REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO.93 OF 2018

HUMPHREY NYAGA THOMAS & 25 OTHERS ……….……………. PETITIONERS

VERSUS

KENYATTA UNIVERSITY ……………………………………..…… RESPONDENT

JUDGEMENT

the petitioners are seeking the following orders;

a) a declaration that the respondent is bound to recognise that the petitioners are permanent and pensionable, having worked continuously for over ten years.

b) a declaration that the internal memo to the petitioners dated 9th July, 2018 is null and void.

c) A declaration that the respondent violated the petitioners fundamental rights and freedoms enshrined under the Bill of Rights of the constitution.

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

e) Orders restraining the respondents either by themselves, employees servants of agents from terminating the employment of the petitioners members herein purportedly as casual employees as the termination would be unlawful and irreparable harm will be caused to the petitioners members and interference with their rights and under the constitution of Kenya particular the rights under article 41, section 1 and 2 of the constitution.

f) Orders restraining the respondent and prohibiting the respondent from employing replacement labour or employees in the same positions to perform the same or similar work as the petitioner members.

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

h) Order to convert the terms and conditions of service of the petitioners herein purportedly being casual employees in the service of the respondent to respondent employees on terms and conditions of service consistent with the Employment Act, 200u7.

i) Orders to pay July, August, 2018 and subsequent month's salaries up to the date of judgement and remuneration inconsistent with the Employment Act, 2007. as per Schedule A

j) Orders that the petitioners be allowed to join a trade union of their choice with immediate effect.

k) An award of damages for constitutional violations to be assessed by the court.

l) An award of damages for pecuniary losses to be assessed by the court.

m) Any other and better orders as the court may deem just and fit to grant.

n) The respondent to bear the costs of this petition.

Petition

The petitioners were variously engaged by the respondent from the year 1998 to date. some have worked for 20 years, others for 11 years and others for 10 years and depending on the date of employment. the petitioners have worked continuously without an off duty or annual leave.

Prior to the year 2008 the respondent paid all wages in cash at the end of every two weeks and from 2008 the salary is paid through Equity Bank accounts with the monthly wage being Ksh.28, 038 calculated at the rate of Ksh.934.60 per day. Any off day is unpaid.

The petition is also that for the entire employment period the petitioners have never been issued with written contracts of service as required under section 10 of the Employment Act, 2007 (The Act) save the respondent has continuously deducted statutory dues of PAYE, NSSF and NHIF no payment statement has been issued as required under section 21(2) of the Act or an itemised payment statement in accordance with section 20 of the Act.

On 9th July, 2018 the respondent through the Deputy Vice-Chancellor Administration issued an internal memo to all Deans of Faculties, Directors/Heads of Departments/Sections and Units on engagement contracts letters and submission updated data for all skilled, semi-skilled and unskilled casuals and were required to submit the data by 18th July, 2018 these officers were also directed to communicate and direct the 'purported' casuals to report without fail at the graduation square on 19th July, 2018 for the purpose of signing seasonal contracts and were warned that only those who would sign the same would be paid July, 2018 salary. The memo was issued to the employees at 4PM.

On 19th July, 2018, the 1st petitioner Humphrey Nyaga served the respondent with notice to sue with regard to the memo which was contested on the basis that it was in violation of his fundamental rights and freedoms under Article 41(2) of the Constituting and requested for suspension and withdrawal of the Memo of 9th July, 2018.

The seasonal contracts purported to reduce the due wage from Ksh.28, 038 to Ksh.19, 233 which is in gross violation of the employees' rights under Article 41(20 of the Constitution which provides for air remuneration and hence the petitioners declined to sign the seasonal contracts which are in gross violation of section 19 of the Act and on the grounds that;

a) The petitioners are not casual employees having worked for the respondent for more than 5 years and section 2 of the Act defines a casual employees. In **Peter Kariuki Wambugu & 16 others v KARI ELRC Cause No.2 of 2013** the court abolished casual employment in public institutions.

b) The seasonal contract is a mischievous way of terminating employment without due process. Clause 16 of the contract is not renewable.

c) The seasonal contracts lowed wages from Ksh.28, 038 to Ksh.19, 233 and which aimed at changing employment terms and conditions in violation of the Act which employment had by operation of the law become permanent and pensionable.

d) Section 3(6) of the Act declares null and void any attempt to relinquish, vary or amend whether by agreement of policy the terms and conditions of employment.

e) The respondent is in violation of the Constitution and the Act and has failed to pay the wages for July, 2018 to date despite the petitioners having worked for such period which is in violation of Article 29(d) of the Constitution which prohibits torture in any manner including physical and psychological. The petitioners' rental houses have been locked and have had to sleep in the cold with their children.

f) In early January, February and March, 2018 the 1st petitioner Humphrey was not paid his overtime despite the line manager recommending for payment of the same yet all other employees whom he had alternated with were paid and efforts to settle the matter with the Deputy Vice Chancellor failed to bear fruits.

The petition is that the actions of the respondent against the petitioners is inhuman, degrading and akin to modern day servitude In violation of Article 30 of the Constitution. this is in breach of Article 10, the petitioners have been treated unequally with other employees of the respondent who are paid overtime, and there is inhuman and degrading treatment contrary to article 29 and 30 of the constitution. this has resulted in extreme financial constraints and trauma to the petitioners and the orders and remedies sought in the petition should issue.

The petition is also that there is violation of Articles 10, 20, 22, 23, 27, 28, 29, 30, 36, 41, 43, 47, 50, 259 of the Constitution and the respondent has failed to promote the values and principles which advance the rule of law and rights of the petitioners.

The respondent is in breach of section 5, 18, 40, 41, 43, and 45 of the Act.

The petition is supported by the Supporting Affidavit of the 1st petitioner, Humphrey Nyaga Thomas.

Reply

In reply to the petition, the respondent case is that the petitioners have not been employed continuously since the year 1998 as alleged and the claims that there was no off duty break or annual leave is not correct.

The respondent is a public university whose operations and infrastructure development is highly subsidised by the exchequer. Consequently the respondent is always careful to ensure that the taxpayer's money advanced to it is used for the intended purpose and one way to minimise costs is to concentrate on the core business, education and creating skilled work force.

The respondent has a need for employees to work on its non-core business which is usually not of permanent nature like Infrastructure development is not permanent and when the respondent would take construction workers. The policy is then to employ casuals and contract employees for work which is not permanent in nature and not part of the core business of the respondent.

The government has recently instructed the respondent and other public universities not to employ permanent and pensionable employees without the concurrent of the government since any additional employees would commit the government to long-term expenses.

The petitioners were employed in construction as painters, electricians, plumbers, masons, and carpenters. This was at a time when the respondent was engaged in massive infrastructural development which is no longer the case. At no time did the respondent develop a policy aimed at disadvantaging its employees and has treated all employees fairly and in this regard the casual and on-contract employees keep coming for employment whenever there is need to engage casuals or contract employees.

It is possible the petitioners had at one time been engaged by the respondent as casuals to work as construction workers and such engagement is on and off and can only be described as intermittent, informal and involved many other employees and not just the petitioners.

The respondent engaged the petitioners formally on 3-months contracts depending on availability of work. The contracts could be renewed whenever the respondent had on-going construction work and such work was not of a permanent nature. The petitioners were always referred to as casual employees. The relationship between the petitioners and the respondent was going on well until 2018 when the respondent wanted to formalise the relationship by introducing seasonal contracts.

The response is that the allegations by the petitioners that the monthly wage was ksh.28,038 is not correct as they were paid for days worked in a month hence the wage was not fixed. The respondent adhered to the prescribed minimum wage.

The petitioners frustrated the respondent's efforts to formalise their employment of issuing seasonal contracts. In July, 2018 the respondent wanted to update its data with regard to qualifications and skills of employees and some on-contract employees refused to submit such data and it emerged many of them had passed themselves as being skilled or semi-skilled when they were not. The petitioners have no proof of their qualifications or skills.

The 1st petitioner did not make any demand with regard to his overtime pay as alleged.

The petitioners were on contract and that contract employees cannot be converted to permanent employment by operation of the law as alleged.

No employee of the respondent has been treatment in an inhumane or degrading manner. The petitioners kept on coming back for work every time the respondent had construction work on-going and were paid above the prescribed wages.

There is no evidence with regard to the alleged breach to the constitution or the Act or international instruments. The petition should be dismissed with costs.

The parties agreed and addressed the petition by way of written submissions.

The petitioners submitted that their right to fair labour practices was violated by the respondent when they were retained as casual employees for the last 10 to 12 years and denied the right to equal treatment. By Memo dated 9th July, 2018 the respondent threatened to reduce wages from Ksh.28, 038 to Ksh.19, 233 without any justification. Such violates Article 41 of the constitution and section 3(6) of the Act and the unpaid salaries from July, 2018 to date should be paid.

The claimants submitted that they were denied the right to equal treatment contrary to article 30 of the constitution. the employment relationship has been under unclear conditions and which amounts to unfair administrative practice. the respondent has denied the petitioners the right to join a trade union of their choice and proceeded to place them under different terms of employment from other employees; there has been continuous discrimination against the petitioner with regards to terms of employment and which has caused great harm and loss. This is unconstitutional, unlawful and unfair. The declarations and orders sought should issue.

The petitioners relied on the following cases – **Chemelil Sugar Company v Ebrhaim Ochieng Otuon & others Civil Appeal No.70 of 2014; Nanyuki Water & Sewerage Co. Ltd v Benson Mwiti Ndiritu & others Civil Appeal No.20 of 2017 and Esther Njeri Maina v Kenyatta University ELRC Cause No.133 of 2018.**

The respondent submitted that the respondent as a public university has many employees and the petitioners are aware that their employment was dependent on its continued massive infrastructural developments as was the case when some of them were engaged in the year 2008. It then became clear that it was not efficient for the respondent to recruit workers on a daily basis and instead issued them with 3 months contracts and then engaged loosely as casuals and for 3 months contract extended with breaks and depending on work availability.

Each time a contact would be extended, the head of department would write a Memo to the Deputy Vice Chancellor for approval d a response through memo would issue confirming renewal of contract. Due to the number of employees involved, the employment relationship had problems due to non-verification of skills and no proper data base of those on contract, some members of staff on contract would pass off themselves as skilled or qualified which the respondent wanted to regularise, some staff claimed overtime pay without obtaining approval

and would then lodge claims for payment and for these reasons the respondent wanted to formalise the employment relationship.

vide memo dated 9th July, 2018 requested the petitioners to submit their qualifications and sign seasonal contracts. 16 out of the 26 petitioners signed the seasonal contracts. 10 petitioners did not sign and shortly thereafter filed the petition claiming they were permanent employees of the respondent and were excused from signing seasonal contracts.

The petitioners are not permanent employees of the respondent as alleged. Issuance of seasonal contracts is not an attempt to terminate employment or an attempt to reduce wages since the petitioners were not earning Ksh.28, 038 as claimed and each earned a different wage based on the minimum wage including a house allowance.

The respondent submitted the issues before court do not constitute a constitutional petition as held in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014]** and in the case of **Sumayya Athnami Hassan v Paul Masinde Simidi & another [2019] eKLR** that employment claims should be filed under a Memorandum of Claim and not through a constitutional petition and the instant petition should thus be struck out.

The respondents submitted that there is public interest in this matter and the respondent being a public body should apply funds allocated from the exchequer prudently pursuant to article 201(d) of the constitution. if the petition is allowed it would lead to spending public money imprudently as the respondent would be compelled to employ persons whose services are not permanently required. The public interest outweighs the private intrusts as held in **Office of the Director of Public Prosecutions v James Aggrey Orengo; Daniel Ogwoka Manduku & 2 others (interested parties) [2021] eKLR.**

The respondent is justified to issue short term employment of some of its employees as required to set up infrastructure which is not the core business of the university. For this the la provide for casual, piece-rate, fixed term and regular term contracts and therefore legal to engage some employees on short term basis.

The 1st petitioner's bank statements show that he did not work in;

January;

February;

March to June, 2009;

He did not work in July to December, 2017; and January and February, 2018.

The respondent therefore submitted that an employer cannot be compelled to convert a fixed term contact to permanent employment as held in **Emily Migwa v Seventh Day Adventist Church Central Kenya Conference & another [2020] eKLR** and in the case of **Samuel Ocheing' Ogeda v Doshi Enterprises Limited [2017] eKLR.**

The effect of section 37 of the Act is not to make an employee permanent and it merely converts casual employment to a term contract where the employee is paid at month end instead of a daily wage and before employment is terminated the employee is entitled to notice or pay thereof.

The petitioners are not entitled to the remedies sought.

Determination

The issues which emerge for determination are whether this is proper constitutional petition; whether the petitioners' rights under the Constitution and the Act have been violated; and whether the remedies sought should issue.

The petitioners' case is that they have been in the employment of the respondent for periods of 10 to 12 years to date and prior to the year 2008 they would be paid in cash and since their wages would be paid bi-weekly through the bank. That for the entire period of employment the petitioners have never been issued with written contracts of service as required under section 10 of the Act save the respondent has continuously deducted statutory dues of PAYE, NSSF and NHIF but no payment statement have been issued as required under section 21(2) of the Act or an itemised payment statement in accordance with section 20 of the Act.

The petition is that in a memo dated 9th July, 2018 the respondent directed the petitioners to sign seasonal contracts with a reduced wage and the contracts were not renewable. such has resulted in the violation of their constitutional and legal rights.

The respondent's case is that it is a public university holding public funds and due to need to develop has infrastructure projects requiring employees under which the petitioners were employed on short term contracts as this is not its core business. The petitioners have been retained on such short term contracts. In order to develop a database of qualifications and skills the respondent directed the petitioners to sign contracts which is lawful and some 16 petitioners signed but later decided to file this petition.

The basis of the petition is that the respondent is in violation of articles 3, 10, 20, 27, 28, 29, 36, 41 and 47 of the Constitution where the petitioners' right to dignity,equality and non-discrimination has not been protected through the acts of the respondent in denying them equal treatment in employment like other employees; that they have been denied the right to equal protections and equal benefit of the law and the full enjoyment of all rights in employment by being denied terms and conditions of employment that protect and secure fair labour practices

and hence have been subjected to inhumane treatment and dignity and been denied the right to reasonable working conditions.

As correctly submitted by the respondents, a constitutional petition should meet the threshold established in the case of **Anarita Karimi Njeru v Republic** in that the particulars of violations alleged to have been committed must be specifically and with precision stated.

The respondent further submitted that Article 41 of the Constitution secures the right to every employees to a fair remuneration, reasonable working conditions, right to form, join and to participate in the activities of a trade union of choice an to go on strike.

At the core of this petition is the issue of fair remuneration, reasonable working conditions and issuance of terms and conditions of employment that are equal and fair to every employee and that the petitioners have been denied the right to join the trade union of their choice.

The short of it, the respondent acknowledge the essence of the petition as being one couched under the violation of constitutional rights and the nature of orders sought relates to the alleged violations and which the court must address on the merits.

As correctly submitted by the respondent, under the provisions of Article 41 of the constitution read together with the Act, fair labour practices requires and makes it lawful for an employer to issue various forms of employment contracts. Casual employment is lawful and legitimate. Term contract, piece-rate and seasonal contracts are equally lawful and legitimate.

Section 2 of the Act defines casual employee to be one who;

> ***"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;***

At paragraph 11 (e) of the response, the respondent's case is that;

> *e) the petitioners were employed to work in construction as painters, electricians, plumbers, masons, carpenters e.t.c. this was at a time when the University was engaged in massive infrastructural development which is no longer the case.*

At paragraph 17 the response the respondent's case is that;

> *… The respondent further avers that the Petitioners were on contract and that contract employees cannot be converted to permanent employees by operations of the law as alleged or at all. …*

The alleged short-term contracts of service have not been produced by the respondent as the employer as required under the provisions of section 10(6) and (7) of the Act that;

> ***(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.***
>
> ***(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer***

Without any evidence to the contrary, the court is left with the petitioner's evidence that they were under the employment of the respondent without any written contracts of service for period of between 10 to 12 years and based on the date of engagement.

The petitioners have gone to great length and submitted part of their work records despite such duty being vested upon the respondent.

There are work cards with details of the department each petitioner was placed by the respondent;

> There are bank deposit statements for the wage paid on a monthly basis;
>
> There are statutory deductions and remittances to the NSSF;
>
> The casual workers daily attendance register; and Demand letter for payment of overtime work.

As defined above, a casual employee is one who is engaged daily and his/her wages paid at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.

In the case of **Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR** the court in addressing the case of who a casual employee is held that;

> *Our reading of **Section 37** of the **Employment Act** reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in **Krystalline Salt Limited vs.***

***Kwekwe Mwakele & 67 others** [2017] eKLR.*

> *While we appreciate his concern that the respondents having worked for long as piece rate workers, their terms ought to have reflected this fact, such a course was not foreseen by the makers of that law. If they intended the piece rate workers to benefit from the conversion like casual worker that would not have been such a difficult thing.*

A casual employee and employee on piece-work terms are regulated under different provisions of the law. section 2 of the Act has defined 'casual employee' and 'piece work' and section 18 address how 'piece work' should be regulated and paid in 'piece-rate'.

Where 16 petitioners signed the seasonal work contracts, these work records have not been submitted by the employer, the respondent. Even where such were to be produced, the period of employment prior to 9th July, 2018 is in question that the petitioners remained casual employees of the respondent under terms that were unequal and unfair.

On the evidence before court and the records submitted by the petitioners, it is clear to the court they were in the service of the respondent for period of over 24 hours and their wages were paid on a monthly basis and beyond the time period allowed for a casual employee as defined under the Act. in the circumstances, the petitioners' casual employment automatically converted to term employment and became protected under the provisions of section 37 of the Act;

37. (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.

The conversion and protection of the casual employee under the provisions of section 37 of the Act is important as the employee becomes entitled to the rights and benefits under the Act. the employee is entitled to the following;

a) Notice before employment is terminated or payment in lieu thereof;

b) a paid rest day after every 6 days of work and including work during a public holiday;

c) is entitled to such terms and conditions of service as he would have been entitled to under Act; and

d) the Court is given power to; ***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.***

This court so guided, where the respondent enjoyed the services and labours of the petitioners, being a public institution, did not exempt them from complying with the mandatory provisions of the Constitution and the Act. Engaging in unfair labour practices is specifically outlawed pursuant under Article 41 of the Constitution, 2010; Article 41(2) of the Constitution, 2010 directs that;

(2) Every worker has the right—

> ***(a) to fair remuneration;***
>
> ***(b) to reasonable working conditions;***
>
> ***(c) to form, join or participate in the activities and programmes of a trade union; and***
>
> ***(d) to go on strike.***

The act of keeping the petitioners under casual employment for period beyond the legal minimum of 24 hours and for long periods going to 10 years is contrary to section 9 of the Act and in violation of fair labour practices; Section 9(1) and (2) of the Act directs that;

(1) A contract of service—

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified work which could not 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,shall be in writing.

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

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

The issuance of seasonal contracts to the petitioners is overtaken by the law. Unless the respondent applies the provisions of section 13 of the Act and changes the employment particulars of the petitioners, to change the nature of employment without first obtaining the consent of the affected employees is to engage in unfair labour practices which is an act prohibited under the constitution.

Save to issue Memo dated 9th July, 2018 the respondent failed to abide section 13 of the Act. no consent was obtained from the petitioners. To take the position that the respondent by employing the petitioners in better terms of employment would be wasting public money is far from the truth. The respondent cannot be found to justify its acts of violating the petitioner’s constitutional and legal rights under the guise of saving the taxpayer its money. To the contrary, the violations apparent, the respondent is at fault.

As a public institution, the respondent bears greater responsibility in the public interest.

For the duration of employment, pursuant to section 37 (4) of the Act the court is directed to convert casual employment to term contract on terms and conditions that are favourable to the employee. Such provisions must be read together with section 26(2) of that Act and which requires that the more favourable terms to the employee should be applied;

2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply

On these findings, the petitioners shall be issued with term contracts similar to those issued to other employees and without placing the petitioners at a disadvantage for being or not being members of the trade union that is without being placed on terms and conditions separate or different as those applicable to employees on permanent and pensionable terms and on terms and conditions applicable to unionisable employees. Such placement shall be undertaken within the next 30 days.

The respondent shall further re-engage the petitioners on suitable terms and conditions and without putting them at a disadvantage for being or not being members of the trade union.

On these findings, the memo dated 9th July, 2018 is declared null and void and without any legal force.

Where the respondent is desirous of creating a database for its employees, such should apply equally and without separating the petitioner’s aside as such is discriminatory.

The issued seasonal contracts are hereby suspended and shall only issue with the full knowledge, acceptance and consent of the petitioners. Such seasonal contracts where issued must abide the provision of section 29 of the Act, comply with the terms and conditions of section 10 of the Act, and following the petition, the respondent is hereby directed to comply with the provisions of section 9(4) of the Act. for reference, the employer is required to;

(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that the employee understands.

The petitioners are seeking for payment of wages from July, 2018 to date. The petitioners have not submitted any evidence that from 19th July, 2018 when the respondent directed them to sign seasonal contracts have resumed work. Even though the court directed that parties to maintain the *status quo* there is no evidence that the petitioners have resumed duty.

On the remedy sought for a declaration that there is violation of the constitution, the action of the respondent through the issuance of memo dated 9th July, 2018 led to the filing of this petition on the grounds that the petitioners were not treated equally as other employees. Indeed the respondent in the response and in the written submissions has maintained that the petitioners are casual employees, that they were on 3 months term contracts, that they were secured for infrastructural development projects and as such the respondent was keen to maintain them but under seasonal contract. 16 petitioners are said to have signed the seasonal contract.

What is clear to this court, the respondent picked and separated the petitioners from other employees and denied them the benefits of the law under the guise that these are casual employees, that they were on 3 months contract employees save there are no work records to maintain and support such assertions. Such has denied the petitioners their rights at work, such is in violation of the right to dignity, security at work, in violation of the right to property and fundamentally a violation to the right to fair labour practices and cumulatively this is an act of discrimination against the claimants as the respondent has other employees not similarly treated and under better terms and conditions of employment.

The Court of Appeal in defining discrimination in employment in the case of **Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others [2018] eKLR** held as that;

> *… 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.*

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.

This is well summarised by the Supreme Court in the case of **Law Society of Kenya v The Attorney General and Central Organisation of Trade Unions (COTU) Petition No.4 of 2019** that;

[discrimination is a] … a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society For constitutional violations, the petitioners are entitled to payment of damages.

The respondent has relied on the case of **Peter Gachenga Kimuhu v Kenol Kobil Limited [2014] eKLR** on the grounds that employees whose contracts are breached should not replicate injuries and multiply remedies but the facts therefrom are different from the instant suit, the court has made a finding of a clear violation of the constitution and the remedy of damages is available under the provisions of section 12 of the Employment and Labour Relations Court Act, 2011. Further, any injury to an employee, the remedies thereof available under section 49 of the Act can issue singly or multiple. Section 49(1) of the Act;

> ***(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee <u>any or all of the following</u>—*** [emphasis added].

The daily wage for the petitioners remained at Ksh.934.60. an award of damages equivalent to one month's pay for the minimum of 10 years served; such wage is hereby found appropriate and fair. Each petitioner shall be paid damage amounting to ksh.934.60 x 30 x 10 all ksh.280, 380.

Even where compensation were to be assessed under the provisions of the Act for unfair treatment in employment, failure to abide the provisions of section 37 of the Act, an award of 10 months based on the daily wage paid would amount to Kh.283,080 for each petitioner. The Respondent shall pay damages all t ksh.280, 380 to each petitioner.

The petitioners are also seeking for a declaration that their employment be secured and that there be no termination. On the findings above, the actions of the respondent are found in violation of the constitution and such is redressed. The court has further declared the memo dated 9th July, 2018 null and void and further ordered the respondent to issue the petitioners with appropriate terms and conditions of service. Employment hence secured, the petitioners shall be paid for work done and where there is good cause, such employment can terminate.

As a public institution of higher learning, the respondent is bound by public policy, best practices in human resource and capital management. Article 10 of the Constitution, 2010 binds the respondent to ensure compliance with the values and principles thereof and particularly the Rule of Law, transparency and accountability.

The law addressed above, the respondent is bound. unless there is good cause to terminate the petitioners' employment, the provisions of section 2 and 37 of the Act with regard to employment of casual employees and the conversation thereof, the petitioners are protected

employees. employment can only terminate in accordance with the Act.

On the claim for payment of wages from July, 2018 to date and for payment of the accrued house allowances, the respondent above directed to issue the petitioners with terms and conditions of employment without being placed at any disadvantage to other employees, such is addressed.

The daily wage paid by the respondent at ksh.934.60 is commensurate to the Wage Orders on the payment of a daily wage and that far the respondent having complied, though under the wrong belief that the petitioners were casual employees, such daily rate in comparison to the due wage under the Regulation of Wages (General) (Amendment) Order, 2018 in force from 1st May, 2018 the daily wage for Nairobi was 653.10 and such put into account, the respondent shall comply as directed above.

The claim for annual leave, leave allowance, commuter allowances such were removed from the petitioners by virtue of the wrong holding by the respondent that they were casual employees, such is addressed and redressed accordingly. In issuing new terms and conditions, such matters shall be factored as the petitioners fall under the unionisable category of employees and enjoy such right to unionise pursuant to Article 41 of the Constitution.

The claim for payment of overtime owed to the 1st petitioner is acknowledged by his supervisor following his letter of demand dated 7th May, 2018 and approved on equal date.

Vide Memo dated 22nd March, 2018 the *Ag. Estates Manager*, S. B. A. Muguna sought for authority to have the employees to work overtime including over the weekends, public holidays similar authority was sought vide memo dated 2nd January, 2017, 5th April, 2018 and all the served overtime hours shall be tabulated by the respondent for payment to the petitioner(s) accordingly.

The respondent being the custodian of work records, such shall be retrieved pursuant to the provisions of section 10(6) and (7) of the Act and paid within the next 30 days. Where the respondent fails to pay, the petitioners shall tabulate their overtime payments due and submit for approval by the court.

The petitioners are also seeking for Orders that they be allowed to join a trade union of their choice with immediate effect.

Whereas the right to join a trade union of one’s choice is under the Bill of Rights the same create a positive obligation to an employee and not the employer. The employer cannot negate such right in any manner. Where an employee wishes to join a trade union of his/her choice, such duty vests in the employee.

The petitioners have not submitted any matter that they have made any effort to join a trade union of their choice and the respondent has stopped them. such right must commence through the action of the employee/petitioners. Even where the respondent as the employer were to interfere with the enjoyment of the right to join a trade union of choice, nothing stops the petitioners from exercising such right out of own free will and paying trade union dues directly to the trade union of their choice pursuant to section 52 of the Labour Relations Act, 2007.

> ***52. Direct payment of trade union dues Nothing in this Part prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorised by the constitution of the trade union directly to the trade union.***

On the findings above, judgement is hereby entered for the petitioners against the respondent in the following terms;

> **a) a declaration that the petitioners’ employment with the respondent is not casual but converted by operation of the law and protected with rights and benefits under the Employment Act, 2007;**
>
> **b) the respondent shall issue the petitioners with contracts of employment with terms and conditions similar to those issued to other employees and without placing them at a disadvantage for being or not being members of the trade union; this shall be done within the next 30 days;**
>
> **c) Further to (a) and (b) above, the respondent shall re-engage the petitioners on suitable terms and conditions and without putting them at a disadvantage for not being unionised though they are unionisable;**
>
> **d) A declaration that is hereby entered that the memo dated 9th July, 2018 is null and void and of no legal force;**
>
> **e) A declaration that the petitioners’ constitutional rights have been violated by the respondent and are hereby awarded damages each at Ksh.280,380;**
>
> **f) Overtime payments due and unpaid to date shall be tabulated by the respondent and paid to the petitioners within 30 days and failure to which the petitioners shall submit their tabulations for confirmation by the court;**
>
> **g) The dues owed above shall be paid as directed and failure to pay the same shall accrue interests at court rate from the date due and until paid in full; and**
>
> **h) The petition is found with good foundation and costs are hereby awarded to the petitioner.**

Delivered at Nairobi this 10th day of December, 2021.

M. MBARU

JUDGE