



**Kimani v Ethics and Anti-Corruption Commission (Employment and Labour Relations  
Petition E078 of 2022) [2022] KEELRC 12821 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12821 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E078 OF 2022  
MN NDUMA, J  
OCTOBER 6, 2022  
IN THE MATTER OF ARTICLES 2,3,10,19,20,22,27,41,47,232,258, 259 AND 260 OF THE  
CONSTITUTION OF KENYA, 2010  
AND  
IN THE MATTER OF ALLEGED CONTRAVENTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER  
ARTICLES 10, 19, 27, 41, 43, 47, 232, 249 AND  
260 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**GLORIA KIMANI ..... PETITIONER**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The petitioner Gloria Kimani, faults the advertisements made by the respondent on diverse dates between October, 2018 and March, 2022 for various job vacancies within the establishment of the respondent to the extent that the respondent requires the applicant to have a minimum of Kenya Certificate of Secondary Education (KCSE) minimum mean grade of C+ (C plus) while other positions did not have a similar requirement.
2. The petitioner asserts that the requirement is discriminatory and irrational and same curtails career progression of current employees of the respondent who joined the commission at the entry level where there is no requirement for the minimum KCSE mean grade to be employed.
3. The petitioner states that the respondent is deliberately placing such a requirement specifically for internal adverts (promotions) to discriminatively curtail career progression of some employees of the



respondent who may now have a first and even a masters degree but did not score mean grade of C+ in their Kenya Certificate of Secondary Education.

4. That the respondent has in place human resource management guidelines that include corporate policies and procedures manual and career progression guidelines which guide the commission on recruitment and career progression of its staff. That these provide for competitive recruitment based on merit with advertisements made internally and externally depending on the needs of the organization.
5. That clause 2.4.7 of the said corporate policies and procedure manual provides for appointment or promotion based on the existing career progression guidelines and commission's terms and conditions of service.
6. That on or about October, 2018, the respondent advertised externally for the position of secretary/ chief executive officer of the commission which advertisement did not require applicant to have a minimum Kenya Certificate of Secondary Education grade. That on or about March, 19, ten (10) other senior positions were advertised without similar requirement. That on or about July, 2021, position of deputy chief executive officer was advertised without such a requirement.
7. That in December, 2018, the respondent advertised for 8 positions at, director, assistant director, and human resource management levels of between grade '3' to '5' with a requirement for applicant to have minimum KCSE mean grade of C+. In June, 2021 other positions of between grade '3 to '5' were advertised with similar requirement.
8. In March, 2022, an internal advertisement of positions in Job grades '4' to '6' was made with a similar requirement.
10. That this requirement is a hindrance to career progression of already employed staff and also discriminates against new entrants to the commission who may have higher qualification but did not attain KCSE grade C+.
11. That employees of the commission have a legitimate expectation to be promoted based on their performance without any technicalities placed on their path.
12. The petitioner plead that the conduct by the respondent violates article 10, 27, 47, and 232 of the Constitution by placing this unwarranted, and irrational requirement on recruitment and career progression in respect of commission's employees. The petitioner prays for the following reliefs: -
  - (i) A declaration be and hereby issued to the respondent's internal advertisement number, hrm/int.advert 2022/01, internal advisement number for the positions of deputy director-regional office, job grade – EACC '4' assistant director-regional office, job grade – EACC '5', senior officer- regional office, job grade – EACC '6', senior investigations officer, job grade – EACC '6', security assistant III, job grade – EACC II, deputy director – assets recovery and civil litigation, job grade – EACC '4', assistant director – civil litigation, job grade – EACC '5', deputy director human resource management, job grade EACC '4' and assistant director – finance and accounts, job grade – EACC '5' has violated the constitutional rights of the respondent's employees to equal protection and benefit of the law, protection from discrimination, fair labour practices and fair administrative actions under article 27, 41 and 47 of the Constitution respectively.
  - (ii). A declaration be and is hereby issued that the respondent has infringed on the employee's legitimate expectation regarding promotions and career progressions.
  - (iii). This honourable court be pleased to grant an order of prohibition restraining the respondent, its employees, officers, agents or persons acting under its instructions from proceeding with



the planned promotions of employees on the basis of the impugned advertisement in respect of the positions of deputy director – regional office, job grade – EACC '4', assistant director – regional office, job grade – EACC '5', senior officer – regional office, job grade EACC '6', senior investigations officer, job grade EACC '6', security assistant iii, job grade EACC 'ii', deputy director – assets recovery and civil litigation, job grade – EACC '4', assistant director – civil litigation, job grade – EACC '5', deputy director human resource management, job grade – EACC '4' and assistant director – finance and accounts, job grade – EACC '5'.

- (iv) An order of certiorari be and is hereby issued to bring to this honourable court and quash the respondent's impugned advertisement, subsequent interviews and resultant promotions on the basis of the impugned advertisement in respect of the positions of deputy director-regional office, job grade – EACC '4', assistant director – regional office, job grade – EACC '5', senior officer – regional office, job grade EACC '6', senior investigations officer, job grade EACC '6', security assistant III, job grade EACC 'II', deputy director – assets recovery and civil litigation, job grade – EACC '4', assistant director – civil litigation, job grade – EACC '5', deputy director human resource management, job grade – EACC '4' and assistant director – finance and accounts, job grade – EACC '5'.
- (v) An order of mandamus be and is hereby issued compelling the respondent to re-advertise the positions of deputy director- regional office, job grade – EACC '4', assistant director – regional office, job grade – EACC '5', senior officer – regional office, job grade EACC '6', senior investigations officer, job grade EACC '6', security assistant III, job grade EACC 'II', deputy director – assets recovery and civil litigation, job grade – EACC '4', assistant director – civil litigation, job grade – EACC '5', deputy director human resource management, job grade – EACC '4' and assistant director – finance and accounts, job grade – EACC '5' on the impugned advertisement in strict compliance with the Constitution, respondent's corporate policies and procedures manual and career progression guidelines.
- (vi) Costs of this petition be provided for.

### Replying affidavit

13. The respondent filed replying affidavit of Ellyjoy Bundi acting deputy director, human resource management of the respondent in response to the petition. The deponent deposes that the petition is ill founded, and an attempt to interfere and/or prevent the respondent from recruiting staff by a person who has not laid down any legitimate cause for doing so. That there is real likelihood that the petitioner is not in existence as a person and lacks locus standi in terms of article 22 of the Constitution, there being no evidence that the petitioner is acting on behalf of another person who cannot act in their own name, is a person acting as a member of or in the interest of a group or class of persons, is acting in public interest or is an associate acting in the interest of one or more of its members. It is not in public interest to interfere with the independence of the commission to recruit suitable staff internally and externally.
14. That the minimum requirement of mean grade of C+ in KSCE prescribed by the respondent for vacancies advertised in the impugned advertisement, e.g HRM/INT ADVERT 2022/01 is not inconsistent with the minimum requirement for entry level positions which requires candidates to possess a university degree. That as per Clause 4.1 (iii) of the Kenya Universities and Colleges Central Placement Service (KUCCPS) Placement Processing Policy 2014, the minimum requirement for university education in Kenya is a KSCE mean grade of C+.



15. That there is no evidence placed before court by the petitioner enumerating any candidates who do not possess the minimum requirement of mean grade C+ in KCSC and who consequently deserve the intervention of the court.
16. Therefore, this requirement is neither irrational nor discriminatory and this court has made similar decision in Nairobi ELRC Petition No E113 of 2021 – Kevin Otieno Odongo -vs- EACC & Others.
17. That article 1(2) of the Discrimination (Employment Occupation) Convention, 1958 provides that 'Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements, thereof shall not be deemed to be discrimination.'
18. That except the position of deputy director asset recovery and civil litigation (EACC 4), deputy director HRM (EACC 4) and assistant director civil litigation (EACC 5), all the other positions, carried in internal advert HRM/INF ADVERT 2022/01 have already been filled.
19. That the suit lacks merit and it be dismissed with costs.
20. The petitioner filed supplementary affidavit joining issues with the respondent and reiterates the averments made in the petition and in the supporting affidavit of the petitioner. The respondent also filed further affidavit in which is disclosed the true identity of the petitioner as an advocate working in the firm of Sheikh Sharif Advocates who does not qualify to bring the petition per article 22 of the Constitution. The respondent further deposes that all impugned positions have since been filled and the petition is spent.
21. The parties later on filed written submission in support of their respective positions.

### **Determination**

The issues for determination are: -

- a. Whether the petitioner has set out a proper basis for the petition in line with Anarita Karimi Njeru -vs- Republic [1979] eKLR and affirmed in the Court of Appeal case of Mumo Matemu -v-s Trusted Society of Human Rights Alliance and 5 others [2013] eKLR. In Anarita Karimi case the court held as follows: -
  - i. Constitutional violations must be pleaded with a reasonable degree of precision.
  - (ii) The article of the Constitution which entitles rights to the petitioner must precisely be enumerated and how one is entitled to the same.
  - (iii) The violation must be particularized in precise manner.
  - (iv) The manner in which the alleged violation was committed and to what extent.
- b. Whether the petition is spent, having been overtaken by events.
- c. Whether the petitioner is entitled to any of the reliefs sought.
22. The court proceeds to consider all the issues together. The 2<sup>nd</sup> issue above, as regards whether or not all impugned positions have been filled may itself not pre-empt the issues raised in the petition being, whether or not the requirement by the respondent to place the minimum requirement of a mean grade of C+ for some of its positions is irrational and discriminatory of some applicants internally and externally.
23. However, the court should not engage in idle academic exercise where a case does not identify any particular person or a class of persons aggrieved by the decision of the respondent. In



the present case, the petitioner has not disclosed her identity but was exposed in the further pleadings of the respondent to be an advocate, who does not disclose who she actually represents.

24. In the circumstances of the case, especially, going by the uncontroverted evidence by the respondent that all the impugned positions have already been filled and no complaint was received by anyone during the process of recruitment, the court is persuaded by the respondent that the petitioner is engaged in a speculative exercise without any iota of evidence that the impugned adverts actually aggrieved any internal or external applicant to the advertised position set out in the petition. To this extent, the petitioner has failed to satisfy the requirements of a petitioner set out in the Anarita Karimi case and Mumo Matemu case. (supra). On that score alone, the petition cannot stand.
25. The petitioner on another score had the onus of demonstrating that the requirement of a minimum score of a C+ in KCSE was irrational and was not necessary in the case of the advertised positions. No tangible evidence was placed before the court in this regard. This is a matter which this court has weighed on in before in the case of *Kevin Otieno Odongo -vs- EACC & Others - Nairobi ELRC Petition – E113 of 2021* in which the court held: -
  102. The Act does not limit the respondent from deciding the qualifications of the professional and technical staff to fill any positions within the organization as is necessary for it to perform its functions.
  - 103 Section 18(2) responds to the issue raised by the ex-parte applicant about the qualifications of the deputy chief executive officer. Such position having not been provided for in the Act, it is the sole discretion of the respondent to decide on the titles and qualifications for any position within its secretariat, the only limit being as set out in section 18(2) of the Act.
  104. The fact that the Act sets out the minimum qualifications of chief executive officer does not mean that the respondent cannot appoint persons with higher qualifications than that of the chief executive officer if such qualifications are necessary for its operations. Indeed, it is a matter of common knowledge that in most organisations, the chief executive officer is not always the person holding the highest qualifications in the organization. The qualifications depend on the requirements of the positions. Specialist or technical persons, which in many organisations, require qualifications that may be higher than the chief executive officer.’
26. Accordingly, the petitioner has failed to establish that the said requirement is irrational and/or oppressive to any identified person or a class of persons represented by the petitioner.
27. It was held in *Lyomoki and Others -vs- Attorney General [2005] EA 127*, the onus, in constitutional petition, as in other ordinary civil actors, is upon the petitioner or the plaintiff to establish a prima facie case, and thereafter the burden shifts to the respondent to justify the limitation to those rights.
28. In the present case, no burden has shifted to the respondent for failure by the petitioner to make a prima facie case due to lack of any substantive evidence presented before court.
29. Accordingly, the petition falls on all fronts for want of any real evidence to sustain the bare claims made.



30. The petition is dismissed with costs for lack of proper disclosure on the part of the petitioner of who she actually is and, on whose behalf, she approached court.

**DATED AND DELIVERED AT NAIROBI (ELECTRONICALLY) THIS 6<sup>TH</sup> DAY OF OCTOBER, 2022**

**MATHEWS N NDUMA**

**JUDGE**

Appearances

Mr Mohammed for the petitioner

Mr Kagucia for Respondent

Ekale – Court Assistant

