



Munjalu & 3 others v DCC Matete Sub-County & another (Petition E007 of 2024) [2025] KEELRC 791 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 791 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
PETITION E007 OF 2024**

DN NDERITU, J

MARCH 13, 2025

**IN THE MATTER OF ARTICLES 3(1), 22, 23, 25, 42, 47, 48,
50(1), 162(2)(A), 165(5) & 258 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2),
10, 19, 20, 21, 22, 24, 27, 41(1), 47, 73, 75, 232 & 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION
37(1) & (4) OF THE PUBLIC SERVICE COMMISSION ACT, 2017**

BETWEEN

**MARTIN MUNJALU 1ST PETITIONER
JOSHUA SAKWA 2ND PETITIONER
ENOCK WAWIRE MWENYA 3RD PETITIONER
AMBROSE KHAEMBA 4TH PETITIONER**

AND

**DCC MATETE SUB-COUNTY 1ST RESPONDENT
PUBLIC SERVICE COMMISSION 2ND RESPONDENT**

JUDGMENT

I. Introduction

1. The petitioners through Marisio Luchivya & Co. Advocates commenced these proceedings by way of a petition dated 7th November, 2024 filed in court on even date wherein they pray for –



- a. A declaration that the respondents in shortlisting candidates for interviews on 6-11-2024 in respect of the advertisement dated 13th September, 2024 acted contrary to the provisions of Articles 2(1), 10, 20, 21, 27, 35, 47, and 232 of *the Constitution*.
 - b. A declaration that the letter dated 13th September, 2024 was made in contravention of sec 37(2) of the *Public Service Commission Act* and infringed on Articles 10,35, and 47 of *the Constitution*.
 - c. A declaration that the recruitment process is unconstitutional therefore null and void.
 - d. General damages for breach of the petitioners' rights under Articles 35,27 and 47 of *the Constitution*.
 - e. Costs of the suit.
2. The petition anchored on Section 5(1) of the *Employment Act*, Section 37(1) & (4) of the *Public Service Commission Act*, and Articles 2(1), 2(5), 10(1) & (2), 19, 20(1), 21, 22, 23, 24, 27, 35, 41, 47, 56, 73, and 232 of *the Constitution*.
 3. The petition is accompanied with an affidavit in support sworn by the 1st petitioner on even date with several annexures thereto.
 4. The petition was accompanied with notice of motion filed under certificate of urgency wherein the petitioners were seeking orders that –
 - a. Spent
 - b. That pending the hearing of this application, interpartes a conservatory order of injunction do issue restraining the respondents, their agents, and assigns from interviewing, recruiting, and or hiring from the interview slated for 6/11/2024 anyone of the shortlisted persons slated to be interviewed on the said date pursuant to the advert contained in the letter dated 13/9/2024.
 - c. That pending the hearing of this petition, interpartes a conservatory order of injunction do issue restraining the respondents, their agents, and assigns from interviewing, recruiting, and or hiring from the interview slated for 6/11/2024 anyone of the shortlisted persons slated to be interviewed on the said date pursuant to the advert contained in the letter dated 13/9/2024.
 - d. Costs hereof provided for.
 5. The facts and the law relied upon are set out in the body of the petition.
 6. When the matter came up in court for directions on 20th November, 2024 the respondents were granted 14 days to file their response to the application and the petition.
 7. On 5th December, 2024 when the matter came up in court for further directions there was no response(s) from the respondents and the court issued interim orders restraining the respondents from recruiting or hiring any person for the impugned position pending the hearing and the determination of the petition. The court directed that the petition be canvassed by way of written submissions.
 8. On 24th January, 2025 the petitioners changed their representation from the firm of Marisio Luchivya & Co. Advocates to Oscar Wachilonga & Associates Advocates.
 9. The petitioners' counsel, Mr. Munyendo, filed his submissions on 4th February, 2025. No submissions were filed by or for the respondents.



II. The Petitioners' Case

10. The petitioners' case is based on the filed pleadings, the documentary evidence tendered, and the written submissions by their counsel, and the same is summarized hereunder.
11. The petitioners are residents of Kulumbeni sub-location wherein a vacancy was declared in the position of an assistant chief of Kulumbeni Sub-location in the Matete sub-county of Kakamega County on 20th August, 2023. The said sub-location is said to be cosmopolitan inhabited by the Tachoni, Kabras, Teso, and Banyala communities.
12. It is pleaded that the 1st respondent conducted interviews that were marred by allegations of the top three candidates being overlooked, bribery, and favoritism, which ultimately led to the nullification of the entire process. The area had remained without an assistant-chief for a period of time.
13. It is pleaded that vide a notice dated 13th September, 2024 the respondents through the 1st respondent re-advertised for the impugned position and fixed interviews for 6th November, 2024.
14. It is pleaded that some of the applicants who were shortlisted for the earlier interviews applied upon the re-advertisement but were not shortlisted. Two of them were Frankline Khaemba and Martin Munjalu who met the minimum requirements. It is further pleaded that out of twenty applicants seven persons were shortlisted with three among them, Samuel Lumbasi, Roselyne Wafula, and Johnson Sifuna, having been previously interviewed for the same position.
15. The petitioners stated that many candidates who met the minimum qualifications were not shortlisted and the shortlisted persons already collected their letters ready for the interview slated for 6th November, 2024. It is stated that members of minority communities like the Teso who applied for the first interview were not considered for the second interview.
16. The petitioners state that they applied for the impugned position but were not shortlisted despite being qualified. They stated that they were not informed of the reasons for their not being shortlisted or disqualification. The petitioners state that the re-advertisement of 13th September, 2024 indicated that only shortlisted candidates would be contacted which they claim was a basis for denying them access to relevant information.
17. Further, the petitioners stated that the shortlisting was discriminatory and hence unconstitutional. The petitioners state that they had legitimate expectation that they would be afforded an opportunity to attend the interview for due consideration.

III. Submissions

18. Counsel for the petitioners submitted globally in support of the petition that the petitioners having participated in the first interview they had a legitimate expectation to be eligible for the second interview.
19. Citing various decisions including *Judicial Service Commission v Mbalu Mutava & Anor* (2015), *R v Cabinet Secretary Ministry of Interior & 6 others ex parte Africa Centre for Open Year Governance & 7 others*, and *Okiya Omtata Okoiti & 3 others v Nairobi City County & 5 others* (2014) eKLR, it is submitted that the respondents are mandated by Article 3(1) of *the Constitution* to uphold and defend the same. It is submitted that under Articles 10, 47, 73, and 232 of *the Constitution* the respondents are obligated to ensure that public appointments are open and transparent.
20. It is submitted that the advert declaring the vacancy in the impugned position limited the petitioners' right to information under Articles 35(1) & (2) of *the Constitution* and their right to fair administrative



action in requiring that interested persons in public service were to channel their applications through their heads of departments, stating that only shortlisted candidates could be contacted, and further stating that canvassing would lead to disqualification.

21. It is submitted that the respondents breached the provisions of Articles 10, 73, & 232 of *the Constitution* on transparency for failing to inform the petitioners of the reason for their disqualification and for not being invited for the interview.

IV. Issues for Determination

22. The court has read the pleadings and the documentary evidence by the petitioners as summarized above. The court has also gone through the submissions by counsel for the petitioners.
23. The following issues commend themselves to the court for determination –
 - a. Whether the advertisement of 13th September, 2024 was in compliance with the law?
 - b. Whether the respondents violated the law in shortlisting the candidates for the interview on 6th November, 2024.
 - c. What reliefs, if any, should the court grant in the circumstances?

V. Advertisement

24. The petitioners submitted that the respondents breached the law, in particular Articles 2(1), 10, 20, 21, 27, 35, 47, & 232 of *the Constitution* and Section 37(2) of the *Public Service Commission Act* (PSC Act) on the parameters used in the recruitment for the impugned vacancy.
25. The petitioners assert that the failure by the respondents to shortlist them and failing to contact all applicants for the interview scheduled for 6th November, 2024 contravenes the petitioners' right to information and fair administrative action.
26. By the time the petition and the application were filed in court on 7th November, 2024 interviews had already been conducted on 6th November, 2024 and presumably what is pending is the appointment of the successful candidate which appointment the petitioners are also seeking to stop.
27. The respondents did not enter appearance or file any response to the petition. From the documents filed by the petitioners, the 1st respondents through an advertisement dated 30th August, 2023 called for suitably qualified persons to apply for the position of assistant-chief for Kulumbeni Sub-location. The petitioners applied and were shortlisted for the position but the recruitment was canceled on allegations that it was marred by claims of bribery and favoritism. No evidence was adduced by the petitioners that indeed they applied for the vacancy or that they had been shortlisted for the interview.
28. Further, no notice was availed by the petitioners that indeed the first advertisement was canceled due to the claims of alleged bribery or favoritism. The court cannot ascertain why if at all the first advertisement was cancelled.
29. Section 37 of the PSC Act provides that –
 - (1) Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission's website, at least one daily newspaper of nationwide coverage, the radio, and other modes of communication, so as to reach as wide a population of potential applicants as possible.



- (2) The Commission or an authorised officer shall ensure that an invitation for application does not discriminate against any person.
 - (3) The advertisements in subsection (1) shall be conducted in an efficient and effective manner so as to ensure that the applicants, including persons who for any reason have been or may be disadvantaged, have an equal opportunity to apply for the advertised positions.
 - (4) An advertisement inviting applications to fill any vacancy in a public office shall provide for—
 - (a) the title and rank of the public office;
 - (b) the public body in which the office is tenable;
 - (c) the background and context of the work, where necessary;
 - (d) the terms of employment;
 - (e) the applicable remuneration including salary, allowances, and other benefits;
 - (f) the prescribed qualifications applicable, including any desired previous achievements;
 - (g) the core duties of the office;
 - (h) the expected deliverables of the office;
 - (i) the supervision, accountability, and reporting arrangements;
 - (j) any added advantage applicable;
 - (k) the mode and deadline of transmitting the application;
 - (l) any consideration that may occasion disqualification; and
 - (m) any consideration of equity or affirmative action.
30. The court notes that the advertisement dated 30th August, 2023 did not specify the applicable compensation, including salary, allowances, and or other benefits, as well as any factors that could lead to disqualification as required by the above provision.
31. Further, the timeframe for closing the advertisement did not conform with the Human Resource Policies and Procedures Manual for the Public Service, 2016 which provides in section B 4(1) that vacancies be open for at least 21 days before closing. The said advert was published on 30th August, 2023 and was to close on 19th September, 2023 a duration of 20 days instead of the 21 days required in law.
32. The petitioners have indicated that they indeed saw the first advertisement and applied for the vacancy. Although the first advertisement was clearly flawed in law the reason for the cancellation of the first advertisement is not clear from the pleadings and evidence filed and there is no evidence availed that the petitioners indeed applied for the position then. However, evidently, the advertisement of 30th August, 2023 did not comply with the law and was thus null and void.
33. However, the re-advertisement of 13th September, 2024 calling for applicants for the impugned position with a deadline of 11th October, 2024 conformed with to Section B (4)(1) of the PSC Human Resource Policies and Procedures Manual and the requirements outlined above under Section 37 of the PSC Act.



VI. Shortlist

34. The petitioners assert that by including the statement that “only those who were shortlisted could be contacted” the respondents contravened their right to information.
35. The petitioners allege that the 1st petitioner and one Frankline Khaemba applied for the impugned vacancy and were shortlisted following the first advertisement, but the 1st respondents failed to shortlist them following the second advertisement, despite the qualifications in both advertisements being identical. The petitioners further claim that out of more than twenty applicants, the 1st respondent only shortlisted seven persons out of whom three had been shortlisted and interviewed in the first interview. They also allege that minority communities like the Teso who had candidates shortlisted in the first interview, were left out in the second interview.
36. Despite the assertion by the petitioners that they were left out of the shortlist by the respondents, they have not established in the first place that they indeed applied for the impugned position either following the first advertisement or in the re-advertisement. If indeed the petitioners had been shortlisted the first time, they should have availed the evidence of the notification of having been shortlisted the first time. The court has already found that the petitioners did prove that they applied for the position.
37. As for Frankline Khaemba who is alleged to have been left out in the second interview, he is not a party to this petition and thus the court cannot make a finding on a party not before it. The petitioners did not plead that they were also representing his interests and had no such authority filed in court.
38. The petitioners allege that the failure to inform all the applicants of the outcome of the shortlisting the respondents violated their right to information.
39. Section 39 of the PSC Act provides that – The Commission or any other lawful appointing authority shall maintain a record of all applications received in response to an advertisement inviting applications” (Emphasis added). The 2nd respondent is the appointing authority and hence mandated by the preceding provision to keep a record of all applicants for any job. The petitioners have not demonstrated or proved that they sought for any information from either of the respondents and that such information was denied or withheld.
40. What the court can discern is that the petitioners are aggrieved for not being on the shortlist of candidates and that they were not informed of the reason therefor. The petitioners rely on Articles 27 & 47 of *the Constitution* in arguing that they were discriminated as they were entitled to be informed why they were not shortlisted.
41. The advertisement for the vacancy did not countenance discrimination or provide that any particular community or clan could not apply for the position. The petitioners have not availed evidence that the alleged minority tribes were prevented from applying for the impugned position. The petitioners have not adduced evidence to prove that indeed the respondents prevented any person from applying for the position, neither have the petitioners proved that indeed there was discrimination in the shortlisting of the candidates.
42. A shortlist of candidates is meant to identify from a longlist of applicants the most suitable candidates for a particular job opening. A person not shortlisted would have to demonstrate and prove discrimination for the court to interfere with the process.



43. Section 8(1) of the *Access to Information Act* provides that –
- “An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.”
44. The 2nd respondent as the appointing authority and the 1st respondent as the delegatee of the Commission maintain a list of all applicants and upon request should provide a list of all applicants, their qualifications, and reason(s) for not shortlisting them. The petitioners allege that they were not given the reason why they were not shortlisted. There is no evidence on record that the petitioners requested for such information from the respondents and that such information was withheld or denied.
45. The petitioners’ contention is for the reason why they were not shortlisted. The petitioners have not adduced evidence that they sought clarification from the respondents as to why they were not shortlisted if they indeed applied for the vacancy in the first place.
46. At the time of the filing of the petition, interviews of the shortlisted candidates had been undertaken. At that point, the petitioners’ recourse was to seek why they were not shortlisted for the concluded interviews. They did not do so and there is no evidence on record that they applied for the said position.
47. The petitioners saw the notice of re-advertisement that lasted between 13th September, 2024 and 11th October, 2024 and if they considered the statement that ‘only shortlisted candidates could be contacted’ violated their right, they had a right to seek the intervention of the respondents to remove the said phrase at that point before the deadline. However, they allegedly proceeded to apply for the impugned position, and only wish to exercise their right after they failed to find themselves in the shortlist of candidates. The petitioners’ action is clearly an afterthought. The court finds that the petitioners have failed to prove that their rights to access information or fair administrative action was infringed, breached, or violated.
48. The court granted interim orders restraining the respondents from appointing the successful candidate to the impugned position. However, it is apparent that interviews had already been undertaken on 6th November, 2024 before this petition was filed. In the public interest, it is absolutely necessary that the vacancy to be filled to enable facilitate service delivery to the public. The respondents are at liberty to conclude the recruitment and appointment of a suitable candidate to fill the vacancy. The interim orders issued on 6th December, 2024 are hereby vacated.
49. The court has said enough in demonstrating that the petitioners have not proved that any of their constitutional rights were infringed by the respondents as alleged. There is no evidence on record that they applied for the impugned position in the first place.
50. For all the foregoing reasons, the court finds no merit in the petition and the same is hereby dismissed.

VII. Orders

51. In the disposal of this petition the court issues the following orders –
- i. The petition is devoid of merit.
 - ii. The interim orders issued on 6th December, 2024 are hereby vacated.



- iii. The respondents are at liberty to conclude the process of recruitment and appointment to fill the position of assistant-chief for Kulumbeni Sub-location of Matete sub-county, Kakamega County.
- iv. No order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 13TH DAY OF MARCH, 2025.

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HON. DAVID NDERITU

JUDGE

