



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 113 OF 2018

GIKUNDI MURIUKI.....1ST PETITIONER

JOSEPH GATIKA.....2ND PETITIONER

VERSUS

KENYA PRISONS SERVICE.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

MARTIN OREMBO.....INTERESTED PARTY

JUDGEMENT

1. In the petition filed on 21st March, 2017 the petitioners contended among others that:

- a. *The Petitioners are suing on behalf of their colleagues at the Kenya Prisons Service who are aggrieved and dissatisfied with the criteria of appointments and promotions by the 1st Respondent.*
- b. *That the Petitioners are ranked between the positions of prison constables and Sergeants.*
- c. *The Petitioners have been in the same position for more than ten (10) years without career advancements.*
- d. *That the Petitioners have improved their educational qualifications by obtaining undergraduate degree certificates, Masters, and Phds but the 1st Respondent has neglected and/or refused to offer them any upward mobility.*
- e. *That on 7th October, 2014 the Prison Scheme of Service came into force and its contents were meant to favour new recruits in the interest of the senior officers who intended to hire their keens and cronies.*
- f. *That the Petitioners approached the relevant bodies for assistance including the Commission of Administrative Justice, Salaries and Remuneration Commission and The Law Society of Kenya but our efforts proved futile.*
- g. *That sometime in August, 2016 the Prisons Commissioner General wrote to regional commissioners directing wardens to submit applications for promotions by 5th September, 2016 to the positions of Inspector.*
- h. *. That the said directive aroused fear within the Prisons Department since the same was tailor made to favour the Prison Directors and Top Officers who already had preferred candidates.*
- i. *That the directive by the Commissioner General was skewed and conceived to favour friends and relatives in the following manner,*
- j. *That between 4th January, 2017 and 31st January, 2017 the Petitioners reported to the Departmental Promotions Board at the Prisons Headquarters and participated in the interviews for promotion.*
- k. *On 16th March, 2017 the Petitioners were shocked to realize that lists for successful candidates was released but the same*

contained names of wives, children, in-laws, friends and relatives of the Prison Directors and senior Officials of the 1st Respondent.

l. The Petitioners are aggrieved and dissatisfied with the said decision and/or promotions since most of them are long serving officers and have relevant educational qualifications yet they have been denied promotions due to nepotism, favoritism and corruption that have bedeviled the Prisons Department.

2. The petitioners as a consequence of the above allegations contended that the respondents violated article 10(2) (b) and (c) of the Constitution by skewing and conceiving a prison service scheme without their participation and further using it to benefit the top officials by recruiting their wives, children, in-laws friend and relatives at the expense of long serving wardens with relevant educational and academic qualifications. This action according to the petitioners portrayed that the respondent failed to meet the constitutional standard of equity, equality, non-discrimination and protection of the marginalized communities.

3. Further by failing to adhere to the provisions of article 27 of the Constitution, the respondent grossly infringed and violated the rights of the petitioners by offering promotions to persons predominantly from two tribes in Kenya hence discriminating the petitioners on ground of social and ethnic background. The petitioners therefore sought orders among others that a declaration that the interview for promotions carried out between 4th January, 2017 to 31st January, 2017 was inconsistent with or in contravention of article 10,27,48 and 73 of the Constitution.

4. The petitioners further sought an order of judicial review in the nature of certiorari to remove to the court quashing the outcome of the interview for promotions carried out between 4th January, 2017 and 31st January, 2017. Further an order of prohibition prohibiting the 1st respondent from issuing appointment letters to persons promoted on the basis of the recruitment exercise carried out on 4th January, 2017 to 31st January, 2017.

5. The 1st respondent filed a replying affidavit through one John K. Nkiria who deponed on the main that:

a. That I am the Senior Deputy Commissioner of Prisons and Director of Administration and Personnel of the Respondent/Applicant conversant with the matters set out in the motion and in that capacity I am duly authorized and competent to swear this affidavit.

b. That I am charged with the responsibility of transfers, deployment, recruitment and promotions for officers within the Kenya Prison Service.

c. That an internal advertisement for the positions of Inspector and Chief Inspector of Prisons was made on 12th August 2016

d. That the said positions for promotions were open to all serving officers in the rank of Constable, Corporal, Sergeants, Senior Sergeants and Inspector of prisons.

e. That about two thousand and two (2002) applications were received and all the applicants applied for positions were shortlisted for interviews.

f. That the interviews for promotions took place from 4th to 26th January, 2017.

g. That on 16th March 2017, the Commissioner General of Prisons of the 1st Respondent/Applicant, communicated via signals, to all Regional Commanders, the names of the officers who were successful in the interviews for promotions.

h. That the said signals contained the names of the officers who were promoted to the ranks of Inspector and Chief Inspector of Prisons and clearly indicate that the promotions would take effect from 16th Marh, 2017.

i. That the officers promoted on the 16th march 2017 immediately assumed office and currently undertaking their duties in their respective ranks.

j. That the promotions were carried out as there was dire need to fill existing vacancies in order to enable the Prison Service to discharge its mandate effectively.

k. That the officers who were duly promoted were selected through a competitive process with due regard to merit, discipline and availability of vacancy in their respective fields of specialization.

l. That the reliefs sought by the Petitioners/Respondents aim at stopping the process of promotions which has already been conducted and completed.

6. In his final submissions in support of the petition, Mr Swaka for the petitioners submitted that the petitioners sought the intervention of the court since their fundamental rights and freedoms were being infringed upon by the respondents. Article 10 provides for national values and principles of governance which include equity, inclusiveness, human rights and non-discrimination whereas article 232 stipulates for fair competition and merit appointments and promotions. According to counsel, it was visible that his client's rights as protected by the foregoing provisions of the constitution were violated in the said promotions that were riddled with irregularities and discrimination.

7. Counsel further submitted that the respondent being a public body established and governed by the constitution violated article 10(2) (b) and (c) by skewing and conceiving a prison service without their participation and using it to benefit the top officials by recruiting their

wives, children, in laws, friends and relatives at the expense of long serving wardens with relevant educational and academic qualifications. Participation in the making of laws was an inalienable right provided for in the constitution. Counsel further submitted that the respondent violated the provisions of article 48 on access to justice by stifling and muzzling the petitioners from inquiring or complaining on the aforementioned injustices.

8. The respondent on its part submitted that due process was followed in the interviews and promotion exercise and that there was strict adherence to the provisions of the constitution. Ms Ndirangu further submitted that the process of promotions begun on 12th August, 2016 when the 1st respondent advertised internally for the interviews for promotion for positions of Inspector and Chief Inspector positions which were open to officers in the rank of Sergeant, Corporals and Constables of prisons. The 1st respondent received over 2002 applications including those of the petitioners and all those who applied were short listed. The interviews were conducted from 4th January to 31st January 2017 and 110 met the requirements and were successful. The list of those promoted was released on 16th March, 2017 and the selection was done through a competitive process with due regard to merit, discipline and availability of vacancy in their respective fields of specialization. The petitioners were unfortunately unsuccessful.

9. According to counsel the appointments were done in compliance with the Prisons Act and constitutional ethos particularly article 27 and requirement of fair competition and merit which form the basis of appointments and promotions in public service under article 232 (1) (g).

10. Concerning allegations of nepotism and favoritism, counsel submitted that the name of a person cannot be sufficient evidence of his relationship to the appointing authority. The court therefore could not presume by a cursory glance at the names of the successful candidates and make a determination as to their ethnicity or relationship with the 1st respondent's officials. Mr Ndirangu further submitted that consideration of regional and ethnic diversity did not demand that every tribe in Kenya be represented in the appointments yet only four positions were available. Further whereas the court has jurisdiction to look into the legality of the process of the interviews and promotions, it should not get into the realm of merit of the decisions of a competent body. The petitioners by raising claims that they were more qualified than the successful candidates are invoking the court to sit on appeal over the selection by the 1st respondent which would be improper. According to counsel, the courts concern should be limited to the integrity of the decision making process but not the merits of the impugned decision. The court has no basis for looking into the subjective mind of the 1st respondent in selecting the successful candidates.

11. Further it was trite law that the burden of proof was on the petitioners to prove that their rights had been violated by the actions of the respondent. They must adduce evidence that the promotion process as conducted by the 1st respondent violated their rights protected by the constitution. The supporting affidavit of the petitioner's sworn by Mr Gikundi Muriuki contained mere accusations against the respondent with no averment of fact to establish that there were defects in the procedure fundamental omissions or considerations of extraneous matters. The so called evidence furnished by the petitioners was a list generated by themselves of the people who were promoted but in their view had no qualifications.

12. Ms Ndirangu further submitted that the petitioners never exhausted all the mechanisms and remedies available. According to counsel when the Prisons Service Scheme came into force on 7th October, 2014 and the petitioners felt its contents were meant to favour new recruits, they sought help from the Commission on Administrative of Justice, SRC and LSK. The complaint lodged was with regard to the recruitment exercise by the 1st respondent. The 1st respondent's commissioner responded to these allegations stating that the scheme had been approved by the Public Service Commission and released to the department following which a team of senior prison officers was appointed to carry out sensitization exercise country wide. The Commissioner clarified that the scheme of service did not create new vacancies but only gave guidelines for the entry point of newly recruited officers commensurate with their academic qualifications and that serving officers posts were not interfered with.

13. Counsel further submitted that there was no evidence to show that the petitioners attempted to seek redress through the internally provided mechanisms for dispute resolutions. Section 8 provided for the procedure for internal dispute resolution mechanism which the petitioners never followed. Counsel further submitted that the petitioners being public servants failed to adhere to section 13 of the Public Service (values and Principle) Act 2015 which grants civil servants an avenue to lodge their complaints before they seek judicial redress.

14. The petitioner's initial complaint to the Commission on Administrative Justice, LSK and SRC was over the Kenya Prisons Scheme of Service which came into force on 7th October, 2014. The complaint was that the drafters of the scheme never sought suggestions from all stake holders especially prison officers before forwarding it to the public service commission for approval hence the contents did not reflect the general feelings of the prison officers but served the interest of the senior officers.

15. According to the petitioners the scheme majorly favoured new recruits but made little or no mention of serving prison staff that possessed relevant academic qualifications making the same a tool for senior officers to hire their kin into the service in the name of professionals. The petitioners further complained that the scheme did not provide for the rank of graduate constables making the prison department the only government institution which did not reward efforts by serving staff to better their knowledge and skills through higher education. According to the petitioners, the department had gone ahead and advertised for recruitment of professional cadet officers without first considering serving officers who possess similar academic qualifications or even higher than those advertised. Most skills and expertise sought by the prisons department through recruitment were available within the prison service but the senior officers wanted to hire their kins to fill the vacancies.

16. In the petition the main complaint seem to concern dissatisfaction with the criteria for appointments and promotions by the 1st respondent. According to the petitioners they had been in the same position for more than 10 years without advancement and some had improved their educational qualifications by obtaining undergraduate degrees, masters and Phds but the respondent had neglected to offer them upward mobility.

17. In August, 2016 the Commissioner of Prisons wrote to regional commissioners directing wardens to submit applications for promotions by 5th September, 2016 to the positions of inspector. According to the petitioners, the directive aroused fear within the prisons department

since the same was tailor made to favour the prison directors and top officers who already had preferred candidates.

18. The petition was filed on 21st March, 2017 while the scheme of service for prisons staff which forms part of it came into force on 7th October 2014. Pursuant to this scheme of service which the petitioners faulted, advertisements were put up in the daily newspapers on 27th April, 2015 to recruit professional cadet officers.

19. Further in August, 2016 the Commissioner of Prisons wrote to regional commissioners directing wardens to submit applications for promotion to positions of inspector by 5th September, 2016. According to the petitioners between 4th and 31st January, 2017 they reported to Departmental Promotions Board and participated in the interviews for promotion. On 16th March 2017 the petitioners were shocked to realize that the list of successful candidates contained names of wives, children, in laws, friends and relatives of prison directors and senior officials of the 1st respondent.

20. The court observes that the scheme of service complained about came into force on 17th October, 2014. Under the said scheme recruitment for cadets was called for on 27th April, 2015. Further under the said scheme the petitioners were directed by the commissioner to apply for promotion by 5th September, 2016. The petitioners applied and between 4th and 31st January 2017 appeared before the Departmental Board and participated in the interviews for promotion. The results came out on 16th March 2017 however the petitioners were not among the persons recommended for promotion. In the petitioner's view, the only reason they were not recommended was because the Commissioners and senior officers seized the opportunity to recruit their wives, in-laws and children who did not even have the minimum academic qualifications.

21. The respondent received 2002 applications for promotion and only promoted 110. The competition therefore must have been very stiff. Not everyone could possibly have qualified for promotion. The court has further noted that from the onset, the petitioners appeared opposed to the implementation of the scheme of service despite being part of the officers who were sensitized over it. Further, the court noted that the petitioners alleged that the calling for applications for promotions done by the Commissioner pursuant to the said scheme caused fear since the same was tailor made to favour the respondent's directors and top officers who already had preferred candidates.

22. The court considering the petition as a whole cannot help but perceive the same as an attempt by the movers to resist reform and the opening up of the prison service to merit based recruitment to public service as required by article 232 of the Constitution. The petitioners appeared to fear that if the service was opened to competitive recruitment, they would lose out and therefore preferred an exclusive club where promotion was based on longevity of service and not merit. These are the true and naked facts of the petition and invocation of the constitution was merely intended to hide the real fear the petitioners had.

23. From 2014 when the scheme of service came into force, through to the participation in the promotion interviews in January 2017 and the filing of the petition herein on 21st March 2017 after the petitioners were unsuccessful and after the issuance of promotion letters to successful candidates was an attempt by unsuccessful petitioners to stall a process simply because they felt more deserving than the rest. The Departmental Promotion Committee before whom the interviewees appear were masters of their own game. They interviewed each and every individual candidate and made their own assessment and settled on the 110 out of the 2002 applicants. Unless for glaring anomalies and malpractices backed by evidence the court cannot substitute its own view of who was better to be promoted than the other. The allegations over the wives, children and in-laws of the directors and top officials was not supported by any evidence. Further, even if that were so, the petitioners did not provide evidence that they were the only ones recruited at the expense of other qualified officers.

24. The court, courts of equal status including High Court and Superior courts have pronounced themselves severally on what constitutes a constitutional question and the minimum threshold to qualify as a constitutional question. Some of the decisions have been relied on by counsel for the parties. The court will pronounce no more save that the petition does not meet the set threshold and the same is hereby dismissed with no order as to costs.

25. It is so ordered.

Dated at Nairobi this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

Delivered this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

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