



**Wangari v Kenya Ports Authority & 2 others; Ogutu & 3 others (Interested Parties)
(Petition E005 of 2022) [2023] KEELRC 3465 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3465 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E005 OF 2022**

**M MBARÚ, J
JULY 13, 2023**

BETWEEN

CATHERINE WANGARI PETITIONER

AND

THE KENYA PORTS AUTHORITY 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF NATIONAL TREASURY 2ND
RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

DANIEL OMONDI OGUTU INTERESTED PARTY

NATIONAL GENDER AND EQUALITY COMMISSION .. INTERESTED PARTY

PUBLIC SERVICE COMMISSION INTERESTED PARTY

DOCK WORKERS UNION INTERESTED PARTY

JUDGMENT

1. The petitioner is an employee of the 1st respondent, a state corporation incorporated by the [Kenya Ports Authority Act](#). The 2nd respondent is an office established under Article 155 of [the Constitution](#). The 3rd respondent is an office established under Article 156 of [the Constitution](#). The 1st interested party is the current general manager in charge of human resource and administration of the 1st respondent. The 2nd interested party is an independent commission established under Article 59 of [the Constitution](#). 3rd interested party is an independent commission pursuant to Article 233 of [the Constitution](#).

The petitioner is seeking for orders that;

- a. An order of declaration does issue that the process commenced by the 1st respondent to fill up the vacancy in the office of the general manager in charge of human resource and administration of the 1st respondent was unconstitutional for failing to comply with the provisions of Article 10(1) and (2), 27(8) and 232 of *the Constitution*, the office being an office in the public service.
 - b. An order of prohibition does issue to prohibit and stop the 1st interested party from assuming the office of the general manager in charge of human resource and administration.
 - c. An order of prohibition does issue to prohibit and stop the 1st respondent from filling the position of the office of the general manager in charge of the human resources and administration and any other office without complying with Articles 10, 20(8), 59 and 232 of *the Constitution*.
 - d. Costs of the suit be borne by the 1st and 2 respondents.
2. The petition is that the 1st respondent is a state corporation and appointed the 1st interested party to the office of general manager in charge of the human resource and administration on 2 May 2019 in terms of clause B.1 (iv) of the KPA HR Manual, 2017 (the HR Policy) and which policy had been developed in accordance with Section 11, 12 and 13 of the *Employment Act*, 2007 (the Act) and Article 234(1) of *the Constitution*. the HR policy has provided that the appointment in the categories of those in the position occupied by the 1st interested party shall be for a period not exceeding 3 years and by operation of the law, the office of general manager in charge of human resource and administration should have become vacant on 2 May 2022.
 3. The appointment of the 1st interested party was done without the position being subjected to competition and constitutes unfair labour practices contrary to Article 41 of *the Constitution*. Unfair labour practices would mean a practice which does not discriminate others or where there is procurement of labour or employment whose procedure is tilted in favour of one person, group or otherwise against the others.
 4. In the proposed appointment of the 1st interested party, he was intended to be accorded a contract for a period of 5 years in contravention of the HR policy of the 1st respondent and by extension, this is in breach of Section 11, 12, and 13 of the Act and Article 234(f) of *the Constitution*.
 5. The board of the 1st respondent has commenced the appointment of the next occupier of the office of the general manager in charge of human resource and administration when it convened the board of directors 177th HR meeting on 26 and 27 January 2022. In its deliberations, the board commenced the recruitment of the next office holder of the said office without subjecting it to the principles of Articles 10, 59, 232 and 234 of *the Constitution*. under Section 10, 11, and 12 of the Kenya Port Authority Act the board of the 1st respondent has various powers but not to fill this position and even if it has, the board failed to meet the constitutional and legal threshold.
 6. The 1st respondent board commenced the filling of a position in the public service in disregard to *the constitution* as a public entity which requires competitive and ensure gender equality and equity. The fact that the 1st interested party contract may be extended does not exclude his appointment from being subjected to the constitutional requirements. There is no advertisement despite the term ending on 2 May 2022 and the 1st respondent should involve all consumers of the service of the 1st interested party and subject the same for scrutiny, performance and transparency.
 7. The petition is also that the office of the 1st interested party should be reviewed in terms of his performance and be opened to scrutiny and which should be aligned to the policies which should be

in place with regard to issues such as HIV and AIDS, Sexual harassment at work and protection of minorities and gender equality and equity. The 1st interested party has been incompetent and has failed in his duties. The petitioner received the following complaints;

- a. On 25 September 2020 a complaint from staff S.H of sexual harassment from another employee G.O. but the 1st interested party held the matter in a public place instead of doing so in his chambers thereby embarrassing the complainant;
 - b. The law requires every employer with over 50 employees to develop a sexual harassment policy a function of the 1st interested party which he failed to do hence exposing women employees to sexual harassment by male counterparts;
 - c. The 1st respondent is a 24-hour facility and the function of human resource section is to mobilise employees but the 1st interested party has capped overtime at 30% of the basic salary without considering staffing level or with consultations with the employees;
 - d. The 1st interested party assigned some dockers to work on the floating bridge which is a new facility in the establishment of the 1st respondent a function of Kenya Ferry Services and although through a Cabinet decision this was merged with the 1st respondent, the 1st interested party failed to consider the employees ought to have been working in shifts subjecting the allocated employees to 12 hours shifts without paying overtime;
 - e. The 1st interested party has elevated himself above all department heads causing disharmony and conflicts in management;
 - f. The 1st interested party has failed to maintain peaceful industrial relations leading to suits being filed in court against the 1st respondent. On 10 November 2021 Dock Workers Union issued a strike notice leading to ELRC Cause No. E099 of 2021;
 - g. The 1st interested party has suspended several employees and proceeded to undertake disciplinary hearings outside the stipulated periods contrary to the HR manual;
 - h. The Dock Workers Union has accused the 1st interested party of disregarding the Recognition Agreement;
8. The petition is also that the 1st respondent has failed to promote equality and equity within the function of human resource and administration because such office has only been occupied by the following men; On 23 December 2015 Salim Chingabwi retired from service and was replaced by Amani Komora on 8 February 2018 and on 2 May 2019 the 1st interested party was appointed and his contract is due to expire on 2 May 2022.
 9. The following have occupied the position of general manager board and legal services; on 6 February 2006 Ruth Onyanchar's employment was terminated, on 8 February 2016 Muthoni Gatere retired, on 4 June 2021 Addraya Dena retired, and on 4 June 2021 Turasha Kinyanjui was appointed.
 10. The top management of the 1st respondent are held only by one gender contrary to *the constitution* values and principles and as a public body all positions should be subjected to competitive appointments within its ranks and this can only be realised with advertising all positions which fall vacant and cannot be filled internally and the orders sought in the petition should be allowed
 11. The petitioner has filed her Supporting Affidavit in support of the petition, an employee of the 1st respondent in the position of Employees Relations Manager.

12. In response, the 1st respondent filed the Affidavit of Turasha Kinyanjui the acting general manager –board and secretarial services and aver that the petitioner assumes that the office of GM human resources is a public office as defined by law and that it cannot be filled by the 1st respondent board of directors and that such office must be filled through gender balance. The petitioner is converting the court into a technocrat to determine the competency or otherwise of the 1st respondent’s employees which is beyond the court powers. The 1st interested party is being questioned for baseless allegations without proof.
13. The assumptions made by the petitioner are unsupported by evidence. The 1st respondent board of directors have power under Section 51(1) and (3) of the *State Corporations Act* to engage and employ such number of employees as the Minister may approve. The position of GM – Human Resources was approved by the Minister and has been in existence for long and not clear why the petitioner is contesting this fact.
14. Under Section 8(1) of KPA Act, the board has power to appoint employees as may be necessary in its work. Such includes the office of GM – Human resources. Under Section B.2(c)(ii) of the HR policy the board has power to recruit its employees and GM - human resources is at grade HE1 which is above Grade HM2 and in this regard, such position is not a public office.
15. The 1st interested party contract was renewed and not a new appointment. There was a vacancy in the office in the year 2018 and the 1st respondent through a consulting firm advertised for qualified candidates to fill the position and a rigorous process followed the advertisement and the 1st interested party was appointed through letter dated 1st April 2019 on a contract of 3 years renewable based on performance and evaluation by the board of directors. The 1st interested party was appointed and has discharged his duties since and by letter dated 6 September 2021 he applied to the 1st respondent for a renewal of his contract due to expire on 30 April 2022. By a memorandum of November 2021 prepared by the 1st respondent managing director, he proposed the renewal of the contract for a term of 5 years. The HR Policy allow that contracts should be for a term of 3 years and may be renewed. It is silent if the term of renewal is for 3 years or more. The managing director made a proposal for a 5 years renewal which is legitimate.
16. The meeting of the board that was to consider the memorandum and renewal of contract was to be held on 10 December 2021 but was held on 26 January 2022 and the memorandum had to be altered to reflect such change of date.
17. The managing director and the board committees are not the appointing authority and merely recommend to the full board, which may approve or reject and, in this case, a board meeting held on 18 February 2022 considered the HR Committee’s and managing director’s recommendations to renew the 1st interested party contract for 5 years and only approved a renewal for 3 years and a letter issued to this effect. the 1st interested party was competitively recruited in the year 2018 and appointed for a term of 3 years and the renewal for 3 years is valid and justified. There is no requirement that the renewal be subjected to a fresh recruitment process.
18. With regard to gender equality, Kinyanjui aver that the letter of renewal of contract dated 21 February 2022 is explicit that the term is for 3 years and does not violate the terms of the HR policy as alleged by the petitioner. The documents filed by the petitioner on alleged meeting of the board on 26 and 27 January 2022 are not signed and it is not possible to tell who attended such meeting. The 1st respondent as the custodian of board records did not originate with such documents and the memorandum filed by the petitioner is not authentic.

19. With regard to alleged gender inequality, the petitioner does not seek any relief in the petition. The HR division where the petitioner sits has 304 employees out of who 180 are female. The legal department has had 3 female heads from 2006 to 2021 and the holistic approach is not to single out general manager. The 1st respondent board of directors has 4 women, 27 heads of divisions some of who are women and other thousands of women in its ranks.
20. The court is ill-equipped to evaluate the 1st interested party competence based on the events isolated by the petitioner which are without proof. While the petitioner has accused the 1st interested party of addressing a matter of sexual harassment in the public, she has addressed such matter in her petition hence publishing it to the word. The 1st interested party heads a division and cannot personally deal with all matters and must delegate as necessary. the noted complaint was lodged on 4 September 2020 to the head of administration and the petitioner and the complainant chose to withdraw it through letter dated 12 October 2020 but the 1st interested party went ahead to consider the complaint and took disciplinary action against the offender on 9 September 2021.
21. On alleged capping of overtime at 30%, the 1st respondent cannot pay fictitious claims of overtime and the managing director issued a memo on 6 August 2020 limiting overtime claims to 30% of the basic pay or go above with approval and this was not a choice for the 1st interested party.
22. On the complaint about the floating bridge, the 1st interested party does not operate the same and the departments in charge is the marine Engineering and his role was to deploy more employee upon request by the head of department who on 23 September 2021 did request the 1st interested party for 10 employees for 24 September 2021. There is no evidence that employees at the floating bridge who worked overtime were not paid.
23. The 1st respondent has reported structures and the 1st interested party cannot have elevated himself to a position other than the one he was contracted for.
24. For industrial relations, the petitioner as the industrial relations manager should have addressed the concerns of employees before they became disputes and appears to be championing the causes for Dock Workers Union without regard to the employer interests. The matters which have ended up in court have existed even before the 1st interested party was contracted;
 - Mombasa ELRC No. E062 of 2021 arose out of deduction of union dues and there is an agreement in place;
 - Mombasa ELRC No. E088 of 2021 arose out of a decision to ask employees suspended far back from 2009 to show cause why they should not be dismissed due to ongoing criminal proceedings; and
 - Mombasa ELRC Cause No. E099 of 2021 relates to the union lawful strike notice.
25. Filing of suits against the 1st respondent is not an indication of incompetence on the part of the 1st interested party. The petition is filed by a rabble rouser who engages in acts of misconduct evidenced by letters dated 8 July 2005, 3 August 2004, 4 August 2005, 24 March 2006 and 28 April 2006 and as a disciplinary measure, the petitioner was transferred from public relations department to public relations department on 10 August 2005 and she is now targeting the 1st interested party so that the position can fall vacant in the hope that she will be considered to fill it either in an acting capacity or substantively and for these reasons, the petition is without merit and should be dismissed with costs.
26. The 3rd interested party, Public Service Commission replied to the petition through the Affidavit of Dr. Simon K Rotich, the secretary and chief executive officer and aver that the 3 interested party is

- established under Article 233(1) of *the Constitution* to among other things address values and principles of public service in all state organs and state corporations and such mandate is further addressed under the PSC Act as held in the case of KUDHEIHA v Salaries and Remuneration Commission [2014] eKLR that the 3 interested party mandate covers state corporations including the 1st respondent. The office of the GM Human resource as the 1st respondent is a public office subject to the 3 interested party mandate with regard to appointment and re-appointment into office.
27. The HR Policy of the 1st respondent should not negate the mandate of the 3 interested party in terms of *the Constitution* and the PSC Act. The 1st respondent in applying its HR Policy must be guided under Article 232 of *the Constitution* with regard to ensuring high standards of professionalism, involvement of the public in the process of policy making, accountability for administrative acts and transparency in competitive recruitment in a fair competition and merit that should promote diversity and equal opportunities for all.
 28. Dr. Rotich aver that the issue before court relates to the renewal of contract for the GM - Human resources and under Section 45(3) of the PSC Act such is allowed based on workload, performance of the officer, expression of interest and that the decision to renew the contract does not disadvantage any public officer employed on permanent terms and that such decision is made at least 3 months before expiry of the contract.
 29. Under the 1st respondent HR Policy at clause B.1 (vi), a contract of employment can be renewed when necessary. In the case of HC JR No. 280 of 2013 - Republic v Cabinet Secretary for Education, Science & Technology & 3 others [2014] eKLR and in the case of William Ateka Ogato v Kisii University & 2 others [2021] eKLR the courts held that a person eligible for re-appointment to a public office ought to be taken through a competitive process, which only kicks in when the person is being recruited for the first time and in re-appointment for a further term, the body responsible for the appointment assesses the person and makes a decision whether to re-appoint.
 30. The 3 interested party has analysed the deliberations at the meeting of the 1st respondent and filed a report dated 9 March 2022 and the finding is that the 1st interested party contract was properly renewed and the petition should be dismissed as it does not meet the constitutional threshold.

Determination

31. From the pleadings, the written submissions, the issues which emerge for determination based on the orders sought in the petition are;
 - Whether the process commenced by the 1st respondent to fill the position of general manager - human resources and administration is unconstitutional;
 - Whether the 1st interested party should be prohibited from taking up such office; and
 - Who should pay costs.
32. At the core of the petition is the application of Article 10(1) and (2), 27(8) and 232 of *the Constitution*. The essence of these provisions is that all public officers are bound by the principles and values of *the Constitution* in undertaking their duties and in doing so, leadership and integrity should be running values with high standards of professional ethics in the public service.
33. In this regard, the 3rd interested party is the independent constitutional body given mandate to establish and abolish offices in the public service and to implement values and principles under Article 10 and 232 of *the Constitution* with regard to the public service.

34. Such public service is defined under Article 232(2) of *the Constitution* to include all officers and persons serving all state organs at national and county governments and including those serving under state corporations such as the 1st respondent, Kenya Ports Authority.
35. The petition is that the 1st respondent has in disregard to *the Constitution*, the *Kenya Ports Authority Act* and the HR Policy appointed the 1st interested party as the GM - Human resources and administration exceeding his 3 years terms without subjecting his position to a competitive process, without evaluation or taking into account the gender equality for such role and without addressing his competences and integrity on the role and term undertaken.
36. The petitioner moved the court under Certificate of Urgency which was addressed at the time.
37. The Dock Workers Union came in as 4th interested party and filed an application under Certificate of Urgency which application was addressed by the court. The petitioner was guided to amend the petition but this was not addressed.
38. It is not in dispute that the 1st interested party was competitively recruited by the 1st respondent through an external company in the year 2018 and through letter dated 1st April 2019 appointed on a contract of 3 years renewable based on performance and evaluation by the board of directors. The 1st interested party by letter dated 6 September 2021 applied to the 1st respondent for a renewal of his contract due to expire on 30 April 2022. By a memorandum of November 2021 prepared by the 1st respondent managing director presented to the board of directors, a recommendation for renewal for 5 years was made. The board of directors, through its Human resources committee had reviewed the 1st interested party application for renewal, the managing director's memorandum and approved the renewal which was submitted to the full board of directors who agreed to the renewal but for a term of 3 years.
39. The 1st respondent filed the HR Policy and the court reading of Section B.1(a)(vi) and B.2(c)(I) both allow for issuance of employment contracts for a term of 3 years which may be renewed. The 1st interested party applied for renewal and there is a full board approval on 18 February 2022 and subsequently, through letter dated 21 February 2022 the 1st interested party was informed of the renewal which was prior to the expiry of his contract.

Should the position of GM Human resources and administration be subjected to new recruitment procedures before renewal?

40. The jurisprudence of the court in this regard is consistent. Where the contract of employment allow for application for renewal and the conditions thereto are met, an employer can renew the contract without undertaking fresh recruitment procedures. The constitutional repository of all that is public service and requirements thereto is the Public Service Commission. This is in tandem with Section 45(3) of the PSC Act which allow for the extension of a term contract of a public officer if the appointing authority is satisfied that there is sufficient workload for further engagement, the performance of the officer is found satisfactory and there is a written request for renewal of contract and that no other officer is disadvantaged.
41. All appointments or re-appointments in the public service are subject to the mandatory provisions of article 232(1)(g) of *the Constitution* which obligates public institutions to be guided by fair competition and merit in making appointments in the public service. The Court of Appeal in the case of Wilfrida Itolondo & 4 others v The President & others [2015] eKLR in addressing a case of re-appointment into office of public officers the court held that the subject officer whose re-appointment was being challenged was not being recruited afresh since service was ongoing. In a re-appointment,

new recruitment procedures were unnecessary. The aspect of competitive recruitment did not apply at this stage. It was not a fresh recruitment but a re-appointment and to which the subject officer was entitled to.

42. In this case, the 3rd interested party as the regulator of public service agree that under Section 45(3) of the PSC Act a re-appointment into office is allowed for the appointing authority. These provisions read together with the 1st respondent HR Policy which give the procedures for renewal of contract buttress the fact that during re-appointment, competitive recruitment does not arise since this is not a fresh recruitment. During recruitment a different procedure is used whereas during re-appointment a different procedure requires a performance appraisal of the officer as held in the case of Wilfrida Arnodah Itolondo v Attorney General & 3 other [2019] eKLR that the re-appointment of a member into the Senate followed consideration at the board based on performance during the first term and being satisfied, a recommendation thereof for re-appointment for another term is sufficient since the officer is already serving in such office and capacity upon competitive recruitment. Such complied with articles 10 and 232 of the Constitution on the principles of democracy, transparency and inclusivity.
43. Therefore, re-appointment of the 1st interested party in this regard did not violate the law or the Constitution as alleged by the petitioner. The re-appointment of the GM - Human resources and administration is procedural cognisant of Articles 232(1) of the Constitution read with Section 45(3) of the PSC Act and the 1st respondent's HR Policy.
44. Before conclusion, the petitioner has addressed various other matters with regard to the competencies and integrity of the 1st interested party to hold his office. The question of gender equality and which the 1st respondent through the Affidavit of Turasha Kinyanjui addressed with a chronology of various officers including the number of female members in the ranks of the 1st respondent board, legal department, human resources department but missed the point that the petitioner raised. The position of attention here is that of GM - Human resources and administration and which, from the history given has been occupied only by persons of the male gender. Even though this should be looked at in context vis-a-vies other offices in the ranks of the 1st respondent, this, in my humble view, is an invitation to introspection and address provisions and requirements of Article 232 of the Constitution which Dr. Rotich in his Replying Affidavit went into and which directs the 1st respondent as a public body to be compliant in terms of its values and principles in the public service and ensure the following under Article 232(1)(j) that;
 - (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.
45. The petitioner has also set out various other matters with regard to sexual harassment at the workplace, work overtime, reporting structures and industrial relations. Whereas this is her petition, the petitioner has defined herself as a public relations officer of the 1st respondent. In such office, several internal matters of the employer must pass through her hands as an employee and recourse should be to have these addressed through the internal channels available. It is clear to the court that there exists a vibrant trade union, the 4th interested party at the shop floor. Unless such matters are processed and gone into within these structures agreed upon by the tripartite available, the court will be called to enter at the shop floor and make administrative decisions ordinarily which ought to be taken up by the trade

union with the employer. This is more so, taking into account that the 4th interested party has taken up several matters against the 1st respondent and which are pending in court.

46. In response to the petition, the 1st respondent also took the chance to delve into the conduct of the petitioner over the years. This reflects a dire need for audit of systems and which the 3rd interested is constitutionally mandated to address.

47. For this petition, the court brings to the attention of the 1st respondent the provisions of the Employment Act, 2007 that is Sections (6) (2) to (4) of the Act which directs that;

(2) An employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.

(3) The policy statement required under subsection (2) may contain any term the employer considers appropriate for the purposes of this section and shall contain—

(a) the definition of sexual harassment as specified in subsection (1);

(b) a statement—

(i) that every employee is entitled to employment that is free of sexual harassment;

(ii) that the employer shall take steps to ensure that no employee is subjected to sexual harassment;

(iii) that the employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any employee to sexual harassment;

(iv) explaining how complaints of sexual harassment may be brought to the attention of the employer; and

(v) that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.

(4) An employer shall bring to the attention of each person under the employer's direction the policy statement required under subsection (2).

48. The employer has a legal duty to develop a policy statement against sexual harassment if the establishment has more than 20 employees giving procedures and of how an employee can submit grievances without victimisation and protecting confidentiality.

49. For the petition, the orders sought are found without merit and are hereby dismissed. The petitioner shall meet the costs due to the 1st respondent, 1st and 3rd interested parties.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JULY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and