

## Chapter 13

# Discrimination at the Workplace

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### Case 13.1 George Opiyo and 2 Others v Deputy County Commissioner Gem, & Another (Siaya)

(HCCP NO. 1 of 2015)

#### Facts

The petitioners George Opiyo, George Ocheng and John Okinyo challenged the constitutionality of the appointment of the second respondent – Pauline Apondi – as an assistant chief of Ulamba sub-location by the first respondent, the deputy county commissioner, Gem, Siaya County.

The petition was brought for and on behalf of the people of Ulamba sub-location, who were displeased and dissatisfied with the actions of the first respondent, who appointed the second respondent without any consultation.

The basis of the petition was that the first respondent in appointment of the second respondent contravened **Article 27 of the constitution**, acted unprocedurally and was not fair. The appointment was not done in the best interests of the people of Ulamba sub-location as the sub-location was inhabited by numerous thugs, who caused the area to have ‘run away insecurity’ leading to loss of lives. Further, that the second respondent had always stayed out of Ulamba by staying in Sudan, and therefore was not well conversant with the area. Given the area’s large size, location and the nature of the work, which required both day and night patrols, the second respondent was not in a position to effectively perform the task needed: the terrain called for a stronger personality (a man) to manage it.

The petitioners further alleged that the first respondent, throughout the appointing process of the second respondent as the assistant chief of Ulamba, did not consult and co-operate with the people of Ulamba and this denied them the right to access public services. As such, the right to security of the person as enshrined in the constitution had been violated by the first respondent, by appointing someone who was not principally qualified to handle the insecurity in Ulamba sub-location. The first respondent violated the principle of supremacy of the constitution in Articles 1 and 2, 6, 10, 20, 22, 23, 27 and 48.

Issues:

1. Whether the appointment of the second respondent was in accordance with the constitution and the law.

2. Whether the petition was premature, misconceived and lacked merit.
3. Whether the petition violated Article 27 of the constitution.

Held that:

1. The first respondent, in making the appointment of an assistant chief should be guided by the national values and principles set out in Article 10 of the constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Upon evaluation of the evidence and considering the relevant provisions of the constitution and counsel submissions, due process and conformity with the constitution was complied with, as the second respondent emerged among the top in the selection process. The first respondent made appointment of the second respondent on the basis of clear constitutional criteria and complied with Articles 10 and 73 of the Constitution of Kenya, 2010. The second respondent, who was appointed to the position of assistant chief, met certain integrity and competence standards as set out under chapter 6 of the Constitution of Kenya. Inquiry was made with regard to the suitability of the second respondent under the provisions of the constitution by the first respondent assisted by a panel, which included members of public, who represented the public. The court therefore found that there was public participation.
2. As to whether the petition violated Article 27 of the Constitution of Kenya, the petitioners sought to discriminate against the second respondent on the ground of sex in her efforts to secure the job of assistant chief. The petitioners portrayed the second respondent as weak, because she is simply a woman; that she should not be offered the job because it was tedious in nature and in which one was expected to work during day and night. In the court's view, this was discrimination on the ground of sex; it was against human dignity and scornful to women and the second respondent. Further, the petition intended to ensure that women and men should not have the right to equal treatment, including the right to equal opportunities in economic, cultural and social spheres.
3. In constitutional references where a petitioner is seeking to enforce his purported violated constitutional rights, he should not be allowed to violate or breach and/or infringe the right of others or another so as to have his purported right enforced. The petitioners were in the court's view seeking to violate the constitutional rights of the second respondent by discriminating against her. The

petitioners violated the same constitutional provisions that they relied on to seek redress before the court. The petitioners should have realised that the second respondent had the right to equal treatment and the right to equal opportunities, as she was also protected by the same constitution as they were – and should not be discriminated against by virtue of her gender or sex.

**Order of court**

The petition was without merits and was dismissed.

**Contribution to jurisprudence/ point to note:**

- The court rejected the stereotype that certain types of employment do not suit women. It emphasised the right to equality and work opportunities for both men and women.