



**Musungu & another v Dola & 2 others; Andati & another (Interested Parties)
(Petition E010 of 2021) [2022] KEELRC 1322 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1322 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E010 OF 2021**

**JW KELI, J
JULY 14, 2022**

BETWEEN

BENSON MUSUNGU 1ST PETITIONER

MATHEWS MISANGO 2ND PETITIONER

AND

PAULINE DOLA 1ST RESPONDENT

GEOFFREY TANUI 2ND RESPONDENT

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

AND

GABRIEL ANDATI INTERESTED PARTY

MARY RAPANDO INTERESTED PARTY

JUDGMENT

1. The Petitioners approached the court under certificate of urgency dated 5th November 2021 with a Notice of Motion and Petition of even date all received in court on the 5th November 2021. The Notice of Motion was later withdrawn by the Applicant.
2. The Judgment is on the Petition dated 5th November 2021 seeking the following prayers;-
 - (a) A declaration that the failure by the 1st & 2nd Respondents to provide information sought under Article 35 (1) of *the Constitution* on the basis of the Petitioner' request dated 12th October 2021 is a violation of the right to access to information.
 - (b) A declaration that the receipt of the Petition dated 16th July, 2021 after the interviews conducted by the 1st Respondent was a violation of Article 10 of *the Constitution* specifically



the values of participation of the people, human rights good governance, transparency and accountability.

- (c) An order of Mandamus compelling the 1st Respondent to forthwith provide at the cost of the 1st and 2nd Respondents information sought by the Petitioners in their letter to the Respondents dated 12th October 2021.
 - (d) An order of Mandamus compelling the 1st Respondent to disclose the scores of each interviewee, including the 1st Interested Party herein and the recommendation report forwarded to the 2nd Respondent.
 - (e) An order of Mandamus compelling the 2nd Respondent to appoint the interviewee who scored the highest.
 - (f) The costs of this Petition be provided for.
3. The Petitioners state the particulars and the provisions of *the Constitution* alleged to have been contravened and is supported by a joint affidavit of the 2 Petitioners sworn on the 5th November 2021.
 4. The Petition is opposed by the Respondents who filed replying affidavit in response sworn by Chrispinus Wamalwa Walingo on the 2nd January 2022.

The Petitioners Case.

5. The Petitioners state that they are residents of Esumeyia sub- location within Kakamega County as well as the Chairman and Vice – Chairman respectively of the Nanzushi family. The 1st Respondent is a Public Officer holding the position of County Commissioner, Kakamega County, while the 2nd Respondent is the Deputy County Commissioner, Navakholo sub-County who for purposes of the Petition was the Chairman of the panel that interviewed applicants for position of Assistant chief of Esumeyia sub-location where the 1st and 2nd interested parties were candidates. The 3rd Respondent is a constitutional Commission created under Article 233 of *the Constitution* of Kenya and whose function is to establish and abolish offices in Public Office, appoint persons to hold or act in those offices and to confirm appointments.
6. The 1st Interested Party was interviewed and shortlisted for position of Assistant chief Esumeyia Sub-location and his name was mentioned adversely by persons claiming to be residents of Esumeyia Sub-location (annexures “BM 2and BM 3’ by Petitioner). The 2nd, Interested party is the current Assistant Chief appointed by the 3rd Respondent pursuant to the interviews by 2nd Respondent held on 14th July 2021.
7. The Petitioners allege that following the advertisement of the vacancy for the position of Assistant Chief, Esumeyia sub-location, 40 Applicants applied and 17 were shortlisted and only 14 turned up for the interviews on 14th July 2021 chaired by the 2nd Respondent .
8. That on the 12th October, 2021 long after the interviews had been conducted the Petitioners learnt of a letter dated 16th July, 2021 addressed to the 1st Respondent purportedly authored by residents of Esumeyia Sub-location and copied to the 2nd Respondent and other high ranking State officers and Public Officers where sweeping allegations were made against the family of the Petitioners and the 1st Interested party.
9. That the Petitioners wrote to the 1st Respondent in response to the letter of 16th July,2021 and requested for among other things information concerning the allegation in the said letter and whether the letter would inform the appointment of the Assistant Chief. They did not get response but came to



learn that the 2nd Interested was appointed after the writing of the letter dated 16th July 2021 (BM-2) which they believe influenced the appointment. That there was no express invitation for comments from residents prior to the interviews and the said allegation in the letter should have been before the panel conducting the interviews and the fact that the allegations were received after the interviews that cast doubts as to the fairness, openness, transparency and accountability of the process leading to appointment of the 2nd Interested Party.

10. That the Petitioners and 1st interested party were denied opportunity to defend themselves of the allegations under letter of 16th July 2021. That they are entitled to full information on how the interview was conducted who scored the highest and recommendation report of the panel and how the 2nd Interested Party was appointed.
11. The Petitioners rely on Article 35 of *the Constitution* of Kenya on right to access information, Section 4,5 & 7 of the *Access to Information Act* and state that the 1st to 2nd Respondents were under obligation to furnish without delay the information required and that in violation of their rights they failed, refused and or neglected to provide the information.
12. That their rights to fair administrative action under Article 47 of *the Constitution* as read together with the Fair Administrative Action Act 2015 was violated. That the 1st to 2nd Respondent failed to observe the provisions of Article 10 of *the Constitution* in particular the Values and Principles of Participation of the People, Human Rights, Good Governance, Transparency and Accountability. That they had legitimate expectation of Public participation in the process and that the person who scored highest marks would be appointed and are entitled to know the criteria upon which the person appointed as Assistant Chief is based.

The Respondents' Response.

13. The Respondents' through Affidavit sworn by Chrispinus Wamalwa Walingo the Human Resources Management Assistant Navakholo Sub- County who states that the 1st and 2nd Respondent have proceeded on transfer to Kisumu and Kilifi Counties respectively and says he is authorized to respond to Petition. He states that the Position of Assistant Chief, Esumeiya Sub-location fell vacant on 3rd April, 2021 upon retirement of the office holder. That the Authority to fill the position was granted on 13th May, 2021 (annexture 'CW1') and called for adherence to recruitment policy on gender and scheme of service for National Government Administration Officers. That on 8th June, 2021 they publicly advertised for the position (Annexture "CW2"). That out of the 20 Applicants 18 of them were shortlisted for interviews, 13 appeared before the interviewing panel and 3 candidates were ranked highest and their names forwarded to the appointing authority (annexture 'CW3').
14. That on 16th September. 2021 the 1st Respondent was authorized to affect the Appointment of the 2nd Interested party as the Assistant Chief (annexture 'CW4'). That the 2nd Interested Party accepted the appointment and assumed office of Assistant Chief on the 1st October 2021.
15. That the petition was served with the 2nd Interested party had been in office for more than 1 month. That the Appointment satisfied the dictates of Article 27 (8) and 81 (b) of *the Constitution*. That no objection was made by his members of Public as to the legality of the process of recruitment leading to appointment. That the 1st Interested party, though, he scored highest marks his failure to get the position was not due to malice or bias.
16. That the 3 names were submitted for appointment at discretion of the appointing authority as stipulated in the Recruitment Policy. That Navakholo Sub-County has 22 Chiefs out of which only 5 are female including the 2nd Interested Party. That there is no mandatory provision directing that a



candidate who scores the highest marks must get the position applied for. That the information sought by the Petitioners in the letter therein ‘annexture BM3’ addressed to 1st Respondent were explanation/ opinions to the allegation raised and not about any particular information held by the Respondent.

17. The Petition is canvassed by way of written submissions. The Petitioners’ written submissions drawn by Amasakha & Company Advocates are dated 27th April, 2022 and received in court on even date.
18. The Respondent’s written submissions drawn by Deborah Were, Senior State Counsel for the Hon. Attorney General are dated 25th April 2022 and filed in court on the 26th April 2022.

Determination

Issues for determination

19. The Petitioner identified the following as the issues for determination.
 - (i) Whether there was violation of Articles 35(1) of *the Constitution*.
 - (ii) Whether the Petitioners are entitled to the reliefs sought in the Petition.
20. The Respondent on the other hand has identified the following issues for determination.
 - (a) Whether the Petitioners Constitutional rights were violated.
 - Article 35 right to access information.
 - Article 47 right to fair administration.
 - (b) Whether the Petitioners are entitled to reliefs sought in the Petition.
21. The court then considering the case by the parties finds the issues to be determined for conclusive resolution in the Petition are as follows:-
 - (a) Whether there was a violation of Articles 35(1) of *the Constitution* by the Respondent.
 - (b) Whether there was violation of the right to fair administrative action under Article 47 of *the Constitution*.
 - (c) Whether the Petitioner are entitled to reliefs sought

Whether there was a violation of Article 35 (1) of *the Constitution* by the Respondents.

21. The Petitioners submit that it is not disputed that they sought information under annexture ‘BM3’ and such information was not provided within the period it was required. That it is apparent the Respondents took into account complaints filed after completion of the recruitment exercise. In the letter (BM – 3) dated 12th October 2021 addressed to Pauline Dola (1st Respondent) by Advocates for the Petitioner, It stated in part “ In terms of Article 35 of *the Constitution* which protects citizens rights to information our clients demand a proper explanation in regard to the following :-
 - (1) Whether all administrative posts within Esumeyia sub-location have been duly advertised followed by a competitive interview process, followed by proper appointments or whether those posts have been ‘dedicated’ to one family namely the Nanzushi family by the Government as alleged in the said letter that is implicating the government in collusion.
 - (2) Whether the information given in the said letter will be acted on adversely against the Nanzushi family.



- (3) Why the information in question was not furnished to the relevant interviewing panel members before the interview and why information is being furnished to your office long after the interviews have been held.
- (4) Why to date despite the adverse mention of certain family members of the Nanzushi family in the letter under reference none of the concerned family members have been invited to defend themselves against the serious allegations contained therein which amounts to their being condemned unheard contrary to the Cardinal Principles of Natural Justice.
22. The Respondents in response state that the said request were explanations/ opinions on the allegations raised by the Residents and not about any particular information held by the Respondents.
23. Article 35 of *the Constitution* states that every citizen has right to access information held by the state, information held by another person and required for the exercise of any right or fundamental freedom.
24. Under the *Access to Information Act* the word “ Information “ is defined to include ‘all records held by a Public entity or a private body, regardless of the form in which the information is stored, its source or the date of production’.
25. The Respondents submit that the said request by the Petitioners to the 1st Respondent was for explanations and opinion on whether the letter by the Residents of Esumeyia would affect their family interests. That by instituting these proceedings the Petitioners were aggrieved that the 1st Interested Party who hails from their family was not appointed as Assistant chief as per their threat in the Letter (BM-3). There is no indication in the said letter that the Petitioners sought for information or record from the Respondents.
26. That it is clear all the information was available to the petitioners under paragraph 13 the Petition where it is stated they were entitled to information regarding how the interview was conducted, who scored the highest and the recommendation report of the panel and how the 2nd interested party was appointed. The Respondents submit none of the information under the Petition was requested for by the Petitioners.
27. The court having examined the letter (BM-3) and in particular the part of the letter referred to be under Article 35 and outlined above it is apparent what was sought from the 1st Respondent was explanation on how the letter allegedly authored by the Residents of Esumeyia sub-location would affect the Petitioner’s family interest and in particular with respect to interview of their kin, the 1st interested party. Such a request does not qualify as information or record held by the Respondents under Article 35 of *the Constitution* and or as information as defined under the *Access to Information Act*.
28. The court finds there was no violation of the Right of the Petitioners of access to information by the Respondents under the law.

Whether there was a violation of right to fair administrative action under Article 47 of *the Constitution*.

29. The Petitioners submit that it is apparent the Respondents took into account the complaints (BM-2) that were filed after the completion of the recruitment exercise. That the Respondents admitted that the 1st Interested Party scored the highest marks at the interviews and that the 2nd Interested Party with less marks was appointed as the Assistant Chief II and based their appointment on gender parity but have not given full particulars of their position and have not given names in paragraph 20 and 21 of their replying affidavit sworn on 2nd January 2022.



30. The Respondents submit that the Petitioners have not indicated how their right to fair administration was violated as per allegation under paragraph 16 of the Petition. That the threshold for filing Constitutional Petitions has been laid out by the court in *Anarita Karimi Njeru -vs Republic* and is further emphasized in *Mumo Matemu -vs - Trusted Society of Human Rights Alliance (2014) eKLR* where the court stated that, “A person seeking redress from the High Court on a matter which involves reference to *the Constitution* it is important (if only to ensure justice is done to his case). That he should set out with a reasonable degree of precision that of which he complains of, the provisions said to have been infringed and the manner in which they are alleged to be infringed”.
31. The Respondents submit that the Petitioners have not proved violation. The court having considered the submissions by the parties and the allegation that the appointment of the 2nd Interested party as the Assistant chief was not fair and was unlawfully influenced by letter dated 16th July 2021 makes its determination. The said letter dated 16th July 2021 refers to the interviews dated 14th July 2021 and is addressed to the County Commissioner Kakamega County. There is no evidence before court that the said letter and annexures reached the target audience. However, the said letter and its contents are not denied by the Respondents. The Respondents submit that there only 5 Female Assistant Chiefs inclusive of the 2nd Interested Party out of the 22 position in Navakholo Sub-County.
32. The Petitioners submit that no names have been given under paragraph 20 and 21 . The court notes that there was no response filed by Petitioners to challenge the averments in the replying affidavit filed by the Respondents. The court further notes that the Respondents have produced in court the score sheet of the interviews for the leading 3 candidates (CW- 3).
33. The 1st interested party scored highest marks at 92.75% (male) 2nd Interested party 84.5% (female) and the third Interested party 82% (male). The Respondents have justified the appointment of the 2nd highest candidate based on gender taking into consideration that there are only 5 female Assistant Chief out of the 22 in office serving Navakholo sub- county.
34. It is the finding of the court that any of the three candidates being qualified under the criteria under the Advertised vacancy (BM- 1) could have been appointed. They were all qualified. The Respondents have justified why they settled on the 2nd Interested party and not the other 2 candidates. The court finds and determines that the decision of the Respondents to appoint the 2nd Interested party is justified under Article 27 (6) of *the Constitution* being affirmative action in appointments to address gender gaps and also Article 27 (8) towards achievement of the 2/3 gender Principle in appointive positions.
35. The court has not found evidence that the alleged letter by the residents of Esumeyia affected the decision of the Respondents in making the appointment of the 2nd interested party as the Assistant chief of the sub-county and further the court finds she was qualified.

Whether the Petitioners are entitled to the reliefs sought.

36. On the 1st prayer, the court found no violation of the provisions of Article 35 of *the Constitution*.
37. on 2nd prayer the court found no evidence of receipt of the alleged petition and further no evidence that the said information influenced the decision on the said appointment.
38. On the 3rd prayer the court finds no merit in the prayer having found that the said letter of 12th October 2021 by the Petitioners Advocates addressed to the 1st Respondent did not seek information as defined under the *Access to information Act*.



39. On prayer 4, the court finds that the scores of the leading interviewees have been disclosed under Exhibit “CW3” by the Respondents and explanation on the Appointment of the 2nd Interested party done under Exhibit “CW4”. The prayer is addressed.
40. On prayer 5 the same has no merit the court having found the appointment of the 2nd Interested party was justified and merited.
41. The Petition dated 5th November 2021 is found to be without merit and is dismissed.
42. No order as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT IN BUNGOMA THIS 14TH DAY OF JULY 2022.

**J. W. KELI,
JUDGE.**

In the presence of:-

Court Assistant : Brenda Wesonga

Petitioner: Absent

Respondents: Ms Were Senior State Counsel

