



**Kihiko & 49 others v Ministry of Environment, Climate Change and Forestry & 2 others  
(Petition E090 of 2023) [2023] KEELRC 3014 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3014 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E090 OF 2023**

**B ONGAYA, J**

**NOVEMBER 27, 2023**

**IN THE MATTER OF ARTICLES 2(1), (2) (5), (6), 3(1), 10, 19(1) AND (2), 20(1-4),  
21 (1), 22(1) & 23(1) AND (3), 24(1), 27(1) & (4), 28, 41(1) & 2(B), 47, 48, 50(1), 159,  
162(2)(A), 165 (3)(B), 258(1) & 2(B) & 259 (1) OF THE CONSTITUTION OF KENYA  
IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT  
IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF  
ARTICLES 10, 27(1) & 4, 41(1) & 2(B) AND 47 OF THE CONSTITUTION OF KENYA 2010  
IN THE MATTER OF THE EMPLOYMENT ACT, 2007  
IN THE MATTER OF FAIR ADMINISTRATIVE  
ACTIONS ACT, NO. 4 OF 2015 OF THE LAWS OF KENYA  
IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICES AND PROCEDURES RULES**

**BETWEEN**

**MOSES KIBE KIHICO & 49 OTHERS ..... PETITIONER**

**AND**

**MINISTRY OF ENVIRONMENT, CLIMATE CHANGE AND  
FORESTRY ..... 1<sup>ST</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**



## JUDGMENT

1. The petitioner filed the petition dated 19.05.2023 through M/S Mino Kimeu & Company Advocates. The petitioner prayed for:
  - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have jointly and/or severally violated and continue to violate the rights and fundamental of the petitioners contrary to the provisions of Articles 27 and 47 of the constitution.
  - b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were jointly and/or severally in breach of section 5 of the Employment Act.
  - c. Compensation and damages for violation of the petitioners' constitutional rights
  - d. An order that the petitioners be promoted from job group 'N' to 'P' with effect from 9<sup>th</sup> June 2021 or any other past date as the Court may order.
  - e. Consequent to (d) above, an order that the petitioners' salary, remuneration and allowances be revised and paid to the petitioners with effect from the date of the promotion as particularized under paragraph 40 of the petition.
  - f. An order that the respondents jointly and/or severally undertake not to victimize the petitioners in any way as a result of the petition.
  - g. An order that the respondents be ordered jointly/severally to ensure compliance with court orders within 90 days from the date of judgment or any time as the Court may direct.
  - h. Costs of the petition
    - i. Interest; and
  - j. Any other orders that the court deems fit to grant.
2. The petition was based upon Moses Kibe Kihiko's supporting affidavit sworn on 19.05.2023 and exhibits thereto attached to the petition as well as his supplementary affidavit sworn on 03.11.2023. The petitioners' case is as follows:
  - a. The petitioners are Principal Meteorological Technologists in the Kenya Meteorological Department within the Ministry of Environment, Climate Change and Forestry, having been promoted to that cadre in the year 2017.
  - b. That on 10.04.2017 the 2<sup>nd</sup> respondent vide MET/C/8/4/3VOL 8/95 invited 170 Senior Principal Meteorological Superintendents Job Group M at the time for an interview, out of which 156 were promoted to Principal Meteorological Superintendents later renamed Principal Meteorological Technologists Group N.
  - c. That on 21.06.2021 the 2<sup>nd</sup> respondent promoted a total of 45 Principal Meteorological Technologists Job Group N/CSG 8 to Senior Principal Meteorological Technologists Job Group P/CSG7
  - d. That vide a letter referenced Met/4/2(120) dated 27.07.2021, the Director Kenya Meteorological department addressed the promotion of the said 45 Principal Meteorological



technologists CGS8 Group N to Senior Principal Meteorological Technologists CGS7/Group P and stated thus;

- i. That promoting the forty-five (45) and leaving others served as a great anomaly which is left unaddressed would really cause dissatisfaction in the cadre
  - ii. That apart from setting a bad precedent in the service, where junior officers surpass the senior officers in seniority, this would really be a cause of great demoralization and dissatisfaction in the service and may adversely affect service delivery
  - iii. Besides, if allowed to take root in the civil service, such discrimination results to ill health such as stress, depression, chronic conditions like blood pressure and therefore further increases the burden of disease incidences, treatment, psychological and counselling need in government something which would be avoided
  - iv. The letter argued further that the Meteorological Technologists' cadre as a whole form the backbone of Kenya Meteorological Department and therefore no action should be allowed to negatively affect the cadre.
  - v. The letter further gave the history that similar past discriminatory approaches towards human resource issues which resulted into go slows and sometimes unfortunately landed in Court for resolution and determination
  - vi. The Director then urged that all Principal Meteorological Technologists hold same qualifications and in the Director's letter of appeal recommended that all Principal Meteorological Technologists be promoted to CGS7 Group P which recommendation has never been implemented.
- e. That notwithstanding the Director's recommendation that all Principal Meteorological Technologists be promoted to CGS7 Group P, vide a letter dated 01.04.2022 ref no. PSC/EMCS/30/ (20); PSC/EMCS/9(13) and titled Appeals for Promotion of Officers, eleven (11) Principal Meteorological Technologists CSG 8/group N were promoted to the grade of Senior Principal Meteorological Technologists CSG7 Group P.
  - f. The one and only criterion upon which the the promotions of 11 Principal Meteorological Technologists CSG 8/ Group N were promoted to the grade of Senior Principal Meteorological Technologists CSG 7/ Group P was based on years served in the grade.
  - g. The petitioners and the 11 Principal Meteorological Technologists CSG7/Group P were all promoted in 2017 and had therefore served the same number of years.
  - h. The petitioners' case is that the 1<sup>st</sup> respondent by promoting only 11 Principal Meteorological Technologists and leaving out the petitioners amounts to discrimination against the petitioners and amounts to unfair labour practices.
    - i. The petitioners have severally written to the 2<sup>nd</sup> respondent through the 1<sup>st</sup> respondent particularizing their grievances as regards their stagnation in the same Job Group for a period of 4 years.
    - j. That the Revised Scheme of Service for meteorological personnel stipulates that a staff is legible for the next grade if they have stagnated in the same grade for three years.
3. The 1<sup>st</sup> and 3<sup>rd</sup> respondents in reply filed grounds of opposition dated 26.07.2023 through learned State Counsel Mary Mochoge for Attorney General. It was stated as follows:



- a. That the petitioners seek an escape route through the Constitution and are using it as a general substitute for the normal procedures for invoking judicial control of administrative action.
  - b. That the petitioners are circumventing the *Employment Act* and the *Labour Relations Act* by relying on the constitutional provisions.
  - c. That the cause of action challenged is based on a contract of employment between the petitioners and the respondents, therefore the petitioners ought to have filed an ordinary claim to ventilate their grievances as opposed to filing a constitutional petition.
  - d. That the petitioners have not demonstrated with precision how their fundamental rights and freedoms under the constitution have been violated or are threatened and have not produced any evidence to prove the alleged violations contrary to the principles espoused in the locus classicus decision in *Mumo Matemu Vs. Trusted Society of Human Rights Alliance* (2013) eKLR and *Annarita Karimi Njeru* (1979) KLR 154.
  - e. That the petitioners have approached the Honourable Court prematurely and in contravention of the doctrine of exhaustion which requires that a party exhaust all available internal disputes resolution mechanisms provided by the law before filing a dispute in Court.
  - f. That the petitioners want to micro-manage the human resource functions of the 1<sup>st</sup> respondent contrary to the law and the Constitution
  - g. The application and petition as drawn is therefore defective, bad in law and should be struck out.
4. The 2<sup>nd</sup> respondent filed their replying affidavit sworn on 16.10.2023 by Remmy N. Mulati MBS, the Deputy Commission Secretary (Corporate Services) and filed through the learned Principal Legal Counsel Wangeci Gichangi. It was stated and urged as follows:
- a. The terminal grade for diploma cadre in the Kenya Meteorological Department is Senior Principal Meteorological Technologist Job Grade CSG-7/Job Group P in Kenya Meteorological Department.
  - b. That on 09.06.2021 the Commission approved the organization structure and staff establishment for the Ministry of Environment and Forestry. In the approved staff establishment, the grade of Senior Principal Meteorological Technologist CSG 7/Job Group P had an authorized establishment of forty (40) officers against an in post of forty (40) and therefore the grade was optimally established.
  - c. That on 09.06.2021 the Commission while considering that there were persons who were due to retire at the end of 2021 promoted forty-five (45) officers to the grade of senior Principal Meteorological Technologists under the succession management process.
  - d. That the common criteria used in the consideration during the succession management was:
    - i. Availability of vacancy in the establishment of offices the officers were supposed to be promoted to.
    - ii. Years in the current post.
    - iii. Age.
    - iv. Years in service.



- v. Gender.
  - vi. People living with disabilities.
  - vii. Detachment.
- e. That where the above-mentioned criteria were common amongst all officers and a vacancy existed as in the present case, seniority in service was used as per the human resources and procedures manual section B.29.
  - f. That the Commission received an appeal dated 27.07.2021 from the Director Kenya Meteorological Department addressing the issues of promoting 45 officers and leaving out other officers who were on the same job grade and who had also been promoted on 10.04.2017.
  - g. That on 31.03.2022 upon considering the appeal, the Commission promoted 11 officers to Senior Principal Meteorological Technologists CSG/Job Group P. The Commission considered that there were 9 officers at the grade who were due to retire and therefore vacancies would be created pursuant to regulation 20(1) of the *Public Service Commission Regulations, 2020*.
  - h. That through letter dated 01.04.2022 the Commission communicated its decisions on review of the organizational structure, staff establishment and succession management. The Commission granted approval for the Kenya Meteorological Department Staff as follows and specific to the two job grades the subject to this petition:
    - i. Senior Principal Meteorological Technologist CSG 7 has an approved establishment of 40 and at the time of approval had an in-post of 45.
    - ii. Principal Meteorological Technologist CSG 8 has an approved establishment of 120 and at the time of approval had an in-post of 178.
    - i. That the petitioners cannot be promote to positions that do not exist in the staff establishment and organization structure of the Kenya Meteorological Department.
  - j. That it has been the Commission's recommendations that appointments and or promotions should not overshoot the ceiling of the staff establishment of any Ministry as it will lead to substantial cost to the public. Promotions should only be done where there are available vacancies.
  - k. That any appointment and/or promotion in the public service is guided by the values and principles set out under Article 10 and 232 of the *Constitution* and should be in compliance with Article 41 and section 36 of the *Public Service Commission Act*.
  - l. That the succession management in the public service was undertaken to cure the gaps that had been created by the aging workforce in the public service and the same was concluded by the Public Service Commission.
5. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
  6. The 1<sup>st</sup> issue for determination is whether the petitioners have established discrimination contrary to Article 27 of the *Constitution* and section 5 of the *Employment* and *Labour Relations Act*. The petitioners allege at paragraph 8 of the supplementary affidavit that the establishment for the position of Senior Principal Meteorologist Technologist was 40 but the 2<sup>nd</sup> respondent appointed 45 officers



beyond the established positions. To that the 2<sup>nd</sup> respondent states that it received the appeal dated 27.07.2021 from the Director Kenya Meteorological Department to address the issue of promotion of 45 officers and leaving out other officers who were on the same job grade and who had also been promoted on 10.04.2017 and on 30.03.2022. The 2<sup>nd</sup> respondent considered the appeal and promoted 11 officers to Senior Principal Meteorologist Technologist CSG7 Job Group P. In doing so, the 2<sup>nd</sup> respondent had considered that 9 officers at that grade were due to retire and vacancies would be created. Even in consideration of that explanation, it appears to the Court that the 2<sup>nd</sup> respondent in promoting the 11 officers did not account for 2 officers in view of the establishment of 45 positions. The 2<sup>nd</sup> respondent's explanation in that regard is found unsatisfactory as the promotions consequential to the appeal have not been shown to have been consistent with the 45 vacancies of the grade's establishment.

7. The Court has as well considered the petitioner's case against the criteria for promotion in section 36 of the *Public Service Commission Act*, the further criteria applied in succession management, and definition of seniority in section B.29 of the Human Resources and Procedures Manual. The Court returns that the petitioners have failed to show by analysis that each of the petitioners were in exact similar position as against the criteria for promotion as those who were promoted. On the material before the Court, it is difficult to determine that the petitioners were thereby discriminated against.
8. The Court returns that in the circumstances and to answer the 2<sup>nd</sup> issue for determination, the petitioners have failed to establish violation of rights and freedoms subject of the prayer for a declaration in the petition. The other remedies as prayed for will collapse. It appears to the Court that indeed without shown positions to which the petitioners would be promoted to in Job Group P and without showing that under the promotional criteria the petitioners scored equally as their colleagues already promoted, then the remedies as prayed for cannot issue. Further, it could be that the Director Kenya Meteorological Department may consider initiating a process of establishment of more positions at Job Group P in issue per section 27 of the *Public Service Commission Act*, 2017 and if found justifiable, then the petitioners' concerns may be addressed one way or the other. It is that under section 46 of the *Employment Act* an employee shall not be victimised for initiating a well-founded grievance or legal proceedings. A declaration shall issue that the respondents shall not victimise the petitioners for filing the petition which, though not successful, was well founded and not frivolous.
9. It was submitted for 1<sup>st</sup> and 3<sup>rd</sup> respondents that the petition was in avoidance of statutory procedure. However, it turns out that the alternative statutory procedure was not shown and the petitioners have only failed to establish the claims and prayers but the constitutional petition appears to have been the appropriate path to move the Court for the alleged violations.
10. The Court has considered the genesis of the dispute and the interests involved and returns that each party shall bear own costs of the petition.

**In conclusion, the petition is hereby determined with orders:**

1. The declaration that the respondents by themselves or by their officers or agents shall not victimise, harass or punish the petitioners on account of initiating and prosecuting the petition.
2. Each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 27<sup>TH</sup> NOVEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

