



Abajillo v Principal Secretary, Ministry of Interior & Coordination of National Government & 6 others (Employment and Labour Relations Petition E001 of 2024) [2024] KEELRC 2761 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2761 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

EMPLOYMENT AND LABOUR RELATIONS PETITION E001 OF 2024

ON MAKAU, J

NOVEMBER 8, 2024

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS AND ARTICLES 2, 3, 10, 22, 23, 27, 35, 41, 75, 165, 232, 233 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION AND VIOLATION OF ARTICLES 10,19, 20, 21, 22, 23, 24, 25, 35, 41, 50, 179, 232 AND 233 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF APPOINTMENT OF ASHA IBRAHIM BORU AS CHIEF GRADE II OF TOWNSHIP LOCATION, CENTRAL DIVISION, MOYALE SUB-COUNTY

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, 2012

AND

IN THE MATTER OF EMPLOYMENT ACT, 2007

BETWEEN

ABDULLAHI OMAR ABAJILLO PETITIONER

AND

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

REGIONAL COMMISSIONER, EASTERN REGION 2ND RESPONDENT

COUNTY COMMISSIONER, MARSABIT COUNTY 3RD RESPONDENT

DEPUTY COUNTY COMMISSIONER, MOYALE SUBCOUNTY 4TH RESPONDENT



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|---------------------------------|----------------------------|
| ASHA IBRAHIM BORU | 5 TH RESPONDENT |
| ATTORNEY GENERAL | 6 TH RESPONDENT |
| PUBLIC SERVICE COMMISSION | 7 TH RESPONDENT |

JUDGMENT

Introduction

1. By a Petition dated 7th March 2024, the Petitioner alleged that the Constitution and his right to fair administrative action, right to human dignity and fundamental freedom from discrimination were violated/threatened with violation by the Respondents during the recruitment process of the Chief Township Location, Moyale Sub-county. Therefore, he sought the following orders:
 - a. A declaration be and is hereby issued that the recruitment of the 5th Respondent as Chief Township location is unconstitutional, illegal, unreasonable, irrational and procedurally unfair.
 - b. An order restraining and/or prohibiting the 5th Respondent from assuming office, exercising power and functions of Chief Grade II for Township location, Moyale sub-county or drawing/earning any salaries or allowances thereof.
 - c. Any other or further order the Honourable Court deems fit and just to grant.
 - d. Costs be provided for.
2. The 1st -4th respondents opposed the Petition vide a Replying Affidavit sworn 15th April 2024 by one Benedict Muniwoki while the 5th Respondent filed a Replying Affidavit sworn on 9th April 2024. They all contended that the recruitment process was above board and the alleged violations were not factual.
3. However, the Interested Party faulted the recruitment process for violating the principles of recruitment in the public service as prescribed in Article 232 (1) of the Constitution, Statutory provisions and Public Service Commission Regulations.

Factual background

4. The Ministry of Interior and Coordination of the National Government advertised the position of Chief Grade II Township location, Moyale Sub-county, on 12th September 2023; the petitioner together with other candidates applied and they were interviewed; that the recruitment process was undertaken by a panel which recommended the 5th Respondent for the appointment; that the recommendation was approved by the Principal Secretary vide a letter dated 20th December 2023; and that the approval was cascaded to the County Commissioner and Deputy County Commissioner for effecting the appointment.
5. The petitioner was aggrieved and filed this petition alleging that the Recruitment process and the appointment of the 5th respondent was marred with corruption, tribalism, nepotism among other malpractices in the recruitment process; that the 5th Respondent was not qualified for the appointment as per the advertisement and the schemes of service. That the 5th respondent possessed academic grade of D+ in KCSE instead of C (plain), and she hailed from another location; that the principle of fair representation was breached as minority community is unrepresented; and that the 5th Respondent was a brother to the assistant chief township sub-location and whose community was dominant.



6. The Petitioner averred that the Respondents' actions violated/threatened to violate his right to equality before the law and freedom from discrimination, and also right to human dignity as guaranteed under Article 27 and 28 of the Constitution. He contended that, although he emerged the top candidate during the interviews, the 5th respondent was unfairly recommended for appointment, an act which amounts to abuse of administrative authority and discretion.
7. The 1st-4th Respondents averred that the Petitioner deliberately misled the Court by making allegations aimed at distorting the facts in order to prevent the successful party from taking up her duties; that at no time was the Petitioner declared the top candidate; that the panel results were held in confidence and never shared anywhere save in this court; that there were no complaints received of any existing relationship between candidates; and that even if there was any relationship, the same would not in any way influence the competitive process and the outcome.
8. They further averred that after the advertisement, 9 applications were received and six candidates were shortlisted; that only five attended the interview and that the committee selected the 5th respondent in a process guided by high standards, merit, professional ethics, competitiveness and equal opportunity.
9. They further averred that the 5th Respondent was a serving assistant chief and was also the acting Chief of the Township Location position since 1st May 2022; that the Appellant was overqualified for the position as he held a Bachelor of Laws degree and therefore was not suitable for appointment as they doubted his ability to serve in public for long; that the candidates' bio data information that was shared did not include kinship therefore there was no way for the panel to establish any existing relations; and that the appointment of the 5th Respondent was recommended because she was the most qualified candidate with a performance of 82.6% while the Petitioner was third at 65.4%.
10. Besides, they contended that the age requirement was inapplicable to already serving candidates as the same only applied to entry level applicants; that despite the 5th Respondent's age, she was most qualified due to her merit certificates being an exemplary serving officer with good records and relevant experience gained since 12th May 2005; that although the 5th Respondent had a D grade at the time of her appointment in 2005, the same was immaterial and should not be used to her disadvantage; that disqualifying her on the academic grounds would amount to an injustice and failure to adhere to Article 236 of the Constitution that guarantees public officers the right to advance through promotion; and that her appointment was in consideration of the gender rule to ensure women representation in all levels of public service.
11. They further averred the 5th Respondent demonstrated superior community cooperation skills which was a prerequisite outlined in the advertisement and therefore fit to serve in Moyale Township location which is prone to conflicts with neighbouring communities as it has a cosmopolitan population; and that the 5th Respondent's performance in community activities and political neutrality in comparison with other chiefs in the region underscored her capability to serve effectively in such an environment.
12. They cited the letter dated 5th May 2023 Ref: Z 16 VOL II/91 which accorded priority to serving chiefs including the 5th Respondent who was a serving assistant chief; that the same was in line with the policy guideline B.14 and B.25 of the Human Resource Policies and Procedures Manual for Public Service 2016; and that the 5th Respondent had the right to be promoted as per guideline B.25 on basis of qualification.
13. They contended that the 5th Respondent had undertaken the chief's security management training, community development training and evaluation service training making her the most qualified serving in an acting capacity as a candidate for the position of chief; and that the Petitioner was not an



- appropriate candidate as he was overqualified to take up the duties of a chief in a border, cosmopolitan township that had had incidences of insecurity.
14. They denied the allegation that they had altered the results and termed the same as false and misleading. They contended that the Petitioner neither produced any proof that the process was marred with illegality, bias and procedural unfairness nor did he demonstrate violation of Article 47, 27 and 28 of the Constitution. Therefore, they prayed for dismissal of the Petition with costs.
 15. The 5th Respondent contended that the interview process was above board, competitive, professional and merit based; that she was surprised that the Petitioner had a copy of her identity card without her consent which amounted to a misuse of personal data; that Petitioner's allegations were false and made with the intention of obstructing her from taking office; that there were no altered results that were produced by the Petitioner; and that she had a prequalified right to be prioritized in the appointment as chief.
 16. She denied the claim of nepotism and averred that there was no legal provision barring members of the same clan or kinship from seeking employment concurrently; that the Petitioner's allegations were geared towards tarnishing her reputation and advance the stereotype that women are incapable of serving effectively as public officers; and that there was no evidence adduced in support of the allegation that the appointment was unconstitutional or illegal.
 17. The Interested Party averred its establishment and legal mandate are laid out under Articles 233(1) and 234 of the Constitution respectively; that section 31 and 33 of the Public Service Commission (PSC) Act provides for delegation of its power; that vide delegation instrument Ref: PSC/SEC/93/37(37) dated 30th July, 2018 it delegated its functions to the authorized officer at the Ministry of Interior and Coordination of the National Government to exercise its mandate to appoint chiefs and assistant chiefs.
 18. It further averred that the said ministry placed an advertisement for the position of chief II Township location on 12th September, 2022 which introduced requirements which are alien to the Revised Scheme of Service for the National Government Administrative Officer, October 2015; the alien requirements included "one to be married, be aged 30-45 years and be involved in development initiatives; that the recruitment process was undertaken and the 5th Respondent was recommended to the Principal Secretary for appointment; and that the recommendation was approved.
 19. However, the interested party contended that the 5th respondent did not meet the minimum qualification for the position under the Revised Scheme of Service for the National Government Administrative Officer, October 2015.

Submissions

20. It was submitted for the Petitioner that the recruitment of the 5th respondent as the Chief of Township Location, Moyale disregarded the principles of fairness, equality and national values espoused under Article 10, 27, 28 and 232 of the Constitution. It was submitted that the 5th respondent did not qualify for the advertised position and she concealed the information that she was a blood relative to the Assistant in the same Location. Finally, the court was urged to intervene in the recruitment process because it will violate the petitioner's fundamental rights and freedoms guaranteed in the Constitution.
21. The Respondents raised the following issues for determination: whether the recruitment of the 5th Respondent as Chief Township location is unconstitutional, illegal, unreasonable, irrational, and procedurally unfair and whether the Petition satisfies the precision threshold required of constitutional petitions.



22. On the first issue, it was submitted that recruitment process met the constitutional standards set out in Articles 10,232, and 234 of the Constitution and policy guidelines A12, B3(2), 14 and 25 of the Human Resource Policy and Procedures Manual for public service. It was further submitted that the Petitioner mislead the court into granting conservatory orders on 15th March 2024, as it was the 5th Respondent and not the petitioner who emerged the top candidate after meeting all the requirements set out in the job Advert.
23. To buttress their argument on constitutionality of the process, reliance was placed on the case of *Katiba Institute & Another v Attorney General & another* [2020] eKLR, *Community Advocacy and Awareness Trust & others v Attorney General*, Nairobi Petition no. 243 of 2011 and the Ugandan case of *Pastoli v Kabale District Local Government Council and others* [2008] 2 EA 300.
24. It was further submitted that the Constitution and guideline B.5 of the HR Policies and Procedure Manual for the Public Service, 2016 require that recruitment in public service should on the basis of fair competition and merits, representation of Kenya’s diverse communities, adequate and equal opportunities to all gender, youth, ethnic groups, persons with disabilities and minorities. For emphasis reliance was placed on *Katiba Institute & Another v Attorney General & another* [2020] eKLR and *Elisha Mien Owalla v Attorney General Republic of Kenya & 4 Others* [2018] eKLR.
25. It was also submitted that the petitioner has not adduced any evidence to prove that the recruitment process was actuated with malice, bad faith, bias and unfairness. Reliance was placed on the case of *Rawal v Judicial Service Commission & another; Okoiti (Interested Party) International Commission of Jurist & Another (Amicus Curiae) (Civil Appeal) (Application) 1 of 2016* [2016].
26. As regards the second issue, it was submitted that the petition did not meet the legal threshold a constitutional pleading established by Court in *Anarita Karimi Njeru v Republic* [1979] eKLR. It was submitted that the Petitioner did not plead with reasonable degree of precision the constitutional entitlement threatened, infringed or violated and the manner of the alleged violation so as to enable the Respondent to mount a defence.
27. Besides, the petitioner has not adduced evidence to prove discrimination and inhuman treatment as alleged. Consequently, it was submitted that the alleged violations have not been substantiated and the petition ought to be dismissed with costs as it happened in *Ibrahim Mohamud Ibrahim & another v Kenya Wildlife Services & 4 others* [2019] eKLR.

Determination

28. I have considered the Petition, the responses, the submissions by parties, the authorities cited and the law. The petitioner applied for the position of Chief Township Location, Moyale Sub-County but the 5th respondent was recommended for appointment. The issues falling for determination are:
 - a. Whether or not the Petition meets the competence threshold laid out in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR.
 - b. Whether or not the appointment of the 5th Respondent violated or will violate the Constitution and the petitioner’s constitutional rights.
 - c. Whether the orders sought should be granted.



Competence threshold

29. The issue of competence of the petition was only raised by the Respondents during their closing submissions. In *Anarita Karimi Njeru v Republic* [197] eKLR the High Court states follows:

“We would, however, again stress 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.”

30. The Petitioner pleaded in paragraph 25, 26 and 27 the provisions of the Constitution that have been or are threatened with violation if the appointment of the 5th respondent is allowed to stand. It further indicated that the said provisions will be violated through discrimination, violation of rights to human dignity, and procedural unfairness. Having considered the said paragraphs, I find that the Petitioner has pleaded with reasonable precision a case of violation and threat to violation of the Constitution that warrants this courts determination on the merits. I am also satisfied that the respondents have been able to mount a defence without raising the issue of competence of the petition.

Constitutional violations

31. The petitioner’s allegation of the violations of the Constitution was supported by the Interested Party. It is without any dispute that the power to recruit officers into the public service belongs to the interested party but it has delegated the said power to the 1st - 4th respondents. Consequently, the Court takes seriously, the averments by the interested party that the power to recruit and appoint the 5th respondent was exercised contrary to express provisions of the Constitution, Statutes and Regulations.

32. It has been clarified to this Court that the 5th Respondent did not meet the minimum requirement for appointment. It is also clear that that the process lacked openness as there was material non-disclosure, by the 5th and 4th respondents, to the interviewing panel that the 5th respondent was a sister to the Assistant Chief of Township Location on whom she was to play supervisory role, hence conflict of interest.

33. Section 12 of the Public Officer Ethics Act provides that:

“12. Conflict of interest

1. A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.
2. Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in the public officer’s personal interests conflicting with his official duties.
3. A public officer whose personal interests conflict with his official duties shall-



- a. declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and
 - b. refrain from participating in any deliberations with respect to the matter.
4. Notwithstanding any directions to the contrary under subsection (3)(a), a public officer shall not award a contract, or influence the award of a contract, to-
 - a. himself;
 - b. a spouse or relative;
 - c. a business associate; or
 - d. a corporation, partnership or other body in which the officer has an interest.
 5. The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.
 6. In this section, "personal interest" includes the interest of a spouse, relative or business associate."

34. Having considered the evidence and submissions presented to the Court, I find that the non-disclosure of material facts about the blood relationship between the 5th respondent and the Assistant Chief in the same location violated the principles of transparency and accountability. Besides, the 4th respondent was made aware of the said blood relationship through a letter dated 24th April 2023 but failed to reveal the matter during the interviews on 2nd October 2023. The 4th respondent did not dispute receipt of the letter dated 24th April 2023. Consequently, I agree with the petitioner and the interested party that the appointment of the 5th respondent violated the National Values and Principles of governance as set out under Article 10 which provides as follows:

“National values and principles of governance.

10. The national values and principles of governance in this Article bind all State
 - (1) 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— *Constitution of Kenya, 2010*
 - 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 marginalized;
- c. good governance, integrity, transparency and accountability; and
- d. sustainable development.”

35. In addition, the recruitment of the 5th respondent was faulted for the reason that she did not meet the minimum merit qualification set out in the advertisement and the Revised Scheme of Service for the National Government Administrative Officer, October 2015 being:

- " i. Mean Grade C (plain) in Kenya Certificate of Secondary Education (KCSE) or its equivalent from a recognized examining body;
- ii. Be in possession of a Diploma in any of the following disciplines; public administration, management, social work, community development, education, governance, conflict management or equivalent qualification from a recognized institution.
- iii. Be not less than thirty-five (35) years of age;
- iv. Be a resident of a particular location;
- v. A certificate of good conduct;
- vi. Have good communication skills; and
- vii. Have certificate in computer application skills from a recognized institution.”

36. There is admission that the 5th respondent had Grade D in KCSE and did not have a Diploma in any of the required fields. She was therefore not qualified for the appointment to the position advertised. The 5th respondent was also not a resident in the Township Location. Consequently, her appointment was also contrary to the principles of public service provided under Article 232 of Constitution which states as follows:

“ Values and principles of public service.

232. The values and principles of public service include-

(1)

- 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.”

37. It was further contended that the recruitment of the 5th respondent was discriminatory against the petitioner because he was denied the job because he was overqualified and there was doubt whether he could continue in the public service for long period if appointed. I am inclined to agree with the Petitioner on the alleged discrimination because the schemes of service provided for the minimum qualification and no maximum qualification. It was discrimination to exclude the petitioner who had met the minimum qualification and appoint the 5th respondent who was not qualified at all.

38. Section 5 (3) of the *Employment Act*, 2007 prohibits discrimination in work place in the following terms:

- “(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.
- (3) It is not discrimination to—
- a. take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;
 - 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;
 - d. restrict access to limited categories of employment where it is necessary in the interest of state security.”



39. Guided by the above provision, I further find that the recruitment process by the 1st -4th respondent was tainted with indirect discrimination against the Petitioner and other qualified applicants who were locked out by the addition of marriage and age factors as requirements in the advertisement. The said additional requirements were not provided for in the Schemes of service and therefore the recruitment process was discriminatory and flawed ab initio.
40. I further find that, the final decision to appoint the 5th respondent as the chief of Township Location was also irrational since it was tainted with the said procedural impropriety and it was reached after taking into account irrelevant factors and not the relevant factors set out under the schemes of service, the Constitution, statutes and the Public Service Regulations.
41. Finally, the petitioner alleged that his right to human dignity were violated. I sought guidance from the case of Mathenge v Julie Njubi Muiruri (t/a Human Hair Center) (Petition E032 of 2023) [2024] KEHC 6970 (KLR) (Constitutional and Human Rights) (13 June 2024) (Judgment) where it was observed as follows:
- “ 53. Courts have interpreted the right to human dignity to be the bedrock for the enjoyment of all the other rights under the Bill of rights. In Mutuku Ndambuki Matingi (supra) the Court affirmed:
- “ 50. As regards the right to dignity, in Ahmed Issack Hassan vs. Auditor General [2015] eKL the Court held that:
- “...the right to human dignity is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”. See Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516.”
42. I have already found that the petitioner was a victim of a recruitment process that violated the Constitution, Statutes and Public Service regulation. I have also found that the process was contrary to Schemes of Service, and was discriminatory ab initio, and the final decision was tainted with procedural impropriety and irrationality. In view of the said violations of the petitioner’s rights I find that his dignity was put to mockery.
43. I conclude this part by holding that the petitioner has proved on a balance of probability the alleged violations to the Constitution and his fundamental rights and freedoms guaranteed under Article 27, 28 and 47 of the Constitution.

Reliefs

44. In view of the foregoing conclusion, I find that the petitioner is entitled to declaratory order in prayer (a) paragraph 29 of the petition. This declaration renders the process and the final decision appointing



the 5th respondent as Chief Grade II for Township Location, Moyale Sub-County, a nullity for being in contravention with the Constitution. (See Article 2 and 3 of the Constitution).

45. He is also entitled to an order restraining the 5th respondent from assuming office, exercising powers and functions of Chief Grade II for Township Location, Moyale Sub-County or drawing/earning any salaries or allowances thereof.
46. For avoidance of any doubt the 1st- 4th respondents are at liberty to carry out the recruitment process afresh as long as it is done within the four corners of the Constitution, Statute law, Regulations and the Schemes of Service.

Disposition

47. On the basis of matters above, I enter judgment in favour of the petitioner against the respondent as follows:
 - i. A declaration be and is hereby issued that the recruitment of the 5th Respondent as Chief Township location is unconstitutional, illegal, unreasonable, irrational, procedurally unfair and therefore a nullity.
 - ii. An order restraining and/or prohibiting the 5th Respondent from assuming office, exercising power and functions of Chief Grade II for Township location, Moyale sub-county or drawing/earning any salaries or allowances thereof.
 - iii. Costs be provided to the petitioner.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF NOVEMBER, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

