



REPUBLIC OF KENYA



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**Nyongesa v Masinde Muliro University of Science and Technology
& 2 others; Muhehe & 5 others (Interested Parties) (Petition
E005 of 2021) [2023] KEELRC 192 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 192 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

PETITION E005 OF 2021

JW KELL, J

JANUARY 26, 2023

IN THE MATTER OF ARTICLE

1,2,10,22,23,27,41,47,48,50,73,75,232 AND 258

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF

ARTICLES 10,27 AND 232 OF THE CONSTITUTION OF KENYA

2010, RULE 3 OF THE HARMONIZED CRITERIA &

GUIDELINES FOR APPOINTMENT AND PROMOTION OF

ACADEMIC STAFF IN UNIVERSITIES IN KENYA

AND

IN THE MATTER OF THE ALLEGED UNCONSTITUTIONAL

AND IRREGULAR APPOINTMENT OF THE MASINDE MULIRO

UNIVERSITY OF SCIENCE AND TECHNOLOGY UNIVERSITY

SENIOR LECTURER, ASSOCIATE PROFESSORS AND FULL

PROFESSORS

AND

IN THE MATTER OF THE DETERMINATION THAT THE

APPOINTMENT OF THE MASINDE MULIRO UNIVERSITY OF

SCIENCE AND TECHNOLOGY SENIOR LECTURER ASSOCIATE

PROFESSORS AND FULL PROFESSORS LACKED FAIR

COMPETITION AND MERIT AS THE BASIS OF APPOINTMENT



**AND PROMOTIONS BUT RATHER MARRED WITH
JUDGMEENT IN BGM ELR PETITION NO. E005 OF 20211
DISCRIMINATIONS**

BETWEEN

FERDINAND CHIRURE NYONGESA PETITIONER

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY 1ST RESPONDENT**

**VICE CHANCELLOR MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY 2ND RESPONDENT**

**CHAIR OF COUNCIL MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY 3RD RESPONDENT**

AND

JOHN MUHEHE INTERESTED PARTY

JANET N KASILLY INTERESTED PARTY

BERNADETTE SABUNI INTERESTED PARTY

ALEXANDER KHAEMBA INTERESTED PARTY

JOSEPH NASONGO WAMOCHA INTERESTED PARTY

JUDAH NDIKU INTERESTED PARTY

JUDGMENT

1. The Petitioner was a lecturer at the 1st Respondent University. Following unsuccessful promotion interview conducted by the respondents and being aggrieved by the process the petitioner filed the instant petition dated 29th September 2021 and amended on the 23rd February 2022 seeking the following reliefs:-
 - a. A declaration be and is hereby issued that the decision by the 1st 2nd and 3rd Respondents to appoint the 1st and 2nd - 6th Interested Parties as Senior Principal Technician (Senior Lecturer equivalent) and Associate Professor, respectively, of Masinde Muliro University of Science and Technology, contravened national values and principles, responsibilities of leadership, values and principles of Public service and discriminatory as envisaged under Articles 10,73,232,&27 of the *Constitution* of Kenya 2010.
 - b. A declaration that all the decision and actions undertaken by the 2nd Respondent as ex-officio member and the 3rd Respondent as Chairperson of the Appointment and Promotions Committee of the 1st Respondent in Selection of Senior Lecturer Grade 13, Associate Professor Grade 14 and Professor Grade 15 together with equivalent graded in non- teaching cadres is null and void.



- c. An order do issue directing the 2nd and 3rd Respondents to recall appointment letters issued to the beneficiaries in academic positions of Senior Lecturer Grade 13, Associate Professor Grade 14 and Professor Grade 15 and equivalent Grades in the non-teaching cadres.
 - d. Any other relief and or order that the Honourable court may deem fit and just to grant.
 - e. Costs of the Petition.
2. The Petition was accompanied by verifying affidavit and affidavit in support all sworn by the petitioner on the 29th September, 2021 together with exhibits relied on.
 3. The Petition was opposed.
 4. The 1st and 2nd Respondents filed replying affidavit in response to the petition sworn by Prof. Solomon Shibairo on the 19th October 2021.
 5. The 1st Interested party, John Muthee, filed their replying affidavit sworn on the 19th October 2021 and filed in court on the 22nd October 2022.
 6. The 2nd Interested party, Prof. Janet Nasambu Kassily Barasa filed their affidavit sworn on the 19th October 2021 in opposition to the petition which was received in court on the 22nd October 2021. They further filed grounds of opposition dated 21st October 2022 to the amended petition;
 7. The 3rd Interested party, Prof. Engineer Bernadette Sabuni filed their affidavit sworn on the 19th October 2021 in opposition to the petition which was received in court on the 22nd October 2021.
 8. The 4th Interested party, Dr. Alexander W. Khaemba filed their affidavit sworn on the 18th October 2021 in opposition to the petition which was received in court on the 22nd October 2021.
 9. The 5th Interested party Dr. Joseph Wamocha Nasongo entered appearance and filed notice of preliminary objection dated 21st October 2021 and their replying affidavit sworn on the 21st October 2021 together with his exhibits all filed in court on the 21st October 2021.
 10. The 6th Interested party, Dr. Judah Ndiku, entered appearance and filed notice of preliminary objection dated 21st October 2021 and his replying affidavit sworn on the 21st October 2021 together with his exhibits all filed in court on the 21st October 2021.

Rejoinder

11. The Petitioner filed affidavits in rejoinder to respondents replying affidavit all sworn on the 23rd February 2022, affidavits and in rejoinder to the 1st, 2nd, 3rd, 4th, 5th and 6th interested parties all received in court on even date of 23rd February 2022.

Petitioner's case in summary

12. The Petitioner stated that vide advert by the 1st Respondent 68 posts were advertised for senior lecturer grade XIII, 28 posts for associate professor grade XIV and 15 posts for professor grade XV (Exhibit B). That the petitioner applied for senior lecturer grade XIII and was later interviewed. He received regret letter citing failure to supervise three post graduate students to completion (exhibit E). The Petitioner states that the reason given for the rejection was frivolous and discriminatory as the 1st interested party in the same department with less qualifications (holds masters degree) and no supervision was promoted to grade XIII.



That the department of Electrical and Communications Engineering did not offer any post graduate program and therefore there were no students to be supervised by the Petitioner, a well known fact to the 1st and 2nd respondents. That the exercise was riddled with discrimination and favoritism wherein the petitioner was a victim of discrimination. That the discrimination continued to higher ranks of associate professors where unqualified candidates were handed promotions. The petitioner cited the 6 interested parties as the beneficiaries of the alleged discrimination and favoritism.

That the 2nd interested party appears on item 6 on list of associate professors as professor of Religion whereas her area of specialization as guided by her PhD degree was in disaster management and humanitarian assistance.

The 3rd Interested party appears at item 7 on the list of associate professors as a professor of civil and structural engineering but her area of specialization as guided by her PhD degree was in disaster management and humanitarian assistance.

The 4th Interested party appears at item 14 on the list of associate professors of GIS and Remote Sensing but his area of specialization as guided by her PhD degree was in disaster management and humanitarian assistance.

The 5th Interested party appears at item 17 on the list of associate professors as a professor Education Foundations but his area of specialization as guided by his PhD degree was in disaster management and humanitarian assistance.

The 6th Interested party appears at item 18 on the list of associate professors as a professor Educational Planning and Management but his area of specialization as guided by his PhD degree was in disaster management and humanitarian assistance.

That disaster management and humanitarian assistance is not related to Religion, Civil and Structural Engineering , GIS and Remote Sensing, Education Foundations and Education Planning and Management as cited above.

13. In terms of constitutional violations the petitioner pleaded the contravention of Article 232(1)(g) of the Constitution by the respondents for failure to adhere to national values and principles of public service by not observing fair competition and merit basis in appointments and promotions.

That the Respondents failed to adhere to national values and principles for governance in contravention of Article 10 of the Constitution.

To the extent that the respondents directly and indirectly discriminated against the petitioner in not ensuring that the selection of the 6 interested parties was not influenced by nepotism and other improper motive or corrupt practices contrary to Articles 27(5) and 73(2)(b) of the Constitution and lastly to the extent the respondents selected the 1st interested party with masters qualification to grade 13 against the petitioner with PhD when there was no special case in the circumstance in total contravention of Rule 3; minimum criteria for appointment or promotion of university academic staff as set by the Commission for University Education.

Respondents' case

14. That the 2nd Respondent is ex official member of the council hence his name out to be struck off the suit.
15. That the 1st Interested party was not an academician but a technical employee working in the department of Electrical and Communication Engineering and that he was issued with letter of appointment way back on 8th June 2021 and which position was to take effect from 29th April



2021(academic papers, appointment letter annexed as SS2). The Respondents through replying affidavit of Prof Shibairo sworn on 19th October 2021 annexed as SS4 the internal advert for academic staff and internal advert for administrative technical and support staff. That the petitioner did not meet the qualification for appointment, that there were other persons promoted yet not sued and could be affected by the orders in the petition, that the 6 interested parties were promoted after rigorous interviews and met the qualifications, that the harmonized criteria and guidelines for appointment and promotion of Academic staff in the universities in Kenya as a set out by the Commission for University Education as relied on by the petitioner in paragraph 11 of the supporting affidavit was declared unconstitutional by court in the case of *University Academic Staff Union v Machakos University and another* [2019] eKLR for having contravened articles 10(2), 41(1), 2(c) & 5 of the *Constitution* of Kenya hence respondents could not have contravened the same.

16. That the Petitioner was subjected to appeal process and the appeal was dismissed on the same ground of having not supervised to completion 3 PhD students(FCN-1B letter dated 2nd February 2022 by Prof Shibairo to the petition communicating outcome of the appeal) .
17. All the Interested parties filed their replying affidavits defending their promotions and stating they were qualified for the appointments. The 1st interested party stated he was a non-teaching staff hence was not required to supervise students. The other interested parties stated they met all qualifications and were appointed on merit and produced their credentials under their affidavits.

Petitioner rejoinder to response

18. The Petitioner filed rejoinder insisting the interested parties were not qualified for appointment, that the 1st interested party on basis that he did not hold PhD and was irregularly appointed to the senior lecturer scale 13 under advert for academic staff yet he was not teaching. That the other interested parties did not hold relevant PhD and some had not supervised the required number of PhD students.

The hearing

19. The court gave directions for the petition to be canvassed by way of written submissions. The parties complied.

Determination

Issues for determination

20. The Petitioner addressed the following issues in his submissions:-
 - i. Whether the Respondents' appointees in the respective disciplines of associate professors are inconsistent with and in contravention of the articles 10,27, 73 and 232 of the *Constitution* of Kenya
 - ii. What remedies are available in the circumstances.
21. The Respondents and interested parties addressed the following issues in their submissions:-
 - i. Whether the respondents violated the constitutional rights of the petitioner
 - ii. Whether the interested parties were rightly promoted to their current position
 - iii. Whether the petitioner is entitled to reliefs sought



22. The court having read the pleadings by the parties, the reliefs sought in the petition and having considered issues addressed by the parties in their written submissions was of the considered view that the issues placed before the court by the parties for determination of the dispute as are follows:-
- a. Whether the petitioner was discriminated against by the Respondents in the appointments
 - b. Whether the respondents violated the constitutional provisions of Articles 10, 27(1), 73 and 236 of the Constitution in the appointments
 - c. Whether the petitioner was entitled to the reliefs sought

Whether the petitioner was discriminated against by the Respondents in the appointments

23. The relevant law.

The Employment Act provides for an elaborative definition of discrimination of employee and the criteria to be applied by the court in event of alleged discrimination against the employee under section 5 which reads:-

5. Discrimination in employment
 - (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;
 - (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.
- (8) For the purposes of this section—
 - (a) “employee” includes an applicant for employment;
 - (b) “employer” includes an employment agency;
 - (c) an “employment policy or practice” includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment on disciplinary measures.”

24. The Petitioner in the instant case was a serving lecturer in the department of Electrical and Communications Engineering of the 1st Respondent. The Petitioner stated that vide advert by the 1st respondent 68 posts for senior lecturer grade 13, 28 posts for associate professor grade 14 and 15 posts for professor grade 15 were advertised (petitioner’s list doc .no. 2). That the petitioner applied for senior lecturer grade 13 and was later interviewed. He received regret letter citing failure to supervise three (3) post graduate students to completion. The employer rejected his appeal on the same ground. The petitioner states that the reason given for the rejection was frivolous and discriminatory as the 1st interested party in the same department with less qualifications (holds masters degree) and with no supervision record was promoted to grade 13. That the department of Electrical and Communications Engineering did not offer any post graduate program and therefore there were no students to be supervised by the Petitioner, a well known fact to the 1st and 2nd respondent. That the exercise was riddled with discrimination and favoritism wherein the petitioner was a victim of discrimination. That the discrimination continued to higher ranks of associate professors where unqualified candidates were handed promotions.

25. The court in determining whether or not the petitioner was a victim of discrimination in the hiring process considered whether the rejection of the petitioner’s application for promotion to senior lecturer grade 13 was discriminatory.

Petitioner’s Qualification for the promotion

26. The Petitioner produced the advert for academic position (Doc No.2). The requirements for the – Senior Lecturer (Grade X111) under the advert were as follows:-



‘Applicants should have earned PhD or equivalent degree qualification in the relevant area from recognised/accredited university, at least three (3) years as lecturer or 6 years in industry, in addition they must have accumulated at least 34 equivalent publications points four (4) publications in refereed journals since last appointment . they should show evidence of continued research , publications, effective teaching, participation in seminars and conference and supervision of post graduate students ie. Supervised at least three (3) post graduate students to completion since last appointment . they should show evidence of community service. Applicants are required to be registered with professional bodies where applicable.’ Thus a very elaborative criteria for promotion to the grade. It was not in dispute that the petitioner had not supervised at least 3 PhD students in the instant petition thus did not meet the required criteria for promotion.

27. The letter of results of the interview as communicated to the petitioner was dated 8th July 2021(Petitioner’s doc no. 4) and in the body stated: ‘Following you application for the position of Senior Lecturer Grade XIII at MMUST and subsequent appearance before the Appointment and Promotions Committee on Wednesday 30th April, we regret to inform you that you were unsuccessful since you had not supervised three (3) post graduate students to completion. I take this opportunity to thank you for showing interest in the position and wish you all the best in your endeavours.’ The court finds that the reason for the non- promotion was disclosed in the aforesaid letter to be the petitioner having not supervised three (3) post graduate students to completion.
28. The Petitioner in his appeal letter dated 13th July 2021 stated that he was aware that he had not supervised three(3) post graduate student to completion. On appeal the Respondents reiterated the same reasons and dismissed the appeal. Applying the provisions of section 5 (4) (b) of the Employment Act that it is not discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job, then there was no discrimination against the petitioner by the respondent based on the requirement of the job he sought to be promoted to .

Whether there was discrimination in the treatment of the petitioner against other employees

29. The Petitioner’s case further is that he was a victim of discrimination as other employees who did not meet the requirements of the promotions were promoted.

Section 5(2) and (3) of the Employment Act provides: “(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”.

The Petitioner’s case was that he was treated differently from the 6 interested parties who he alleged had not met the qualifications of the jobs they were promoted to. Before delving into the merit of the allegation the court found that the petitioner had applied for appointment as senior lecturer grade 13. That there were 68 promotions into the position and that none of the appointees was sued in the



instant case. The petitioner did not justify why he did not sue the appointees to the teaching position he had applied to. The court then considered the promotions of the 6 interested parties.

Whether the 1st interested party met qualifications to his promotion

30. The Petitioner stated he was discriminated to the extent that the 1st interested party with masters qualification was promoted to grade 13 against the petitioner with PhD when there was no special case in the circumstance in total contravention of Rule 3; minimum criteria for appointment or promotion of university academic staff as set by the commission for university education.
31. The 1st Interested party response was that he was a non- teaching staff hence was not required to supervise students. That he had Masters. The respondent vide replying affidavit of Prof Shibira dated 19th October 2021 paragraph 7 stated that the 1st interested party was a non-teaching staff employed way back on 8th June 2021 with promotion taking effect on 29th April 2021 and under advert for non-teaching staff (SS2 is employment letter and and exhibit no.2 of SS4 advert for not teaching staff).
32. The court was satisfied by the response that the 1st interested party was employed under the non-teaching staff category. The court holds that there was no comparison in terms of job requirements for the 1st interested party and the petitioner.

The court holds that there was no discrimination of the petitioner against the 1st interested parties as they were in non- comparable positions and the job requirements were different. Indeed section 5(4) (a) of the *Employment Act* provides that it is not discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

The case against 2nd interested party and the other parties .

33. The Petitioner alleges that the 2nd interested party appears on item 6 on list of associate professors as Professor of Religion whereas her area of specialization as guided by her PhD degree was in disaster management and humanitarian assistance. The 2nd interested party defended her position stating she was promoted on merit and holds a Masters in religion and PhD in religion (exhibits JKN2, JKN3 and JKN4) and that she had supervised 2 PhD students as required.
34. The Petitioner in rejoinder stated that it was not possible the 2nd interested party had supervised 2 students considering the degree takes 3 years.
35. The court finds and determines that the 2nd interested party held a PhD in Religion thus relevant to position of promotion. On allegation by the Petitioner on the supervision the court finds that claim was based on hypothesis and the court would not engage on academic exercise. Considering the petitioner raised false allegation on the PhD of the 2nd interested party the court finds and determines on balance of probability the claim against the 2nd interested party had no merit.
36. The court considered the other interested parties and found that they were all promoted to associate professor level and made the following further findings:-
 - a. That the 3rd to 6th Interested parties were not promoted to the position the petitioner had applied to hence not comparable.
 - b. Secondly contrary to assertion by the petitioner that they all held PhD in disaster management and humanitarian assistance, the court found as follows with respect to the 3rd to 6th PhD degrees:-



- c. The court found evidence that the 3rd interested party holds PhD in Disaster Preparedness and Engineering (BS5)
 - d. The court found evidence that the 4th interested party holds PhD in Environmental Studies and Environmental Monitoring and Planning(AWK4)
 - e. The court found evidence that the 5th interested party holds PhD in Conflict Resolution and Management (JWN1)
 - f. The court found evidence that the 6th interested party holds PhD in in Conflict Resolution and Management (JM1 page 43 of his affidavit)
37. The court will sparingly interfere with the internal management of the employers and that is only in case of gross violation of the law. The employer must be allowed freedom to manage its employees within the law and in accordance to their human resources manuals or policies. An employee bringing an employer to a constitutional court alleging discrimination must approach the court with evidence of the discrimination as it is a serious charge which if true can attract compensation. The court in the instant petition finds that the petitioner approached the court with false information and inuendos against his colleagues at senior level as to their academic qualifications giving the false impression they were treated more favorably than him. The petitioner even alleged corruption and nepotism without any iota of evidence. The court placed weight to that fact that the petitioner did not sue any of the 68 persons promoted to Senior Lecturer Grade XIII which is the relevant pool in the instant case for comparison purposes. The court finds on balance of probabilities there was no credible allegation against the interested parties and the court found no basis to question their promotions which were not in any case comparable to the petitioner’s case. The burden of proof is on the person who alleges existence of a fact. In the instant case it would have been helpful for the court to receive the marking schemes of the interviews of the interested parties as prove of any malpractice at the interviews. The court had no credible way of questioning the decision of the respondents on the interested parties promotions. It is the opinion of the court that interference with employees’ contracts on allegations of malpractice in promotions is a very serious issue which would require strict proof. The petitioner failed to meet the test.

Whether the respondent violated the constitutional provisions of articles 10, 27(1), 73 and 236 of the Constitution in the promotions

38. The Petitioner submits that the PhD students’ supervision criteria was not applied to the 3rd, 4th and 5th interested parties and were promoted besides lacking the relevant PhD qualification. The said interested parties produced their PhD certificates which the court found were not on disaster management and humanitarian assistance as alleged in the petition. That threw the credibility of the entire allegations against merit of the promotions of the 2nd to 6th interested parties out of the window as that was a key issue in the petition and in the professional capacity of the interested parties. The court further found those professors had not applied for same job as the petitioner hence not in the same pool for comparison purpose. Further the court found no proof that the interested parties had not merited the promotions. In consideration of whether there was violation of the provisions of Article 27 of the Constitution by the Respondent in failing to promote the petitioner, the court upheld the authority cited by the respondent in John Harun Mwau V Independent Electoral Boundaries Commission and another (2013) eKLR holding that :- ‘it must be clear that a person alleging violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others , the claimant has been denied equal protection or benefit of the law. It does not necessarily mean different treatment or inequality per se amount to discrimination and violation of the Constitution.’ The court in



the instant case based its finding on the fact that the petitioner did not meet the disclosed requirements of the job category he had applied for. None of the interested parties had applied for Senior Lecturer Grade XIII hence no comparison.

39. On whether there was violation of Article 73 of the Constitution by the Respondents, the court found that the Petitioner did not present any evidence to disclose the violation.
40. On whether there was violation of Article 232 of the Constitution by the Respondents, the court found that the petitioner did not meet the requirements for promotion. All other claims by the Petitioner were of little help to him as he cannot be promoted without meeting the requirements of the promotion. Further the court found no credible evidence adverse to the promotion of the interested parties.

Whether the petitioner is entitled to reliefs sought

41. The employer faced with allegation of discrimination bears the burden to prove there was no discrimination. The court cleared the interested parties and the employer of discrimination against the petitioner. The employer justified the reason for rejection of promotion of the petitioner for failure to have supervised 3 PhD students to completion which reason is justified under section 5(4)(b) of the Employment Act to wit:- “It is not discrimination to (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;”

The *Black Law Dictionary (10th Edition Bryan A. Garner ED)* describes employment discrimination as:- ‘Discrimination against an employee, former employee, job applicant by an employer based on a characteristic or status such as race , age, religion, disability or sexual orientation. Employment discrimination may be lawful if an employer can show that there is a valid job related reason for it.’”

Applying the foregoing definition of employment discrimination and the law aforesaid, the court found that it was a formal requirement by the university for the job applicant (petitioner) to have had supervised 3 PhD students as a condition for promotion to Senior Lecturer Grade 13, that the Petitioner admitted to not have supervised any PhD Student, then applying the provisions of section 5(4)(b) of the Employment Act to wit:- ‘It is not discrimination to (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;’ the court finds and determines that the Respondent did not discriminate against the petitioner in rejecting his application for promotion to said Senior Lecturer Grade 13 position.

42. The court found no prove of alleged violation by the employer in the promotions of the 6 interested parties and in rejection of the petitioner’s application for promotion of the Articles 10, 27, 73 and 232 of the Constitution. The court upholds the decision by Justice Hellen Wasilwa cited by both the respondents and interested parties that it will not interfere with job promotions unless there is proof of gross violations of the law in Dickson Kabiru Muburu v Teachers Service Commission and another (2017) eKLR to wit :- ‘26. Having considered the evidence and submissions of both parties, it is clear that the issues of promotion of an employee are a preserve of the employer and are based on the workplace policy and the contract of employment. Courts would not normally interfere in this process unless there is evidence of gross violations based on the law and processes and unless it is evident that the Applicant has been obviously discriminated against.’”
43. The Petitioner did not prove on balance of probabilities the alleged violations of the constitutional provisions and discrimination against him to warrant the court’s interference with the promotions of the interested parties or his own lack of promotion. The lack of promotion of the petitioner was justified by the employer being the failure to meet the promotion requirements. The court found that the act by the employer did not amount to discrimination of the petitioner under section 5(4)(b) of



the Employment Act to wit:- “It is not discrimination to (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;”

44. In conclusion, the courts finds no merit in the petition. The Petition dated 29th September 2021 and amended on 23rd February 2022 is dismissed in its entirety with costs to the 1st Respondent and all the interested parties.

45. Stay of 30 days

46. It is so ordered.

DATED , SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT ON THE 26THJANUARY 2023.

J.W. KELI

JUDGE

Delivered in the presence of :

Court Assistant: Brenda Wesonga

Petitioner : In person with Fundi holding brief for Wamalwa Simiyu

Respondents : Ombiti h/b Tarus

Interested parties:- Absent

