



**Akinyi & 4 others v Kenya Medical Research Institute [KEMRI] & another  
(Petition E007 of 2023) [2023] KEELRC 2060 (KLR) (30 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2060 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E007 OF 2023**

**J RIKA, J  
AUGUST 30, 2023**

**BETWEEN**

**NELLY AKINYI ..... 1<sup>ST</sup> PETITIONER  
IBRAHIM OYAWA ..... 2<sup>ND</sup> PETITIONER  
HANNINGTON OMOLO ..... 3<sup>RD</sup> PETITIONER  
ERIC OJWANG ..... 4<sup>TH</sup> PETITIONER  
MAUREEN ADHIAMBO ..... 5<sup>TH</sup> PETITIONER**

**AND**

**KENYA MEDICAL RESEARCH INSTITUTE [KEMRI] ..... 1<sup>ST</sup> RESPONDENT  
PROFESSOR MATILU MWAU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners filed their Petition, on 18<sup>th</sup> January 2023.
2. They state that, they were long-serving Employees of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Petitioner worked for 18 years; 5<sup>th</sup> Petitioner for 9 years; and the rest for 7 years.
3. The 1<sup>st</sup> Respondent is a State Corporation, while the 2<sup>nd</sup> Respondent is an Employee of the 1<sup>st</sup> Respondent. He is the Laboratory Director of the 1<sup>st</sup> Respondent's Alupe HIV Laboratory and LMB Laboratory in Nairobi.
4. The Petitioners' contracts were renewed yearly, or after a period of time, either by grant winner, or by the 1<sup>st</sup> Respondent if subcontracted, as long as funds were available to pay their salaries.



5. Funding came from US Presidential Emergency for AIDS Relief, through Centre for Disease Control in Kenya, and finally by whichever partner/ institution who won the grant, normally running for 5 consecutive years.
6. In 2016 -2020, staff salaries were paid directly by Maryland University, the grant winner. It was alternatively paid by Maryland University, through the 1<sup>st</sup> Respondent, under Boresha Maabara project.
7. The next 5-year grant, to support staff salaries, was won by AMREF. It was to run from October 2020 to September 2025.
8. The names of staff covered under the grant were submitted to AMREF. AMREF gave contracts of 3 months, from October 2020. This was followed by 9 months' contracts, from January to September 2021.
9. During the transition from the 1<sup>st</sup> Respondent to AMREF, attempts were made by the 2<sup>nd</sup> Respondent to interfere with the Petitioners' employment. The 1<sup>st</sup> Respondent intervened and saved the Petitioners.
10. After the lapse of 9 months, AMREF subcontracted the 1<sup>st</sup> Respondent to continue paying HIV/EID/ TB staff salaries. At no time were the names of the Petitioners eliminated from the grant, program or work location. However, there were attempts to do so.
11. The first sub-grant covered the period October 2021 to September 2022. The 1<sup>st</sup> Respondent issued staff 1-year contracts.
12. In August 2022, the Petitioners received communication from the Respondents, that the Respondents had received communication from AMREF, of reduced funding in the financial year 2022-2023. The 1<sup>st</sup> Respondent would consequently, reduce it staff numbers significantly.
13. The Petitioners enquired from AMREF about reduced funding. AMREF refuted that there was reduced funding. It was explained by AMREF that in issue, was that the 1<sup>st</sup> Respondent's intended implementation of policy reducing staff, and increasing the salaries of remaining staff.
14. The Petitioners engaged the 1<sup>st</sup> Respondent. They communicated their willingness to receive their old salaries, in order to preserve jobs for all staff.
15. The 1<sup>st</sup> Respondent however, went on to organize and conduct job interviews internally. The advertisement was amended quickly, removing the requirement for applicants for research scientist role, to have 5 years' experience, among other requirements. The exercise was meant to eliminate the Petitioners, and replace them with interns and casuals.
16. Some of the Petitioners had been assigned additional roles, in the Laboratory such as deputy manager, quality officer or safety officer. They discharged these roles in addition to their core roles of research scientists.
17. They submit that their right of legitimate expectation under Article 47 has been violated. They expected to have their contracts renewed under the grant ending in the year 2025.
18. The Respondents have acted in breach of fair administrative action under Article 47; the *Employment Act*; and the Integrity requirement under Article 73. The allegation that there was reduced funding, warranting staff reduction, was a fabrication by the Respondents, aimed at clearing out long-serving staff, and replacing them with preferred candidates. The outcome reflected nepotism, conflict of interest, lack of integrity, and lack of consideration for marginalized tribes.



19. 3 months after the exercise, on 30<sup>th</sup> October 2022, the Petitioners received notification to report back. Notification was rescinded a day later. The invitation suggested that there was room for negotiation.
20. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Petitioners had encountered several attempts previously, to eliminate them from the grant and from their workplace.
21. The 2<sup>nd</sup> Respondent was conflicted. He sat in the panels which interviewed casuals who worked under his short-term grant. He interviewed an attachee, who was his nephew. All staff that the 2<sup>nd</sup> Respondent taught at the JKUAT were considered for the job. The new jobs came with better salaries, hence the 2<sup>nd</sup> Respondent's interest, in determining who would get the jobs. The 2<sup>nd</sup> Respondent's brother continues to work as a data clerk, while other data clerks were sent home. The 2<sup>nd</sup> Respondent's relatives were availed by the 2<sup>nd</sup> Respondent, interview questions.
22. The Respondents' conduct was in violation of the Petitioners' right to fair labour practices, under Article 41 of *the Constitution*. The conduct was in breach of the 1<sup>st</sup> Respondent's Human Resource Policy and Procedure Manual. Decisions were not sanctioned by the Board, or communicated by the Chairman or the Director General. The 2<sup>nd</sup> Respondent replaced long-serving Employees with casuals and his relatives, in violation of Articles 41 and 232 of *the Constitution*.
23. The Petitioners were replaced with interns and casuals whom they had trained, inducted and mentored.
24. Even assuming there was reduced funding, the Respondents ought to have undertaken a redundancy process, as opposed to conducting fresh interviews and recruiting of interns and casuals.
25. Replacement of the Petitioners by interns and casuals, violated the Petitioners' right to dignity, under Article 28. Change in the terms of job advertisement to single out long-serving Employees was discriminatory, as was placing the 1<sup>st</sup> Petitioner on short-term renewable contracts, over a period of 18 years. The 1<sup>st</sup> Respondent had during this period, recruited staff on permanent and pensionable terms. The Respondents' conduct was discriminatory and violated Article 27.
26. The Petitioners submit that the Respondents have contravened Articles 10 and 232 of *the Constitution*, including principles relating to rule of law; accountability; high standards of professional ethics; equal opportunity; diversity; and human rights.
27. The 1<sup>st</sup> Respondent abetted violations committed by the 2<sup>nd</sup> Respondent, and abused public trust.
28. The Petitioners state that they were dismissed by the Respondents unlawfully and unfairly. They state that they have capacity to petition the Court, under Articles 22 and 258 of *the Constitution*.
29. They seek the following orders: -
  - a. Declaration that the Petitioners had legitimate expectation to work during the life of the KEMRI –AMREF grant, 2021-2025, and as long as funds were available to pay their salaries which was contravened by unconstitutional, unfair, unreasonable and unlawful conduct of the Respondents and contravention of the Petitioners' fundamental rights and freedom.
  - b. That the process of replacement of the Petitioners through a sham interview process, and purported implementation of 'KMR 2020,' contravened the principles of legitimate expectation and values under Articles 10, 27, 28, 41, 47, 73, 232, the KEMRI Human Resource and Procedure Manual, and all applicable laws, and is declared unlawful, unfair, unreasonable, unconstitutional, null and void ab initio and is hereby quashed; status quo ante, as per 30<sup>th</sup> September 2022 subsists, the Petitioners deemed to be in employment and entitled to their back salaries.



- c. Declaration that it is an unfair and unlawful labour practice and discriminatory to continuously keep the Petitioners under long term contracts, and they be deemed permanent and pensionable.
- d. Compensation for violation of the Petitioners' fundamental rights and breach of expectation, equivalent to lost salaries, under the KEMRI-AMREF grant 2021 to 2025, or as the Court deems just and fair.
- e. Costs with interest.

**Response.**

- 30. The Respondents rely on the Replying Affidavit of Gachuhi Mungai, Principal Human Resource Officer, sworn on 27<sup>th</sup> February 2023.
- 31. It is conceded that the 2<sup>nd</sup> Respondent is employed by the 1<sup>st</sup> Respondent as a senior principal clinical scientist. He also serves as the principal investigator, for the PEPFAR-AMREF project. It is not true that the 2<sup>nd</sup> Respondent is the recipient of the sub-award grant, between the 1<sup>st</sup> Respondent and AMREF. The 1<sup>st</sup> Respondent is the recipient, under sub-award agreement dated 16<sup>th</sup> June 2021, between the 1<sup>st</sup> Respondent and AMREF.
- 32. The Petitioners were contract Employees of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent has always been in charge of human resources, even when projects were carried out in collaboration with other funding organizations.
- 33. The 1<sup>st</sup> phase of the project was for 4 months, running from 1<sup>st</sup> June 2021 to 30<sup>th</sup> September 2021. The Petitioners were contracted by the 1<sup>st</sup> Respondent for the 4 months. An addendum to the agreement between the 1<sup>st</sup> Respondent and AMREF was executed, extending the period from 1<sup>st</sup> October 2021, to 30<sup>th</sup> September 2022. 45 Employees were recruited to work for PEPFAR –AMREF project.
- 34. The 3<sup>rd</sup> phase under addendum 3, started from 1<sup>st</sup> October 2022 to 30<sup>th</sup> September 2023. AMREF reduced its commitment to the project budget, from the previous Kshs. 104 million to Kshs. 94 million.
- 35. The 1<sup>st</sup> Respondent was in the process of transitioning its entire staff composition, from the old grading structure to the new KMR grading structure. The new structure became effective in January 2019, a fact known to the Petitioners.
- 36. The Petitioners contract expired. They were notified that there would be staff reduction for the period 2022-2023 owing to reduced funding.
- 37. The 1<sup>st</sup> Respondent did not amend any advertisement, to prejudice any candidate. The 1<sup>st</sup> Respondent was throughout guided by its Human Resource Policy and Procedure Manual. Advertisement requirements under clause 2.14.15 of the Manual were observed.
- 38. The Petitioners were contracted for the 2<sup>nd</sup> phase for 1 year, covering the period 1<sup>st</sup> October 2021 to 30<sup>th</sup> September 2022.
- 39. The contracts provided for renewal, at the option of the 1<sup>st</sup> Respondent, and subject to availability of funds. The contracts required Employees who wished to have their contracts renewed, to issue notice to the 1<sup>st</sup> Respondent, not more than 6 months after the commencement of the contract, and not less than 3 months before the expiry of the contract. The Petitioners did not issue such notice.



40. Clause 2.8.1 of the Manual requires an Employee desiring renewal, to notify the Director-General, 6 months before expiry of the contract. If no notice is received, the Employee is deemed to have completed his term, on the date specified in the contract. The clause states that the contract shall not be renewed or extended.
41. The 1<sup>st</sup> Respondent advertised 35 positions, down from 45 positions, considering reduced funding. All the Petitioners applied, albeit unsuccessfully.
42. In the circumstances, the 1<sup>st</sup> Respondent could not have created legitimate expectation in the minds of the Petitioners, for automatic renewal.
43. There was never a redundancy situation, the Petitioners' fixed-term contracts having expired. Nonrenewal did not amount to redundancy.
44. The Petitioners were advised by the 2<sup>nd</sup> Respondent through e-mail, not to continue working, as they did not have contracts. The 2<sup>nd</sup> Respondent's presence in the interviewing panel was mandated by clause 2.15.10 which allows the Director- General to advertise vacancies, under delegated authority.
45. There was no discrimination. The Petitioners were always contract Employees. They received their terminal dues, at the end of their contracts. They are not entitled to the prayers sought. The Respondents pray the Court to decline the Petition.

#### **Hearing.**

46. Parties agreed on 1<sup>st</sup> March 2023 to abandon an application for conservatory measures, brought by the Petitioners, and to go straight into the main Petition. It was further agreed that the Petition is disposed of on the strength of the record, and submissions, which were confirmed to have been filed and exchanged, at the last appearance before the Court, on 27<sup>th</sup> July 2023.

#### **Petitioners' submissions.**

47. The Petitioners submit that they had legitimate expectation, after long service and many years of contract renewal, that their contracts would be renewed.
48. They rely on Court of Appeal decision, *Keen Kleeners Limited v. Kenya Plantation and Agricultural Workers Union* [2021] KECA 352 [KLR]. There is legitimate expectation where the Employer, by representation or past practice, has aroused an expectation in the Employee, that an expiring contract would be renewed.
49. The 1<sup>st</sup> Respondent is a public body, expected to fulfil the legitimate expectation of the Petitioners, as held in Supreme Court of Kenya *Petition No. 14 of 2014, Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*.
50. The Petitioners submit that they are entitled to reinstatement. Alternatively, they urge the Court for grant of general damages at Kshs. 2.5 million each, relying on Supreme Court decision in *Wamwere & 5 Others v. Attorney-General* [2023] KESC 3[KLR].
51. Countering a decision of the Court of Appeal in *Teresa Carlo Omondi v. Transparency International* [2017] e-KLR, invoked by the Respondents, which held that fixed-term contracts carry no expectation of renewal, the Petitioners cite through their supplementary submissions, the Court of Appeal in *Keen Kleeners* [supra], which was to the effect that there is legitimate expectation of fixed-term contract renewal, in certain circumstances.



52. The Respondents rely on the Supreme Court decision, Communication Commission of Kenya [supra], which expounded that for the principle of legitimate expectation to be sustained, “there must be an express, clear, and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision-maker to make; and there cannot be legitimate expectation against clear provisions of the law or *the Constitution*.” The law does not protect every expectation, but only that which is legitimate.
53. The Respondents as indicated above, rely on the Court of Appeal decision in Transparency International [supra], holding that fixed-term contracts do not create legitimate expectation, and non-renewal does not amount to unfair termination. They further cite E&LRC decision in Margaret A. Ochieng’ v. National Water Conservation and Pipeline Corporation [2014], holding that fixed-term contracts carry no expectancy of renewal.
54. The issues are whether: -
  - a. The Petitioners had legitimate expectation of renewal of their contracts until 2025;
  - b. Their constitutional and statutory rights were violated by the Respondents; and,
  - c. They are entitled to declaratory orders, reinstatement or damages and costs.

**The Court Finds: -**

55. Employment. The Petitioners were employed by the 1<sup>st</sup> Respondent, a State Corporation, in separate limited-term contracts, as Research Scientists.
56. The 1<sup>st</sup> Petitioner worked for 18 years; 5<sup>th</sup> Petitioner for 9 years; and Petitioners 2, 3 and 4, for 7 years each.
57. They worked under a project known in short as PEPFAR –AMREF project [ full name - Implementation of Sustainable Laboratory Quality Systems for HIV/TB Epidemic Control in the Republic of Kenya under the President’s Emergency Plan for Aids Relief].
58. AMREF and the 1<sup>st</sup> Respondent entered into a Sub-Award Agreement, dated 16<sup>th</sup> June 2021, where AMREF Health Africa in Kenya, was to provide funding for the project for approximately 5 years, running from 1<sup>st</sup> June 2021 to 30<sup>th</sup> September 2025.
59. Disbursement of funds would be staggered, depending on availability.
60. The Petitioners were contracted for the 1<sup>st</sup> phase, for a period of 4 months, running from 1<sup>st</sup> June 2021 to 30<sup>th</sup> September 2021.
61. The 2<sup>nd</sup> phase was for 1 year, as captured in the Addendum 1 to the Sub-award agreement. It run from 1<sup>st</sup> October 2021 to 30<sup>th</sup> September 2022. The project budget over this period was Kshs. 104, 874, 325.
62. The Petitioners were contracted again for the limited period of 1 year.
63. The Respondents state that funding for the 3<sup>rd</sup> phase beginning 1<sup>st</sup> October 2022 to 30<sup>th</sup> September 2023 was reduced, from Kshs. 104, 874,325 to Kshs. 94,373,376.
64. The 1<sup>st</sup> Respondent issued an internal memo to all staff, dated 22<sup>nd</sup> August 2022, notifying them that it would reduce staff numbers in light of diminished funding, for the financial period 2022-2023.



65. The 1<sup>st</sup> Respondent states that it could not sustain 32 Research Assistant positions, and had to reduce that number to 29. Other positions including Data Clerk and Laboratory Technologist, were affected. The Respondent advertised the positions internally.
66. The 1<sup>st</sup> Respondent was simultaneously, involved in the implementation of its new job grading structure 'KMR,' which came into effect in 2019.
67. In total, the 1<sup>st</sup> Respondent advertised 35 positions, for the period 2022-2023, down from 45 in the previous period. The Petitioners' contracts had expired. They applied for the new positions, but were not successful.
68. Legitimate expectation. The 1<sup>st</sup> Respondent operated PEPFAR project in collaboration with AMREF. Funding was by the Principal Recipient of the funds [PR], AMREF. The 1<sup>st</sup> Respondent was the Sub Recipient [SR]. The 1<sup>st</sup> Respondent's ability to sustain Employees under the project, therefore depended on the funding from the Principal Recipient.
69. The 2<sup>nd</sup> Respondent was an Employee of the 1<sup>st</sup> Respondent. He was not party to the AMREF-KEMRI agreement, and was not the Petitioners' Employer. He cannot bear employment liability. He cannot compensate the Petitioners, for any breach of their employment contracts. He was, as pleaded by the Petitioners, an Employee of the 1<sup>st</sup> Respondent.
70. There was reduced funding for the period 1<sup>st</sup> October 2022 to 30<sup>th</sup> September 2023. It compelled the 1<sup>st</sup> Respondent to reduce its staff numbers.
71. The Petitioners applied for the internally advertised, but reduced positions, for the new period 2022-2023 but were not successful.
72. The Court does not think that in donor funded projects, which operate for specified period, Employees would have legitimate and reasonable expectation of continued employment, irrespective of the availability of donor funds. If the Respondent experienced reduced donor funding, it would be compelled to cut down its wage bill, to sustain the project.
73. The principle of legitimate expectation is highly dependent of the facts of each case. The Petitioners invoke the decision of the Court of Appeal in Keen Kleeners Limited v. Kenya Plantation and Agricultural Workers Union [2021] KECA 352 [KLR], which cited with approval the decision of this Court, in Teresa Carlo Omondi v. Transparency International [2017] e-KLR, where it was held that legitimate expectation is created through regular practice, or through an express promise made by the Employer, leading the Employee to expect that his contract would be renewed.
74. The Respondent submits that the Court of Appeal, in Transparency International Kenya v. Omondi [KECA 174] [KLR], overruled this Court, holding that limited-term contracts do not have legitimate expectation of renewal.
75. From the submissions filed by the Parties, there apparently is a difference of judicial reasoning, between the 2 decisions of the Court of Appeal: the first holding that there in legitimate expectation in renewal of limited-term contracts, the second, holding that there is no such legitimate expectation of renewal.
76. Judicial precedent is a statement of law, found in decisions of Superior Courts, meant to be followed by the same Courts and bind Subordinate Courts. It ensures there is legal order, uniformity and predictability. If Judges and Judicial Officers are allowed to write freely, the fate of litigants would hang precariously, without judicial precedents to guide them in conflict resolution.



77. Superior Courts are therefore duty-bound to minimize differences in judicial reasoning, in order to create reliable and binding precedents. Courts below the Court of Appeal have an obligation to follow and apply decisions of the Court of Appeal. All Courts have an obligation to follow the decisions of the Supreme Court. The Supreme Court is allowed to diverge from its own precedents, in limited circumstances. Article 163 [7] of *the Constitution*, states that all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.
78. There are various mechanisms for departing from precedent. A Court may find a past decision was mistaken [per incuriam], which would justify departure. The Court of Appeal in *Transparency International –Kenya*, did not declare its earlier decision in *Keen Kleeners*, to have issued per incuriam.
79. Another mechanism is through distinguishing the facts from the past case to the latter precedent. In creation of legitimate expectation, the facts are highly significant. Limited-term contracts, and circumstances surrounding the expiry of such a contracts, are hardly the same. In citing precedents on legitimate expectation on renewal of limited-term contracts, regard must therefore be given to distinguishing facts. The Court of Appeal in the latter precedent, did not express if departure was based on distinguishing facts.
80. In *Young v. Bristol Aeroplane Co. Ltd* [1944] KB 718, English Court of Appeal held that:
- a. The Court is entitled and bound to decide which of its 2 previous conflicting decision of its own, it will follow. [this principle only allows the Superior Court making the decision, to determine which of its conflicting decisions, it will adopt. It does not help the Courts below, to determine which precedent to apply].
  - b. The Court is bound to refuse to follow a decision of its own, which cannot stand with a decision of the House of Lords [Supreme Court].
  - c. The Court is not bound to follow its own decision if the decision was given per incuriam.
81. Certain jurisdictions, such as the US, [See Justice Ruth Ginsburg in ‘Judgments In Search of Full Faith And Credit: the Last-in-Time Rule For Conflicting Judgments,’ *Harvard Law Review*, Vol. 82 No. 4 [ Feb 1969] pp. 798 -832], adopt the position that in case of conflict in judicial precedents, the last-in-time controls subsequent litigation. The rule is characterized as ‘last-in-time’ rule. This rule has encountered stiff resistance, as it should, from various Courts. It is not universally embraced.
82. The *Amnesty International-Kenya* decision, not *Keen Kleeners*, would therefore control subsequent litigation, in certain jurisdictions, under last-in-time rule.
83. The alternative argument is that the first-in-time [*Keen Kleeners*] would lessen the incentive for the party discontented with the first adjudication, to re-litigate. This is countered by *res judicata* defence, where it is argued, that notwithstanding that the Superior Court has set a fresh precedent, issues in the first-in-time decision were comprehensively heard and determined.
84. Courts below the Court of Appeal would be hampered in adopting the last-in-time, over first-in-time precedent, because it appears to result in relying on a precedent made by Judges of the same jurisdiction, in disregard of another precedent, created earlier, by Judges of the same Court. In other words, the decision of the first Appellate bench, would in effect have been overturned by the second bench at the same level of judicial hierarchy. This rule is definitely not in consonance with legal systems, where Courts operate based on a defined hierarchy.
85. Sebastian Lewis in ‘Precedent and the Rule of Law’ *Oxford Journal of Legal Studies*, Volume 41, Issue 4 Winter 2021, page 873-898, recognizes precedent as an important principle is the sustenance of judicial



reliability, stability, transparency and good governance. He argues however, that the reason in favour of following precedent, is only a minimum requirement.

86. Sebastian postulates that Courts decide disputes, and thereby attempt to deliver justice by applying the law of the case at hand. But what is the specific law, that allows Judges to reach legally justified decisions? he asks.
87. To answer this question, the writer submits that it depends on sources of the law. Legislation is typically a source of law, meaning Judges can reach legally justified decisions, by applying Constitutional or Statutory law alone.
88. In many civil jurisdictions, Sebastian argues that judicial precedents are authoritative, with respect to the Parties to the decision only. Precedents in such jurisdictions are said to have 'relative force.' This argument used to be applied in the Industrial Court of Kenya, where awards of the Court, had relative force. Most awards had binding force, only to the Parties involved. Under French law, explicit reference by a Court to its own jurisprudence, when giving a decision and more generally, citation of previous cases, is not allowed when these are meant to serve as a legal basis for the Court's decision. This legal tradition holds that civil jurisdictions should usually rely on undisputed sources of law, such as Legislation and [the Constitution](#). This position is rooted in the legal philosophy of Jeremy Bentham.
89. Jeremy Bentham [see Dean Alfange Jr. Jeremy Bentham and the Codification of the Law, SS Cornell L. Rev. 58 [1969] was convinced that legislation was a science, and laws should be drawn by scientists like himself. There could be no room for haphazard legal development. Laws drawn up by scientists, would be placed in the form of a code, and nothing that did not appear in that code, would be law. This according to Bentham, would include all judge-made law. This theory conflicted with the English common law.
90. Encountered with conflicting decisions of Superior Courts, Lower Courts and Litigants ought to look at other undisputed sources of the law, such as Legislation and [the Constitution](#) and examine carefully, whether the facts in different precedents are distinguishable. Conflicting precedents remain authoritative sources of the law, but must be examined closely with other undisputed sources of the law.
91. In *Bernard Wanjohi Muriuki v. Kirinyaga Water and Sanitation & Another* [2012] e-KLR, which was cited by the Court of Appeal in the *Keen Kleeners Limited*, this Court held that there is no obligation to give reasons to an Employee why a limited-term contract should not be renewed.
92. The facts were different in *Oshwal Academy Nairobi & Another v. Indu Vishwanath* [2015] e-KLR where the Court of Appeal found that there may be instances where unique circumstances of the employment relationship, may create legitimate expectation that fixed term contract would be renewed. The Employee had worked for 23 years in the *Oshwal Academy Nairobi* decision, and developed a bond with the Employer, justifying legitimate expectation of renewal. In Cause Number 2244 of 2015, *Mark Mbau Muthee v. Rai Radio Televisione Italiana* the Court adopted this position, in finding that the Claimant, who had worked on 9 different limited-term contracts, which were unfailingly renewed, over a continuous period of 5 years, had legitimate expectation of renewal on the 10<sup>th</sup> occasion.
93. These decisions on the presence of legitimate expectation, are supported by Section 45 [5] [d] of the [Employment Act](#), an undisputed source of law, mandating the Court, in deciding whether it was just and equitable to terminate the employment of an Employee, to consider the previous practice of the Employer, in dealing with the types of circumstances, which led to termination. Previous practice, renewing a contract of employment unfailingly, may therefore create legitimate expectation in the mind of the particular Employee.



94. In *Margaret A. Ochieng' v. National Water Conservation and Pipeline Corporation* [2014] e-KLR, where the Court cited a decision of UN Appeals Tribunal [UNAT] Case NO. 2010-125, *Frenchon v. The Secretary-General of the United Nations*, it was held that the decision of an Employer, not to renew the contract of an Employee, may be challenged on limited grounds: where the actions of the Employer give rise to reasonable expectation of renewal on the part of the Employee; when the decision not to renew is based on improper motive; or where there are countervailing circumstances. This is the position adopted by the Court of Appeal in *Keen Kleeners Limited and Oshwal Academy Nairobi* [supra] and has statutory support under Section 45 [5] [d] of the [Employment Act](#).
95. The Petitioners worked for many years for the 1<sup>st</sup> Respondent. They did not however disclose to the Court whether their employment, prior to PEFAR- AMREF project, was project-based and donor –funded. What were the terms of engagement before PEFAR-AMREF and before University of Maryland- KEMRI? Each limited-term contract, must have had its own unique features. It is not enough in establishing legitimate expectation to argue simply, that an Employee has been in service for long. The Court must be persuaded that the contracts were in continuity, and the terms and conditions of succeeding contracts, must be placed before the Court.
96. And why would the 1<sup>st</sup> Petitioner wait for 18 years, to ask the Court to declare that he was permanent and pensionable? Why did he not make any demands upon the Respondent, to be converted into permanent and pensionable ranks, in those 18 years?
97. The dispute relates mainly to the period October 2021 to September 2025 when AMREF was the Principal Recipient.
98. The Petitioners state that from 2016 to 2020, they were being paid salaries directly by Maryland University, through the Respondent.
99. If the 1<sup>st</sup> Petitioner worked for 18 years, it is not clear from the record, if he at any time worked for the Respondent, without depending on donor funding, in time-bound projects.
100. In the view of the Court, the Petitioners' employment, was wholly sustained through donor funding. Renewal of the contracts depended on the availability of donor funds.
101. There is no letter from AMREF, exhibited by the Petitioners, confirming their allegation that they had written to AMREF, who confirmed that there was no reduced funding, and that the 1<sup>st</sup> Respondent was only engaged in its own restructuring, reducing staff and raising salaries for the remaining staff. The Petitioners were not parties to the funding agreement between AMREF and the 1<sup>st</sup> Respondent.
102. There was no legitimate and reasonable expectation that there would be renewal, with diminished funding. There was no guarantee that the Petitioners would continue working, beyond 30<sup>th</sup> September 2022. There were circumstances, beyond the control of the 1<sup>st</sup> Respondent, which made it impossible for the 1<sup>st</sup> Respondent, to sustain the Petitioners in employment.
103. Violation of Constitutional and Statutory Rights. From the foregoing analysis of the law and the facts, the Court is not able to agree with the Petitioners that their Constitutional and Statutory rights have been violated by the Respondents.
104. They were in limited-term contracts, working on a defined project, funded by donors, whose sustenance wholly depended on availability of donor funds.
105. The 1<sup>st</sup> Respondent was not under obligation to declare positions held by Employees whose contracts had lapsed, redundant. The Court does not think that the circumstances leading to the Petitioners



- leaving employment, amounted to a redundancy situation. Their contracts expired, and could not be renewed with reduced funding.
106. They were well-versed with the Respondent's Human Resource Policy and Procedure Manual. Clause 2.6.10 of the Manual states that, "Appointments of contract Employees by KEMRI through collaborative /research projects or programs, shall be guided by the respective agreements signed between KEMRI and the collaborating institutions, partners / projects and both parties shall comply with the provisions of this Manual."
  107. Further, clause 2.6.14 states that, "basic salary, remunerative and facilitative allowances, gratuity and other staff obligations shall be the responsibility of the Collaborators, but must adhere to KEMRI terms and conditions of service."
  108. The Petitioners, in urging the Court to find that they had legitimate expectation of renewal, and that the Respondent violated their Constitutional and Statutory rights in declining renewal, failed to appreciate the role of the project Collaborators, in their employment. The 1<sup>st</sup> Respondent did not determine alone, whether the Petitioners remained in employment; it was paramount that the Collaborators in the project, facilitated the Respondent on funding. The Petitioners' contracts were joined at the hip, with the agreements executed between KEMRI and its Collaborators.
  109. Even assuming that, the Collaborators availed adequate funds, the Petitioners were required under Clause 2.8.1 of the Manual, to notify the Director-General of their wish to be considered for renewal, in writing, 6 months before the expiry of the contract.
  110. Their contracts [Clause 2 Schedule to Agreement], required that, not more than 3 months before the date on which continuous service terminates, they would give notice to the 1<sup>st</sup> Respondent, in writing, indicating whether they desired to remain in employment.
  111. They have not exhibited such notices, and their claim that they expected renewal, is a very weak position, the Petitioners having not complied with basic clauses, on notification to the Director-General, of their wishes to have their contracts renewed. There would be no legitimate expectation of renewal, where an Employee has not complied with the terms of the Human Resource and Procedure Manual, and individual contract of employment, governing renewal.
  112. Clause 2.8.2 of the Manual, is clear on the effect of default to notify the Director-General. It reads, "If such a notification is not made, the Employee will be deemed to have completed his term and the contract shall not be renewed or extended. However, the Institute, upon review of the performance appraisal reports of such an Employee, may request him to seek renewal of his terms, if performance has been satisfactory."
  113. None of the Petitioner gave notice, or failing such notice, sought to have renewal considered on the strength of their performance appraisals.
  114. There is no evidence that internal interviews conducted by the Respondents, were for an improper motive. The Respondents acted in accordance with the reduction of funding.
  115. There is no support for the submission that the Petitioners were targeted in preference for younger candidates. The Petitioners did not establish discrimination and nepotism. They referred to the 2<sup>nd</sup> Respondent's employment of his nephew, brother, interns and casuals who were recruited without meriting the jobs. No details of these persons were disclosed. Their qualifications, against project requirements were not laid bare. They made an accusation that interviews discriminated against marginalized communities. No evidence was placed before the Court from any marginalized community or person.



116. The Court has not been provided with evidence, establishing that the Respondents sanctioned or abetted gross violations of the Petitioners' Constitutional and Statutory rights. In the view of the Court the inability of the 1<sup>st</sup> Respondent to renew the Petitioners' contracts, boiled down to scarcity of donor funds.
117. Declaratory, reinstatement compensatory damages, costs and interest. Prayer 34 [a] of the Petition is that the Court declares that the Petitioners had a legitimate expectation of renewal of their contracts, for the entire period of 2021-2025, and as long as funds were available to pay their salaries.
118. The Court has concluded that the funding of PEPFAR –AMREF project for the period 2022-2023 was reduced. The Petitioners did not notify the 1<sup>st</sup> Respondent, of their wish to have their contracts renewed. A notice to the Director-General expressing their wishes to have their contracts renewed, would have been the first indicator of legitimate expectation of renewal. The Court has no evidence to declare that the Petitioners had legitimate expectation of renewal.
119. There is no evidence to declare that internal interviews and implementation of 'KMR' structural grading, contravened the principle of legitimate expectation and Articles 10, 27, 28, 41, 47, 73, 232 and the 1<sup>st</sup> Respondent's Manual. There is no justification is granting an order of reinstatement with back pay. The Petitioners were paid, and sustained in employment from donor funds.
120. They were kept in limited-term contracts, because their contracts were tied down to their Employer-Donor funding contracts. It would be illogical for the Court to find that the Respondent acted in violation of the Petitioners' right to fair labour practices and non-discrimination.
121. The Petitioners have not established that they merit compensation for lost salaries under the AMREF-KEMRI project for 2021-2025. The salaries were sourced from donor funds. It would be against the Manual, to order the 1<sup>st</sup> Respondent to compensate the Petitioners for salaries which the 1<sup>st</sup> Respondent alone, did not have the means to pay, without donor funding.
122. No order on the costs.

**In Sum, It Is Ordered: -**

- a. The Petition is declined.
- b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 30<sup>TH</sup> DAY OF AUGUST 2023.**

**JAMES RIKA**

**JUDGE**

