



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E045 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 22, 23(1) & (3), 27(1), 27(4), 27(5), 28, 35,
41(1), 47(1), 47(2), 48, 50(1), 159, 160, 165, 259 & 260 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: RULES 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

AND

**IN THE MATTER OF: SECTION 12(1) OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT ACT OF KENYA**

AND

IN THE MATTER OF: VACANCIES IN THE GRADE OF SENIOR ASSISTANT DIRECTOR

AND

IN THE MATTER OF: ADVERTISEMENT NO. 293 OF 2017

AND

IN THE MATTER OF: DISCRIMINATION OF DR. WILLIAM NDEGWA IN THE SELECTION PROCESS

AND

**IN THE MATTER OF: UNFAIRNESS AND LACK OF TRANSPARENCY IN THE
SHORTLISTING PROCESS BY THE PUBLIC SERVICE COMMISSION**

AND

**IN THE MATTER OF: SHORTLISTING OF OFFICERS FOR THE POST OF
SENIOR ASSISTANT DIRECTOR OF METEOROLOGICAL SERVICES**

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 27, 28, 41, 47, 48 & 50 OF THE CONSTITUTION

OF KENYA, 2010

BETWEEN

DR. WILLIAM NDEGWA GITHUNGO.....PETITIONER

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES.....2ND RESPONDENT

KENYA METEOROLOGICAL DEPARTMENT.....3RD RESPONDENT

PERMANENT REPRESENTATIVE OF KENYA TO WMO

(DIRECTOR OF METEOROLOGICAL SERVICES).....4TH RESPONDENT

JUDGMENT

1. The Petitioner through his Petition dated 26th March 2021 and filed in Court on 30th March, 2021 avers that he joined the Kenya Meteorological Department, the 3rd Respondent herein on or about 10th November, 1989 at a junior position in the scheme of service as a Meteorologist II upon his appointment to the position by the 1st Respondent.

2. He further averred that he performed his duties diligently and to the Respondents satisfaction, even going through various trainings to sharpen his skills; That in the year 2010 he entered senior level of the Meteorological profession and was promoted to the position of Assistant Director of Meteorological Services.

3. He contended that upon his promotion he was deployed to work as Provisional Meteorological Officer, Nairobi Province under the title “*Provincial Director of Meteorology*”.

4. Further, that in the year 2017 the Cabinet Secretary, Ministry of Environment and Forestry appointed the Petitioner to perform extra duties of Senior Assistant Director for Meteorological Services for a period of six months commencing May, 2017 during which period he earned an additional 15% of his basic salary as extra duty allowance.

5. The Petitioner maintained that he performed the duties attached to the additional role exemplarily and to the Respondents’ satisfaction.

6. At the completion of the six months’ period in the year 2018 the position was advertised by the 1st Respondent vide advertisement “V/No. 293/2017” and the Petitioner expressed his interest to fill the position. He was however not shortlisted.

7. The Petitioner maintained that this was an error on the part of the 1st Respondent’s shortlisting panel. He appealed against the decision on 10th April, 2018. The 4th Respondent forwarded the appeal to the Cabinet Secretary through the office of the Director of Kenya Meteorological Department along with a forwarding letter referenced “MET/C/1/4/8/1 VOL 3/176 dated 11th April, 2018 to the Permanent Secretary seeking to have the Petitioner’s application considered for purposes of the interview.

8. That the Appeal was not successful as was communicated vide the letter dated 20th April, 2018. Dissatisfied with the decision taken, the Petitioner further appealed to the 1st respondent to consider the case maintaining that he was competent and was qualified to hold the position. He maintained that it was only fair that he be given an opportunity to progress his career by allowing him participate in the recruitment process, but the appeal was also dismissed.

9. The Petitioner maintained that his Constitutional rights were violated and that he was unfairly discriminated in the recruitment process.

10. Aggrieved by the decisions and the process of shortlisting the Petitioner filed the instant Petition seeking the following reliefs:

(i) An Order to issue directing that meteorological work at the national meteorological services in Kenya is provided by the WMO Convention;

(ii) An Order that the competencies and qualifications of meteorological profession working at the national meteorological services in Kenya is determined as provided by the WMO Convention and related technical regulations;

(iii) An order that the 1st and 2nd Respondents have no role in determining the qualification of a meteorological profession other than what is provided for by the WMO convention;

(iv) An order that a Masters Degree in Meteorology is not a requirement for performing in Meteorological work as provided for in the WMO Convention;

(v) A declaratory order that the 1st and 2nd Respondents violated the Petitioners dignity and did not accord the Petitioner the status and recognition commensurate with the qualifications required for the fulfilment of the respective duties which the Petitioner does as required by the WMO Convention;

(vi) An order that the 1st and 2nd Respondents, violated the Petitioners right to free and fair employment in the process of recruitment of the position of Senior Assistant Director for Meteorological Services;

(vii) An order that the Petitioner be compensated Kshs.1,477,113.00, which is income for loss of opportunity for Job Group Q;

(viii) An order that the Petitioner be awarded Kshs.2,951,379.00 being estimated opportunity loss;

(ix) An order that the Petitioner be awarded Kshs.4,137,324.00 being the lost opportunity to earn income due of payment of pensions and related benefits in accordance with the provisions of the Pensions Act CAP 189, Laws of Kenya;

(x) In the Alternative and without any prejudice to the foregoing, the Respondent be ordered to fully compensate the Petitioner for unfair, unlawful and wrongful discrimination

(xi) General damages;

(xii) Cost of the suit and interest;

(xiii) Any other relief the Court deems fit.

11. Given the urgency of the matter the Petition was filed together with a Notice of Motion Application filed under Certificate of Urgency seeking the following Orders:

(i) THAT this Application be certified urgent and be heard ex parte at the first instance for the purposes of granting this prayer and prayer (ii) herein;

(ii) THAT pending the hearing and determination of the Petition herein, a conservatory order to issue restraining the Respondents, either by themselves, assigns or any person claiming through them, from interfering with the Petitioners right of employment;

(iii) THAT pending the hearing and determination of the Petition herein, a conservatory order to issue restraining the Respondents, either by themselves, assigns or any person claiming through them, from intimidating, interfering with the Petitioner in the course of his employment:

(iv) THAT the Respondents bear the costs of this Application.

12. The Application is supported by the Affidavit of **DR. WILLIAM NDEGWA GITHUNGO**, the Petitioner herein sworn on 26th March, 2021 in which he reiterates the averments on the face of the Motion.

13. In response to both Application and Petition the Respondents filed grounds of opposition dated 6th May, 2021 raising the following grounds:

a) THAT the instant Application and Petition as instituted is an abuse of the court process has no merit and is based on a misconception of law.

b) THAT the instant Petition/Application does not raise any Constitutional issues with precision as it should as was held in **Meme v Republic [2004] eKLR**, followed, the Court of Appeal said:

"Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants."

a) THAT the Petitioner's did not meet one of the requirements for the post as stipulated in the indent and the advertisement which originates from the schemes of services which sets the standards for recruitment graining and advancement for public officer. The Petitioner did not meet the requirement of possessing a master's degree in Meteorology. His master degree is in business administration which was not considered relevant to the requirements for the position.

b) THAT promotions in the civil service such as this are based on performance, qualifications and other requirement for appointment as stipulated in the scheme of service (now career progression guidelines)

c) THAT recruitment for the position subject to this suit took place in the year 2018 hence this suit is Moot.

d) THAT this application is made after an inordinate, unexplained, and inexcusable delay of about 3 years since the Advertisement was made in, 2018. Equity aids the vigilant and not the indolent. It follows that this application must fail.

14. The Petition was disposed of by way of written submissions.

Petitioner's Submissions

15. In his submissions the Petitioner maintains that he meets the minimum requirements for the job of Senior Assistant Director Meteorological Services in that he possesses a Master's degree in Business Administration (MBA) having graduated from the University of Nairobi in 2010.

16. He further submitted that the letter dated 11th April, 2018 to the Permanent Secretary, Ministry of Environment and Forestry from the then Director of Meteorological Department is clear proof that he was qualified to be shortlisted and interviewed for the position of Senior Assistant Director Meteorological Services as he was highly recommended to the panel.

17. He further maintained that the Master's degree he had acquired was in the circumstances relevant due to the nature of operations of the position.

18. The Petitioner submitted that the recruitment was discriminatory given that the Respondents failed to consider his application having worked for the 3rd Respondent. To buttress this argument the Petitioner relied on the case of **Jane Achieng & Another v University of Nairobi [2015] eKLR** where the Claimants therein were facing an exact situation where 8 positions were advertised and the Respondent failed to shortlist the Claimants and instead shortlisted 7 external candidates. The Claimants' termed this as discrimination on the part of the Respondent.

19. He maintains that his Petition raises fundamental constitutional issues and is not moot as contended by the Respondent. The Petitioner relied on the case of **Daniel Kaminjia & 3 Others (Suing as Westland Environment Caretaker Group) v County Government of Nairobi [2019] eKLR** where the Court held that an issue is considered to be moot and academic when it ceases to present a justifiable controversy by virtue of supervening events, so that an adjudication on the issue would be of no practical value or use.

20. The Petitioner faults the respondents' recruitment process which he terms as discriminatory and contrary to the provisions of Section 5(3) (b) of the Employment Act, 2007. For emphasis the Petitioner relied on the case of **Jane Achieng & Another v University of Nairobi (supra)**.

21. The Petitioner urged this Court to find merit in the petition as filed and to accordingly allow it in terms of the reliefs sought therein.

Respondents' Submissions

22. The Respondent on the other hand maintained that the Petitioner's rights were not violated as contended and that the Petitioner did not meet the minimum requirement to fill the position of Senior Assistant Director Meteorological Services.

23. The Respondents contend that the Petitioner cannot rely on the letter dated 11th April, 2018 addressed to the Principal Secretary Ministry of Environment and Forestry from the then Director Meteorological Services maintaining that the purpose of the letter was a mere recommendation and that the content was not binding upon the Respondents.

24. It is further submitted that staffing remains a managerial prerogative which this Court should not entertain. To buttress this argument the Respondents relied on the case of **Geoffrey Mworira v Water Resources Management Authority & 2 Others [2015] eKLR** where it was held that Courts will sparingly interfere with the employer's entitlement to perform any of the Human Resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function.

25. The Respondents further denied any discrimination against the Petitioner in the recruitment process as alleged. The Respondents maintained that the process was conducted in accordance with the law.

26. The Respondents maintained that failure to shortlist the Petitioner to the position of Senior Assistant Director Meteorological Services did not amount to discrimination, holding that it was carrying out a human resource function with due regard to procedure and the law.

27. The Respondents maintained that the Petitioner failed to establish that the Respondents had violated any of the Constitutional provisions that he relies upon in his petition. For emphasis the Respondent relied on the case of **STAWU obo Members v South African Airways (Pty) Ltd and Others (JAS54/13) (2014)** where it was held that an employee who makes a claim for discrimination must prove it.

28. The Respondents argue that the recruitment process was fair and non-discriminatory against the Petitioner and thus urge this Court to dismiss the Petition in its entirety with costs to the Respondents.

Analysis and Determination

29. Having considered the facts of this Petition, Affidavits, evidence, submissions and authorities cited by the parties the issues for determination are:

- (a) Whether the Petitioner met the minimum requirements for shortlisting for the position of Senior Assistant Director Meteorological Services;
- (b) Whether the Petitioner's rights have been infringed;
- (c) Whether the Petitioner is entitled to the reliefs sought.

Whether the Petitioner met the minimum requirements for shortlisting for the position of Senior Assistant Director Meteorological Services

30. The Petitioner in his Petition and Submissions maintained that he was unfairly left out of the shortlist despite meeting the minimum requirement set by the Respondents for the position of Senior Assistant Director, Meteorological Services.
31. He argued that the recruitment process was unfair, lacked transparency and that the Respondents failed to give him an opportunity to progress in his career.
32. He maintained that his Masters' Degree in Business Administration ought to have been considered by the panel as part of the fulfillment of the minimum requirement set for the position.
33. The Petitioner placed reliance on the Letter dated 11th April, 2018 to the Principal Secretary, Ministry of Environment and Forestry as proof that he had indeed met and was therefore eligible for shortlisting.
34. The Respondent on the other hand maintains that the Petitioner did not meet the minimum requirement as set and that the recruitment process was free, fair and procedural.

Minimum Requirements for appointment

35. The 3rd Respondent through its advertisement No. **V/No. 293/2017** set the minimum requirement for the position of Senior Assistant Director Meteorological Services, under Job group Q as follows:

(1) Served for a minimum of three years in the grade of Assistant Director of Meteorological Services, Job Group 'P' in the civil service

(2) A Bachelor's degree in Meteorology or its equivalent from a recognized university in Kenya

OR

(1) A Bachelors in Mathematics and Physics plus a Post Graduate Diploma in Meteorology or its equivalent qualification from a university recognized in Kenya

(2) A Master of science degree in Meteorology or equivalent qualifications from a university recognized in Kenya

(3) Attended a Strategic Leadership Development Programme lasting not less than six weeks in a recognized institution and

(4) shown professional and managerial capacity in work performance and results.

36. From the foregoing it is clear that the Petitioner did not meet the minimum qualifications as required and/or set by the 3rd Respondent for consideration to fill the position of Senior Assistant Director Meteorological Services.

37. As submitted by the Respondents, recruitment is a managerial function which this Court will very sparingly and upon justifiable reasons interfere with only where there is proof that the Petitioner's constitutional rights have been or are about to be infringed, or that the process is flawed, in which case the Court will interfere only to correct the situation.

38. In this case the Petitioner appealed when he was not shortlisted through his letter dated 7th May, 2018 which appeal was dismissed. The Petitioner was informed of the reason for failure to include him in the short list. The letter reads as follows:

"MET/1989132787 (179

Mr. William Ndegwa Githungo

Thro'

The DDCMS

KMD HEADQUARTERS

APPEAL ON SHORTLISTING – SENIOR ASSISTANT DIRECTOR OF METEOROLOGICAL SERVICES

I have the honour to refer to your letter dated 7th May, 2018, addressed to the secretary, Public Service Commission, through the Director Kenya Meteorological Department and also through the Cabinet Secretary, Ministry of Environment and Forestry, which you made an appeal on shortlisting for the position of Senior Assistant Director, Meteorological Services.

The Public Service Commission, has since responded and disallowed your appeal to have you shortlisted for interview for the post of Senior Assistant Director, Meteorological Services, Job Group ‘Q’ as you do not possess the relevant Master’s Degree.

(Signed)

Stella Aura, MBS

Ag. DIRECTOR OF METEOROLOGICAL SERVICES”

[Emphasis added]

39. The Master’s degree referred to in the job advertisement is “*a Master of Science Degree in Meteorology of equivalent.*” The Petitioner’s Masters was in Business Administration (MBA). This is not a relevant degree, as advised in the letter rejecting his appeal.

40. I agree with the Respondents that the Petitioner did not meet the minimum qualifications for the advertised post and did qualify to be shortlisted for interview for the advertised position.

Whether the Petitioner’s rights have been infringed

41. The Petitioner claimed that his rights were infringed by the Respondents in the process of recruitment of persons to fill the position of Senior Assistant Director Meteorological Services, by virtue of the fact that he was not shortlisted for the position. He termed the failure as discrimination against him and urged this Court to make a finding in his favour.

42. The Respondents on the other hand denied any infringement of any of the Petitioner’s rights and/or discrimination in the recruitment exercise, maintaining that the Petitioner was not considered for the position as he did not possess the minimum qualifications for the position.

43. According to **Blacks Law Dictionary, 10th Edition**, discrimination is defined as –

(1) The intellectual faculty of noting differences and similarities.

(2) The effect of a well or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or disability.

(3) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.

44. The Claimant did not demonstrate that he was subjected to a different treatment from any of the persons who were shortlisted for interview. He did not demonstrate either that others were favoured or that the Respondents acted contrary to previous practice.

45. I find that there is no thread of evidence to support any infringement of any rights and/or discrimination against the Petitioner herein.

Whether the Petitioner is entitled to the reliefs sought

46. Having found that the Petitioner did not meet the minimum qualifications be shortlisted for the position of Senior Assistant Director for the Meteorological Services and further, the Petitioner having filed to prove that he was discriminated by not being shortlisted, I find no merit in the petition. The same is accordingly dismissed.

47. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**,

which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE