



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 2144 OF 2012
JANE ACHIENG.....1ST CLAIMANT
ESTHER OBACHI.....2ND CLAIMANT
VS
UNIVERSITY OF NAIROBI.....RESPONDENT

AWARD

Introduction

1. This case arises from an unresolved discourse on the concept of fair play between the University of Nairobi, a premiere institution of higher learning in this country and two of its employees. Jane Achieng and Esther Obachi, the Claimants in this case are both employees of the University working in the Library Department.
2. Being aggrieved by a recruitment exercise within their Department, the Claimants brought this action by way of a Memorandum of Claim dated 8th October and amended on 26th October 2012. The Respondent filed an amended Memorandum of Defence on 23rd January 2013. The parties also filed written submissions.

The Claimants' Case

3. The Claimants' claim arises from a job advertisement for 8 positions in the establishment of Librarian posted by the Respondent on 13th April 2012. The Claimants applied for the advertised positions but were not shortlisted. Instead, the Respondent shortlisted 7 external candidates.
4. The Claimants allege that the Respondent's failure to shortlist them was informed by ill motive and was discriminatory against them contrary to the Constitution and the law. They therefore seek a declaration that the recruitment arising from the aforesaid process was illegal, unlawful, null and void. In their written submissions, the Claimants also pray for general and exemplary damages as well as several orders for specific performance.

The Respondent's Case

5. In its amended Memorandum of Defence filed on 23rd January 2013, the Respondent states that on 13th April 2012 it advertised for 8 posts of Librarian and 6 posts of Senior Librarian. Both Claimants applied for the position of Librarian but were not shortlisted.

6. The Respondent denies the Claimants' allegations of ill motive and discrimination and states that only candidates who had met the stipulated criteria were shortlisted for the advertised positions. The Respondent goes on to state that the advertisement was published externally through the press and the University website and the whole process was conducted impartially and professionally. A total of 22 candidates applied for the position of Librarian out of whom 7 were shortlisted with 5 attending the interview and 3 being appointed to the position of Librarian.

7. The Respondent states that it was at all times guided by its Staff Recruitment & Selection and the Training & Development Policies which were not contrary to the provisions of any Kenyan law nor the rules of natural justice. The Respondent avers that it is an equal opportunities employer and is guided by both the law and its own policies in the recruitment of staff.

8. In defence against the Claimants' claim of discrimination, the Respondent states that the Claimants did not meet the following minimum requirements set for the position of Librarian and were therefore not shortlisted:

- a. A Masters Degree in Library and Information Science;
- b. A minimum of three (3) years post qualification experience in a busy library;
- c. ICT working knowledge.

9. Evidence of research and experience in academic libraries was stated as an added advantage. The Respondent adds that the advertisement indicated that the successful candidates were expected to manage a section of the Respondent's Library as well as teach Library Information Skills Programme to both undergraduate and postgraduate students of the Respondent and it was therefore vital and mandatory for the candidates to have a minimum of a Masters Degree in Library and Information Science or its equivalent with three (3) years post qualification experience. None of the Claimants possessed these minimum qualifications.

10. The 1st Claimant's qualifications were stated as follows:

- a) Bachelor of Science in Information Science;
- b) Certificate in Management of Information Science and Technology;
- c) Diploma in Management;
- d) Certificate in Librarianship.

11. The 2nd Claimant held the following qualifications:

- a) Master of Arts in Medical Sociology;
- b) Bachelor of Library & Information Science;
- c) Post Graduate Diploma in Gender and Development Studies.

12. The Respondent denies the allegations of discrimination made by the Claimants noting that before the filing of this case, the 2nd Claimant had been promoted to the position of Senior Library Assistant (Grade DEF) effective 13th April 2012.

13. The Respondent submits that by the time the Claimants filed this case the recruitment process had been completed and binding employment contracts issued to the successful candidates. The Respondent together with the recruited staff would therefore suffer irreparable damage and loss if the orders sought by the Claimants are granted.

14. The Respondent further submits that promotions are carried out on merit when staff meet the minimum requirements for the higher position which the Claimants did not possess. Only 3 of the eight 8 advertised positions of Librarian had been filled and the Claimants were free to apply for the vacant positions once re-advertised subject to their having attained the minimum qualifications.

15. Finally, the Respondent submits that the prayers sought by the Claimants are not available in employment law as the Court cannot bar an employer from recruiting for vacant positions in its establishment nor direct the employer on who to appoint to a vacant position.

Findings and Determination

16. From the pleadings and submissions submitted to the Court I have distilled the following issues for determination:

- a) Whether the recruitment process initiated and completed by the Respondent was discriminatory against the Claimants;
- b) What remedies are available to the Claimants.

The Recruitment

17. The recruitment which forms the subject matter of this action was triggered by an advertisement setting the following specifications:

“Applicants must be graduates of recognized university with a minimum of a Masters degree in Library and Information Science or its equivalent. They must have a minimum of three (3) years post qualification professional experience in a busy library. Evidence of ICT working knowledge is a must. Those with evidence of research and experience in academic libraries will have an added advantage.

The successful candidate will be expected to manage one of the sections within the University Library System. They will, in addition, be expected to participate in the teaching of Information Skills Programme to both undergraduate and postgraduate students.”

18. The Court was referred to the Respondent's Policy on Training, Promotion and Establishment, popularly known as the 'Kagiko Report.' According to the Kagiko Report, the minimum qualifications for the position of Librarian were as follows:

- a) Masters Degree in Librarianship
- b) 6 years experience in a busy library
- c) Computer literacy

19. The gist of the Claimants' claim is that by failing to shortlist them for the position of Librarian, the Respondent discriminated against them. Specifically, the Claimants contend that in evaluating their respective applications, the Respondent failed to consider their achieved qualifications and long experience as relevant and equivalent qualifications for the advertised positions.

20. Article 27 of the Constitution of Kenya, 2010 provides as follows:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit before the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

21. Employment and Labour rights are well secured as part of the Bill of Rights under Article 41 of the Constitution. It follows therefore that discrimination in the employment sphere is outlawed in terms of Article 27 set out above. Moreover, Section 5 of the Employment Act, 2007 prohibits discrimination. Specifically Section 5(1) (2) and (3) provides as follows:

5.(1) It shall be the duty of the Minister, labour officers and the Industrial Court-

(a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and

(b) to promote and guarantee equality of opportunity for a person who, is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.

2. An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

3. No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment or other matters arising out of employment

22. In adjudicating disputes between employers and employees, the Employment and Labour Relations Court is well advised to respect decisions made by the employer in as far as they comply with the law and internal policies. However, where the employer's action fails to comply with the relevant legal and policy parameters, the Court is obliged to intervene.

23. I have examined the specifications contained in the job advertisement giving rise to this suit and find a significant departure from the Kagiko Report in as far as the experience period is reduced from 6 years to 3 years. The Respondent did not offer any explanation for this departure.

24. The Claimants claim that some of the candidates shortlisted for the position of Librarian did not meet the minimum qualifications. In addition, they cite a wide range of instances where the Respondent has effected staff promotions within the University contrary to the parameters set by the Kagiko Report. The Claimants also make allegations of ethnic imbalance within the Library Department establishment. Again, the Respondent chose not to respond to these allegations.

25. In *STAWU obo Members Vs South African Airways (Pty) Ltd and Others (JAS54/13) [2014] ZALAC 40; [2015] 2 BLLR 137 (LAC) 14*, the Labour Appeal Court of South Africa held that an employer against whom an allegation of unfair discrimination is made by an employee is required to prove that the action complained of was in fact fair.

26. This is one of the unique features of employment and labour law where the burden of proof shifts from the employee to the employer. The reason for this is that in an employment arrangement, the employer possesses information that would not ordinarily be within the reach of the employee. The employer is therefore under a duty to produce all information within its possession that would aid the Court to arrive at a just and fair determination of the dispute before it.

27. Reading from the Respondent's pleadings and submissions in this case, it seems to me that the Respondent chose to skirt around the issues raised by the Claimants. Even assuming that the allegations made by the Claimants were untrue, the Court was unable to understand why the Respondent chose not to respond to them.

28. More gravely, the Respondent opted to let the Court reach its own conclusion as to why the advertisement in issue did not meet the minimum specifications set out in the Kagiko Report. In the absence of any explanation, the Court concludes that the Respondent knowingly manipulated the recruitment process to the Claimants' detriment.

29. In order to achieve the ideal skills and competencies mix, an employer is expected to recruit both internally and externally. While recruiting exclusively from within exposes an employer to the vagaries of inbreeding, exclusive external recruitment erodes employee morale and defeats loyalty.

30. The Court took notice that prior to filing this action, the Claimants had raised their grievances with the Respondent's management but received no response. It would appear that the Respondent carried its silent mode right through the trial. This did not aid the Respondent's case in any way.

31. Jurisprudence within the current constitutional dispensation leans towards fair play at every stage in the recruitment process. In *Jared Juma Vs Kenya Broadcasting Corporation & 3 Others [2014] eKLR Nduma J* declared a recruitment policy setting the upper limit age of candidates for the position of Managing Director to 45 years unconstitutional.

32. In similar fashion, *Lenaola J in Independent Oversight Authority & Another Vs Attorney General & 660 Others [2014] eKLR* held that recruitment within the public sector must be fair in terms of the ethnic diversity of the country. I fully associate myself with my brother Judges and add that managers of public institutions must be called to account in line with the provisions of the Constitution and the laws made thereunder.

33. On its part, the Employment and Labour Relations Court must where necessary require employers to provide full information for just and fair determination of industrial disputes. To my mind, this would include an audit of the establishment mix, including ethnic balance, in public institutions. This must be the case if we are to translate the provisions in our Constitution from mere aspirations to real life experiences.

34. With respect to the case before me, the Respondent pleads that recruitment has already taken place and binding employment contracts signed with the successful candidates. The Respondent however adds that only 3 of the 8 positions were filled, leaving 5 vacancies.

Remedies

35. I have agonised over the remedies sought by the Claimants in light of the fact that 3 persons have already been recruited and contracts of employment issued to them. I am also aware that there are existing vacancies within the Library establishment. Courts do not run institutions but where managers of those institutions fail to adhere to their own internal policies and the law, they must be directed accordingly. In light of this I make the following orders:

- a) In filling the existing vacancies within the Library establishment and within the University generally, the Respondent shall adhere strictly to the law and its own internal policies and guidelines;
- b) In undertaking future recruitment, the University shall examine its establishment mix bearing in mind the ethnic diversity in this Country.

36. I find no legal basis upon which I can grant the prayers for damages and specific performance sought by the Claimants.

36. The Respondent will meet the costs of this case.

37. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT NAIROBI THIS 10TH DAY OF APRIL 2015

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JUDGE

Appearance:

Jane Achieng (1st Claimant in person)

Esther Obachi (2nd Claimant in person)

Mr. Molenje for the Respondent