



**Constantine Joseph Advocates LLP v Judicial Service Commission & 2 others
(Petition 195 of 2021) [2023] KEELRC 1424 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1424 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 195 OF 2021
NZIOKI WA MAKAU, J
MAY 10, 2023**

**IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ALLEGED CONTRAVENTION OF
THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
ARTICLE 54(2) OF THE CONSTITUTION OF KENYA**

**BETWEEN
CONSTANTINE JOSEPH ADVOCATES LLP APPLICANT
AND
JUDICIAL SERVICE COMMISSION 1ST RESPONDENT
NATIONAL COUNCIL OF PERSONS WITH DISABILITIES 2ND
RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. The Petitioner herein filed this Petition against the Judicial Service Commission, The National Council of Persons with Disabilities and The Attorney General. The Petitioner prays for:
 - a. A declaration that at least five percent of the judges of the Supreme Court, the Court of Appeal and the High Court ought to be persons with disabilities so as to conform with Article 54(2) of *the Constitution*.
 - b. An order of mandamus requiring the 1st Respondent to take affirmative action and recommend qualified persons with disabilities to the President for appointment as judges of the Supreme



Court, the Court of Appeal and the High Court the next time there are vacancies so as to conform with Articles 10(2)(b), 27(6) and 54(2) of *the Constitution*.

- c. An order of mandamus requiring the 2nd Respondent to liaise with relevant public and private bodies and advise on suitable means of realizing the reservation of at least five percent of all employment positions in the public and private sectors for persons with disabilities in conformity with Articles 10(2)(b), 27(6) and 54(2) of *the Constitution*.
 - d. Costs of this Petition.
2. The Petitioner avers that the 1st Respondent has failed to take affirmative action and recommend qualified persons with disabilities to the President for appointment as judges of the Supreme Court, the Court of Appeal and the High Court. That the 2nd Respondent has failed to liaise with relevant public and private bodies and give advice on suitable means of realizing the reservation of at least five percent of all employment positions in the public and private sectors for persons with disabilities. It is the Petitioner's averment that the 1st Respondent failure to take affirmative action is that no person with disabilities has ever been appointed judge of the Supreme Court of Kenya, contrary to Article 54(2) which requires that at least at least five percent of the members of the public in elective and appointive bodies be persons with disabilities; and Article 27(6) which directs the State to take affirmative action to redress any disadvantage suffered by persons with disabilities because of past discrimination. This omission further means that there are also not enough judges of the Court of Appeal and High Court, who meet the threshold set in Article 54(2) of *the Constitution*, section 13 of the *Persons with Disabilities Act* and Regulation 11(3) of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009. Further, that the result of the omission by the 2nd Respondent is that employment positions in the public and private sectors have not been reserved for persons with disabilities, which is also contrary to Articles 27(6) and 54(2) of *the Constitution*.
 3. The Petitioner filed a Supporting Affidavit sworn by Jacob Nyandega Osoro who depones that because there is no person with disabilities on the Supreme Court Bench, the Court falls short of the national values and principles of governance contained in Article 10(2)(b) of *the Constitution*. These include inclusiveness, equality, non-discrimination and protection of the marginalized. He avers that the 3rd Respondent, who is a member of the 1st Respondent, is duty bound by Article 156(6) to promote, protect and uphold the rule of law, and defend public interest. Mr. Osoro believes that the lack of action by the Respondents is undeserved and unconstitutional and that the orders sought in the Petition should be granted in the interest of justice.
 4. Respondent's Case
The 1st Respondent filed a Replying Affidavit by Ms. Anne Amadi who avers that the appointment of the Chief Justice, Deputy Chief Justice, and other Judges (hereinafter "the positions") is undertaken pursuant to the provisions of Article 166 of *the Constitution* as read with Section 30 of the *Judicial Service Act* and the First Schedule thereto. That the criteria for evaluating qualified applicants provided for under Paragraph 13, Part V of the First Schedule to the *Judicial Service Act* is wholistic, comprehensive and objective to all the applicants. That once the interviews are concluded, the 1st Respondent deliberates and nominates the most qualified applicants into the positions while taking into account gender, regional, ethnic and other diversities of the people of Kenya. That an applicant must receive three or more affirmative votes to be nominated for recommendation for appointment to the positions.
 5. The deponent, on behalf of the 1st Respondent, avers that section 13 of the *Persons with Disabilities Act*, 2003 as read with Regulation 11(3) of the Persons with Disabilities (Access to Employment,



Services and Facilities) Regulations, 2009 neither confers a right nor a duty upon any person or organ but recognizes the need for a collaborative effort towards the progressive achievement of the desired outcome. Ms. Amadi avers that Article 27 of *the Constitution* does not wholly or partly impose a duty upon the 1st Respondent in the performance of its constitutional, statutory and administrative functions. That neither does the said provision impose a duty on the State, other than the requirement to progressively take legislative and other measures to implement the said principle. She avers that Article 54(2) of *the Constitution* does not confer a right but establishes a principle which forms a basis for the implementation of the requirement of five percent of persons with disabilities. That the provisions of Article 54(2) should be read holistically and interpreted harmoniously with the *Judicial Service Act* and *the Constitution* and that a disjointed reading of the same will have a negative effect that is contrary to what was envisaged by the drafters of *the Constitution*. She asserts that the realization of five percent of the members of the public in elective and appointive bodies of persons with disabilities is progressive in nature.

6. Ms. Amadi further avers that the Petitioner has failed to demonstrate that the 1st Respondent, in the exercise of its legal functions, has failed to comply with either Article 27(6) or Article 54(2) of *the Constitution*. That the Petitioner has also failed to demonstrate the rights under *the Constitution* that the 1st Respondent has violated or the discrimination suffered by persons with disabilities as a result of the 1st Respondent's actions. In addition, that the Petitioner has not provided evidence that any persons with disability applied for the positions and that qualified members categorized as persons with disability were not considered. She believes that the Petitioner has not met the threshold for the grant of the orders sought and granting the said orders would be encroaching upon policy and legislative undertakings, which are not a preserve of the Judiciary. That this would be offending the doctrine of separation of powers.

7. The 2nd and 3rd Respondents never entered appearance in the case.

8. Petitioner's Submissions

The Petitioner submits that the discrimination against persons with disabilities in Kenyan society is rooted in widespread stereotypes that portray persons with disabilities as burdens and cursed, and the discussion of disability as taboo. That Parliament passed the *Persons with Disabilities Act*, 2003, (the "PWD Act") to combat these stereotypes by recognising the rights of persons with disabilities and further, to achieve the equalisation of opportunities for persons with disabilities. That thereafter came the 2010 Constitution, which under Article 19(3)(b), recognises the Rights and Privileges of Persons with Disabilities, contained in Part II of the PWD Act, by providing that:

The rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter.

9. It is the Petitioner's submission that Article 260 of *the Constitution* defines "marginalised group" as a group of people who, because of laws or practices before, on, or after the effective date of *the Constitution*, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4). That the said Article 27(4) identifies disability as one of the grounds of discrimination that the State ought to take legislative measures for to redress any disadvantage suffered by individuals or groups in the past as under Article 27(6). According to the Petitioner, the "historical factors of discrimination" referred to in section 3(k) of the *Judicial Service Act* include the discrimination against persons with disabilities.



10. Regarding the meaning of “progressive implementation”, the Petitioner submits that the Supreme Court of Kenya *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]* eKLR, defined “Progressive realization” as “a gradual movement or development towards a destination” (Concise Oxford English Dictionary). That the Supreme Court Justices went on to state that “such supportive measures may involve legislative, policy or programme initiatives including affirmative action.”
11. The Petitioner submits that section 11 of the *PWD Act* casts an affirmative obligation on the Government to take steps to achieving the full realization of the rights of persons with disabilities set out in Part III of the Act. That however, in the case of *Northern Nomadic Disabled Person's Organization (Nondo) v Governor County Government of Garissa & another [2013]* eKLR, the High Court agreed that Article 54(2) is not a right but a principle on how to implement the five percent of persons with disabilities requirement and that the rights of persons with disabilities are to be found in Article 54(1) of *the Constitution*. According to the Court, the Petition thereat did not claim that any of the rights under Article 54(1) had been violated. It is nevertheless the Petitioner’s submission that section 13 of the *PWD Act*, titled “Reservation of employment”, gives concrete shape to the principle laid down in Article 54(2) by specifically requiring the 2nd Respondent to secure the reservation of five per cent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. That the same is replicated under Regulation 11(3) of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, titled “Promotion of employment of persons with disabilities”.
12. The Petitioner submits that in August 2020, the UN released its first ever guidelines on access to social justice for people with disabilities to make it easier for them to access justice systems around the world. That Principle 7 under the guidelines provides that persons with disabilities have the right to participate in the administration of justice on an equal basis with others. Relying on the decision of the Court in the Northern Nomadic Disabled Person's Organization (Nondo) case (*supra*) and based on the legal provisions analysed hereinabove, the Petitioner submits that at least five percent of the judges of the Supreme Court, the Court of Appeal, and the High Court ought to be persons with disabilities.
13. As to whether the 1st Respondent has a duty to therefore take affirmative action in favour of persons with disabilities, the Petitioner submits that Article 259(1)(a) of *the Constitution* states that *the Constitution* shall be interpreted in a manner that promotes its purposes, values, and principles. It cites the case of Muciimi Mbaka & Co. Advocates v Town Clerk, City Council Of Nairobi [2012] eKLR where the High Court expressed that an order of mandamus is issued to compel performance of a public duty, or a duty imposed by statute where there has been failure to perform the said duty to the detriment of an aggrieved party. That this was reiterated by the Court of Appeal in the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR. In that regard, it is the Petitioner's submission that the 1st Respondent has failed to take affirmative action to ensure that qualified persons with disabilities are appointment as judges of the Supreme Court, the Court of Appeal and the High Court. That this Court should humbly therefore grant the Petitioner an order of mandamus to compel the 1st Respondent to take such affirmative action.
14. The Petitioner submits that the 2nd Respondent has not produced any evidence before Court showing that they had taken any steps to secure the reservation of five per cent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities since the passing of the PWD Act in 2003. That the 2nd Respondent’s inaction has met the threshold set out in the Republic v Kenya National Examinations Council Ex Parte Gathenji case (*supra*) and an



order of mandamus is the only remedy available to the Petitioner. On costs, the Petitioner submits that section 26(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practise and Procedure Rules, 2013, provides that the award of costs is at the discretion of the Court. That the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR, cited with approval, Halsbury's Laws of England, 4th ed Re-Issue (2010), Vol. 10, para. 16 which states, among other things, that the court's discretion on costs must be exercised judicially and must not be exercised arbitrarily but in accordance with reason and justice. That the Supreme Court further stated that the principle that costs follow the event is for compensating the successful party for the trouble taken in prosecuting or defending the suit. The Petitioner therefore asks this Court to give them costs if the remedies sought in the Petition are granted.

15. 1st Respondent's Submissions

Firstly, the 1st Respondent submits that it is a principle in constitutional litigation that the party alleging violation of his or her rights must plead the articles of *the Constitution* that entitle rights to the petitioner, the claim demonstrating the purported violation of rights particularised with reasonable precision, and the manner the alleged violations were committed shown by way of evidence. It cites the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR in which the Court of Appeal stated as follows with respect to establishing the above elements:

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

16. It is the 1st Respondent's submission that apart from citing omnibus provisions of *the Constitution*, the Petitioner failed to provide particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before this Court and has prejudiced the Respondents herein. That a perusal of the Petition will reveal that the alleged contraventions of *the Constitution* and the law by the 1st Respondent was not established in evidence. That indeed, the Petitioner has not established that the 1st Respondent, in its recruitment process, was presented with an eligible and duly qualified candidate with disability who it then failed, refused and/or neglected to recommend for appointment as a Judge of the superior courts, on account of the candidate's disability or for any other reason whatsoever. That the Petitioner has in fact not challenged any recruitment process carried out by the 1st Respondent with respect to the appointment of particular judges of the superior court. That the Petitioner simply invites this Court to issue a declaration of constitutional violations based on unsupported hypotheses, which invitation this Court should decline as did the High Court in the case of Leonard Otieno v Airtel Kenya Limited [2018] eKLR wherein Mativo J, as he then was, stated as follows:

“...Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

17. It is the 1st Respondent's submission that the Petition herein is therefore incompetent for failure to plead and establish the alleged violations of *the Constitution* with reasonable precision and that this



Court should dismiss the same with costs to the Respondent. Secondly, the 1st Respondent submits that without prejudice to the submissions hereinabove, the present Petition is procedurally non-justiciable on account of the ripeness doctrine and the political question doctrine. That the High Court in the case of Kiriro Wa Ngugi & 19 others v Attorney General & 2 others [2020] eKLR discussed justiciability and the ripeness doctrine as follows:

“ 107. Lastly is the Ripeness Doctrine. The doctrine focuses on the time when a dispute is presented for adjudication. The Black’s Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:

The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.

...

110. In National Assembly of Kenya & Another v The Institute for Social Accountability & 6 others [supra] the Court of Appeal held:

(73) Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.

111. In Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, Onguto J stated:

(27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.” (emphasis by 1st Respondent)

18. It submits that it is evident that the Petition herein is not ripe for determination by this Court as it is premised on hypothetical scenarios and devoid of a factual matrix that would support the invocation of this Court’s jurisdiction. That there is thus no dispute to resolve and no controversy requiring adjudication by this Court. It further submits that the Court in the Kiriro Wa Ngugi case (supra) also discussed the political question doctrine stating that the doctrine focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions and is underpinned by the concept of separation of powers. The Respondent also cites the case of William Odhiambo Ramogi & 2 others v Attorney General & 6 others [2018] eKLR where the Court stated that:

“ It is evident from the case law that the two main criteria that will influence the justiciability of an issue or otherwise are firstly, whether there is a clear constitutional commitment and



mandate to a particular government organ to make a decision on the issue, and secondly, even where such a constitutional mandate exists, whether the nature of the issue and dispute is such that it is more effectively resolved by conventional political methods of majoritarian decision-making rather than by a deliberative constitutional judgment. This will include situations where a Court lacks the capacity to develop clear and coherent principles to govern litigants' conduct.” (emphasis by 1st Respondent)

19. It is the 1st Respondent's submission that this Petition presents issues that would be better adjudicated by the legislature or the executive through policies aimed at implementing the constitutional and legislative requirements set out in the law. It urges this Court to dismiss the Petition on the above grounds with costs to the 1st Respondent. Thirdly, the 1st Respondent submits that the obligation under Article 27(6) of *the Constitution* does not give an enforceable positive right but instead creates the legitimate expectation on citizens that the Government would formulate and undertake legislative and policy measures for progressive redress of the challenges faced by the special groups and cites in aid the case of Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR. It submits that in addition, the provisions of Article 27(6) can only be enforced as against the State, where it fails to take legislative and other measures or after inadequate measures by the Government but cannot be enforced against the 1st Respondent. That the use of “the State” in that provision depicts the framers of *the Constitution*'s intent to have the obligations therein only enforceable as against the Government. That Article 260 of *the Constitution* defines “State” as the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution. It is the 1st Respondent's submission that the phrase “the State” cannot be used synonymously with the independent commissions established under Chapter Fifteen of *the Constitution* such as the 1st Respondent herein. That this position was affirmed in the Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another case (supra) in which the Court held that:

“...It is also our view that Article 27 as a whole or in part does not address or impose a duty upon the Judicial Service Commission in the performance of its Constitutional, Statutory and administrative functions. We think any claim on Article 27 can only be sustained against the Government with specific complaints and after it has failed to take legislative and other measures or after inadequate mechanisms by the State...”

20. The 1st Respondent further submits that appointment of judges of the superior courts is a mandate for which it is bound by constitutional and statutory provisions on the criteria and process of such appointments and which mandate it exercises no discretion when performing and relies on the case of Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another (supra). The 1st Respondent submits that while dealing with a similar petition seeking to enforce the two-third gender rule in the appointment of the judges of the Supreme Court, the High Court in the case of National Gender & Equality Commission & another v Judicial Service Commission & 2 others [2017] eKLR, opined that even where the applicants meet basic constitutional requirements, the JSC, in making recommendations for appointment of a judge, has to consider competence as the first criteria before considering other criteria including gender. It is the 1st Respondent's submission that it has always followed the law in advertising, conducting interviews and subsequently recommending the successful applicants for appointment.
21. Lastly, the 1st Respondent submits that this Court should thus decline to grant the orders sought in the Petition because the Petitioner has not established that the 1st Respondent has failed to perform its public duty as mandated by *the Constitution* or the *Judicial Service Act*. Concerning costs, it urges



this Court to be guided by the principle that costs follow the event and to award costs in favour of the 1st Respondent.

22. The Court has considered the able submissions of parties as well as *the Constitution*, laws flowing from it as well as international instruments and municipal case law in coming to this decision. The motion before me encompasses the entire gamut of the Petition. A decision one way or another will dispose of the Petition in its entirety.
23. When Kenyans promulgated *the Constitution* of Kenya 2010 at Uhuru Park that glorious Friday 27th of August 2010, the intention was to ensure a marked shift towards realisation of the aspirations a majority had for a new, revamped Kenya. By a stroke of history, Kenya's best President Mwai Kibaki was the one who received the instruments on our behalf from Hon. Amos Wako. This Constitution was to reshape governance, the State actors and various arms of Government such as the Judiciary paving way for the articulation of hitherto forbidden rights. It is on the wings of that lofty ideal, the constitutional order we took for ourselves as the preamble states –

Exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution: Adopt, Enact and give this Constitution to ourselves and to our future generations.

24. The Petitioner articulates the issue as failure to comply with the Constitutional provision and recommend for appointment qualified persons with disabilities. This alleged failure to take affirmative action and recommend qualified persons with disabilities to the President for appointment as judges of the Supreme Court, the Court of Appeal and the High Court seems to be the main grouse.
25. A careful reading of the law reveals this: section 13 of the *Persons with Disabilities Act*, 2003 as read with Regulation 11(3) of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 neither confers a right nor a duty upon any person or organ. Section 13 states that the 2nd Respondent shall endeavour to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. Read together with Article 54(2) of *the Constitution* which provides that the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are to be persons with disabilities, means that the alleged failure to realise the implementation of the five percent rule espoused in Article 54 is not one that can be placed on the steps of either the 1st or 2nd Respondent but the State. The State is defined under Article 260 of *the Constitution* as the collectivity of offices, organs and other entities comprising the government of the Republic under *the Constitution*. I agree with the 1st Respondent that the phrase “the State” cannot be used synonymously with the independent commissions established under Chapter Fifteen of *the Constitution*.
26. The Petitioner submitted that in August 2020, the UN released its first ever guidelines on access to social justice for people with disabilities to make it easier for them to access justice systems around the world. On a side note, this was a decade after the promulgation of our Constitution. It seems lost in the wind that Principle 7 under the guidelines provides that persons with disabilities have the right to participate in the administration of justice on an equal basis with others. The Petitioner fails to appreciate that the guidelines under Principle 7 provide for progressive application of the principle. It provides for instance at Guideline 7.1 as follows:-

The right to equal access to justice requires that persons with disabilities have the opportunity to participate directly in adjudicative processes and be involved in various roles in the administration of justice on an equal basis with others. States should ensure that



persons with disabilities are able to act as judges, lawyers, prosecutors, witnesses, jurors, experts and court officials in the justice system without discrimination.

27. The Respondents have not been shown to have impeded in any way, manner, shape or form, the implementation of Article 54, the *Persons with Disabilities Act* or the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR Onguto J stated thus:
- (27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.”
28. The Court opines that the Petition is an affront to the ripeness doctrine my brother the late Onguto J. spoke of in that case. As there is no dispute to resolve, no controversy requiring adjudication by this Court and no facts to support the assertions made in the Petition, the Petition is premised on hypothetical scenarios devoid of a factual matrix and is only fit for dismissal.
29. As the Petition was brought mistakenly in the belief that the Respondents bear any responsibility in the implementation of the five percent rule, and the fact that it was articulated by a law firm that should have researched the matter better than a lay person or institution, it must be mulcted in costs since the Petition was merely full of hot air and nothing more. Petition dismissed with costs to the 1st Respondent as the 2nd and 3rd Respondents did not appear or participate in the matter.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY 2023

Nzioki wa Makau

JUDGE

