mandated to appoint, receive complaints against, investigate and remove from office or otherwise discipline staff of the Judiciary, in the manner prescribed by statute. In the performance of its functions, it shall be guided by competitiveness and transparency in the appointment of other staff of the judiciary.
3. The Judicial Service Act at section 7 establishes the position of legal researchers, appointed and assigned to judges. It is against this background that the respondents were recruited and employed by letters of appointment dated 13th June 2012. Their terms of engagement, particularly on remuneration, were subsequently reviewed upwards.
4. Thereafter, the respondents complained that the appellant unilaterally, and without due regard to its obligations, varied their terms of engagement contrary to Articles 41 (1) and 47 (1) of the Constitution. The particulars of breach were enumerated in the respondents’ petition dated 5th July 2016 before the



Nakuru ELRC in Cause No. 260 of 2016. They complained that the appellant violated their rights to fair administrative action, fair labour practices, equal treatment and legitimate expectation. They sought a raft of reliefs in that petition.

5. The appellant filed its response. It relied on the replying affidavit sworn by Anne Amadi on 16th August 2016 to argue that the petition lacked merit and was for dismissal. It enumerated that it had complied with the law and therefore, no basis for the petition lay against it.
6. The petition was canvassed by way of written submissions. In her judgment dated 17th January 2019, Mbaaru, J. held in part as follows:

“ 36. Article 41 of the Constitution, 2010 gives the right to fair labour practice. In an employment relationship and to ensure such fair labour practices, the Employment Act, 2007 (the Act) allow parties in an employment relationship to agree on the mode of employment as under section 9, 10 and 37. Employment may be by oral agreement, written agreement and where there is no agreement and such employment subsists for the period stipulated under section 37, by operation of the law, such employment becomes protected with rights under the Act.

37. Employment under contract for a fixed term or under terms as agreed upon by the parties is lawful and a legitimate mode of employment. Unless such employment is obtained through fraud, misrepresentation or any other form of illegality, the court is bound to uphold the terms agreed upon by the parties in a written contract of service.

38. The 2nd (sic) and 23rd petitioners were issued with fixed term contracts for 2 years. The court reading of such contract is that the terms, conditions and term was clear to the extent that there was no expectation created that there would be automatic renewal of the contracts upon lapse. Such contract have (sic) since ended on their term. Save for the interim orders issued by the court and where the petitioners have remained in the service of the respondent, such contracts ended by application of the term and the applicable law.

39. The 1st to 21st petitioners were issued with letter (sic) of appointment dated 13th June, 2012. All such letters are similar to the extent that the petitioners were appointed Legal Researchers on probationary terms and on the conditions that change in your terms of service will be subject to satisfactory performance.

40. Remuneration and other benefits attached to the appointed positions were also spelt out in the letters of appointment. These included:

- i. House allowance Kshs. 25,000 per month
- ii. Responsibility allowance Kshs. 5,500 per month
- iii. Transport allowance Kshs. 8,000 per month
- iv. Non practice allowance Kshs. 17,000 per month
- v. Extraneous allowance Kshs. 30,000 per month
- vi. Risk allowance Kshs. 15,000 per month
- vii. Leave allowance Kshs. 18,000 per month



41. The petitioners also had the benefit of medical insurance and group personal accident cover.
42. Probationary contracts of service in their nature are regulated under section 42 of the Employment Act. Where no period is set out under the contract, by operation of the law, such term cannot go beyond 12 months from the date when employment commenced. On the lapse of such period and without any other provisions, the employee before full time employee with benefits under the Employment Act, 2007 and the term contract converts to one protected under the provisions of section 35 and 41 of the Act.
43. In the petitioners' case, they were required to confirm acceptance to the offer of employment before 9th July, 2012.
44. The date of 9th July, 2012 is therefore important as from such date, the probationary period effectively ended on 8th July, 2013.
45. From the pleadings and submissions, I take it the respondent did nothing with regard to the petitioners' employment until the letter dated 30th January, 2013 to the effect that:

“Addendum – offer of appointment

Following the Judicial Service Commission Meeting held on December 5th, 2013, we wish to inform you that you are on a three (3) years contract effective July 9th, 2012.

Please note that all other terms and conditions of your employment conveyed to you vide our letter of June 13th, 2012 remain unchanged.”

46. The petitioners seem to have accepted the communication and remained in employment. Nothing was done to challenge this development or protect their rights which had accrued to them effective 8th July, 2013. With the acceptance of the variation of the employment terms and the promise of fixed terms of employment for 3 years backdated to 13th June, 2012 and by application of section 10 (3) (c) of the Employment Act, 2007 the petitioners became bound into fixed term contracts of service.
47. The fixed term service contract lapsed and by letter dated 28th May, 2015 there was an extension for 6 months period. With these extensions some benefits accruing under the initial probationary contracts were reduced or removed. The letter dated 14th December, 2015 noted as follows:

“Extension of contract

Following the...held on 2nd December, 2015, I wish to inform you that your contract has been extended up to 31st March 2016...”

48. A similar letter was issued and dated 30th March, 2016. It was an extension of contract.



49. Such communication thus became binding on the parties as to the applicable terms and conditions of service. the duration applicable was clear. The last extension of the contract of service ended on 30th June, 2016.
50. As correctly submitted by the respondent, section 13 of the Employment Act, 2007 requires the employer when effecting change to the employment contract to give the employee a written statement containing particulars of the change within one (1) (sic) one upon such change taking effect...
51. The changes in the remuneration and work benefits due to the petitioners after the issuance of the probationary contract and the various extensions therefrom and vide communications dated 28th May, 2015; 14th December, 2015 and 30th March, 2016 should have complied with the express terms of the subsisting contracts of service which had effectively been extended on their terms and conditions. Without any written communication of any changes thereto as required under section 13 of the Act, any withholding of any benefit, remuneration or other matter therefrom became due and owing.
52. The petition is that from December, 2013 the respondent withdrew the risk allowance due to the 1st to 21st petitioners; the responsibility allowances were reduced from Ksh. 25,000.00 to Ksh. 10,000.00 per month. The full benefits due to the petitioners under the extension of the contract in their full terms and conditions are due.
53. On 6th July, 2016 the petitioners moved the court following the lapse of their contracts of service with the respondent. This followed their application and petition dated 5th July, 2016.
54. The last extension of contract ended on 30th June, 2016. Effectively, such dated ended the employment relationship.
55. On good basis, and to allow the court to hear both parties on their merits, interim orders allowing the petitioners to be retained by the respondent in employment under terms of remuneration subsisting and in effect as at 30.06.2016... the respondent has complied. They stand in good stead.
56. Effectively, what the petitioners are entitled to are the withheld risk allowances from December, 2013 and the balance from reduced responsibility allowances up and until 30th June, 2016. Such dues only accrue to the 1st to the 21st petitioners. The petition by the 22nd and 23rd petitioner (sic) is found without merit.
57. The owing dues to the petitioners shall be computed and on the shop floor and paid within sixty (60) days from the date hereof. Accordingly, the petition succeeds in part. Petition by the 22nd and 23rd petitioners is hereby dismissed. The 1st to the 21st petitioners shall be paid their withheld dues from December, 2013 comprising risk allowances and the balance due in responsibility allowances and such payments shall be subject to the provisions of section 49 (2) of the Employment Act, 2007. As the computation of the owing dues shall be done at the shop floor, each party shall bear own costs.”



7. The appellant is aggrieved by those findings. It filed its notice of appeal dated 25th January 2019. It subsequently filed its memorandum of appeal dated 17th June 2019 that raised the following summarized grounds disputing the findings of the learned judge: that the learned judge misdirected herself for failing to find that the 1st to 21st respondents, by willingly signing their employment contracts, waived any rights accrued in their previous contracts; and the trial court erroneously found that the appellant reduced and/or withheld the responsibility and risk allowance for the 1st to 21st respondents between December 2013 and 30th June 2016 and further found that they were entitled to that relief.
8. It continued that the learned judge was in error in determining that the 1st to 21st respondents had the right to take up new contracts of employment and at the same time claim benefits under the original contracts; and that the learned judge erred in failing to find that the respondents acquiesced to the varying of the terms of employment and were bound by the terms of their contracts of employment. In view of the foregoing, the appellant urged this Court to allow the appeal by setting aside the findings of the trial court. It further prayed for costs of the appeal.
9. The respondents filed a notice of cross appeal dated 20th November 2016. Similarly, they were dissatisfied with the findings of the learned judge to this extent: that the trial court erred in dismissing the petition by the 22nd and 23rd respondents; that the learned judge erred in failing to award the respondents retention in service under their terms of remuneration subsisting as at 30th June 2016 subject to periodic upward reviews as provided in the appellant's human resource laws, policies and manuals; and that the trial court failed to declare that the unilateral variation of the respondents' remuneration under the revised terms of service for legal researchers dated 20th April 2014 and the letter of offer of appointment dated 28th June 2016 was a violation of their right to secure protection of the law, fair labour practices, fair administrative action and legitimate expectation in contravention of Articles 27, 41 and 47 of the Constitution thereby null and void and of no legal effect.
10. The respondents complained that the trial court ought to have declared that the unilateral revision of the 1st to 21st respondents' contracts from open ended to three year contracts and later two year contracts violated their right to secure protection of the law, fair labour practices, fair administrative action as well as their legitimate expectations in contravention of Articles 27, 41 and 47 of the Constitution thereby null and void and of no legal effect; and the learned judge erred in failing to award compensation by way of general damages for multiple violations of their rights and fundamental freedoms set out in the Constitution. For those reasons, they urged this Court to further allow the petition dated 5th July 2016 in addition to the reliefs granted by the trial court. Additionally, they prayed for general damages for violation of their rights and fundamental freedoms as would be determined by this Court.
11. This appeal was heard on 8th April 2025. The appellant was represented by learned counsel Mr. Mwangi while learned counsel Mr. Ongoya represented the respondents. At the hearing, parties relied on their respective written submissions that were orally highlighted.
12. The appellant's written submissions and list and bundle of authorities, all dated 24th March 2025, abridged the facts at trial to frame three issues for determination: whether the contracts were open ended or fixed term; whether there was any unilateral change of the risk and responsibility allowance; and whether the respondents were entitled to any of the reliefs sought in their cross appeal.
13. On the first issue framed for determination, learned counsel submitted that by dint of the letter dated 30th January 2014, the respondents' probationary contracts morphed to three-year contracts effective 9th July 2012. The respondents did not raise any objection. It could therefore be deduced that the



respondents were on a three-year fixed term contract from 9th July 2012 to 9th July 2015. Regarding the 22nd and 23rd respondents, the appellant submitted that they were recruited on 24th March 2014 and 4th April 2014 respectively for two-year contracts with end dates. Upon effluxion of time, their contracts were renewed with revised terms of service. It therefore argued that the contracts were not permanent and pensionable and did not resultantly create any legitimate expectations.

14. The above notwithstanding, the appellant submitted that since the respondents were bound by the terms in the fixed term contracts, they ceded the rights enshrined in the previous open-ended contracts that were effectively terminated. This is because the new fixed term contract took effect. For this argument, it relied on the authority of *Mbatia vs. Kirinyaga Water & Sanitation Company (KIRIWASCO)* [2023] KEELRC 3364 (KLR).
15. Speaking further on legitimate expectation, learned counsel submitted that legitimate expectation could not arise since the contracts were on fixed terms basis and would expire in the terms set out in the various contracts. While acknowledging that the respondents' contracts were renewed severally for shorter periods of time, he emphasized there was no promise that their contracts would be extended further for a longer term or on permanent and pensionable terms. In view of the foregoing, no legitimate expectation could arise for a renewal of the fixed term contracts or on such other terms. In any event, fixed term contracts were only renewable at the discretion of the employer. It relied on the case of *Transparency International – Kenya vs. Omondi* [2023] KECA 174 (KLR) in support of those arguments.
16. The appellant then argued that it was not duty bound to disclose the reasons for not renewing a contract upon its expiry. It fortified that submission by quoting the case of *Registered Trustees De La Salle Christian Brothers T/A St. Mary's Boys' Secondary School vs. Julius D M Bains* [2017] eKLR. Taking another angle, the appellant submitted that the contracts issued in 2016 were neither extensions nor renewals but new contracts separate and distinct from the initial contracts that had been extended on three occasions. Thus, the respondents had an elective decision to either accept employment or opt out of these new contracts.
17. Turning to the second issue framed for determination, the appellant contended that there were critical inconsistencies that undermined the claim that there were unilateral changes to risk allowances and responsibility allowances. Taking a look at the pay slips of Nicholas Gesumwa Mayieka and Jackie Chepkoskei Kibogy, the appellant observed that the figures captured in the offer letters did not reflect in the pay slips that in fact paid a higher amount than they were entitled to. The enhanced figures paid out to the respondents, it argued, were not supported in law or in any form of documentation. For those reasons, it justified that their reduction to contractual levels or amounts double the contractual levels could not constitute an unfair unilateral variation.
18. It further pointed out the respondents did not adduce their December 2013 pay slips, wherein they alleged that the reduction occurred. In the absence of such evidence, the appellant submitted that the claim was speculative. In its view, using two sets of pay slips from different persons did not demonstrate the alleged variation. It then justified that contrary to the respondents' allegations, the appellant adjusted the allowances to double the amounts expressly stipulated in the letters of offer. Thus, the reduction of such benefits to contractual levels could not be considered unlawful deprivation but a realignment of allowances to contractual obligations.
19. Submitting on risk allowance, learned counsel argued that the same was not available to legal researchers under the organogram of the Judiciary. They were therefore not entitled to such an allowance. Since it was not legally approved, it could not be enforced simply because it was included in the employment contract. The appellant buttressed that the respondents being under grade 11, could



- not benefit from the payment of this allowance by dint of clause H.15 of the Judicial Service HR policy and manual.
20. The appellant continued that the HR policy ranked in priority to their contracts which ought not to have conferred risk allowance. In any event, since the risk allowances were never paid, that indicates and importantly demonstrates that it was never the intention of the appellant to remit that allowance. This fact of not paying was never raised as an issue by the respondents ab initio and were estopped from raising it at trial.
 21. Gathered from their inaction, the appellant concluded that the respondents indeed acknowledged that they were never entitled to that relief. For that reason, the concept of legitimate expectation could not arise since the risk allowance was not available as a matter of policy. It then argued that since the appellant was bound by budgetary and regulatory constraints, it could not issue payments that were not formally sanctioned by law or policy as that would amount to a violation of the public finance management principles embedded in the Constitution and the Public Finance Management Act.
 22. Lastly, turning to whether the respondents were entitled to the reliefs enumerated in their notice of cross appeal, the appellant submitted in the negative. It submitted that the contracts entered did not envision a rise of legitimate expectation that their contracts would be renewed. It thus lauded the findings of the trial court in holding that the 22nd and 23rd respondents' petition lacked merit and was dismissed. No obligation arose on the part of the appellant, it submitted, for retention of services.
 23. Finally, the appellant added that no labour rights were violated as to warrant the respondents to an award of general damages. In any event, it pointed out, that relief was never sought at trial. It thus prayed that its appeal be allowed and the respondents' cross appeal be dismissed.
 24. The respondents on their part filed joint written submissions, a list and bundle of authorities and case digest all dated 7th April 2025. They crystallized the following issues for determination: whether their contracts were open ended; whether there was unilateral change in the risk allowances and reduced responsibility allowances; whether the respondents were entitled to claim benefits under the original contract; whether the trial court erroneously dismissed the petition by the 22nd and 23rd respondents; whether the respondents were entitled to retention in service under their terms of remuneration subsisting as at 30th June 2016; whether there was a breach of fair labour practices, fair administrative action and legitimate expectation; and whether the respondents were entitled to general damages for breach of their constitutional rights.
 25. Arguing the first issue framed, the respondents submitted that the 1st to 21st respondents were employed on open ended contracts vide their offer letters dated 13th June 2012. Interpreting the clauses therein, learned counsel submitted that the contracts effectively provided an automatic renewal of the contract. However, the appellant unilaterally revised those contracts to three-year contracts effective 9th July 2012 vide letters dated 30th January 2014. According to the respondents, the letters maintained all the terms and conditions of employment in the offer letters of 13th June 2012. This effectively maintained the allowances and the expectation of automatic renewal of their contracts.
 26. The respondents observed that on three other occasions, the contracts were extended for a period of six months, three months and three months vide extension contracts dated 28th May 2015, 14th December 2015 and 30th March 2016 respectively. Come 20th April 2016, the appellant released new terms and conditions of employment including the change of job title, two-year non- renewable contracts and a salary cut.
 27. In their view, the above action was unconstitutional and a violation of their rights to fair administrative action enshrined under Article 47 (1) of the Constitution, the right to secure protection of the law



- and the right to fair labour practices. They drew inference on this submission from the case of Fredrick Ouma vs. Spectre International Limited [2013] eKLR.
28. Condensing the second and third issues framed for determination, the respondents submitted that the issuance of the letters of appointment dated 20th April 2016 gave them no opportunity to contest the changes; rather requiring them to sign the contracts on the new terms encapsulated therein. In their view, the appellant's inaction of not consulting the respondents before issuance of the appointment letters violated section 10 (5) of the Employment Act and was contrary to the holding in Ibrahim Kamasi Amoni vs. Kenital Solar Limited [2018] KEELRC 1093 (KLR) and Kennedy Mutua Mwangangi vs. Madison Insurance Company (K) Limited [2020] KEELRC 1890 (KLR).
 29. The respondents submitted that the reduction of the responsibility allowance and withdrawal of the risk allowance unilaterally amounted to a violation of their right to secure protection of the law, fair labour practices and fair administrative action. Furthermore, the reduction of salary was unlawful because it was neither done in consultation with the respondents nor premised on any justifiable basis.
 30. On whether the respondents were entitled to claim benefits under the original contract, learned counsel submitted that the risk and responsibility allowances were provided in their letters of appointment dated 30th June 2012. Their interpretation of the letters dated 30th January 2014 was that all terms of employment were retained, save for the conversion of their employment to that three-year contract. That throughout, the appellant never communicated its intention to scrap of any benefit until 20th April 2016, when the contract amended the benefits and allowances enjoyed by the respondents.
 31. Addressing their cross appeal, the respondents firstly submitted that the trial court erroneously dismissed the petition by the 22nd and 23rd respondents. They argued that the two respondents were given contract letters initially on 24th March 2014 and 4th April 2014 respectively. It was then communicated that those terms would be revised vide a letter dated 20th April 2016.
 32. Unhappy with the revised terms, particularly reviewing their remuneration downwards, the respondents lodged a complaint with the appellant. However, instead of responding to the complaint, the appellant, through express or implied duress, compelled them to sign acceptance of the terms of the new contract. In the respondents' view, the absence of engaging them prior to the implementation of the 2016 contracts, violated their right to fair administrative action considering that their salary was revised downwards.
 33. Speaking to the issue of retention in service, the respondents submitted that they were entitled to retention because the original contracts were open ended. Thereafter, the subsequent review and extension of contracts were indicative of a great representation of long-term contracts. In fact, the said letters informed the respondents that there was an expectation of long-term contracts hence their retention. In view of the foregoing, they were entitled to retention.
 34. Submitting affirmatively that the appellant breached the respondents' rights to fair labour practices, fair administrative action and legitimate expectation, the respondents argued that the appellant's action of unilaterally revising the contracts without their input was a violation of their right to fair administrative action. Secondly, the unilateral revision of the terms of employment and reduction of their remuneration violated their right to fair labour practices as espoused in Article 41 of the Constitution.
 35. Expostulating on the doctrine of legitimate expectation, the respondents anticipated that with the open-ended contract, they would benefit from career progression and upward review of remuneration. However, their career progression dreams were impeded by the fact that they would be subjected to fresh probationary terms upon execution of the contract. Furthermore, they submitted that they had



- the legitimate expectation that over time, their salaries would be reviewed upwards and not downwards as was the case herein. For this presupposition, they relied on the case of *Republic vs. Principal Secretary Ministry of Mining ex parte Airbus Helicopters Southern Africa (PTY) Ltd* [2017] eKLR.
36. Finally, on the award for compensation in the form of general damages for breach of constitutional rights, the respondents submitted that since there was a violation of Articles 27, 41 and 47 of the Constitution, they were entitled to that relief. For those reasons, the respondents prayed that the appellants' appeal be dismissed with costs and their cross appeal be allowed.
37. This is a first appeal. Our duty as a first appellate Court was ruminated by this Court in the case of *David Sironga Ole Tukai vs. Francis Arap Muge & 2 others* [2014] KECA 155 (KLR) as follows:
- “Conscious of our duty as the first appellate Court in this matter, we have reconsidered the evidence, assessed it and made our own conclusions on the evidence, subject to the cardinal fact that we did not have the advantage singularly enjoyed by the trial judge, of seeing and hearing the witnesses as they testified. (See *Seascapes LTD V. Development Finance Company Of Kenya LTD* [2009] KLR, 384). We also remind ourselves that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See *Ephantus Mwangi & Another V Duncan Mwangi Wambugu* [1982-88] 1 KAR 278).”
38. Before formulating the issues for determination, we note that the undisputed facts are that by letters of appointment dated 13th June 2012, the 1st to 21st respondents were employed by the appellant in fulfillment of the provisions of section 7 of the Judicial Service Act. Following a series of negotiations with the Judiciary and the Salaries Remuneration Commission, the gross salary of these respondents was enhanced to a sum of Kshs. 187,740.00.
39. On 30th January 2014, the Director of Human Resource and Management and the Judiciary wrote to the respondents informing them that a decision had been arrived at by the appellant in a meeting held on 5th December 2013 resolving that the respondents were employed on three-year contracts from 9th July 2012.
40. During the period between July 2012 and November 2013, as per the pay slips of the 1st respondent adduced in evidence, the risk allowance was never paid. However, the responsibility allowance was paid during this period at Kshs. 25,000.00 per month. For the year 2014, the 17th respondent's pay slips revealed that she was never paid the risk allowance but was in receipt of the responsibility allowance in the sum of Kshs. 10,000.00.
41. On 28th May 2015, the appellant wrote to the 1st to 21st respondents stating that pursuant to a meeting of the appellant held on 30th April 2015, their contracts had been extended for a further period of six months effective 8th July 2015 to ensure services were available to the judges as the appellant concludes deliberations on the long-term contracts. It is important to note that the effective dates of extension varied individually.
42. A similar letter was written to the 1st to 21st respondents on 14th December 2015. The only variation was that pursuant to a meeting of the Judicial Service Commission Human Resource Management Committee held on 2nd December 2015, their contracts were extended up to 31st March 2016. A third letter dated 30th March 2016 to the 1st to 21st respondents, bearing the same content of the letter dated 14th December 2015, stated that their contracts were extended up to 30th June 2016.



43. In the meantime, the 22nd and 23rd respondents were recruited via letters of appointment dated 24th March 2014 and 4th April 2014. Come 20th April 2016, the appellant revised the terms of service for legal researchers and law clerks. Thereafter, on 9th May 2016, the appellant wrote to the 22nd and 23rd respondents stating as follows:

“Re: Addendum – Revised Terms of Service For Legal Researchers and Law Clerks

Further to our letter dated 20th April 2016 on revised terms of service for Legal Researchers and Law Clerks. We take note that our letter stated the new terms of service to take effect upon expiry of your current contract. However, in line with Judicial Service Commission directive of 21st March, 2016 all current contracts of serving Legal Researchers/Law Clerks expiring between March and June, 2016 were to be extended to 30th June 2016.

Therefore, take note that your current contract shall run up to 30th June 2016 and upon expiry the new terms of service will take effect from 1st July, 2016 subject to satisfactory performance. Any inconvenience caused is highly regretted.

We thank you for your continued service and wish you the very best.”

44. The receipt of the last two letters galvanized some of the respondents to write a letter dated 10th May 2016 where several concerns regarding the contractual terms and issues arising as at that time regarding their job conditions were raised. On 28th June 2016, the respondents were offered letters of appointment.
45. The interpretation of these contracts by the parties were sharply contrasted. This remained the focal point for determination by the learned judge in her analysis of the issues before her. The issue for determination is whether the learned judge arrived at a correct or incorrect decision in her analysis. In addressing this pertinent question, we shall address the following issues sequentially in determining whether the trial court arrived at a correct finding.

Whether the contracts were initially open ended

46. According to the respondents, the initial contracts dated 13th June 2012 were open ended; a fact vehemently refuted by the appellant. The 1st respondent’s letter, which was similar to that of the 2nd to 21st respondents, reads as follows:

“Following your interview by the Judicial Service Commission, I am pleased to inform you that you have been offered for appointment as a Legal Researcher on probationary terms, with effect from the date you report to the Registrar, High Court of Kenya, for deployment at Milimani High Court, Nairobi. Change in your terms of service will be subject to satisfactory performance.

The salary attached to this grade is in scale M4/R2 Ksh. 40,835 × 2,042 – 42,877 × 2,144 – 45,021 × 2,251 – 47,272 × 2,364 – 49,636 × 2,487 - 52,123 × 2,260 – 54,743 pm. You will enter the scale at Ksh. 40,835 and your future incremental date will be determined in accordance with section G.8 of the Judicial Service Staff Regulations.

Other Benefits Include The Following:

A. Allowances

- i. House Allowance Kshs. 25,000 per month



- ii. Responsibility Allowance Kshs.5,500 per month
- iii. Transport Allowance Kshs. 8,000 per month
- iv. Non-practicing Allowance Kshs.17,000 per month
- v. Extraneous allowance Kshs. 30,000 per month
- vi. Risk Allowance Kshs. 15,000 per month
- vii. Leave allowance Kshs. 18,000 per month

B. Medical insurance and Group Personal Accident Cover

Please signify in writing your acceptance or otherwise of this offer on or before 9th July, 2012 to facilitate your induction. Also ensure the following forms attached herein are filled and submitted to this office with your letter of acceptance:

- i. Personal data forms
- ii. Next of Kin forms
- iii. Declaration of wealth forms
- iv. Medical Scheme application forms
- v. National Hospital Insurance Fund forms (NHIF)

Please note that the offer will be deemed to have lapsed if not accepted by 9th June 2012.”

47. A cursory perusal of the contents and terms of service indeed reveals that the contracts were open ended to the extent that they had neither a contractual period nor stated whether they were on permanent and pensionable terms. The contracts did not provide for a duration of the contract. In other words, it was not a fixed term contract. We therefore find that, the contracts entered into by the 1st to 21st respondents were open ended.
48. Turning to the contracts entered into by the 22nd and 23rd respondents dated 24th March 2014 and 4th April 2014 respectively, the same provided as follows:

“Re: Letter of Offer of Appointment

Following your interview, I wish to convey the decision of the Judicial Service Commission at its

meeting held on 11th November, 2013, that you were successful and you are hereby offered appointment as a Legal Researcher.

The terms and conditions of employment are as follows:

- 1. Title
Your job title will be Legal Researcher.
- 2. Duration

This contract of employment will be for a term of two (2) years commencing from the date you report for duty. You will serve on probation for a period of six (6) months, effective the date of your appointment.



3. Duties and responsibilities

You will perform the following functions:-

- i. Research on precedent setting authorities with varied jurisdiction both within and outside of the Commonwealth;
- ii. Draft well planned legal briefs on variety of legal issues touching on different branches of law;
- iii. Write analytical summaries of written arguments in light of academic legal literature and case law; and
- iv. Carry out any other additional duty assigned by your superior officers from time to time.

4. Remuneration

The salary range for this grade is Kshs. 70,000.00 × 2800 to 72800 × 2912 to 75,712 × 3028 to 78,740 × 3150 to 81,890 × 3276 to 85,166 × 3406 to 88,572.00. You will enter at Kshs. 70,000 per month and the incremental date will be determined in accordance with Section G.8 of the Judicial Service Staff Regulations based on your reporting date.

Other benefits include:-

- i. House allowance Kshs. 35,000 p.m
- ii. Extraneous allowance Kshs. 30,000 p.m
- iii. Responsibility allowance Kshs. 10,000 p.m
- iv. Commuter allowance Kshs. 16,000 p.m
- v. Non-practicing allowance Kshs. 18,000 p.m
- vi. Leave allowance Kshs. 20,000 p.a
- vii. A Medical Insurance Cover as per the existing scheme.
- viii. Annual leave entitlement of thirty (30) days per calendar year after serving for a minimum period of six (6) months.

Any further reviews of salary beyond the scale given above shall be at the discretion of the judicial service commission and will be based solely on performance among other factors

5. Gratuity

You will be entitled to taxable gratuity at the rate of thirty-one (31%) per centum of the total basic salary paid during the term of the contract or part worked thereof, provided that:-

You do not become a member of the permanent and pensionable establishment during the contract period. You maintain discipline to ensure the contract is not terminated. In case of termination of the same by the Judicial Service Commission all rights and advantages reserved for you will cease.

6. Termination of employment contract



- a. Termination of service during the probation period will be by either party giving two calendar weeks' notice or payment of an equivalent salary in lieu of notice.
 - b. At the end of the probation, the Judicial Service Commission may confirm the appointment, terminate the appointment or extend the period of probation for a further period of six months depending on performance. Unless you are confirmed on completion of such further period of probation, the probationary appointment shall stand terminated at the end of one year from the date of appointment.
 - c. After probation, and upon confirmation into the contract of service, either party may terminate the service by giving one month's notice or payment of one month's gross salary in lieu of notice.
7. Original certificates
- Confirmation of this appointment will be conditional upon production of all your original certificates, both academic and professional, for our sighting and record. It will also be subject to satisfactory references from referees who will include your former employers. In this regard, it is our understanding that by accepting this offer, you also indicate that you have no objection to the Judiciary approaching your former employees for references. In the event that any of the aforementioned references turn out to be adverse, this offer will stand repudiated.
8. Employment laws and staff rules
- You will be subject to provisions of the Constitution of Kenya, 2010, the Judicial Service Act, 2011, Judicial Code of Conduct and Ethics that are currently in force or as may be amended from time to time.
9. Conflict of interest
- To avoid an actual conflict of interest or appearance of a conflict of interest, you must not engage in any remunerative activity including a business or consultancy that seeks to have a relationship with the Judiciary. In the event that you are engaging in such an activity currently, you are required to declare this immediately and cease such activities forthwith to avoid disciplinary action which may include termination of the contract.
10. Confidentiality
- You will not during your engagement disclose any confidential matters of the Judicial Service Commission/Judiciary to any one not authorized or entitled to receive them.
- In addition, you will sign a confidentiality agreement to the effect that all matter pertaining to your duties while in the service of the Judiciary will be confidential and no communication with third parties will be allowed except as explicitly authorized by the Judicial Service Commission.



11. Acceptance

This appointment shall take effect from the date you report for duty. If you accept the offer on the above-mentioned terms, please sign and return to the undersigned, the attached copy of this letter indicating the reporting date. Your signed acceptance should be received within 30 days from the date of this letter. Please note that if no response is received from you within the 30 days, it will be assumed that you do not wish to accept this offer and the same shall automatically lapse.”

49. Looking at the nature of those contracts it cannot be gainsaid that they were fixed term. This negated the aspect that they were open ended since they clearly indicated that they were to run for two years.

Whether the appellant unilaterally and unfairly varied the contractual terms

50. At the heart of the dispute is the claim that the appellant without any colour of right, changed the terms of the contract without their consultation. It is important to point out that the 1st to 21st respondents received open ended letters on 9th July 2012. However, come 30th January 2014, the appellant informed the 1st to 21st respondents that they were employed on three-year contracts effective 9th July 2012. It further stated that all other terms and conditions of your employment conveyed in the letter of 13th June 2012 remained unchanged.

51. On three occasions, the 1st to 21st respondents received extensions of the contracts on 28th May 2015, 14th December 2015 and 30th March 2016. This last contract extended their contracts to 30th June 2016. The appellant issued the following offer letters to the respondents on 20th April 2016.

“The Judicial Service Commission at its meeting held on 12th January, 2016 released new terms and conditions of service for Law Clerks and Legal Researchers.

In this regard, I wish to inform you that with effect from 1st April, 2016 your terms of service will be as follows. That:-

1. Your position will be a Law Clerk.
2. The position will be at the level of a Resident Magistrate.
3. You will serve on a two (2) year non-renewable contract.
4. Your current contract will run up-to the end of the contract period on 02 June, 2016. Thereafter, you will be required to sign a new contract but subject to accepting the new terms stipulated herein and satisfactory performance as indicated in appraisal reports.
5. Your remuneration and benefits shall be as follows:
 - A. Remuneration
 - A Consolidated salary of Kshs. 123,750 × 6,625 p.a
 - 190,000 p.a
 - Non-Practicing Allowance: Kshs. 10,000.00/= Annual Leave Allowance: Kshs. 18,000.00/=



You will enter at Kshs. 123,750/= per month and the incremental date will be based on your reporting date.

B. Benefits

- i. You will be entitled to Medical insurance cover as provided in the Judiciary Medical Scheme.
- ii. You will be entitled to Group Personal Accident cover as provided for by the Judiciary.
- iii. You will be entitled to airtime allowance of Kshs. 3,000/= as provided in the Judiciary Human Resource Policy Manual.
- iv. You will not be entitled to Car and Mortgage loan facilities while on contract.
- v. You will not be entitled for leave of absence, study and unpaid leave, however you are entitled to Paternity, Maternity and Annual leave of 30 days.

C. Contract gratuity

You will be entitled to taxable gratuity at the rate of thirty-one (31%) per centum of the total basic salary paid during the term of the contract or part worked thereof, provided that:-

You do not become a member of a permanent and pensionable establishment during the contract period. You maintain discipline to ensure the contract is not terminated. In case of termination of the same by the Judicial Service Commission all rights and advantages reserved to you will cease.

You are therefore required to signify in writing your acceptance or otherwise of the same within fourteen (14) days from the date of this letter, to facilitate processing of new contract with effect from 9th May, 2016.”

52. Dissatisfied with those terms of the contract, some of the respondents elected to address the appellant, sharing their concerns, in their letter dated 10th May 2016. However, the same was not responded to. Nevertheless, the respondents received the following letters of offer dated 28th June 2016:

Re: Letter of offer of appointment

Following your acceptance of the revised terms of service and subsequent satisfactory report from your supervisor, I am pleased to inform you of your appointment as a Law Clerk by the Judicial Service Commission

The terms and conditions of employment are as follows:

1. Title
Your job title will be Law Clerk.
2. Duration



You will serve on contract for a non-renewable term of two (2) years commencing from the date you report for duty.

3. Duties and responsibilities

You will perform the following functions:-

- v. Research on precedent setting authorities with varied jurisdiction both within and outside of the Commonwealth;
- vi. Draft well planned legal briefs on variety of legal issues touching on different branches of law;
- vii. Write analytical summaries of written arguments in light of academic legal literature and case law; and
- viii. Carry out any other additional duty assigned by your superior officers from time to time.

4. Remuneration

The salary attached to this grade is in scale M4/R2 viz Kshs. 123,750 × 6625 to 130,375 × 6625 to 137,000 × 6625 to 143,625 × 6625 to 150,000 × 6625 to 163,500 × 6625 to 170,125 × 6625 to 176,750 × 6625 to 183,375 × 6625 to 190,000 p.a. You will enter at Kshs. 123,750/= per month and the incremental date will be determined in accordance with Section G.4 of the Judicial Human Resource Policy & Procedure Manual.

Other benefits include the following:-

- i. Non-practicing allowance Kshs. 10,000 p.m
- ii. Leave allowance Kshs. 18,000 p.a
- iii. A General Personal Accident cover as per the existing scheme.
- iv. A Medical Insurance Cover as per the existing scheme.
- v. Annual leave entitlement of thirty (30) days per calendar year after serving for a minimum period of six (6) months.

Any further reviews of salary beyond the scale given above shall be at the discretion of the Judicial Service Commission and will be based solely on performance among other factors

5. Gratuity

You will be entitled to taxable gratuity at the rate of thirty-one (31%) per centum of the total basic salary paid during the term of the contract or part worked thereof, provided that:-

You do not become a member of the permanent and pensionable establishment during the contract period. You maintain discipline to ensure the contract is not terminated. In case of termination of the same by the Judicial Service Commission all rights and advantages reserved for you will cease.

6. Termination of employment contract



- d. Termination of service during the probation period will be by either party giving two calendar weeks' notice or payment of an equivalent salary in lieu of notice.
 - e. At the end of the probation, the Judicial Service Commission may confirm the appointment, terminate the appointment or extend the period of probation for a further period of six months depending on performance. Unless you are confirmed on completion of such further period of probation, the probationary appointment shall stand terminated at the end of one year from the date of appointment.
 - f. After probation, and upon confirmation into the contract of service, either party may terminate the service by giving one month's notice or payment of one month's gross salary in lieu of notice.
7. Original certificates
- Confirmation of this appointment will be conditional upon production of all your original certificates, both academic and professional, for our sighting and record. It will also be subject to satisfactory references from referees who will include your former employers. In this regard, it is our understanding that by accepting this offer, you also indicate that you have no objection to the Judiciary approaching your former employees for references. In the event that any of the aforementioned references turn out to be adverse, this offer will stand repudiated.
8. Employment laws and staff rules
- You will be subject to provisions of the Constitution of Kenya, 2010, the Judicial Service Act, 2011, Judicial Code of Conduct and Ethics that are currently in force or as may be amended from time to time.
9. Conflict of interest
- To avoid an actual conflict of interest or appearance of a conflict of interest, you must not engage in any remunerative activity including a business or consultancy that seeks to have a relationship with the Judiciary. In the event that you are engaging in such an activity currently, you are required to declare this immediately and cease such activities forthwith to avoid disciplinary action which may include termination of the contract.
10. Confidentiality
- During your engagement, you will not disclose any confidential matters of the Judicial Service Commission/Judiciary to any one not authorized or entitled to receive them.
- In addition, you will sign a confidentiality agreement to the effect that all matters pertaining to your duties while in the service of the Judiciary will be confidential and no communication with third parties will be allowed except as explicitly authorized by the Judicial Service Commission.



11. Acceptance

This appointment shall take effect from the date you report for duty. If you accept the offer on the above-mentioned terms, please sign and return to the undersigned, the attached copy of this letter indicating the reporting date. Your signed acceptance should be received within 30 days from the date of this letter. Please note that if no response is received from you within the 30 days, it will be assumed that you do not wish to accept this offer and the same shall automatically lapse.”

53. What is the law on variation of contracts? The starting point is to be found in section 10 of the Employment Act which enlists the employment particulars in a contract. Among those particulars are the form and duration of contract as well as the remuneration of the employee. Section 13 of the Act, in no uncertain terms, goes on to state that any change of particulars provided in section 10 shall be given to the employee by way of a written statement. Though the appellant submitted that this provision did not apply, it was not demonstrated how the appellant fell within the exceptions to this mandatory general rule. We therefore find that the provisions remained alive and applicable.
54. It is clear that when comparing the contracts side by side, some of the clauses have changed. For instance, the respondents were offered two years contracts instead of the three-year contracts they had enjoyed. Secondly, the risk and responsibility allowances had been removed from the new contract. Thirdly, the latest contract included a non-renewable clause; one that did not exist in the previous contract.
55. On their part, the respondents argued that the actions of the appellant amounted to a violation of their rights enshrined in the Constitution because they were not consulted or given prior notice of these changes. The appellant, contra, argued that the contracts had lapsed and the new contracts properly embedded terms and conditions of service that did not require prior consultation since it was unrelated to the previous contract.
56. Were the contracts a variation from the contracts of 9th June 2012 or were they to be treated as a new contract separate and distinct from the expired ones? The answer lies in the language of the two contracts which ought to be interpreted as far as possible in their ordinary meaning. After all, contractual interpretation is in essence simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. [See *Euromec International Ltd vs. Shandong Taikai Power Engineering Co Ltd* (2012) 93 KLR].
57. The opening statement in the letter dated 20th April 2016 reads:
- “The Judicial Service Commission at its meeting held on 12th January, 2016 released new terms and conditions of service for Law Clerks and Legal Researchers...”
58. Our understanding of that statement is that the appellant had intended to introduce new terms and conditions of service to the pre-existing ones. In essence, the appellant was making amendments to the initial letters of offer out of which the respondents were constantly informed in the contract extensions that the appellant was in the process of concluding deliberations on the long-term contracts. (emphasis ours) From the wording of that statement, it was the intention of the appellant to fine tune the terms of service for the respondents. Otherwise, nothing would have been easier than stating in no uncertain terms the nature of the contracts when the respondents were first issued with contracts on 9th July 2012.



59. In our view, the appellant unilaterally varied the terms of the contract without informing the respondents within the parameters of section 13 of the Employment Act. We find that the contract was not contradistinguished from the original contracts but a continuation of the contracts the respondents had entered with the appellant initially. We therefore do not agree with the appellant that the contracts were different and distinct from each other.
60. Regarding the risk allowances that were made available to the 1st to 21st respondents, the appellant submitted that the same was not available to the respondents, who were under grade 11, by dint of clause H.15 of the Judicial Service HR policy and manual. It contended that for that reason, it never justifiably paid the said allowance to the respondent. In addition, the appellant continued that the failure by the respondents to raise any complaint during the pendency of their antecedent contracts was akin to their acknowledgment that they were not entitled to that allowance.
61. That argument is unacceptable. It is trite law that parties are bound by their contractual terms and cannot be varied unilaterally. The appellant had indeed offered the respondents a risk allowance that according to the respondents, was never settled. The fact that it was allegedly not available for the respondents in the organogram could not have led the appellant to depart from a bad bargain. It was incumbent upon it to fulfil its obligations under the contract as stated. Those terms were unambiguous and there was certainly no reason why it did not settle that allowance.
62. Turning to the responsibility allowances, we also find that they were reduced from Kshs. 25,000.00 to Kshs. 10,000.00 without any legal or justifiable basis against all respondents. Again, it was incumbent on the appellant to make prior written statements of such changes in their contracts. Though the appellant submitted that the pay slips for December 2013 were not adduced in evidence to establish that the responsibility allowances had been reduced, this fact was not denied at trial. We find that on a balance of probabilities, the responsibility allowances were indeed reduced unilaterally.
63. On whether the respondents ought to have lodged the complaint earlier, we find the Canadian decision of the Court of Appeal in the case Hill vs. Peter Gorman Ltd (1957) O.J. No. 188, 9 D.L.R. 124 useful of that held as follows:

“an employee’s decision to continue performing his duties in light of a unilateral variation of a contractual term by an employer does not amount to an employee’s acceptance of the unilateral variation, if the employee has signalled his objection to the variation and the employer does not then bring the contract to an end.”

64. Some of the respondents objected to the variation of the contract.

That complaint was never responded to. Be that as it may, the fact that the respondents continued with the contracts did not in any way relinquish their rights to address this issue before this court. The respondents were left with no choice but to either accept the terms or decline and find employment anywhere. It was a fait accompli. They were certainly disadvantaged absent some consultative engagements. We thus find that they were certainly entitled to risk allowances and ought to have been paid during the duration of the contracts.

Whether the 22nd and 23rd respondents’ petition was merited?

65. At trial, the learned judge dismissed the 22nd and 23rd respondents’ petition, finding that it lacked merit. In the court’s view, since they were issued with fixed term contracts for two years, their terms and



conditions were clear since no expectation arose for an automatic renewal of the contract upon lapse. In particular, the learned judge pronounced herself as follows:

“ 38. The 2nd (sic) and 23rd petitioners were issued with fixed term contracts for 2 years. The court reading of such contract is that the terms, conditions and term was clear to the extent that there was no expectation created that there would be automatic renewal of the contracts upon lapse. Such contract have (sic) since ended on their term. Save for the interim orders issued by the court and where the petitioners have remained in the service of the respondent, such contracts ended by application of the term and the applicable law.”

66. Looking at the contracts entered in 2014 alongside those entered in 2016, we find no reason to fault the learned judge. See the 22nd and 23rd respondents' contracts entered in 2014 expressly stated that they were two-year fixed term contracts. Contrary to their counterparts, there were no uncertain terms with a promise that their contracts would be deliberated upon. Accordingly, no legitimate expectation could arise on automatic renewal since it was never the intention of the appellant to do so. We thus come to the inescapable conclusion that their petition indeed lacked merit and their cross appeal to this extent must fail.

Whether the appellant violated the respondents constitutional rights enshrined in Articles 27 (1), 41 and 47 as well as the doctrine of legitimate expectation?

67. While addressing this question, we are alive to the dictates of Article 24 which allow the limitation of a right or fundamental freedom to the extent that the limitation is reasonable and justifiable in an open and democratic society. Article 27 (1) of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. When the appellant elected not to fulfill its legal obligations under the contract dated 9th June 2012, by not settling the respondents' risk allowances, and reducing their responsibility allowances unilaterally, we find that the appellant infringed upon the respondents' right to equal protection and equal benefit of the law.

68. Article 41 (1) and (2) provide that every person has the right to fair labour practices. We find that the failure by the appellant to confine itself within the requirements of section 13 of the Employment Act, for failing to notify the respondents in writing of the changes in the contract, amounted to a violation of the respondents' rights to fair labour practices. We find that the appellant ambushed the respondents with amended terms of employment that were unfavourable and implemented without notifying the respondents prior. In the same fashion, the appellant's actions contravened the fair administrative action principle set out in Article 47 of the Constitution.

69. Turning to the principle of legitimate expectation, it was contended by the appellant that the same did not arise since the respondents were on fixed term contracts. In its view, they could not anticipate an automatic renewal of the contract given their nature; an action that was left at its sole discretion.



70. The concept of legitimate expectation is now well settled in our jurisdiction. In, *Ngetich & 3 others vs. County Service Board Bomet & another* [2022] KECA 575 (KLR) this Court, constituted differently enunciated itself as follows:

“The term “legitimate expectation” is a technical term of profound doctrinal basis. It is not the expression of wishful thinking or desire capable of translation into a legal right. Arvind Thapliyal enunciates the doctrine of legitimate expectation in 2006 (8) SCJ p.721 thus:

“What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term ‘established practice’ refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based ON sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established.”...

In *Jitendra Kumar vs. State of Haryana & Others* 2012 (78) ACC 70, the Supreme Court of India explained that –“A legitimate expectation is not the same thing as anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity, predictability and certainty in the Government’s dealings with the public, and the doctrine of legitimate expectation operates both in procedural and substantive matters.”

The doctrine is essentially a creature of administrative law, having been evolved by the courts for the purpose of regulating the exercise of power by administrative authorities so as to provide effective safeguards from arbitrariness or abuse of power. It belongs to the domain of constitutional and administrative law. It cannot be read into or transplanted root-and-branch into the domain of the law of contract, or into our comprehensive and meticulously drafted employment laws for that matter, such as the extant statutory regulation of contracts of employment in county public service as is the case here.

As already stated, the Doctrine of “Legitimate Expectation” is not a legal right in itself embedded in some statute or Code readily available for its inference and applicability. However, it is a right to be treated fairly and the same has been fashioned by judicial precedents of various courts in common law jurisdictions over a period of time, and is still in its evolving stage. As was observed by the Supreme Court of India in the case of *National Buildings Construction Corporation vs. S. Raghunathan & Others* AIR 1998 SC 2779, the doctrine has its genesis in the field of administrative law. Under the doctrine, “... the Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion.” See also *Republic vs. Attorney-General and Another Ex Parte Waswa and 2 others* [2005] 1 KLR p.280.

71. Was the doctrine applicable to the facts and circumstances of the present dispute? We think so. The appellants continually informed the respondents that it was deliberating on long term contracts when the respondents’ contracts were extended on three occasions. However, in the contracts issued in 2016,



the appellant was categorical that the contracts were no longer renewable automatically and further, the risk and responsibility allowances were removed. Additionally, the respondents' remuneration dealt a hard blow when they were reviewed downwards.

72. The variation of the contract in those terms left no other impression other than a violation of this doctrine. We find that the respondents reasonably expected the terms and conditions of service to progress and not digress in the manner set out by the appellant. During the hearing of the appeal, the appellant's counsel informed this Court that the responsibility allowance was deliberately enhanced from Kshs. 5,500.00 to Kshs. 25,000.00 as an ex gratia payment. Certainly so, by conduct of the appellant, the respondents legitimately expected that this allowance would gain traction positively rather than the reduction at Kshs. 10,000.00.

Whether the respondents were entitled to compensation by award of general damages?

73. The respondents submitted that they were entitled to a claim for general damages for breach of constitutional rights on account of the violation of Articles 27, 41 and 47 of the Constitution. Refuting this claim, the appellant submitted that the claim was never sought in their petition. The Court could not therefore grant that which was not prayed for. In further response, the respondents submitted that the omnibus prayer (h) "such other or further order as the court may deem just and expedient" in their petition invited the exercise of discretion of the court to award compensation.
74. Looking extensively at the petition, we note that indeed that specific prayer was not sought in the petition. Nothing would have been easier than for the respondents to enumerate that prayer in their petition. We do not have to belabor that parties are bound by their pleadings. In our view, a prayer for "any other or further relief as the court may deem fit", does not give the court the power to grant a relief not expressly prayed for. Such a prayer may only be invoked to grant a consequential order arising from the pleaded prayers with the intention of giving effect to the reliefs granted by the court. It cannot therefore be a basis for granting a substantive relief such as the award of general damages which is not expressly sought by the parties. An omnibus prayer cannot salvage a party that never sought a particular relief. In any event, though the respondents were empathic that they were entitled to an award of general damages, the same was not addressed comprehensively: what is the measure of damages they were entitled to? What were the principles applicable? Without addressing those issues, this Court would have been engaging in a conjecture exercise; a potential affront to the administration of justice.
75. Additionally, this Court is also alive to the fact that not all constitutional violations necessitate an award of general damages. It is not an automatic relief. We adopt findings of our Apex Court in CMM (Suing as the Next of Friend of and on behalf of CWM) vs. Standard Group and 4 others [2023] KESC 68 (KLR) that held as follows:

"To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindictory, as should be apparent from the list of examples of reliefs in article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of



damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.”

76. The present case did not present a case for compensation by an award of general damages for the reasons we have stated. We find that in the circumstances thus, a declaratory order, as pronounced herein, suffices as vindication. This was the position adopted by this Court in *Johana Nyokwoyo Buti v Walter Rasugu Omariba (Suing through his attorney Beutah Onsomu Rasugu) & 2 others* [2011] eKLR where it was held that:

“A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the court to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.”

77. The upshot of our above analysis is that the appeal herein lacks merit and we dismiss it. Turning to the cross appeal, we find that the same similarly lacks merit. As regards costs, we order that each party shall bear its own costs of the appeal and the cross appeal.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY 2025.

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

