



Kenya National Union of Nurses v Cabinet Secretary Ministry of Public Service, Youth and Gender Affairs & 2 others; National Employment Authority (Interested Party) (Petition 113 of 2019) [2022] KEELRC 13333 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13333 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 113 OF 2019**

J RIKA, J

NOVEMBER 30, 2022

**IN THE MATTER OF: THE CONSTITUTION OF KENYA,
ARTICLES 22, 41, 232 AND 259, AMONG OTHERS;**

AND,

IN THE MATTER OF: THE EMPLOYMENT ACT SECTIONS 2, 5 AND 17;

AND.

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT;

AND,

**IN THE MATTER OF: THE CONSTITUTION OF KENYA [PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS] PRACTICE AND PROCEDURE RULES, 2013;**

AND,

**IN THE MATTER OF: THE EMPLOYMENT AND LABOUR
RELATIONS COURT [PROCEDURE] RULES 2016;**

AND,

**IN THE MATTERS OF: THE SOCIAL SECURITY [MINIMUM STANDARDS]
CONVENTION, 1952 AND SOCIAL PROTECTION FLOORS RECOMMENDATION, 2012**

AND,

**IN THE MATTERS OF PUBLIC SERVICE COMMISSION NOTICES IN THE
DAILY NATION AND THE STANDARD NEWSPAPERS DATED 23RD JUNE 2019;**

AND,

IN THE MATTER OF THE ORDERS OF CERTIORARI AND PROHIBITION;

BETWEEN

KENYA NATIONAL UNION OF NURSES PETITIONER



AND

CABINET SECRETARY MINISTRY OF PUBLIC SERVICE, YOUTH AND
GENDER AFFAIRS 1ST RESPONDENT
PUBLIC SERVICE COMMISSION 2ND RESPONDENT
ATTORNEY-GENERAL 3RD RESPONDENT

AND

NATIONAL EMPLOYMENT AUTHORITY INTERESTED PARTY

JUDGMENT

1. The petitioner lodged this petition on July 2, 2019.
2. The petitioner is a registered trade union.
3. The 1st respondent is the Cabinet Secretary overseeing public service; the 2nd respondent is a constitutional commission created under article 233 of the Constitution overseeing public service; the 3rd respondent is the Chief Legal Advisor to the Government; while the interested party is a statutory authority established under National Employment Authority Act, providing a framework for employment management.
4. The petition is brought on behalf of existing and potential nurses.
5. The 1st and 2nd respondents published in daily newspapers, notices on June 23, 2019, on intended changes in the public service.
6. The changes include introduction of new tools to measure performance of employees, including that of nurses. Performance contracts have been proposed. It is proposed that new employees in the public service, are employed under contracts, and not on permanent and pensionable terms. Promotion practice is intended to move away from longevity- based, to performance-based.
7. The petitioner wrote to the 2nd respondent on June 20, 2019, asking for the model Human Resource Policy Guidelines in the Public Service, but received no response.
8. The petitioner states, it has capacity to present this petition under articles 3[1] and 22 [1] and [2] of the Constitution of Kenya, while the court is seized of jurisdiction under article 162[2] [a] of the Constitution.
9. The petitioner submits that the intended changes are being made without regard to national values and principles of governance under article 10 of the Constitution; they violate the petitioner's equality and freedom from discrimination under article 27 [1], [2] and [4]; the changes have not been subjected to public participation; the petitioner and its members have not been consulted contrary to their expectation under article 47; and that the intended changes are against ILO Convention No 102 of 1952, on Social Security [Minimum Standards].
10. The petition is founded on the affidavit of the petitioner's General Secretary, Seth Ambusini Panyako, sworn on the 1st day of July 2019.
11. The affidavit restates the grounds set out in the petition as summarized above. The petitioner exhibits the newspaper notices where the intended changes were publicised; a copy of the Manual for Public



Service and Human Resource Policies and Procedures; and a letter dated June 20, 2019 from the petitioner to the 2nd respondent, asking for Human Resource Policy Guidelines.

12. The petitioner prays for judgment against the respondent as follows: -
 - a. Declaration that the decision of the respondents to: introduce new tools to measure performance; requiring all civil and public servants to be put under performance contracts; requiring new recruits to government agencies to be employed under contracts; and requiring the existing promotion policies to be changed, from longevity to performance- based is unconstitutional against articles 10, 27,28, 41,43,47,48,233, and 259.
 - b. An order of certiorari, quashing in entirety the decision of the respondents jointly and/or severally, introducing new tools to measure performance; requiring all civil and public servants to be put under performance contracts; requiring that new recruits to government agencies to be employed under contracts; and that the existing promotion policies are changed from longevity to performance- based is thus unconstitutional, null and void.
 - c. An order of prohibition, permanently prohibiting the respondents, and their agents from imposing, deducting and/or implementing the aforestated decision.
 - d. Costs.
 - e. Any other suitable relief.
13. The respondents and the interested party filed grounds of opposition dated December 14, 2020. Their position is that section 45 of the [Public Service Commission Act 2017](#), allows the commission to employ on contract. No decision had been made to convert the terms and conditions of existing employees from permanent and pensionable to contract. Performance contracting has been in the public service for many years, and is not a new reform measure. The petition is without foundation. The respondent and the interested party pray for dismissal of the petition.
14. The respondents and the interested party filed a notice of preliminary objection, challenging the jurisdiction of the court. A ruling was made February 3, 2022, declining the preliminary objection.
15. Parties agreed to have the petition considered and determined on the strength of their pleadings, documents and submissions, the latter which were confirmed to have been filed and exchanged at the last mention before the court, on September 30, 2022.
16. The issues in dispute are: whether the respondents have introduced new policy on employment and performance in the public service; whether the change, in policy if any, is unconstitutional; and whether the orders of declaration, *certiorari* and prohibition, should issue against the said decision.

The Court Finds: -

17. The petitioner relies on various documents in its petition, among them, the Human Resource Policies and Procedures Manual for the Public Service, May 2016.
18. Part II, section B.8 states that appointments in the public service, shall fall into 2 categories: pensionable and contract.
19. These categories are replicated in Counties Public Service Human Resource Policies and Procedures Manual



20. The categorization is anchored on section 45 of the [Public Service Commission Act, 2017](#), which allows the 2nd respondent to employ persons on contract, for a period of at least 12 months, but not exceeding 5 years.
21. The petitioner relies on advertisements placed in the national dailies calling on applicants for medical personnel vacancies in certain counties. There are advertisements with regard to the Counties of Bungoma and Murang'a.
22. It has not been explained how these advertisements fit within the scope of the petition. The petitioner has not established that the respondents have employed, or intend to employ, outside the ambit of the existing law and manual.
23. The complaint about performance contracting similarly does not appear to be correct. The manual exhibited by the petitioner, at part IV, section G provides for performance management. Section G.3 regulates performance contracting, explaining the rationale of the policy, and reiterating that performance contracting should be cascaded to all departments, sections, levels and cadres of employees.
24. Section 62 [1] [c] [d] and [e] of the [Public Service Commission Act](#), refers to performance contracts and the role of the 2nd respondent, in setting guidelines and evaluating performance agreements between the government and public bodies or individual public officers.
25. The petitioner has not established that performance contracting is a new tool in the public service, to measure performance. It has been in place for a while, and is clearly captured in the Human Resource Manual exhibited by the petitioner.
26. The principle on promotion based on performance, rather than longevity of service, is contemplated by the Human Resource Manual. The manual provides that the objective of performance appraisal is to among other things, provide information for decision-making on administrative and human resources issues such as renewal of contracts and promotions. There is nothing in the [Public Service Commission Act](#), or the Human Resource Manual, which binds the 2nd respondent, to base promotions on the length of service, rather than good performance.
27. Longevity at the workplace has its place, but does not necessarily lead to promotion. It can be rewarded through promotion, when it is coupled with good performance, and may also be recognized and rewarded through long service awards. Promotion in the public service is driven, or ought to be driven by meritocracy, under article 232 [1] [g] which entails fair competition and merit, as the basis of appointments and promotions.
28. The last issue relates to public participation. The court is not in the first place persuaded that there are new changes in the Public Service Human Resource Policies and Procedures Manual.
29. The policies on employment under contract, performance contract, and promotion are embedded in the existing legislation and manual. The policies cannot be undone, without declaring the existing legislation and manual to be unconstitutional, which is not what the court has been asked to order. The petitioner relies on newspaper reports to prop the petition. In the view of the court there is nothing new in these reports. Employment contracts, performance contracts, and promotion based on performance are not new concepts in the public service. Introduction of electronic card system to reduce wastage in fuel payments is not a new measure as reported in the newspapers. Fuel cards have been in use for some years. In any event, it is not clear how use of electronic fuel cards relates to the issues in dispute.



30. The documents exhibited by the petitioner, the *Public Service Commission Act*, and article 232 of the *Constitution*, suggest to the court that the respondents have not acted outside their mandates. There is nothing to engage the public about, as the policies challenged by the petitioner, are already part of the public service governance and ethos. There are no real or apprehended constitutional and legal violations against the petitioner and its members, which have been disclosed in this petition.

It is Ordered: -

- a. The petition is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 30TH DAY OF NOVEMBER 2022.

JAMES RIKA

JUDGE

Rika J

Court Assistant: Emmanuel Kiprono

Ojienda & Company Advocates for the Petitioner

The Attorney-General for the Respondents and the Interested Party

