

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E618 OF 2021

OMONDI JUSTUS RANGA'NGA & 28 OTHERS..... CLAIMANTS

VERSUS

KCB BANK KENYA LTD.....RESPONDENT

AND

BANKING, INSURANCE AND FINANCE UNION (BIFU) INTERESTED PARTY

JUDGMENT

The claimants are seeking the following orders that;

- a) *A declaration that the work practices, policies, guidelines, directions, and their implementations have been discriminatory towards contract clerks.*
- b) *A declaration that the Claimants' right to fair labour practices have been breached.*
- c) *A declaration that the respondent has violated the principle of equal pay for equal work and work with equal value*
- d) *A declaration that the claimants are all unionisable staff and are entitled to the CBA benefits.*
- e) *A declaration that the employer willingly exposed contract staff to an unhealthy work environment and compensate for the injuries.*
- f) *A declaration that the type of contractual relationship is sham and bogus and substitutes it with an order confirming the roles into permanent and pensionable.*
- g) *Compensation for Defamation at the place of work*
- h) *Compensation for Retaliation.*
- i) *Compensation for slavery or servitude.*
- j) *Review and proration of claimants' salaries and applicable benefits to*

match roles and years of experience.

k) *Tabulation and compensation of lost income to include underpaid salary, backdated meals, underpaid overtime, pension not granted, house allowance, and bonuses missed as below;*

i. Unpaid salaries;

ii. Annual leave not taken Ksh.4,912,000;

iii. House allowance Ksh.11,500 per claimant;

iv. Underpaid overtime;

v. Bonuses pay Ksh.67,127;

vi. Pension Ksh.530,303 for each claimant;

vii. Un-backdated meals Ksh.7,200;

l) *Compensation on medical benefits missed.*

m) *Compensation for pay discrimination for equal work, work with equal value, and work with greater value.*

n) *The respondent be ordered to align the entire work environment to eliminate any form of direct or indirect discrimination in the workplace.*

o) *Costs of this suit.*

p) *Any other order that the court may deem fit and just to grant in the circumstances.*

1. The claimants are all former employees of the Respondent Bank. They filed the memorandum of claim dated the 19th July 2021 which was later amended by the claim dated 30th August 2021. The claim by the claimants is that there was discrimination in their pay for equal work of equal value and greater value.

Claim

2. The claimants' case is that on diverse dates in the years 2013, 2014, 2015, 2016, they entered into a contract with the Respondent as contract clerks and were deployed to work at Contact Centre (Kencom House) under the Customer Experience Department which later became a division in 2018.

3. The Respondent extended the contracts of the claimants to date with the latest extension scheduled to end on 31st December 2021.

4. The claimants were deployed to work with the Permanent Clerks within two main sections of the Customer Experience Division mainly; Front Office and Back-office clerical roles. Both permanent and contract clerks were issued with a similar job description specifying the skills, experience, challenges, and responsibility required at their respective sections or places of work. The contract and permanent clerks were issued and evaluated with a similar Balanced Score Card (BSC) for similar job responsibilities 4 times a year. The Respondent paid each claimant a monthly gross wage of Kshs. 32,481.00 while similar clerks performing the same duty earn a minimum starting basic salary of Kshs. 67, 157.00 per month. The Respondent thus on account of the existing Collective Bargaining Agreement (CBA) paid the Claimants less by Kshs. 34,646.00 every month. The practice has led to underpayment on account of collective bargaining agreement and discrimination on account of equal pay for equal work.
5. The claimant is also that the Permanent Clerks have an annual salary increment of at least 5% while contract clerks with similar duties do not qualify. The Basic Salary above that is, Ksh.67, 157.00 for permanent clerks attract an increment while the gross value paid to the claimants of Kshs. 32,481.00 has never been increased for over 6 years served. This practice amount to direct discrimination given the claimants performed similar duties and also ought to be bound by similar CBAs. The Claimants are therefore denied an annual increment of at least Kshs. 3,356.35. The practice has led to underpayment on account of the CBA and discrimination on account of equal pay for work of equal value.
6. As a result of Salary underpayments, direct benefits and or pays such as overtime have been undervalued given that overtime is pegged on basic salary. A Permanent clerk's overtime is high, about Kshs. 614 per hourly normal rate and Kshs. 820 double hourly rate and is also dynamic, that is, it is subjected to annual increment. On the other hand, a Contract clerk has about Kshs. 274.22 normal hourly rate and Kshs. 365.63 double rate and is static, that is, not subject to annual increment. The practice has led to the underpayment of at Ksh.446 for double hourly overtime rate and Kshs. 340 for normal hourly overtime rate on account of CBA and discrimination on account of equal pay for equal work.
7. Permanent Clerks are provided with Annual Leave days of 28 days while contract clerks are awarded 24 days. Permanent clerks receive an annual Leave Allowance of Ksh.10, 500.00 while contract clerks performing similar

responsibility do not qualify. The Claimants are therefore denied pay for extra days worked (4 days) as well as an annual Leave Allowance of Kshs. 10, 500.00. The practice has led to underpayment on account of CBA and discrimination on account of equal pay for work of equal value.

8. Permanent clerks with a similar job description as contract clerks are provided with a House Allowance of Kshs. 11, 800.00 while contract clerks are exempted. The practice has led to underpayment on account of collective bargaining agreement and discrimination on account of equal pay for equal work.
9. Contract employees currently have Kshs. 300, 000.00 and Kshs. 50, 000.00 limits as inpatient and outpatient medical cover respectively while their permanent clerks have Kshs. 650, 000.00 and Kshs. 130, 000.00 as inpatient and outpatient respectively. The practice has led to discrimination on account of equal treatment and benefits for equal work.
10. In their previous engagement (2014, 2015, 2016), contract clerks had not been provided with medical cover while permanent staff performing similar duties were provided. The practice has led to discrimination on account of equal treatment and benefits for equal work.
11. Until 2019, contract clerk spouses were not allowed to use the medical cover, while the permanent clerks were allowed to include their families in the cover. The practice has led to discrimination on account of equal treatment and benefits for equal work.
12. The Respondent has a well-defined pension scheme and only contribute and support the permanent clerks while directly discriminating against the claimants some of whom have worked for over 8 years. In February 2019, the claimants began to engage the employer through HR Business Partner, Director Customer Experience regarding unfavourable terms in which claims were dismissed. The claimants being aggrieved; they alerted the HR Director of their grievances who ignored the pleas. After 21 days the matter was escalated to the CEO and a meeting was organized by HR Business Partner where the claimants' pleas were dismissed. Later and after referring the matter to the Ministry of Labour a conciliatory meeting was arranged and attended by the HR Director, GSSD Director, Head Employee relation and wellness, Head Reward, Ag Head Customer Experience, and HR Business Partner. In the meeting, the HR Director yelled and shouted at the claimants and issued threats.

13. The claim is also that on 29th April 2021, the employer separated contract clerks from permanent clerks and redeployment letters were issued to both permanent and contract clerks. An email from management sent to one concerned contract clerk advised that effective 29th April 2021, the employer mapped Inbound Calls, Emails, SMS, and social media, Service Compliance, Quality Assurance, Retention, and Communication as contractual roles. Similarly, Support, Quality and Recovery (SQR), Card Authorization, CX TT, Process Change, and Switchboard were mapped as permanent roles.
14. The claimants' case is that the employer has failed to insert the CBA clause in their contracts in terms of Section 59 (3) of the Labour Relations Act. Additionally, it has failed to remit deductions to BIFU despite express requests and interest. The employer has maintained that the claimants are not unionisable.
15. The employer has only implemented adjustments relating to meals and supper allowance to match the newly negotiated rate. However, in terms of backdating the benefits, only permanent staff have enjoyed the benefits. The employer has failed to honour the minimum starting salary for clerical work for contract clerks as stipulated in the CBA.
16. The Respondent has used CBA for their benefit while denying the contract staff their rightful dues. For instance, when it came to disciplinary issues, the employer quotes provisions of CBA. On 26th November 2020 the employer quoted Clause 5 (b)iv) of the CBA while issuing cautionary letters to contract staff. By citing the provision when it benefits the Respondent thereby disadvantaging the contract clerks, the Respondent has demonstrated bias and impartiality towards the provision of the instrument. The employer keeps on referring to claimants as casual staff both in written and verbal forms despite having brought the matter to their attention. The Claimants thus cannot access the loan facility; in addition, it is embarrassing to claimants' family members and mentors.
17. On 21st April, 2021 the respondent sent selective emails to permanent employees to be considered for vaccination at NBK building, a building near the place of work while advising contract staff to travel to Kiambu on 23rd April, 2021 for the free vaccination. On 26th June, 2021 the respondent advice on the second vaccine intake was that permanent staff and line managers to visit the KCB clinic for vaccination and ignored the contract staff.
18. There was discriminatory treatment contrary to Article 27 of the Constitution.

Being paid lower wages against the permanent employees and clerks yet the claimants were clerks performing the same duties as envisaged under the job description and BSC amounted to pay discrimination. The provided benefits such as leave allowance, house allowance to permanent staff and not the claimants resulted in discrimination. Permanent staff were awarded bonuses based on the final BSC score while contract staff performing the same tasks under similar job descriptions and assess under the same tools did not qualify for a bonus. This treatment amounted to slavery and servitude outlawed under Section 5 of the Employment Act.

19. The respondent engaged in unfair labour practices by failing to include the claimants in the list of employees working from home regardless of the work conditions following COVID pandemic contrary to Article 28 of the Constitution. All employees of the respondent were facilitated to work from home while the claimants were required to attend physically at work. Their complaints with regard to exposure to an unhealthy work environment was not addressed. The respondent altered roles and separated permanent employees from the contract to discredit any claims of different treatment. This resulted in unfair labour practices.
20. Article 31 of the Constitution protects the right to privacy and the insertion of clause 5(e) into the contracts issued to the claimants violated their right to privacy since this denied the claimants the right to engage in any other trade, business or occupation.
21. There was defamation when the respondent made reference to the claimants as casual employees and their right to secure loan facilities outside the respondent bank and being referred to as a casual is embarrassing and meant to deny the claimants equal treatment as colleagues performing the same role.
22. The employer has never issued any certificate of service for every contract that has ended. The employer's recruitment and promotional policy especially on internally advertised jobs have discriminated against contract staff with the same qualifications. On several occasions, the employer has declined to shortlist contract clerks to internally announced vacancies based on the status. The series of contracts signed although meant to run for fixed periods, there were no contractual obligations to automatically end.
23. The claimants have worked continuously for periods of more than five (5) years,

some 6, 7, and 8 years without being confirmed into permanent positions. Therefore, the purported short-term contracts were a perpetuation of the discrimination and amounted to unfair labour practice.

Response

24. In response, the Respondent's case is that the Claimants were at all material times initially employed or were at the first instance employed pursuant to their respective, distinct and/or separate applications, seeking or applying for diverse and/or distinct positions, for agreed tenures and/or contracts each of which were for a term of one (1) year. Further, the said employment contracts and/or letters of employment expressly set out the terms agreed between the Parties to the respective contracts and/or the applicable terms, which included, inter alia, that the engagements were as contract staff on temporary or term basis for the periods agreed between the Parties.
25. The place of work and station was agreed by the respective Parties. The salary and benefits were agreed by the respective Parties. The terms of service were as laid down in the Respondent's terms of service for casual and temporary employees. The Claimants accepted the agreed terms of employment, as set out in the respective contracts, and thereafter they commenced working, as provided in the contracts of employment letters for each employee. Further, by the Claimants acceptance of their respective contracts and the terms therein, they accepted and agreed to be bound by the agreed terms and the Bank's Policies whose particulars are well within the Claimants knowledge. The Respondent contends that some of the Claimants employed on contract basis wilfully and on their own volition resigned and terminated their respective employment contracts.
26. The Respondent engages or contracts employees on different job cadres or positions within the Bank based on the Bank's needs, vacancies available, amongst other criteria, and as set out in the Bank's Policies and also guided by the applications received by the Bank. At all material times there were independent and separate terms of employment or contracts terms for the respective staff members, which includes contract staff, casuals and permanent staff, and which ensue from separate and distinct applications and negotiations
27. The Claimants benefitted and acquired the applicable benefits during the tenure of the applicable contracts, from the terms set out in their respective contracts,

and as had been agreed by the Parties to the applicable contracts, which included, inter alia, the respective salaries, medical covers and such other contractual benefits.

28. The Claimants employment terms, as set out in their respective contracts, were guided by the offers made by the Respondent, on the Claimants' applications, and guided by the Bank's Policies and vacancies available at the material times. The Claimants' claims purportedly seeking to compare their respective contracts or themselves with other employees of the Bank, whereas those others have their separate and distinct engagements and agreements.
29. Parties to an employment relationship have the right to enter into fixed term contracts of employment, and unless such contracts are obtained through fraud, misrepresentation or through illegal means, the Court should enforce the terms governing such fixed term contracts of employment. Parties are bound by the terms of their respective contracts or the contractual terms agreed between the respective Parties.
30. The Respondent has not infringed any rights of the Claimants or the right of any other staff members of the Bank, as alleged or at all and there is no proof. The Respondent complied with the existing and applicable Covid-19 protocols, as issued by the Ministry of Health from time to time, and it further acted for the best interest of all its employees whilst also complying with its own Policies.
31. The Respondent did not and has never infringed any of the Claimants rights which are enshrined in the Constitution and those under the applicable Statutes. The Claimants entered into their respective contracts, pursuant to their own applications, which had terms that are separate terms to those of other staff members of the Bank, and any differential terms, based on agreements between the respective Parties, cannot amount to discrimination as alleged or at all.
32. The Respondent complied with the Covid-19 directive and protocols, as issued by the Ministry of Health from time to time and it acted and/or made policies for the best interest of its staff members. Further, there is no evidence of breach by the Respondent of any Government directives, Protocols and/or Laws in any way or at all. The Claimants wilfully accepted the terms of their respective contracts and they are thus bound by their terms.
33. The allegations by the Claimants are generalized, vexatious, and extraneous and the same are unmerited and intended to mislead the Court. The Parties to any

contract are bound by their respective contracts and as relates any of the benefits under the CBA, they were and are enjoyed by unionisable employees of the Bank and those who remitted union dues which does not include the claimants.

34. The Respondent avers that the Claimants claim lacks merit as pleaded and is by way of a Memorandum of Claim and not a Petition and/or a Constitutional Petition for infringement of Constitutional rights. There is no evidence, to the required threshold, to support the allegations of infringement of constitutional rights and such other allegations as pleaded by the Claimant. The Claimants have over time enjoyed benefits from their respective contracts and the allegations pleaded are an afterthought, vexatious and unmerited.

Submissions

35. the claimants submitted that they were subjected to inferior terms compared to their colleagues performing the same tasks in violation of Articles 27, 28, 41, and 47 of the Constitution and sections 4, 5, 8, 9, 15, 18, 26, 31, and 37 of the Employment Act 2007. the Employer's Group Staff Remuneration Policy, Group Staff Performance Bonus Policy, Covid 19 Remote and Home Working Guidelines, and Defined Contribution Members Handbook Manual exposed them to unhealthy/ unfair labour practices in comparison to their permanent colleagues. The intention of the Group Staff Remuneration Policy was to ensure fairness and equity, motivate, reward, and recruit and retain. The purpose of the Covid 19 Enhanced Protocol and Covid 19 Remote and Home Working Guidelines was to reduce the risk of exposure to any employee.

36. The claimants submitted that the purpose of the bonus policy was to drive the attainment of strategy, business plans, and profitability by rewarding the attainment of goals and targets. Policy as framed and practiced in the workplace only served to encourage unfairness as only permanent clerks performing similar tasks were considered for the benefits and not the claimants.

37. To illustrate the foreshadowed submissions, the claimants contends that they were paid less salaries, no house allowance nor un-backdated Meal Allowance, no medical cover in some cases and lower medical limit, no leave allowance and granted less leave days. The claimants have provided a table to demonstrate the contention.

38. The position was confirmed by the Respondent's 2nd witness who testified in court that the claimants were enjoying terms that were different from those of permanent staff which were incorporated into the negotiated CBA to which they were not party as they were bound by the terms of their individual contracts.
39. To this end, it is the claimants' argument that they were unfairly discriminated against and were made to enjoy inferior terms of engagement when they were doing the same tasks/jobs as their counterparts which amounts to not only unfair labour practices but is also a violation of their right to equal pay for the same work or assignment.
40. The claimants submitted that their contracts were still in force on the 30th of July, 2021 when they filed the claim against the employer who proceeded to terminate their services on the face of the court's conservatory order issued on the 21st of December, 2021 which suspended their termination in the interim. The claimants urged that the claim be allowed as set out in the amended statement of claim. The claimants also gave a supportive tabulation which the court has also gone through.
41. The claimants relied on, inter alia, the cases of **Humphrey Nyagah & Others v Kenyatta University ELRC Petition No. 93 of 2018** where the court found in favour of the claimants who had been engaged as casuals for a long time under unfavourable terms and proceeded to convert their engagement terms to permanent terms, and **CCK & 5 Others v Royal Media Services 2014** for the proposition that for an expectation to be legitimate, it must be founded upon a promise or practise by the public authority that is bound to fulfil the expectation.
42. The Respondent relying on the Court of Appeal's decision in **Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho 2017 e KLR** submitted that *fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry of the contract* contended that it did not terminate the claimant's employment on the 31st December, 2021 or any other date but that the contracts for each of the claimant's lapsed by effluxion of time.
43. The Respondent also submitted on the issue of jurisdiction of the Court as relates to the order of the 18th January, 2022 that by the time the court granted the conservatory orders against the Respondent from terminating the claimant's contracts, the Respondent had already issued the claimants with the notices of

non-renewal of the contracts dated the 22nd December, 2021 and their contracts had already lapsed by the effluxion of time on the 31st December, 2021. The Respondent argued that the court did not have the jurisdiction to issue the orders as this amounted to the court rewriting the contracts for the parties herein. The Respondent also submitted that they have no knowledge of orders given on the 21st December, 2021 referred to in the claimant's submissions and were never served with the same.

44. The Respondent further submitted that the 17th Claimant voluntarily resigned from employment for reasons that in the resignation letter did not attribute any fault on the Respondent as evidenced at page 176 of the Respondent's bundle of documents and in fact thanked the Respondent for giving him the opportunity for growth and development during the period of employment.
45. The Respondent argued that it is indisputable that for a claim of breach of the Constitution to be sustained, it must at a minimum satisfy a basic threshold which is that the claim must be pleaded with some reasonable degree of precision, identify the constitutional provisions that have been violated or threatened to be violated and the manner of violation and or threatened violation as established in the **Anarita Karimi Njeru v the Republic (1979) KLR**. The Respondent submitted that the claimants' memorandum of claim makes general allegations of breach of provisions of the constitution but no particulars of the alleged infringement are set out so as to give the Respondent the opportunity to respond appropriately and none of the witnesses led evidence to prove infringement of rights under the constitution.
46. On whether the Respondent breached the concept of equal pay for equal work, or work of equal value, the Respondent relied on the Court of Appeal case of **Barclays Bank Kenya Limited v Gladys Muthoni & 20 others 2018 eKLR** where the court said that;

Discrimination means affording different treatment to different persons attributable wholly or mainly to their description...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.

47. The Respondent argues that the claimants failed to discharge their obligation by not producing the job description of any permanent employees to prove both were doing similar jobs or the employment payslips of the permanent employees to prove that they were in the same job group, or doing the same job description or cadre with them whereas they were discriminated against by being paid lower pay.
48. The Respondent also submitted on whether the court has jurisdiction to convert fixed term contracts to permanent employment. The Respondent relied on the case of **Obware Georgiadis Ochieng and 61 others versus Kenya Wildlife Service** which held that;
- i. *where a contract of employment defines the period of employment, unless such is obtained by fraud, misrepresentation or through illegal means, the court will enforce the terms governing such fixed term contract of employment...unless the parties agreed to change the terms of employment to new status, such cannot be forced upon the Respondent as to do so would be to interfere with the freedom and rights of the parties herein...court, on its own motion and without any violation of the law, cannot force the Respondent to change the fixed term contracts issued to the claimants.*
49. The Respondent argues that fixed term contracts between the claimant and the Respondent are recognized by the law and there was no evidence presented by the claimant's witnesses or documents before court to prove or demonstrate that the Respondent has violated any law or rights of the claimants by engaging the claimants through fixed term contracts.
50. the Respondent also submitted on other issues which though the claimant included them in the claim, were never submitted on nor framed for consideration by the claimant.

Determination

51. On the pleadings, the evidence through the witnesses called by the parties, the written submissions and cited authorities, the issues which emerge for determination can be summarised as follows;

- a. Whether the claimant's rights and fair labour practices were violated by the Respondent.
- b. Whether there was discrimination against the claimants by the respondent;
- c. Whether the claimants' contracts were unfairly terminated in the light of the Court Orders issued in the instant matter.
- d. The remedies the claimants are entitled to in line with their prayers in the amended statement of claim.

52. Before delving into the issue as outlined, it is important to give a brief history of the matter. The claimants filed the instant claim on 19th July, 2021 seeking to secure their employment on terms and conditions that were not discriminatory compared to permanent employees employed under terms and conditions superior and negotiated with the interested party for unionisable employees. Interim orders issued to secure employment pending hearing and determination and allow the respondent to respond to the claim but come 31st December, 2021 the respondent terminated employment.

53. On whether the claims made with regard to constitutional violations are proper and ought to have satisfied the threshold outlined in **Anarita Karimi Njeru v Republic**, in employment and labour relations and claims filed before this court, the applicable rules of procedure are the Employment and Labour Relations Court (Procedure) Rules, 2016 and under Rule 7(3), a claimant is allowed the leeway to file a Memorandum of Claim and seek the enforcement of any constitutional rights and freedoms or any constitutional provisions in such a statement.

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

54. In the case of **Francis Atoya Ayeko versus Kenya Police Service & another [2017] eKLR** and in **Jane Angila Obando v Teachers Service Commission & 2 others [2020] eKLR** the court has held that a party is at liberty to file a Memorandum of Claim and urge a claim of constitutional violations, judicial

review and other rights violations. The application of *Anarita Karimi Njeru case* and the technicality addressed under the Court Rules to oust the claim is without foundation.

55. Employment under fixed term contract is legitimate and lawful pursuant to Section 10(3) of the Employment Act. however, an employer is not allowed to apply unfavourable employment terms and conditions on any employee where the basic minimum terms and conditions have been negotiated for a unionisable cadre such as clerks covered under a CBA between the respondent and BIFU.
56. The respondent's case is that the claimants were employed on terms of service as laid down in the Respondent's terms of service for casual and temporary employees.
57. Under Section 2 of the Labour Relations Act, 2007 and the Employment Act, 2007 a causal employee is defined to mean;

“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;

58. An employee who is engaged for payment at the end of each day and one who is not engaged for a longer period than 24 hours at a time is a casual employee.
59. Even though a 'temporary' employee is not defined, the literal meaning of such employment is not one under fixed term contract or permanent term employee. However, each type of employment relationship comes with rights and benefits and where employment is continued for periods exceeding and relating to *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*, whether the employment was initiated under *casual terms* or *temporary terms* the subject employee becomes secured in law and under Section 37 of the Employment Act, 2007 the employee is legally protected and *the contract of service of the casual employee shall be deemed to be one* with rights and benefits secured under the Act.
60. The import of Section 37(1) of the Employment Act, 200 is that where a causal employee;

(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,

61. The initiation of an employment relationship is therefore important and where the respondent's intention was to have the claimants employed as casual and temporary employees though under fixed term contract, the obvious conflict, the court seized of a claim of this nature is directed to vary the terms of service and declare the employee to be employed on terms and conditions of service *consistent with the law.*

62. section 37(3) and (4) of the Employment Act, 2007 is couched in mandatory terms that;

(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.

63. Even where the respondent has the prerogative to employ employees on different job cadres or positions within the Bank based on the Bank's needs, vacancies available, amongst other criteria, and as set out in the Bank's Policies and also guided by the applications received by the Bank, terms and conditions of employment for unionisable employees particularly where the respondent had

secured and negotiated a CBA with the interested party has a bearing. Terms and conditions of employment once negotiated and secured under a CBA are enforceable and applicable to all unionisable employees protected under the law and based on Section 59(5) of the Labour Relations Act, 2007 read together with the Employment Act, 2007 especially the provisions directing the employer to directly apply the terms and conditions of employment of a CBA when issuing an employment contract without distinction.

64. Section 10(3)(e) of the Employment Act, 2007 directs the employer in issuing an employment contract to an employee that;

(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—

(a) any terms and conditions relating to any of the following—

...

(e) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the person by whom they were made; and ...

65. in securing an employment contract, whether for a casual employee, a temporary employee or as the case may require, such contract must give an account to the provisions of any CBA directly affecting the terms and conditions of employment and which must be reasonably be made accessible to the employee. Therefore, the wording, formulation and application of Section 11(3) of the Employment Act, 2007 is deliberate and contextualised to apply to all employees at the shop floor who are unionisable that;

(3) A statement under section 10 may refer the employee for particulars of either of the matters specified in section 10(3)(e) to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the employee.

66. As noted above, the claimants filed suit while in service and challenged the application of the terms and conditions of employment in a discriminatory manner

that failed to recognise the fact of being clerks placed alongside other clerks working on the same job, positions but on different terms and conditions on the face of the CBA regulating terms and conditions of service for unionisable employees. This is not disputed by the respondent save to assert that there was a right to issue term contracts which were accepted by the claimants.

67. As outlined above, rights in employment are protected. On the undisputed facts of the claimants being employed as clerks in the unionisable cadres and the on the declaration that they were not casual or temporary employees and were protected in law; the respondent was bound under Section 26 of the Employment Act, 2007 to apply terms and conditions under the CBA or on terms more favourable to the claimants. The basic minimum conditions of employment ought and should have been the CBA or such other favourable terms and conditions and to go below is unlawful.

26. Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(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 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.

68. The respondent has made claim that Parties to an employment relationship have the right to enter into fixed term contracts of employment, and unless such contracts are obtained through fraud, misrepresentation or through illegal means, the Court should enforce the terms governing such fixed term contracts of employment because Parties are bound by the terms of their respective contracts or the contractual terms agreed between the respective Parties. The legal duty to disclose an existing CBA in the contracting process vests on the employer pursuant to Section 14 of the Employment Act, 2007. Where the employer then proceeds to issue a fixed term contract and blind-sides the employee on the terms and conditions negotiated under a CBA for the cadre of the employee and

despite any consent given by the employee placed under such circumstances, such is direct fraud, it is misrepresentation of facts of the existence of the CBA regulating employment and this being contrary to the law regulating basic terms and conditions of employment is illegal. Such invalidates the term contracts issued by the respondent to the claimants. The lack of knowledge of the existing CBA negates the consent given at the point of signing each contract and the respondent with knowledge failed to disclose favourable terms and conditions of employment resulting in engaging in unfair labour practices outlawed under the Bill of Rights for being unconstitutional pursuant to Article 41 of the Constitution. The respondent has not given any lawful justification for such treatment of the claimant and the belief that they were casual and temporary is found unlawful.

69. The redress where an employer engages in unfair labour practices is payment of damages. General damages are due to the claimants for loss and damage suffered for being placed under terms and conditions of employment less favourable contrary to negotiated terms and conditions applicable to unionisable employees of the respondent and contrary to the mandatory provision of Section 26 of the Employment Act, 2006.
70. The claimants taking account of their circumstances did not sit back and sulk. They took action. While in employment, recognising their constitutional and legal rights violations, they were vigilant in a proactive way, despite the apparent danger of losing employment, which they did when their employment was terminated. The claimants were bold enough to do what is just and lawful. They have sought for protection under the law by the court.
71. The claims premised on the wage differences compared to the CBA rates as the basic minimum are therefore justified. The difference in wage payments on the basic minimum under the CBA becomes an underpayment.
72. These shall be assessed being due.
73. the claimants have claimed that there was discrimination against them. Save for the underpayments, that the application of separate and different terms and conditions employment denied them in equal work of equal value as against similarly placed clerks as they were. The wage disparities applied in benefits application, award of work allowances, though discretionary, the basis was an underlying reason of the claimants being taken as casual and temporary employee and hence did not accrue any benefit of whatever nature.

74. Such treatment in employment and labour relations is addressed under Section 5 of the Employment Act, 2007 that

75. Under the ILO Discrimination (Employment and Occupation) Convention, 1958 'discrimination' in employment is defined to be;

(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;

(b) Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

76. The Supreme Court of Kenya gives an apt summary of what is discrimination in the case of **Law Society of Kenya v Attorney General and COTU Petition No.4 of 2019** that Discrimination entails the unjust or prejudicial treatment of different categories of people in the same circumstances.

77. The respondents defences to the claims of discriminatory treatment asserted that the Claimants entered into their respective contracts, pursuant to their own applications, which had terms that are separate terms to those of other staff members of the Bank, and any differential terms, based on agreements between the respective Parties, cannot amount to discrimination as alleged or at all. As outlined above, the duty to apply basic terms and conditions of employment is placed upon an employer pursuant to Section 26 of the Employment Act, 2007 and where there is a negotiated CBA its basic terms should apply or other terms that are *more favourable*. This is the legal basic minimum. The response therefore confirm the existence of wage disparities premised on no justifiable grounds and resulting in discriminatory practices outlawed under Section 5 of the Employment Act, 2007 and given authority under Article 27 of the Constitution.

78. On the issue of equal pay for equal work, or work of equal value I will directly adopt the submissions by the respondents which are well outlined in reliance on

the Court of Appeal case of **Barclays Bank Kenya Limited v Gladys Muthoni & 20 others 2018 eKLR** where the court said that;

Discrimination means affording different treatment to different persons attributable wholly or mainly to their description...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.

79. In **Dinah Musindarwezo v African Women's Development Network (FEMNET) [2012]eKLR** the court in addressing workplace discrimination held that;

For an employee to prove discrimination the employee has to demonstrate that two or more persons doing the same work were being paid differently with one earning and the other not earning the allowances and that there is no justification or explanation for the difference such as merit, seniority or length of service.

80. This aptly defines the claimants as against the permanent employees who were doing the same work similar to the claimants but paid differently without justification of either merit, seniority or length of service.

81. The claimants were placed at the shop floor as clerks on fixed term contract with other clerks on permanent terms giving them the same description but on different terms and conditions. The restrictive wages as against the privilege accorded to permanent employees based on the CBA terms and conditions means an unfair treatment and denial of normal privileges on account of the nature of employment relationship of fixed term contract. Such failure to treat all clerks equally where no reasonable distinction can be found save that the claimants as clerks were on causal and temporary terms is a direct of discrimination against the claimants.

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82. The recognition of fixed term contract in law is not a justification to pay low wages and create a disparity that is not justified. The right to issue a term contract should not negate the application of the law in its entirety with regard to payment of a basic minimum wage based on a negotiated CBA and the employer is aware of its provisions and duty to apply the CBA on all unionisable employees, and the claimants were such unionisable employee.
83. The court finds there was discrimination against the claimants by the respondent contrary to Article 27 of the Constitution and Section 5 of the Employment Act, 2007.

Reliefs

84. On the reliefs sought by the claimants The claimants worked for the respondent for periods between 6 to 5 years. they have all consistently been in employment for the last 3 years. with each fixed term contract, the injustice under each contract taken into account, the claimants ought to have asserted their rights within 3 years of their employment as they have done in this case pursuant to Section 90 of the Employment Act, 2007. On this basis, the reliefs sought shall go back 3 years and not beyond and with employment terminated on 31st December, 2021 the period to apply shall be back to the contract ending 31st December, 2018 a total of 36 months.
85. Leave days earned by an employee, where regulated under a CBA and without placing the employee under fixed term contract, the CBA rate shall apply.
86. Section 28(3) of the Employment Act, 2007 requires that where there exists the CBA, the terms and conditions of taking annual leave be applied as negotiated for all employees covered in the subject CBA.

(3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave-earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.

87. The difference in leave days taken and that secured under the CBA are due. with termination of employment, the due leave days difference shall be quantified and awarded.
88. Underpayment based on Ksh.32, 481 instead of Ksh.67,157 there was a difference of Ksh.34,646 per month. At the rate of 36 months, each claimant is entitled to a sum of ksh. 1, 247,256 in underpayment.
89. Overtime difference payments based on the basic wage. damages shall apply to address the differential treatment in underpayments taking into account the claimants made a general claim and though not contested by the respondent, the unequal treatment in the award of benefits and privileges and application of a lower wage as against the permanent employees placed the claimants at a disadvantage in any overtime paid.
90. Annual leave days is a right under Section 28 of the Employment Act, 2007. the CBA terms and conditions applicable to the claimants provided for 28 days with an allowance of ksh.10,500 per year. the claimants were allowed 24 days each year while they were entitled to the negotiated 28 days hence the difference of 4 days is due in cash. Total leave days for the 3 years is 12 days.
91. On the due basic wage of ksh.67,157 each month, the 12 days earned and not taken, each claimant is entitled to Ksh.30,995.50.
92. for the 36 months served the claimants are entitled to an annual leave allowance of Ksh.31,500 each.
93. On the claim for a house allowance similar to what the permanent employees are paid at ksh.11,800 per month, Section 31 of the Employment Act, 2007 requires that an employee be provided with housing or a sufficient sum as rent in addition to the wages paid and where the same is regulated under a CBA, the house allowance so allocated is due. Section 31(1) and 2(b) requires that

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service—

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

94. on the negotiated CBA house allowance of Ksh.11,800, for the 36 months in employment, each claimant is entitled to ksh.424,800.

95. On the claim for medical allowances and differential rates for contract and permanent employees, the gist of such provision is to ensure that every employee is covered in the event of sickness and illness. An employer hence invests in a medical cover to address any such eventuality. The respondent made a provision of Ksh.300,000 and Ksh.50,000 limits as inpatient and outpatients respectively while making a provision of Ksh.650,000 and ksh.130,000 for permanent employees respectively which is a clear differential application of a benefit in employment and directly speaks to discriminatory treatment against the claimants. However, where any of the claimants suffered ill-health and the provided medical cover limit was found inadequate for this to be compensated as special damage was not addressed.

96. The differential medical limits shall apply in assessment of general damages.

97. On the claim that there was discrimination in employment, in addressing different cases where there was discrimination against the employee due to wage disparities, the Court of Appeal in the case of **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR** awarded Ksh.7,500,000. In the case of **VMK v Catholic University of Eastern Africa (2013) eKLR** where the court awarded the employee Kshs. 5,000,000 for discrimination on the grounds of health status. in **Keith Wright v Kentegra Biotechnology (Epz) Ltd [2021] eKLR** the court awarded an employee Ksh.5,000,000 on the finding that there was discrimination on the basis of employability which had exposed the

employee directly and indirectly and the court relied on the Supreme Court case of **Gichuru v Package Insurance Brokers Ltd** on the award of damages from Ksh.5, 000,000 for discriminatory treatment in employment benefits.

98. The damages paid range from Ksh.5,000,000 to Ksh.7,500,000 based on current and recent decisions across the awards by superior court. these factors taken into account, the multiple discriminatory practices in terms of wage disparities, denial of equal pay for work of equal value, failure to award bonus for excellent work performance, failure to allocate overtime pay on a preferential rate similar to permanent employees, failure to allocate a medical cover of equal value to other employees similarly situated, taking into account the number of claimants involved, the court finds an award of ksh.2,000,000 each is justified and appropriate.
99. On the claim for payment of bonus, this allocation is as the discretion of the employer save it should not apply in a manner that disadvantages a class of employees similarly placed as others and who are assessed based on the same tools and parameters. The claimants testified that the BSC score card was applied equally to them and appraisals applied to them but on the results, they were not allocated any bonus. Such was without justification.
100. The lapse in payment of a bonus pay is addressed as an element of discrimination against the claimants.
101. With regard to pension, this is due under the CBA between the respondent and BIFU at the rate of 10% of the basic wage and on the number of months worked. on the basis of the due wage of ksh.67,127 at 10% each month and for 36 months total due in pension is Ksh.241,657.20. this is due in pension benefit.
102. On the claim for un-backdated meals, this benefit was paid differently under the umbrella of discriminatory work place practices. This is due as claimed at ksh.7,200 for each claimant.
103. On the claim for defamation and payment of damages, on the allegations made, the claimants not clear on how their reputations were damaged, such claim is lost.
104. Similarly, the claims that there was violation of the rights to privacy, slavery and servitude are left bare.

105. Certificates of service are due for the entire period of employment pursuant to Section 51 of the Employment Act, 2007. Where such Certificates have not issued, these shall issue unconditionally.

106. On costs, the claim is found with good foundation, the respondent well aware of the order to preserve employment went ahead and issued notices leading to termination of employment. had the respondent abided the orders of the court, such would have placed it in good standing. Costs are hereby awarded to the claimants.

Accordingly, judgment is hereby entered for the claimants against the respondent and the following orders issued;

- a) A declaration is hereby issued that the respondent applied unfair labour practices against the claimants;**
- b) it is hereby declared that the Claimants were discriminated against by the Respondent, on account of employment terms and conditions contrary to the CBA rates applicable to unionisable employees and were paid an unequal wage for equal work and work of equal value with permanent employees of the clerk level;**
- c) General damages awarded at ksh.2,000,000 for each claimant;**
- d) Pension due at Ksh.241,657.20 for each claimant;**
- e) ksh.1,247,256 in underpayment for each claimant;**
- f) Untaken leave days awarded at ksh.30,995.50 for each claimant;**
- g) Leave allowance Ksh.31,500 for each claimant;**
- h) House allowance Ksh.424,800 for each claimant;**
- i) Meals allowances ksh.7,200 for each claimant;**

- j) The respondent shall issue the claimants with Certificates of Service for the entire period of employment in terms of Section 51 of the Employment Act, 2007 where such certificates have not issued; and
- k) The claimants are awarded costs.

Delivered in court at Nairobi this 30th day of November, 2022.


M. MBARŪ

JUDGE

In the presence of:

Court Assistants: Okodoi

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