



**Association of Public health Officers of Kenya v Siaya County Secretary & 2 others
(Petition E010 of 2024) [2024] KEELRC 2023 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2023 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E010 OF 2024**

**CN BAARI, J
JULY 25, 2024**

BETWEEN

ASSOCIATION OF PUBLIC HEALTH OFFICERS OF KENYA PETITIONER

AND

SIAYA COUNTY SECRETARY 1ST RESPONDENT

SIAYA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

SIAYA COUNTY GOVERNMENT 3RD RESPONDENT

JUDGMENT

1. The Petitioner's petition is dated 13th March, 2024. The Petitioner seeks the following reliefs: -
 - i. That a declaration be issued that the failure by the 2nd Respondent to adhere to the requirements of Article 10, 27, 73 and 232 of the *Constitution* as well as Sections 65(1) and 65(2) of the *County Governments Act* and Regulation B.6 (1) and 2 of the County Public Service Human Resource Manual renders the purported process of recruitment for the position of County Director of Health invalid.
 - ii. That a declaration be issued that the 2nd Respondent's reliance on Section 19(4) to advertise for the position of County Director of Health, a provision that was declared Unconstitutional through the case of *Pharmaceutical Society of Kenya and Another vs. Attorney General and 3 others (Petition 85 of 2018(2021) KEHC 85 (KLR)* is invalid null and void.
 - iii. That a declaration be issued that the failure by the 2nd Respondent to adhere to the constitutional provisions, the *County Governments Act* and the procedure espoused by the County Public Service Human Resource Manual in recruitment and short listing the Applicants for the position County Director of Health is a violation of the legitimate



expectation that the Petitioner had in regard to how the 2nd Respondent would conduct the process of assessing for purposes of shortlisting and recruiting for the aforesaid position.

- iv. That an Order of certiorari do issue to bring into this Court and quash the recruitment and shortlisting exercise for the position of County Director of Health, as the same was in violation of Articles 10, 73 and 232 of the Constitution, the County Governments Act as well as the County Public Service Human Resource Manual.
- v. That an Order of certiorari do issue to bring into this Court and quash the results/ outcome of the recruitment and short-listing exercise for the position of County Director of Health as the same was in violation of the Constitution, the County Governments Act as well as the Cow1ty Public Human Resource Manual
- vi. That in the alternative the Honourable Court do issue an Order of mandamus to compel the 2nd Respondent to allow applications include the names of the members not registered by the Medical Practitioners Board (Nurses, Public health officials, pharmacists and dentists) having been qualified for the position of County Director of Health to apply provided they meet the basic requirements.
- vii. That the Honourable Court do issue an Order of mandamus to compel the 2nd Respondent to re-advertise position of County Director of Health inviting all health professionals as espoused by the Health Act,2017.
- viii. That costs for this Petition be payable to the Petitioner by the Respondents.

The Petition

2. The petition is grounded on the Respondents' advertisement for the position of County Director of Health placed on the 2nd Respondent's website inviting qualified and competent persons for purposes of recruitment to the position.
3. The Petitioner states that the application deadline for the position was indicated as 12th March, 2024, and that despite the fact that the 1st Respondent exercises discretion in short listing the applicants; the shortlisting stage is critical in the recruitment
4. The Petitioner further states that the exercise of such discretion by the 1st Respondent should be within the parameters set by the Constitution of Kenya, the County Governments Act and the County Public Service Human Resource Manual.
5. It avers that among other qualifications, the advertisement for the position of County Director of Health placed on the website requires that the holder of such post should be a Medical Doctor registered by the Medical Practitioners Board.
6. It states further that Section 19(4) of the Health Act that established that for a person to be appointed as a County Director of Health; the person shall be a medical practitioner registered by the Medical Practitioners and Dentists Board, was declared unconstitutional through the case of Pharmaceutical Societt1 of Kent/a and Another vs. Attorney General and 3 others (Petition 85 of 2018)(2021) KEHC 85 (KLR) for reason that confining the position of County Director of Health to medical practitioners at the expense of other health professionals, is discriminatory to other health professionals and offends Article 27 of the Constitution.
7. That the 2nd Respondent notwithstanding the above, has advertised for the position of County Director of Health restricting the position to only medical doctors.



8. It is the Petitioner's assertion that the qualification bars pharmacists, nurses, public health officers, clinical officers from holding the administrative posts which they ought to hold on an equal platform.
9. It is the Petitioner's position that the requirement that the holders of such post should be Medical Doctors registered by the Medical Practitioners Board, means that health professionals that are regulated under the Pharmacy and Poisons Board, the Nurses Council, the Public Health Officers and Technicians are not eligible for the position.
10. It further asserts that the recruitment subject of this petition is being conducted in flagrant disregard of the law that stipulates that fair competition and merit should be a vital tenet for recruitment and the ensuing appointments.
11. The Respondents did not defend the petition despite service.

The Petitioner's Submissions

12. The Petitioner submits that the right not to be discriminated against is one protected not only under the Constitution, but also under regional and international instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and People Rights amongst others.
13. It is the Petitioner's submission that there was no justifiable explanation given by the Respondents as to why the position of Director health is reserved for medical practitioners registered by the Medical Practitioners and Dentists Board, while they are aware that health professionals are registered under various organizations.
14. The Petitioner submits that Section 19 of the Health Act having been declared unconstitutional and the Respondents having advertised the impugned position goes to confirm that the Petitioner is entitled to the orders sought.

Analysis and Determination

15. Upon careful appraisal of the petition and the submissions by the Petitioner's, the singular issue that presents for determination is whether the advertisement of the position of County Director of Health for Siaya County is unconstitutional for having limited the pool of possible applicants to only health professionals who are medical doctors registered by the Medical Practitioners and Dentists Board.
16. The Petitioner relies to a large extent on the declaration of unconstitutionality of Section 19(4) of the Health Act, pursuant to which the advertisement of the position of County Director Health, is premised.
17. Indeed, Justice Weldon Korir in the case of Pharmaceutical Society of Kenya & another v Attorney General & 3 others [2021] eKLR held thus:

“The Health Act, 2017 was purposely enacted to cater for the needs of the health care system in Kenya with the main goal of delivering quality health products and services to all persons in Kenya. The Act in its definitions revealed inclusivity of the health care professionals and at that point did not differentiate between one health care professional from another. A job qualification differentiation was introduced in the impugned provisions which specified that the said positions could only be filled by a medical practitioner registered by the Medical Practitioners and Dentists Board thereby excluding all other health care professionals (emphasis own).....



It had not been demonstrated that members of the Medical Practitioners and Dentists Board had unique administrative skills not available to the members of the petitioners hence justifying the reservation of the managerial positions to its members. The differentiation introduced in the impugned provisions was unreasonable as there was no valid reason to treat healthcare providers and healthcare professionals differently yet they all served in the same healthcare system with the aim of attaining the goals identified in the Health Act, 2017. Accordingly, the impugned provisions of sections 16, 19 and 33 of the Health Act, 2017 violated article 27 of the Constitution and were therefore unconstitutional.”

18. Section 19 (2) of the Health Act states that: -

“There shall be established the office of the County Director of health who shall be a technical advisor on all matters of health in the County.”

19. Section 19 (4) goes on to provide: -

“A person appointed a County Director of health shall-

- (a) be a medical practitioner registered by the Medical Practitioners and Dentists Board;
- (b) be at least a holder of a Masters degree in public health, medicine or any other health related discipline; and
- (c) have at least five years' experience in management of health services.”

20. As correctly held in the *Pharmaceutical Society of Kenya & another v Attorney General & 3 others* case (supra), the Health Act in its definitions reveal inclusivity of the health care professionals and does not differentiate between one group of health care professionals from another. It thus follows that the job qualification differentiation is solely introduced by Section 19 (4) of the Act which by its wording, disqualifies all other health care professionals from the position of County Director of Health which the impugned provision reserves for Medical Practitioners registered under the Medical Practitioners and Dentists Board.

21. Article 27 of the Constitution demands that people of the same status be treated equally. In my view, the training and qualifications of members of the Petitioner and those registered by the Medical Practitioners and Dentists Board is similar, and hence treating them unequally without justification amounts to discrimination and which renders the law allowing such discrimination unconstitutional.

22. By the reasons foregone, I fully associate myself with the holding in *Pharmaceutical Society of Kenya & another v Attorney General & 3 others* (supra) on the unconstitutionality of Section 19(4) of the Health Act, 2017.

23. In whole, the Petitioner’s petition succeeds and I grant orders as follows: -

- a. A declaration be and is hereby issued that the 2nd Respondent’s reliance on Section 19 (4) of the Health Act to advertise the position of County Director of Health, a provision that was declared unconstitutional is invalid null and void.
- b. An Order of judicial review in the nature of Certiorari be and is hereby issued to bring into this Court and to quash the results/outcome of the recruitment and short-listing exercise for the position of County Director of Health for Siaya county.



- c. That an order of judicial review in the nature of Mandamus be and is hereby issued to compel the 2nd Respondent to re-advertise the position of County Director of Health and invite all health professionals to apply as espoused by the *Health Act*,2017.
- d. The petition being undefended, parties shall bear their own costs.

24. It is ordered.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF JULY, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A for the Petitioner

N/A for the Respondents

Anjeline & Debra - C/As

