IN INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 21 OF 2013

DR. SAMSON GWER ..... 1ST PETITIONER

DR. MICHAEL MWANIKI ……..…..... 2ND PETITIONER

DR. NAHASHON THUO ……..…… 3RD PETITIONER

DR. JOHN WAGAI ……..…….. 4TH PETITIONER

DR. MOSES NDIRITU …….…….. 5TH PETITIONER

DR. ALBERT KOMBA …….…….… 6TH PETITIONER

VERSUS

KENYA MEDICAL RESEARCH

INSTITUTE (KEMRI) ……..... 1ST RESPONDENT

MINISTRY OF PUBLIC HEALTH AND

SANITATION ..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

UNION OF NATIONAL RESEARCH AND

ALLIED INSTITUTES STAFF OF KENYA …. INTERESTED PARTY

Mr. Chigiti for the Petitioners

Mr. Munge for the 1st, 2nd and 3rd Respondents

Mr. Enonda for Interested Party

JUDGMENT

1. The six (6) Petitioners approached the High Court pursuant to Article 22 and 23 of the

Constitution of Kenya 2010 by a petition dated 2nd December, 2011 and filed on 5th December, 2011.

2. The 1st Respondent is the Kenya Medical Research Institute (KEMRI); the 2nd Respondent, the Ministry of Public Health and Sanitation and the 3rd Respondent is the Hon. Attorney General.

Cause of Action

3. The Petitioner were employed by the 1st Respondent under (KEMRI) Wellcome Trust Programme on diverse dates.

4. On 1st October 2005, the agreement under the said KEMRI Wellcome Trust Research Programme was subsumed under KEMRI in a new agreement under KEMRI.

5. The Petitioners' terms of service with the KEMRI Wellcome Trust Research Programme were brought under KEMRI by an agreement between KEMRI and the Welcome Trust Research Laboratory.

6. In terms thereof, the Petitioners contracts were severally extended on short term basis. These short term contracts are alleged by the petitioners to have been unclear and oppressive effectively subjecting the petitioners to unfair administrative arrangement by the Respondents.

Discrimination

A

7. It is specifically pleaded under paragraph 4 of the petition that the Respondents treated the petitioners with inequality on the basis of their race contrary to ***Article 27(4***) of the Constitution with respect to;

i. awarding international jobs;
ii. awarding grants from the wellcome Trust based on requirements for funding that tend to bar non-EEA residents and that at KWTRP, the white expatriate are more likely to be supported to apply for grants from WJ while there is no clear policy to do this for equally or more qualified local black scientists;
iii. distribution of senior scientific positions at KWTRP;
iv. equal pay for equal work;
v. Insignificant high impact publications;
vi. prejudice / condescension against local African workers.
vii. lack of commitment to racial equality or a policy to ensure racial equality.

8. ***Article 27(4)*** reads:

> **"the state shall not discriminate directly or indirectly against any person on any ground including race....."**

B

9. It is also alleged that the Respondent have leaked, exposed and or violated the Petitioners' right to fair labour practices as guaranteed and as provided for under ***Article 41(1)*** and ***2(b)*** of the ***Constitution*** and which stipulates that every worker has the right to reasonable working conditions by:-

> (i) issuing them with extremely short multi contracts, some even considered as monthly rolling contracts;

(ii) offending the rules of natural justice by unfairly dismissing the Petitioners without being heard or without reasons among other grounds stated including (vi) being a stumbling block in the exercise of the right to join a trade union of their choice.

10. The damages and loss suffered by the Petitioners as a result of the alleged discrimination has been particularized in the petition to include;

i. unequal training opportunities and also complete denial of the same;
ii. failure to achieve position of scientific leadership and mentorship for African researchers by the KEMRI CMGR director as is expected;
iii. suspension from work for raising these grievances;
iv. being sent on indefinite forced leave without any written documentation on the leave despite asking for it and without any reasons being given;
v. failure to address terminal dues at the end of the Petitioners' current contracts;
vi. non-responsive posture to the Petitioners' plea to meet the Director of KEMRI.

11. The Petitioners further plead under paragraph 6 that the Respondent has failed to put up remedial measures to the complaints by the Petitioners.

Furthermore it is specifically pleaded that the Respondent has routinely violated the Petitioner's right under ***Article 40(1)*** of the ***Constitution*** by taking away the Petitioner's right to intellectual property resulting in the Respondents, its servants, employees and students taking credit for the work and scientific innovation of the Petitioners by;

i. (a) disregard syndrome
ii. (b) Mathew Effect (Discovery Credit inadvertently reassigned from the original discoverer for a better known researcher);

ii. disapproval by the Respondent of the Petitioners and other local scientists innovations or work to apply for grants;
iii. misappropriation of the work of local scientists to benefit expatriate scientists.
iv. frequent unfair administrative action;
v. Inability to veto adverse decisions by the scientific team leader;
vi. redeployment and chastisement through mail from the Director of KEMRI on the account of raising these grievances.

The effect of this conduct has exposed the Petitioners to;

i. inhuman and degrading treatment in violation of ***Article 28*** of the constitution;
ii. taking away the Petitioners' dignity under ***Article 29*** of the Constitution;
iii. subjected the Petitioners to modern day slavery in violation of ***Article 30*** of the ***Constitution***.

12. That the cumulative effect is to forever stifle the progress by Kenyan researchers and to impede their autonomy and dream of Kenyanising scientific innovations nor enjoy the national values and principle of governance as enshrined under Article 10 of the Constitution.

13. Mr Chigiti for Petitioners made very able submissions on the complaints set out in the petition relying on various documentation produced before Court and list of authorities in support of the Petitioners case.

He relied on international instruments supportive of the rights and freedoms enshrined in our constitution in particular;

a. ***The international convention on Civil and Political Rights*** **to which Kenya is a state party, via accession on 1st May 1972, and particularly *Article 6(1)* which provides that every human**

being has the inherent right to life which right shall be protected by law. No person is to be arbitrarily deprived of his life.

b. ***The Convention Against Torture and other cruel inhuman or degrading treatment or punishment*** **to which Kenya is a state party via Accession on 21st February 1997, and particularly interalia:**

a. ***Article 2*** **provides that in** ***Sub article (1)*** **each party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.**

b. ***The African Charter on Human and People's Rights*****, to which Kenya became a state party on 23rd January 1992 and in particular** ***Article 3(2*****) which provides that every person is entitled to equal protection of the law.**

Article 5 which provides that every individual shall have the right to the respect of the dignity inherent in a human being;

Article 9 which provides that every individual shall have the right to receive information and to express disseminate his opinions within the law, and ***Article 14***, which guarantees right to property which may only be encroached in accordance with the provisions of the appropriate law.

The Petitioner also relied on various International Labour Conventions to buttress the protection guaranteed individuals against violation of their human rights and dignity at the work place.

14. The Petitioners pray for the following reliefs;

a. A declaration that the Respondent's conduct amounts to and is discriminately against the Petitioners under ***Article 27*** of the ***Constitution***.
b. A declaration that, the Respondent's conduct, acts and or omissions are unlawful, illegal and / or unfair and the same violates ***Articles 28, 29, 40*** and ***41*** of the ***Constitution***.
c. An order compelling the respondents to reinstate the Petitioners unconditionally.
d. An order that the Petitioners are entitled to compensation for the said violations under ***Article 23*** of the Constitution.
e. a declaration that the Petitioners are entitled to access to information under ***Article 35***.
f. or such other orders as this Honourable court shall deem just.

Evidence

15. The Petition is supported by affidavits of;

a. Dr. Moses Ndiritu
b. Dr. Samson Gwer
c. Dr. Michael Mwaniki
d. Dr. Nahashon Thuo
e. Dr. John Wagai
f. Dr. Albert Komba
g. Dr. James Ignes Kuola and
h. Prof. Alexis Nzila; all dated 2nd December 2010.

16. The following facts applicable to all the Petitioners are evident from the Affidavits;

a. All were placed on short term contracts renewed from time to time and are alleged to constitute discrimination, unfair administrative action, deliberate career blockade which cumulatively amounted to work place harassment, scientific misconduct and denial of intellectual property rights.

17. It is alleged that the 1st respondent being a state institution has the duty to protect and uphold the rights of the Petitioners which instead it violated with rampant regularity.

Inequality

18. The 1st Petitioner's Affidavit in paragraphs 70 – 74 at page 13 sets out particulars of in equal award of international jobs; paragraph 80 – 107 page 15 – 22 sets out particulars of discriminately awarding of grants from the Wellcome Trust based on requirements for funding that effectively bar local African residents as follows;

> The funding criteria are:
>
> "(a) **Intermediate Research fellow…….. "the award is open to individuals with a relevant connection to the European Economic Area (EEA) ……".**

b. **Post Doctoral Training Fellowships for MBI PhD Graduates …….. "The award is open to individuals with a relevant connection to the European Economic Area (EEA) ……."**
c. **Research Training Fellowships…….. "The fellowship is open to individuals with a relevant connection to the European Economic Area (EEA) ..…."**
d. **Senior Research Fellowships in Clinical Science ……. "Fellowships are awarded annually to candidates of exceptional ability and outstanding promise. You must have a relevant connection to the European Economic Area (EEA) ……"**

19. It is the Petitioners' submission that because of the above racially discriminatory Criteria, virtually all funding goes to white expatriates as depicted in a graph produced in Court for the period 2005 to 2010 which shows Grants in millions pounds (£) to KEMRI – WT programme from Wellcome Trust and how the same was distributed to the staff of the Respondent by race.

20. It is also set out in paragraphs 75 – 79 in pages 13 – 14 of the 1st Petitioners' Affidavit and the annexture thereof that most of the senior scientific positions at KWTRP are retained by the white employees; that career programmes of African workers is virtually stunted; that at paragraph 65 – 74 pages 11 – 74 and as set out in the 5th Petitioner's Affidavit paragraph 214 – 225 and the annexture thereto that the pay structure between the African and white employees is unequal in favour of the white employees.

21. Furthermore, significant and high impact publications as set out in paragraphs 201 – 206 (page 317) of the 5th Petitioner's Affidavit and perpetuated through systematic scientific misconduct as set out in paragraphs 198 – 221 in pages 30 – 33 of the 5th Petitioner's Affidavit and in paragraphs 77 – 129 in pages 16 – 24 of the 2nd Petitioner's Affidavit and the annexture set thereof.

22. In paragraph 113 at page 23 of the 5th Petitioner's Affidavit and annextures thereof is demonstrated prejudicial / condescension against local African workers.

The Petitioners also set out to demonstrate lack of commitment to racial equality or a policy to ensure racial equality in;

i. 1st Petitioner's Affidavit paragraphs 45 – 119 (pages 9 – 24);

iv. 2nd Petitioner's Affidavit paragraphs 15 – 76 pages 4 – 16;
v. 5th Petitioner's Affidavit paragraphs 119 – 236 (page 30 – 34) and;
vi. the entire supporting Affidavit of Prof. Alexis Nzila dated 2nd December 2010 and the annextures set out thereof.

23. It is the Petitioners' submission that they have demonstrated that KEMRI Wellcome Trust Research programme exemplifies institutional racism; deliberately inhibits any attempts to remedy the situation; Punishes those who dare openly oppose the discriminatory policy and its perpetuation; and therefore the Institution is a perpetual violator of the ***Article 27(4)*** of the Constitution of Kenya as against the black Kenyan and African Scholars.

24. That plagiarism which appropriates another person's ideas processes, results or words without giving appropriate credit is rampant at the institution. This appropriation of the ideas and results of others, and publishing as to make it appear the author had performed all the work under which the data was obtained when it was not the case.

This is accompanied by citation plagiarism which is willful or negligent failure to appropriately credit other or prior discoverers, so as to give an improper impression of priority. It was submitted that this behavior is also referred to as **''Citation amnesia' the 'disregard syndrome' and bibliographic negligence''.**

25. The Petitioners submitted that this was the most rampant scientific misconduct by the respondent against the Petitioners and other African scholars.

In other cases, discovery credit was inadvertently reassigned from the original discoverer to a better known researcher. This is a special case of the Mathew Effect detailed in annexture MN14 and MN15 in pages 460 – 477 of the 5th Petitioner's Affidavit.

26. It is therefore the Petitioners' submissions that they have been subjected to the aforesaid discrimination and scientific misconduct by the respondent, its agents, servants, employees and or students who have taken credit for the work and scientific innovations of the Petitioners to their loss and detriment.

Others have gained mileage from their sweat and intellect and the 1st Respondent should be held liable to compensate the Petitioners for the loss and damage. That the Respondent arm-twisted the Petitioners to give up their intellectual rights and cede their passwords to research and innovation.

That the contracts of employment do not entitle the 1st Respondent to the intellectual property of the Petitioners and the appropriation outlined is unlawful.

27. With respect to violation of ***Article 27, 41*** and ***47*** of the ***Constitution*** of ***Kenya 2010***, the Petitioners have deposed to the manner in which they were unfairly sent on leave, suspended and eventually dismissed from employment by the 1st Respondent.

28. That they were not given opportunity to explain themselves but were instead punished for raising, genuine grievances. This information is contained in the Affidavits of all the Petitioners as set out on pages 14 – 15 of the Petitioners' written submissions.

29. Prior to the termination, the Petitioners were forcefully and unlawfully redeployed from country where they had their research cohorts and data essentially terminating their research work and careers and disrupting their social circumstances. Any useful interventions to stop this practice was disregarded by the 1st Respondent.

30. The Court was referred to neutral advice to the 1st Respondent against maintaining and funding racially divided programme as evident in the report indicated in paragraph 104 – 105 in pages 20 – 21 of 1st Petitioners Affidavit and the annexture set therein.

31. The 1st Respondent was advised to make stronger African leadership especially in application of research funding as a pre-condition. See pages 15 – 16 of the Petitioners' written submissions.

32. It was also submitted that the 1st Respondent frustrated the efforts of the Kenya National Commission of Human Rights and equally to arbitrate on the issues of violations of Constitutional rights raised by the Petitioners as evident in paragraph 10(N) in page 10 of the Petitioners' replying affidavit and the annexture thereto.

33. That the 1st Respondent also disregarded the findings of their own KEMRI board sub-committee constituted to investigate the issues raised by the Petitioners and whose findings largely vindicated the grievances raised by the Petitioners. This is seen on page 151 – 152 in page 29 of the 1st Petitioner's Affidavit and the annexture thereof.

Furthermore, the 1st Respondent denied the Petitioners access to the report of the sub-committee which was public information guaranteed under ***Article 35(1) (a)*** & ***(b)*** of the constitution.

34. It was further submitted that the 1st Respondent thwarted internal mechanisms to resolve the dispute and disregarded the neutral intervention by the Ministry of Labour and how to resolve the work environment issues raised in this matter.

35. To compound the entire predicament of the Petitioners, the 1st Respondents has persistent in issuing short term contracts under KWJRP and KEMRI Board of management that has created a very unclear chain of command not knowing to whom the Petitioners report and who should deal with the issues that concern them at the workplace.

36. In certain cases the 1st Respondent did not honour its own contracts as shown in pages 740 – 747 of the 1st Petitioner's Affidavit and annexture MN155 on pages 1359 of the 5th Petitioner's Affidavit.

For these and other reasons set out in the Petition and the supporting Affidavit of the Petitioners and annextures thereof, the Petitioners urged the Court to uphold the Petition and award accordingly.

37. The Union of Research Institute of Kenya, joined this suit as an interested party. It has fully associated itself with the pleadings and submissions of the Petitioners. It has also filed its own submissions and list of the authorities which the Court has considered in arriving at this decision.

38. The Affidavit by **Mr. Zalharia Alum Chacha** dated 20th June 2012 has fully canvassed the issues of alleged unlawful and unfair treatment accorded the Petitioners by the 1st Respondent.

39. The Union reported the dispute to the Ministry of Labour on 7th February 2011. A conciliator was appointed on 31st March 2011.

The management failed to attend two meetings called by the conciliator and she proceeded to make findings and recommendations as contained in her report dated 7th November 2011.

40. In her report she found that the Petitioners were employed on three years renewable contracts and were sent on indefinite forced leave when they complained about certain malpractices in the organization.

That they were all undertaking post graduate studies sponsored by the employer which studies related to their work.

The indefinite leave jeopardized their studies and the scientists were embarrassed and humiliated as they were unable to tend for themselves and their families.

When the scientists questioned the length of the leave the employer responded by asking them to

resume studies in circumstances which were unclear. This heightened their anxiety and confusion since there was no mention of resumption of work.

41. It was the conciliator's conclusion that the forced leave was unprocedural and uncalled for. **Mrs. M. M. Kezziah** on behalf of the Minister for Labour therefore recommended that the six (6) Petitioners resume work without loss of seniority or benefits.

42. The Union wrote to the 1st Respondent on 21st November, 2015 requesting the Respondent to abide by the Minister's recommendation and reinstate the Petitioners accordingly.

43. On 29th November 2011, the 1st Respondent wrote to the Minister for Labour expressing disappointment in the findings as contained in the conciliation report.

The 1st Respondent stated in the letter as it does in its response before Court that the six Research Scientists were employees of the Institute on definite contractual terms and not on three year renewable contracts. That while on employment of the institute, they were offered higher study opportunities under sponsorships and fellowships.

44. That on or about December 2010 the six research scientists raised serious unsubstantiated allegations against KWTRP under which they were working and studying and were put on suspension. That the suspension was lifted immediately by the Board of management and the Board commenced instigations on the matter which instigations were concluded promptly.

45. That on February 2011, the petitioners were requested to mend their relationship with their colleagues and senior officers of the KWTRP and further discuss with the Director, KEMRI on how **"they could be facilitated to complete their studies noting that some of their employment contracts were expiring."**

46. That the Petitioners failed to heed the advice given to them in writing and approached the Kenya National Commission on Human Rights following which a mediation process was conducted and concluded in July.

47. The Petitioners were again presented with proposals on how they were to be facilitated to complete their studies and employment under KEMRI terms and conditions of service since some of the contracts had already lapsed.

48. The 1st Respondent states that during this time, the Petitioners were on **"a self-inflicted leave with pay"** having been advised to discuss how they could be facilitated to complete their studies and employment in February in vain.

49. The 1st Respondent further states that five of the six Research scientists rejected all the recommendations of the KHCHR and the Board. That **Dr. Stephen Ntoburi** heeded the advice and returned to work and study. The five refused to resume their studies and employment under KEMRI terms and conditions of service and the five have therefore ceased to be employees of the institute.

With that the 1st Respondent rejected the recommendations of the Minister for Labour hence the matter came to Court.

50. It is the 1st Respondents' case that the Petitioners lack good faith, their hands are tainted, hence the Court should reject the Petition in its entirety. On the converse, the 1st Respondent demonstrated good faith in initiating the investigations on the grievances raised by the Petitioners and immediately lifted the suspension on reasonable terms that the Petitioners reconcile with their colleagues and superiors and resume work and study immediately. That they were paid salaries for close to one year whilst they were not working. Accordingly, the Petitioners do not deserve

any sympathy from the Court at all.

51. Furthermore, when the KNCHR mediated the dispute, the Petitioners failed to heed the recommendations by the Commission to return to employment and study on KEMRI terms and conditions of service.

52. Counsel for the 1st Respondent Mr. Muge submitted that the Petitioners were spoilt individuals who could only work and study on their own dictated terms and conditions which position is untenable.

53. The 1st Respondent further submitted that it did not terminate the employment and study contracts of any of the Petitioners. That the suspension was temporary and was lifted immediately by the Board of management after only one (1) day but the Petitioners refused to return to work.

54. The Affidavit of the Chief Executive Officer of the 1st Respondent on page 752 clearly outlines the correct circumstances of this case.

55. The CEO had responded to the grievances raised by the Petitioners with a view to have them addressed internally.

That he Petitioners were reluctant to have the issues addressed internally but instead embarked on a campaign to disparage KEMRI and copying their correspondence to third parties.

56. The Court was urged to infer from their conduct their unwillingness to resolve the dispute and reject the suit brought to Court unnecessarily.

It was further submitted by the 1st Respondent that it was now too late for the Petitioners to return to KEMRI because their contracts had long expired and were each paid full salaries for the entire term of their contracts though were not working.

57. On the particulars of discrimination by the Petitioners, counsel for the 1st Respondent submitted that the Petitioners were bound by their pleadings and could not rely on any matters not contained in their petition.

The counsel submitted that no evidence has been adduced to substantiate the bald allegations of discrimination and violation of the Constitutional rights of the Petitioners.

58. In particular there is not an iota of evidence before court on alleged violation of ***Article 27(1), 27(4), 35(1)(b), 40(1), 41(1), 47*** of the ***Constitution*** *of* ***Kenya 2010***.

59. The counsel further submitted that the supplementary Affidavit of Dr. Boke has rebutted all allegations of racial discrimination made by the Petitioners as against the 1st Respondent.

60. The Respondent sets out the awards of PhD, Masters Programmes and Research fellowships to Kenyan citizens. The 1st Respondent has also demonstrated that not all Directors and senior staff of the 1st Respondent are whites stating that the allegations by the Petitioners are blatantly false as the Board of Directors of the 1st Respondent are local persons.

61. It was refuted that the white staff under the Kilifi Programme were paid more than the locals adding that paragraph 66 of the replying Affidavit fully explains this issue. More specifically, Wellcome Trust is a collaborator. That the staff at Kilifi are seconded as employees of Oxford University and Wellcome Trust. They are not employees of KEMRI hence their salaries were different.

The 1st, 2nd and 3rd Respondents strongly submitted that no basis of racial discrimination has been established by the Petitioners before Court adding that not all differences constitute discrimination in terms of ***Article 27*** of the constitution.

Conclusion of Facts

62. A careful analysis of the evidential material presented to the Court by way of lengthy Affidavits and annexures therein has led the Court to a summarized finding of facts as follows;

1. That Petitioners were Research Scientists serving the Respondent while enjoying study scholarships under KEMRI, Welcome Trust Research Programme.
2. That whereas KEMRI as an employer is a public institution, the funding under the KEMRI Wellcome Trust Research Programme emanated from external donors.
3. That the external donors attached specific terms and conditions to the grant and administration of the Wellcome Trust Research Programme which terms and conditions became subject of grievances by the Petitioners.
4. That the Petitioners escalated the grievances by way of an open letter to the management of the 1st Respondent, which letter was copied to various third parties.
5. That the 1st Respondent initially suspended the Petitioners upon receipt of the letter which was seen to be disparaging the 1st Respondent but the Board of management reversed that decision after one day and called upon the Petitioners to resume their employment and study pending internal investigations that were immediately commenced by the 1st Respondent.
6. That the Petitioners did not heed the call to resume their employment and study stating that the terms of the return were vague and detrimental to their terms and conditions as existed prior to the suspension.
7. That the Petitioners approached KNHRC who mediated the dispute subsequent to which the 1st Respondent reiterated the call to the petitioners to return to work and study.
8. The Petitioners were not satisfied with the recommendation by KNHRC nor the terms of the recall and they escalated the dispute to the Minister for Labour through their union, the interested party herein.
9. Meanwhile, one of the Grievants heeded the call by the 1st Respondent to resume employment and study and was absorbed accordingly.
10. The Petitioners continued to receive their full salary though not at work while ventilating the dispute at the Ministry of Labour.
11. The Minister's report pursuant to a conciliation process recommended reinstatement of the Petitioners but the 1st Respondent was dissatisfied by the findings of the Minister and therefore did not honour the recommendations thereat.
12. As at the time the matter came to Court, the short term contracts under which the Petitioners served had lapsed and the 1st Respondent had paid the Petitioners' salaries fully, up to the end of each of the respective contracts.
13. It is a matter of fact therefore that the contractual relationship between the Petitioners and the 1st Respondent has since lapsed as at the time of writing this Judgment.

63. **Issues for determination**

a. Whether the Respondent's conduct amounts to and is discriminatory against the Petitioners under **Article 27*(4)*** of the Constitution.
b. Whether the Respondents conduct, acts and or omissions are unlawful, illegal and or unfair for violating ***Articles 27(1)(4),28, 29(f)***, ***35(1)(b), 40(1), 41(1)(2) & 47 (1)*** of the Constitution.
c. Whether or not the Petitioners are entitled to an order for;

i. reinstatement; or

ii. (ii) compensation under ***Article 23*** of the Constitution.

The Law

64. **Article 259** of the Constitution provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law and human rights and fundamental freedoms in the Bill of Rights. Permits the development of the law and contributes to good governance.

65. As was observed by **Abuodha J.** in **Industrial Court of Kenya Cause No. 1065 of 2012,**

Dr. Anne Kinya Vs. Nyayo Tea Zone Development Corporation and 3 others;

> **"Courts in determining Constitutional Questions ought to adopt a more robust and purposive approach."**

66. Therefore the Constitution ought not be interpreted as any ordinary statute especially where words used are unambiguous.

In this regard **Article 27(1)** reads:

> **"Every person is equal before the law and has the right to equal protection and equal benefit of the laws."**

Whereas **Clause 27(4)** reads:

> **"The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethinic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."**

Furthermore, **Clause 27(5)** reads:

> **"A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in *Clause (4).*"**

67. It is apposite to note that whereas ***Clause 4*** deals with discrimination by the state, ***Clause 5*** specifically prohibits discrimination by any person directly or indirectly against another person.

68. This distinction is important for purposes of this suit because the pleadings and submissions point to discriminative policy prescribed under an international sponsorship programme rather than government policy per se.

69. In this regard, the Petitioner's term of service within the KEMRI Wellcome Trust Research Programme were brought under KEMRI by an agreement between KEMRI and the Welcome Trust Research Laboratory.

70. It is under this programme that the impugned short contracts and terms of sponsorship were implemented. The alleged discriminatory salaries are also part of an Oxford University exchange programme.

71. The impugned criteria for funding for Research fellows, senior Research Fellowships and post doctoral Training Fellowships for MB/PhD Graduates are **"open to individuals with a relevant connection to the European Economic area (EEA)……..."**

This criteria is said to be the main basis for non or underfunding of local researchers leading for

racial discrimination scientific misconduct and intellectual property right and career blockade leading to career stagnation.

72. Questioning of the criteria was met by workplace harassment and unfair administrative actions by the 1st Respondent, which is a state Agency in its endeavor to sustain a foreign funded programme to the loss and detriment of local scholars generally and the Petitioners in particular.

73. It was submitted by counsel for the Petitioners that the discrimination and inequality meted against the Petitioners by the Respondent therefore amounted to institutional racism which is defined as:

i. differential treatment on the basis of race that disadvantages a racial group

And

ii. treatment on the basis of inadequately justifiable factors other than race that disadvantage a racial group.

74. We were referred to the recommendations of the **Stephen Lawrence** inquiry into the murder of a black teenager in the UK wherein racist incident was defined as any incident, which is perceived to be racist by the victim, or any other person. The report went on to say;

> **"it is incumbent upon every institution to examine their policies and the outcomes of their policies and practices to guard against disadvantaging any section of our communities."**

75. Counsel further submitted that the report indicated the measuring of the outcome of racial discrimination allows focus on the actions of institutions rather than individuals since people may act in good faith and not harbor racist attitudes but perpetuate discriminatory practices because of systems set up by the institution.

76. It was submitted that, given the differential outcomes along racial faults as depicted in the affidavits of the Petitioners and the annexures set therein, the KEMRI Wellcome Trust Research Programme exemplifies institutional racism.

That deliberate attempts by institutional leaders to inhibit calls for a re-examination of institutional policies and practices that promote racial discrimination of institutional policies and practices that promote racial discrimination, and responding with repression, indicate individual culpability by the Respondents and its senior officials inactively promoting racial discrimination and inequality.

77. Whereas the Court fully agrees with the submissions by counsel based on the facts proven in this case on a balance of probability, the Court recognizes the vital role that has been played by the 1st Respondent in promoting scientific research in Kenya which would otherwise be impossible without the international funding that it relies on.

It need not be gainsaid that the future of scientific research in Kenya will continue to benefit from the 1st Respondent through the funding and exchange programmes it undertakes.

78. Having said that, given the history of this country, racial discrimination at the work place be it perpetuated by individuals or by an institution is completely unacceptable and should not be tolerated for purposes of accessing funds, exchange programmes and other benefits provided by our international benefactors.

79. A requirement that a scientific researcher under the employment of KEMRI must have **"relevant connection to the European Economic area (EEA)."** is discriminatory as against colleagues under the same employment who do not have such relevant connection.

80. In the case of **Pravin Bowry Vs. Ethics & Anti-corruption Commission, Cause No. 1168 of 2012**, and in matter of **Veronica Muthio Kioko Vs. Catholic University of Eastern Africa**, **Industrial Cause No. 1161 of 2010**.

I resorted to ***Article I*** *of* ***Convention No. 111*** – Convention concerning discrimination in respect of **Employment** and **Occupation, 1958** which defines discrimination thus;

"For the purpose of this convention the terms discrimination includes;

a. **any distinction exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." Emphasis mine.**

This is the definition applicable to ***Article 27(4)*** and ***(5)*** of the constitution as read with ***Section 5(3) (a***) and ***(b)*** of the ***Employment Act No. 11 of 2007*** which expressly prohibits discrimination at the work place.

Furthermore ***Section 5(2)*** enjoins every employer in Kenya, in mandatory terms to;

"promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice."

81. The Petitioners have proven on a balance of probability that the 1st Respondent has not done enough to eliminate institutional discrimination in violation of ***Article 27*** and ***Section 5(2***) of the ***Employment Act*** to the loss and detriment of the Petitioners.

82. The 1st Respondent as a state employer is bound by the Constitution to protect the right of the Petitioners and not allow a policy that appropriates their intellectual property as has been ably demonstrated by the Petitioner herein contrary to ***Article 40(1)*** of the ***Constitution***. The Petitioners have also ably demonstrated that they were subjected to harassment upon raising the grievances so as to be protected by the 1st Respondent against discriminatory and unequal practices by the 1st Respondent under the research programme whose cumulative result was systemic career stagnation and exploitation by colleagues who directly benefitted from the institutional segregation.

83. In this regard the Petitioners have proved that the 1st Respondent perpetrated unfair labour practices in violation of ***Article 41*** of the ***Constitution*** by arbitrarily suspending them from employment and study for raising genuine grievances and recalling them on changed, ambiguous and inferior terms and conditions of service. This also amounted to unfair administrative action contrary to ***Article 47*** of the ***Constitution***. This was exacerbated by the 1st Respondents failure to attend conciliation under the auspices of the Minister for Labour and subsequently renouncing the recommendations by the Minister to reinstate the Petitioners to their employment and study on clear terms of service. The failure to provide the Petitioners with the report of the investigation essential to prosecute their case was in violation of ***Article 35(1)(b*)** of the ***Constitution***.

84. To the credit of 1st Respondent, it continued to pay the salaries for the Petitioners until each of their respective contracts came to an end.

85. This notwithstanding, the dispute has led to the loss of employment and opportunity to complete their respective study programmes mid-stream. This is a loss which is enormous in terms of career development, contribution to scientific outcomes to the country and in terms of ability to get alternative employment and academic scholarships.

The Petitioners necessarily require material references and certificates of service from the

Respondent to ease their moving on.

Remedies

86. In the case of **Professor Daniel N. Mugendi Vs. Kenyatta University and 3 others: Civil Appeal No. 6 of 2012**, the Court of Appeal sitting at Nairobi noted;

> **"In any matter falling within the provisions of *Section 12* of the Industrial Court, then the Industrial Court has jurisdiction to enforce not only *Article 41* rights but also all fundamental rights ancillary and incidental to the Employment and Labour Relations including interpretation of the Constitution within the matter before it."**

87. Furthermore in **Industrial Court Petition No. 17 of 2013**, **Gilbert Mwangi Njuguna Vs. The Attorney General**: The Court relied on the decision of the **Privy Council in Appeal No. 13 of 2004, Attorney General of Trinidad & Tobago Vs. Ramawop** as follows;

> **"The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate that right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief.**
>
> **But in this case, the contravention was as the judge said, calculated to affect the appellant's interests and it did so."**

88. This rings true in the present case before the Court.

The systemic discrimination and violation of the fundamental rights of the Petitioners has had significant detrimental effect on the Petitioners. The Petitioners have not only lost a chance to renew their employment contracts and connected scholarships to complete their studies but have lost significant scientific research outcomes as a result of unequal and discriminative practices by the Respondent described by the Petitioners which the Court has found have been sufficiently proved by the Petitioners.

89. It is difficult to quantify loss of study opportunity and research conducted over a period of several years that has been appropriated by the Respondent for the benefit of others without due acknowledgment and credit being given.

It is difficult to recompense for sustained invasion of personal dignity caused by policies skewed for a selected group in an institution the Petitioners called their employer.

It is difficult to assess the extent of suffering and loss the Petitioners have undergone as they fought before various institutions and this Court to have their rights and human dignity vindicated.

90. This is to hope the outcome of this case will not only serve to vindicate the right of the Petitioners only but would go a long way to unleash a change of heart and policy at the 1st Respondent organisation and especially with regard to the various scientific research programmes conducted in collaboration with external actors who may be inclined to exploit their vantage points to the loss and detriment of Kenyan and African scholars in the country.

91. Accordingly, in line with the prayers in this Petition, the Court declares and orders against the Respondents jointly and severally;

a. that, the 1st Respondent's conduct amounts to and is discriminatory against the Petitioners under ***Article 27(4)*** of the ***Constitution***.
b. that, the 1st Respondent's conduct, acts and or, omissions are unlawful, illegal and or unfair and the same violates ***Articles 27(1) 28, 29(d) & (f), 35(1)(b) 40(1)*** and ***41 (1) & (2)*** of the

Constitution.

c. that each of the Petitioners is entitled to compensation for the said violations under ***Article 23*** of the ***Constitution*** in the sum of Kshs.5million within thirty (30) days of this Judgment.
d. that the Petitioners are entitled to access all the outcomes of their scientific research and to the credit and benefit attached to the outcomes under ***Article 35*** and ***40*** of the ***Constitution***.
e. that each of the Petitioners is entitled to a certificate of service acknowledging the service and scientific outcomes attributed to their research and work within 30 days from the date of this judgment.
f. the 1st Respondent to pay interest at Court rates on (c) above from date of this judgment to payment in full.
g. the 1st Respondent to pay costs of the Petition.

Dated and Delivered at Nairobi this 18th day of July, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE