



REPUBLIC OF KENYA

Industrial Court of Kenya

Petition 2 of 2013

**PETER WAMBUGU KARIUKI AND 16
OTHERS.....PETITIONERS**

-VERSUS-

**KENYA AGRICULTURAL RESEARCH
INSTITUTE.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 3rd May, 2013)

JUDGMENT

The Petitioners are Peter Wambugu Kariuki, Abel O.Anyika, Alfred K. Tonui, Peter Nzuve Kinyasia, Wilkister Moraa, Samuel Kipkorir Mutai, John Kariuki, Charles Kipkerio, Boniface Ndirangu, Jane Arunda, Jackson Okwoko Anyika, Daniel Kaberi Mwaura, George Ngesa Ramogi, Elijah Nduati Kiiru, Ruth Wairimu, Beatrice Arunda Kageha and Veronica Wairimu Kaura. They filed a petition on 03.07.2012 through Konosi & Company Advocates. The petition cited Articles 22, 23, 28 and 41 of the Constitution of Kenya, 2010, Article 23 of the Universal Declaration on Human Rights and Article 15 of the African Charter on Human and Peoples' Rights. The petition was supported by the affidavit of Peter Wambugu Kariuki attached to the petition. The petitioners prayed for:

a) A declaration that the respondent violated the petitioners' rights to fair labour practices, fair remuneration and reasonable working conditions.

b) A declaration that the petitioners were permanent employees of the respondent and the termination of their employment was unfair and unlawful.

c) A declaration that each of the petitioners is entitled to terminal benefits, namely: 90 days notice for years worked, accumulated leave pay for the years served, unpaid overtime, house allowance, compensation for loss of employment and service for the years worked.

d) An order compelling the respondent to pay the petitioners terminal benefits due to them in accordance with the provisions of the Employment Act, 2007.

e) An order for costs of the Petition.

f) Such other orders as the honorable court may deem fit to grant.

The respondent is the Kenya Agricultural Research Institute. It is a public institution established to conduct agricultural research for public good under the Ministry of Agriculture and is established under the Science and Technology Act, Chapter 250 of the Laws of Kenya. It opposed the petition by filing on 18.07.2012 the replying affidavit sworn by its Lanet Centre's Administrative Officer one Paul Marutegek. The respondent was initially represented by Pauline Masila Advocate and later changed representation to Millimo, Muthomi & Company Advocates.

The petition came up for hearing on 25.04.2013. Mr. Konosi Advocate appeared for the petitioners while Mr. Millimo Advocate appeared for the respondent.

For the petitioners, it was stated as follows:

a) The petitioners were employed by the respondent as casual workers to serve in various capacities and on diverse dates being 13.09.1985, 1.06.1977, 5.12.1984, 15.08.1986, 17.07.1985, in 1991, 7.03. 2000, 30.10.2006, in 2002 and 2007, 2.01.2008, 2.12.2009, in 2008, 5.08.2009, 1999 and 5.01.1990. The initial employment was on casual terms for a term of two or three months and upon lapsing of the term each of the respondents continued to serve in employment of the respondent without any interruption. The petitioners were members of the National Social Security Fund as permanent staff of the respondent as relevant contributions to the Fund were made on their behalf.

b) In the course of the accruing permanent service, the respondent required the petitioners to convert their permanent service to casual service by demanding that they sign letters titled employment on casual terms of service. The letters of casual employment were issued to the petitioners on diverse dates and they are attached on the supporting affidavit of Peter Wambugu Kariuki. Each of the letters specified the duties of the affected petitioner and that the casual employment would be subject to the following conditions, namely:

i. That it will be for unspecified period not exceeding three months effective from the commencement date as stated in the letter.

ii. That the wages would be determined as per a daily rate set out in the letter.

iii. That the employee would perform the assigned duties to the satisfaction of the respondent at all times; failing which the services would be terminated without any notice.

iv. That under the agreement the employee would not have any other claims against the respondent apart from the wages.

v. That the employment on casual basis did not guarantee confirmation to the permanent establishment.

c) A perusal of the letters of the casual employment shows that they provide for duties of a permanent nature and which the petitioners had performed for a long time on permanent basis since their respective dates of initial engagement. The duties as set out in the respective letters included:

i Herding of livestock and ensuring their safety and well being in the field both day and night as arranged by the supervisor through a duty roster.

ii General farm labour as assigned by the supervisor.

iii. Herding of the dairy herd including their milking and as required to assist in keeping of milk records as arranged by the supervisor.

iv. General farm duties including fencing and general repair of centre livestock paddocks and related duties.

v. Livestock handling practices that include designing, making and maintenance of livestock handling equipment and fencing.

d) About September, 2010 after periods of non-payment, the respondent offered to pay the petitioners part of their unpaid salaries as full and final payment up to the date of the payment and upon acknowledging the payment the respondent would offer the petitioners the contract of conversion from permanent

employment to casual employment. Since the petitioners considered themselves as permanent employees they decided to decline and to reject the conversion contracts. It was the petitioners' case that such unilateral variation of their terms of service was a gross violation of their constitutional rights.

e) The respondent had involved Administration Police Officers to force the petitioners to sign and accept the conversion contracts or to get evicted from the housing provided by the respondent. Subsequently the respondent locked out the petitioners from 1.10.2010 and the Kenya Plantation and Agricultural Union filed on 26.10.2010 Industrial Cause No. 1303 of 2010 at Nairobi on behalf of the petitioners. The award in that cause as delivered on 17.05.2011 by the Honourable Justice James Rika and the members of the court (then a tribunal) is the last appendix on the supporting affidavit accompanying the petition. In that case the claimant argued the case on the basis of the facts as set out in this judgment and argued that the new contracts were prejudicial to the employees. The court was asked to order an end to the lockout, the employees to be protected from signing the conversion contracts which were detrimental to them, old contracts be terminated before negotiating the new contracts, all wages and outstanding allowances be paid and the threatened eviction be declared unlawful. In that cause the respondent urged the court to reject the prayers and to uphold the counterclaim by ordering the grievants to pay the respondent arrears of rent and to be ordered to surrender vacant possession of the institutional houses. In deciding the case, the court found that there was no material to grant either the claim or the counterclaim and both were rejected.

f) That the court then sitting as a tribunal was of the opinion that the petitioners as grievants in that cause had failed to show that there was a lockout and had opted to end the employment relationship by not renewing that relationship; by their rejection to sign the conversion contracts from accrued permanent to casual employment. Accordingly, by operation of the award in that cause, their employment was terminated effective 1.10.2010, the date of the lockout without any written notice and with no payment of the terminal dues.

g) The petitioners' case is that their rights to fair labour practices, fair remuneration and reasonable working conditions were violated by the respondent's decision requiring them to enter into fresh contracts on casual terms after many years of service. Further, failure by the respondent to provide the petitioners with written contracts specifying the employment particulars after the initial three months contract on casual basis was in contravention of the cited provisions of the Constitution, the Employment Act, 2007 and the Universal Declaration on Human Rights as well as the African Charter on Human and Peoples' Rights.

It was submitted for the respondent that the petition was hollow, wanting in merit and an abuse of the due process of law. It was submitted that the petition was *res judicata* in view of the earlier court decision in the cited cause No.1303 of 2010 at Nairobi. The issues of fact and law, it was submitted, were similar in this petition as they were in that cause. Evidence was given, parties examined and a final decision was made. The court rejected the evidence and the claim was rejected and dismissed. The respondent therefore submitted that the claim in the petition was disguised as a claim seeking declarations and the same should be dismissed. In such circumstances the court lacks jurisdiction and the respondent's case is that the petition must fail. It was submitted that litigation must come to an end as the court was being invited to review its own decision.

The respondent further submitted that in 2010 the petitioners did not decline to sign the renewal contracts because they were already permanent staff but they did so by their own volition as an election and as shown by the award in cause No. 1303 of 2010. It was submitted for the respondent that PWK1 on the

supporting affidavit showed that there was interrupted service.

The following are the issues to be determined in this petition:

1. Whether the doctrine of *res judicata* or abuse of the process of the court apply in the circumstances of this case.
2. Whether the petitioners' rights were breached as alleged.
3. Whether the petitioners are entitled to the remedies as prayed for in the petition.

On the first issue it was submitted for the petitioners that cause No. 1303 of 2010 was about nonpayment of wages, unlawful lockout and wrongful eviction of employees and the claims were totally different from the claims in the present petition. Further it was submitted that the Industrial Court then established as a tribunal lacked jurisdiction to enforce fundamental rights and it cannot be said that the petitioners would have enforced their rights as claimed in this petition before the Industrial Court Tribunal as then established. Thus, it was submitted that the petitioners had filed this petition in the High Court and later transferred to the Industrial Court as established in the Constitution of Kenya, 2010 and the Industrial Court Act, 2011 as a court of record to determine disputes and enforce employment and labour rights as prayed for by the petitioners.

To urge a finding of *res judicata* and in alternative dismissal of the petition on account of abuse of court process, the respondent cited some authorities. First was the decision by the High Court in **David Kamau – Versus – Savings & Loan Kenya Limited.**^[1] The Honorable court upheld a preliminary objection and struck out the suit because it was an abuse of court process despite the finding that the plea of *res judicata* did not apply because the previous suit in issue had not been fully heard and determined. The learned Judge at the last page of the ruling stated as follows:

“In my considered view, a comparison of the above pleadings shows that the Plaintiff’s claim in the current suit bears a striking resemblance to the previous suit. The matter directly and substantially in issue is basically the same. Notwithstanding the few cosmetic changes which make the current suit appear to be based on subsequent events, the substratum of both suits is the exercise of the Defendant’s statutory power of sale and the Plaintiff’s attempts to determine how that power should be exercised. Moreover the issue of accounts and statutory notice (which are being introduced in the present suit) are issues which could well have been raised in the previous suit.

The Plaintiff is therefore in breach of Order VII rule 1 (2) of the Civil Procedure Rules in failing to disclose the existence of the previous suit. I find that the present case is an abuse of the process of the court as is intended to circumvent the ruling of Azangalala J in High Court Civil Suit No. 1566 of 1999 and that of the Court of Appeal in Civil Application No. Nai. 255 of 2005 dismissing the Plaintiff’s application for injunction pending the hearing of its intended appeal against the ruling of Azangalala J in HCCC No. 1566 of 1999. On this ground I do uphold the preliminary objection and

strike out the Plaintiff's suit as being an abuse of the process of the court,"

Secondly, the respondent referred to the case of **Maingi Munyoki –Versus- Rebecca Cieranja.**^[2] The court held that it was an abuse of court process to re-litigate the same issue or a judge of concurrent jurisdiction to sit on appeal against a decision made by such other judge of concurrent jurisdiction.^[3]

Thirdly the respondent's counsel referred to the High Court decision in **Guled Housing Company Limited –Versus- Dekee Holdings Limited.**^[4] The court was of the view that whether a matter is *res judicata* was a matter of substance and is not how the orders of a judge are couched but what was decided by the court and whether the court conclusively decided the matter before it. The issue of *res judicata* is not merely of form but of substance.

The court has considered the authorities and has also considered its decision in **Meshack Ageng'o Omondi –Versus- Eldoret Municipal Council and Another,**^[5] in which the court stated:

“Res-Judicata is an affirmative defense barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transactions and that could have been, but was not raised in the first suit (See Black's Law Dictionary, 9th Edition). The three essential elements are:

(a) an earlier decision on the issue;

(b) a final judgment on the merits; and

(c) the involvement of the same parties, or parties in privity with the original parties.

The doctrine of *res-Judicata* aims at ensuring that litigation comes to an end. An issue that has been conclusively decided upon by a competent judicial authority must not find itself before the same or other competent judicial authority for reconsideration.”

The court has to evaluate the circumstance of the current petition in view of the cited decisions and determine whether the petition is *res judicata* or an abuse of the process of the court or it is not barred on such considerations.

Industrial cause No. 1303 was filed on 26.10.2010, was heard and closed on 21.03.2011 and the ensuing

award was made on 17.05.2011. The cause was heard and concluded by the Industrial Court then established and constituted as a tribunal and not as a superior court of record as provided for in Article 162(2) (a) as read together with Article 165(5) (b) of the Constitution of Kenya, 2010 which came into effect on 27.08.2010. Indeed, the award was signed by the Honourable learned Judge and two members as it obtained in the statutory provisions that applied to the then court established as a tribunal. The Industrial Court as a superior Court of record was established under the Industrial Court Act, 2011 which came into operation on 30.08.2011, long after conclusion of cause No. 1303 of 2010 by the award delivered on 17.05.2011. On the other hand, this petition was filed on 13.07.2012 at a time the Industrial Court as a superior court of record had not been appointed and had not become operational.

Thus, it is the opinion of the court that the petitioners who set out to enforce alleged breaches of their fundamental rights were entitled to move the High Court and subsequently the petition was correctly transferred to this court as the constitutional and statutory forum for enforcement of the rights and freedoms as they arise and relate to employment and labour relations. It is the considered opinion of this court that the court sitting as a tribunal in cause No. 1303 of 2010 was not vested with the primary statutory or constitutional jurisdiction to enforce fundamental rights and freedoms.

The court further considers that the issue of fundamental rights and freedoms as pleaded in the petition was not a mere clothing of fashion and form to circumvent the decision in cause No. 1303 of 2010. Far from form and mere fashion, it was a substantive constitutionally protected matter that goes to jurisdiction and which the petitioners could only ventilate before the superior court of record and not the tribunal that had decided that cause. It was an issue never raised before the tribunal, could be so raised collaterally but without finality of its determination and even if it had been so raised and decided upon by the tribunal, that would not operate as a bar to the petitioners seeking a determination on the issue before the constitutionally prescribed forum namely, the superior court of record. Taking into account the doctrine of justiciability which answers the question as to the best and correct forum to entertain and determine the dispute at hand, it is the considered opinion and holding of the court that enforcement of fundamental rights and freedoms in disputes relating to employment and labour relations is properly vested in this court by the Constitution and the Industrial Court Act, 2011 as a superior court of record.

While making this finding, the court recognizes the constitutional obligation imposed, by Article 10 of the Constitution, upon all state organs, state officers, public officers and all persons to uphold the national values and principles whenever applying or interpreting the Constitution; enacting, applying or interpreting any law; or making or implementing public policy decisions. The provision is an embodiment of the idea of taking the constitution to the people which the preamble to the Constitution recognizes as the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Accordingly, each and every individual person has the constitutional obligation to uphold the national values and principles as prescribed in the Article. The court considers that obligation as a necessary and mandatory prescription towards the realization of the provisions of the Constitution but which does not override the constitutional authority of the superior courts as the primary and authoritative forum for enforcement of the fundamental rights and freedoms in accordance with the Constitutional and enabling statutory provisions.

Accordingly, with respect to the first issue for determination, the court finds that the petition is not barred on account of *res judicata* or abuse of the process of the court.

The second issue for determination is whether the petitioners' rights were breached as alleged. The petitioners cited Articles 22, 23, 28 and 41 of the Constitution of Kenya, 2010, Article 23 of the Universal Declaration on Human Rights and Article 15 of the African Charter on Human and Peoples' Rights. However, during the submissions counsel for the petitioners narrowed down to Article 41(1) of the Constitution which provides that every person has a right to fair labour practices.

What is this right to fair labour practices?

First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in Article 41(2), (3), (4) and (5) of the Constitution. Under Article 41(2) every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Under Article 41(3) every employer has the right to form and join an employers' organization; and to participate in the activities and programmes of an employers' organization. Under Article 41(4), every trade union and every employers' organization has the right to determine its own administration, programmes and activities; to organize; and to form and join a federation. Under Article 41(5) every trade union, employers' organization and employer has the right to engage in collective bargaining. These constitutional provisions constitute the foundational contents of the right to fair labour practices.

Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work.

Thirdly, it is vital to appreciate the antagonistic challenges this court and other relevant institutions are likely to face towards the realization of the right to fair labour practices. These challenges manifest as difficult policy considerations that inform decision making in determining disputes relating to fairness in employment and labour relations and prescribing appropriate remedies. In that regard, two dilemmas have emerged for which it is not easy to envision the evolution of employment and labour relations and the role of the law in that evolution. The dilemmas have been expressed in the following terms:

"...These are first whether to promote collective labour relations founded on effective bargaining which can only be based on strong trade unions, or whether to encourage the progressive dilution of 'bargaining' in favour of the more ambiguous 'information and consultation standards'....The second dilemma is to determine the extent to which it is legitimate to qualify management prerogatives, which some employers would like to exercise subject to little or no restriction, by individual employment rights."^[6]

In our constitutional and statutory framework on employment and labour relations, a mixed prescription with regard to the identified dilemmas has been provided for and it is the opinion of the court that in resolving disputes about the right to fair labour practices, every individual case shall be considered and determined on its unique merits. Admittedly, these dilemmas have continued to confront this court in the many cases that come before the court and hopefully a coherent approach based on the nature of the cases presented will evolve or emerge.

In this petition it was submitted that the petitioners had served for a long period of time without any break in service and thereby bringing to an end their casual employment status. Further, the accrued period of unbroken service thereby entitled and emplaced them to a permanent employment status. To cement their case the petitioners submitted that their continuous service beyond three months converted them from casual service to permanent terms of employment with full benefit of the minimum terms and conditions of service under the Employment Act, 2007.

For the respondent it was submitted that sometimes in September, 2010 the petitioners had indicated that they did not wish to remain in employment of the respondent and they declined to sign the new contracts of service. The respondent paid the full wages up to 30.09.2010 being the last day they had served and thereby bringing to an end the employment contract without any liabilities.

A casual employee is defined under section 2 of the Employment Act, 2007 to mean 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. The court has considered the material on record and finds that the petitioners were not casual workers because they were engaged for a longer period than twenty four hours at a time. They served for many days without any break in their service. Each of the petitioners served for more than three continuous months and the respondent was required to reduce their contract of service in writing as provided for in section 9 (1) of the Act.

The petitioners have submitted that the minimum terms of service under the Act applied to their service. Under section 10 (7) of the Act, it is the burden of the respondent to prove or disapprove the terms of employment in absence of the written terms. It is the finding of the court that the respondent has failed to discharge that burden. It is the further finding of the court that the respondent breached the respondents' respective rights to fair labour practices by failing to uphold the cited provisions of the Act. It is the considered opinion of the court that an employer subjects the employee to unfair labour practices as protected in Article 41 (1) of the Constitution if the employer, like in this case, by omission or action fails to uphold the statutory provisions that protect the employee. The court also finds that casual employment does not exist merely because the agreement between the parties states that they are in such arrangement; casual employment is a state of existence to be deciphered from the facts of individual cases as weighed against the cited statutory definition of casual employee.

As already found by the court, the petitioners were never in a relationship of casual employment with the respondent. A considerable attention need to be paid to provisions of section 37 of the Employment Act, 2007 which provides for conversion of casual service to permanent employment. In particular subsection 37(5) provides that an employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months 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 the Act had he not initially been employed as a casual employee. Further subsection 37(4) empowers the court to vary terms and conditions of service of such employee by applying terms and conditions consistent with the provisions of the Act. It is the finding of the court that these provisions of the Act fully apply to the petitioners' circumstances.

The petitioners as permanent employees were entitled to a termination notice and a hearing before their

termination as provided for under section 41 of the Employment Act, 2007. Upon raising genuine complaints about their permanency in service, the respondent decided to act by unilaterally treating the petitioners' service as terminated. Such attitude and action on the part of the respondent subjected the petitioners to inhuman and degrading treatment contrary to Article 28 of the Constitution which states that every person has inherent dignity and the right to have that dignity respected and protected.

The respondent submitted that it never terminated the services of the petitioners. However, in **Joseph Mwangi –Versus- the Board of Governors, Mwiruti Secondary School**, this Court stated as follows:

“The next issue for determination is whether the claimant was unfairly terminated. The court considers that the employment relationship is of high trust and confidence under which the employer and employee must at all times uphold cooperation. Thus, it is the court’s opinion that conduct by the employer that undermines such high trust, confidence and cooperation thereby occasioning breakdown in the employment relationship amounts to termination of the contract of employment. In such circumstances, it is the view of the court that a dismissal by way of constructive termination occurs if, the employee leaves employment by reason of the employer’s breach of his, her or its obligation.”^[7]

The court finds that the opinion applies to this petition because the respondent breached the high trust, confidence and cooperation implied in every contract of employment when the respondent deliberately refused to acknowledge the long term of service by the petitioners and declined to resolve the genuine grievances surrounding the signing of the contract for conversion to casual service. The court finds that by conduct of the respondent, the petitioners' contracts of service were terminated constructively.

In view of the findings of the court on the first and second issues, the court finds that the petitioners are entitled to the remedies as prayed for with the modification that the wages were agreed upon at all material times; in view of the circumstances of the case, payment of wages for one month in lieu of termination would be reasonable; and payment of six months gross salaries at the rate of the salary at termination for the unfair constructive termination is fair - especially that the petitioners were in short term contracts but for the conduct of the respondent that led to crystallizing of the long term permanent employment. The court finds that there was no material evidence on record to support the other compensatory reliefs in the prayers made in the petition and the same were therefore not tenable. A claim for gratuity or service pay is not justified because the material on record show that the petitioners were members of the National Social Security Fund and the relevant remission was made by the respondent.

Finally, the court is alert that the respondent is a public body and is bound by the established standards for employment in the public service. This court identified the applicable standards in the case of **Robert Mureithi Ndegwa –Versus- the Minister for Tourism** where it was stated as follows:

“The fourth question is: What are the constitutional and statutory standards for appointment of the Board’s chief executive officer? It was submitted for the respondent that renewal of the petitioner’s contract of service would contravene Section 37 of the Tourism Act, 2012 and Articles 10 prescribing democracy and participation of the people, 73 on responsibilities of leadership, 75 on conduct of public officers and 77 on restriction on activities of state officers. The court has

considered these provisions and is of the opinion that the main issue for determination is whether the renewal of the contract would undermine or derogate from any constitutional or statutory provisions governing recruitment, appointment, promotion or retention in public service. Article 232 of the Constitution provides for the values and principles of public service to include:

a) high standards of professional ethics;

b) efficient, effective and economic use of resources;

c) responsive, prompt, effective, impartial and equitable provision of services;

d) involvement of the people in the process of policy making;

e) accountability for administrative acts;

f) transparency and provision to the public of timely, accurate information;

g) subject to paragraph (h) and (i), fair competition and merit as the basis of appointments and promotions;

h) representation of Kenya's diverse communities; and

i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women; the members of all ethnic groups; and persons with disabilities.

Section 22 of the Public Officer Ethics Act, 2003 provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections. Thus by the Constitution and by statute, the standards for undertaking public employment have been determined....”[8]

The court considers that the foregoing standards that govern employment in the public service essentially discourage and abolish casual employment in the public service. Casual workers do not qualify as public officers within the tests set in the standards for employment of public officers. For instance, by nature of

casual service within the meaning assigned in the Employment Act, 2007, casual workers do not and cannot enjoy the constitutional protection of public officers from victimization or discrimination for performing their duties and entitlement to due process in event of termination as provided for in Article 236 of the Constitution and section 41 of the Act. Further, recruitment and selection process in engagement of casuals opens itself to failure to meet the constitutional and statutory tests of participation, competition, merit, inclusivity, representation, integrity, competence and suitability. In delivery, casual workers are unlikely, and are invariably unable, to comply with the relevant public service codes of conduct, ethics and integrity which are at the core of good public service delivery. Casual employment in the public sector easily falls prey to likely corrupt practices as manifested in kleptocracy in remuneration processes; favoritism or nepotism or bribery or cronyism in appointment processes; unprofessional service delivery through intellectual dishonesty to preserve the employment; and exclusion of competent and suitable persons from otherwise permanent employment. The pretended casual worker is dejected and de-motivated as it happened in this case because the legal protections are undermined in the casual employment relationship. Thus, in event of temporary duties, it is the opinion of the court that employers in public service would rather invoke public procurement laws and engage private sector service providers to avoid contravention of the constitutional and statutory provisions on public employment and whose framework does not only discourage but in effect abolishes casual employment in the public service.

In conclusion judgment is entered for the petitioners against the respondent for:

- a) A declaration that the respondent violated the petitioners' rights to fair labour practices namely reasonable working conditions including permanent terms and conditions of service as protected under Article 41(1) of the Constitution and the provisions of the Employment Act, 2007.
- b) A declaration that the petitioners were permanent employees of the respondent and the termination of their employment was constructive, unfair and unlawful.
- c) A declaration that each of the petitioners is entitled to terminal payment of wages for one month in lieu of termination notice; and payment of six months gross salaries at the rate of the salary at termination for the unfair constructive termination to be computed by petitioners, filed in court and served within fourteen days from the date of judgment and for recording in court at a convenient date; and the respondent to pay interest thereon from date of this judgment till full payment.
- d) An order for the respondent to pay the costs of the Petition.
- e) The respondent to deliver to each of the petitioners a certificate of service within thirty days from the date of this judgment.

Signed, dated and delivered in court at Nakuru this **Friday, 3rd May, 2013.**

BYRAM ONGAYA

JUDGE

- [1] Ruling delivered by Honourable Justice H.M.Okwengu on 14.03.2007 in Civil Case No. 112 of 2007, High Court at Nairobi, Commercial and Tax Division.
- [2] Ruling delivered on 3.12.2009 by Honourable Justice Mary Kasango in HCCC No. 64 of 1986 at Meru.
- [3] See last page of the Ruling
- [4] Ruling delivered on 20.01.2012 by Honourable Justices Mumbi Ngugi and D.S Majanja in High Court Civil Appeal No. 381 of 2011at paragraph 20.
- [5] Ruling delivered on 12.10.2012 by Honourable Justice Byram Ongaya in Industrial Court Cause No. 15N of 2010 at Nairobi at page 5-6 of court copy.
- [6] See Richard Painter & Ann Holmes, Cases and Materials on Employment Law, Oxford University Press, (2002) 4th Edition at page 9.
- [7] Judgment in cause No. 13 of 2012 at Nakuru formerly cause No. 610 of 2012 at Nairobi delivered on 03.05.2012 by Honorable Justice Byram Ongaya.
- [8] See paragraph 20 of the Judgment in Industrial Court Petition No. 41 of 2012 at Nairobi delivered on 16.11.2012 by the Honourable Justice Byram Ongaya.