



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

PETITION NO. 16 OF 2017

PETRONILLA SAVAHI1ST PETITIONER

ROSE KHABAYI2ND PETITIONER

PAMELA KHASOHA JONATHAN.....3RD PETITIONER

VERSUS

DEPUTY COUNTY COMMISSIONER

(KAKAMEGA SOUTH)..... 1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JOSEPH AMWAYI3RD RESPONDENT

GILBERT ISABWA SHIVISI4TH RESPONDENT

RULING

1. The petitioner filed a petition dated 20th November, 2017 in which they sought that the court declares the appointment of the 3rd respondent as an assistant chief of Mutaho Sub-location unconstitutional for failure to meet the provisions of Articles 10, 5 and 27 of the Constitution of Kenya. The petitioners further prayed for a fresh process to be undertaken to appoint a new assistant chief for the said Sub-location.
2. The respondents entered appearance and filed grounds of opposition dated 11th December, 2017. They opposed the petition on the grounds that it does not demonstrate the violation of the petitioner's fundamental rights. Further that the petition is bad in law and an abuse of the process of the court.
3. The facts that are not in dispute are that the 1st respondent, Deputy County Commissioner Kakamega South, on the 2/5/2017 announced a vacancy in the office of the Assistant Chief, Mutaho Sub-location, inviting applicants who met the criteria to apply. One Rose Taabu Shamalande and the 3rd respondent were among the candidates/applicants who were shortlisted and interviewed. The 3rd respondent was declared the successful candidate.
4. The petitioner contests the appointment of the 3rd respondent on the grounds that he does not meet the criteria set out in the application in that he is a resident of a different location, Idakho North. That the interviews were conducted in secrecy and lacked transparency. That the residents of Mutaho Sub-location were not offered an opportunity to present memoranda and views of the suitability of the applicants.
5. That the 3rd respondent is a brother of a retired chief John Mutsunga and therefore that his appointment smacks of nepotism in appointment of public officers. Further that out of the 22 Sub-locations in the Sub-County only 2 have an Assistant Chief of a female gender. That in an effort to increase the representation of the female gender in the ministry, the said Rose Taabu Shamalande who was the only female shortlisted for the position was well placed to be appointed Assistant Chief of Mutaho Sub-location.
6. Further that many residents of the Sub-location are against the appointment of the 3rd respondent as shown by a list marked "PS-a" attached to the 1st petitioner's supplementary affidavit sworn on 7th December, 2017.
7. The 3rd respondent opposed the petition through his replying affidavit sworn on 27th November, 2017. He depones in the affidavit that he

is a resident of Mutaho Sub-location as evidenced by his identity card annexure marked “JA2”, by his Chief’s letter annexure marked “JA3” and by church certificate showing membership of Friends Church Mutaho village meeting, annexure marked “JA1”. That 6 candidates were interviewed for the job three of whom were female and the other three male. That he was declared the successful candidate and issued with an appointment letter, annexure marked “JA4”. That he has been working since.

8. Further that there were several public barazas where members of the public were sensitized on the vacant position of the Assistant Chief, Mutaho Sub-Location. That the appointment of the 3rd respondent did not offend the constitution in regard to $\frac{1}{3}$ gender rule as he was the successful candidate. That though the 3rd respondent is a brother to the retired Chief John Mutsunga that has nothing to do with his qualification and in no way amounts to nepotism.

9. The advocate for the petitioners, **M. Kiveu Advocate**, submitted that public participation is one of the national values and principles of governance enshrined in Article 10 of the Constitution. Counsel cited the case of **Robert N. Gakuru & Others –Vs- Governor, Kiambu County (2014) eKLR** where it was held that:-

“Public participation ought to be real and not illusory and ought to be treated as a mere formality for the purposes of fulfillment of the constitutional dictates ... the spirit of public participation is attained both quantitatively and qualitatively.”

10. It also cited the case of **Poverty Alleviation Network and Others –Vs- President of the Republic of South Africa and 19 Others CCT 86/08 (2010) ZACC5** cited in **Richard Kariuki Kibuchwa & Another –Vs- Governor Kirinyaga County & 2 Others (2016) eKLR** where the essence of public participation was captured as follows:-

“Engagement with the public is essential. Public participation informs the public of what is expected. It allows the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When decision is made without consulting the public the result can never be an informed decision.”

11. Counsel submitted that Article 56 of the Constitution of Kenya 2010 requires the state to incorporate minorities and marginalised groups in state governance. That marginalised groups include the female gender, the young and old persons. That Rose Shamalande as the only female candidate who was shortlisted for the position ought to have been appointed so as to bridge the gender balance in the Sub-County.

12. The respondents through the Litigation Counsel, Deborah Were, submitted that though the petitioners have the locus to file the petition they had ulterior motive to benefit Rose Shamalande in filing the petition and to discredit the 3rd respondent. That they are out to seek personal and private gain as opposed to benefiting the public. Counsel cited the case of **Trusted Society of Human Rights and Mumo Matemu & Another Pet. No. 279 of 2012** where it was held that:-

“The person who moves the court for judicial redress in the case of this kind must not act for personal gain or private profit political motivation or other unspecified consideration.”

13. Counsel submitted that the petition does not disclose any cause of action. That none of the provisions of the constitution cited in the heading were particularized or explained. That the supporting affidavit does not specifically explain the provisions of the constitution that they allege to have been violated. That the petition does not meet the threshold in filing constitutional petitions as laid out in the case of **Anarita Karimi Njeru –Vs- Attorney General (1979) KLR 154**.

14. Further that the petitioners have explained that the position of the Assistant Chief was advertised, candidates shortlisted and interviews conducted. That the court has not been told of the outcome of the interviews and whether the named female candidate passed the interview. That the National Government Co-ordination Act No. 1 of 2013 Section 15 makes provision of recruitment and appointment of national government Administration officers. The petitioners have not challenged any particular provision that was not complied with.

15. Counsel submitted that failure of a female candidate to clinch the position cannot be said to be unconstitutional. That the inference that a female candidate was discriminated against by the respondents was not explained.

16. That the supplementary affidavit and the list filed by the petitioners of those disgruntled with the appointment of the 3rd respondent does not raise any violation of the petitioner’s constitutional rights but rather seeks to discredit the 3rd respondent and not how the process was undertaken. That in essence no constitutional rights were violated. That the petition was instituted in bad faith and is an abuse of the court process. That it is in the interest of the public to appoint a candidate who successfully passes an interview regardless of their gender.

17. The questions for determination in this petition are –

- (1) Whether the petition as filed is competent and whether it discloses any cause of action.
- (2) Whether the respondents have violated any of the petitioners’ constitutional rights as framed.
- (3) Whether the petitioners are entitled to the orders sought.

18. The petition is made pursuant to Articles 10 and 56 of the Constitution of Kenya 2010. Article 10 stipulates as follows:-

“(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) *applies or interprets this Constitution;*

(b) *enacts, applies or interprets any law; or*

(c) *makes or implements public policy decisions.*

(2) *The national values and principles of governance include—*

(a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*

(b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*

(c) *good governance, integrity, transparency and accountability; and*

(d) *sustainable development.”*

19. Article 56 stipulates as follows:-

“The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(a) *participate and are represented in governance and other spheres of life;*

(b) *are provided special opportunities in educational and economic fields;*

(c) *are provided special opportunities for access to employment;*

(d) *develop their cultural values, languages and practices; and*

(e) *have reasonable access to water, health services and infrastructure.”*

20. It is the right of every person to move to the High Court to enforce a right or fundamental freedom. Article 22 (1) of the Constitution stipulates that:-

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

21. Rule 3 (4) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides that:-

“Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”

22. A petitioner in a constitutional petition is required to set out with due particularity the nature of his claim by identifying the specific right violated and how it is violated. This principle was sated in the case of **Anirita Karimi Njeru –Vs- Attorney General (1979) KLR 154** where it was held that:-

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (see also Meme Vs. Republic & Another [2004] 1 KLR 637).

23. The same was emphasized by the Court of Appeal in **Mumo Matemu –Vs- Trusted Society for Human Rights & 5 Others** (Supra) where it stated that:-

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

24. Apart from the heading that the petition is made under Articles 10 and 56 of the Constitution, the petition herein does not specify how and the manner in which the rights under the said articles were infringed. However in **Mumo Matemo –Vs- Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**, the High Court seemed to be of the view that as long as the breach of the Constitution is

apparent on the face of the petition and the evidence the court has the duty to enforce the right though the right may not have been stated in the petition. Stated the court:-

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

25. In **ANM & Another (Suing in their own behalf and on behalf of ANM (Minor) as parents and next friend) –Vs- FPA & Another (2019) eKLR**, Odunga J. was of the view that the principle in *Anirita Karimi* case ought not to be religiously followed and held that:-

“52. It must therefore be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the applicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former.”

26. I am of the view that the court should not dismiss a petition alleging contravention of the Constitution where it is apparent from the petition and the evidence that there was a breach of the Constitution. Article 22 of the Constitution provides that when considering a petition touching on contravention of the Constitution, the court though required to observe the rules of natural justice should not be unreasonably restricted by procedural technicalities. The **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides the procedure of filing constitutional petitions. It is evident from the provisions of the rules that a petition need not be formal. Rule 10 (3) allows filing of a petition by informal documentation. The Rule provides that:-

“Subject to rules 9 and 10, the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.”

In my considered view the fact that the court can accept an oral petition by implication means that a petition should not be dismissed for want of form. The spirit of the Constitution and the Rules seem to be that the priority of the court should be to enforce the rights infringed notwithstanding the defect in form of the petition. Only a petition that is hopeless for which no life can be breathed into it can be dismissed.

27. The purpose of pleadings is to notify the opposite party of the issue in controversy. In this petition it was clear that the petitioners were alleging infringement of the constitution first, by lack of public participation as required in Article 10 of the Constitution and secondly by failing to consider gender balance in public appointments as required by Article 56 of the Constitution. The respondents answered the petition in the two areas. Their advocates made submissions in respect to two areas. Though the petition did not comply with the principle set out in *Anarita Karimi Njeru Case*, I find that it was not so defective as to warrant a dismissal. The petition is therefore competent as to give sufficient notice to the respondent as to what was being sought.

28. The petitioners admit that the position of the Assistant Chief of Mutaho Sub-location was advertised, shortlisting done and interviews conducted. They admit that there were public barazas where female applicants were encouraged to apply. There is no evidence that anybody was prevented from presenting adverse information about the 3rd respondent during the interview. There is no person who was present during the interview to state that the interview was conducted under a cloud of secrecy. The petitioners did not adduce sufficient evidence that the process leading to the appointment of the 3rd respondent was not transparent or that there was no public participation. I agree with the submissions by the counsel for the respondents that the list of those disgruntled by the appointment of the 3rd respondent does not raise any issue about the process leading to the appointment of the 3rd respondent. It can only be meant to discredit the 3rd respondent.

29. The 3rd respondent filed documents to show that he is a resident of Muhato Sub-location. The petitioners did not produce evidence to counter the assertions by the 3rd respondent. The allegations by the petitioners on the residency of the 3rd respondent have no substance.

30. The petitioners did not attach a list of Assistant Chief's in their Sub-County to show that there is no gender balance. The petitioners have not attached documents to indicate what their preferred candidate scored during the interview. They have not shown that the 3rd respondent was favoured in the interview because of his relationship to the former chief of the area.

31. In my view gender balance is not the only issue to be considered during an interview of a public officer. The 3rd respondent indicated in the replying affidavit that there were 3 female candidates who were interviewed. This evidence was not countered by the petitioners. The argument that the preferred candidate should have been appointed because she was the only female candidate has no basis.

32. In the foregoing, I do not find merit in the petition. The petition is accordingly dismissed in its entirety.

Delivered, dated and signed in open court at Kakamega this 13th day of February, 2020.

J. NJAGI

JUDGE

In the presence of:

No appearance for Petitioners

Miss Were for Respondents

Petitioners - absent

Respondents - absent

Court Assistant - Polycap

30 days right of appeal.