



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 24 OF 2013

JARED JUMA PETITIONER/APPLICANT

VERSUS

KENYA BROADCASTING CORPORATION 1ST RESPONDENT

WAITHAKA WAIHENYA 2ND RESPONDENT

VITALIS MUSEBE 3RD RESPONDENT

SAMUEL MAINA 4TH RESPONDENT

Petitioner / Applicant in person

M/S Patricia Khisa for the Respondents

JUDGMENT

1. **High Court Petition 425 of 2012 and High Court judicial Review Application No. 339 of 2012** were consolidated.

2. The matters were subsequently transferred to the High Court. The parties agreed to proceed by way of written submission and therefore no *vivavoce* evidence was adduced.

3. The parties agreed on the issues for determination as follows;

(i) It is agreed that for one to be appointed as the Managing Director of Kenya Broadcasting Corporation one must not be above the age of 45 years. The issue for determination is whether this is discriminatory and a violation of **Article 27** of the **Constitution**.

(ii) It is agreed that the Kenya Broadcasting Corporation has not recruited a Deputy managing Director. The issue for determination is whether this is contrary to the Constitution and the **Kenya broadcasting Act (Cap 221)** particularly **Section 5(2) thereof**;

(iii) In respect of **JR Misc. 339 of 2012**, the issue for determination arising from the Notice of Motion dated 19th September 2012 is whether the recruitment of

the Editor in Chief and the Deputy Editor in Chief in March 2012 without following the Kenya broadcasting Corporation code of Regulation was lawful and reasonable in the circumstances.

4. **Issue I**

The Petitioner relying on the papers filed on record and the written submission states that there is no justifiable public good in limiting the selection category of the Managing Director to only those who are not more than age 45.

The Petitioner submits that, this is not part of government policy and has no basis in Law. That the practice is contrary to **Article 27** of the **Constitution of Kenya 2010**.

5. **Background**

In 2003, the Deputy Managing Director of the 1st Respondent died. Up to the time of filing this position the position remained vacant contrary to **Section 5(2)** of the **Kenya Broadcasting Corporation Act Cap 221**.

6. In 2006, the Respondents reviewed the Kenya Broad Casting Corporation Code of Regulations (KBC COR) and left out the position of Deputy managing Director contrary to the law.

7. In 2004, following the removal from office of the then Managing Director of the 1st Respondent, the 3rd Respondent assumed office in an acting capacity.

8. The 3rd Respondent was then recruited following an advertisement that placed the age requirement for the position of Managing Director as being below forty five (45) years.

9. The job specifications and terms of service were vague and lower than those for the office of the Human Resource officer who was recruited around the same time.

The specifications closely tarried with those held by the incumbent Acting Managing Director who was eventually recruited.

10. It is submitted by the Petitioner that, by arbitrarily limiting the age of the managing Director to be below the age of forty five (45) years, the Petitioner's right and those of other citizens were violated contrary to **Article 27(4)** of the **Constitution of Kenya**.

11. That failure to give the salary scale applicable to the advertised vacancy was a clear violation of the right to information as required under **Article 35(1)(a) and (b)** of the **Constitution** as read **with KBC COR B(3)(III)**.

That KBC COR makes it compulsory to disclose the salary in the advertisement.

12. The non-disclosure was deliberately intended to mute the interest by other persons to the advertised post to give the 3rd Respondent undue advantage.

13. Furthermore, failure by the 1st Respondent to appoint a Deputy Managing Director as required of it under **Article 10** of the **Constitution** and **KBC Act Cap 221 Section 5(2)** amounts to abuse of office.

14. The Petitioner prays for the following orders;

a) Inclusion of a must meet condition being below age forty five (45) to be suitable for the office of the managing Director was and remains a violation of rights to discrimination on age contrary to **Article 27(4)**.

b) A declaration that the right to access information under Article 35 of the Constitution in circumstances of the recruitment and deployment of the 3rd Respondent as Managing Director of the 1st Respondent was violated and as such, there is continuous violation of the said right.

c) A declaration that the current holder of the office of the Managing Director of the 1st Respondent is in office unconstitutionally occasioned by the discrimination in the recruitment exercise.

d) A declaration that failure by the Respondents to appoint Deputy Managing Director is contrary to **Section 5(2)** of the **KBC Act Cap 221**.

15. **Consolidation and further submissions**

The Judicial Review Application No. 339 of 2012 Republic –Vs- Kenya Broadcasting Corporation ex-parte was filed.

In a ruling dated 8th day of November, 2012, D. S. Majanja J. observed that;

*“although the Judicial Review Application raises similar underlying issues as in **Petition 425 of 2012**, it concerns appointment of the Chief Deputy Editor-in-Chief of the Kenya Broadcasting Corporation in March 2012 and the procedure adopted”.*

The Hon. Judge proceeded to consolidate the two cases. The Hon. Judge also declined to make an order for security for costs as this would amount to limiting the right of access to the Court contemplated in **Article 22**.

16. The agreed issue for determination with respect to the JR Application is as set out in issue III above being whether the failure by the Kenya Broadcasting Corporation to follow its code of Regulation in appointing the Editor and Deputy Editor in Chief was lawful and reasonable in the circumstances of the case.

17. In this respect, the ex-parte Applicant submits the two officers were appointed without advertising the positions internally as provided for in the 1st Respondent’s Code of Regulation.

18. In this regard, **Regulation B(3)Iiii)** provides for internal advertisement unless the skills being sought are not available within the corporation.

19. The Applicant submits that the Respondents did not demonstrate that the skills they sought were lacking in the corporation before they resorted to recruiting from outside.

The action by the Respondents created despondency amongst employees, who proceeded before the Parliamentary Committee on House Broadcasting and Energy as tabled in Parliament on the 14th day of June 2012.

20. That the Respondents abused their discretion in this respect and their action was therefore illegal in the circumstances of this case.

Regulation B3(iii) reads;

“following the Managing Director’s approval, vacant posts which cannot be filled internally will be advertised in the press, specifying the required qualifications, duties to be performed, salaries and other terms and conditions of service applicable to the post.”

21. It is submitted that the recruitment of the two officers did not adhere to the well laid procedures of the Corporation and therefore unlawful.

22. The Applicant prays for orders that;

(i) An order of certiorari to bring to this Honourable Court for the purpose of being quashed, the decision of the 1st and 2nd Respondents purporting to recruit an Editor in Chief and a Deputy Editor-in-Chief on or about the month of March 2012 without following the set procedure in the **KBC COR B3(i), (ii), (iii)**.

(ii) The cost of the application in favour of the Applicant

23. **RESPONSE TO THE PETITION AND JR APPLICATION**

The Respondents have opposed the Petition vide the Replying Affidavit of Charles Muoki the Chairman of the Board of Kenya Broadcasting Corporation dated 30th October 2012 and the Replying Affidavit of Charles Waihenya Managing Director of Kenya Broadcasting Corporation dated 30th October 2012.

Both Affidavits were filed on 2nd November 2012.

The Respondents have in addition filed written submissions to the JR Application dated 19th September 2012 and the Petition dated 20th September 2012.

24. **Gravaman of the opposition**

The Respondents state the following in opposition to the Petition and JR Application;

(i) The internal administrative affairs regarding recruitment and appointment of office bearers of the corporation including the Managing Director are subject to Corporate policies and resolutions which are formulated by the Board of KBC established pursuant to **Section 4** of the **KBC Act**;

(ii) That such powers are given under **Section 5** of the **State Corporations Act (Cap 441) Laws of Kenya**

(iii) That policies on job grading, job and person specification for the particular post of Managing Director are formulated by the Board pursuant to **Section 5(1)** of the **Act and Section 492) Legal Notice No. 93, 2004 state corporations (performance contracting) Regulatory** annexed to the Affidavit of Mr. Muoki and marked "CM1".

25. **Regulation 4 titled "Autonomy and responsibilities of Board of Directors"** reads;

"(i) subject to the Act, and any other written law, every state corporation shall have all the powers necessary or expedient for the performance of its functions" and Section 4(2) states:

"subject to paragraph (1) the Board of a state corporation shall; recruit staff including the Chief Executive of the state corporation."

26. The Respondents submit that the Board has the discretion and mandate to recruit and appoint the holder of the position of Managing Director applying its independent judgment and mandate in deciding the requirements and person specifications required. That the specifications it attached to the position of the Managing Director are proper and not discriminatory as alleged or at all.

27. That several institutions and corporations both private and public including constitutional offices include and specify age requirements for a particular post and that specifications and requirements by themselves are not discriminatory.

28. The particular advert was produced before Court and marked *PJ4* 'to the supporting Affidavit of Paul Jilani, the Corporation Secretary' of KBC.

The same was placed on the Daily Nation Newspaper of 8th September 2010 and partly reads;

“KBC

(1) Managing Director

Duties and Responsibilities

Requirements for Appointment

The ideal candidate must possess the following;

- Not more than 45 years of age
- A University degree in Social Sciences from a recognized University
- Must have at least ten years experience in the Media Industry
- Must have worked at a Senior position in the broadcasting sector for at least three years
- Must have extensive knowledge in the emerging trends in the media industry both locally and globally
- In addition, he / she must demonstrate sound leadership and management skills and have excellent interpersonal and negotiation skills.

Remuneration

The appointment will be for an initial contract of three (3) years which may be renewable on the basis of satisfactory performance.

An attractive remuneration package will be offered to the successful candidate.

29. The impugned requirement is one requiring “*not more than forty five (45) years of age*” and failure to specify the remuneration attached to the position.

30. The chairman of the Board deposes that **Article 167(1)** of the **Constitution of Kenya, 2010** specifies and limits the age which the holder of the Constitutional Office of a judge and or Chief justice shall not exceed by virtue of the job requirements of that Constitutional Office and consequently that age specification by itself cannot be looked at in isolation of all other relevant factors.

31. Furthermore, the chairman deposes that the recruitment of the Managing Director is subjected to guidelines provided in circumstances of the 5th November 2004 and 9th May 2008 which circulars expressly provided for transparent and competitive recruitment exercise for the holder of the position of Managing Director. The circulars are annexed to the Affidavit of the chairman and marked ‘*CM2 and CM3*’.

32. The circular dated 5th November 2004 is from Ambassador Francis K. Muthaura, MBS, the then Permanent Secretary / Secretary to the Cabinet and Head of Public service.

The circular partly reads;

“(i) Chief Executives

*Chief Executive Officers of State Corporations should be recruited competitively from the open Labour Market by the Boards of Directors in accordance with **Section 5(3) of the State Corporations Act, Cap 446.**”*

33. The circular dated 9th May 2008 partly reads;

“(ii) appointment of Chief Executive Officers

In line with the Guidelines Chief Executive Officers of State Corporations are selected competitively by the Boards themselves or through reputable recruitment agencies. In both cases the process should select the best three (3) candidates who will be recommended to the Minister for appointment of one of them.”

Annex ‘CM7’, to the Affidavit, is a document dated 23rd November 2004 titled:

“OFFICE OF THE PRESIDENT –

Guidelines on Terms and Conditions of Service for

State Corporations

Chief Executive Officers

Chairmen and Board members

Management Staff

Unionsable Staff.

34. In **Clause 15** thereof headed “*Competitive Sourcing of Chief Executives*” it reads;

“15 in order to attract persons of sound background with the relevant skills and experience which each state Corporation requires to manage its business efficiently and effectively, Boards are advised that henceforth new appointments of Chief Executive Officers should be competitive.”

35. It is the Respondent’s submission that Board of KBC was well guided by the existing policy of the government to advertise for the position of the Managing Director of KBC on 8th September 2010, which specified the job and person requirements deemed to be suitable for the position.

36. That these job specifications were objective and not tailored to suit any specific candidate.

37. The recruitment exercise was open to all persons who met the criteria and therefore the specifications cannot be said to be discriminatory.

38. Mr. Charles Waihenya Waithaka, the Managing Director in his replying Affidavit and Mr. Paul Jilani, the Corporation Secretary, fully supports the evidence contained in the Supporting Affidavit of the chairman and the Court need not repeat the averments in the two Supporting Affidavits.

39. The Respondents pray that the Petition be dismissed with costs.

40. **JR Application**

The Applicant alleges that KBC recruited Editor in Chief and the Deputy Editor in Chief without following **KBC COR B3 (i), (ii) and (iii)**. That by so doing, KBC breached the Legitimate Expectations of the Applicant and the members of the public by failing to advertise in the first place, the said positions internally, before placing open advertisements to the members of the public.

41. That the exercise became illegal due to that failure as it was contrary to **145c COR B3(i), (ii) and (iii)**.

And that, the omission was done in bad faith to avoid giving the Applicant and other possible internal candidates a chance. That the decision was insensitive to the plight of existing employees and is detrimental to the morale and team work.

42. The Respondents have opposed the assertions by the Applicant strenuously in the Affidavit of Paul Jilani dated 7th November 2012 stating that the Applicant has recklessly instituted suits against KBC without good cause.

43. The Respondents have also filed written submissions on 4th July 2013 on this aspect of the case as follows;

That KBC has mandate to engage and employ such number of staff, including the Chief Executive on such terms and conditions of service pursuant to **Section 5(3) of the state Corporations Act, Cap 446 Laws of Kenya**.

44. That KBC'S COR is in existence as a consequence and in direct fulfilment of the directives given in the statutes governing its operations.

45. That the KBC Act and the state Corporations Act, and the Government circulars promulgated pursuant thereto rank higher than the Internal code of conduct the Applicant purports to rely on.

46. That the Board is well guided by the law on matters of recruitment and if there is any conflict between the statutes, the Government circulars and the KBC COR, the statutes and circulars prevail.

47. The Respondents submit therefore that they were well guided in the recruitment of the Editor in Chief and Deputy Editor in Chief by the primary legislation and Government Policy Circular dated 23rd November 2004 "*on the Guidelines on Terms and conditions of service for state corporations etc ... (annexed to the 2nd Respondent's Replying Affidavit, Mr. Waithaka Waihenya, marked 'WW1'*".

48. The Respondents further submit that the position of Editor in Chief ranks as Head of Department within the operation of KBC and pursuant to **Article A.3 of KBC COR**.

49. That recruitment process of Heads of Departments in state Corporations is guided by the Government circular dated November 2004 annexed to the Replying Affidavit of Mr. Waithaka Waihenya and marked "(WWM7)". KBC COR does not address itself to recruitment of Heads of Departments within the Corporation.

50. The Government circular at page 4 **Clause 12** titled "*Terms and Conditions of service for management Staff partly reads;*

"To ensure that the structure is manned by staff with relevant skills and experience recruitment should be competitive when filling any Management position, whether internally or externally. Pay levels will depend, interalia on job evaluation and the Corporations' salary scales as the starting point".

51. This coupled with the circular dated 5th November 2004 annexed to Mr. Waithaka Waihenya's Replying Affidavit marked "WW3".

52. It is submitted by the Respondents therefore, Corporations are directed to appoint Heads of Departments competitively through the Board of Directors. This implied advertisement of the vacant posts as part of the recruitment process coupled with a credible interviewing process of the shortlisted candidates.

That the Respondent adhered to this process strictly and cannot be faulted by the Court therefore.

The Respondent prays that the Application be dismissed with costs.

53. **Determination**

1st and 2nd Issue arising from the Petition.

Article 27(4) of the **Constitution of Kenya 2010** provides;

"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". (emphasis mine)

54. The question that the Court must answer is whether placing an age limit as a pre-condition to qualify for the position of Managing Director amounted to discrimination within the meaning of **Article 27(4)** of the **Constitution of Kenya 2010**.

55. The starting point is that as a matter of fact, the relevant statutes and the statutory rules or regulations canvassed in this suit do not prescribe the age limit applicable to the occupant of the position of Managing Director of KBC.

56. It cannot therefore be said that the Board of KBC breached any statutory or regulatory provision in its decision to limit the age of the occupier of the position of the Managing Director of KBC to forty five (45) years and below.

57. The 2nd step is to establish whether the Petitioner has demonstrated that the decision was deliberately made to discriminate against himself as a candidate for the advertised position.

58. The Petitioner has not adduced any evidence to the effect that the age limitation placed on the position of Managing Director of KBC prevented him to apply for the advertised position.

59. As a matter of fact, the Petitioner does not indicate whether he was interested in applying for the position or whether he had applied to be considered for the position and if so, for what reasons he was not successful.

60. Furthermore, the Petitioner did not disclose whether he had raised the matter with the Board of KBC at any particular time or at all.

In short, the Petitioner lacks any factual basis on which actual prejudice against the Petitioner or any other specific person may be deduced.

61. The 3rd step therefore is to decide whether a maximum age limit of forty five (45) years as a requirement for recruitment as the Managing Director of KBC perse was contrary to the Constitution of Kenya 2010 and therefore null and void *abinito*.

62. A Decision may be declared unconstitutional for various reasons including ;

- (i) Being contrary to the letter and spirit of the Constitution;
- (ii) Being in violation of a principle, right or freedom provided in the Constitution;
- (iii) Being irrational or disproportionate taking into account the minimum core content of the particular right.

63. The Constitution of Kenya 2010 does not have a provision of general application dealing with age as a qualifier or disqualifier to hold a state or public office.

Even with respect to specific positions such as those of judges under **Article 167(i)**, the Constitution provides only for the maximum age upon which a Judge may hold office.

64. The Constitution also limits the tenure of certain positions including that of the President to two (2) terms and the Chief Justice to a maximum of ten (10) years.

65. Another principle of limitation embraced by the Constitution is on number of years of experience with regard to Judicial Officers under **Article 166(5)** which requires at least ten (10) years experience either as a Supreme Court Judge, or professionally qualified Magistrate or as a distinguished academic or legal practitioner.

66. These Constitutional provisions place minimum requirements on the holders of certain Constitutional Offices which effectively excludes persons who have not attained those requirements.

67. Similarly, all public officers on permanent and pensionable terms except certain state officers, like Judges whose retirement age is seventy (70) years are statutorily bound to retire at the age of sixty (60) under the **Pensions Act**.

68. These provisions therefore disqualify persons beyond certain ages from holding a public office except as otherwise provided by the law.

69. Given that government public policy envisages any qualified person to hold office in various cadre, including in the various parastatals such as KBC, what informed the decision by Board of KBC to limit the age of the Managing Director to forty five (45) years? Is it a decision in keeping with Public Policy? Is it so restrictive as to be construed as grossly unreasonable and in violation of the right of the Petitioner to apply for the position and others above the age of forty five (45)? Does the decision conform to the minimum core content of equality and non- discrimination under **Article 27(4)**?

70. In **Associated Provincial picture Houses –vs- Wednesbury Corporation – (1948) 1KR 223 commonly known as Wednesbury unreasonable.** Lord Green M. R. said;

“Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in Judicial review proceedings where the Court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.”

This principle of reasonableness equally applies in Constitutional adjudication.

71. It is the Court’s considered view that the Board of KCB, properly directing itself on the relevant law (especially on the retirement age of public servants in Kenya) and acting reasonably could not have reached the decision that a Managing Director of public parastatal should not be more than forty five (45) years old.

72. The decision was therefore grossly unreasonable as to amount to discrimination on grounds of age contrary to **Article 27(4)** of the **Constitution of Kenya 2010**.

73. The decision necessary excluded many worthy applicants from being considered on merit to occupy the position of Managing Director of KBC. The decision negated the minimum core content of the right provided under **Article 27(4)**.

74. The decision was also equally in breach of the principle of proportionality. The principal was defined in 1980 by the Committee of Ministers of the Council of Europe as follows;

“An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have on the rights, liberties or interests of the person concerned and the purpose which the authority is seeking to pursue”.

75. It is the Court’s considered view that an appropriate balance was not sought in arriving at a cut off age of forty five (45) years to the loss and detriment of the Petitioner and others in his position.

(ii) Recruitment of Deputy managing Director.

76. The Court finds no merit in the allegation that failure to recruit the Deputy Managing Director violates the **Constitution of Kenya 2010** and **Section 5(2)** of the **KBC Act**.

This is a decision within the discretion of the Board of KBC.

77. No evidence has been placed before Court that the failure to appoint the Deputy Managing Director at that particular time was unreasonable or in any manner infringed the right of the Petitioner and / or any other persons.

78. **Issue No. III**

Failure to advertise the positions of Chief and Deputy Chief Editor internally.

This is the subject matter of the JR Application that was consolidated with the Petition.

79. The grievance by the Applicant is that the positions of the Chief and Deputy Chief Editor were filled following an advertisement to the general public in the local daily newspaper without first considering filling the position internally.

80. That there were competent persons in the employment of the Respondent at the time including the Applicant capable of filling the two positions.

81. That failure to conduct an internal recruitment exercise first before advertising to the general public was contrary to the Respondent’s recruitment policy and the KBC Act.

The procedure followed was thus in excess of authority conferred on the KBC Board and therefore null and void.

82. Having considered the Applicable statute, the KBC COR and the various Government circulars, the Court is of the conclusion that it was proper and in keeping with the Government Policy on recruitment, to advertise the vacant positions of the Chief and Deputy Chief Editors to the General Public rather than conduct an internal recruitment advocated by the Applicant herein.

83. It must be remembered that KBC is a public parastatal and therefore is subject to the values and principles of Public service contained in Chapter thirteen of the Constitution of Kenya 2010.

84. In particular **Article 232(1)(g)** of the **Constitution** provides that;

“The values and principles of Public Service includes;

“subject to paragraphs (h) and (i) fair competition and merit as ‘the basis of appointments and promotions;”

This does not however exclude where appropriate, appointments restricted to existing staff and internal promotions to fill up vacant positions.

85. In the present case, it has not been demonstrated that the KBC Board abused its authority in placing external advertisements for the positions of Editor and Deputy Editor of KBC.

86. The onus is on the Applicant to prove on a balance of probability that, this was the case. The Applicant has failed to do so, with the result that the Application to quash the decision of the KBC Board is dismissed.

87. In the final analysis the Court makes the following orders;

a) declares that including a must meet condition of being below age forty five (45) to be suitable for the office of the Managing Director was and remains a violation of the right against discrimination on age contrary to **Article 27(4)** of the **Constitution of Kenya 2010**.

b) declares that, to the extent, that the recruitment of the current holder in the office of the Managing Director, the 1st Respondent was done in contravention of **Article 27(4)** of the **Constitution of Kenya 2010**, the said recruitment is null and void.

c) the rest of the orders sought in The Industrial Court consolidated **JR Application No. 24 of 2013** are dismissed.;

d) the 1st Respondent to meet the costs of the suit.

Dated and Delivered at Nairobi this 5th day of December, 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE