



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION 568 OF 2015

**IN THE MATTER OF ARTICLES 10, 20, 23, 27, 35, 47,
165(3) (b), 258 & 259 (1) (b) OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER CHAPTER (4) OF THE
CONSTITUTION OF KENYA PARTICULARLY ARTICLES 27, 28, 35 AND 47**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE**

AND PROCEDURAL RULES, 2013

BETWEEN

JOE M. MURIUKI.....PETITIONER

VERSUS

NATIONAL AIDS CONTROL COUNCIL (NACC).....RESPONDENT

JUDGMENT

PETITIONER'S CASE

1. The Petitioner through a Petition filed on 17th December 2015 pursuant to Articles 10, 19, 20, 22, 23, 27, 28, 35, 47, 165(3) (b); 258 and 259(1)(b) of the Constitution of Kenya, 2010 prays for the following reliefs:-

a) An order that the Petitioner be appointed forthwith to the position for which he was successfully interviewed; Deputy Director Coordination and Support.

b) A Declaration that the Respondent's action amounted to violation of the Petitioner's right to fair administrative action and Human dignity.

c) A declaration that the Respondent discriminated against the Petitioner on the basis of his HIV status.

d) An order that the Respondent issue the Petitioner with records, documents and information relating to the Recruitment process subject matter of the Petition herein.

e) An order of Compensation in favour of the Petitioner for such damages arising from mental anguish, indignity, embarrassment, inconvenience, ridicule suffered by the petitioner as a consequent of breach of his Constitutional rights.

f) An order for costs of this suit.

g) Any other/further order or relief that this Honourable Court may deem fit to grant.

2. The Petitioner's case is that the Respondent herein advertised for a position of Deputy Director coordination and support in the Daily Nation Newspaper of 29th August 2014 through its agent, Howkins and Associates Limited, a leading International recruitment firm.

3. The Petitioner avers that he applied for the job, was shortlisted, after an interview on 16th September 2014 by the Respondent's recruitment firm; the Petitioner argue that he was then advised by the recruiting firm: M/s Howkins and Associates Limited, that he was successful and that he should follow up with the Respondent for a formal appointment. The Petitioner subsequently did not receive any communication and /or information regarding the recruitment process for about a month after his interview, following which, the Petitioner visited the Respondent's Director Dr. Rose Nduku in October 2014 to follow up the matter; which visit did not elicit any formal communication on the day of the visit or thereafter to which the Petitioner contend he noticed deliberate lack of interest in addressing the issue raised.

4. The Petitioner urge that he made efforts and communicated his grievances regarding lack of communication on that matter and threatened breach of his constitutional rights to various public offices including the office of the first lady, Principal Secretary Ministry of Health and Director of Medical Health, which offices referred him for a meeting with the Director of the Respondent to solve the matter.

5. The Petitioner contention is that the Respondent, vide its Director or any other person, failed to address the issue raised by the Petitioner regarding lack of deliberate communication and information on the recruitment process as well as violation of his rights despite spirited efforts. The Petitioner urge that in utter breach of his rights to fair administrative action, that is expeditious, efficient and lawful, the Respondent instead put up another advertisement for the same position subject matter of the petition herein on 9th January 2015.

6. In the second advertisement it was stated that those who had applied in response to the first advertisement need not re-apply and further the second recruitment process would be carried out by the Respondent. It is petitioners position that prior to the second advertisement, the Respondent did not communicate to the Petitioner or any of the other participants of the first recruitment process the outcome of their interview.

7. The Petitioner aver that due to his persistence in pursuant of protection and enforcement of his constitutional rights; the Respondent vide its director, reached out to Senior Officer of the organization known as Network of people living with HIV in Kenya (NePHAK) and another Senior Officer of PLHIV group known as KETAM separately to discuss the issues raised by the Petitioner with a view to cause them to persuade the Petitioner to abandon the matter.

8. The Petitioner in support of his Petition relies on supporting affidavit sworn on 17th August 2015 and filed on the even date and his oral evidence.

RESPONDENT'S CASE

9. The Respondent is opposed to the Petitioner's petition and relies on its Replying affidavit dated 21st June 2016. The Respondent relies on and adopt the Replying Affidavit sworn by Dr. Rose Nduku Kilonzo on 21st May 2016 together with its oral testimony of 30th January 2018.

10. The Respondent aver that it did advertise for a position of Deputy Director Coordination in the Daily Newspaper dated 29th August 2014 through a recruitment firm, M/s Howkins & Associates Limited. The contract between the recruitment firm and the Respondent's clearly stipulated that the recruitment firm was only responsible to advertise and shortlist candidates for the mentioned position.

11. That the recruitment firm M/s Howkins & Associates Limited conducted interviews and submitted to the Respondent an Interview report which contained the list of the shortlisted candidates, that the firm found suitable for the said position. The report compiled by the consultant firm on the interview and short listing clearly demonstrate that the Petitioner was not the top candidate as alleged and the said report went further to mention the areas of concern regarding the Petitioner as stated in paragraph 10 of the Respondent's Replying Affidavit; in which the report indicated the petitioner scored very low marks in the written interview by scoring 19%.

12. The recruiting firm it is contended was only mandated to recruit, interview and recommended to the Board of Directors of the Respondent to proceed and deliberate at the recommendation.

13. The Respondent state that the final report made by the consultant; recommended that the position be re-advertised because the Applicants who had been interviewed, the Petitioner included, had not met the threshold for the position. It is further respondent's contention that during the advertisement and on shortlisting process there was no engagement at all between the Petitioner and the Respondent herein as the process was wholly carried out by the consultant firm. That the question begin raised by the Petitioner on whether he was successful can rightly be answered by the recruiting firm and not the Respondent. It is Respondent's contention that the advertisement was clear that only successful candidates would be contacted and that the petitioner was not a successful candidate and the firm could not contact him. It is further averred that the Respondent only communicated to the applicants who made it to the final list that was forwarded to the Respondent by the consultant firm. The said candidates were further interviewed by the Respondent's Board of Directors and Petitioner was not among them.

14. It is the Respondent's case that there was no 3rd party involved in the recruitment process as alleged by the Petitioner who is bent to scandalizing and blackmailing the Respondent because he is infected by HIV virus and living positively which the respondent urges is something that was not known to the Respondent and Recruiting Firm during the Interview. It is further contended by the Respondent that the fact that the Petitioner is infected by HIV virus and living positively does not guarantee him the position advertised as the Respondent was keen on qualifications for the candidate to fill the position.

ANALYSIS AND DETERMINATION

15. I have considered the parties rival pleadings, oral evidence, and written submissions, as well as the authority relied upon by the parties and from the aforesaid, the issues arising for consideration are as follows:

a) Whether the Petition filed is misconceived and an abuse of the court process?

b) Whether the petitioner was denied his right of access to information and right to Fair Administrative Action?

c) *Whether the Petitioner was discriminated?*

d) *Whether the Petitioner is entitled to the prayers sought?*

e) *Who is to bear costs of the Petition?*

A. WHETHER THE PETITION FILED IS MISCONCEIVED AND AN ABUSE OF THE COURT PROCESS?

16. The Respondent contend that the Petitioner's petition does not meet the basic threshold for Constitutional Petitions as set out in the case of *Anarita Karimi Njeru vs. Republic (No.1)(1978) KLR 154* as affirmed by the Court of Appeal in the case of *Mumo Matemo v. Trusted Society for Human Rights Alliance & 5 Others NRB CA Civil Appeal 290 of 2012 (2013) eKLR* where the Court stated that:

"A petitioner ought to set out his claim against the Respondent with reasonable degree of precision."

17. It is trite that in a Constitutional Petition, the Petition ought to point to the Articles of the Constitution violated in a manner that makes it possible for the Respondent to answer the claim and enable the Court adjudicate upon it. Upon perusal of the petition filed herein, it is clear that the Petition does not disclose the Petitioner's rights allegedly violated and in what manner and further the prayers being sought by the petitioner are not attainable in law as they are in my view tantamount to creating a contract between the Petitioner and the Respondent, which cannot be executed by this Court.

18. The Petition is further misconceived and an abuse of the Court process because the fact that the petitioner has been championing for the right of the people living with HIV virus does not in any way entitle him to be granted the position of the Deputy Director of the Respondent. From the perusal of the Petition, it turns out that the Petitioner has failed to establish a case against the Respondent. It is in this case the duty of the Petitioner to prove his case by stating the violations or breaches meted against him by the Respondent to demonstrating how and in what manner the violations occurred. The Petitioner has not set out his claim against the Respondent with a reasonable degree of precision. The Petition has filed puts the court in difficulty situation as the Court is left to determine whether indeed the Petitioner's rights were violated given that the same is vague and does not in any way state the violations alleged to have been violated. I find from the petition the Petitioner has failed to make out a case of violation of his constitutional rights, under what articles, and in what manner as enshrined in the constitution but has only made generalized mere averments in the Petition and his supporting affidavit based on information received from a third party who he has not called as a witness in this case and also on the fact that the Petitioner is infected by HIV virus and living positively.

B. WHETHER THE PETITIONER WAS DENIED HIS RIGHT OF ACCESS TO INFORMATION AND RIGHT TO FAIR ADMINISTRATIVE ACTION?

19. The Petitioner contend that he applied for and was interviewed for the post of the Respondent Deputy Director. That the Respondent failed to communicate to the Petitioner the outcome of his interview before re-advertising the position and eventually substantively employed another individual.

20. It is urged by the Petition that the Respondent is a state organ established under **Section 3 of the State Corporations Act (Cap 466) Laws of Kenya** and as a state organ the Respondent was enjoined to facilitate access of information with regard to the recruitment process to the petition herein. It is urged that the Respondent was under duty to communicate the outcome of the interview process to all the candidates in attendance.

21. Article 35(1) (a) and (b) of the Constitution provides:-

"35. Access to information

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”

22. The Petitioner in his evidence confirmed that despite numerous queries through email and letters he was not given any information as regard the outcome of the interviews conducted by the Respondent’s agent.

23. The Respondent contention is that they did all that was expected of them and did not therefore violate the Petitioner’s constitutional right to fair administrative action and human dignity as contended. The Respondent position is that it had a contract with the recruitment firm; M/s Howkins and Associates Limited that required it to advertise; and shortlist candidates for advertised position. The Respondent contend that the Petitioner’s move of seeking information from the Respondent about the interview; when the process was ongoing and even after it had been concluded, clearly indicate a move which was not lawful and with an intention to sabotage, a process being conducted by a consultant which had the mandate to carry out the said process. The Respondent further demonstrated how Petitioner tried to manipulate the Respondent into entry into an unlawful agreement due to his health status which had no nexus at all with the recruitment process.

24. From the evidence on record, it is clear that the Respondent did not at any one point engage the candidates that were interviewed since it had engaged a firm that was contracted to do the recruitment and if the Petitioner wanted any information then, it would have been proper and prudent to have sought that information from the recruitment firm but not the Respondent. It is clear the Respondent had a consulting firm and it was not in any way supposed to communicate with third party. The information sought by the Petitioner was never in Respondent’s possession and it could not release the information that it did not hold as a state organ. In the case of **Andrew Omtatah Okoiti v. Attorney General & 2 Others [2011] eKLR**, the Court stated that,

“Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC’ to avail to him any information that he considered necessary and the same was not granted.” (emphasis mine.

The Petitioner’s allegation that the Respondent did not provide information about the interview does not hold water as every information with regard to the interview was given to the petitioner.

25. From the above it has not been demonstrated that the Petitioner ever sought the information first from the consultant about the outcome of the interview before approaching the Respondent, nor has it been demonstrated that the Respondent had the information as of the time of the requests and declined the request.

C. WHETHER THE PETITIONER WAS DISCRIMINATED?

26. The Petitioner urge that he emerged the winner of the interview held by Howkins and associates Limited on behalf of the Respondent. He avers he was informed of his success in the interview by the Respondent’s consultant and the Petitioner not being privy to the nature of the contract between the Respondent and the Recruiting firm and the mandate of the consultant had no reason to question the competency of the consultant so as to doubt the consultant’s indication, that he, the Petitioner had been selected for the position of Deputy Director.

27. It is Petitioner’s argument that the Respondent Director Dr. Rose Nduku denied the Petitioner his

appointment as Deputy Director Coordination and Support due to his HIV status and this is a breach of the Petitioner's Constitutional Right as enshrined at **Article 27(1) (4) and (5) of the Constitution**.

28. **Article 27(4) and (5) of the Constitution** provides:-

“27. Equality and freedom from discrimination-

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(4)The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

29. From the aforesaid the petitioner aver that the Respondents action amounts to indirect discrimination on the basis of his HIV status and the same amounts to breach of his constitutional rights and freedom as enshrined in the Constitution of Kenya.

30. It is the Respondents response that the interview were conducted in a fair manner a fact explained in both the Replying Affidavit and during the oral testimony of Dr. Rose Nduku. It is contended the rules set by the recruiting firm applied to all the candidates, who had applied for the position and which rules set for the interview and recruitment of individuals for the posts so advertised, were appropriate for the purpose of seeing the right candidate for the advertised posts.

31. In the instant Petition, the Petitioner, has not demonstrated to the Court any form of discrimination, that was meted to him, nor has he demonstrated any favour, extended to particular candidates. He did call one of the candidates interviewed on that day to supporting any of the discrimination meted against him. The advertisement was clear that only successful persons will be contacted. He did not qualify to the post as shown in the report done by the recruiting firm. The Petitioner in his petition did not plead that he emerged the winner at the interview and even if he had done so, he did call the consultant as a witness nor did he provide any evidence regarding his purported success. Indeed the Replying Affidavit by Dr. Nduku show he performed miserably in the written interview by scoring only 19%. The Respondent did not support his alleged successful interview in any way other only making unsupported averments.

32. The Black's Law Dictionary defines **“discrimination”** as follows:-

“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”

33. In the case of **Peter K. Waweru v. Republic (2006) eKLR** the court held the following on definition of **“discrimination”** :-

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to... restrictions to which persons of another discrimination 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.”

34. From the evidence on record it is clear that the Petitioner herein has failed to furnish evidence of other

person, who were given preferential treatment during the interview and that the recruitment process, due to their health status. I find no evidence having been brought before Court, that the preferred candidate that holds the position so advertised, did not merit and that the candidate does not have the academic requirements set by the Respondent. It is therefore clear that the Right of the Petitioner to be protected against discrimination and his right to information about the interview and short listing were not in any way impeded by the Respondents. I find no evidence of any infringement of the Petitioner's right against discrimination. For the petitioner to have succeed under this limb, it was his duty to have set out clearly and precisely the particulars of the discrimination in the petition but not to rely on the submissions which are not supported by the pleadings.

D. WHETHER THE PETITIONER IS ENTITLED TO THE PRAYERS SOUGHT?

35. The Petitioner seeks various reliefs in this Petition, which I find, that this court if it proceeded to grant the same, its effect would lead to interference with the Respondent's exercise of powers of recruiting competent persons to fill in the position advertised. I find that the Petitioner has not demonstrated that he is entitled to the remedy sought as he has not shown the Respondent and the firm so contracted to conduct recruitment and interview and finally make recommendation, carried out the process in a manner that is in contravention of the provision of the constitution and any statute in force. I further find that the petitioner has failed to establish that the recruiting firm's process, as agents of the Respondent, were carried in a manner that is manifestly unfair and devoid of merits and in a discriminatory manner to justify intervention by this Court to protect the Petitioner's rights, so as to meet the ends of justice. In the case of *Geoffrey Mworira vs. Water Resources Management Authority [2015] eKLR* the court stated:-

“...to interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process.”

36. From the Petition filed herein I find that it is misconceived as it does not disclose which articles of the constitution on the rights of the Petitioner have been allegedly been infringed by the Respondent and in what manner. I find making an award of damages the Court would be vindicating the Petitioner for infringement of fundamental rights, which I find is not the case here as the Petitioner has not specified any grounds that can entitled him an award of damages.

E. WHO IS TO BEAR COSTS OF THE PETITION?

37. From my findings I consider that an appropriate order would be to struck out the Petition. On the issue of costs, costs are awarded to successful party for the trouble taken in presenting or defending the suit. The petition do not appear to have been brought in public interest but for the interest of the Petitioner. The Constitution provides that the award of costs is at the discretion of the Court but in awarding costs the court is required to take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms. In view of the above I proceed to make the following orders:-

a) The Petitioner's Petition is misconceived and an abuse of the Court process and is accordingly struck out.

b) In view of Rule 26(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013 and taking into account that the Court is enjoined to take appropriate measures to ensure that every person has access to the court to determine the right and fundamental freedoms, I direct that each party do bear its own costs.

Dated, Signed and Delivered at Nairobi on this 18th day of June, 2020.

J. A. MAKAU

JUDGE