



Environmental Public Health Association Of Kenya (EPHAK) v Public Service Commission & 2 others (Petition E121 of 2022) [2024] KEELRC 593 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 593 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E121 OF 2022**

K OCHARO, J

MARCH 8, 2024

BETWEEN

**ENVIRONMENTAL PUBLIC HEALTH ASSOCIATION OF KENYA
(EPHAK) PETITIONER**

AND

THE PUBLIC SERVICE COMMISSION 1ST RESPONDENT

THE MINISTRY OF HEALTH 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner commenced the proceedings herein vide a Petition dated 13th July 2022 seeking: -
 - a. A declaration that the omission and/or disqualification of the qualifications in BSc Environmental Health and BSc Public Health held by the Petitioner’s members from applying for the positions in the Ministry of Health, 2nd Respondent herein, advertised by the 1st Respondent on the 14th June 2022 was discriminatory, in breach of the Petitioner’s members’ rights to fair labour practices and fair administrative action as espoused under Articles 27,41 and 47 of *the Constitution*.
 - b. A declaration that the 1st and 2nd Respondents conduct was against the national values and principles of public service on fair competition and merit as the basis of appointments and promotions and thus violated the provisions of Articles 10 (2) and Articles 234 (2) (c) of *the Constitution*.



- c. A permanent injunction be and is hereby issued restraining the 1st and 2nd Respondent from proceeding with the recruitment process for the positions in the Ministry of Health advertised by the 1st Respondent on the 14th of June 2022.
 - d. An order of certiorari be issued to remove into the Honourable Court and quash the decision by the 1st and 2nd Respondents to omit and/or disqualify persons holding qualifications of BSc Environmental Health and BSc Public Health from applying for the positions in the Ministry of Health advertised by the 1st Respondent on 14th June 2022.
 - e. An order of mandamus be issued compelling the 1st Respondent to re-advertise the positions in the Ministry of Health advertised on 14th June 2022 and include qualifications in BSc Environmental Health and BSc Public Health in the list of required qualifications.
 - f. Any other order the Court may deem fit and just to grant.
 - g. Costs of the suit be awarded to the Petitioner.
2. In response to the Petition the 1st Respondent filed a Replying Affidavit sworn by one SIMON K. ROTICH on 22nd August 2022. On its part, the 2nd Respondent filed a Replying Affidavit sworn by one Stephen Khaemba on 21st September 2022.
 3. The Petitioner filed a Further Affidavit sworn on 15th August 2022 as a rejoinder to the two affidavits that were filed by the Respondents, mentioned hereinabove,
 4. On 1st March 2023, when the matter came up for directions, this Honourable Court ordered that the Petition be canvassed by way of written submissions. This culminated in the Petitioner's Submissions dated 12th April 2022; the 1st Respondent's Submissions dated 6th April 2023 and the 2nd Respondent's Submissions dated 14th April 2023.

Petitioner's case

5. The Petitioner's case is that the 1st Respondent published an advertisement in the Daily Newspapers and on its official website on 14th June 2022 for vacant positions in the Ministry of Health, the 2nd Respondent herein. Some of the positions advertised were: Director Health Management (Family Health and Sanitation) – One (1) Post – V/No.18/2022; Director Health Management (Health Systems) – One (1) Post – V/No.20/2022; Director Health Management (Digital Health and Sector Performance) – One (1) Post-V./No. 22/2022; and Director Health Management (Sector Coordination and Relations) – One (1) Post-V/No.23/2022.
6. In the advertisement, the 1st Respondent placed forth the academic qualifications the applicants could necessarily possess to qualify for the advertised positions. The Petitioner contends that the list of qualifications, excluded, BSc Environmental Health and BSc Public Health. Consequently, holders of these qualifications were automatically disqualified from applying for the positions, yet their qualifications aligned with the functions/responsibilities of the advertised offices.
7. The petitioner further contended that the Respondent didn't give any reasons for the exclusion of the academic qualifications necessary for the advertised jobs, a decision which effectively disqualified its members from applying for the positions advertised. Further, the Respondents did not consult the Petitioner or its members before reaching the impugned decision.



8. Besides omitting the above-stated qualifications from the list of requisite qualifications for the positions, the Respondents listed non-existent qualifications for the advertised positions, for instance, a degree in food safety, which in Kenya, is only offered at the Higher National Diploma level. There is no undergraduate training on food safety. The petitioner takes the position that including non-existent qualifications while excluding a BSc in Environmental Health and a BSc in Public Health, is extremely discriminatory.
9. The Petitioner states that the 2nd Respondent has a full-fledged Environmental Health Department headed by a Director in line with the PSC Scheme of Services, hence persons holding qualifications in this space should have been allowed to apply for leadership positions in the 2nd Respondent. Its members deserve a fair opportunity to apply, compete, and be considered for the advertised positions.
10. Moreover, its members are registered under the Public Health Officers and Technicians Council (PHOTC) which is recognised as the regulatory body under the Revised Scheme of Service [2014] for them, by the 1st Respondent. This is all indicative that its membership is comprised of recognized professionals within the Ministry of Health. Further, this fact was confirmed by the 2nd Respondent in its recommendation to the Registrar of Societies during the Petitioner's registration process.
11. The Petitioner asserts that the 1st and 2nd Respondents arbitrarily disqualified the Petitioner's members from applying for the positions that were advertised in the Ministry of Health, positions for which its members are duly qualified to occupy, without consulting the Petitioner or giving reasons for the decision, the Respondents violated the provisions of Article 47 of *the Constitution*.
12. The Petitioner further asserts that to the extent that the Respondents denied the Petitioner's members a chance or a fair opportunity to apply for the positions in the stated Ministry for which they were qualified, the Respondents violated the provisions of Article 41 of *the Constitution*.
13. By the acts of the Respondents, its members were denied an opportunity to compete for the positions advertised, the Respondents violated the provisions of Article 232[g].
14. Their intention to make appointments that were destitute of merit by excluding qualified persons from applying for the positions advertised, was an affront to the stipulations of Article 232[g] of *the Constitution*. Further, the exclusion of the Petitioner's members from applying for the positions breached their right not to be discriminated against under Article 27 of *the Constitution*.

1st Respondents' case

15. The 1st Respondent denies the allegation that the Petitioner's members were discriminated against. Considering the reality that it is not practically possible for the Ministry of Health to keep track of the changes in the names of courses offered by Universities in Kenya and update the career progression guidelines to recognise every new course, its advertisements normally have a provision that any other relevant qualification from a recognized University in Kenya will be considered. The list of qualifications was therefore not a shut one. The members of the petitioner were covered under this provision.
16. On the claim that the Respondents included non-existent qualifications, namely, a degree in food safety, the 1st Respondent states that the advertisement targeted applicants trained both locally and internationally. Further, the Bachelor of Science Health Promotion degree is offered at Kenyatta University.
17. In conclusion, the 1st Respondent states that the allegations raised by the Petitioner are not supported at all, and nothing prevented its members from applying for the positions that were advertised.



The 2nd Respondents' Case

18. The 2nd Respondent vehemently denies that the qualifications held by the Petitioner's members were arbitrarily omitted and/or excluded as qualifications relevant to the positions advertised. Culminating in the disqualification of its members from applying, and being discriminated against.
19. The 2nd Respondent states that by advertising the positions, it was intended the process could culminate in qualified and professional persons being attracted and hired. In the Respondent's view, persons with a degree in food safety could be ideal among others. Attracting and hiring qualified people could enhance Organizational operational capacities.
20. Moreover, under the advertisement, persons with such relevant qualifications were eligible to apply. Discernably, candidates with a Bachelor of Science in Public Health, and Environmental Health were not precluded from applying. Further, the Petitioner's suggestion that the advertisement could have been tailored to suit only those trained in, and qualified from Kenyan Institutions, was unconstitutional and could suffocate the Constitutional and statutory principle of competitive recruitment.
21. The 2nd and 3rd Respondents are categorical that the Petitioner has failed to demonstrate how the actions of the 2nd Respondent violated their fundamental Constitutional rights as alleged; and that the instant case is an attempt to dictate and/or bar the Respondents from employing qualified Kenyans of the required skills based on competitive interviews as required by Law.

Petitioner's Submissions

22. The Petitioner submitted that its members who hold qualifications in BSc Environmental Health advertised positions. In the advertisement, the Respondents excluded the degrees from the list of the academic qualifications necessary for suitability to apply and get hired for the positions. This had the consequence of disqualifying the petitioner's members from applying.
23. The Petitioner submitted further that by their actions the Respondents discriminated against its members. To buttress its submissions on the alleged discrimination, the Petitioner holds that in the context of the instant matter, the definition in International Labour Organization Discrimination (Employment and Occupation) Convention 1958 (No.111) is more relevant, thus:-
 - a. any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.
 - b. Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers' and workers' organizations where such exist, and with other appropriate bodies-
 2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."
24. The Petitioner argues that in the instant matter, a distinction was made by the Respondents predicated on professional qualifications. Only those possessing the qualifications listed in the advertisement could qualify to apply. As a result, its members who were duly qualified for the advertised positions were impaired from applying.



25. The Respondent's assertion that it is not practically possible to contemplate every new course to be listed, makes little sense and is misleading as the two degrees hereinabove mentioned aren't new. In fact, there is a full-fledged Environmental Health Unit at the Ministry of Health headquarters. The Scheme of Service, as revised in 2014, speak to the fact that the Respondents appreciate the qualifications as relevant to the suitability of persons serving under the Department.
26. The Petitioner argues further that the Respondents cannot hide under the clause "...or any other equivalent qualification from a university recognized in Kenya" under the impugned advertisement to shade off the Petitioner's attack on their and justify, actions complained of. The place the Petitioner's members under the category contemplated under the clause is itself discriminatory as it in its view, relegating the members to the category "Others". Only those with the specifically listed qualifications will always be considered for advertised positions.
27. The Petitioner contends further that by its actions, the Respondents violated the provisions of Article 232 of *the Constitution*. The Article requires them to uphold the values and principles of public service including high standards of professional ethics. Further, Section 22 of the Public Officers Ethics Act, decrees that public officers shall practice and promote the principle of selection of public officers based on integrity, competence and suitability or election in fair elections. This position was aptly expressed in the case of Robert Muriithi Ndegwa vs Minister of Tourism, Petition No. 14 of 2012. The Respondents have blatantly disregarded these provisions.
28. The Petitioner further submits that its members have been denied a fair opportunity to compete for the advertised positions through the exclusion of their qualifications from the list of requirements thereof, despite being qualified for the said positions. That the aforesaid conduct goes against the national values and principles of public service on fair competition and merit as the basis of appointment and promotions, hence violates Articles 10(2) and 234 (2) (c) of *the Constitution*.

1st Respondent's Submissions

29. Relying on the definition by Black's Law Dictionary, 10th Edition of discrimination as:

"failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured".

The 1st Respondent submits that the acts complained of or any of its acts do not fit into the definition at all.
30. The Respondent further submits that the inclusion of the clause "...or any other equivalent qualification from a university recognized in Kenya", after the qualifications that were specifically set out in the advertisement for each of the positions was deliberate, to widen the spectrum of those who will qualify to apply and hired to fill the vacancies. Nothing stopped the Petitioner's members from applying for the advertised positions, certainly not the manner the advertisements were done.
31. Sections 36 and 37 of the *Public Service Commission Act* 2017 set out what constitutes fair competition and merit, inter alia that a vacancy be advertised in a manner that reaches the widest pool of applicants and that the advertisement contains certain information. The 1st Respondent submits that it didn't violate any constitutional principle, provision or right, and or statutory provision.



2nd and 3rd Respondent's Submissions

32. The 2nd Respondent submits that the Petitioner has not in any manner demonstrated that it violated, its constitutional right[s] any Constitutional or statutory provision. There cannot be any basis, therefore, for this Court to find in favour of the Petitioner in this matter, against it.
33. Like the 1st Respondent, the 2nd and 3rd Respondents argue that the advertised positions were open to persons trained in Kenya and abroad. This is why a degree in Food Safety was included. As such the recruitment was competitive.
34. The 2nd Respondent submits that under law, employers are at liberty to engage in the function of recruitment of new employees into its service and bring on board those with expertise to serve in the emerging areas of employment. The employers are not obligated in any way to consult its employees on the qualifications of new employees to be recruited.
35. According to the 2nd Respondents, discrimination means treating others differently without any objective and reasonable justification from persons in relevant and similar situations. To support this view, reliance was placed on the holding of the Supreme Court in the case of *The Law Society of Kenya vs Attorney General & COTU* [2019] eKLR; and the Court of Appeal in *Barclays Bank of Kenya Limited & Another vs Gladys Muthoni & 2 Others* [2018] eKLR.
36. It is submitted that the Petitioner's members were never treated differently from other qualified Kenyans. The advertised positions being new positions within the 2nd Respondent's established structure, all qualified Kenyans with relevant degrees were required to apply including the Petitioner's members.

Issues for Determination

37. I have carefully considered the petitioner's, the further affidavit it filed, the Respondents' response affidavits, and the submissions by the parties, and the following issues emerge for determination;
 - a. Whether the Respondents discriminated against the Petitioner's members.
 - b. Whether the Respondents violated the rights of the Petitioner's members to fair labour practices and fair administrative action;
 - c. Whether the Respondents violated the national values and principles of governance contained in Article 10 (2) and Article 232 of *the Constitution* of Kenya 2010;
 - d. Whether the Court should grant the prayers sought by the Petitioner.
38. The gravamen of the Petitioner's petition, is that in the advertisements for the positions hereinabove set out, the qualifications [the two degrees specified hereinabove], held by its members were excluded from among those the 1st Respondent put forth, as relevant for the candidates' suitability to apply and get hired for the positions. The Petitioner's petition and submissions suggest that the non-inclusion was deliberate, and arbitrarily disqualified its members from applying and getting hired, for the advertised



positions. Therefore, its members were discriminated against. Discrimination in the employment context is prohibited under Section 5 of the *Employment Act* 2007 which provides that:

- “(1) It shall be the duty of the Minister, labour officers and the Industrial Court—
- (a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and
 - (b) to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.
- (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
- (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
- (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
 - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
- (4) It is not discrimination to—
- (a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace; CAP. 226 [Rev. 2012] Employment [Issue 1] 12
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;
 - (c) employ a citizen in accordance with the national employment policy; or
 - (d) restrict access to limited categories of employment where it is necessary in the interest of State security.
- (5) An employer shall pay his employees equal remuneration for work of equal value.
- (6) An employer who contravenes the provision of the section commits an offence.
- (7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”



39. Though the above provisions pre-date *the Constitution* of Kenya, 2010, they find Constitutional backing in Article 27 (1)-(4) of *the Constitution* of Kenya 2010 that provides that:

“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.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (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).”

40. Both the Petitioner and Respondents herein have provided this Court with definitions of discrimination from various sources. The Petitioner draws inspiration from the International Labour Organization’s definition contained in its Discrimination (Employment and Occupation) Convention 1958 (No.111); while the 1st Respondent draws inspiration from the definition contained in Black’s Law Dictionary, 10th Edition.

41. In the Supreme Court case of *Law Society of Kenya v Attorney General & another* [2019] eKLR, the Court delved into the definition of discrimination in great detail. It held: -

“We thus make the logical inference that the Petitioner meant that Section 25(1) and (3) of the Act is inconsistent with the former Constitution as it contravened Section 82 of the said Constitution which prohibited discrimination. In addition, this is the Section that corresponds with Article 27 of *the Constitution* 2010.

- (79) According to Black’s Law Dictionary, 8th ed. (Bryan A. Garner, ed.) (St. Paul, MN: West Group, 2004), page 500, discrimination is “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.”

Further, in *Willis vs The United Kingdom* (2002) 34 EHR 547 the European Court of Human Rights defined discrimination as:

“... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society”. (See *Andrews vs Law Society of British Columbia* [1989] 1 SCR 143, as per McIntyre J.)



In our own jurisdiction, the Court of Appeal in *Barclays Bank of Kenya LTD & Another vs Gladys Muthoni & 20 Others* [2018] eKLR held as follows;

“.....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 description 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.”

[80] Discrimination therefore entails the unjust or prejudicial treatment of different categories of people in the same circumstances and in the present matter, the Petitioner contends that the impugned Section 25(1) and (3).....”

42. The question that this Court must answer, therefore, is whether considering how the advertisements were couched, it had the effect of distinguishing, visiting on the Petitioner’s members, differential treatment or “prejudicial treatment” when compared to those prospective employees whose qualifications were specifically set out in the advertisement,
43. It is not contested that the qualifications allegedly held by the Petitioner’s members, and more specifically the two degrees mentioned hereinabove, were not expressly listed among the required qualifications in the advertisements dated 14th November 2018. However, in answer to the complaint, the Respondents asserted that ordinarily, they include the statement “...or any other equivalent qualification from a university recognized in Kenya”, purposively, to ensure that as the advertiser could not be in a position to contemplate all degree courses that might be relevant to the advertised positions, are not prejudiced. The Petitioner’s members could be accommodated under this clause. They were not in any manner barred from applying for the positions.
44. In my view, the inclusion of the clause, “or any other relevant qualification” in an advertisement for an employment position serves a specific purpose. This clause is often added to ensure flexibility and inclusivity in the hiring process. It acknowledges that qualifications may vary, and candidates with diverse educational or experiential backgrounds could bring valuable skills and perspectives to the role.
45. I could sum up the purposes and benefits, thus; flexibility- the clause allows employers to consider a broader range of qualifications beyond those explicitly listed. It recognizes that alternative educational paths may make a candidate well-suited for the position, encouraging diversity- employers who do not rigidly specify certain qualifications promote diversity in the applicant pool. This leads to a more inclusive workforce with individuals who bring different perspectives, skills, and experiences, adapting to change requirements- in a rapidly evolving world of work, including the clause that allows employers to adapt to changing skill sets and requirements. It recognizes that the landscape of the qualifications may shift over time, lastly, reducing barriers- specifying only a narrow set of qualifications can create barriers for individuals who have gained expertise through non-traditional means. The clause helps to eliminate unnecessary barriers and encourages a more inclusive hiring process.
46. As a result, of the foregoing premises, I am not persuaded that the holders of BSc Environmental Health and BSc Public Health were disqualified from applying for the advertised positions, expressly, or implicitly. They could have still applied and been considered under the clause. I am, and with great respect not able to fathom the sense in the Petitioner’s contention that to suggest that its members could have applied and been considered under the clause, would amount to some form of the relegation of them to a category, “others.” Having found as I have hereinabove, I find that the failure to specifically



list the two degrees allegedly possessed by the Petitioner’s members didn’t have the effect alleged by the Petitioner, and or one that can be said to have amounted to discrimination.

47. Further, this Court is cognizant of the principle that mere differentiation or inequality in treatment doesn’t perse amount to discrimination. See, Mohammed Abduba Dida vs Debate Media Limited & Another [2018] eklr. It must be shown that the act complained of was unreasonable or arbitrary, and that it does not rest on any rational basis. I have elaborately demonstrated hereinabove, why the clause “or any other qualifications, are usually incorporated in an advertisement, and that the Respondents rightfully engaged it and argued that even the petitioner’s members could be covered thereunder. The Respondent’s manner of advertisement was not therefore arbitrary and unreasonable.
48. Assuming I am wrong on the forgoing premises, It is my view that it is within the Human Resource Management function of an entity to decide the skills and qualifications necessary for a particular role. This view is appreciated for instance by Section 5 (4) (b) of the *Employment Act* 2007 which provides that it is not discrimination to “distinguish, exclude or prefer any person on the basis of an inherent requirement of a job”. Then it is at this point that I must state that seldom does this Court interfere with an employer’s right to perform internal human resources functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function unless it can be shown that the functions are carried out without regard to *the Constitution* or other legislation, the agreement between parties, or fair labour practices, see, Kenya Plantation and Agricultural Workers Union vs James Finlay (K) Limited [2013] eklr and Geoffrey Mworira vs Water Resources Management Authority & 2 Others [2015].
49. This Court is cognizant of the burden of proof placed on the employer to demonstrate the absence of discrimination under Section 5 (7) of the *Employment Act* 2007. I am satisfied that the 1st and 2nd Respondents herein have discharged that burden by proving that the Petitioner’s members were not precluded from applying for the advertised jobs.
- b. Whether the Respondents violated the rights of the Petitioner’s members to fair labour practices and fair administrative action.
50. The right to fair labour practices is enshrined in Article 41 of *the Constitution* of Kenya 2010, as follows:

“Labour relations.

41.

- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and to go on strike.
- (3) Every employer has the right—
 - (e) to form and join an employers organisation; and
 - (f) to participate in the activities and programmes of an employers organisation.”



52. On what constitutes a fair labour practice, the South Africa's Constitutional Court in *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* [2002] ZACC 27 observed that:

“The concept of fair labour practice is incapable of precise definition...Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept”

53. Likewise, the Supreme Court of South Africa in *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd.* [1992] ZASCA 149 suggests that the question of whether a labour practice is unfair is ultimately a question of discretion and judgment of the learned trial judge than a question of law or fact. It states:

“The position then is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices and of the fairness of such effects. And, when applying the definition, the Labour Appeal Court is again expressly enjoined to have regard not only to law but also to fairness. In my view, a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions.”

54. In my view, an unfair practice is one, that is arbitrary, capricious and unreasonable. However, whether it is one that is inflicted by these attributes, depends on the peculiar circumstances of each case. I have already made the finding that the Petitioner's members were not in any manner, expressly or implicitly barred from applying for the advertised positions and that it was for good purpose that the advertisements contained the clause referred to hereinabove. As such, I can only disagree with the Respondent's violated the edicts of Article 41 of *the Constitution* of Kenya, 2010.

55. I now turn to whether the right to fair administrative action was breached. Article 47 provides for fair administrative action as follows: -

“47. Fair administrative action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

56. My findings hereinabove point to one thing, no adverse, unlawful or unreasonable action or decision taken against the Petitioner's members. The invocation of the provisions of the Article by the Petitioner is mis-anchored. It should be allowed to sink. I am not persuaded, therefore, that there was any breach of the article as alleged or at all.

c. Whether the Respondents violated the national values and principles of governance contained in Article 10 (2) and Article 232 of *the Constitution* of Kenya 2010

57. The Petitioner asserted that the Respondents affronted the national values and principles of governance stipulated under Article 10 (2) of *the Constitution* of Kenya 2010 provides that-

“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.”

58. I have carefully considered the material placed before this Court on this allegation by the petitioner, I am challenged to understand which of the values or principles were breached by the Respondents. Put in another way, the Petitioner hasn't unambiguously set out how the provisions of the Article were violated.

59. Time and again, this Court has held that it is not enough for a party to allege that his or her constitutional right, or that a constitutional provision has been infringed upon. It behooves the party so alleging to move a point further and sufficiently demonstrate how the infringement and or violation occurred, otherwise, courts will not have any difficulty in rejecting the allegation, and that is what I hereby do as regards the Petitioner's assertion that the stipulations of Article 10, were violated.

60. Article 232 provides that: -

- (1) The values and principles of public service include—
 - (a) high standards of professional ethics;
 - (b) efficient, effective and economic use of resources;
 - (c) responsive, prompt, effective, impartial and equitable provision of services;
 - (d) involvement of the people in the process of policy making;
 - (e) accountability for administrative acts;
 - (f) transparency and provision to the public of timely, accurate information;
 - (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
 - (h) representation of Kenya's diverse communities; and
 - (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.
- (2) The values and principles of public service apply to public service in—
 - (a) all State organs in both levels of government; and
 - (b) all State corporations.
- (3) Parliament shall enact legislation to give full effect to this Article.”



61. Having interpreted the advertisements in the manner I have hereinabove, I am not persuaded that by the advertisements the Respondent acted in a manner that stifled competition, transparency, and accountability in the hiring process that had been commenced, and having disagreed with the Petitioner's allegations on discrimination, this Court is impelled to conclude that there was no prove that the principles or any of them postulated in the Article were violated.
62. The Respondents are emphatic that their advertisement dated 14th June 2022 adhered to the legal requirements under Sections 36 and 37 of the Public Commission Act relating to fair competition.
63. Sections 36 and 37 of the Public Service Act, for the criteria for appointment and promotion, in my view, a criterion that aims to promote a more inclusive, flexible, and diverse hiring process, fostering an environment where individuals with various qualifications can contribute to the success of the public service. The Sections provide thus: -

“Criteria for appointment and promotion

- (1) In selecting candidates for appointment or promotions, the Commission or other lawful appointing authority shall have regard to—
- (a) merit, equity, aptitude and suitability;
 - (b) the prescribed qualifications for holding in the office;
 - (c) the efficiency of the public service;
 - (d) the provable experience and demonstrable milestones attained by the candidate; and
 - (e) the personal integrity of the candidate.
- (2) For the purposes of this section, "merit" in regard to a person means, the person —
- (a) has the abilities, aptitude, skills, qualifications, knowledge, experience and personal qualities relevant to the carrying out of the duties in question;
 - (b) has potential for development; and
 - (c) meets the criteria set out in subsection (1).
- (3) In making appointments or promotions, the Commission or authorized officer are bound by the constitutional principles which require that—
- (a) no applicant or candidate is discriminated on any ground;
 - (b) no one gender constitutes more than two thirds of those appointed;
 - (c) at least five percent of the appointments constitute persons with disabilities;
 - (d) there is proportionate representation of all ethnic communities; and
 - (e) the youth are appointed.



- (4) For purposes of ensuring representation of the diverse Kenyan Communities in the public service, the Commission or authorized officer shall, where necessary, adopt affirmative action measures in line with Articles 27(6) and 56(c) of *the Constitution*.
- (5) Where the Commission or other authorized officer prescribes a standard application form for submitting applications for employment, the Commission or other lawful appointing authority shall ensure that the form meets the requirements of this Act.
- (6) Where an expatriate is to be appointed to a position that falls within the Commission's jurisdiction, the Commission shall approve such an appointment.
- (7) The Commission shall approve the appointment of an expatriate only where the expertise sought is not locally available.

64. Advertisement of vacancies

- (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.”

65. The Petitioner failed to demonstrate that there had been a selection process or advertisement that offended this statutory criterion. Its allegations as regards incompetency of those who could be appointed out of the initiated process, is in my view, a bald allegation, one which cannot only be characterized as mere speculation.

Whether the Court should grant the prayers sought by the Petitioner.

66. Having found as I have hereinabove on the various identified issues, I find no difficulty in finding that this Court cannot avail any of the sought remedies to the Petitioner, as the Petition lacks merit.

67. In the upshot the Petition dated 13th July 2022 is dismissed with costs.

68. It is so ordered.

READ, DELIVERED AND SIGNED THIS 8th DAY OF MARCH, 2024.

OCHARO KEBIRA.

JUDGE

In the presence of:

Ms. Iseme for 1st Respondent

Mr. Oure for 2nd and 3rd Respondent

No appearance for Petitioner

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

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