



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO.39 OF 2013

(Formerly Petition No.5 of 2012 in the High Court at Nyeri)

THE UNION OF CIVIL SERVANTS.....PETITIONER

VERSUS

THE PERMANENT SECRETARY,

MINISTRY OF STATE FOR PUBLIC SERVICE.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 24th March, 2016)

JUDGMENT

The Petitioner filed the petition on 31.10.2012 through Gori, Ombongi & Company Advocates. The petition was filed in the matter of the contravention of rights and fundamental freedoms under Articles 232(1) (i)(i) and 234(f) and protection of the right to fair administrative action and fair hearing under the Constitution of Kenya; in the matter of the Public Service Commission; in the matter of the Office of the Permanent Secretary, Ministry of State for Public Service, Office of the Prime Minister; and in the matter of the scheme of service for clerical officers dated March 2007 and the subsequent guidelines on the implementation of the scheme of service for clerical officers. The petitioner prayed for:

- a. A declaration that the revised scheme of service for clerical officers, issued in March 2007 by the Permanent Secretary, Ministry of State for Public Service, office of the President, is oppressive and unconstitutional.
- b. An order that circular ref. No. MSPS MIN. 1/3/4/67 of 8.10.2010 by the Permanent Secretary, Ministry of Public Service, to be set aside.
- c. An order that the said scheme of service for clerical officers issued in March 2007 by the Permanent Secretary, Ministry of State for Public Service be reviewed competitively and or set aside entirely.
- d. An order that clerical officers with recognised academic certificates be elevated to conform to other schemes of service and particularly the scheme of service for record management officers and human resources management assistants.
- e. An order that clerical officers be re-designated and absorbed in the relevant scheme of service after passing the requisite proficiency examinations in the respective clerical officer's preference.
- f. An order that the respondents do pay general and special damages sustained by the respective plaintiffs pursuant to retrogression occasioned by implementation of the said scheme in the common establishment and growth of clerical officers.

- g. An order that the respondents do pay costs of the petition.

The petition was supported with the affidavit of the petitioner's member one Simon M. Wainaina sworn on 31.10.2012 and filed together with the petition. On 06.05.2013 the petitioner filed a notice of change of advocates from its earlier advocates to C.M. King'ori Advocates. On 16.08.2013 the petitioner filed the further supporting affidavit of Simon M. Wainaina and a further supporting affidavit by the said Wainaina filed on 06.08.2013. The petitioner also filed on 06.08.2013 the supporting affidavit of Ngatia Ngunjiri.

The record shows that the respondent did not file a replying affidavit or an answer to the petition. On a number of occasions when the matter came up for mention for directions Mr. A.M.Njagi, Litigation Counsel, for the Attorney General, informed the court that the 1st respondent had failed to give the relevant instructions and at one of such mentions he informed the court that he did not know why the Director of Public Service Management had failed to respond. The court, on numerous occasions, gave parties chance to negotiate the petition with a view of amicable resolution but there were no positive outcomes. The parties' advocates agreed to file written submissions and for judgment to issue on the basis of the material on record.

The parties are in a recognition agreement. The members of the petitioner are public servants administered by the 1st respondent. The members of the petitioner are deployed to serve in the various government departments and are subject to postings across the departments from time to time.

It is the petitioner's case that clerical officers when initially appointed in the public service, they serve as clerical officers, they are then subjected to proficiency examinations and after passing the examination, through unknown criterion, they are clustered to serve in supply chain management, records management, accountancy, or human resource management. It is the petitioner's case that the clerical officers in the stated categories, at all material times prior to the offensive decisions leading to the current petition, were subjected to proficiency examinations and the same terms of service and one got promoted based on their level of education.

The 1st respondent issued on 8.10.2010 the circular Ref. No. MSPS.MIN/1/3/4/67 with a view of making clarifications on the provisions of the scheme of service for clerical officers issued in March 2007 and in line with requests for clarifications by various ministries and departments. It was further in reaction to requests by clerical officers who had acquired diploma or degree certificates in various fields to be re-designated to other cadres. The circular then proceeded to issue the following guidelines:

- a. The phrase **"...or any other approved equivalent qualification from a recognised institution"** be interpreted to mean technical qualifications (certificates or diplomas) defined in existing schemes of service for various cadres in the civil service. Those qualifications that are not defined in schemes of service shall not be recognised as equivalent or relevant. Further, recognised technical qualifications shall be those acquired after a training duration of at least 6 months for certificate courses and 9 months for diploma courses. The examinations leading to the qualifications must have been conducted by an institution recognised by the Ministry of Higher Education, Science and Technology, the Kenya National Examinations Council or the Commission for Higher Education. Further, clerical officers are advised to pursue professional courses that fall within the existing schemes of service- so as to provide avenues for them to branch to other cadres for the purpose of career progression and to avoid stagnation in one job group in the clerical officers' cadre.
- b. Clerical officers who attain diplomas and degrees and wish to join other cadres will be subjected to suitability and promotional interviews once positions have been declared and advertised by the Public Service Commission of Kenya or the respective administrators of the schemes of service under delegated powers.
- c. The computer certificate specified as a requirement in the scheme of service should include qualifications in all the following areas; word, excel, PowerPoint and internet.
- d. That at all current material time, for appointment to the grade of chief clerical officer Job Group 'J' an officer was to possess a certificate in any of the disciplines specified in the scheme of service. That provision was henceforth amended to state, **"...for appointment to this grade, an officer**

must possess a Diploma stipulated in an existing scheme of service for any cadre in the civil service in addition to meeting all other requirements specified in the scheme of service for clerical officers”.

- e. The posts of chief clerical officer will be advertised centrally by the ministry of state for public service for competitive filling to ensure parity of treatment across the service.
- f. All the other provisions of the scheme of service remain unchanged.

The petitioner's members being clerical officers were offended with the provisions of the scheme of service of March 2007 and the circular giving the guidelines on its interpretation. The dissatisfaction was as follows:

- a. The scheme of service for clerical officers prior to the one of March 2007 was moribund in that it pegged progression on availability of a vacancy, completion of 3 years in the previous job group prior to the promotion, and merit and ability. The effect was that officers stagnated in the same job group and some advanced by sheer luck of **“Knowing someone up there”**.
- b. Under the scheme of March 2007 and the subsequent circular by the 1st respondent, to re-designate a clerical officer to another cadre the officer had to be subjected to a suitability and promotional interview which would give undue advantage to officers holding the other cadre in terms of experience.
- c. The Public Service Commission by the circular Ref. No. 3/1/I/III dated 15.09.2010 expanded common establishment grades for promotion without need of a vacancy to include Job Groups G, H, J and K. The scheme of service for clerical officers of March 2007 pegged the maximum rank at Job Group ‘J’, and attainable subject to vacancy filled through a common advertisement by the 1st respondent. That clearly disadvantaged the petitioner's members being the clerical officers because they were thereby denied from enjoying the progression in the common establishment grades of G, H, J and K as established and communicated by the Commission in the circular Ref. No. 3/1/I/III dated 15.09.2010.

The affected petitioner's members therefore foresaw a regime of stagnation flowing from the scheme of service of March 2007 and the subsequent 1st respondent's circular on implementation guidelines Ref. No. MSPS.MIN/1/3/4/67. They made the following proposals to ameliorate their circumstance:

1. Expansion and renaming of the scheme of service of clerical officers to that of office management with job groups F to Q as follows:
 - Office Assistant II JG-F
 - Office Assistant I JG-G
 - Office Management Officer III JG-H
 - Office Management Officer II JG-J
 - Office Management Officer I JG-K
 - Senior Office Management Officer JG-L
 - Chief Office Management Officer JG-M
 - Principal Office Management Officer JG-N
 - Assistant Director of Office Management JG-P
 - Senior Assistant Director of Office Management JG-Q

It was the petitioner's case that such grading would ensure that clerical officers are not underpaid by being assigned duties for which other cadres are highly paid.

2. In alternative, it was proposed that the clerical cadre be dissolved and the clerical officers are absorbed in other cadres' schemes of service. In that way, the clerical officers would be at liberty to study and improve them-selves with a clear career destiny.
3. For the stagnated officers, it was proposed that a hybrid form of promotion to the next job group, especially those above 50 years of age, be instituted.
4. The clerical officers who have acquired better and higher qualifications be promoted to an acceptable grade up to a maximum of job group ‘L’ which should form the competitive grade.

The record shows that the petitioner wrote numerous letters to the 1st respondent and the Public Service Commission but the issues remained unresolved thus the filing of the petition.

The petitioner lamented that the clerical officers had to be subjected to more conditions in comparison to officers in similar levels of service such as in cadres of records management officers, supply chain management assistants, artisans, health administration assistants and secretaries. In particular the clerical officer did not enjoy the four grades of common establishment. They were also subjected to computer, diploma or certificate qualifications and to progress they had to leave their cadre and join other cadres on disadvantaged experience considerations at the competitive interviews held for that purpose of progression.

The petitioner's case was therefore that the clerical officers had been discriminated. It was submitted that section 5(1) of the Employment Act, 2007 provides that an employer must promote equality of opportunity in employment in order to eliminate discrimination in employment and, under section 5(2) of the Act, is required of an employer to promote equal opportunity in employment and to strive to eliminate discrimination in any employment policy or practice. Further section 5(3)(a) of the Act outlaws discrimination against an employee, directly or indirectly, in respect of recruitment, training, promotion, terms and conditions of employment or other matters arising out of employment. Under section 3(3) of the Act, the Act was binding upon the government and the cited provisions of the Act implemented Articles 232(1)(i)(i) and 234(1) (f) of the Constitution but which the petitioner said the 1st respondent had decided to contravene.

The respondents did not file an affidavit to dispute any of the facts as set out for the petitioner.

The **1st issue** for determination is whether the petitioner has established its case that the 1st respondent acted in contravention of the Constitution.

Article, 232(1) (i) (i) provides that one of the values and principles of public service is affording adequate and equal opportunities for appointment, training, advancement, at all levels of the public service of men and women. The court finds that the petitioner has established that the 1st respondent acted in contravention of that constitutional provision in view of the offensive provisions of the circular Ref. No. MSPS. MIN/1/3/4/67 and, the scheme of service for clerical officers issued in March 2007. The court further finds that the 1st respondent by issuing the circular Ref. No. MSPS. MIN/1/3/4/67 dated 8.10.2010 thereby acted against the communication by the Commission in the circular Ref. No. 3/1/I/III dated 15.09.2010. As submitted for the petitioner, the court returns that the 1st respondent thereby acted in contravention of the function of the Commission to develop human resources in the public service and as provided for in Article 234(1) (f) of the Constitution.

To answer the 1st issue for determination, the court returns that the petitioner has established that the 1st respondent acted in contravention of Articles 232(1)(i)(i) and 234(1) (f) of the Constitution of Kenya, 2010.

The **2nd issue** for determination is whether the petitioner is entitled to the remedies as prayed for. The court returns that there is no material on record to deny the prayers as made as the petitioner has established it is entitled except that there were no submissions on special and general damages as the same was not established and the prayer on special and general damages will fail as abandoned and not justified.

In conclusion judgment is entered for the petitioner against the respondents for orders:

- a. That circular ref. No. MSPS MIN. 1/3/4/67 of 8.10.2010 by the Permanent Secretary, Ministry of Public Service, is hereby set aside.
- b. That the said scheme of service for clerical officers issued in March 2007 by the Permanent Secretary, Ministry of State for Public Service is hereby set aside in its entirety to be reviewed

competitively; and for that purpose the parties to undertake relevant review consultations or meetings and to file in court the revised scheme of service or report by 01.07.2016 and parties to mention the matter on a convenient date for recording the settlement in that regard.

c. That the clerical officers with recognised academic certificates be elevated to conform to other schemes of service and particularly the scheme of service for record management officers and human resources management assistants.

d. That the clerical officers be re-designated and absorbed in the relevant scheme of service after passing the requisite proficiency examinations in the respective clerical officer's preference.

e. That the respondents do pay costs of the petition.

Signed, dated and delivered in court at Nyeri this Thursday, 24th March, 2016.

BYRAM ONGAYA

JUDGE