



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 2 OF 2017
DAVID ITHAU WAMBUA CLAIMANT
VERSUS
VISION 2030 DELIVERY BOARD RESPONDENT

Mr. Wambola for the petitioner

Mr. Donald Kipkorir for the respondent

JUDGMENT

1. The petitioner seeks the following orders set out in the body of the petition.
 - (i) A declaration that the petitioner's right to fair labour practice was violated.
 - (ii) A declaration that the petitioner's right of access to information was violated.
 - (iii) A declaration that the petitioner's right to fair administrative action was violated.
 - (iv) A declaration that the respondent contravened the provisions of Article 10 and 232 of the Constitution.
 - (v) An order compelling the respondent to publish all the relevant information regarding the interview showing the scores and rankings of all the interviewees.
 - (vi) A declaration that the petitioner was the successful candidate for the advertised position.
 - (vii) An order compelling the respondent to issue the petitioner with an appointment letter for the position.
 - (viii) An order for compensation of the petitioner for violation of his rights.
 - (ix) Costs of the petition
 - (x) Interest on (vi) and (vii) at court rates from the date of filing the petition.
2. The petition is founded on the following facts set out in the body of the petition.

4. Sometime in April, 2015, the respondent invited interested and qualified candidates to apply for the position of Director, Communication and strategy and the petitioner applied.

5. Upon submitting his application, the petitioner was invited for and attended an oral interview on 17.12.2015 at the respondent's secretariat offices.

6. The petitioner was contacted by the respondent's office and invited to a meeting with the then Acting Director General, Vision 2030 on 22.12.2015 which invitation the petitioner honoured.

7. At the meeting, the Acting Director General made it known to the petitioner that the petitioner had emerged successful for the position of Director, Communication and Strategy and that he would soon be appointed.

8. That to date, the petitioner has not been appointed to the position and no valid explanation has been given by the respondent for not appointing the petitioner.

9. Despite receiving several inquiries from the petitioner, specifically inquiries as to the details relating to the minutes and notes taken during the interview, scores and rankings of all the interviewees and qualifications and experience of the interviewees, the respondent has failed to furnish the petitioner with all that information.

3. The petition cites violation of Article 41 of the Constitution which protects the petitioner against unfair labour practice and Article 232 which guarantees the petitioner access to information.

4. It is also alleged that the respondent violated Article 10 (c) on good governance and petitioner was discriminated against in violation of Article 27.

Grounds of opposition

5. The petition is opposed vide grounds of opposition filed on 16/3/17 as follows:

1. That there is no legal or constitutional basis to employ anyone after a job interview.

2. That there is no legal or constitutional basis that one who scores the highest irrespective of the marks ought to be employed.

3. That, the application doesn't establish a factual basis that the material interview was completed or scoring done or that he was the top interviewee.

6. The parties have filed written submissions on 1st April 2017 and 17th May 2017 respectively.

7. The issues for determination are;

(i) Whether the respondent violated the petitioner's rights and constitution as alleged.

(ii) Whether the petitioner is entitled to the remedies sought.

Issue i

8. The petition is based on the alleged failure to appoint the petitioner to the position of Director, communication and strategy after he attended interview and was awarded the highest marks. The petitioner alleges that failure to give him information necessary to assert his constitutional right violated his constitutional right to information.

9. The petitioner further alleges the respondent is in the process of filling the position pursuant to subsequent interview to which he has not been invited.

10. The petitioner relies on the Decision of Musinga J., in **Andrew Omutatah O. Koiti Vs. Attorney General and 2 others [2011] eKLR** to the effect;

“Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise on protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed.”

11. The petitioner submits he has met this threshold hence the cause of action.

12. That Article 232 (1) calls for fair competition and merit as the basis of appointments and promotions *inter alia*. That this is in line with the principles of transparency and accountability enshrined in Article 10 (c) of the Constitution.

13. That respondent cannot waste public funds by advertising for filling of a public position and end up not employing any one as happened in this case. That this violates Article 201 (d) which provides public money shall be used in a prudent and responsible way.

14. That the respondent’s failures to appoint the petitioner upon informing him that he was the most suitable candidate for the job is clear indication of discrimination contrary to Article 27 of the Constitution and lack of transparency.

15. That the court ought and should guarantee the petitioner equal treatment before the law, fair labour practice and administrative action by declaring that the petitioner’s rights have been violated.

16. The petitioner further invokes the **South African case of Mogothle –Vs- Premier of the North-West Province** [2009] 4 BLL12 at paragraph 27 where it was held;

“freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity. For mankind is pre-eminent, a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfillment of what it is to be human is most often bound up with being accepted as socially useful”

17. In this case, the petitioner needs both the job and the remuneration to survive. Respondent on the contrary submits that there is no legal or constitutional imperata to employ anyone after a job interview, whether or not that person scores the highest marks at the interview.

18. That the petitioner has not proved on a balance of probability that the material interview was completed or scoring done or that he was the top interviewee.

19. That the petitioner has failed to prove violation of any of the alleged provisions of the constitution or statute.

20. That there is no legal or constitutional basis for the reliefs sought.

21. That the petitioner seeks to set a dangerous precedent of using judicial process to get employment.

22. The respondent relies on the Decision in **DRY Associates Limited Vs. Capital Market Authority and another [2012] eKLR** to invoke the principle stated by Majanja J. that the element of procedural fairness in Article 47 must be balanced against reasonableness, expediency and efficiency in the decision making process.

23. That the petition does not meet the threshold set in **Ananta Karimi Njeru (No. 1)(1979) IKLR 154** and augmented by the Court of Appeal in the case of **Mumo Matemu Vs. Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR** with regard to the threshold of a

constitutional petition.

24. Upon consideration of the foregoing submissions on facts and law, it is the courts considered view and finding that;

a) There is no requirement by the constitution or any statute that a candidate who scores the highest in an interview must be appointed to the position. Other considerations including references at a later stage inform the final decision taken.

b) The appellant has not discharged the onus of proof, on a balance of probability to show that he was indeed the number one scorer in the interview and that the recruitment process has been finalized and that he was adjudged a suitable candidate for recruitment to the position.

25. There is no prove that the respondent has discriminated the petitioner in violation of Article 27 of the Constitution nor has it been shown that the respondent violated Articles 41 and 47 of the constitution in the recruitment process.

26. However, the respondent is duty bound to conduct open, fair, all inclusive recruitment process and is prohibited from barring any qualified person, including the petitioner from participating in any such recruitment process without any justifiable reason(s).

27. As was stated in **Provincial Administration Western Cape (Department of Health and Social Services) Vs. Bikwani and others (2002) 23 ILS 701 (LC) (pages 48 – 82);**

“There is a considerable judicial authority supporting the principle that courts and adjudicators will be reluctant, in the absence of good cause clearly shown to interfere with the managerial prerogative of employers in the employment selection and appointment process.”

28. The respondent has raised sufficient doubt that the petitioner was entitled to information regarding his performance in the job interview at the time the information was requested. Equally there is sufficient doubt as to the suitability of the petitioner for the position upon finalization of all recruitment steps including making references on the past records of the petitioner.

29. The court must hasten to state that the right to access information in terms of Article 35 of the Constitution is not without limitations. Every case must be decided on its own merits giving due regard to other considerations as guided by Article 24 of the Constitution on what is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

30. For these reasons, the petition lacks merit and same is dismissed with no order as to costs.

Dated and delivered at Nairobi this 21st day of July, 2017.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE