



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT ELDORET**

**PETITION NO 4 OF 2018**

**FRANCIS CHAMWOR P.S. O MUKEN AND 2 OTHERS.....PETITIONERS**

**VERSUS**

**THE SPEAKER TRANS-NZOIA COUNTY ASSEMBLY AND 3 OTHERS...RESPONDENT**

**J U D G E M E N T**

1. By a petition dated 31<sup>st</sup> July, 2019 the Petition sought orders among others that: -

i. A declaration be issued to the effect that the actions and omissions of the 1<sup>st</sup> to 5<sup>th</sup> Respondents constitute Discrimination, Unfair labour Practices, Nepotism, Partiality, Gross abuse of office and Corrupt Practices which are inconsistent with the purposes and objects of the constitution of Kenya, 2010.

ii. A declaration that the appointment of 5<sup>th</sup> to 48<sup>th</sup> Respondents on 1<sup>st</sup> July, 2016 as Employees of the 2<sup>nd</sup> Respondent on permanent and pensionable terms to the exclusion of 6 other employees who were also employed on contract terms was discriminatory and influenced by Nepotism, Favourism and corrupt practices involving members of the 1<sup>st</sup> and the Respondents and the 5 to 48<sup>th</sup> Respondents jointly and severally, and was in breach of the Employment Act 2007, the Constitution and Internationally recognized Labour Practices and the same are null and void.

iii. A Declaration to the effect that it is an act of abuse of office and corruption for the 5<sup>th</sup> Respondent (IRENE WAMBANI SASAKA) to serve both as Member of the 4<sup>th</sup> Respondents Service Board and employee of the 2<sup>nd</sup> Respondent and earning allowances and salary.

iv. An order of certiorari do issue to remove to this court and quash the proceedings and decision of the 4<sup>th</sup> Respondent service Board of 27<sup>th</sup> June, 2016 to employ the 5<sup>th</sup> to 49<sup>th</sup> Respondents on permanent and pensionable terms.

2. The petitioner relied on facts among others that: -

i. On the 29<sup>th</sup> day of June, 2015 the 4<sup>th</sup> Respondent County Assembly Service Board advertised vacant job positions in the Daily Nation dated Monday, June 29<sup>th</sup>, 2015 but did not clarify whether the same were to be on contract or on permanent and pensionable terms.

ii. 108 Applicants for the advertised positions were shortlisted and their names were published on print media in the star newspaper on the Friday 4<sup>th</sup> September, 2015.

iii. Out of the 108 Shortlisted Applicants 51 were employed on 2 years renewal contract with effect from 26.10.2015.

iv. The 4<sup>th</sup> Respondent conducted interviews of the shortlisted candidates after which on the 26<sup>th</sup> October, 2015, or thereafter 51 successful people were appointed to various positions on 2 years Renewable Contract.

v. There were however persons who neither applied for the advertised jobs nor shortlisted and interviewed who were also employed

on contract making the Member of new employers recruited pursuant to the job's advertisement on 29.6.2015 to be 64 being: -

1. Harriet C. Rop office Assistant 1
2. Iva Stella Wekesa ICT Assistant 1
3. Winfridah Mokaya Office Administrative Ass.
4. Michael Engolan Gardener
5. Hellen Wanjiku Njuki Office Assistant
6. Ben Bittok Korir Committee Clerk 1
7. Andrew Wekesa Weswa Office Assistant
8. David Etyang Wamalwa Office Administrative Ass.
9. Mwikali Matembwa Office Administrative Ass.
10. Benard Nyongesa Manyonge Office Assistant
11. Magdalene Chepkorir Kemei Office Assistant
12. Pascal Kipchirchir Kemei Office Assistant
13. Nobert Kipkosgei Committee Clerk 1

vi. Three quarters of the job applicants who were shortlisted were related to the Members of the 2<sup>nd</sup> Respondent County Assembly (MCA's) and Members of the 4<sup>th</sup> Respondent Service Board, and the employees who were recruited without first applying for the jobs and being shortlisted and interviewed were so employed pursuant to improper motives or corrupt practices.

vii. Between Sunday the 26<sup>th</sup> day of June ,2016 and Wednesday, the 29<sup>th</sup> day of June, 2016 the 2<sup>nd</sup> Respondents Budget and Appropriation Committee comprising the 1<sup>st</sup> Respondent , all Members of the 2<sup>nd</sup> Respondents the 3<sup>rd</sup> Respondents and curiously the 5<sup>th</sup> Respondent who is a Member of the 4<sup>th</sup> Respondent were meeting at a retreat at the Sunset Hotel, at Kisumu ostensibly to approve the budget estimates for the County Government of Trans Nzoia for the 2016/2017 Financial year.

viii. On the 27<sup>th</sup> day of June 2016 the Members of the 2<sup>nd</sup> Respondent made it a condition precedent that they would only approve the budget estimates if their relatives who had in October,2015 been employed on contract are confirmed on Permanent and Pensionable terms.

ix. On the said 27<sup>th</sup> day of June,2016 at 4.00pm the 4<sup>th</sup> Respondent whose Membership present comprised of the 1<sup>st</sup> Respondent the 3<sup>rd</sup> Respondent and the 5<sup>th</sup> Respondent convened an impromptu meeting to approve the demands of the Members of the 2<sup>nd</sup> Respondent.

x. The new positions created on 27.6.2016 for employment on permanent and pensionable terms were not advertised to allow selection on the basis of personal integrity, competence and suitability of the interested applicants and to allow a wider number of persons the right to apply for employment from within the County and from outside the County.

xi. The 5<sup>th</sup> Respondent being a Member of the 4<sup>th</sup> Respondent Service Board corruptly also held the position of Employee of the 2<sup>nd</sup> Respondent thereby earning salary as employee as principal Clerk and allowances as Member of the 4<sup>th</sup> Respondent Service Board.

xii. The 5<sup>th</sup> Respondent in abuse of her Membership of the 4<sup>th</sup> Respondent corruptly employed herself on permanent and pensionable terms and also presided over the employment of the 6<sup>th</sup> Respondent who is her spouse on permanent and pensionable terms also.

xiii. The failure as required by law to advertise the positions filled by the 5<sup>th</sup> to 4<sup>th</sup> Respondent as permanent and pensionable employees denied of other competent residents of Trans-Nzoia and Kenya the right to apply and compete for appointment and or selection on merit.

xiv. The 6 employees serving on 2 Years Renewable Contract were discriminated against and excluded from being employed on Permanent and Pensionable terms because none of them was related or fronted by Members of the 2<sup>nd</sup> Respondent: -

## **Particulars**

- a. Benard Kipsang Kwalia Camera Technician P/FNO 20150084129
- b. Moses Fwamba Maina Camera Technician P/FNO: 20150084110
- c. Valentine Biegon Chepkogei Hansard Recorder P/FNO: 20150084085
- d. Mike Musungu Mwalati Hansard Recorder P/FNO: 20150084094
- e. David Sirengo Musundi Committee Clerk II
- f. Benta Bokose Warden

3. The petitioner has averred that article 10(1) and (2) (b) and (c) of the Constitution concerning natural values and principles of governance was thus violated. The petitioner further alleged that the actions by the respondents violated article 41(1) on fair Labour practices. The petitioners further cited violations of article 73 on responsibilities of leadership and article 75(1) on conduct of state officers.

4. According to the petitioner the actions of the respondent caused injury to the public in that it resulted in the employment of unqualified persons which compromised service delivery, loss of public funds paid to persons who were appointed to positions which they did not qualify for. Further persons belonging to marginalized committees and persons with disabilities were not considered.

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent filed a replying affidavit through one Elkana Kipkurgat Korir who deponed on the main that: -

(1) **THAT** I am the Human Resource Officer at the County Assembly of Trans Nzoia by virtue of which position I am well conversant with all matters of employment at the institution.

(2) **THAT** I am authorized by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to swear this affidavit on their behalf.

(3) **THAT** the amended petition dated 31<sup>st</sup> July, 2019 together with its Supporting affidavit and annexures thereto have been read and explained to me by my advocates on record and having understood its import and tenor I now wish to respond to the same as herein under.

(4) **THAT** on 29<sup>th</sup> June, 2015 the County Assembly of Trans- Nzoia Service Board advertised various job vacancies.

(5) **THAT** 1386 persons did apply for the various vacancies out of which 108 applicants were shortlisted.

(6) **THAT** due process was followed and shortlisting of the said 108 candidates was done on 29<sup>th</sup> August, 2015, 30<sup>th</sup> August 2015, 31<sup>st</sup> August 2015, 1<sup>st</sup> September 2015, 2<sup>nd</sup> September 2015 and 3<sup>rd</sup> September 2015.

(7) **THAT** after the shortlisting exercise, interviews were conducted as per the guidelines and only on the shortlisted candidates and they were recruited based on merit.

(8) **THAT** it is not true that three quarter of the job applicants who were shortlisted were related to the members of the county assembly and members of the service board and that they were recruited without first applying for the jobs and being interviewed and shortlisted.

(9) **THAT** the County Assembly's Budget and Appropriation Committee does not comprise the whole house as alleged in paragraph 6 of the Supporting affidavit; the committee is created under Standing Order 185 which provides: -

a. **“There shall be a select to be known as the County Assembly Budget and Appropriate Committee.**

b. **The committee shall consist of a chairperson and not more than eight other members .....**”

(10) **THAT** purported list appended to the minutes of the Board is a false document formulated by the petitioner and the list did not emanate from the County Assembly Service Board.

(11) **THAT** the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not violate any provisions of the constitution as alleged by the petitioners.

(12) **THAT** the Respondents did not act in any manner as to have caused any injury to the public.

6. In his submissions in support of the petition, Kraido for the petitioner submitted among others that the 4<sup>th</sup> respondent's decision of 27<sup>th</sup> June, 2016 which led to the employment of 5<sup>th</sup> to 48<sup>th</sup> respondents without following due procedure contravened chapter 6 of the Constitution on trust and authority placed on its to promote confidence and integrity. The respondents failed to apply impartiality in their decisions and were influenced by nepotism, favouritism and corruption. To this extent counsel relied on the case of **Ferdinand Ndung'u Waititu v Benson Ritho and 2 Others (2018) eKLR.**

7. To prove their allegations the petitioners annexed as evidence exhibit 1 to 10 in their supporting affidavit. Whereas the successful candidates had been shortlisted in respect to the advertised positions, other persons clearly listed in pages 11 and 12 of the petitions who were neither applied for the advertised jobs, shortlisted nor interviewed were also employed alongside successful candidates.
8. Counsel further contended three quarters of the job applicants who were shortlisted were related to the members of the 2<sup>nd</sup> respondent's County Assembly MCAs and members of the 4<sup>th</sup> respondents Service Board. This according to Counsel contravened article 232 of the Constitution which calls for accountability and transparency in affording equal opportunities for appointments. In support counsel relied on the case of **Robert Mureithi Ndegwa v Minister for Toursim Act 41 of 2012.**
9. Counsel further submitted that the employment of the 5<sup>th</sup> to 48<sup>th</sup> respondent on permanent and pensionable terms was not based on competence and merit but purely on personal relationship with members of the 2<sup>nd</sup> and 4<sup>th</sup> respondent.
10. Ifedha for respondents on the other hand submitted that its was imperative that a party coming to court alleging violation of the Constitution must with reasonable precision speak out the relevant articles of the Constitution violated and particularize the alleged violation. In this context counsel relied on the case of Anarita Karimi Njeri v Republic and Meme vs Republic (2004) eklr. According to Counsel the petitioner had blanketly quoted articles of the Constitution without proving or elaborating how the said provisions were contravened by the respondents.
11. The petitioners alleged that the respondents did not follow due procedure and that they contravened Chapter six of the Constitution but did not elaborate and prove how the 4<sup>th</sup> respondent breached the provisions of the Constitution. The recruitment process according to Counsel was done in a transparent manner from advertisement of the positions in the Nation Newspaper, conducting free and fair interviews and recruiting employees based on qualification and merit.
12. According to the petitioner the respondent contravened the stated provisions of the Constitution when two-year contract of six employees was not renewed while the rest of the employees remained in employment.
13. However, counsel submitted that an employee who does not renew a contract of an employee does not amount to violation of constitutional rights under article 41 of the Constitution on fair Labour practices. The employees whose contract were not renewed were aware that the continuity of their employment with the respondent was based on their performance which was to be assessed and reviewed by the 4<sup>th</sup> respondent.
14. On whether the petition was brought in public interest, counsel submitted that it was clear that the petitioners brought the petition on behalf of the six employees whose contracts were not renewed by the 2<sup>nd</sup> and 4<sup>th</sup> respondent and not on behalf of the general public as purported.
15. The 6<sup>th</sup> to 48<sup>th</sup> respondent together with six named persons were employed at the same time and the petitioners at that time never felt that there were issues of nepotism, ..... and corruption during the recruitment. According to the petitioners the said violations only arose after the said contracts were not renewed. According to Counsel of the six had their contracts renewed the petition would not have been filed.
16. By an advertisement in print media on 29<sup>th</sup> June, 2015 the respondent declared certain vacancies and invited applicants from suitable candidates. By another advertisement dated 14<sup>th</sup> September, 2015 the respondent shortlisted candidates and conducted interviews on 26<sup>th</sup> October, 2015 and those who were successful appointed to various positions on two years renewable contract. The issue of ....., nepotism and corruption was never raised upon the appointment of these who emerged successful after the interviews. This petition was filed for the first time on 4<sup>th</sup> August, 2016 almost one year after the appointment of successful applicants. There is therefore a service in which the respondent could be right in submitting that this petition was not been brought in good faith and was prompted by the none renewal of the two-year contract of some six employees. The Court however notes that whereas the initial appointments were on two-year renewable contracts, the transition to permanent and pensionable employees was never done through an open and competitive selection process. The respondent did not produce any evidence of any advertisement whether internal or external asking for promotional or transitional interviews.
17. Counsel for the respondent while submitting that the respondent was under no obligation renew a fixed seem contract and further that the six whose contracts were not renewed was on the basis of nonperformance did not exhibit any evidence of any appraisal of the six showing there performance did not meet expectations. No show cause letter or any form of warning was exhibited in support. To this extent the petitioners are justified in raising the complaints in the petitioner.
18. The internal .....from fixed term contract to permanent and pensionable terms without an open and competitive process therefore amounted to unfair Labour practice. The exclusion of the six employees from the transition to permanent terms on unproved allegations of non-performance was in the Court's view discriminatory.
19. In conclusion, the court hereby declares that the appointment of 5<sup>th</sup> to 48<sup>th</sup> respondents on 1<sup>st</sup> July, 2016 as employees of the 2<sup>nd</sup> respondent on permanent and pensionable terms to the exclusion of the six employees was discriminatory and amounted to unfair labour practice.
20. Further an order of certiorari hereby issues quisting the proceedings and decision of the 4<sup>th</sup> respondents Service Board of 27<sup>th</sup> June, 2016 to employ the 5<sup>th</sup> to 49<sup>th</sup> respondent's on permanent and pensionable terms.

It is so ordered.

**Dated at Eldoret this 30<sup>th</sup> day of October 2020**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 30th Day of October 2020**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent