



Araru v Judicial Service Commission (Employment and Labour Relations Petition E002 of 2023) [2023] KEELRC 2598 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2598 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

EMPLOYMENT AND LABOUR RELATIONS PETITION E002 OF 2023

ON MAKAU, J

OCTOBER 25, 2023

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 3,10,20,21 (1), 22, 23,25(B), 27, 28, 30, 35, 41, 47, 162 (2), 172 (1)(B), (II), (C) & (2) (A) & (B),232 AND 258(1) AND 2(C) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ENFORCEMENT OF THE SUPREMACY OF THE CONSTITUTION AS PER ARTICLE 47 OF THE CONSTITUTION.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2023

BETWEEN

ABDIRAHAMAN OMAR ARARU PETITIONER

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

Introduction

1. The petitioner was employed by the Judiciary of Kenya in the year 1996 and rose to the position of Court Bailiff at the Principal Magistrate’s Court at Moyale. He earns a gross monthly salary of Kshs.143,540.00. The respondent is an Independent Commission established under Article 171 of *the Constitution* with the responsibility to appoint, recommend terms and conditions of service, and discipline Judicial staff.
2. The petitioner brought this petition on 4th May, 2023 through the Law firm of Mabeya & Mabeya Advocates and Amended it on 4th May 2023. He accuses the respondent of violating his fundamental



freedoms and rights through a letter dated 18th November, 2022. The letter notified him that his office had been abolished and further offered a fresh appointment as a Court Assistant. He prays for the following reliefs: -

- a. A finding that the Respondent's unilateral actions infringed on the Petitioner's Right to Fair Administrative Action.
 - b. A finding that the Respondent's action amount to discrimination.
 - c. A finding that the Respondent's actions infringed on the Petitioner's right to legitimate expectation.
 - d. A finding that the Respondent's action to retain only older employees in the position of Court Bailiff amounted to favoritism and directly infringed on the Petitioner's rights to non-discrimination under Article 27 of *the Constitution*.
 - e. A finding that the Respondent's actions infringed on the Petitioner's right against Unfair Labour Practices.
 - f. A finding that the said Redundancy is unprocedural, arbitrary, unfair and unlawful.
 - g. A finding that the petitioner is entitled to an award of damages in the following terms:
Severance Pay: $(143,540/1/2 \times 24 \text{ years} = \text{Kshs.}1,722,480.00$
Notice Pay: Kshs.143,540/-
Damages for unfair and unlawful redundancy $(143,540 \times 12 \text{ months}) \text{ Kshs.}1,722,480/-$
Leave days: $(21/30 \ 143,540 \times 24 \text{ years} = \text{Kshs.}2,411,472/-$
Total: Kshs.5,999,972/-
 - h. An Order of Certiorari be and is hereby issued, calling into this court, and quashing implementation of the letter dated 18th November, 2022 and addressed to the petitioner declaring his position redundant as unlawful, unconstitutional and offending the *employment Act* and Labour Practices.
 - i. A Declaration be and hereby issued that the letter served by the Commission through the secretary and received on the 18th November, 2022 is unlawful, unconstitutional, and in violations of employment policy and practice.
 - j. A Declaration That the petitioner is deemed to have been lawfully appointed to the position of court bailiff vide the letter of appointment dated 4th November, 2015.
 - k. An Order of Prohibition be and hereby issued restraining to the respondent from freezing the petitioner's annual salary increment and other benefits accorded to the position of court bailiff.
 - l. A Conservatory order be and hereby issued restraining the Respondent from acting unlawfully, unconstitutionally, by declaring the petitioner's position redundant.
 - m. Any other relief that the Honourable Court deems appropriate, just and fit to grant.
 - n. The costs of the Petition be provided for.
3. The Respondent admitted that it wrote the impugned letter but denied that its decision was unlawful or a violation of the petitioner's Constitutional rights. It further denied that the petitioner was declared redundant and prayed for the petition to be dismissed with costs.



4. The petitioner filed a Notice of Motion simultaneously with the petition seeking conservative orders to stay the impugned decision pending the hearing and determination of the petition and on 28th February 2023, the order was recorded by consent.

Factual background

5. Both parties filed affidavits setting out the facts leading to the petition and annexed bundles of documents as exhibits. The petitioner deposed that he was employed as a casual in 1996. In 1997, he was appointed on permanent and pensionable terms as a Senior Subordinate staff. Due to his diligent service, he was promoted to the position of Process Server II, and then Senior Process Server. In 2015 he applied for the position of Court Bailiff and after a competitive interview he was promoted to that position. He worked as such until 3rd February 2023, when he received a letter dated 18th November 2022 notifying him of the respondent's decision to demote him from the position of Court Bailiff to Process Server. The letter further froze his annual salary increments.
6. He contended that he was cherry picked and treated differently from other employees who lacked qualifications under the new grading structure just because he had many years before retirement. As such he contended that he was discriminated on the basis of age contrary to Article 27 of *the Constitution*. He contended that he was competent to do the job of Court bailiff since he was interviewed for the same before the appointment and later had served in the position for 8 years. His performance had also been favourably appraised annually.
7. In view of the foregoing matters he contended that his rights to legitimate expectation and fair labour practices have been violated contrary to Article 41 of *the Constitution*. Further his right to be treated with dignity under Article 28 of *the Constitution* has been violated by being subjected to undignified working condition as compared to his peers.
8. Finally, he opined that by the alleged scrapping of his position of Court Bailiff meant that his employment had been unfairly terminated on account of redundancy. In that respect, he contended that his right to fair administrative action under Article 47 of *the Constitution*, *Employment Act* and *Fair Administrative Action Act*, was violated in that;
 - i. The respondent commenced the process without collecting views of the bearers of the offices to be abolished.
 - ii. The letter issued by the respondent requires that the petitioner engages in new and fresh terms.
 - iii. The letter froze the remuneration of the petitioner until retirement.
9. The respondent, on the other hand, admits that the petitioner was promoted from the position of Senior Process Server to a Court Bailiff job grade PLS 9 with effect from 5th October 2015. However, on 8th December 2016, judiciary organizational review process was initiated. The aim was to review the judiciary organizational and governance structures in order to efficiently deliver justice. Professional Training Consultants (PTC) was appointed to undertake the exercise.
10. It is further respondent's case that all the staff of the judiciary were involved in the process by being issued with Job Analysis Questionnaires and they responded. Job evaluation was then done by a committee drawn from registries, directorates, Courts and representatives of the Kenya Judicial Staff Association. A report of that exercise was approved by the respondent in November 2018 and Judiciary Organizational Review Implementation Team was established.



11. The implementation team recommended for the implementation of the report in the following sub-categories:
 - i. Judiciary Administration structure
 - ii. Judiciary grading structure
 - iii. Judiciary staff salary structure
 - iv. Judiciary staff establishment
 - v. Judiciary staff career progression guidelines framework.
12. The respondent averred that the approved grading structure collapsed the existing 17-steps (PLS) to 11 steps (JSG) leading to some functions being merged, down-graded or even abolished. Job grade PLS 9 was converted to JSG 6 but the position of Court Bailiff was abolished and does not exist under JSG 6 after being found to be inconvertible. Other nine positions also fell off. The positions of court bailiff under the new structure are now in three levels starting as Process server JSG 9, then Court Bailiff JSG 8 and Senior Court Bailiff JSG 7.
13. The respondent admitted that the petitioner was promoted to Court Bailiff after a successful interview and has performed well in his annual appraisal prior to 2019. However, it was contended that the petitioner lacked the minimum qualification of Bachelor's degree to be placed under JSG 6 in the new structure, and therefore he was redeployed to JSG 9 where he qualified. His salary was not affected by the redeployment. Further, he could not be placed in JSG 6 because his retirement age was to be 65 years. Therefore, the respondent maintained that the decision taken was beneficial to the petitioner and none of his rights were violated.
14. As regards the procedure followed, the respondent averred that all the staff in the non-convertible positions were invited to a meeting on 12th January, 2023 with the Director Human Resources and the new job Grade structure was explained to them as per the respondent's resolution. The Court Bailiffs including the petitioner attended. It denied that the petitioner was discriminated and contended that 46 judicial staff in the non-Convertible positions were also aligned to the new 11-grading structure. Finally, the petitioner was promised the higher position if he attains the minimum qualifications.

Submissions

15. It was submitted for the petitioner that this court has jurisdiction under Article 23(1) of *the Constitution* to interrogate whether a right has been violated and make a remedy. In this case it was argued that the petitioner was discriminated contrary to Article 27 of *the Constitution* on account of age. It was observed that, the respondent has admitted in paragraph 11 of the further Replying Affidavit that some employees were allowed to retain their positions despite lack of qualification because they had less than 5 years to the age retirement.
16. It was submitted that the said action is contrary to section 5(3)(b) of the *Employment Act* which provides that there shall be no discrimination directly or otherwise in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment. In this case, it was contended that the petitioner has been demoted as a result of the organizational restructuring and his salary increment frozen for the same reason of his age. The said action was also deemed to be a violation of the petitioner's right to fair labour practices contrary to Article 41 of *the constitution*.



17. It was further submitted that the petitioner's right to fair administrative action under Article 47 of *the Constitution* was violated. It was argued that the new grading structure was made in October, 2019, according to the letter dated 18th November 2022, before according the petitioner any hearing to give his views. That the said letter was a fresh appointment after the petitioner's position was declared redundant and abolished.
18. It was further submitted that whereas the reason for the termination was valid and fair, the procedure followed was not fair and that rendered the redundancy unlawful. The procedure was further faulted because the Labour officer was not involved before the redundancy was declared. Further it was submitted that the redundancy was unlawful because the petitioner was not paid salary in lieu of notice and severance pay.
19. For emphasis, reliance was placed on the case of *Hesbon Ngaruiya Waisi v Equatorial Commercial Bank Limited* [2013] eKLR where the court held that if the procedure set out under section 40 of the *Employment Act* is not followed, the resultant redundancy is unfair. Further reliance was placed on the case of *KUDHEIHA v the Aga Khan University Hospital Nairobi*, cited in *Bernard Misawo Obora v Coca Cola Juices Kenya limited* [2015] eKLR where the court stated that the notices envisaged under section 40 are not mechanical and should be carefully crafted prior to being issued as they affect the employees behind the redundancy process.
20. The Respondent, on the other hand submitted from the onset that the petition does not meet the competency threshold established by the case of *Anarita Karimi Njeru v Republic* [1979] 1 KLR, 54 concerning pleadings in constitutional petitions. It submitted that the petitioner cited various constitutional provisions but has failed to set out with precision the violations complained of and prove the same to the required standard. Consequently, the court was urged to find that no violations have been disclosed and dismiss the petition with costs.
21. As regards the merits of the petition, it was submitted that the crux of the petition is the restructuring done on the Organization of the Judiciary which created new structures. It was further submitted that under Article 172 (1) (b) of *the Constitution*, the respondent has the power to review and make recommendations on the conditions of service for the judicial staff. It also has the power under section 13 of the *Judicial Service Act* to perform all necessary acts for the proper performance of its functions under *the constitution* including engaging experts or consultants under section 14 of the Act.
22. It was further submitted that the position of Court Bailiff PLS 9 which the petitioner earlier held was not entirely abolished under the new Job Grading structure, but it was placed as JSG 8 requiring diploma certificate as the minimum qualification. The petitioner did not possess the said qualification and therefore he was offered a new job in the new structure where he qualified but his salary and other terms of service remained unchanged. Therefore, the alleged redundancy was denied.
23. It was further submitted that the promotion of the petitioner to a Court Bailiff in 2015 was subject to the respondent's mandate to restructure and reorganize the institution and as such the petitioner had no legitimate expectation to serve as such until retirement. In that respect, it was argued that the petitioner is not entitled to any damages for the alleged violation of his constitutional rights.
24. It was also submitted that the respondent has filed a Report by the consultant to show that there was prior consultation with the staff and the stakeholders. It was also submitted that the petitioner attended a meeting with other affected staff for explanation of the change in the organization structure and he signed the attendance register.
25. As regards the alleged discrimination it was reiterated that 46 employees were affected by restructuring and not the petitioner alone. Further, the few employees who remained in their position without



qualifications were those with 5 years or less before retirement. It was also argued that the petitioner was allowed room to obtain the required qualification and get promoted. Consequently, it was submitted that there were no constitutional violations as the decision taken was fair and to the advantage of the petitioner. For emphasis, several judicial decisions were cited.

Analysis and determination

26. There is no dispute that the petitioner is an employee of the respondent since 1996 and that in 2015 he was promoted to a Court Bailiff Job Grade PLS 9. It is also a fact that in 2019 the respondent adopted a new organization structure for the judicial staff in which some roles were merged, upgraded, downgraded or abolished. It is further a fact that the position of Court Bailiff was abolished under JSG 6 in the new Job Grading structures and a new one was created under JSG 8 requiring a Diploma certificate as the minimum qualification. Finally, it is a fact that the petitioner has O-level certificate plus a certificate in computer application.
27. The issues that fall for determination are:-
 - a. Whether the petition meets competence threshold for a constitutional case.
 - b. Whether the petitioner's employment was terminated on account of redundancy.
 - c. Whether the judiciary organizational review violated petitioner's fundamental rights and freedoms.
 - d. Whether the reliefs sought by the the petitioner are merited.

Competence threshold

28. The competence threshold was established by the High Court in the Anarita Karimi Njeru case, supra, thus:

“We would, however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to *the constitution*, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”
29. In this case, the respondent never raised the issue of incompetence in its pleadings but waited till the time of written submissions. The petitioner ignored the issue and his counsel never mentioned it in his oral submissions. Having considered the Amended petition, I agree that, the petitioner has basically pleaded the provisions of *the constitution* which he alleges to have been violated, but he has not set out with a degree of precision the complaint he has against the respondent and the manner in which the said provisions have been violated. The provisions cited are Article 27, 28, 41 and 47 of *the Constitution*.
30. Part C of the petition is titled “CONtravention Of The Petitioner's Rights, The Law And *The Constitution* Of Kenya 2010”. Under this part are paragraph 11 to 19 which in my view do not bring out the constitutional violations complained of and how the same have been done. My reading of the said paragraphs and the reliefs sought, brings out a case of unlawful redundancy. Such a dispute should not have been elevated to a constitutional one.
31. This matter ought to end at this point. However, I will proceed to consider the dispute on merits.



Termination on account of redundancy

32. The petitioner alleges that he was declared redundant vide the letter dated 18th November, 2022 but the respondent is in denial. Redundancy is defined in Section 2 of the [Employment Act](#) as follows:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupational loss of employment.”

33. The letter dated 18th November, 2022 stated, thus: -

“REF: PJ No.26006

Abdulrahman Osman Araru

(Court Bailiff)

Thro’

Principal; Magistrate

Moyale Law Courts

O Box 266-60700

Moyale

Appointment as Court Assistant II, JSG 9

The Judicial Service Commission (JSC) in its meeting held on 17th October 2019 approved the implementation of the New Grading and Salary Structure as per the Organization Review (OR) Report (2018).

The OR Job Evaluation and grading exercise resulted in merging, restructuring, retention or abolition of jobs. Consequently, the judiciary grades were collapsed from seventeen (17) to eleven (11) grades. Jobs in the old 17 grades (PLS) were converted to new 11 grades (JSG) in line with the job evaluation and grading results.

The position of Court Bailiff PLS 9 was abolished. The new Court Bailiff cadre positions were established at JSG 9 being the entry grade with JSG 7 being the highest-grade level.

It is noted that jobs in PLS 9 were converting to JSG6 as per the conversion framework. With the position of Court Bailiff, PLS 9 having been abolished, no position for the cadre of Court Bailiff exists at this grade. The holder of the position would thus be declared redundant.

The Approved Judiciary Career Guidelines (2019) outlines the academic and professional qualifications for appointment to JSG 6 as below;

- i. Bachelor’s Degree
- ii. Meets the Requirements of Chapter six (6) of [the Constitution](#).

Records held in your personal file indicate you possess KCSE C- (Minus) and Computer Applications certificate and hence you do not meet the minimum requirements for re-designation to a position within the grade of JSG6.



Consequently, the Judicial Service Commission at its meeting held on 29th September 2022 considered that the position you were holding has been abolished.

The commission has however, subject to your agreement, considered to offer you a fresh engagement and appointment as Court Assistant II, JSG 9 where you meet the minimum entry requirements.

Your remuneration will be frozen (no further increment) at current notch. You may however later pursue relevant certifications and apply for suitable position(s) upon declaration of vacancies.

Your other terms and conditions of service remain the same.

A detailed job description outlining your new role, duties and responsibilities is herewith attached for reference.

You are required to sign to signify your acceptance of this fresh appointment.

Appropriate deployment as per your new role will follow in due course.

Anne A. Amadi, CBS

Secretary,

Judicial Service Commission

Acceptance

I hereby confirm my acceptance/decline of this offer on the terms and conditions of appointment in this letter as approved by the Judicial Service Commission.

34. The petitioner maintains that the above letter confirmed that his employment had been terminated on account of redundancy and new appointment was then offered to him. He faulted the respondent for terminating his services on account of redundancy without following fair procedure which requires notice to the Labour officer and payment of severance pay.
35. The respondent, however, denies the alleged redundancy and maintains that the position of Court Bailiff PLS 9 was removed from JSG 6 in the new Grading structure and placed under JSG8. The minimum qualification for the position of Court Bailiff in the new Grading structure was enhanced to O-level certificate plus Diploma certificate in relevant field. The redesigned position was not convertible with scrapped Court Bailiff PLS 9 and therefore it offered the petitioner a new appointment in JSG 9 where he met the qualifications. His salary was retained just like for other employees who were affected like him.
36. Applying the aforesaid statutory definition of redundancy to the facts of this case, I would say that the issue of redundancy does not arise because the petitioner has not lost his job. It is clear from the evidence that the outcome of the judiciary organizational structure exposed him to redundancy. However, the petitioner like other affected employees were given alternative jobs in the new grading structure to prevent the redundancy. Their salary and other terms of service were never altered save for the annual increments that were frozen.
37. In my view, one cannot talk of redundancy where the employer has provided the employee with an alternative job to prevent or mitigate the effect of redundancy. Since no redundancy has been proved in this case, the allegation that fair procedure was not followed before the redundancy does not add up.



Violation of rights and fundamental freedoms

38. The petitioner alleged that the judiciary organizational review and his subsequent demotion to the position of Court Process Server violated his constitutional rights and fundamental freedoms. There is no doubt that Article 27, 28, 41 and 47 of *the Constitution* obliges an employer to act fairly while making any decision that affects the rights of an employee under a contract of service. The said obligation extends to any decision that alters an employee's terms of service or otherwise terminates the employment. The obligation further extends to ensuring that the employer does not discriminate or expose any employee to undignified treatment.
39. In this case there is evidence that the respondent undertook an elaborate exercise of the Judiciary organizational review. The respondent's power to do so and the legality of the exercise has not been contested. The respondent did not have any intention to lay off any of the judicial staff but to improve on efficient and effective delivery of justice. The exercise was also done professionally with the help of a Consultant in the name and style of Professional Training Consultants (PTC).
40. As regards procedure, there is evidence to show that the exercise was not done secretly. All the judiciary staff was involved in order to ensure inclusivity during the process. A Job Analysis Questionnaire was shared to all Judicial staff and stakeholders. Interviews were conducted including work load analysis. Exhibits AA-1 and AA-2 have been presented by the respondent as proof of the said stakeholder engagement.
41. There is further evidence that the respondent formed a Review Job Evaluation Committee drawn from Registries, Courts, Directorates and Kenya Judicial Staff Association. There is also evidence that a report on the review was prepared and a validation was done.
42. The report of the entire exercise was received the respondent's approval on 17th October 2019. The desired judiciary organizational structure was therefore achieved and the following was to be implemented, new:
- i. Judiciary Administrative Structure;
 - ii. Judiciary Grading Structure;
 - iii. Judiciary Staff Salary Structure;
 - iv. Judiciary Staff Establishment; and
 - v. Judiciary Staff Career Progression Guidelines Framework.
43. Taking into account all the above matters, I am satisfied that the process of the judiciary organizational review was done fairly and all the staff were involved. All the staff members were made aware of the exercise and they participated in one way or another. The petitioner was fully aware of the organizational review process and he participated in it like all the other judiciary staff. He was also invited to, and did attend, a meeting on 12th January 2023 with the Director of Human Resources where the new Job Grade structure and staff placement was explained to him alongside other affected court Bailiffs.
44. Considering all the circumstances of this case, I see a fair balancing act between the respondent's constitutional mandate to ensure efficient and effective delivery of justice, one hand, and protecting the petitioner from a glaring redundancy on the other hand. The petitioner holds an O' level certificate and certificate in computer applications which is below the minimum academic qualification for Court Bailiff under the new structure. The respondent has even gone to an extent of retaining the petitioner's



salary for JSG 6 and all the other terms and conditions of service save for annual salary increments. He has also been promised promotions should he attain the minimum qualification for the new position of Court Bailiff JSG 8.

45. The said actions by the respondent, in my view do not amount to violation of the petitioner's right to fair labour practices, right to fair administrative action, right to be treated with dignity and right not to be discriminated against. Based on the evidence before me, the petitioner was made aware of the organizational review process, he participated in it, he was notified of the outcome and he was even spared from an obvious redundancy. In the circumstances, I find and hold that, the alleged violations have not been proved on a balance of probability.

Reliefs

46. In view of all the findings and reasons highlighted above, I have reached the conclusion that the petitioner is not entitled to the reliefs sought in his Amended Petition dated 24th March, 2023. Consequently, the Amended petition is hereby dismissed with no costs considering that the parties are still in employment relationship.

DATED, SIGNED AND DELIVERED AT NYERI THIS 25TH DAY OF OCTOBER 2023.

ONESMUS N MAKAU

JUDGE

Order

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

ONESMUS N. MAKAU

JUDGE

