



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONST. PETITION NO. 1 OF 2020

**IN THE MATTER OF CONSTITUTIONAL INTERPRETATION PROTECTION AND
ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
ARTICLE 2(1), 19, 20(1), (2), (3) (b), (4) (a), (b), 21(1), 22(1), 23, 159, 165, (3) (a) (B) 258
(1) 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF CONSTITUTIONAL INTERPRETATION AND THE ALLEGED
CONSTRUCTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
ARTICLES 27 (1) & (2) OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

MESHACK ODIENY ASENSO.....PETITIONER

AND

PRINCIPAL SECRETARY,

MINISTRY OF EDUCATION.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

The Petitioner, **MESHACK ODIENY ASENSO** has moved the Court through his Constitutional Petition dated 8th January 2020.

1. The Petitioner worked as a Senior Principal Lecturer at the Kisumu National Polytechnic until 20th December 2018. Shortly after his retirement, the Ministry of Education issued a Circular Ref. **MOE/VTT/1/18/Vol II(39)**. The said Circular was addressed to all the Principals of Vocational and Technical Colleges.

2. The subject matter of the Circular was the Appointment of Trainers to **TVET** Institutions on Local Agreement Terms.

3. The persons who were to be appointed were retirees.
4. As the Petitioner was a retiree, he expected that his name would be on the list of persons who would be appointed.
5. When his name was omitted from the List that was forwarded to the Principal of Kisumu National Polytechnic, the Petitioner brought that fact to the attention of the Principal of the said Kisumu National Polytechnic and also to the Secretary of the Teachers Service Commission.
6. It was the Petitioner's case that the Teachers Service Commission did rectify the anomaly, and it recommended that the Petitioner be appointed alongside other Applicants.
7. However, instead of having him appointed, the 1st Respondent, the **PRINCIPAL SECRETARY, MINISTRY OF EDUCATION**, declined the Petitioner's application.
8. The Petitioner holds the view that the 1st Respondent discriminated against him, because the reason cited by him, for not appointing the Petitioner, did not stop the 1st Respondent from appointing two former colleagues of the Petitioner.
9. The colleagues who are said to have been appointed on 20th February 2019 and on 8th July 2019, respectively, were **PIUS OTIENO NYAWADE** and **SOSPETER ABADE**

ODHIAMBO.

10. In the circumstances, the Petitioner asked the Court to make the following Orders;

(a) A declaration be and is hereby issued

that the Respondents' actions amount

to discrimination, unjustifiably selective

and unequal treatment against the

Petitioner and is contrary to Article 27

of the Constitution;

(b) An order of mandamus be and is hereby

issued directing the 1st Respondent to

appoint the Petitioner to the position

held prior to his retirement under

similar terms;

(c) An order that the Petitioner is entitled

to compensation for the said violations

under Article 23 of the Constitution of

Kenya, 2010;

(d) Costs of this petition;

(e) Any other or further relief that the

Honourable Court considers appropriate

and just to grant."

11. When canvassing the Petition, the Petitioner submitted

notwithstanding the fact that;

“..... the Petitioner met all the requisite qualifications that the 1st Respondent had advertised in its circular dated 7th January 2019, though erroneously captured as 2018; The 1st Respondent erroneously omitted his name from the list of retired trainers whose contacts were sought by the 1st Respondent.”

12. The Petitioner complained that the 1st Respondent had failed to provide any justification or the criteria which he used to omit the Petitioner's name from the list of retired trainers who were to be appointed as trainers on Local Agreement Terms.

13. In the circumstances, the Petitioner asserted that the 1st Respondent had acted in a discriminatory manner, against him.

14. Secondly, the Petitioner submitted that the 1st Respondent had created a legitimate expectation that the Petitioner would be employed on Local Agreement Terms.

15. Therefore, when the 1st Respondent failed to give an opportunity to the Petitioner, on the grounds that the Petitioner's name was not on the approved list, despite the numerous attempts made by the Petitioner and the Teachers Service Commission, the Petitioner deemed that to be a clear violation of his legitimate expectation.

16. In support of its claim based on legitimate expectation, the Petitioner placed reliance on the case of **COMMUNICATIONS COMMISSION OF KENYA –VS ROYAL MEDIA SERVICES & 5 OTHERS [2014] eKLR**. In particular, the Petitioner cited the following words of the Supreme Court;

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.”

17. Based upon that authority, the Petitioner asserted that the 1st Respondent denied him, his legitimate expectation to a fair administrative action since the Petitioner's concerns were not taken into account. He pointed out that there were no consultations between the parties on how they would rectify the omission, with a view to eventually employing him, on the Local Agreement Terms.

18. In my considered opinion, the assertion that the Petitioner had a legitimate expectation to a fair administrative action, which would take his concerns into account, is a diversion from substantive petition which is before me. I so hold because the petition did not contain any claim that any of the Respondents had flouted the Petitioner's rights to a fair administrative action.

19. In any event, as the Petitioner had made it clear that the omission had been rectified by the Teachers Service Commission, I fail to understand why the Petitioner would still hold the view that there had been a need for the parties to hold consultations on how to rectify the

said omission.

20. It is noteworthy that the omission did not require the intervention of either of the Respondents, so as to be rectified.

21. As regards the Petitioner's alleged legitimate expectation that he would be employed on Local Agreement Terms, he submitted that the said expectation was created by the 1st Respondent.

22. This court must therefore give due consideration to the Circular which was issued by the Ministry of Education, so as to ascertain whether or not it gave rise to the legitimate expectation cited by the Petitioner.

23. In the case of **REPUBLIC Vs COUNCIL OF LEGAL EDUCATION & 2 OTHERS EXPARTE MITCHELLE NJERI THIONG'O NDUATI MISC. APPLICATION NO. 261 OF 2018** it was quoted with approval the following requirements for the existence of a legitimate expectation, under the law in South Africa, as spelt out in **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Vs PHILIPS [2002] 4 SA 60;**

“These include;-

(i) That there must be a representation

which is clear, unambiguous and

devoid of relevant qualifications;

(ii) That the expectation must be

reasonable, in the sense that a

reasonable person would act upon

it;

(iii) That the expectation must have

been induced by the decision-maker

and;

(iv) That it must have been lawful for

the decision-maker to make such

representation.”

24. I will now examine the circular which constitutes the representation, in order to ascertain if it meets the requirements of legitimate expectation.

25. First, it is to be noted that the Circular was issued by the **STATE DEPARTMENT OF VOCATIONAL AND TECHNICAL TRAINING**, which is a department within the Ministry of Education.

26. Second, it is noted that the Circular was addressed to All Principals of Vocational and Technical Colleges.

27. The Circular reads as follows;

“This state department appealed to

the Public Service Commission to

recruit trainers to address the

serious shortage of trainers in the

TVET Institutions.

The Public Service Commission

observed that recruitment of staff would take a long time while the institutions continue to suffer from the acute staff shortage.

The Commission resolved that as a stop gap measure pending recruitment of trainers to address staff shortfall, the retired teachers, as per the attached list be appointed to their former posts on local agreement Terms for a period of one (1) year with effect from the date(s) they report for duties but not later than 31st January 2019.

In view of the above, this is to kindly and urgently request you to contact the said trainers as per the attached list and those who are retiring w.e.f. 1st January, 2019, to 31st July, 2019 of this new development and advise them to liaise with this office and provide us with their contact address to enable us formalize the appointments for those who will accept the offer.”

28. As the Petitioner had retired on 20th December 2018, he fell into the category of those who would be considered if his name was on the List which had been provided by the Teachers Service Commission.

29. When the Petitioner realized that his name was not on the said List, he wrote to the 1st Respondent on 24th April 2019. By his said letter, the Petitioner expressed his

understanding of the circular as being the medium through which;

“The Ministry of Education sought Principals of Vocational and

Technical Colleges (TVET Institutions)

to contact Trainer retired as from 1st

January 2015 to 31st December 2018

(as per attached list) provided by the

Teachers Service Commission. The

retirees would thereafter link with

the Ministry to formalize appointments.”

30. As the Petitioner noted, it was the omission by the Teachers Service Commission which denied him the opportunity to be appointed on contract, along with the others.

31. By a letter dated 16th May 2019, the Teachers Service

Commission wrote to the 1st Respondent, confirming that the Petitioner's name had been erroneously omitted from the list of retired teachers which was submitted to the State Department of Vocational and Technical Training.

32. I therefore find that it was the Teachers Service Commission that failed the Petitioner, as the omission of the particulars of the Petitioner from the list presented to the 1st Respondent implied that the Petitioner had not met the clear, unambiguous representation that was in the circular.

33. I hold the considered view that when the Petitioner insists that after the Teachers Service Commission had admitted that his details had been erroneously omitted, the Respondents would still be obliged to offer him employment after the Teachers Service Commission had admitted their error, is not a legitimate expectation.

34. Indeed, even when conceding having made an error, the Teachers Service Commission simply asked the 1st Respondent to offer assistance to the Petitioner: the Commission did not make a demand. I hold the view that that conduct of the Teachers Service Commission was Consistent with the fact that it is they who had failed the Petitioner and therefore they could not insist that the Petitioner be accorded the same treatment as the retired teachers who had been on the original list.

35. It is also noteworthy that the circular had conveyed the message that the decision to recruit trainers, for the period of one year, had been made by the **PUBLIC SERVICE COMMISSION**. Therefore I find that neither of the Respondents was “*the decision-maker*” who induced any legitimate expectation.

36. The role that was to be played by the 1st Respondent was that of formalizing the appointments for those who accepted the offer, after they had met the set criteria.

37. My finding about the identity of the decision-maker is further fortified by the letters which the Petitioner exhibited when he was demonstrating that 2 other persons were employed in February and in July, 2019, respectively. The said letters are similar in the relevant portions, which reads as follows;

“The Public Service Commission vide

their letter No. PSC/13 (19):

PSC/5/ST/25/(24) dated 20th

December, 2018 resolved that as

a stop gap measure pending

recruitment of trainers to address

the staff shortfall in TVET

institutions, that you among other

retired trainers be appointed to

your former post on Local Agreement/

Contract Terms of service for a period

of one (1) year.

This is therefore to convey the decision

of the Public Service Commission that

you be appointed on Local Agreement

Terms for a period of one year with

effect from”

38. Considering that it is the Petitioner who exhibited the 2 letters dated 20th February 2019, and 8th July 2019, respectively, it follows that by the time he was lodging this Petition, he was fully aware that the decision maker was the Public Service Commission. It, therefore, follows that the Petition was directed at persons who could not have given rise to the legitimate expectation alluded to by the Petitioner.

39. I also find that the Petitioner failed to prove that his circumstances were similar in every respect to that of the two retirees who were appointed by the Public Service

Commission in February and July 2019, respectively. I so find because the Petitioner did not adduce evidence to show that **PIUS OTIENO NYAWADE** and **SOSPETER ABADE ODHIAMBO** were appointed although their names were not in the original List presented by the Teachers Service Commission.

40. Accordingly, I find no basis upon which I could make a declaration that the actions of the Respondents amount to discrimination, unjustifiably selective and unequal treatment against the Petitioner, contrary to **Article 27** of the **Constitution**.

41. If anything, the Petitioner failed to prove any specific rights, pursuant to **Article 27** of the **Constitution**, which had been violated with regard to him.

42. I also find that an order of Mandamus cannot issue in this case as the appointment contemplated by the circular in issue, had made it clear that the appointments to be effected were as a stop gap measure, for a very limited period of time, which has since lapsed.

43. Thirdly, I find that the Petitioner had failed to prove that he was entitled to any compensation in relation to the alleged violations of his Constitutional rights.

44. In the result, the Petition is dismissed, as it lacks merit. The Petitioner is ordered to pay costs thereof to the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF MAY 2021

FRED A. OCHIENG

JUDGE