



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 1 OF 2020

IN THE MATTER OF: ARTICLES 10, 27, 28, 29, 41 AND 54 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: SECTIONS 15 OF THE PERSONS WITH DISABILITIES ACT

IN THE MATTER OF: SECTIONS 5, 31 AND 87 OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE UNITED NATIONS CONVENTION ON RIGHTS OF PERSONS WITH DISABILITY

BETWEEN

ECB.....PETITIONER

VERSUS

THE NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioner is a retired police officer having joined the first respondent on 12th November 1983 as a Police Constable. The first respondent is the commission mandated under Article 246 of the Constitution to recruit, appoint, promote and exercise disciplinary control over officers in the police service. The second respondent is the principal legal advisor to the government and statutory bodies on matters pertaining to the enforcement of the bill of rights as enshrined in the constitution.

2. The facts of this case are that from the time the petitioner joined the police service to the date of his retirement, he was never promoted. He contends that he was denied promotion when his colleagues rose through the ranks because he was suffering from a skin condition called Vitiligo since 1992. Having served the police service diligently and competently, he maintains that he had a legitimate expectation that he would be promoted but that was not the case. In his view, the employer discriminated him due to his medical condition by denying him deserving promotion since no other reason was given.

3. Further, he contends that the first respondent failed to recognize that his medical condition as a disability and thereby failed provide him with reasonable accommodation in the work schedule to enable him access medical service on regular basis.

4. Again he maintains that, the employer did not treat him with the dignity assigned to a person with disability contrary to Article 28 and 54 of the Constitution. He avers that by the said conduct, the employer denied him access to opportunities for suitable employment due to his disability contrary to section 12 of the Persons with Disabilities Act (PWD Act).

5. In summary he averred that he was discriminated against contrary to Article 27(4), 28, 29, 41(1) &(2) b and 54 (1) of the Constitution and prayed for the following reliefs:-

a. A declaration that the petitioner's right not to be discriminated against under Article 27 (4), (5), (6) and (7) of the Constitution and Article 7 of the Universal Declaration of Human Rights has been violated.

b. Declaration that as a result of the aforementioned breaches the petitioner has been unfairly treated and subjected to serious economic hardship thus deprived of his right to livelihood and thus is entitled to general damages.

c. Costs of the suit and interest at court rates.

d. Any other better relief that the Court may deem fit to grant.

6. The petition is supported by an affidavit sworn by the petitioner and a written statement also recorded by the petitioner both of which were filed simultaneously with the petition. The two echo the facts set out above and therefore I see no need of repeating the same. Further the petitioner has fortified his case by annexing a bundle of documents to the supporting affidavit.

7. The first Respondent has filed grounds of opposition dated 24th January, 2022 in response to the petition, namely:

a. The petitioner has failed to plead his case with reasonable precision in the standard set by the High Court in **Anarita Karimi Njeru v Republic (1976-1980) KLR 1272**.

b. The petition as against the first respondent is therefore scandalous, frivolous and vexatious.

8. The court directed the parties to dispose of the petition by written submissions but only the respondent complied with the directions. In brief, the first respondent submits that the petition does not state the constitutional provisions that he alleges to have been violated and acts or omissions complained of with reasonable precision.

9. In its view, the petition cites omnibus provisions of the Constitution without setting out the particulars of the alleged complaints, the manner of the alleged infringements or the jurisdictional basis of the action before the court. It maintains that it is difficult to adequately respond to the petition for want of adequate factual reference. As such the court cannot to justly adjudicate on the matter. It urged the court to dismiss the petition for lack of precision and specificity.

Issues for determination

10. I have carefully considered the pleadings, evidence and submissions and I find no dispute in the fact that the petitioner was employed the respondents as a police constable from 12th November 1983. The issues for determination in this suit are:-

a. Whether the petition has met the competence threshold for a constitutional reference.

b. Whether the respondents violated the constitutional rights of the petitioner during his service.

c. Whether the petitioner is entitled to the reliefs sought.

Competence threshold for the petition

11. The first respondent objected to the petition on the ground that it did not meet the competence threshold for a constitutional reference. In their view, the pleadings are not precise on the constitutional provision allegedly violated and the particulars of violation complained of and the manner in which the violation was committed. As a result of the said omission, the first respondent contends that it is unable to respond adequately to the petition because of the petition lacks adequate factual reference.

12. In the celebrated **Anarita Karimi Njeru v Republic [1979] eKLR** the court held that:

“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 only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that which he complains of, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

13. The Court of Appeal upheld the above decision in **Mumo Matemu –v Trusted Society of Human Rights Alliance &5 others [2013] eKLR** and dismissed the petition on ground that it failed to plead the case with reasonable degree of precision. The court held that:

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.

(43) The petition before the High court referred to Articles 1,2,3,4,10,19,20 and 73 of the constitution in the title. However, the petition provide little or no particulars as to the allegations and the manner of the infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organ ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further paragraph 4 of the petition alleged that the Government of Kenya had overthrown the constitution, again without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect to the spirit of the Constitution and the rule of law, again without any particulars.”

14. Having carefully considered the petition herein, it is clear that the petitioner makes omnibus allegations of violation without any particulars. The petition has not clearly stated the specific provisions of the constitution and set out the particulars of the violation of the specified provisions. He has also not clearly pleaded the manner in which the violation was done. Without such precise pleadings of the law and facts, the respondents are prejudiced as they cannot adequately respond to the shoddily drafted pleadings. Likewise it becomes difficult for the court to effectively adjudicate over the matter.

15. The petitioner was allowed by the court to apply for leave to amend the petition but later his counsel said he did not wish to amend the petitioner and instead sought leave to file further affidavit. However, he also abandoned that leave. Finally, he failed to file written submissions to prosecute the petition. The court finds and holds that the said defect in the petition is fatal as the petition falls short of the competence threshold required for a constitutional petition.

Whether the petitioner is entitled to the relief sought.

16. In view of the observations and findings herein above that the petition does not meet the competency threshold of a constitutional reference, the reliefs sought cannot issue. Therefore the petition is struck out with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF APRIL, 2022

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online 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