



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 262 OF 2014

KELVIN KIGEN KIETI.....CLAIMANT

VS

KILIFI COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant has brought this suit against the respondents seeking the following orders:-
 - a. Permanent injunction restraining the 1st Respondent from effecting the appointment of the 2nd Respondent to the position of Head of Supply Chain Management (HSCM).
 - b. Declaration that the appointment of the 2nd Respondent to the position of the HSCM is illegal, unlawful, null and void.
 - c. Mandatory injunction compelling the 1st Respondent to deploy the claimant to the position of HSCM of the Kilifi County.
 - d. Costs of the suit.
2. The respondents have denied any wrong doing in the recruitment and appointment of the 2nd Respondent as the HSCM for the Kilifi County and pray for the suit to be dismissed. According to them, the said appointment was fair and lawful and the 2nd Respondent had already taken office from 3.6.2014 even before the filing of this suit in court.
3. The suit was heard on 26.8.2014 and 9.12.2015 when the claimant testified as cw1, Rosalia Shida Nyale represented 1st Respondent as Rw1 and the 2nd Respondent testified as Rw2. Thereafter the parties filed written submissions.

Claimant's case

4. Cw1 is employed by the Ministry of Finance in the National Government as an Assistant Director

Supply Chain. He was seconded to the Kilifi County through the Transitional Authority of Kenya (TA) as the HSCM. His mandate was to set up structures of procurement in the County among other duties. He picked the 2nd respondent to be his assistant. In 2013, the 1st Respondent advertised for the post of HSCM and Cw1 applied for it. After the interviews in October 2013 he was ranked number one. To his surprise, the appointment was given to the 2nd Respondent who was ranked number four in the interview.

5. According to Cw1, the 2nd Respondent was not qualified for the post and he should not even have been shortlisted for the interview because he was not a holder of a Bachelor's Degree from any recognized University. That the failure by the 1st Respondent to appoint him as the HSCM was unfair, unlawful, unconstitutional and an act of discrimination. That he was not informed of the criteria used to deny him the appointment. That he only learnt of the appointment of the 2nd Respondent when he went to his office requesting for handing over the office.

6. He wrote to the Anticorruption Agency complaining that he was discriminated in the appointment of the 2nd Respondent but he received no response. He maintained that the appointment of the 2nd Respondent as the HSCM was skewed and he was discriminated because the 30% representation from outside the County was not complied with; he was not notified of the outcome of the interview; and that the 2nd Respondent did not present any degree certificate during the interview which was the minimum basic requirement.

1st Respondent case

7. Rw1 is the secretary for the 1st Respondent. She confirmed that the Board advertised for the post of HSCM in the County of Kilifi to replace the officer seconded there from the National Government. The pass mark for the interview was 70% and 7 candidates qualified with the claimant topping the list on the criteria of mediocrity. However considering other criteria provided under the Constitution, the 2nd Respondent was appointed. The said constitutional criteria considered were gender, religion, minority, marginalized, people with disability, 30:70% rule and the wage bill.

8. On the wage bill, the 2nd Respondent was the best option because he was already on the county payroll and appointing another person meant additional wage bill. On the issue of minority, the 2nd Respondent came from Kambe Community which is the smallest group in the Mijikenda. He was also falling within the youth bracket. That Kezia Wangui from Nakuru an auditor who was already in the County payroll was appointed Auditor to represent ladies and the 30% appointees from outside the county. Likewise Ibtisam Mbarak from Mombasa was appointed to represent the Islam religion and the 30% rule. She maintained that the 2nd Respondent was qualified for the interview and the appointment because he held a letter and transcripts from the University showing that he had completed Bachelor's Degree and was waiting for graduation ceremony. She denied that Cw1 was discriminated against. She maintained that this suit was brought after the Board had already made the appointment. According to her the Board is the only person with the legal mandate to hire staff for the County.

2nd Respondent's case

9. Rw2 was employed as procurement officer by the defunct Kilifi town council until he was absorbed in the County Government of Kilifi under the new Constitutional order. He completed his Bachelor's Degree exams on Supplies Chain Management at JKUAT in April 2013. That on 24.7.2013 he was given

a letter certifying that he had qualified for the degree and was only waiting for graduation. According to him the recruitment exercise was fair and denied that the claimant was discriminated against by the 1st Respondent. He further denied any role or interference with the recruitment process and prayed that the suit be dismissed.

10. The parties agreed on the following issues for determination:

- a. **Whether the 2nd Respondent was duly qualified for shortlisting for the interview of the HSCM.**
- b. **Whether the 1st Respondent was right in appointing the 2nd Respondent when he was not ranked first in the interview.**
- c. **Whether the claimant was entitled to be informed of the criteria for the appointment of the 2nd Respondent to the post of HSCM.**
- d. **Whether that information was availed to him.**

Qualification for shortlisting

11. There is no dispute from the evidence herein that the minimum qualification for a candidate to be shortlisted for the interview for the post of HSCM was a Bachelor's degree in the relevant discipline. There is also no dispute that Rw2 had completed his course for the Bachelor's degree in Supplies Chain Management from JKUAT but had not yet graduated as at the time he applied for the material job. He however presented the letter dated 24.7.2013 confirming that he had successfully completed his studies in Bachelor of Purchasing and Supplies Management from the University and that he was scheduled to graduate on 29.11.2013 with Second Class Honors Upper Division. The 1st Respondent was satisfied that he was qualified and shortlisted him for the interview. Cw1 however contends that the 2nd Respondent was not qualified for the short listing because he did not present any Bachelor's Degree Certificate. Consequently, the claimant submits that the employer violated the principle of fair Labour practice enshrined under Article 47 of the Constitution by considering irrelevant matters to deny the claimant employment opportunity and gave it to an unqualified person.

12. After careful consideration of the evidence presented herein, the court finds that the 2nd Respondent was qualified to apply for the post of HSCM and was properly shortlisted for the interview. The minimum academic qualification was Bachelor's degree in the relevant field which he had attained save for the graduation ceremony. In this courts view, the letter dated 24.7.2013 from the University plus the examination transcript were sufficient proof that the candidate had possessed the qualification for a holder of Bachelor degree in the area studied. The contention by the claimant that one was disqualified if he did not have the physical degree certificate is misconceived to say the least. Infact, the presenting a degree certificate for any purpose nowadays should not be taken as the full proof of such qualification until verification is done from the relevant University. In making the foregoing observation the court takes judicial notice of the numerous case, especially among the political class and job seekers where such qualification have been found to be wanting even after candidates present degree certificates and other examination certificates.

Was the appointment right

13. Cw1 contends that the appointment of the 2nd Respondent was not right because he was not ranked position one during the interview. That by appointing the 2nd Respondent, the employer discriminated the

claimant because he was the best candidate for the job. According to him the 2nd Respondent was not qualified for both the shortlisting and the appointment. That the appointment violated the Constitution in Article 10 which deals with the National values and principles of governance, Article 47 which provides for fair administrative action and Article 232 which provides for the values and principles of the public service.

14. The respondents have on the other hand maintained that the appointment of the 2nd Respondent was right and in accordance with the Constitutional provision of affirmative action programs for the youth enshrined under Article 55 and 56 of the Constitution. That under such programs all the state organs including the 1st Respondent are required to take measures to ensure that the youth, the minorities and the marginalized have access to employment. That the 1st Respondent considered the foregoing constitutional requirement as the basis for according to the 2nd Respondent the job because he was a youth and came from the minority group of Kambe in the Mijikenda community.

15. After carefully considering the rival contentions by the two sides, the court finds on a balance of probability that the 1st Respondent was right in appointing the 2nd Respondent as the HSCM for the Kilifi County. Under Article 232 (1) (g) of the Constitution the basis for appointments and promotion is fair competition and merits subject to paragraphs (h) and (i) of the said Article. The said paragraphs provides as follows:-

“(h) Representation of Kenya’s diverse communities, and

i. Affording adequate and equal opportunities for appointment, training and advancement, at all levels of Public service of

i. Men and women

ii. The members of all ethnic groups and

iii. Persons with disabilities”.

16. In addition, sub-article e of Article 232 binds all state organs in both levels of government to apply the said values and principles of public service. After considering the provisions of Article 232, Article 55 and 56 of the Constitution, this court is satisfied that the appointment of the 2nd Respondent was proper and lawful and in consonance with Constitution both in matter of procedure and merit. He may not have beaten the claimant in the academic and professional competence under Article 232 (1) (g) of the Constitution. However such competence is subject to Article 232 (1) (h) and (i) aforesaid. With such express provisions of the constitution in place, the best candidates may never be guaranteed of the appointments in the public service and the courts will do nothing about it.

Right to information of the criteria of appointment of the 2nd Respondent

17. No evidence was adduced herein to show that Cw1 had no right to the information regarding the criteria which was used to appoint the 2nd respondent to the post of HSCM. Under Article 35 of the Constitution every person has the right of access to information held by the state and any other person that is required for exercise or protection of any right or fundamental freedom. In this case, the claimant alleges that his right to employment was violated through discrimination. He was therefore entitled to the information regarding the reason why he was not appointed the HSCM for Kilifi County after being ranked the best candidate after the interviews.

Was the information availed?

18. There is no doubt that the information regarding the criteria used to appoint the 2nd respondent was never availed to the claimant. There is however no evidence to prove that he ever sought the information from the 1st respondent. All what Cw1 did after learning that the 2nd Respondent was appointed was to lodge a complaint with the Anti-corruption Agency for investigation of the alleged unethical recruitment process. He never addressed himself to the person with the information directly. He cannot therefore be heard now alleging that his right to information was violated. The foregoing notwithstanding, the information has now been availed through the testimony of Rw1 aforesaid. Consequently the court is satisfied on a balance of probability that the failure to receive the information on the criteria used to appoint 2nd Respondent is because Cw1 never sought for the same from the 1st Respondent.

Disposition

19. For the reasons stated above the claimants suit is dismissed. Each party shall bear his costs.

Dated, signed and delivered this 6th day of May 2016.

ONESMUS MAKAU

JUDGE