

LEGAL ALERT: EMPLOYMENT LAW DEPARTMENT



Court of Appeal Rules That Rolling Short-Term Contracts Cannot Defeat Permanent Employment Rights

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“The Act was precisely put in place to protect employees who often have no voice against the ‘big brother’ from unfair and poor labour practices that dogged the public and private service for decades.” These are not the words of a newspaper headline or a punchy media soundbite. They are the Court of Appeal’s own words, at paragraph 43 of its judgment in [*Kenya County Government Workers’ Union v Embu County Government & Another, Civil Appeal No. 178 of 2020; \[2026\] KECA 1481 \(KLR\)*](#) by [Kantai, Lesiit & Ali-Aroni, JJ.A.](#)

In that decision, the Court allowed the appeal and set aside the judgment of the Employment and Labour Relations Court. It held that the affected workers, some of whom had served continuously for more than twenty years while performing work of a permanent and continuous nature, could not lawfully be treated as casual employees or retained indefinitely on successive short-term contracts, notwithstanding the terms of their letters of appointment.

The judgment serves as an important reminder to national and county government employers, as well as private sector employers, that the legal character of an employment relationship is not determined by the designation or terms in a letter of appointment. Rather, courts will examine the true nature of the relationship, having regard to its substance, continuity, and the manner in which it was performed. Accordingly, the existence and incidents of an employment relationship are determined by its factual and legal realities, rather than the form or description adopted by the parties.

The Case at a glance

Case: **Kenya County Government Workers' Union v Embu County Government & Another**

Citation: Civil Appeal No. 178 of 2020; [2026] KECA 1481 (KLR)

Court & Coram: Court of Appeal at Nyeri (Kantai, Lesiit & Ali-Aroni, JJ.A.)

On appeal from: ELRC at Meru (Nzioki wa Makau, J.), Petition No. 7 of 2019, judgment of 24th June 2020

THE DISPUTE

The appellant, a trade union, petitioned the Employment and Labour Relations Court on behalf of its members who were long-serving health workers at Embu County facilities, most of whom had originally been engaged by the national government's hospital management boards before devolution. Many had been kept on repeated short-term engagements of three (3) months to one (1) year, renewed over periods reaching up to twenty (20) years, performing duties of a clearly permanent nature. Some letters of appointment described them as "casual" employees despite them being paid monthly and working continuously for years. Such an arrangement does not meet the statutory definition of casual employment under the **Employment Act**.

The union sought, among other reliefs, a declaration that the county had violated its members' right to fair labour practices under **Article 41 of the Constitution**; an order converting their status from casual to permanent and pensionable terms; and a declaration of unlawful discrimination based on unequal pay for comparable work. The trial court had dismissed the petition, holding that it was misplaced and that grievances should have been raised through shop-floor union representatives rather than litigated as a constitutional claim.

WHAT THE COURT OF APPEAL DECIDED

1 Continuous service converts status by law

Employees who are remunerated every month and retained under successive short-term engagements characterised as “casual employment” over an extended period do not qualify as casual employees within the meaning of **section 2 of the Employment Act**. By operation of **section 37 of the Act**, casual employment converts where the employee works continuously for an aggregate period of at least one month, or performs work that cannot reasonably be expected to be completed within three months or more. Repeatedly renewing short fixed-term contracts for decades was, in the Court’s words, **“a roundabout way of avoiding the provisions of the law on casual employment.”**

2 Fair labour practices were violated

Retaining employees on prolonged casual or rolling short-term arrangements is a deliberate circumvention of labour protections and breaches the right to fair labour practices under **Article 41 of the Constitution**. The legal character of an employment relationship is not determined by the description contained in a letter of appointment; courts examine the substance of the relationship, including duration, continuity and the nature of the duties performed.

This judgment complements the Employment and Labour Relations Court’s developing jurisprudence on the scope of its specialised jurisdiction, discussed in our earlier alert on **Consumer Federation of Kenya v Cabinet Secretary for Energy and Petroleum & 4 Others; Eng. Kipkemoi Kibias (Interested Party), Petition No. E153 of 2026**, in which the Court struck out a petition challenging the appointment of KETRACO’s Managing Director and Chief Executive Officer. The ELRC held that the petition did not arise from an employment or labour relationship and therefore fell outside its specialised jurisdiction. Read together, the decisions illustrate the jurisdictional importance of an

identifiable employment relationship. The present appeal arose directly from employer-employee relations, while the public-interest appointment challenge in the KETRACO case lacked the employment nexus necessary to invoke the ELRC's specialised jurisdiction. In case you missed our earlier alert, you can find it [here](#).

Second, on the discrimination claim under **Article 27 of the Constitution** and **section 5 of the Employment Act**, the Court held that the union had not produced sufficient documentary or comparative evidence to establish unequal pay. Although **section 5(7) of the Employment Act** places the burden on an employer to disprove discrimination once a prima facie case has been established, the employer's failure to call evidence did not cure the union's failure to lay an adequate evidential foundation. The discrimination claim therefore failed.

ORDERS

The appeal was allowed, and the ELRC judgment dated 24th June 2020 set aside. The Court declared that the respondents violated the appellant members' right to fair labour practices, and that the employment relationship is not casual, temporary or fixed-term but permanent and pensionable.

The respondents were directed to regularise the affected employees' terms and conditions of service forthwith, in accordance with the Constitution and the Employment Act.

Costs of both the petition and the appeal were awarded to the appellant.

WHY THE DECISION MATTERS

- **Substance over form:** the legal character of an employment relationship is not determined by an employer's designation of a worker as a "casual" employee or by the use of successive fixed-term contracts. Rather, courts will examine the substantive nature, continuity, and duration of the engagement and, where the statutory requirements are satisfied, deem the employment relationship to have been converted by operation of **section 37 of the Employment Act**.
- **Rolling short-term contracts carry significant legal risk:** The repeated renewal of three-to-twelve-month contracts over an extended period may be regarded as evidence of an attempt to circumvent statutory labour protections. Courts will assess the substance of the employment relationship, rather than the contractual arrangement adopted by the employer, in determining the employee's legal status.
- **Exhaustion of internal dispute-resolution mechanisms:** Employees and trade unions should ordinarily pursue any applicable statutory, contractual, collective bargaining or workplace grievance procedures before approaching the Employment and Labour Relations Court. Direct recourse to the Court may, however, be permitted where no adequate mechanism exists, the available process is ineffective, or a recognised exception to the doctrine of exhaustion applies.
- **The evidentiary burden in discrimination claims cuts both ways:** although an employee must first establish a prima facie case of discrimination by adducing evidence of differential treatment, **section 5(7) of the Employment Act** shifts the burden to the employer to prove that the alleged discrimination did not occur. Employers who fail to adduce evidence in rebuttal, including by failing to participate in the proceedings, do so at considerable legal risk.
- **Public employers are not exempt:** the Court was explicit that government employers are expected to model compliance with labour law, not exploit prolonged contractual uncertainty for cost savings.

PRACTICAL NEXT STEPS

County governments, national government agencies, and private employers using casual or repeatedly-renewed fixed-term staff should consider the following:

- **Audit long-serving casual and fixed-term employment arrangements:** Identify employees engaged on successive fixed-term contracts over extended periods, or those remunerated every month notwithstanding their classification as casual employees, and assess whether their employment relationships are susceptible to statutory conversion under section 37 of the Employment Act.
- **Review letters of appointment against actual practice:** Ensure that contractual terms genuinely reflect the nature of the engagement; a mismatch between the terms and the substance of the relationship is a key risk factor identified by the Court.
- **Reassess reliance on rolling fixed-term contracts:** Consider whether repeated renewal of short-term contracts for roles of a clearly permanent nature is defensible, or whether it should be regularised proactively.
- **Prepare to meet the evidentiary burden on discrimination claims:** Employers facing allegations of unequal pay should be ready to produce comparative pay and contract records, and should not assume that non-appearance at trial is a safe litigation strategy.
- **Review applicable dispute-resolution procedures:** While employers should establish and effectively implement statutory, contractual, collective bargaining, and workplace grievance procedures, they should not assume that these mechanisms invariably constitute a mandatory precondition to litigation. Whether the exhaustion doctrine applies will depend on the statutory framework governing the dispute and, in appropriate cases, the nature of the constitutional or legal claims advanced.

OUR ASSESSMENT

This judgment builds upon the Court of Appeal's jurisprudence in [*Kenyatta University v Maina*](#) and [*Chemelil Sugar Company v Otuon*](#), reaffirming that where the requirements of **section 37 of the Employment Act** are satisfied, employees engaged on long-term, continuous, casual or successive short-term arrangements are deemed to be permanent employees by operation of the law, notwithstanding the terms of their letters of appointment.

For county governments in particular, many of which inherited casual and fixed-term health and other staff from pre-devolution structures, this judgment should prompt an immediate internal audit. Left unaddressed, the same exposure that faced Embu County is likely to recur across other counties with similar staffing histories.

ADVISORY SUPPORT

At **Allamano & Associates**, we advise national and county government entities, and private employers, on employment and labour compliance, contract structuring, and dispute resolution before the Employment and Labour Relations Court. Our services include:

- Conducting a legal audit of casual and fixed-term employment arrangements to assess compliance with **section 37 of the Employment Act**;
- Advising on the regularisation of casual and fixed-term employment arrangements, including statutory conversion under **section 37 of the Employment Act** and, where applicable, the transition of eligible employees to permanent and pensionable terms;
- Reviewing and regularising letters of appointment, employment contracts, and employment policies to ensure they accurately reflect the legal character of the employment relationship and comply with applicable law;
- Defending and prosecuting employment and labour disputes before the Employment and Labour Relations Court and the appellate courts; and
- Advising boards and HR functions on compliance with the right to fair labour practices under **Article 41 of the Constitution**.

This Legal Alert is provided for general informational purposes only and does not constitute legal advice. For advice specific to your circumstances, please contact Allamano & Associates.

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