



**Taireni Association of Mijikenda v Kenya Ports Authority (Petition
E015 of 2021) [2022] KEELRC 12974 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12974 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E015 OF 2021
AK NZEI, J
OCTOBER 27, 2022**

BETWEEN
TAIRENI ASSOCIATION OF MIJIKENDA CLAIMANT
AND
KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The background of the Petition before me is that on November 23, 2021, the respondent published an advertisement inviting applications for the position of Docker Grade HG4. The advertised posts were two hundred (200), and the requirements were that the applicants were to be holders of at least Kenya Certificate of Secondary Education (KCSE) grade D or its equivalent, physically fit and of good communication skills. The applications for the advertised positions were required to reach the respondent not later than December 8, 2021. This date was subsequently extended by the respondent to December 15, 2021 *vide* a published public notice.
2. Vide a petition dated December 28, 2021 and filed in court on December 29, 2021, the petitioner moved the court for:-
 - a) a declaration that the mode of recruitment criteria set out by the respondent was illegal, unlawful and contravened the provisions of the Constitution of Kenya.
 - b) a permanent injunction directed at the respondent restraining it from further discrimination against members of the Mijikenda Community in its recruitment process unless done in strict adherence to the provisions of the law.
 - c) a declaration that youth members of the Mijikenda Community represented by the petitioner are eligible for consideration for employment by the respondent.
3. The petitioner pleaded in the petition, *inter-alia*:-



- a) that the cluster for consideration set out in the advert which include the ability to undertake the assigned role, high motivation and satisfaction of the conditions is a misnomer as depicted by previous selection and induction process which has largely hitherto discriminated against the members of Mijikenda Community who have, for the longest period, failed to secure employment by the respondent.
 - b) that of the employees engaged by the respondent, 2274 of them (representing 35%) are from the Mijikenda Community and that this number constituted employees who were employed 30 to 40 years ago with no members drawn from the current generation. That the youth who form the crux of the community and constitute the larger percentage remain heavily unrepresented.
 - c) that the petitioner is apprehensive that its members, who have been singled out by the respondent for the longest time, will be left out of the process.
 - d) that the recruitment process fails to take into account regional balance as it does not include the current generation of the group based on the past recruitments which date some 30 to 40 years back, and that this adversely affects the community at individual and collective capacity.
 - e) that the youth are discriminated against contrary to provisions of the Constitution of Kenya, the Employment Act and National Cohesion and Integration Act, all of which reverberate and reinforce the same concept that discrimination is prohibited, especially on factors such as ethnic group and age.
 - f) that the petitioner seeks reliefs for actual violation of the rights of the petitioner and its members and bases the petition on article 3 of the Constitution, articles 19,20 and 21 on rights and fundamental freedoms, article 27 on the right of equality and freedom from discrimination, article 55 on the state's obligation to ensure involvement of the youth in the employment sector, article 56 on the rights of minorities and marginalized groups to access employment, section 5 of the Employment Act which prohibits discrimination at the work place and sections 3 and 12 of the Employment and Labour Relations Court Act which provide for powers, functions and objectives of the Labour Relations Court.
4. The petition was filed contemporaneously with a notice of motion dated November 28, 2021, *vide* which the petitioner sought conservatory orders preventing and/or stopping the respondent from conducting and concluding the advertised process pending hearing and determination of the petition. The application was, however, withdrawn by the petitioners on February 16, 2022.
 5. The petition is supported by an affidavit sworn by one Peter Ponda Kadzahaon December 28, 2021; and documents annexed to the said affidavit included the public notice extending the date for submission of applications for the advertised employment positions to December 15, 2021 and other documents unrelated to the advertised recruitment process.
 6. The petition was opposed by the respondent *vide* a replying affidavit of Daniel Ogutu, the General Manager (Human Resource and Administration) at the respondent authority. It was deponed in the said affidavit, inter-alia:-
 - a) that whereas the petition sought to challenge KPA's recruitment of 200 individuals for the position of Docker on alleged grounds of discrimination against members of the Mijikenda Community, no document whatsoever had been filed to substantiate those allegations of discrimination against the KPA had been filed alongside the petition.



- b) that all the documents filed by the petitioner included mainly correspondence emanating from the National Assembly and the Government with respect to collective bargaining agreement negotiations between KPA and its employees and newspaper cuttings; and that the petition was based on conjuncture, speculations and stray allegations.
 - c) that whereas the petitioner was challenging recruitment and/or selection criteria, it had specifically failed to file in court the advertisement notice and such alleged criteria, if at all.
 - d) that from the petition, the only issue challenged by the petitioner in the respondent's advert (annexed to the replying affidavit of David Ogutu and marked Do1) was only in so far as it sets out a precondition for the cluster to be considered as "...ability to undertake assigned role, high motivation and satisfaction of the conditions" which the petitioner alleged constituted a misnomer as depicted in previous selection and induction processes which largely discriminated against members of the Mijikenda Community.
 - e) that although the respondent had openly advertised for the position of Docker and received applications from interested individuals, it had not yet commenced the selection process (when the petition herein was filed); hence the allegations of discrimination as postulated in the petition were speculative and ill-informed.
 - f) that it is true that the majority of KPA's (the respondent's) workforce is drawn from the Mijikenda Community, standing at 2353 out of 6631 employees as at December 1, 2021, which translates to 35.38% of the employees.
 - g) that the respondent's employees were employed competitively and at different times to fill workforce demands whenever need arose, and that the allegation that the KPA employees of the Mijikenda Community were employed 30 to 40 years ago was baseless and untrue.
 - h) that the petition expressly offends the Constitution by purporting to profile and to categorize youth into ethnic segments.
 - i) that whereas the petitioner asserted that it sought relief for actual violation of rights of its members, it had failed to specifically demonstrate any of the alleged violation of rights, other than making speculative allegations against a selection process which had not even commenced.
 - j) that for purposes of KPA employment, members of the petitioner did not constitute a marginalized group as defined by the Constitution of Kenya 2010 because as admitted by the petitioner, the Mijikenda Community constitutes a majority of the KPA's workforce, being 35.38% of all employees.
7. Apart from admitting that members of the Mijikenda Community constitute majority of the respondent's workforce, the petitioner did not present to this court any analysis of the respondent's past recruitment exercises to show that qualified members of the Mijikenda Community had previously been discriminated against during such exercises.
8. I have noted that the respondent's advertisement for the competitive filling of 200 posts for the position of Docker Grade HG4 was published in the MyGov edition of November 23, 2021 and on the respondent's website, and that the advertisement ran from the same date to December 8, 2021, upon which a public notice was published extending the period for submission of applications upto December 15, 2021. The conditions for selection/employment are set out in paragraph 1 of this judgment and the advertisement did not contain any discriminatory clauses or undertones.



9. The petitioner filed the petition herein on December 29, 2021 before the selection process commenced, and did not tell this court whether any of its qualified members had submitted applications for the advertised positions, and whether any such members had been discriminated against and denied employment. The petitioner's allegations of the current generation of its members being excluded from the respondent's employment have not been substantiated. The petitioner has not in any way demonstrated actual or threatened violation of the rights of its members.

10. The Court of Appeal stated as follows in the case of *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR:-

“this is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner's knowledge. Once the case is made out, the burden shifts to the other party. More particularly, in view of the observation that the rights alleged to have been infringed do not fall within the grounds classified by article 27(4), more so the reason for the petitioner to prove that his or her rights have been infringed in respect of the grounds alleged. In other words, the burden of proof was on Dida to show that, on a balance of probabilities, the guidelines were in violation of the prohibition set out in article 27 which burden did not shift until a case was made out and this is why the learned judge stated, and we agree, that “...where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.”

11. In the present case, the petitioner failed to make out a case against the respondent. It failed to prove an irrational and arbitrary conduct on the part of the respondent that can be said to have amounted to discrimination that led, or could lead to exclusion of the petitioner's members from the respondent's workforce. The burden of proof did not shift from the petitioner to the respondent. Indeed, the petitioner admitted and even pleaded that members of the Mijikenda Community are the majority in the respondent's workforce. Further, the petitioner did not prove any acts of discrimination by the respondent regarding the recruitment process commenced *vide* the job advertisement published by the respondent on November 23, 2021.

12. The petitioner has not established actual or threatened violation of any of its members' rights as pleaded, and how such rights were violated or are threatened with violation by the respondent. It was stated as follows in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR:-

“...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 of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”

13. In view of all the foregoing, and having considered submissions filed by counsel for both parties, I find no merit in the petition herein. The same is hereby dismissed.

14. Each party will bear its own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2022



AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... **for Petitioner**

..... **for Respondent**

