



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
PETITION NO. 10 OF 2018
(FORMERLY KISUMU HIGH COURT CONSTITUTIONAL
PETITION NO 17 OF 2017)
(Before Hon. Justice Mathews N. Nduma)

ELISHA MIEN OWALLA.....PETITIONER

VERSUS

1. THE ATTORNEY GENERAL REPUBLIC OF KENYA
2. THE PUBLIC SERVICE COMMISSION
3. THE COUNTY COMMISSIONER KISUMU COUNTY
4. THE SUB-COUNTY COMMISSIONER KISUMU EAST/CENTRAL
5. JUDITH AUMA OBURE.....RESPONDENTS

J U D G M E N T

1. The Petitioner seeks the following reliefs:-

- a. A declaration that the process leading to the appointment of Assistant Chief of Nyawita Sub-Location was irregular.
- b. An order directing the 2nd Respondent to remove and or terminate the appointment of the 5th Respondent as the Assistant Chief.
- c. An order directing the process of appointing Assistant Chief be commenced afresh.

2. Petition is based on the following grounds –

The person appointed Assistant chief for Nyawita sub-location did not meet the minimum requirements set out in the advertisement dated 15th July, 2017 which included :-

- (i) Be in possession of at least mean grade C in KCSE with C in English or Kiswahili.
- (ii) Be 35 years old and above.
- (iii) Be a resident of the particular sub-location and a person of integrity who commands respect and
- (iv) Possess good communication skills.

3. That seven (7) persons were short listed for interviews including Simon Nyamamo Mien, John Bwanda pendo, Robert Okoth Dodo Oyoo, Kennedy David Otieno, Samwel Otieno Agwambo. Judith Auma Obura, Philip okullo Nyawir.

4. That the 5th Respondent Judith Auma Obure was appointed the Assistant Chief II for Nyawita Sub-Location, Kondele Location in in Winam Division of Kisumu East Sub-County. The appointment was confirmed by the 2nd, 3rd and 4th Respondents.

5. That the 5th Respondent is not a Resident of Nyawita Sub-Location and did not meet the set criteria of appointment in that, she does not command respect from the residents of Nyawita Sub-Location.

The Response

6. Mrs. Marion Onduru the sub-county Human Resource Management Officer Kisumu Sub-County deposed to a replying affidavit filed on 17th January, 2018 in which she states that –

The 5th Respondent submitted a faint photocopy of her Identity Card but was short listed because an original identity card would be produced during the interview.

7. That the Deputy County Commissioner formed an interview panel for the interview to take place on 30th September, 2015.

8. That each panelist had a score sheet to rank the candidates independently before the scores were aggregated in the end and averaged.

9. That Mr. Robert Okoth Dodo Oyoo ranked the highest and Judith Auma Obure, the 4th Respondent ranked 3rd overall.

10. The three highest ranked candidates' names were then forwarded to the appointing body with a list of how they scored attached vide a letter dated 1st October, 2015.

11. That by a letter dated 19th January, 2016 Judith Auma Obure was appointed to the post of Assistant Chief II.

12. That on 26th January 2016, Judith Auma Obure accepted the position and reported to duty.

13. That the appointment satisfied the dictates of Articles 27(8) and 81(b) of the constitution.

14. That no objections were made by members of the public to the interviewing panel after the short list was published.

15. That in the Kisumu Central Sub-County which has two chiefs and seven Assistant Chiefs, both chiefs are male and five Assistant chiefs are also male and that Judith Auma Obure is one of the only two female Assistant Chiefs.

16. That all the shortlisted applicants including the 5th Respondent are residents of Nyawita Sub-County.

17. That the objection recorded upon Judith's appointment was with regard to her residency. That Nyawita is a cosmopolitan area and that Judith was renting premises and staying in Nyawita.

18. That Simon Nyamamo mien was interviewed and did not get the position. His failure to get the position was not due to malice or bias but was based on constitutional requirements under Article 27(6) and (8) which the government is bound to pursue and achieve.

19. The Respondent prays the petition be dismissed for lack of basis.

Determination

20. The issues for determination are:-

(a) Has the Petitioner proved any violation of his rights by the Respondents as alleged or at all?

(b) Is the Petitioner entitled to the reliefs sought?

Issue a

21. A person who wishes the court to believe existence of specific facts must prove the alleged facts on a balance of probabilities.

22. The petitioner alleges that the 5th Respondent did not qualify to be appointed Assistant chief of Nyawita Sub-Location within Kisumu County on the basis that she was not a resident of the sub-location. That allegation has been sufficiently rebutted by M/s. Marion Onduru vide the replying affidavit sworn on 5th December, 2017, in which she deposes that the 5th Respondent resided in the Sub-Location in a rented house, since this was a cosmopolitan urban area.

23. In the supplementary affidavit by Elisha Mien Owalla a person interviewed and not taken, the deponent merely speculates that the 5th Respondent was not a Resident of the Nyawita sub-Location. It was incumbent on him to prove on a balance of probabilities that indeed the 5th Respondent resided outside Nyawita sub-location. He cannot be heard to shift the burden of proof on the Respondents.

24. The court is satisfied that it was fair and just to pick, the 3rd ranked candidate in the interviews who happened to be a lady taking into account the undisputed fact that the Kisumu Central Sub-County in which Nyawita Sub-Location is situated has two chiefs and seven Assistant Chiefs and both chiefs are male and five Assistant chiefs are male. Judith Auma Obure was one of the only two female Assistant Chiefs.

25. The appointment satisfied the constitutional mandate of gradual gender balance in public service appointments. This qualifies as positive discrimination, otherwise referred to as affirmative action which is mandated by the Constitution of Kenya 2010.

26. It is the courts conclusion that the petitioner was not discriminated against and the appointment did not violate any constitutional or statutory provision as alleged or at all.

Issue b

27. The Petitioner is accordingly not entitled to any reliefs sought.

28. The Petition is dismissed with no order as to costs.

Dated, Delivered and Signed in Kisumu this 20th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Onsongo for the Petitioner

Mr. M. Q. for the Respondent

Chrispo – Court Clerk