



**Kenya Medical Practitioners, Pharmacists And Dentists’ Union [KMPDU] v  
County Government Of Kilifi & another (Employment and Labour Relations  
Petition 6 of 2021) [2022] KEELRC 1185 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1185 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**EMPLOYMENT AND LABOUR RELATIONS PETITION 6 OF 2021**

**BOM MANANI, J**

**JULY 14, 2022**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20(1), 22 (2)(D), 27, 28, 41,  
43, 47, 258, 259 AND 162(2) OF THE CONSTITUTION AND SECTION  
12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT**

**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION AND/ OR THREATENDED  
VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS  
ENSHRINED UNDER ARTICLES 27, 28, 41 AND 47 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS’  
UNION [KMPDU] ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KILIFI ..... 1<sup>ST</sup> RESPONDENT**

**KILIFI COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This petition is presented by the petitioner on behalf of its members who are in the employment of the 1<sup>st</sup> respondent as medical practitioners. Through the action, the petitioner seeks to enforce terms of a Collective Bargaining Agreement (CBA) between the petitioner and the 1<sup>st</sup> respondent which came into force in the year 2017. In the petitioner’s view, the 1<sup>st</sup> respondent has failed to implement the CBA thus violating the rights of the petitioner’s members who are serving employees of the 1<sup>st</sup> respondent.



2. The respondents deny that they are in breach of the CBA. In their view, the CBA has been observed as agreed between the parties. In the respondents' view, the assertion by the petitioner that the 1<sup>st</sup> respondent has not implemented the CBA arises from a misreading of the document.
3. By agreement of the parties, the Petition is to be disposed of based on the pleadings, the affidavits and accompanying documents and written submissions by the parties. I will therefore consider all the above documents in my decision.

### **Petitioner's Case**

4. The petitioner's case is premised on the CBA between the parties drawn in 2017. This CBA was registered by the Employment and Labour Relations Court sitting at Nairobi on September 18, 2017.
5. According to the petitioner, the CBA provides, among others, for the following: -
  - a. Regular promotion of its members within the rank and file of the 1<sup>st</sup> respondent.
  - b. Re-designation of some of the petitioner's members who are at the level of consultants to appropriate job grades within the rank and file of the 1<sup>st</sup> respondent.
  - c. Facilitation of the petitioner's members within the rank and file of the 1<sup>st</sup> respondent to access regular post graduate training.
6. The petitioner asserts that contrary to the foregoing guidelines in the CBA, the respondents have failed to promote a number of the petitioner's members who are due for promotion. It also contends that the respondents have failed to re-designate the petitioner's members who hold the position of consultants to appropriate job grades. Further, it is the petitioner's case that the respondents have failed to release the petitioner's members who are due for further training to pursue further studies in violation of the CBA.
7. The petitioner contends that it has written to the respondents seeking an explanation regarding these alleged lapses. However, the said inquiries have been met with silence from the respondents.
8. In the petitioner's view, the conduct exhibited by the respondents constitutes a breach of the terms of the 2017 CBA. It is a violation of the petitioner's members' constitutional rights to fair labour practice and fair administrative action. and hence the need for the court to intervene to compel the respondents to give effect to the provisions of the CBA in this respect.
9. The petitioner contends that after a trade dispute was declared over the disagreement, the petitioner referred the matter to the Ministry of Labour for conciliation in terms of the requirements of the *Labour Relations Act*. However, no settlement was reached.
10. The petitioner has sought several orders as set out in the amended Petition. These are majorly in the nature of orders for specific performance directed at the respondents to: promote all medical practitioners in service of the 1<sup>st</sup> respondent to their rightful grades; re-designate all medical consultants in the 1<sup>st</sup> respondent's service to appropriate grades; and to release all medical practitioners due for further training for that purpose.

### **Respondents' Case**

11. In response, the respondents argue that there has been no breach of the terms of the CBA between the parties. In the respondents' view, the disagreement between the parties arises from a misinterpretation of the CBA by the petitioner.



12. In the respondents' view, apart from those medical practitioners serving in common establishment positions in terms of the applicable scheme of service, promotion of the petitioner's members is not automatic. Rather, it is merit based and subject to availability of vacancies.
13. The respondents argue that for doctors falling in the common establishment category, up to 77 of them have been promoted in terms of the CBA. Only 29 remain. However, even though promotions in this category may appear automatic, the doctors serving in these positions (Job groups M and N) must nevertheless be processed in terms of the applicable scheme of service.
14. It is the respondents' case that for doctors serving outside the above job groups, they fall outside the common establishment category. Accordingly, and in terms of the applicable scheme of service, human resource manuals and the CBA, this group can only get promotions based on merit review whenever vacancies arise.
15. The respondents state that in compliance with these guidelines, they have indeed advertised vacancies for positions outside job groups M and N and interviewed thirteen (13) employee doctors who are members of the petitioner in this respect. That of the thirteen (13) interviewees, nine (9) of them were successful and have since been promoted.
16. The respondents state that in an effort to ensure their medical staff benefit from the opportunities that present whenever vacancies arise, they have usually opted for internal as opposed to external advertisement of the vacancies in the first instance. This, according to the Respondents, is meant to ensure that the 1<sup>st</sup> respondent's employees get the first bite of the cherry. the respondents assert that they resorted to this form of advertisement for specialist doctor positions in the advertisement of June 24, 2021.
17. In relation to re-designation, the respondents argue that this is not provided for in the CBA. In any event, if it had, re-designation would only apply to medical staff in job groups M and N in line with the applicable Human Resource Manual.
18. Further, as re-designation means horizontal movement of staff usually to entirely different but equivalent positions as the ones currently held by the affected employees, it is unsuitable for specialist cadres of staff. Such staff movement of consultants would disadvantage them since it may push them to lower job grades.
19. The respondents point out that in respect of further professional training of the petitioner's members, this is informed by specific needs of the 1<sup>st</sup> respondent which is informed by a needs survey. Besides, the process must be conducted in a way that does not prejudice service delivery to the public. That unplanned approval of leaves of absence of staff for training is likely to occasion inadequacy of staff in hospitals under the management of the 1<sup>st</sup> respondent. thus, the respondents must of necessity retain the prerogative of determining when to release medical staff for further studies.

### **Issues for Determination**

20. The parties did not file agreed issues at the pretrial stage. However, they did set out either directly or indirectly, their perspective of issues in their final submissions. From the facts set out above, I think that the following are the broad questions for determination: -
  - a. Whether the CBA between the parties provides for the matters raised by the petitioner to wit: promotion of its members; re-designation of some of them; and training of the Petitioner's members.



- b. If the answer to the above question is in the affirmative, whether the respondents have failed to observe their obligation in respect of these matters in breach of the CBA, the law and the Constitution of Kenya 2010.
- c. Whether the petitioner is entitled to the orders sought in the Petition.

## Analysis

21. I have considered the matter as presented. I think that the parties are in agreement that there exists a valid CBA between them registered in court in September 2017. I think that they also agree that the CBA constitutes a binding agreement between them which should provide a guide to their continued industrial relation. It is also common ground that in interpreting the CBA, the parties have to read it together with the applicable Schemes of Service and Human Resource Manuals. I will thus proceed to make my analysis and findings in the cause with this assumption in mind.
22. For purposes of this decision, the first and second questions will be considered simultaneously. This is because they are intertwined.
23. I find no difficulty in finding that the 2017 CBA between the parties has clauses on the promotion of medical practitioners who are members of the petitioner and who are in service of the 1<sup>st</sup> respondent. This is specifically provided for under Article III B of the CBA. It provides as follows: -
  - (B) Promotions
    - a. The employer shall promote officers as per the prevailing scheme of service and other relevant policies and laws.
    - b. The employer shall take measures to promote officers who have served in one grade for more than the designated period taking into account the number of years served and qualifications acquired.
    - c. In case of common establishment, the effective date of promotion will be the date the officer qualifies for promotion provided there is no adverse report. The employer shall endeavour to facilitate the employee with training opportunities that will lead to the improvement of the employee's skills and competencies to enhance service delivery and employee's career progression and development.
    - d. When vacancies outside the common establishment arise, they will be advertised and filled competitively as per the prevailing scheme of service and relevant laws.
    - e. The employer shall endeavour to have staff establishment within a year of the effective date." (Emphasis added by underlining).
24. As is plain from the wording of the clause, all promotions must be processed in line with the subsisting Scheme of Service, other relevant policies and laws. Both the petitioner and the respondents agree that the scheme of service applicable to the affected employees is that which was approved and issued by the Public Service Commission in September 2016 and titled "Revised Scheme of Service for Medical Officers, Dental Officers and Pharmacists."
25. This scheme of service establishes a grading system for all Medical Officers, Dental Officers and Pharmacists serving under County Governments. For these three categories of employees, the grading system provides for seven (7) grades identified from the lowest to the highest as job groups M, N, P, Q, R, S and T. Essentially and as a rule of general application, every medical practitioner, whether serving as a Medical Officer, Dental Officer or Pharmacist is to be hired at the entry level of job group



- “M” before he hopefully progresses to the highest job group “T” (see clause 6 (a) of the Scheme). Progression will be guided by the provisions in the applicable Human Resource Manual and Scheme of Service.
26. For purposes of processing promotions, both the 2016 Scheme of Service and the 2017 CBA draw a distinction between job groups that fall in what is described as “common establishment” and those outside common establishment. It is therefore necessary to determine what the phrase “common establishment” denotes and its implications on career progression.
27. According to the circular by the Public Service Commission dated August 14, 2014 (DB1 on the petitioner’s further affidavit dated June 14, 2022), the phrase “common establishment” means: -
- “A group of positions whose job descriptions are basically the same and promotion or advancement from one grade to another does not require a vacancy.”
28. My understanding of the concept is that in terms of career progression, it permits the promotion of an employee from one job group to another without the need of a vacancy arising in the latter job group. However, the job group from which the employee is departing and the one to which he is being promoted must require the same qualifications.
29. A marginal note in the 2016 Scheme of Service applicable to the parties herein and appearing at page 6 of the Scheme states as follows: -
- “The grades of Medical Officer/Senior Medical Officer, Dental Officer/Senior Dental Officer and Pharmacist/ Senior Pharmacist, Job Groups M/N will form common establishment respectively for purposes of this Scheme of Service.”
30. Therefore, for purposes of the current dispute, the Scheme of Service treats only job groups M and N as constituting the “common establishment” category. Although from the said Scheme of Service job groups M, N and P seemingly share the same qualifications, it is clear to me that there are nevertheless some slight differences. For instance, while it is a requirement that for one to serve as an assistant director of medical, dental or pharmaceutical services (job group P), he must have three (3) years work experience, this is not a requirement for job groups M and N.
31. Whichever way it is looked at, for reasons known to the drafters of the 2016 Scheme of Service for medical practitioners, they specifically elected not to include job group P under the “common establishment” job grades. And this can only be understood to mean that job group P falls outside the “common establishment” concept.
32. If the description assigned to the term “common establishment” by the Public Service Commission in the 2016 Scheme of Service for medical practitioners is anything to go by, then it can only imply that promotion of medical practitioners from job group M to N is not dependent on the existence of a vacancy in the latter job group. This is for the simple reason that these two job groups have been placed under the “common establishment” bracket. However, this reasoning cannot apply to job group P as it sits outside the “common establishment” job groups.
33. The petitioner has sought to rely on the circular by the Public Service Commission dated August 11, 2014 to advance the argument that job groups L to P are the ones that constitute the “common establishment” job groups in respect of which promotions do not require existence of vacancies. This argument is flawed in my view. By it, the Petitioner is conveniently avoiding certain realities.



34. First, the 2014 circular and the 2016 Scheme of Service are both by the Public Service Commission (PSC) and addressed to County Governments. It is not possible that by these two instruments, the PSC intended to apply two conflicting standards to County Governments. It is only rational to take the view that the 2016 instrument being the latter one to be issued by the PSC reflects the latest and therefore applicable position by PSC on what comprises “common establishment” job groups for medical practitioners employed by County Governments.
35. Second, it is apparent from the 2016 Scheme of Service (KCG 3) that the PSC re-characterized job groups for doctors in the service of County Governments. Obviously, this rendered redundant the 2014 document if it had any relevance.
36. As mentioned earlier, Article III B of the CBA inter alia provides as follows on promotion for positions outside “common establishment”:-
- “When vacancies outside the common establishment arise, they will be advertised and filled competitively as per the prevailing scheme of service and relevant laws.”
37. The above position is shared by the 2016 Scheme of Service. Article 7 of the Scheme of Service states as follows:-
- “The Scheme of Service sets out the minimum qualifications and/or experience required for advancement from one grade to another. It is emphasized however, that these are the minimum requirements that entitle an officer to be considered for appointment to the next grade. In addition, advancement from one grade to another will depend on:
- a. Existence of a vacancy in the authorized establishment;
  - b. Merit and ability as reflected in work performance and results; and
  - c. Approval of the Public Service Commission.”
38. My understanding of these clauses in the CBA and Scheme of Service is that promotion opportunities outside the “common establishment” positions cannot arise except when a vacancy is declared. Further one can only rise to occupy these positions through competitive recruitment. Therefore, as the 2016 Scheme of Service confines “common establishment” positions to job groups M and N, it means that progression to job groups P to T must be on the basis of vacancies arising and competitive recruitment being undertaken.
39. Indeed, the County Public Service Human Resource Manual issued by the Public Service Commission requires County Governments to strictly follow their Service Scheme in processing staff promotions. Clause B. 19 of the Manual provides in part: -
- “The Schemes of Service must be followed in processing appointments and promotions of officers in their respective fields of employment.”
- (See annexure KCG 2 on the respondents’ replying affidavit dated 25<sup>th</sup> May 2022)
40. I guess it is in recognition of this requirement that the parties in negotiating the 2017 CBA made promotions subject to the applicable Scheme of Service. Having regard to the foregoing, I find little merit in the position taken by the Petitioner that its members who are currently in job groups N and above are to automatically transition upwards to senior positions and that the Respondents have acted in breach of the CBA by standing in the way of this transition.



41. Contrary to the position taken by the petitioner on this issue, I find that the respondents have indeed adhered to the terms of the CBA in this respect. First, there is evidence that the respondents have progressed seventy-seven (77) medical practitioners from job group M to N. This is evidenced by the report by the respondents filed as KCG 5 on the respondents' further affidavit dated May 25, 2022. It is worth of noting that in the petitioner's response to this affidavit, the Petitioner does not deny the fact that seventy-seven (77) doctors were promoted in December 2020 from job group M to N. Instead, all the petitioner says is that these same doctors are overdue for promotion to job group P.
42. The respondents in their affidavit indicate that after promoting the seventy-seven (77) doctors from job group M to N, some twenty-nine (29) doctors have been left pending for promotion. Of course, the respondents owe the petitioner a written explanation why the twenty-nine (29) have not been promoted given that their promotion is not tied to the existence of vacancies in job group N.
43. However, it must be clear to the parties that these promotions are not a matter of course. Even in "common establishment" job groups, the respondents are entitled to decline to promote any doctor who has an adverse report against him. However, and in my view, any such proposition must first be raised with the affected doctor who must be given an opportunity to rebut the adverse report. And this will not be in derogation of the CBA between the parties.
44. As I have observed elsewhere in this judgment, job groups P, Q, R, S and T lie outside the "common establishment" job groups. As such, progression by staff to these positions is subject to availability of vacancies in the positions which will be filled competitively. Consequently, the petitioner's contention that the respondents have failed to automatically progress the doctors currently in job group N to P and onwards is without sound basis as the Petitioner has not demonstrated that vacancies have arisen in job group P (beyond the ones previously advertised) to warrant recruitment of staff to fill them by way of promotions or otherwise. A similar argument applies to job groups Q, R, S and T.
45. Again, contrary to the petitioner's position that the Respondents have breached the CBA by failing to permit progression to job groups P, Q, R, S and T, there is evidence that the Respondents have effected some progression in these cadres when the situation demanded. For this I refer to annexures KCG 7A, 7B, 7C and KCG 8. These documents evidence advertisement and recruitment of specialist doctors within the rank and file of the 1<sup>st</sup> Respondent. This evidence demonstrates the fact that when vacancies arose in the affected specialist positions, they were competitively filled in line with the requirements of the 2017 CBA and the 2016 Scheme of Service.
46. In my view, it is immaterial that the promotions appear to have been effected after the filing of the current Petition. This is because recruitment and progression of staff are continuous processes.
47. On re-designation of consultant medical practitioners, I have no difficulty in finding that the 2017 CBA between the parties has no provision for this process. And neither is the concept captured under the 2016 Scheme of Service for doctors working in County Governments.
48. The only document that mentions re-designation of staff is the 2013 County Public Service Human Resource Manual (KCG 2). Clause B 22 of the Manual requires that cases of re-designation of staff be handled in accordance with the provisions of the applicable Scheme of Service. As the CBA 2017 does not provide for this concept, I cannot hold that consultant doctors can be moved by way of re-designation in purported enforcement of the provisions of the said CBA. Neither can the court find that the respondents have failed to implement the process of re-designation of some doctors in the absence of express provisions on the subject in the two critical documents relating to doctors: the 2016 Scheme of Service; and the 2017 CBA.



49. Finally, it is clear from the CBA that medical staff in the service of the 1<sup>st</sup> respondent and who are members of the petitioner are entitled to training to enhance their professional competencies. This entitlement is provided for under Article III E of the 2017 CBA.
50. Specifically, the CBA, in part, states as follows on the subject: -
- a. The employer shall undertake continuous professional development of all employees' doctors under its employment;
  - b. An employee shall be eligible for postgraduate training on completion of mandatory professional internship and registration by the relevant regulatory boards;
  - c. Release of the employees eligible above shall be subject to prevailing human resource training policies.
51. From the foregoing, it is once again clear to me that although release of doctor employees for further professional training is an entitlement, the CBA makes such exercise subject to the prevailing human resource training policies. Therefore, for the clauses on training to be properly understood, they must be analyzed together with the relevant policy documents on the subject.
52. In this respect, the only other documents that lay out a policy framework on training of County Government employees are the County Public Service Human Resource Manual, 2013 (marked KCG2 on the Respondents' replying affidavit dated May 25, 2022) and the Training and Procedure Guideline, County Government of Kilifi, 2019 (marked KCG 11 on the Respondents' replying affidavit dated May 25, 2022).
53. Section I of the County Public Service Human Resource Manual gives a detailed guide on training of employees in service. Whilst County Governments must afford their employees training opportunities, the Manual makes this subject to a needs assessment. In other words, no County is entitled to offer training except where a needs evaluation has established that there is need to enhance training of employees in a particular field.
54. The requirement for undertaking a needs assessment audit before determining whether any training of employees is required is reiterated in the Training and Procedure Guideline, County Government of Kilifi, 2019 (see five (5) of the guideline).
55. It is therefore clear to me that under the 2017 CBA, the respondents are under no obligation to release staff for training as a matter of course. They can only do so subject to emerging need guided by an appropriate survey in terms of the aforesaid policy documents.
56. Indeed, there is evidence that some of the petitioner's members have in fact been released for training in compliance with the CBA. This is evident from the list of doctors on training produced by the respondents and attached to their replying affidavit of May 25, 2022 and marked KCG 12.
57. I do not agree with the petitioner that the effect of the CBA was to impose a condition on the respondents to simply release doctors for training without taking into account other factors such as the need to retain a specific portfolio of doctors who are actually in service. If it were that the respondents have an unconditional obligation to release these employees without considering the 1<sup>st</sup> respondent's staffing needs, this would potent a crisis in service delivery. For this reason, I agree with the respondents that they retain overall latitude in determining how to handle the training issue as long as they do so in a manner that is transparent.



## **Determination**

58. Having reached the conclusions appearing in the analysis section, it is now appropriate that I determine the remedies to grant in the cause. I do so in this section.
59. As observed earlier in the judgment, I hold that only job groups M and N for the employees who are the subject of this case comprise the common establishment job groups in relation to which transfers may occur without a vacancy having arisen. All the other job groups beginning with job group P all the way to job group T fall outside the common establishment job groups. Thus, promotion to these latter job groups is dependent on existence of vacancies in the job groups.
60. Except for the twenty- nine (29) doctors in job group M who have not been promoted to job group N, the Respondents have not breached the 2017 CBA by failing to promote the Petitioner’s members to job group P or higher job groups Q, R, S and T. As indicated, promotion of the medical practitioners from job group N to P onwards is not automatic as the latter fall outside the common establishment job groups.
61. Consequently, the petitioner’s claim in respect of promotion of its members is dismissed except for the twenty- nine (29) doctors said to still be serving in job group M. For this category of doctors, the Respondents are ordered to promote them (the 29) to job group N or give the petitioner a written justification for the failure to do so in terms of the provisions of the 2017 CBA between the parties. This exercise should be undertaken immediately and in any event within 30 days of delivery of this judgment.
62. The CBA does not make provision for re-designation of the Petitioner’s members. Accordingly, the claim by the Petitioner relating to re-designation of consultant doctors is dismissed.
63. The 2017 CBA does not make training a matter of course. All training must be informed by specific needs of the 1<sup>st</sup> respondent in terms of specific policy guidelines on training which the 2017 CBA recognizes. Accordingly, the claim by the petitioner that the respondents have failed to release the petitioner’s members for training is without basis. It is dismissed.
64. I make no order as to costs.

**DATED, SIGNED AND DELIVERED ON THE 14<sup>TH</sup> DAY OF JULY, 2022**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

Kigen for the Petitioner

Abala for the Respondents

**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 April 15, 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.

**B. O. M. MANANI**

**JUDGE**

