



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
PETITION NUMBER 113 OF 2019

BETWEEN

KENYA NATIONAL UNION OF NURSESPETITIONER

VERSUS

1. CABINET SECRETARY, MINISTRY OF

PUBLIC SERVICE, YOUTH AND GENDER AFFAIRS

2. THE PUBLIC SERVICE COMMISSION

3. THE HONOURABLE ATTORNEY-GENERAL

4 THE NATIONAL EMPLOYMENT AUTHORITY.....RESPONDENTS

RULING

1 The Petitioner prays that the decision by the Respondents, to introduce new tools to measure performance in public service, be declared unconstitutional.

2 The Petitioner seeks also, to have an order of certiorari quashing the decision, and an order of prohibition, permanently barring the Respondents from implementing the decision.

3 The Attorney-General has filed a Notice of Preliminary Objecting, challenging the jurisdiction of the Court, to hear and determine the Petition. It is alleged that it is only the High Court with jurisdiction in the dispute, under Article 165 [3][d] [i] of the Constitution and that jurisdiction of the E&LRC, is confined to matters and persons defined under Section 12 of the E&LRC Act.

4 It was agreed by the Parties that the Objection is heard and determined through Written Submissions. These were confirmed to have been filed at the last Court appearance on 4th November 2021.

The Court Finds: -

5 There is a catena of Judicial Authorities establishing the jurisdiction of the E&LRC, in constitutional litigation, in matters relating to employment and labour relations.

6 Among the early decisions on the subject, after promulgation of the Constitution in 2010, is the Court of Appeal decision, **Daniel N. Mugendi v. Kenyatta University & 3 Others [2013] e-KLR**.

7 It was held: -

§ The High Court does not have jurisdiction to entertain matter relating to fundamental rights, with regard to employment and labour relations matters.

§ It is in the jurisdiction of the E&LRC to exclusively entertain these matters, with regard to Article 165[5][b] of the Constitution.

8 The decision has assiduously been applied in subsequent disputes on the Court's constitutional jurisdiction, including in *E&LRC decision, Bernard Odera Okello & Another v. Cabinet Secretary for Industrialization & Others [2020] e-KLR*.

9 The Petition involves employment in the public service. It involves the Public Service Commission and the National Employment Authority. It involves performance measurement tools in the public service. Why would the E&LRC not be seized of jurisdiction?

IT IS ORDERED: -

a The Preliminary Objection has no merit and is declined.

b No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 3RD DAY OF FEBRUARY 2022.

JAMES RIKA

JUDGE