



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E010 OF 2020

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3, 10, 73, 174, 175, 232 AND 235 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 58(2) OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 5 AND 6 OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLY APPROVAL) ACT, 2017

BETWEEN

EVANS MUSWAHILI LADTEMA.....PETITIONER

v

GOVERNOR, VIHIGA COUNTY.....RESPONDENT

AND

COUNTY PUBLIC SERVICE BOARD, VIHIGA.....1st INTERESTED PARTY

DR CATHERINE MULOMA EDALIA2nd INTERESTED PARTY

DORICE MUDEIZI KIDIAVAI..... 3rd INTERESTED PARTY

JUDGMENT

1. Evans Muswahili Ladtema (the Petitioner) had challenged the nomination and appointment of Dr Catherine Muloma Edalia and Ms Dorice Mudeizi Kidiavai as members of the County Public Service Board, Vihiga (the Board) but conceded in his submissions that upon reviewing the responses by the Governor and Dr Edalia, he would abandon the challenge against the appointment of Dr Edalia.
2. The Court will, therefore, dismiss the case against Dr Catherine Muloma Edalia.
3. The issue remaining for determination in this Petition is whether the nomination and appointment of Ms Dorice Mudeizi Kidiavai (Ms Kidiavai) as a board member was unlawful.
4. The Petitioner challenged the nomination and appointment of Ms Kidiavai on the ground that she was not on the shortlist of nominees, her nomination was not taken through public participation as required by section 6(2) of Public Appointments (County Assemblies) Approval, Act and that her appointment was not through a competitive process.
5. Opposing the Petition, the Governor contended that Ms Kidiavai applied for membership of the Board as a person living with a disability but was not shortlisted and was placed on the *long list*. The failure to shortlist Ms Kidiavai, it was stated, caused an uproar.
6. Admitting that Ms Kidiavai was not shortlisted for the position of the member, the Governor contended that she had been placed on the *long list*, and when the County Assembly rejected a female nominee, he found her a suitable nominee because of regional balance, gender

and being a person living with a disability.

7. On public participation, the Governor contended that he complied with section 6(2) of the Public Appointments (County Assemblies) Approval Act since the nomination was posted on the walls of county government offices, the county website as well as broadcast on local radio stations.

8. The Governor further asserted that the public participated by making representations to the County Assembly during the approval hearings.

9. Further, the Governor took defended the lawfulness of the nomination and appointment on the ground of affirmative action as, in his view, 5 of the Board members were males, and there was a need to redress gender imbalance.

10. The Governor further contended that any challenges to the nomination and appointment of Ms Kidiavai should have been placed before the County Assembly during the approval hearings.

11. The Governor also asserted that the Petitioner was a proxy who was abusing the court process as the appointment process had been finalised in 2019.

12. Ms Kidiavai, on the other hand, asserted that her nomination and appointment was lawful because she was the only eligible female in addition to being a person living with a disability, thus a member of a special class recognised by the Constitution as a *marginalised group*.

13. Ms Kidiavai also made the argument that any challenge to her nomination and appointment should have been made to the County Assembly as contemplated by section 8 of the Public Appointments (County Assemblies) Approval Act.

14. The Court has considered all the material which was filed (even without leave) and come to the conclusion that the nomination and appointment of Ms Kidiavai were unlawful because of the following reasons.

15. One, the parties did not dispute that an advertisement for the position of members of the Board was published.

16. Section 5(1) of the Public Appointments (County Assemblies) Approval Act, 2017 was thus complied with.

17. It was also not disputed that on 16 July 2019, the shortlisted candidates' names were published in the Daily Nation newspaper.

18. The name of Ms Kidiavai was not on the shortlist.

19. Ms Kidiavai wrote a letter of complaint dated 9 October 2019, querying why she had not been shortlisted yet qualified and was a person living with a disability. Other persons living with a disability also sent a joint complaint letter to the County Assembly.

20. When the County Assembly debated the names sent to it, it did not approve one of the female nominees prompting the Governor then to nominate Ms Kidiavai.

21. Once candidates had been shortlisted, interviewed and names of nominees sent to the County Assembly, it was not open to the Governor to go back to a so-called *long list* and pick a nominee from therein to replace any rejected nominee. Such a course of action is not supported by any law or practice. In any case, the Governor and Ms Kidiavai did not place any such precedents before the Court.

22. Two, the Governor did not provide any evidential material to demonstrate that he notified the County Assembly of the nomination of Ms Kidiavai as envisaged by section 6(1) of the Public Appointments (County Assemblies) Approval Act.

23. Three, the Governor did not show that the public was notified of the nomination of Ms Kidiavai in terms of section 6(2) of the Public Appointments (County Assemblies) Approval Act.

24. Four, there was no evidence placed before the Court that the County Assembly conducted hearings and debates and approved the appointment of Ms Kidiavai.

25. It is instructive that even the dates of approval and appointment were not disclosed.

26. Five, affirmative action, whether on the ground of gender or disability, cannot be the foundation for a unilateral or arbitrary appointment to public office. All persons qualifying for office on the ground of special interests should be given an equal opportunity even as between themselves to be considered.

27. In the present case, if it was the intention to nominate Ms Kidiavai on the ground of disability or gender, she would have been nominated at the first instance instead of being put in the so-called *long list*.

28. Before concluding, the Court wishes to disclose that it has not addressed the competency objections which were raised by the Petitioner because of its findings on the merits of the Petition.

Conclusion and Orders

29. From the foregoing, the Court orders that:

- (i) A declaration be and is hereby issued that the nomination and appointment of Ms Dorice Mudeizi Kidiavai as a member of the County Public Service Board, Vihiga, was illegal.
- (ii) An order of certiorari be and is hereby issued quashing the nomination and appointment of Ms Dorice Mudeizi Kidiavai as a member of the County Public Service Board.
- (iii) An order of mandamus be and is hereby issued compelling the Respondent to start the process of recruiting a member of the County Public Service Board afresh.

30. The Petition was in the public interest. Each party to bear their own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF MARCH 2021.

Radido Stephen, MCI Arb

Judge

Appearances

Petitioner	Ngigi Njuguna & Co. Advocates
For Respondent	Office of the County Attorney
For 1 st and 2 nd Interested Parties	Esther Andisi, Principal Legal Counsel
For 3 rd Interested Party	Osango & Co. Advocates
Court Assistant	Chrispo Aura