



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

PETITION NUMBER 3 OF 2017

**IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES 22 [1] [2] [C], 23, 70,41,47,27,165 [3]
[b], OF THE CONSTITUTION OF KENYA;**

AND;

IN THE MATTER OF: THE KENYA PORTS AUTHORITY HUMAN RESOURCE MANUAL 2011;

BETWEEN

1. STANLEY KUPATA LEWA

2. BASHIR SWALEH KHAMISI.....PETITIONERS

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Okanga & Company Advocates for the Petitioner

Addraya Dena, Advocate for the Respondent

JUDGMENT

1. The Petitioners filed their Petition on 8th March 2017.
2. They state they were, at the time of filing the Petition, employed by the Respondent, in its Marine Engineering Department. The 1st Petitioner was employed in 1993, the 2nd in 1983.
3. They worked on board 2 vessels owned by the Respondent, named SIMBA 3 TUGBOAT and KIBOKO 2 TUGBOAT, since the year 2004, after Employees who worked in these boats as On Board Engineers, retired.
4. They expected they would be promoted and confirmed substantively to the positions they held. The Respondent however, advertised internally for the positions held by the Petitioners. On 10th July 2015, General Manager Engineering Services, Engineer Joseph Atonga, had communicated a Succession Plan at the Department to the Human Resource and Administration Department. The 2 Petitioners were to be promoted as part of this Succession Plan.
5. The Respondent did not promote the Petitioners, but instead advertised vacancies, and raised the bar for qualifications. Candidates were required to possess a Bachelor Degree in Engineering, or Bachelor of Science Degree in Marine/Electrical Mechanical/Mechanotronics. These Degrees were way above those qualifications which the Petitioners possessed.

6. The Petitioners allege they were closed out, and could not apply for positions they have worked in, since the year 2004. They had legitimate expectation they would ascend to the advertised positions. They were discriminated against. They were not accorded the opportunity to further their studies to gain the new qualifications. They ask the Court to enter Judgment against the Respondent in the following terms:-

a) Declaration that the Petitioners' rights to fair labour practices guaranteed under Article 41 of the Constitution have been contravened by the action and omissions of the Respondent.

b) A mandatory injunction to issue to the Respondent, its Servants, Agents, Employees or whosoever acting on the Respondent's directions from receiving applications for the posts 530-2003, 530-2004, 530-2005, 530-2006 and 530-2007 in the Marine Engineering Department, and conducting interviews and subsequent appointing Persons to the 2 posts, pending hearing and determination of the Petition.

c) That the Hon. Court do order that the criteria used by the Respondent to appoint Persons to the posts of Senior Marine Engineers in the year 2012 be used to promote the Petitioners to the post of Senior Marine Engineers, and the said promotion to take effect from the year 2012.

d) Costs of the Petition.

7. The Court issued an order of temporary injunction barring the Respondent from advertising and filling up the vacancies detailed at paragraph 6 [b] of this Judgment. The order issued on 9th November 2017 upon the application of the Petitioners. On 21st February 2019, the order was varied on application of the Respondent. 3 posts - 530-2003, 530-2004 and 530-2007 were excluded from the order of injunction and released to the Respondent for filling up. The other 2 posts remained encumbered under the order of injunction.

8. The Respondent does not seem to have filed a Reply to the Petition, but filed a Replying Affidavit in response to the Petitioners' interlocutory application. The Affidavit, sworn by Assistant Personnel Manager Amani Mambo, on 3rd March 2017, explains in detail, Respondent's position.

9. It is conceded that the Petitioners were employed by the Respondent in its Marine Engineering Department as petitioned. They have never been appointed or promoted to the position of Senior Marine Engineer. They did not meet professional requirements to ascend to this position, under the existing Scheme of Service.

10. Parties agreed on 25th March 2019, to have the Petition considered and determined on the strength of the record. They confirmed filing of Submissions on 18th July 2019. It was confirmed also, that the 1st Petitioner has retired upon attaining the age of retirement, while the 2nd Petitioner was set to retire in September 2019. Judgment is scheduled for delivery on 25th October 2019, by which time both Petitioners will be retired.

The Court Finds:-

11. It is agreed that the Petitioners were employed by the Respondent in its Marine Engineering Department, working onboard 2 Tugboats.

12. They had been recommended by Engineer Atonga for promotion in 2015, under the Succession Plan in the Department. Certain serving Engineers were retiring, opening up vacancies, in senior posts.

13. The Petitioners expected with Engineer Atonga's recommendation, and with their long years of service, they would automatically fill the positions of Senior Marine Engineer. They had since 2004, discharged roles which in their estimation, matched the role of Senior Marine Engineer.

14. The Respondent however advertised for the senior posts, and required candidates to have Bachelor's Degree in the field. The Petitioners did not have this Degree, and were therefore closed out.

15. The Court does not think that the Petitioners were entitled to fill the senior positions on account of their experience only. The Respondent was within its managerial prerogative, in requiring the senior positions to be filled by Bachelor Degree-Holders. The Petitioners argue that they were not given the opportunity to pursue Bachelor Degrees to meet the requirements for the senior positions. It was not practicable for the Respondent to wait for the Petitioners to enlist for, study and graduate with Bachelor's Degrees, so as to qualify for promotion into these positions. The Petitioners had the opportunity in their long years of service, to have obtained Bachelor's Degrees, in anticipation of the senior positions falling vacant.

16. Prayer [b] of the Petition is worded in the language of an interim order. Yet, the Petition is meant to pursue final orders. The order is sought pending hearing and determination of the Petition. This cannot be a final order.

17. Prayer [a] is not supported by evidence. It has not been shown that by being disqualified for higher position on account of lacking necessary academic papers, the Petitioners were denied their right to fair labour practices. The Respondent followed the existing Scheme of Service.

18. They have failed to show that they ought to have been promoted from the year 2012. They allude to promotion criteria in place in 2012. They have not elaborated which criteria this was, and why it should override the Scheme of Service, Revised in May 2013, which has been exhibited in the Affidavit of Amani Mambo. They exhibit the Human Resource Manual 2011 as central in regulating promotions in 2012.

19. Under the Manual, Clause B.8 [c], the Head of Division could recommend promotion of an Employee in his Division. This would be so, in event there are vacancies. The employment record of the Employee recommended for promotion would be forwarded to the Managing Director.

20. The Court has not seen any recommendation made by the Petitioners' Head of Division under the Manual. There was a recommendation made in 2015, which would have been under the era of the Scheme of Service. The Petitioners did not meet the criteria under this Scheme. The recommendation of the Head of Division did not bind the Respondent. Promotion would have to meet the standards set under the Scheme.

21. Lastly, the Petitioners have retired. They no longer have a stake, in positions set to be filled at the Respondent. It would not make sense to issue any form of injunction, barring the Respondent from filling positions which can never be filled by the Petitioners. The Court cannot direct that they are promoted, while they are not in employment. They have not shown that they should have been promoted in 2012, or any year thereafter. They have not asked for damages as an alternative remedy to promotion. The Court agrees also, with the submission of the Respondent that this Petition ought to have been filed and pursued as a regular Cause, instead of a Constitutional Petition. It is not a dispute disclosing constitutional issues. It ought to have been filed as a simple Claim for promotion at the workplace.

IT IS ORDERED:-

a) The Petition is declined with no order on the costs.

b) The Respondent is at liberty to fill all the senior positions in the Marine Engineering Department.

Dated and delivered at Mombasa this 19th day of September 2019.

James Rika

Judge