



REPUBLIC OF KENYA



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**Lusigi & 12 others v Cabinet Secretary, Ministry of Environment & Forestry
(Petition 163 of 2020) [2022] KEELRC 1235 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 163 OF 2020**

**L NDOLO, J
JULY 21, 2022**

BETWEEN

**LIJODI ALEX LUSIGI 1ST PETITIONER
MWANIKI MOFFAT GATHURU 2ND PETITIONER
SHISIA BENARD WEMALI 3RD PETITIONER
NGONDO MARK MBARUKU 4TH PETITIONER
MAKOKHA MILCAH KHASIRO 5TH PETITIONER
GATHARA NANCY WANJIRU 6TH PETITIONER
KIMOTHO LEONARD MBURU 7TH PETITIONER
WANJOHI AGNES NYAWIRA 8TH PETITIONER
TANUI MARGARET 9TH PETITIONER
WERASHIPALA BRUNO ANGATIA 10TH PETITIONER
NGARI PETERSON GICHOBI 11TH PETITIONER
OLOO PETER OUMA 12TH PETITIONER
SAMUEL MATHURI NJUE 13TH PETITIONER**

AND

**CABINET SECRETARY, MINISTRY OF ENVIRONMENT &
FORESTRY RESPONDENT**



JUDGMENT

Introduction.

1. This Petition was initially filed in the High Court at Nairobi as Petition No 163 of 2020. The matter was mentioned before J.A Makau J on 29th September 2020 who, having found that the subject matter was related to employment, transferred it to this Court.
2. By their Petition dated 13th August 2020, the Petitioners seek the following reliefs:
 - a. A declaration that the continued delay in releasing the Petitioners' interview results is unconstitutional and is in violation of their rights;
 - b. An order directing the Respondent to immediately release the Petitioners' interview results for the interviews conducted between 26th February and 2nd March 2018;
 - c. An order directing the Respondents to bear the costs of the Petition.
3. The Respondent opposes the Petition by way of a replying affidavit sworn by the Deputy Director, Human Resource Management and Development in the Ministry of Environment and Forestry, Rosemary Wamoto, on 25th May 2021.

The Petition

4. The Petitioners plead that they are all employees of the Respondent Ministry working in several stations under different job groups.
5. They state that following an internal advertisement Ref DENR/HR/C/3 VOL. III/38 dated 9th October 2017, they applied for advertised positions and were shortlisted for interviews scheduled to commence on 26th February 2018 and conclude on March 2018.
6. The Petitioners aver that after the interviews, the results were released save for those of the Petitioners, who were all Meteorological Technologists. They state that they made oral follow up with the Respondent, seeking to know the results but their requests were never responded to. They thereafter wrote to the Public Service Commission on 22nd July 2019, seeking to find out the outcome of the interviews.
7. The Petitioners also lodged a complaint with the Commission on Administrative Justice (Office of the Ombudsman).
8. By letter dated 28th November 2019, the Director of the Kenya Meteorological Department, while admitting that the Petitioners had been shortlisted and interviewed, attributed the delay in relaying the interview results to what was referred to as the process of aligning the certificates issued to the Petitioners by the Institute for Meteorological Training and Research (IMTR/ WMO – RTC, Nairobi) with the Scheme of Service.
9. The Petitioners state that the Director of the Kenya Meteorological Department, had indicated that in an earlier process, 35 Meteorological Technologists with similar certificates as those held by the Petitioners, had been recruited.



10. The Petitioners contend that this information was not communicated to them directly despite numerous attempts to have their interview results released to them. They maintain that the issue of alignment of certificates cannot hinder the release of results as there is no nexus between the two issues.
11. The Petitioners argue that having been shortlisted and interviewed, there is no plausible reason as to why their results should be withheld.
12. It is the Petitioners' case that withholding of the interview results is in violation of their rights as protected under Articles 27, 31, 33, 35 and 41 of *the Constitution* of Kenya, 2010 as read with Sections 10 and 17 of the *Public Service (Values and Principles) Act*, 2015 and Section 53 of the *Public Service Commission Act*, 2017.
13. The Petitioners hold that the Respondent had a duty to publish the results of the interviews and that failure to do is unlawful and illegal.

The Response

14. The Respondent urges that this Petition is prematurely before the Court.
15. The Respondent states that the Petitioners are within the cadre of Meteorological Technologists in the Ministry of Environment and Forestry, having been appointed with WMO qualifications, pursuant to a course offered at the Institute of Meteorological Training and Research within the Kenya Meteorological Department in the Respondent Ministry.
16. The Respondent further states that the subject course is equated to an ordinary diploma as categorised in the Circular Ref No. DPM / 1/9/2A VOL. III/ (60) dated 24th January 2001 and as a result, promotional interviews were held between 26th February 2018 and 8th March 2018 as follows:
 - a. Principal Meteorological Technologist JG 'N' CSG 8 (2 officers) to the position of Senior Principal Meteorological Technologist JG 'P' CSG 7 (1 post);
 - b. Chief Meteorological Technologist JG 'M' (5 officers) to the position of Principal Meteorological Technologist JG 'N' CSG 8 (4 posts);
 - c. Senior Meteorological Technologist JG 'L' CSG 9 (16 officers) to the position of Chief Meteorological Technologist JG 'M' (35 posts)
17. The Respondent adds that yet another group of Meteorological Technologists III were to be promoted to the next grade of Meteorological Technologist II in line with the Respondent's Human Resource Procedures and Policy Manual, 2016.
18. Ms. Wamoto depones that the Petitioners were not promoted because they did not possess the Ordinary Diploma in Meteorology as stipulated in the Respondent's Scheme of Service. She further depones that on 26th February 2021, the Respondent sought approval from the Public Service Commission to promote officers using the WMO qualifications, but a response was yet to be received.
19. The Respondent pleads that it is keen on resolving the dispute herein and asks for time to meet the Public Service Commission with a view to sorting out the underlying issues of qualifications and the organisational structure.
20. The Respondent urges the Court to find the Petition devoid of merit and to dismiss it with costs.
21. By consent of the parties, the Petition was disposed of by way of written submissions.



The Petitioners' Submissions

22. The petitioners submit that the Respondent's failure to disclose their interview results was discriminatory as there was no reasonable distinction between the Petitioners and their colleagues who attended the interviews. They argue that the Respondent's actions were in complete violation of the Petitioners' rights as protected under Article 41 of *the Constitution* of Kenya, 2010. In advancing their case, the Petitioners rely on the decision in *Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute* [2013] eKLR on fair labour practices as provided under Article 41 of *the Constitution*.
23. The Petitioners further submit that the Respondent's failure to release the interview results was a gross violation of their right of access to information as protected under Articles 33 and 35 of *the Constitution*. In this regard, the Petitioners rely on the South African case of *Brummer v Minister for Social Development 2009 (II) BCLR 1075 (CC)* and the Kenyan case of *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others* [2013] eKLR where the right of access to information was underscored.
24. The Petitioners additionally submit that the Respondent had no just reason for restricting or limiting their right to information and therefore urge the Court to make a finding in their favour and allow the Petition as prayed.

The Respondent's Submissions

25. On his part, the Respondent submits that there was no intention to withhold the results of the interviews as contended by the Petitioners. He argues that such results can only be released with the approval of the Public Service Commission, which approval was yet to be granted. The Respondent further argues that his hands were tied as he was awaiting approval from the Public Service Commission to release the results.
26. The Respondent maintains that the Petitioners have every right in the circumstances to petition the Public Service Commission to release their results.
27. The Respondent accuses the Petitioners of failure to utilise the available internal dispute resolution mechanism, prior to filing the instant Petition. He points out that the Petitioners had a right to appeal to the Public Service Commission for release of their results before coming to court.
28. The Respondent therefore urges the Court to dismiss the Petition and relies on the decision in *Aviation and Allied Workers Union v Kenya Airways Limited* [2012] eKLR where the principle of exhaustion of internal processes was affirmed.
29. The Respondent asks the Court to restrain itself from interfering with internal recruitment procedures. In this regard, the Respondent relies on the decision in *Geoffrey Mworira v Water Resources Management Authority & 2 Others* [2015] eKLR where it was held that courts should sparingly interfere with an employer's entitlement to perform its human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control and redundancy.
30. The Respondent denies any breach of the Petitioners rights and adds that the Petition offends the constitutional doctrine of avoidance as the parties were in an employer-employee relationship governed by the *Employment Act*, which allows for lodging of disputes through a claim as opposed to a constitutional petition. In pursuing this argument, the Respondent relies on the decisions in *Communication Commission of Kenya & Others v Royal Media Services & 5 Others* [2014] eKLR and *Sumayya Athimani Hassan v Paul Masinde Simidi & another* [2019] eKLR.



31. The Respondent maintains that the Petitioners were not discriminated against as alleged and points out that the Public Service Commission clearly stipulates the procedure for the release of interview results in its Human Resource Procedure Manual, 2016 as read together with the *Public Service Commission Act*.

The Petitioners' Further Submissions

32. In a rejoinder to the Respondent's submissions, the Petitioners submit that each of them had a legitimate expectation that the interview results would be released and that they would be accorded the same treatment as their other colleagues who possess similar qualifications as the Petitioners.
33. On the issue of legitimate expectation, the Petitioners rely on the decision in *Jane Kiongo & 15 Others v Laikipia University & 6 Others* [2019] eKLR in addition to the south African case of *National Director of Public Prosecution v Phillips & Others* (2002) (4) SA 60 (W).
34. The Petitioners maintain that they are properly before this Court for protection of their guaranteed rights. They urge that the Respondent's failure to release their interview results has greatly prejudiced them.

Findings and Determination

35. Arising from the parties' pleadings and submissions, the following issues fall for determination by the Court:
- a. Whether the Petitioners' Petition is properly before the Court;
 - b. Whether the Petitioners' constitutional rights have been violated;
 - c. Whether the Petitioners are entitled to the reliefs sought in their Petition.

Whether the Petition is Properly before the Court

36. In opposing the Petition, the Respondent states that the Petitioners have come to court prematurely as they have not exhausted the available dispute resolution mechanism. This argument is premised on the related doctrines of exhaustion and ripeness, which would in appropriate cases, interfere with the justiciability of a matter.
37. In *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR a 5 Judge Bench of the High Court rendered itself as follows:
- “The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*.”
38. Regarding the doctrine of ripeness, the Supreme Court of Kenya, in its decision in *Communications Commission of Kenya v Royal Media Services Ltd & 5 others* [2014] eKLR held that the focal point



is the time when a dispute is presented for adjudication. Drawing from Black's Law Dictionary, 10th Edition at page 1524, the Apex Court assigned the following definition:

“The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.”

39. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR Onguto J addressed the issue of ripeness in the following terms:

“Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases...The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.”

40. By their Petition, the Petitioners raise clear issues regarding violation of their rights under *the Constitution* and the unequivocal finding is that neither the exhaustion nor the ripeness doctrines are applicable in this case. The Petitioner's complaint before the Court is crystal clear and cannot be defeated by the suggestion of some undefined dispute resolution mechanism mentioned in the Respondent's pleadings.

Violation of the Petitioners' Rights?

41. In determining this issue, this Court is required to inquire whether the Petition meets the threshold for a constitutional petition as defined in case law. The undisputed authority on this issue is *Anarita Karimi Njeru v Republic* [1979] KLR 154 where it was held that a party who brings a petition, alleging violation of their constitutional rights must set out, with reasonable precision, the actual violations so as to allow the opposite party to respond.
42. In *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR, it was affirmed that what is expected of a party bringing a constitutional petition before the Court is not mathematical precision.
43. The Petitioners before me plead that by withholding their interview results, the Respondent has violated their rights as protected under Articles 27, 31, 33, 35 and 41 of *the Constitution* of Kenya, 2010 as read with Sections 10 and 17 of the *Public Service (Values and Principles) Act*, 2015 and Section 53 of the *Public Service Commission Act*, 2017.
44. In his response, the Respondent does not deny that the subject interview results have been withheld. In fact, all he does is to attempt to explain away the delay in releasing the results, even apportioning blame to the Public Service Commission. This Court finds the said explanation to be without basis.

Reliefs

45. In light of the foregoing findings, I find in favour of the Petitioners and direct the Respondent to release the Petitioner's interview results, arising from the interviews conducted between 26th February 2018 and 2nd March 2018, within the next twenty-one (21) days from the date of this judgment.
46. The Petitioners will have the costs of the Petition.
47. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JULY 2022

LINNET NDOLO



JUDGE

Appearance:

Mrs. Naro for the Petitioners

Miss Oyugi for the Respondent

