



**Okongo v Judicial Service Commission (Petition E017 of 2023)  
[2023] KEELRC 1587 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1587 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E017 OF 2023**

**J RIKA, J  
JUNE 30, 2023**

**BETWEEN**

**JAPHETH MOGIRE OKONGO ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner filed his Petition, dated January 26, 2023.
2. The Petition is founded on the Grounds stated on the face of the Petition, and the Supporting Affidavit of the Petitioner, sworn on February 26, 2023.
3. He states that he was employed by the Respondent as Casual, in 1996. He was taken in on permanent and pensionable terms the following year, 1997, and designated as a Senior Subordinate Staff.
4. He was promoted to the position of Process-Server II, and after 4 years, became a Senior Process-Server.
5. He successfully applied for the position of Court Bailiff, being appointed on November 4, 2015.
6. He states that on January 23, 2023, he received a letter from the Respondent, demoting him back to the position of a Process-Server. The letter informed him that there would be a freeze, on his annual salary increment.
7. He was advised that he would hence, serve under new terms. He asked for clarification from the Respondent's Human Resource Directorate. He was advised that, he was a person living with disability, who would serve up to the age of 65 years, and would not be retained in the same position as his peers. The Claimant was involved in an accident while in service, and was categorized a person living with disability.



8. The decision by the Respondent to demote the Petitioner, on the ground that he is a person living with disability, eligible for retirement at the age of 65 years, amounts to discrimination, unfair labour practice, and unequal treatment before the law.
9. He has held the Court Bailiff position over the past 8 years. Persons with less than 5 years have been retained as Court Bailiffs. It is unfair labour practice to place the Petitioner on new terms and condition of service, after 8 years in the position of Court Bailiff. It is a violation of the Claimant's right to human dignity, to freeze his annual increment.
10. The Petitioner exhibits the following documents in support of the Petition: -
  - I. Letter dated July 4, 2015 promoting him to the position of Court Bailiff.
  - II. Letter from the Respondent dated November 18, 2022 reverting the Petitioner to the position of Process-Server.
  - III. Letter dated January 14, 2021 from the National Council for Persons with Disabilities, to the Respondent, confirming that the Petitioner is a person living with disability, and eligible to retire at the age of 65 years.
11. The Petitioner submits that the Respondent has contravened his fundamental rights under the Constitution as specified above, and contravened his rights under the Employment Act 2007 and the Fair Administrative Action Act. He was appointed as a Court Bailiff, because he was qualified to hold the position, in accordance with the Respondent's Human Resource Policies and Procedures Manual. He was interviewed and competitively recruited. His performance was appraised annually and was not faulted. The Respondent violated the Petitioner's right to inherent dignity under Article 28 of the Constitution. The Petitioner was not consulted, contrary to the Fair Administrative Action Act. Declaration of the Petitioner's position to be redundant, was made in excess of jurisdiction, is ultra vires and illegal.
12. He prays for Judgment against the Respondent for: -
  - a. An order of certiorari calling into this Court and quashing the letter dated 18<sup>th</sup> November 2022, addressed to the Petitioner declaring his position as redundant, as unlawful, unconstitutional and offending the Employment Act and [fair?] Labour Practices.
  - b. Declaration that the said letter is unlawful, unconstitutional, and contrary to employment policy and practice.
  - c. Declaration that the Petitioner is deemed to have been lawfully appointed to the position of Court Bailiff vide letter of appointment dated November 4, 2015.
  - d. An order of prohibition, restraining the Respondent from freezing the Petitioner's annual salary increment and other benefits accorded to the position of Court Bailiff.
  - e. Conservatory order restraining the Respondent from acting unlawfully and unconstitutionally.
  - f. Conservatory order restraining the Respondent from contravening the Petitioner's rights under Articles 3, 10, 20, 21[1], 22,23, 25[B], 27, 28, 30, 35, 41,47, 162[2], 172 [1] [B], 232, and 258 [1] of the Constitution.
  - g. Any other relief the Court deems suitable.
  - h. Costs.



13. The Respondent relies on the Replying Affidavit of its Secretary, who also serves as the Chief Registrar to the Judiciary, Hon Anne A Amadi, sworn on March 3, 2023.
14. She explains that the Respondent is empowered under Section 13 [1] and 13[3] of the Judicial Service Act, to take measures necessary for the proper performance of its functions under the Constitution and said Act.
15. The Respondent initiated the Judicial Organization Review Process on December 8, 2016, through the firm of Professional Training Consultants.
16. To ensure stakeholder engagement, the Consultants generated and circulated to Judicial Staff, Job Analysis Questionnaire, which elicited 85% response.
17. Thereafter, the Respondent appointed a Judiciary Organization Review Committee, chaired by the Chief Registrar, comprising representatives from Court Registries, Courts, Directorates and Kenya Judicial Staff Association.
18. The mandate of the Committee was to evaluate existing job descriptions, establish any additional duties and responsibilities, and determine the relative value of individual jobs through a fair and professional assessment. The Committee Report was approved by the Respondent in November 2018.
19. The Report recommended various organizational re-engineering initiatives, for enhanced service delivery in the Judiciary. A Subcommittee on Implementation was established in April 2019. It comprised representatives from Kenya Magistrates and Judges Association, Kenya Judicial Staff Association, Registrars from various Courts, Court Stations, Directorates and Administrative Offices.
20. The Respondent approved the Report of the Subcommittee on October 22, 2019. The Implementation Committee conducted Change Agents' sensitization sessions in January and February 2020.
21. The result was that the existing 17-step grading structure in the Judiciary was collapsed into 11- step grading structure.
22. There was no discrimination. All Staff were converted under the new grading structure. The position of Court Bailiff PLS 9, was one out of 9 job titles that were abolished after being found to be non-convertible to the approved Organization Review Conversion Titles. 46 Judicial Staff occupied the 9 non-convertible positions, and were aligned to the new 11 tier grading structure.
23. The Petitioner held the position of Court Bailiff PLS 9. The Organization Review established 3 progression levels: Process-Server JSG 9, being the entry level; Court Bailiff- JSG 8; and Senior Court Bailiff, JSG 7, being the highest grade.
24. Under the Judiciary Career Guidelines, 2019, the academic and professional qualifications for appointment to Staff to JSG 6, formerly PLS 9, the qualification the Petitioner ought to have had to be appointed to the said grade, were a Bachelor's degree.
25. The Petitioner held KCE Division 4, Licensed Court Process-Server, and Computer Application Certificates. He did not meet the minimum requirement for re-designation to grade JSG 6.
26. He fell in the category of Staff to be issued fresh engagement at lower grade, based on their qualifications, with the salary frozen at the current scale.



27. The letter to the Petitioner dated November 18, 2022, issued against this background. His other terms and conditions of service were retained. He was advised he could pursue the relevant certificates and apply for suitable position, once such position was advertised.
28. His submission that he has been discriminated based on his disability is misleading. He was not demoted but offered fresh appointment. His submission that his right to inherent dignity under Article 28 of the Constitution has been violated, is baseless. His submission on violations under Article 41 and 47 of the Constitution, are similarly unfounded.
29. The Respondent exhibits the following Documents in response to the Petition: -
  - I. Job Analysis Questionnaire.
  - II. Approved Judiciary Organizational Report.
  - III. Letter by the Respondent dated October 22, 2019, approving the Report of the Subcommittee on Implementation of the Organizational Review.
  - IV. Letter from the Respondent dated October 3, 2022, advising on non-convertible positions under the new grading structure.
  - V. Letter dated November 4, 2015 appointing the Petitioner as a Court Bailiff.
  - VI. Judiciary Career Guidelines.
  - VII. Letter from the Respondent to the Petitioner dated November 18, 2022, advising the Petitioner about his reversal to the Court Process- Server role, and freezing of annual salary increment.
  - VIII. E-mail communication between the Parties, explaining the new grading structure.
30. The Respondent prays for dismissal of the Petition with costs.
31. Parties agreed before the Court, on March 3, 2023, that the Petition is determined on the strength of their Affidavits, Documents and Submissions. They confirmed filing and exchange of the Submissions at the last mention before the Court, on April 20, 2023.
32. The issues are, whether the Petitioner's reversal of position, from Court Bailiff to Court Process-Server is in violation of his constitutional and statutory rights; and whether he merits the prayers sought.

### **The Court Finds**

33. The record indicates that the Petitioner joined the Judiciary as a Casual Employee, way back in 1996. He worked his way up to permanent and pensionable employment. He rose through the ranks, becoming a Senior Subordinate Staff; a Process-Server II; Senior Process-Server; and eventually was appointed a Court Bailiff, on November 4, 2015. He held this position when the cause of action arose, on November 18, 2022, when the Respondent proposed to revert him to Court Process- Server, and freeze his annual salary increment.
34. The record indicates further, that the Petitioner is the holder of KCE Division 4 Certificate; Court Process- Server License; and Computer Application Certificate.
35. The Respondent initiated Judicial Organization Review in December, 2016. This was based on its mandate under Articles 171 and 172[1] [b] of the Constitution, and Sections 13 and 14 of the Judicial Service Act.



36. The process was participatory, involving stakeholders including individual Judicial Staff, Kenya Judicial Staff Association, Registrars, Courts and Court Stations, Directorates, Administrative Units, and the Kenya Magistrates and Judges Association.
37. Judicial Staff were issued Questionnaires, which elicited 85% response.
38. There was established a Judiciary Organization Review Committee, with wide representation from the justice sector, whose work resulted in a Judiciary Organizational Report.
39. Subsequently, a Subcommittee on Implementation was established. It generated a Report which was submitted to the Respondent. There were sensitization sessions involving stakeholders, in January and February 2020.
40. Every step in the process was approved by the Petitioner's Employer, the Respondent herein.
41. It was resolved that the grading structure is collapsed, from the existing 17-step [PLS] structure, into the new 11-step [JSG] structure.
42. All Judicial Staff were converted under the new structure. It was not a conversion which affected the Petitioner alone. It affected all Judicial Staff.
43. The position of Court Bailiff was not singled out in adoption of the new grading structure. It was one out of 9 job titles that were abolished after being found to be non-convertible under the new conversion matrix. 46 Staff occupied the 9 positions, and were aligned to the 11 tier grading structure. The Court does not think the claim that the Petitioner was discriminated, on any ground, has justification.
44. 3 progression levels for Court Bailiff – Process- Server [JSG 9], Court Bailiff [JSG 8] and Senior Court Bailiff [JSG 7] were established. The Judiciary Career Guidelines 2019, prescribe qualifications for appointment to JSG 6, which was formerly the PLS 9, the grade held by the Petitioner, as a minimum of Bachelor's Degree.
45. Unfortunately, the Petitioner did not hold a Bachelor's Degree, and could not therefore continue holding the Court Bailiff position.
46. The Respondent reorganized its structures as it is mandated to do, resulting in positions being phased out. The Petitioner's contract was in effect varied, as were other Staff in non-convertible positions, without resulting in termination of employment on account of redundancy. He was reverted to the position of Court Process-Server, without any other change in the terms and conditions of service. His remuneration remained the same, as did his creditable years of service. He continues to serve as a person with disability, until he clocks 65 years. The alternative to reversal to the Court Process- Server role, was to terminate the Petitioner's contract under Section 40 of the *Employment Act*, a painful route which the Respondent avoided.
47. He was advised that it was open to him, to apply for other suitable positions, which would include Court Bailiff and Senior Court Bailiff, once he obtained the necessary qualifications under the new Organizational Structure. Given the wide consultation preceding implementation of the new structure, which included Staff Questionnaires, the Petitioner is not justified in holding that he was not consulted.
48. The freezing of salary increment, was not unconstitutional, illegal or in the nature of an unfair labour practice. The Petitioner was being offered a fresh role as a Process-Server, instead of being compelled to leave employment on redundancy. Salary freeze was part of the restructuring process. Salary increments are not mandated by the law, but are negotiable between an Employer and an Employee. The freeze



is determined by the financial position of the Organization, something the Respondent must have taken into account during the Organization Structure Review. This is a negotiable item, and the Parties would be free to revisit the subject, once the new structures concretized, and the Petitioner was settled in his new role. The freezing of salary increment was not unconstitutional or illegal. Salary increment is a contractual item, which can be renegotiated at a future date.

49. An order of certiorari, quashing the letter from the Respondent to the Petitioner, dated November 18, 2022, would result in the Petitioner continuing to work, in a position which has been phased out. He would be left alone, working outside the new Organizational Structure. Salary increment as discussed above is not mandatory, and is an item which normally depends on the financial position of the Employer. The Court would be interfering with the Respondent's managerial prerogative, in issuing an order prohibiting the Respondent from freezing salary increment. Prohibition is sought based on a job which has been phased out from the Organizational Structure. Conservatory orders sought are wholly misplaced. A conservatory order is not a final order. It is an interim measure, issued on the strength of a *prima facie* case, as held in the High Court decision, *Board of Management of Uburu Secondary School v City County Director of Education & 2 others* [2015] e-KLR. It is aimed at conserving the subject matter, pending the hearing and determination of the full Petition. The Petitioner cannot therefore be granted conservatory orders, as final orders, as sought in his Petition.
50. In conclusion, there is no evidence that the Respondent discriminated against the Petitioner on account of his disability, or other grounds; the Respondent acted within its mandate under the *Constitution*, the *Judicial Service Act* and the *Employment Act*; review exercise involved wide stakeholder engagement, including individual Staff, and Justice Sector Groups; approval of the Respondent was sought and obtained at every step of the way by the Committee and Subcommittee charged with the exercise; implementation was equally consultative, and affected the Judicial Staff collectively; and, the exercise was necessary for reduction of organizational cholesterol, enhancement of organizational sustainability, and service delivery.
51. The Petition has no merit.
- It Is Ordered:
- a. The Petition is declined.
  - b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 30<sup>TH</sup> DAY OF JUNE 2023.**

**JAMES RIKA**

**JUDGE**

