



Leleruk & 41 others v Isiolo County Government & 2 others (Employment and Labour Relations Petition E010 of 2023) [2025] KEELRC 98 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 98 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

EMPLOYMENT AND LABOUR RELATIONS PETITION E010 OF 2023

ON MAKAU, J

JANUARY 24, 2025

**IN THE MATTER OF ARTICLES 1, 2, 12, 19, 21, 22, 23, 27, 41
43, 49 AND 51 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 19, 21, 22, 23,
27, 41, 45 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 5, 17, 18, AND 37 OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF SECTION 3, 5, 6 AND 61(3)
OF THE COUNTY GOVERNMENT ACT, 2012**

BETWEEN

**STEVE SAIMU LELERUK & 41 OTHERS & 41 OTHERS & 41
OTHERS APPLICANT**

AND

ISILOLO COUNTY GOVERNMENT 1ST RESPONDENT

ISILOLO COUNTY SECRETARY 2ND RESPONDENT

ISILOLO COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT



JUDGMENT

Introduction

1. By an Amended petition dated 25th September 2024 the Petitioners prayed for the following orders that:
 - a. The decisions and actions of the Respondents violates Petitioners fundamental rights under Articles 10, 22, 28, 41 (1 & 2), 48, 232 and 236 of *the Constitution* of Kenya, invoke section 37 of the *Employment Act* 2007, and section 61(3) of the County Government Act.
 - b. The Honourable Court do vary the terms of service of the casualization and declare the employees to be employed on terms and conditions of service consistent with the *Employment Act* section 37 and the County Government Act.
 - c. The Honourable Court do restrain the Respondents by themselves, servants or agents from terminating the employment of the Petitioners herein purported as casuals.
 - d. The Honourable Court do issue a mandatory injunction requiring all salary arrears pending up to date be paid to be petitioner without further delay and further include petitioner's names in the respondent's payroll for payment of salaries monthly.
 - e. An order that the costs of this petition be borne by the Respondents.
 - f. Such other order or relief as this Honourable Court may deem fit and appropriate in the circumstances.
2. The Court's jurisdiction was invoked through Articles 1, 2, 12, 19, 21, 22, 23, 27, 28, 30, 41, 43, 45, 47, 49, 51, 159, 162 (2), 232 and 236 of *the Constitution*; section 5, 17, 18 and 37 of the *Employment Act*; and sections 3, 5, 6 and 61(3) of the *County Governments Act*. In a nutshell, the petition is on the infringement of constitutional rights to fair labour practices, right to dignity and freedom from discrimination.
3. It was alleged that the rights were infringed by withholding and/or non-payment of the petitioners' salaries by the Respondents, engaging the Petitioners on casual terms for over five (5) years while the rest of the Respondents' employees were engaged on permanent terms. They further alleged that the Respondents actions infringed their economic and social rights and have denied the petitioners and their families a dignified life as guaranteed under Article 28 of *the Constitution*.
4. It was further alleged that the actions by the respondents amounted to direct and indirect discrimination and denied them the protection of the law as provided under section 61(3) of the County Government Act and section 37 of the *Employment Act*.
5. The 1st and 2nd Respondents opposed the Petition vide a Replying Affidavit sworn on 27th May 2024 by one Dadhe Boru, the County Secretary. He deposed that the petition was misconceived, incompetent, abuse of court process, premature and therefore ought to be dismissed as it failed to identify the articles of *the Constitution* that were violated. Further that the jurisdiction of the court was invoked prematurely before exhausting the appeal mechanism at the Public Service Commission (PSC). As such he contended that the Petition offended the principle of constitutional avoidance as it touched on issues addressed by statutes.



6. As regards the merits of the Petition, the affiant averred that Adan Koto Huka was never engaged by the Respondents for provision of services in any capacity. He further averred that the rest of the Petitioners' employment on casual terms was in line with *the constitution* and the County Government Act. He deposed that the Petitioners' employment was on casual basis for 3 months and subject to termination at any time before expiry of the period.
7. He admitted that the Petitioners' salary delayed at times and explained that the same was caused by unavoidable circumstances such as delayed allocation of funds. However, he clarified that the petitioners were paid as soon as the funds were available. Consequently, he denied the alleged constitutional violations and urged the Court to dismiss the petition with costs for lack of merit.

Petitioners' submissions

8. It was submitted for the petitioners that the Court has jurisdiction under Article 162 (2) and 165(2)b of *the Constitution*, to hear and determine a petition for redress of a denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights or where there is a complaint that *the Constitution* has been violated. It was further submitted that in the instant case, the petitioners are victims of the violations of their rights and freedoms as guaranteed in *the Constitution*, Labour Laws, County Government Act and the ILO Conventions.
9. As regards the merits of the case, it was submitted that Section 18 of the *Employment Act* entitles every worker to remuneration for every work done. It was submitted that the petitioners suffered irreparably, entered endless debt and are unable to undertake their responsibilities due to denial or delay of their salaries. To buttress their case, the Petitioners relied on their affidavits, bank statements, rollcalls among other documents.
10. It was further submitted that they attempted to resolve the dispute through conciliation under the *Labour Relations Act* whereby an agreement for payment of the arrears was signed between their trade union and 1st respondent but the same was dishonoured.
11. It was therefore urged that the petitioners were entitled to the reliefs sought because, despite being health workers and support staff working in sensitive departments, they have been discriminated and denied dignified life compared to their counterparts who are on permanent terms, and who enjoy regular and better pay. Reliance was placed on the cases of Kenya County Government Workers Union vs County Government of Nyeri & Another [2015] eKLR and Naftali Mogaka Nyaboga v Kisii County Government & Another [2022] eKLR.
12. It was submitted that the Petitioners have continuously worked as casual staff for over long periods and as such they deserve to be given appointment in terms and conditions stipulated under section 61(3) and 67 of the *County Governments Act* and sections 37 as read with section 9 (1&2) of the *Employment Act*.
13. Finally, it was urged that the respondents had breached the petitioners' rights by discriminating against them with respect to payment of salaries and allowances; by engaging in unfair labour practices; and through inhuman treatment. Consequently, the court was urged to make the declarations sought, order the respondents to pay the petitioners all their unpaid salaries in full, and convert their terms of employment be in line with the law.

Respondents' submissions

14. It was submitted for the respondents that the Court's jurisdiction was invoked prematurely as the matter ought to be determined by the PSC in accordance with section 77 of the County Government



- Act. It was submitted that section 77(b) of the Act mandates the PSC to entertain appeal from the decision relating to the employment of any person in the County Government including recruitment, selection, appointment, qualification to office, remuneration and terms of service.
15. Reference was also made on section 87(2) of the PSC Act which expressly prohibits filing of any legal proceedings in any Court of law with respect to the matters within the jurisdiction of the PSC to hear and determine appeals from the County Public service unless the appeal process has been exhausted.
 16. It was further submitted that the Petitioners never at any time showed their dissatisfaction with their casual terms of engagement and that if at all they were dissatisfied, they ought to have appealed to the PSC.
 17. Accordingly, it was argued that the Court's jurisdiction was ousted by the said sections and therefore it couldn't entertain the petition. Reliance was placed on the case of *Omoit v County Secretary, Busia County Government & 3 others* [2023] KEELRC 2233 (KLR) and the Case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1.
 18. The court was urged to uphold the separation of powers between the various bodies and tribunals established by the law. Reliance was placed on the *Petition No. 359 of 2013 Diana Kethi Kilonzo & Another vs Independent Electoral and Boundaries Commission & 10 others* [2013] eKLR, to urge the court to decline jurisdiction over the instant matter.
 19. It was further submitted that Rule 7 of the Employment and Labour Relations Court Procedure Rules 2016, dictates that constitutional petitions should be in line with *the Constitution* of Kenya [Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*] Practice and Procedure Rules 2012.
 20. It was also argued that courts have adopted the doctrine of avoidance, which asserts that constitutional petitions should be limited to instances where it is absolutely necessary. Reliance was placed on the case of *KKB v SCM & 5 Others* [Constitutional Petition 014 of 2020] [2022] KEHL 289 [KRR] and the case of *Makori Beatrice Kwamboka v Kenya Airways Limited* [2021] eKLR, where the Court defined the concept of constitutional avoidance. Further reliance was placed on the case of *Aliela v Kenton College Trust & Another (Employment and Labour Relations Petition)* [2023] KEELRC 226 (KLR) to submit that constitutional litigation path is narrow and it is only travelled in exceptional and very rare situations while the rest of the disputes should be litigated through common law or statute.
 21. It was further argued that despite the Petitioners citing several articles of *the Constitution*, they failed to show how their rights were violated. It was argued that an ideal constitutional petition ought to plead the alleged infringement of rights with a higher degree of precision. It was therefore submitted that the Petition did not meet the requirements of a proper petition as enunciated in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR.
 22. For the grounds highlighted above, the Court was urged to dismiss the Petition with costs to the Respondents.

Analysis and determination

23. Having considered the Petition, the response and the rival submissions, the issues that arise for determination are as follows:
 - a. Whether petition is premature and the Court lacks jurisdiction to determine the same.
 - b. Whether the petition meets competence threshold.



- c. Whether the Petitioners converted from casual to permanent employees.
- d. Whether the respondents violated the Petitioners' constitutional rights and freedoms.
- e. Whether the reliefs sought by the petitioners are merited.

Jurisdiction

24. The issue of jurisdiction was well settled by the Court in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) where the Court held as follows:

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."

25. The Respondents argued that the Petition was premature because the Petitioners failed to exhaust all internal mechanisms before coming to court. They contended that the petitioners should have invoked the appeal jurisdiction at the PSC under section 77 of the [County Governments Act](#) and not to file suit in this Court.

26. I have considered the rival contentions highlighted above and more so the cited law. Section 77 of the [County Governments Act](#) provides as follows:

“(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this part referred to as the Commission) against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of-

- a. recruitment, selection, appointment and qualifications attached to any office;
- b. remuneration and terms and conditions of service;
- c. disciplinary control;
- d. national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of [the Constitution](#);
- e. retirement and other removal from service;
- f. pension benefits, gratuity and any other terminal benefits; or
- g. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.”

27. There is no doubt that the above provision, expressly clothes the PSC with a wide jurisdiction to determine employment disputes relating to employment in the County public service. It clearly creates



an alternative mechanism for resolving disputes in the area outlined therein instead coming to court. Earlier decisions of the Court were that the said law only provided an option by using the word “may” instead of “shall”. However, the enactment of the Public Service Commission (PSC) Act in 2017, the word “shall” was used to make it clear that the appeal procedure under section 77 of the County Government Act was a mandatory procedure.

28. Section 87(2) of the PSC Act provides that:

“A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the commission to hear and determine appeals from the County Public Service unless the procedure provided for under this part has been exhausted.”

29. The reading of section 77 of the County Government Act together with section 87 of the PSC Act clarifies that the parliament intended to postpone the jurisdiction of the courts of law until the appeal mechanism availed under section 77 of the County Government Act is exhausted. The legal principles emerging from the said provisions is that the first port of call for disputes by county public service employees is the PSC under section 77 of the County Government Act. This does not oust the court’s jurisdiction but rather postpones it until the alternative mechanism is exhausted.

30. However, there is another side of the case before the court which is, that it is a trade dispute that was referred to the Cabinet Secretary for conciliation under section 62 of the *Labour Relations Act* but it was not resolved by the duly appointed conciliator. As such, the parties had the option of approaching this court for determination of the same by dint of section 73 (1) of the Act which provides that:

“If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.”

31. The petitioners exercised that right by filing the petition herein in accordance with the rules of the court. The respondents have not demonstrated that the petition offends the rules of the court in any manner. It follows that the petition is competently before the court as section 77 of the County Government Act and section 87 of the PSC Act have not repealed, ousted, or postponed the jurisdiction donated to the court by section 73 of the *Labour Relations Act*.

32. Besides the remedies which the PSC can grant are quite narrow. Regulation 21 of the PSC (County Appeals Procedures) Regulations, 2022 provides that:

“The Commission may, in relation to an appeal –

- a. Uphold the decision being challenged;
- b. Set aside the decision being challenged;
- c. Vary the decision as it considers just; or
- d. Give such direction as it may consider appropriate.”

33. I am not convinced that the PSC can grant sufficient remedy to the petitioners’ grievances in this case, which include declaration conversion of the terms and conditions of service, and compensating constitutional violations. The petitioners alleged that the respondents have employed the petitioners on casual basis for over five years and only this court can exercise special powers in section 37 of the *Employment Act*. Section 37 of the *Employment Act* settles the issue of jurisdiction this court to vary



and declare terms and conditions of service after conversion of a casual employee to employment for a monthly salary. It states as follows:

“Conversion of causal 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 Industrial Court on the terms and conditions of service of a casual employee, the Industrial 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 87 of this Act shall apply.” [emphasis added]
34. Further the respondents have persisted in delaying petitioners’ salary but pay their colleagues who are employed on permanent and pensionable terms. Also, they have denied the petitioners the same terms and conditions of service as their counterparts who are permanent and pensionable yet they do the same job.
35. It is the petitioners’ case that, the actions by the respondents amount to discrimination, inhuman treatment, servitude and unfair labour practices as guaranteed under Article 27,28, 30 and 41 of *the Constitution*. It is their further case that the respondents have violated the values and principles of public service provided under Article 232 of *the Constitution*. The respondents have not disputed the petitioners’ complaint but only objected to the court’s jurisdiction.
36. Having considered the facts of this case I am satisfied that this court is better placed to determine the dispute than the PSC under section 37 of the *Employment Act* and Article 23 of *the Constitution*.



37. Article 23 (1) provides as follows:

“ Authority of courts to uphold and enforce the Bill of Rights.

1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”
2. ...
3. In any proceedings brought under Article 22, a court may grant appropriate relief, including-
 - a. A declaration of a right;
 - b. An injunction;
 - c. Conservatory order;
 - d. A declaration of invalidity...”

38. Finally, even if there was any doubt as to which forum between the Court and the PSC, is clothed with jurisdiction to determine the dispute, under section 12 of the ELRC Act this Court enjoys unlimited original and appellate jurisdiction in all employment and labour relations disputes and provides for remedies that may be awarded by the Court, thus:

- “(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders-
- (i) interim preservation orders including injunctions in cases of urgency;
 - (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii). any other appropriate relief as the Court may deem fit to grant.” [Emphasis added.]

39. Having considered the provisions of *the constitution* and the statutes I reiterate that this Court is best placed to hear and determine the petition herein. I find support from the decision of Ongaya J in Kenya County Government Workers’ Union v County Government of Nyeri & another [2015] eKLR whose facts were on all fours with the instant petition. I also find that the case of Priscah Iseren



Omoit v County Secretary, Busia County Government & 4 others, Supra, cited by the respondent is distinguishable from the instant case as the facts in the said case were totally different.

Competence threshold

40. The issue of competence of a constitutional petition was discussed by the Court in Anarita Karimi Njeru v Republic [1979] eKLR, thus:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

41. The Petitioner pleaded in paragraph 23 to 33 of the petition, the provisions of *the Constitution* that have been, and which continues to be violated including Article 27, 28, and 41 of *the Constitution*. The same paragraphs further indicate how the said provisions have been violated through discrimination, inhuman treatment, and unfair labour practices by delaying salaries and casual employment for over five years. The respondents have also been able to respond to the said pleading in paragraph 9 to 14 of the Replying Affidavit sworn by the 2nd respondent.

42. Having considered the said paragraphs, I find that the Petitioner has pleaded within the reasonable degree of precision a case of violation of the petitioners’ rights as guaranteed in *the Constitution* that warrants this court’s determination on the merits. I am also satisfied that the respondents have been able to mount a reasonable defence and therefore the matter ought to be determined on the merits.

Conversion from casual employment

43. Section 2 of the *Employment Act* defines casual employee as follows:

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;”

44. The Petitioners, except Shukri Galgalo, produced their appointment letters dated 8/3/2018 appointing them as casual workers for a period of 3 months starting 1/3/2018. Shukri Galgalo, produced a recommendation letter dated 11th February 2019 wherein the Respondents indicated that she was in their service from 1/1/2015 to that date. There were also other recommendation letters for some of the Petitioners produced, which indicated that they were in service for periods of up to 8 years. No further appointment letters were given after the lapse of the three months period on 31st March 2015 but the petitioners continued working until now.

45. In the case of Benson Odhiambo Onyango v Instarect Company Limited [2013] eKLR the Court held that:

“A fixed term contract which expires and continues without a renewal becomes a month to month contract and is therefore governed by the provisions of the *Employment Act*. Termination of such contract must therefore comply with both Section 35 and 41 of the *Employment Act*.”



46. The respondent admitted that the petitioners were employed as casual employees and continues as such. Section 37 of the [Employment Act](#) is repeated below: -

“Conversion of causal 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 Industrial Court on the terms and conditions of service of a casual employee, the Industrial 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 87 of this Act shall apply.”

47. Applying the facts of this case to the above law, I am satisfied that the petitioners have proved that their contract of service as casual employees duly converted to a contract for payment of monthly salary and section 35(1)(c) of the Act applies to it. The latter provision protects an employee from termination without due process and entitles him to payment of service pay.

Violation of the petitioners’ Constitutional rights

48. The Petitioners contended that their rights were infringed by Respondents through unfair labour practices, discrimination and inhuman treatment. They complained about prolonged employment on casual basis and delayed payment of salaries as compared to their counterparts who are employed on permanent and pensionable terms. The respondents admitted those facts but explained that the casual employment was in accordance with the law and the delay of salaries was due to factors beyond



their control. The petitioners' case is that they have been doing the same work and in the same places with colleagues on permanent and pensionable appointment, but for years they have been treated differently in every way. According to them they are victims of the respondents' unfair labour practice, discrimination and inhuman treatment contrary to *the Constitution*.

49. While deciding similar issue, in *Humphrey Nyaga Thomas & 25 others v Kenyatta University* [2021] eKLR Mbaru J had this to say:

“This aptly captures the practice of the respondent against the petitioners. 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.

The respondent was at all material times aware of its needs, the need to keep the petitioners in their service and where this was not the case, with the benefit of the law, casual employment ought to have ended each day as the need arose and renewed each other days such service was required.

Where the continued employment of the petitioners was found untenable, the respondent opted to entice them with seasonal contracts. Such is found unlawful.

The benefits under section 40 of the Act were available, save the respondent opted to take the easy route to further entrench the discriminatory practice of failing to pay the dues and benefits therefrom. Such conduct is a clear manifestation of violation of constitutional rights under Article 41 read together with Articles 27, 28 and 43 on the right to fair labour practices, non-discrimination and equality, right to dignity and property rights for wages which should have been earned by the petitioners.”

50. In *Kenya County Government Workers' Union v County Government of Nyeri & another* [2015] eKLR, Ongaya J upheld his earlier decision in *Peter Wambugu Kariuki & 15 others v Kenya Agricultural Research Institute* [2013] eKLR where he decided that:

“A casual employee is defined under section 2 of the *Employment Act* 2007 to mean a person the terms of whose engagement provides for payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time. The court finds that the petitioners were not casual workers because they were engaged for longer period than twenty-four hours at a time. They served for many days without a break in their service. Each of the petitioners served for more than three continuous months and the respondent was required to reduce their contract of service in writing as provided for in section 9(1) of the Act...

The court considers that the foregoing standards that govern employment in the public service essentially discourage and abolish casual employment in the public service. Casual workers do not qualify as public officers within the tests set in the standards for employment of public officers. For instance, by nature of casual service within the meaning assigned in the *Employment Act*, 2007, casual workers do not and cannot enjoy the constitutional protection of public officers from victimization or discrimination for performing their duties and entitlement to due process in event of termination as provided for in Article 236 of *the Constitution* and section 41 of the *Employment Act*. Further, recruitment and selection process in engagement of casuals opens itself to failure to meet the constitutional and statutory tests of participation, competition, merit, inclusivity, representation, integrity, competence and suitability. ... The pretended casual worker is dejected and demotivated as



it happened in this case because the legal protection underpinned in the casual employment relationship.

51. The Judge went on to opine that;

“Thus in the event of temporary duties, it is the opinion of the court that employers in the public service would rather invoke public procurement laws and engage private sector service providers to avoid contravention of the constitutional and statutory provisions on public employment and whose framework does not only discourage but in effect abolishes casual employment in the public service.”

52. I can't agree more with foregoing decisions of my colleague Judges. Besides, Section 3 of the *Employment Act* provides that the Act shall apply to all employees employed by any employer under a contract of service and it shall bind the Government. The only exception to the foregoing is in respect of the disciplined forces, police service, prison service and family undertaking where dependants are the only employees.

53. There is no doubt that the Act amplifies and implements Article 27, 28, 30 and 41 of *the Constitution* among other provisions. It follows that the failure to comply with the Act amounts to violation of the employees' rights under the Bill of Rights. In this case I am satisfied that the petitioners have proved that the respondents have violated their rights in the manner in which they have treated them.

54. The respondent has violated the petitioners' right to fair labour practices by delaying to pay their salaries as and when they fall due, continuing to employ them as casual employees after serving continuously for over five years, and denying them the same benefits and status as the other staff who are employed on permanent and pensionable terms.

55. The delays to pay salaries by the respondents are contrary to section 18 of the *Employment Act* which provides in mandatory terms when salary or wages become due for payment. For a casual employee, wages are due at the end of each day worked while monthly salaries are due at the end of each month.

56. The continued employment of the petitioners as casual employees violated section 37 (1) of the Act which provides that:

“Conversion of causal 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. (Emphasis added)



57. The respondents also discriminated against the petitioner's contrary to section 5 of the Act which prohibits discrimination at the work place. Subsection (5) – (7) provides as follows:

- “(5) An employer shall pay his employees equal remuneration for work of equal value.
- (6) An employer who contravenes the provision of the section commits an offence.
- (7) 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.”

58. The respondent admitted delaying salaries for the petitioners for many months and continuing to treat them as casual employees after converting to month to month employees by operation of the law and thereby denying the benefits that accrue to converted employees. The respondents' actions in this case fits into the meaning of discrimination given by the Court of Appeal in the case of Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others [2018] eKLR, thus:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description....

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age; sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

59. Having considered the facts of the case, cited law and admission by the respondents, I am satisfied that the petitioners have proved that their right to equal treatment, the right to be treated with dignity and the rights to fair labour practices, guaranteed under Article 41, 27 and 28 of *the Constitution* have been violated by the respondents. The explanation given by the respondent did not hold water and it is rejected.

Reliefs sought

60. In view of the foregoing matters, I am satisfied that the petitioners are entitled to a declaration that the respondents have violated their constitutional rights to fair labour practices, human dignity, freedom from discrimination and continue to do so contrary to Article 27, 28, and 41 of *the Constitution*.

61. It is evidently clear that the petitioners have worked continuously for the respondents for many years and therefore their contract of service as casual employees automatically converted to contracts of service for payment of monthly salary by dint of section 37(1) of the *Employment Act* and section 35(1) (c) of the act applies. I therefore exercise the power given by section 37(4) of the Act to vary the terms of service of the petitioners from casual terms and declare that they are employed on terms and conditions of service consistent with the *Employment Act* and as if they were not employed on casual basis from the start. For avoidance of any doubt the petitioners' terms and conditions of service shall not be less favourable than those of their colleagues, who are already appointed to do the same work on permanent and pensionable.



62. The petitioners are also entitled to a mandatory injunction requiring the respondents to forthwith pay the petitioners all their salary arrears up to date and include their names in the respondents' payroll.

Conclusions

63. I have found that the petitioners' contract of service on casual terms automatically converted to a contract of service for payment of monthly salary and section 35(1) (c) of the Employment Act applies to them. I have further found that the respondents have violated the rights of the petitioners by continuing to treat them as casual employees even after serving continuously for many years, and further by delaying to pay their salaries beyond the due dates. Consequently, I enter judgment for the petitioners against the respondents jointly and severally in the following terms:
- a. A declaration be and is hereby made that the respondents have violated the petitioners' constitutional rights to fair labour practices, human dignity, freedom from discrimination and continue to do so contrary to Article 27, 28, and 41 of the Constitution.
 - b. A declaration be and hereby made that the petitioners' contract of service as casual employees have automatically converted to contracts of service for payment of monthly salary by dint of section 37(1) of the Employment Act and section 35(1) (c) of the Act applies to them.
 - c. An order of mandatory injunction be and is hereby issued requiring the respondents to forthwith pay the petitioners all their salary arrears up to date.
 - d. Pursuant to section 37 (4) of the Employment Act, I hereby vary the terms of service of the of the petitioners from casual terms and declare that they are employed on terms and conditions of service consistent with the Employment Act. For avoidance of any doubt the petitioners' terms and conditions of service shall not be less favourable than those of their colleagues, who are already appointed to do the same work on permanent and pensionable.
 - e. In order to give effect to the foregoing orders, I direct the respondents to issue the petitioners with the necessary appointment letters and add them to the County Government Payroll forthwith.
 - f. Finally, I award the petitioners costs of the suit plus interest at court rate from the date of filing the suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS 24TH DAY OF JANUARY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

