



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 48 OF 2018

(Before Hon. Justice Mathews N. Nduma)

FRANCIS WESILA CHEMSWETI.....PETITIONER/APPLICANT

VERSUS

THE COUNTY EXECUTIVE COMMITTEE MEMBER

HEALTH SERVICES, KAKAMEGA COUNTY.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD,

KAKAMEGA COUNTY.....2ND RESPONDENT

COUNTY GOVERNMENT OF KAKAMEGA.....3RD RESPONDENT

JUDGMENT

1. The Petitioner in his petition filed on 2nd July 2019 prays for the orders that:

- (a) A declaration to issue that the deployment of the Petitioner from his position as the County Medical Laboratory Coordinator posting him to work at the County General Hospital is unconstitutional, unlawful, unprocedural and therefore null and void.
- (b) An order of certiorari to issue quashing the letter dated 21st June 2018 written by the County Executive Committee Member Health Services Kakamega County, deploying the Petitioner from his position as the County Medical Laboratory Coordinator to the County General Hospital.
- (c) An order to issue reinstating the Petitioner to his position as the County Medical Laboratory Coordinator Kakamega County.
- (d) An order of Prohibition to issue restraining the Respondents by themselves or their agents or servants from deploying the Petitioner other than as provided by law.
- (e) Compensation to the Petitioner for damages for the embarrassment suffered and violation of his dignity.
- (f) That the Respondents do pay costs of these proceedings.

2. The Petitioner alleges violation of *Article 236 of the constitution* read with *Section 5 of the Employment Act, 2007* in that the Petitioner was discriminated upon by the respondents. The Petitioner further alleges infringement of *Article 241 of the constitution 2010* in that the respondent engaged in unfair labour practice against the petitioner. Further, the petitioner alleges violation of *Article 28 of the constitution* in that his dignity was violated by the respondent and violation of *Article 47 of the constitution read with Section 4 of the Fair Administration Act, No. 4 of 2015*. Finally, the petitioner alleges that the County Executive Committee Member Health Services acted *ultravires* the County Government Act 2012 by usurping the powers of the Chief Officer, Health services when he deployed the petitioner.

Facts upon which constitutional and legal infringements are hinged.

3. The petitioner in brief states that the respondent purported to deploy, and demote the petitioner without any reasonable or justifiable cause and without granting the petitioner a hearing before taking the adverse action against the petitioner. The petitioner was employed by the government of Kenya as a Medical Lab Technologist III in 1983. The petitioner has served government for 35 years and is now aged 57

years. That the petitioner performed his duties diligently and competently and as a result earned promotions up to the current position of Principal Medical Lab Technologist. The petitioner is in job group 'N' earning Kshs. 138,470 salary per month.

4. Upon devolution, the petitioner became an employee of the County government of Kakamega where he is currently employed as the County Medical Laboratory Coordinator since 2015 to date. The petitioner has set out his duties in paragraphs 37(a) to (p) of the petitioner's County Medical Laboratory Coordinator Kakamega County.

5. By a letter dated 23rd June 2018 the petitioner was deployed from the position of County Medical Laboratory Coordinator at the County Headquarter to go and work at the County General Hospital. The petitioner was required to report to his new position on 25th June 2018. The letter of deployment was by County Executive Committee Health Services Kakamega County.

6. The petitioner learnt of the deployment vide a what's up message sent on 23rd June 2018 in a group.

7. 23 officers were touched by the particular deployment. The Director of Health Services, the supervisor of the petitioner was also demoted. Others were either retained in their positions or promoted. That this was discriminative and contrary to the law. Person appointed to replace the petitioner was new.

8. At the Hospital, the petitioner was to work under the Lab Manager and his duties include decontaminating work benches, receiving and scrutinizing laboratory requisition forms and specimens for accuracy and other related work compared to the wider duties he had as a County Medical Laboratory Coordinator. The petitioner was reduced from a County Policy initiator, implementer and coordinator to a technical person in the hospital laboratory. The petitioner was not given a hearing and the reasons given in the letter of deployment are not reasonable. Main reason was to improve performance of the department of health whilst acknowledging a lot of progress made since the year 2013. There was need therefore to change the Section leaders to give opportunities to staff to understand and have experience in new working areas.

9. From the letter of deployment, the petitioner's designation is Principal Medical Lab Technologist holding the position of Principal Medical Lab-Technologist County Headquarter and the new position was Principal Medical Lab Technologist County General Hospital.

10. The petition is opposed vide a replying affidavit of Dr. Beatrice Etemesi, the Chief Officer in charge of Medical Services as well as the Accounting Officer with respect to health docket of the County Government of Kakamega.

11. She deposes that the CEC health upon assuming office embarked on mobilizing top management in her docket to work on restructuring of the departments and other positions within the docket. This led to a restructuring exercise that resulted in creation of three new departments namely, medical services, public health and projects under three different Chief Officers which dictated shuffling and shifting of personnel to accord with the new structure.

12. The deponent as the accounting officer in the ministry was obligated to come up with a matrix reflecting changes in human resource in line with the new thinking and new structures in consultation with the top management.

13. The deponent issued a circular dated 15th June 2018 effecting the new structure formation and changes within the personnel team. In terms of the new matrix, the petitioner retained his position as Principal Laboratory Technologist but also retained his salary package including his job Group N. The County General Hospital and now the County Teaching and Referral Hospital is now a level 5 hospital by virtue of which it is the highest ranking institution within the County establishment. The head of the hospital is in job group R with many officers working there within job group 'N' and above.

14. The circular deploying the petitioner did not in any way direct the petitioner to report to a junior officer.

15. The petitioner relies on an unauthenticated source namely what's app message as a basis of his claim. This was not an official communication.

16. That the position of coordinator is merely nominally administrative and can be assigned to any officer irrespective of the officer's job group or rank. That had the petitioner reported to his new station he would have known what duties he was going to be allocated at the hospital rather than speculating.

17. That no constitutional right of the petitioner has been violated as alleged or at all.

18. That the petition be dismissed with costs.

19. The petitioner in the supplementary affidavit stated that he was not aware of the circular dated 15th June 2018 but only saw the letter of 21st June 2018. The petitioner denounces the circular of 15th June 2018 as a mere after thought and creation to defeat the petition.

20. Petitioner reiterates that the deployment removed the petitioner from his rank which had supervisory role and placed below the people he had been supervising. That his duties involved coordinating all the medical laboratory services for all hospitals and laboratories in the entire County, Kakamega County Referral Hospital Laboratory being just one of them. The petitioner prays that the petition be granted with costs.

Determination

21. The issues for determination are:

- (i) Did the deployment of the petitioner amount to a demotion?
- (ii) Was any of the constitutional rights of the petitioner violated?

Issue (i)

22. Upon a careful consideration of the evidence adduced by the parties in the petition, and supporting affidavit; the replying affidavit and the supplementary affidavit, it is clear that the rank and substantive position of the petitioner before the new deployment on 21st June 2018 was Principal Medical Laboratory Technologist in job group 'N'. That before the deployment the petitioner held the position of Principal Medical Laboratory Technologist at the County Headquarter and where his duties included supervisory, coordination and administrative duties at the county level. The petitioner was now moved from the County Headquarters to Level 5 General Hospital still holding the designation of Principal Medical Laboratory Technologist, County General Hospital in job group 'N'.

23. The petitioner did not report to his new station before coming to court and therefore he had no knowledge of the specific role he would be playing at the hospital. The grievance of the petitioner is primarily based on the perception that his role would be restricted to serving the County General Hospital instead of the entire county. He therefore considers the movement on that basis alone to be a demotion.

24. The petitioner is aggrieved that some staff were promoted while others were retained in their previous positions except himself and his former supervisor.

25. The court is satisfied that the deployment of the petitioner did not reduce him in rank and designation. The court is further satisfied that the petitioner's salary was not reduced. The case of *Joel Njoroge vs TSC and 2 others (2015) eKLR* is not similar to the present case and is therefore inapplicable in the circumstances of this case. The petitioner did not prove that he would be working under his previous junior officers at the level 5 General hospital because he did not report to the new station in the first place.

26. The court is satisfied that the restructuring done by the new CEC health was done in good faith and to better service delivery of the hospital.

27. The court is therefore satisfied and in answer to issue (ii) that the respondents did not violate any of the stated constitutional rights of the petitioner. The petitioner has failed to discharge the onus placed on him under Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya, that is, to prove the alleged violation of constitutional rights on a balance of probabilities.

28. The court is satisfied that the CEC Health and his team did not act *ultravires* the constitution of Kenya 2010 or the County Government Act of 2012 as alleged or at all.

29. The court is satisfied that the circular issued on 15th June 2018 was pursuant to the new initiative by the new County government to better service delivery of the County in the health sector and the exercise was done in good faith. The petitioner has failed to prove his allegation that the circular was a fraud and after thought created to defeat the petition.

30. Accordingly, the petition lacks merit and is dismissed with costs

Judgment Dated, Signed and delivered this 9th day of October, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Marwa holding brief for M/S Ashitsa for the Respondent

Petitioner in person

Chrispo – Court Clerk