



**Onchari & 14 others v County Public Service Board, Nyamira County & another  
(Petition E002 of 2022) [2022] KEELRC 12833 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12833 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E002 OF 2022  
CN BAARI, J  
OCTOBER 13, 2022**

**BETWEEN**  
**MELLEN KWAMBOKA ONCHARI & 14 OTHERS ..... PETITIONER**  
**AND**  
**COUNTY PUBLIC SERVICE BOARD, NYAMIRA COUNTY 1<sup>ST</sup> RESPONDENT**  
**COUNTY GOVERNMENT OF NYAMIRA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By a petition dated April 28, 2022, the petitioners seek the following reliefs:
  - a) A declaration that the respondents' decision to introduce new requirements for eligibility as an ECDE teacher; to wit age, is flawed, manifestly unreasonable and violates the petitioners' rights inter alia, their right not to be discriminated, to be subjected to fair labour practices and to fair administrative action, therefore null and void *ab initio*.
  - b) A declaration that all actions taken by the respondents in the purported shortlisting and interviewing of candidates for the position of ECDE teachers are null and void.
  - c) An order of mandamus compelling the respondents to employ on permanent and pensionable basis the petitioners who have completed their two (2) term contracts of three (3) years as per the scheme of Service for ECDE teachers of 2017.
  - d) An order of compensation for the violation of the petitioners' rights and fundamental freedoms under articles 27, 28, 29, 41, 47, 48 and 50 of the Constitution.
  - e) Costs of this petition.
2. The petition is premised on the grounds that:



- i. The petitioners have been working as ECDE teachers having been appointed on a (3) three-year renewable contracts, which were set to expire in the year 2022.
  - ii. The said contracts began in 2014 and have constantly been renewed upon the expiry of (3) three-year, thus giving rise to the legitimate expectation that the same would be converted to permanent and pensionable employment in 2022, in the absence of any circumstances that would require otherwise.
  - iii. The scheme of service for ECDE teachers of 2017, clearly stipulates that the teachers who have completed their two contract terms of (3) three years, qualify for permanent and pensionable employment.
  - iv. This was the position held by the Nyamira County Assembly's Committee on Education and Vocational Training Report on the status of ECDE teachers in the county.
  - v. Therefore, upon the respondents advertising 600 positions for ECDE teachers of which the requirements as set out therein excluded age, the petitioners who had duly met the requirements, accordingly applied for the vacant positions, with the expectation that they would be considered for permanent and pensionable employment, having completed their two contracts without any mishaps that would render them unfit for the very job they sought.
  - vi. Upon the shortlist being published, the petitioners' names were missing which prompted them to seek reasons for the said omission.
  - vii. It was the respondents' verbal response and the Governor's radio address on Minto FM that the petitioners were of 'old age' and the candidates being sought were those between the ages of 34 -35 years,
  - viii. It is now the petitioner's averment that the inclusion of an age limit for the position of ECDE teachers was an afterthought only meant to unfairly bar them from being eligible to be shortlisted for interviews for inclusion into permanent and pensionable employment and employed on a permanent and pensionable basis.
  - ix. It is similarly their averment that the said age limit has never been applied in hiring ECDE teachers during previous recruitments, and that other counties within the Republic of Kenya have never applied this discriminatory rule for this category of employees.
  - x. It is therefore the petitioners' contention that the inclusion of the said requirement which was not part of the public advertisement calling for eligible candidates to apply for the position is a violation of the petitioners' right not to be discriminated against, their right to fair labour practices and their right to fair administrative action.
  - xi. Further, from the Identification card numbers on the list of shortlisted candidates, one can identify how age has been selectively used since identification numbers are given according to age.
  - xii. The respondents' failure to consider the petitioners' applications due to age is discriminative and meant to unfairly bar them from eligibility to apply for the position, hence illegal, null and void.
3. The respondents replied to the petition vide a replying affidavit sworn by sworn Dr Peter Kereri the Chairman of the 1<sup>st</sup> respondent dated June 9, 2022.
  4. The respondents' case is:



- i. The respondents deny the allegations by the petitioners that age limit was one of the eligibility criteria for employment.
  - ii. The respondents contend that they acted within their constitutional mandate and statutory limits.
  - iii. Further the respondents contend that the petitioners did not follow the procedure for redress set out in section 77 of the [County Government Act](#), hence this court does not have jurisdiction to entertain this suit.
5. Parties canvassed the petition through written submissions, and submissions were filed for both parties.

### **The petitioners' submissions**

6. The petitioners submit that the respondents did not adhere to the provisions of article 10, when arriving at the decision to include age limit as a requirement for appointment, and further, that age was not in the initial advert and which requirement is vague and unconstitutional.
7. The petitioners further submit that their rights under article 27 of the [Constitution](#) on equal treatment of every person before the law have been gravely violated, as the respondents are seen to openly demonstrate bias in favour of 3<sup>rd</sup> parties, by introducing discriminative requirements as prerequisites to renewing the petitioners' contracts and/or shortlisting them for interviews. It is submitted that the Respondents have openly cited age as a requirement for not shortlisting the petitioners herein for interview and subsequent appointment
8. It is further submitted for the petitioners that article 27(8) stipulates that the government shall take into account the implementation of the two-thirds gender rule while making appointments to any given body. The petitioners submit that the respondents have blatantly neglected and/or failed to apply this clear provision of the law. They sought to rely in [Kenya Union of Domestic Hotels, Educational Institutions and Allied Workers v MP Shab Hospital](#) [2018] eKLR to buttress this position.
9. The petitioners submit that article 28 of the [Constitution](#) entitles them to be treated with dignity and not be subjected to psychological torture. The petitioners submit that by suddenly refusing to renew their contracts and/or shortlisting them for interviews on account of age, the Respondents intended on embarrassing and causing the Petitioners mental anguish through psychological torture.
10. The petitioners further submit that article 41 which protects their rights to fair labour practices has been desecrated by the respondents purporting to introduce new requirements for eligibility as an ECDE teacher arbitrarily.
11. The petitioners submit that their rights under article 47 of the [Constitution](#) to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, has been blatantly disregarded by reason that the decision to introduce new requirements for eligibility an ECDE teacher was made without taking into consideration the plight of teachers over the age of 45.
12. It is the petitioners' submission that their rights to be accorded a fair hearing before an impartial body/ tribunal has not in way whatsoever been adhered to as evidenced by the abruptness of the introduction of new requirements for eligibility as an ECDE teacher.
13. It is the petitioners' submission that all efforts to have the issues herein addressed by the respondents have been thwarted emphatically thus the instant petition.
14. The petitioners finally submit that introduction of age as a requirement for shortlisting and subsequent employment of ECDE teachers is a violation of the petitioners' rights as detailed under the provisions



of the constitution aforementioned, and the same is not capable of being enforced in a just, open and democratic society.

### **The respondents' submissions**

15. It is submitted for the respondents that the petitioners should have first exhausted the statutory dispute resolution mechanisms provided under article 234 (2)(i) read with section 87(2) of the [Public Service Commission Act](#) and section 77(2) of the [County Government Act](#). They had reliance in the holding in *Speaker of the National Assembly versus the Honourable James Njenga Karume* Civ App No 92 of 1992
16. The respondents submit that they exercised their mandate as bestowed upon them by the [Constitution](#) and the [County Government Act](#). They further submit that the petitioners have not disclosed any details or evidence to demonstrate that the respondents infringed upon the rights and fundamental freedoms as alleged.
17. The respondents submit that the petitioners have not demonstrated or adduced any evidence in support of their claim against the respondents to warrant issuance of the orders sought.

### **Analysis and determination**

18. Upon careful consideration of the petition, the reply by the respondents, and the submissions by both parties, the issues that fall for determination are: -
  - i. Whether the petitioners' constitutional rights were violated.
  - ii. Whether the petitioners are entitled to the reliefs sought.

### **Whether the petitioners' constitutional rights were violated.**

19. It is not disputed that the petitioners herein have been in the service of the respondents as Early Childhood Development Education (ECDE) teachers vide contracts issued between April, 2018 to 2021. The appointment contracts indicated the term as three years, and further provided that the contracts were renewable subject to satisfactory performance.
20. It is also not disputed that the respondents religiously renewed the petitioners' contracts upon the lapse of the three years given in their contracts.
21. The respondents in their replying affidavit and submissions, have sought to oust the court's jurisdiction on the matter premised on the provisions of section 77 (2) of the [County Government Act](#) and section 87 (2) of the [Public Service Commission Act](#).
22. Section 77 of the [County Government Act](#), states: -
  - “(1) Any person dissatisfied or affected by a decision made by the county public service board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the public service commission (in this part referred to as the “commission”) against the decision.
  - (2) The commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
    - (a) recruitment, selection, appointment and qualifications attached to any office; (emphasis mine)



23. Section 87 (2) of the [Public Service Commission Act, 2017](#), provides:

“ A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the commission to hear and determine appeals from county government public service unless the procedure provided for under this part has been exhausted.”

24. It is often said that jurisdiction is everything, and without which, a court must down its tools (See [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR). To this end, the issue of jurisdiction raised by the Respondents, must first be determined before the court can deal with the question of violation of the petitioners’ rights.

25. The Court of Appeal in [Secretary County Public Service Board and Another v Hulbhai Gedi Abdulla](#) [2017] eKLR, had this to say on section 77 of the [County Government Act](#): -

“ .... there is no doubt that the respondent initiated judicial review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the Act. The section provides not only forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically followed by the legislators to meet the needs such as the respondents’. In our view the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure and the act rather than resort to the judicial process in the first instance.”

26. In [Chrispinus Likuyuni Lumiti & another v County Chief Officer, Public Service Kakamega County & 3 others](#) [2021] eKLR the court held that the petitioners did not demonstrate that they attempted to or exhausted the statutorily anchored dispute resolution mechanisms before moving the court.

27. The issues in the instant petition concern the recruitment and selection of persons to the position of ECDE teachers to the service of the respondents. Matters of recruitment and selection, are issues that are directly within the purview of public service commission, and for which the law demands that aggrieved persons must first seek redress with the commission before resorting to the courts.

28. The petitioners have not shown that they sought redress with the commission on the issues subject of this petition prior to filing this suit. Arising from the binding decision of the Court of Appeal in Hulbhai Gedi Abdullahi (supra), this court finds and holds that it lacks jurisdiction to entertain the petition herein.

29. The issues subject of the petition thus fall by the way and are not worthy of the court’s determination.

30. The petition is dismissed.

31. Parties shall bear their own costs.

32. Judgment of the court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13TH DAY OF OCTOBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

**Mr. Bonuke present for the Petitioners**



**Mr. Nyambane present for the Respondents**

**Christine Omollo- C/A**

