



Sheria Mtaani Na Shadrack Wambui & Nadi Boru Mohammed & 2 others v Judicial Service Commission (Judicial Review E003 of 2021) [2021] KEELRC 1137 (KLR) (6 July 2021) (Ruling)

Sheria Mtaani Na Shadrack Wambui & another v Judicial Service Commission [2021] eKLR

Neutral citation: [2021] KEELRC 1137 (KLR)

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

JUDICIAL REVIEW E003 OF 2021

NZIOKI WA MAKAU, J

JULY 6, 2021

BETWEEN

SHERIA MTAANI 1ST APPLICANT

SHADRACK WAMBUI 2ND APPLICANT

NADI BORU MOHAMMED 3RD APPLICANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. Pursuant to leave granted by the Court on 16th February 2021, Sheria Mtaani na Shadrack Wambui and Nadi Boru Mohammed filed a Notice of Motion Application dated 17th February 2021 against the Judicial Service Commission. The *Ex-parte* Applicants seek for Orders:-
 1. Spent.
 2. Spent.
 3. A declaration do hereby issue that the Respondent's decision communicated through the Daily Nation Newspaper dated on or about the 27th January 2021 and the Respondent's official website <<https://www.jsc.go.ke/index.php/job-vacancies-feb-2020/>> prescribing a three (3) year post admission experience to the bar as a pre-requisite qualification for consideration and/or appointment as a Resident Magistrate is null and void *ab initio* for being *ultra vires* and in violation of the Article 10, 27, 47 and 55 of the *Constitution* as read together with Section 32(2) of the *Judicial Service Act*, No. 1 of 2011.



4. An Order of certiorari to bring into the High Court for the purposes of quashing the decision of the Respondent as communicated *vide* the Daily Nation Newspaper dated 27th January 2021 and the Respondent's website <<https://www.jsc.go.ke/index.php/job-vacancies-feb-2020/>> to the extent that it prescribes a three (3) year post admission experience as an advocate of the High Court of Kenya as a pre-requisite qualification for the consideration and/or appointment as a Resident Magistrate.
 5. An Order of prohibition prohibiting the Respondent either by itself, its agents or servants from in any manner continuing with the advertisement, recruitment, shortlisting, interviewing, induction and or in any way employing the 50 Resident Magistrates on the basis of the three year post admission experience as advertised in the Daily Nation Newspaper of on or about the 27th January 2021 and the Respondent's website <<https://www.jsc.go.ke/index.php/job-vacancies-feb-2020/>>
 6. That this Honourable Court be and is hereby pleased to issue directions necessary towards ensuring the expeditious disposal of this matter by way of video conferencing either through zoom or Skype during the Covid-19 interruption period.
 7. That in view of the Covid-19 pandemic, this Honourable Court be pleased to order the service of this Application/suit herein either physically, through electronic means to wit, email and/or WhatsApp, whichever is possible.
 8. Costs be in cause.
 9. Any other order that this Honourable Court will be pleased to issue in the circumstances.
2. The Application is based on the grounds that the Respondent advertised 50 posts for the position of Resident Magistrates and one of the necessary qualifications for consideration for appointment as a Resident Magistrate is a three-year post admission experience as an advocate. The *Ex-parte* Applicants are aggrieved by the said requirement which they state is *ultra vires* and potentially discriminates against qualified young advocates that lack the three years post admission to the bar and as such puts the Respondent at a cross purpose with its principal acclaimed objective to be an equal opportunity employer. They assert that the Respondent has illegally relied on irrelevant considerations which are foreign to the requirements set under Section 32(2) of the *Judicial Service Act* and are further irrational, unreasonable and presumptuous that persons with three years post admission qualifications are better, efficient, experienced and/or knowledgeable. The Applicants assert that it is also a breach of legitimate expectation for the young advocates who even after qualifying to be appointed as magistrates, have to wait for three more years and which condition is neither in the *Constitution* nor in the *Judicial Service Act*. They argue further that it is also legitimate expectation of Kenyans that the operations of public bodies and Commissions shall be guided by the dictates of the 2010 *Constitution* as well as enacted Acts of Parliament governing those bodies. Further, that a grant of the orders sought is a win for constitutionalism and the promotion of equal opportunities of employment to youthful advocates yet to clock their third year in practice but who are equal to the task and responsibility of dispensing justice to Kenyans. The Application is supported by the 2nd *Ex-parte* Applicant's Supporting Affidavit sworn on 17th February 2021 on her own behalf and on behalf of the 1st *Ex-parte* Applicant. She asserts that the said 'three years post admission experience as an advocate' prerequisite qualification for appointment as a Resident Magistrate is unconstitutional and unlawful since it bars young advocates like herself from applying for the said position. The deponent asserts that this is further in consideration of the fact that she has taken out a Practicing Certificate, does not have any criminal record and pays taxes as a patriotic citizen.



3. The Respondent is opposed and filed a Replying Affidavit sworn by the Chief Registrar of the Judiciary and Secretary to the Respondent Hon. Anne Amadi. The affidavit sworn on 12th February 2021 depones that the Respondent calling for applications for the position of Resident Magistrates was in exercise of its mandate under Article 172 of the Constitution being *inter alia* to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. She deponed that the Respondent further acted in accordance with Article 73(2) which requires selection on the basis of personal integrity, competence and suitability. She deponed that Paragraph 10, Part III of the Third Schedule to the Judicial Service Act also sets forth the requirements for appointment of Magistrates and other judicial officers of the Judiciary as follows:
- (1) In selecting candidates for appointment, promotion and transfer, the Commission shall have regard to the efficiency of the Judiciary and, in considering public officers for promotion, merit and ability shall be taken into account as well as seniority, experience and official qualifications; and as between public officers' qualifications, proved merit and suitability for the vacancy in question, shall be given greater weight than seniority.
4. She deponed at in accordance with the Paragraph 10, the Commission considers the experience of a public officer and with respect to the appointment of Magistrates, is guided by Section 32(2) of the Judicial Service Act which states:
- “a person shall not be qualified to be appointed as a magistrate by the Commission unless the person —
- i. is an advocate of the High Court of Kenya;
 - ii. has high moral character, integrity and impartiality;
 - iii. has demonstrable management skills;
 - iv. has proficiency in computer applications; and
 - v. has no pending complaints from the Advocates Complaints Commission or the Disciplinary Committee.”
5. She deponed that Section 32 of the Judicial Service Act must further be read in conjunction with Section 2 of the Magistrates Act, 2015 which defines a "magistrate" to mean a chief magistrate, a senior principal magistrate, a principal magistrate, a senior resident magistrate, or a resident magistrate who are appointed based on distinct qualifications and in accordance with the inherent requirements of the functions and duties of those offices. She further avers that pursuant to its constitutional mandate and the statutory powers granted upon it under Section 47 of the Judicial Service Act, the Commission formulated Schemes of Service for Magistrates (the "Scheme") which establishes the standards for recruitment, promotion and the overall career structure for Magistrates. She deponed that the Scheme maps out the requirements for appointment as Resident Magistrate including that the officer must have served in the grade of District Magistrate or a comparable position for a minimum period of three (3) years. She deponed that therefore, the Applicant's claim that the Respondent acted *ultra vires* in setting out the 3 years' experience is untrue and farfetched as such powers are given by the Judicial Service Act and the Scheme. She avers that the Commission was alive to the fact that the efficiency of the Judiciary would be best served by appointment of applicants with at least three years post admission experience to serve as Magistrates. She deponed that by way of an analogy, the Judicial Service Act also provides that Legal Researchers who serve under Judges are required to have two year's post admission experience before appointment and which asserts the post admission experience is



necessary for efficiency in judicial services or any other employment. She believes that it is only logical that Magistrates who render judicial decisions appealable to the High Court should have a higher experience than Legal Researchers. She avers that the Applicants have not pleaded with sufficient precision nor substantiated the allegations on the violations or infringement by the Respondent of Articles 10, 27 and 47 of the *Constitution*. She deponed that for an act to be declared discriminatory, this Court has to establish whether that act differentiates between different persons, whether the differentiation amounts to discrimination, and whether the discrimination is unfair. She asserts that the Respondent's Scheme applies to applicants for the advertised position in this case and that the differentiation which sieves the unqualified person who does not meet the stipulated requirements does not amount to discrimination. She averred that differentiation is permissible if it does not constitute unfair discrimination and that it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. She further avers that *the Scheme* enjoys the presumption of constitutionality until proven otherwise and in this case, its provisions have not been declared invalid or unconstitutional by a Court of competent jurisdiction.

6. The Petition was disposed of by way of submissions and the Court thanks the parties for their detailed submissions. For the Applicants, it was submitted that the requirement under Section 10(II) of the *Respondent's Scheme* that for one to qualify for appointment as a Resident Magistrate one has to have experience of three years as a District Magistrate or in a comparable position, is unlawful. That this is because the position of District Magistrates is obsolete under the Kenyan judicial system post-2015 as acknowledged under Section 4(b) of *the Scheme* and there can therefore be no comparable position and that reliance ought not to be placed on such obsolete requirement. That the imposition of the three years post admission under *the scheme* is thus discriminatory as the same is not backed by the *Judicial Service Act* and is consequently *ultra vires* in so far as the imposed requirement is not contemplated under Section 32(2) or paragraph 10 of the Third Schedule to *the Act*. The Applicants cited the case of *Joy Brenda Masinde v Law Society of Kenya & Another* [2015] eKLR where Odero J. while allowing a petition to quash a requirement that Applicants for the position of Secretary of Law Society of Kenya ought to be a qualified Certified Public Secretary, stated that an administrative body cannot impose additional mandatory requirements that have the effect of barring otherwise qualified persons who meet minimum statutory requirements from applying for a vacancy. They submitted that the Court further stated that such additional requirements can only be used at the interview stage as added advantage and that the minimum qualification for appointment as Secretary/CEO of the Law Society were clearly set out in statute. The Applicants submitted that the *Respondent's Scheme* cannot therefore introduce additional requirements not envisioned under the parent statute and that a body exercising delegated powers cannot exercise those powers in contravention of *the Act* that donates those powers. The Applicants cited the case of *Githu Muigai & Another v Law Society of Kenya & Another* [2015] eKLR and they further rely on Section 24(2) of The *Statutory Instruments Act*, No. 23 of 2013 which states that: "A statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency."
7. The Applicants submitted that in *Henry Mutundu v Chairperson, Independent Electoral and Boundaries Commission & Another; Attorney General (Interested Party)* [2019] eKLR, the Independent Electoral and Boundaries Commission (IEBC) had imposed a requirement in their advertisement that Applicants for the CEO position must possess at least 15 years' experience and the Court quashed the advertisement for not have been contemplated under Section 10 of the *IEBC Act*. The Applicants cited the case of *Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 Others (Interested Parties)* [2019] eKLR where Odunga J. observed that "While such additional qualification may be considered at the stage of interview and in determining the suitability of the candidates, it is my view that imposing such a requirement at inception is inimical



to the requirement that the recruitment be competitive as it amounts to locking out prospective applicants and granting the opening to only a few individuals.” They submit that any additional criteria, not contemplated in law can only apply at the interview stage and contends that that the Respondent acted *ultra vires* by locking out the 2nd *Ex-Parte* Applicant at the preliminary stage while she meets the minimum qualifications under the Constitution and the Judicial Service Act. Further, that they have ably demonstrated that the three years’ experience is not contemplated under the Judicial Service Act. The Applicants submit that the Respondent cannot compare Magistrates and Legal Researchers because Parliament expressly provided at Section 7 of the Act that the Legal Researchers ought to have at least two years post admission experience and that had Parliament wanted to impose a minimum work experience for qualification for appointment as Resident Magistrates, nothing would have been easier but to include the same in Section 32(2) of the Act. The Applicants submitted that the guiding factor for appointment of Magistrates who meet the qualifications under Section 32(2) as intended by Parliament and as can be deciphered from the Third Schedule is the “efficiency of the judiciary”. It is the Applicants’ submission that there is no evidence before this Court to rationalize why the Respondent settled for three years post admission experience and that the Respondent bears the burden to justify such decision pursuant to Section 5(7) of the Employment Act, 2007. They submit that Article 1 of the International Labour Organization Convention No. 111 Discrimination (Employment and Occupation) Convention, 1958 prohibits any form of discrimination, distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. They submitted that Article 1(2) of the Convention only allows such exclusion when the inherent requirements of a particular job so require and that there is no inherent requirements in the instant case which would require a Resident Magistrate to have a minimum of three years post admission experience. They rely on the case of *Law Society of Kenya v Attorney General & National Assembly* [2016] eKLR where the Court held that: “It is therefore clear that discrimination which is disallowed under the Constitution cannot be justified where there is no rational basis for the same. In other words, such discrimination cannot be arbitrarily imposed. It is trite that where no reasons are given for the exercise of discretion in a particular manner, assuming such discretion existed or the reasons given are irrational or irrelevant, the Court is entitled to infer that there were no reasons for the exercise of the discretion in the matter it was exercised.”

8. The Applicants submitted that they have demonstrated there is an apparent disregard of statutory provisions by the Respondent, which are of fundamental nature and that the purpose of the Court is to ensure that the decision-making process is done fairly and justly to all parties and not countenance blatant breaches of statutory provisions. They cited the case of *Resley v The City Council of Nairobi* [2006] 2 EA 311 and urged this Court to grant the reliefs as prayed in their Application pursuant to its requisite jurisdiction under Article 23(3) of the Constitution, Section 11 of the Fair Administrative Act and Section 12 of the Employment and Labour Relations Court Act.
9. The Respondent submitted that the Judicial Service Act 2011 elaborates in no unclear terms the criteria that potential applicants must satisfy when applying to various positions that fall vacant in the Judiciary and that one of the criteria is laid down in Paragraph 13(f)(i), Part V of the First Schedule to the Act which states:
 13. In determining the qualifications of individual applicants under the Constitution, the Commission shall be guided by the following criteria--
 - (f) legal and life experience elements of which shall include -
 - (i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills;



10. The Respondent submitted that in the case of *Republic v Chief Magistrate Milimani Commercial Court & 2 Others Ex-Parte Violet Ndanu Mutinda & 5 Others* [2014] eKLR, Odunga J. considered the broad grounds upon which a judicial review is based and cited authorities where the Court held that in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. The Respondent submitted that for a party to succeed in a matter where the remedy of prohibition is sought, the party must demonstrate that the decision or act complained of was illegal in that it is contrary to the *Constitution*, statute or simply that the decision maker exceeded the powers conferred by statute in carrying out the impugned decision. The Respondent submitted that position is also supported by the case of *Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & Others*, [1997] eKLR Civil Appeal No. 266 of 1996 (CAK) where the Court held that the remedy of prohibition does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. The Respondent submitted that this Honourable Court should not issue an order of prohibition as sought by the *Ex parte* Applicants because there is no ounce of illegality that can be found in the Respondent's decision. The Respondent further submitted that the broad grounds upon which an order of certiorari is based were discussed in *David Mugo t/a Manyatta Auctioneers v Republic*, Civil Appeal No. 265 of 1997 which was cited with approval in the case of *Republic v Disciplinary Committee of the Law Society of Kenya Ex parte Robinson Onyango Malombo* [2010] eKLR. The Respondent submitted that the Court of Appeal held that an order of certiorari lies where there is want or excess of jurisdiction; denial of natural justice; and error on the face of the record. It submitted that the *Ex parte* Applicants' application is based on grounds which do not warrant the exercise of this Court's discretion to grant an order of Certiorari in their favour and urges this Honourable Court to dismiss the said prayer.
11. The Respondent submitted that in order for a party to succeed in proving that an act is discriminatory, they must demonstrate that the decision/act complained of differentiated them with other persons holding similar qualifications. It cited the case of *Willis v The United Kingdom* No. 36042/97, ECHR 2002-IV (cited with approval in *EG & 7 Others v Attorney General; DKM & 9 Others; Katiba Institute & Another* [2019] eKLR), where the European Court of Human Rights observed that discrimination is:
- “...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available members of society.”
12. The Respondent urged this Honourable Court to find that the *Ex parte* Applicants have failed to establish that the advertisement by the Respondent is discriminatory. They further submitted that it is now an established principle of law that anyone who wishes the court to grant a relief must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it and that it is not enough to allege infringement of the *Constitution* without particularizing the details and manner of infringement. The Respondent submitted that the *Ex-Parte* Applicants have not pleaded how the Respondent's advertisement dated 27th January 2021 was in violation of Articles 10, 27 and 55 of the *Constitution*. The Respondent urged this Honourable Court to dismiss the *Ex parte* Applicant's Application with costs to the Respondent.
13. The *Ex parte* Applicants challenge to the advertisement for recruitment to the positions of Resident Magistrate by the Respondent. The impugned advertisements were carried by print and electronic



media circa 27th January 2021. The *Ex parte* Applicants challenge the legality of the advertisement which they term discriminatory and *ultra vires* and void *ab initio*. Without reproducing the *Ex parte* Applicants' arguments in extenso, the following arguments bear repeating. The *Ex parte* Applicants argued that the guiding factor for appointment of Magistrates who meet the qualifications under [Section 32\(2\)](#) as intended by Parliament and as can be deciphered from the [Third Schedule](#) is the "efficiency of the judiciary". They argued that there is no evidence before this Court to demonstrate why the Respondent settled for three years post admission experience. They argued further that the Respondent bears the burden to justify such decision pursuant to Section 5(7) of the [Employment Act, 2007](#). They argued that the Respondent was in breach of the [ILO Convention No. 111 Discrimination \(Employment and Occupation\) Convention, 1958](#) which prohibits any form of discrimination, distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The *Ex parte* Applicants argued that Article 1(2) of [the Convention](#) only allows such exclusion when the inherent requirements of a particular job so require. They argued that any additional criteria, not contemplated in law can only apply at the interview stage and contended that that the Respondent had acted *ultra vires* by locking out the 2nd *Ex-parte* Applicant at the preliminary stage despite the fact that she meets the minimum qualifications under the [Constitution](#) and the [Judicial Service Act](#). They cited a slew of authorities on the question of discrimination and argued that there is no inherent requirement in this instance which would oblige a Resident Magistrate to have a minimum of three years post admission experience in order to be employed by the Respondent. On its part, the Respondent asserts that there was no discrimination and that it had set the 3 years post admission experience because the work of a Resident Magistrate is to determine disputes which would require some degree of post admission experience and that the requirement imposed on applicants was permissible and within the confines of the law. It was argued that the acts the *Ex parte* Applicants complains of are nothing close to discriminatory as the Respondent had set a 2-year post admission experience for legal researchers. It was argued that it is only logical that Magistrates who render judicial decisions appealable to the High Court should have a higher experience than Legal Researchers.

14. The Court has considered the pleadings, the affidavits and evidence filed, the elaborate submissions of parties and the authorities cited in coming to this decision. The Statutory Statement accompanying the Petition is very similar to the motion before me. The statement indicated the reliefs being sought to be judicial review orders for
 - a. A declaration do hereby issue that the Respondent's decision communicated through the Daily Nation Newspaper dated on or about the 27th January 2021 and the Respondent's official website <<https://www.jsc.go.ke/index.php/job-vacancies-feb-2020/>> prescribing a three (3) year post admission experience to the bar as a pre-requisite qualification for consideration and/or appointment as a Resident Magistrate is null and void *ab initio* for being *ultra vires* and in violation of the Article 10, 27, 47 and 55 of the [Constitution](#) as read together with Section 32(2) of the [Judicial Service Act](#), No. 1 of 2011.
 - b. An Order of Certiorari to bring into the High Court for the purposes of quashing the decision of the Respondent as communicated *vide* the Daily Nation Newspaper dated 27th January 2021 and the Respondent's website <<https://www.jsc.go.ke/index.php/job-vacancies-feb-2020/>> to the extent that it prescribes a three (3) year post admission experience as an advocate of the High Court of Kenya as a pre-requisite qualification for the consideration and/or appointment as a Resident Magistrate.
 - c. An Order of Prohibition prohibiting the Respondent either by itself, its agents or servants from in any manner continuing with the advertisement, recruitment, shortlisting,



interviewing, induction and or in any way employing the 50 Resident Magistrates on the basis of the three year post admission experience as advertised in the Daily Nation Newspaper of on or about the 27th January 2021 and the Respondent's website <<https://www.jsc.go.ke/index.php/job-vacancies-feb-2020/>>

- d. That this Honourable Court be and is hereby pleased to issue directions necessary towards ensuring the expeditious disposal of this matter by way of video conferencing either through zoom or Skype during the Covid-19 interruption period.
 - e. That in view of the Covid-19 pandemic, this Honourable Court be pleased to order the service of this Application/suit herein either physically, through electronic means to wit, email and/or WhatsApp, whichever is possible.
 - f. Costs be in cause.
 - g. Any other order that this Honourable Court will be pleased to issue in the circumstances.
15. These reliefs are exactly what was sought in the motion and as a consequence, the determination of the motion will dispose the Petition. It is evident that for an act to be declared discriminatory, this Court has to establish whether that act differentiates between persons in the same category, whether the differentiation amounts to discrimination, and whether the discrimination is unfair. In my considered view, any differentiation which sieves unqualified persons who do not meet the stipulated requirements does not amount to discrimination. Differentiation is permissible if it does not constitute unfair discrimination. This differentiation that allows for an employer to determine the specific skills sets without going overboard is constitutionally is permissible differentiation and does not amount to discrimination. As pointed out by the *Ex parte* Applicants, Article 1(2) of the [ILO Convention No. 111 Discrimination \(Employment and Occupation\) Convention](#), 1958, any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination. The position of a Resident Magistrate is a job that requires a degree of legal knowledge and experience. A requirement that applicants to this position must possess at least 3 years post admission experience is not discrimination. Having found as much, the Court returns in respect to the reliefs sought, as to the requirement that the Respondent's decision communicated through the Daily Nation Newspaper dated on or about the 27th January 2021 and the Respondent's official website prescribing a three (3) year post admission experience to the bar as a pre-requisite qualification for consideration and/or appointment as a Resident Magistrate I hold that requirement is not null and does not violate Articles 10, 27, 47 and 55 of the [Constitution](#) as read together with Section 32(2) of the [Judicial Service Act](#), No. 1 of 2011. The Judicial Service Commission was within the strict confines of the law in insisting for at least 3 years post admission for applicants to the position of Resident Magistrate as advertised on its website and the print media. As such, the 2nd Applicant's legitimate expectation that she could be shortlisted and interviewed for the position of Resident Magistrate is a misplaced expectation as some degree of experience is required to execute the office of Resident Magistrate. I find that the order of certiorari sought is incapable of grant as is the order of prohibition. In the final analysis, there being no merit in the challenge by the Applicants, the Petition is accordingly only fit for dismissal and is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2021

NZIOKI WA MAKAU

JUDGE

