Lugalia & another v Cabinet Secretary, Ministry of Information, Communication and the Digital Economy & 3 others; Kenya Editors Guild (Sued through its President and Secretary Namely Zubediah Kananu Koome & Rosalia Omungo) & 2 others (Interested Parties) (Constitutional Petition E367 of 2024) [2025] KEHC 7286 (KLR) (Constitutional and Human Rights) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7286 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E367 OF 2024

AB MWAMUYE, J

MAY 15, 2025

BETWEEN

LUCY MINAYO LUGALIA ..... 1ST PETITIONER

ANTONY NZAU MUSAU ..... 2ND PETITIONER

AND

CABINET SECRETARY, MINISTRY OF INFORMATION, COMMUNICATION AND THE DIGITAL ECONOMY ..... 1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF INFORMATION, COMMUNICATION AND THE DIGITAL ECONOMY ..... 2ND RESPONDENT

THE SELECTION PANEL FOR THE NOMINATION OF THE CHAIRMAN AND MEMBERS OF THE MEDIA COMPLAINTS COMMISSION ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

KENYA EDITORS GUILD (SUED THROUGH ITS PRESIDENT AND SECRETARY NAMELY ZUBEDIAH KANANU KOOME & ROSALIA OMUNGO) ..... INTERESTED PARTY

KENYA UNION OF JOURNALISTS ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

JUDGMENT

Background

1. Article 34(5) of *the Constitution* of Kenya 2010 requires Parliament to establish an independent body to set media standards and regulate media conduct, including hearing complaints. In furtherance of this mandate, the *Media Council Act*, 2013 established the Media Complaints Commission (hereinafter "the Commission") as the adjudicatory arm of the Media Council of Kenya. The Act provides a detailed procedure for appointing the Chairperson and members of this Commission to safeguard its independence and ensure merit-based selection.

2. When vacancies arise, the 1st Respondent (Cabinet Secretary for ICT) convenes a Selection Panel (3rd Respondent) comprising of a Chairperson and Members drawn from various stakeholders. The Selection Panel invites applications, shortlists candidates, and publishes the shortlisted names in the Kenya Gazette and in newspapers, then conducts interviews.

3. Thereafter, the Selection Panel submits to the 1st Respondent the names of the successful candidates as nominees for appointment to the Commission. The law anticipates that the 1st Respondent will formally appoint the nominees by Gazette notice. Importantly, if the 1st Respondent is not satisfied with any nominee, the law allows a rejection only on reasonable grounds communicated in writing to the Selection Panel. In the event of such rejection, the Selection Panel then selects an alternative candidate from the remaining qualified persons, usually from the initial shortlist, and submits that name to the 1st Respondent for appointment.

4. Section 29 of the Act further underscores that the entire recruitment process must be fair, transparent, competitive, and merit-based.

5. In the present case, a Gazette Notice No. 6284 dated 24th May 2024 was issued by the 1st Respondent inviting applications to fill the positions of Chairperson and Six members of the Media Complaints Commission. In June 2024, the Petitioners applied for the positions of Member of the Commission. Having met all the advertised minimum qualifications, they were shortlisted alongside 18 other candidates (20 candidates in total). The Petitioners were invited for interviews, and after being interviewed by the Selection Panel, the Petitioners emerged as part of the successful candidates selected by the Panel to fill the six vacant member positions. Thereafter, the Selection Panel duly forwarded the six names of the proposed members, along with the name of the proposed Chairperson, to the 1st Respondent for appointment as required by law.

6. The Petitioners aver that the appointment (gazettement) process was inexplicably delayed for about three weeks. They aver that one reason given for the delay was that one of the originally successful nominees had taken up another job in the form of board position at Nation Media Group, necessitating a replacement from the reserve list. Nonetheless, by 12th July 2024, the Petitioners state that they expected all the vetted nominees including themselves to be formally appointed via gazette notice. They aver that to their surprise, on 12th July 2024 the 1st Respondent caused to be published a Gazette Notice appointing the Chairperson and only four out of the six member nominees to the Media Complaints Commission – pointedly omitting the Petitioners' names. In other words, two of the member positions remained unfilled in that Gazette Notice, and those positions corresponded with the Petitioners. The Petitioners aver that their exclusion, notwithstanding having been duly selected by the 3rd Respondent, prompted public concern and inquiries within the media industry.

7. The Petitioners state that they soon learned the purported reason for their omission. By a letter dated 8th July 2024, the 2nd Respondent (Principal Secretary, Ministry of ICT) communicated to the Selection Panel that:

> "following background checks and vetting of the proposed candidates by the relevant Government agencies, it has been found that two candidates Ms. Lucy Minayo and Mr. Anthony Nzau Musau have been found unsuitable for appointment... [t]heir nomination will not be favourable to the sector."

8. The Petitioners state that this letter, effectively rejecting the Petitioners' candidacy, was not copied or disclosed to the Petitioners at the time; and they only became aware of it once the letter entered into the public arena. The Petitioners state that the 2nd Respondent has no legal role in the appointment process and that his issuance of the impugned letter was ultra vires and unlawful. They emphasize that they were never informed of any specific adverse findings from the so-called "background checks," nor were they given any opportunity to know the allegations of unsuitability or to respond to them. The Petitioners maintain that all mandatory clearances were obtained prior to their nomination – they have never been convicted of any crime nor been found guilty of professional misconduct – and thus any insinuation of "unsuitability" is unfounded and has gravely harmed their reputations.

9. The Petitioners proceed to state that the decision to exclude the two nominees sparked an outcry among media stakeholders and civil society. The Kenya Media Sector Working Group issued a public statement demanding that all duly recruited members of the Commission, including the Petitioners, be gazetted without further delay. On 24th July 2024, journalists across the country staged demonstrations partly to protest the "lack of good governance in the appointment of members of the Media Complaints Commission," among other grievances. In the eyes of the Petitioners, this alleged public discontent underscored the perception that the integrity and independence of the media regulatory framework were being undermined.

10. Aggrieved by what they saw as an illegal interference in a lawful appointment process, the Petitioners moved to this Court. In their Petition filed on 29th July 2024, they allege that the Respondents' actions violated multiple constitutional provisions, principally: the right to fair administrative action (Article 47(1)), the right to a fair hearing (Article 50(1)), and the constitutional guarantees of media freedom and independence (Article 34, especially Article 34(5)). They also invoke foundational principles of *the Constitution* such as Article 10 (rule of law, good governance, transparency) and Article 2(4) (the invalidity of any law or action inconsistent with *the Constitution*). In essence, the Petitioners contend that the 1st Respondent's decision to reject their nominations in the manner that it was done was taken without lawful authority and without affording them due process; thereby infringing their constitutional rights and also the independence of the Media Complaints Commission. They emphasize that Section 27(5) of the *Media Council Act* allows rejection of a nominee only on reasonable grounds, and even then, such power must be exercised transparently and in conformity with Article 47 and the *Fair Administrative Action Act*, 2015.

11. The Petitioners assert that in this case the grounds for rejection were not reasonable, and the process of their ostensible rejection was neither transparent nor fair. They further argue that the 1st Respondent did not in actual fact formally exercise the rejection power granted to that office in by the Act– instead it was the 2nd Respondent who signed the rejection letter – rendering that decision ultra vires. In their view, the 2nd Respondent acted without lawful mandate or authority of law, and even if he purported to act at the 1st Respondent's behest and as an agent of that office, the law does not permit delegation of the 1st Respondent's appointment/rejection function in this context.

12. The Petitioners also assert a legitimate expectation that, having successfully undergone a rigorous selection process which they state included vetting and background checks, they would be appointed barring any valid, proven disqualification – an expectation they say was thwarted arbitrarily.

13. Ultimately, the Petitioners pray for declarations that their fundamental rights have been violated, a declaration that the 2nd Respondent's rejection letter was ultra vires and thus null and void, an order of certiorari quashing the partial Gazette Notice that omitted their names, an order of mandamus directing the 1st Respondent to gazette the Petitioners as Members of the Commission, and an injunction to restrain the swearing-in of any other persons to those positions except the Petitioners.

14. The Respondents filed replying affidavits and submissions refuting the Petitioners' claims. Factually, the Respondents acknowledge that the Petitioners were among those nominated by the Selection Panel but aver that subsequent "background checks" by relevant state agencies found the Petitioners unsuitable for appointment. They maintain that the decision to exclude the Petitioners was based on reasonable grounds, namely the adverse vetting information, and it was made in good faith and to ensure that only suitable persons serve on the Commission.

15. The 1st Respondent contends that he was entitled to rely on the assessments of "relevant government agencies" regarding the candidates' suitability, and that doing so was neither arbitrary nor capricious. The Respondents generally further argue that no law was violated and in their view Section 27(5) of the *Media Council Act* was complied with because the Petitioners' nominations were rejected on bona fide grounds (unsuitability) and this was communicated via the 2nd Respondent's letter to the Selection Panel. They assert that the 2nd Respondent's letter was issued under the direction and authority of the 1st Respondent, and thus there was no usurpation of power. The Respondents did not, however, produce any written instrument or record showing that the 1st Respondent formally directed and/or authorized the 2nd Respondent to act on his behalf in this matter.

16. Regarding the Petitioners' constitutional claims, the Respondents contend that the Petitioners have no constitutional right to a public appointment and cannot claim that there was a violation of either Article 47 or Article 50 simply because they were not selected for a public appointment. They cite the principle that while every person has the right to fair treatment, there is no entitlement to a specific job or appointment absent a contractual or statutory guarantee. In support of this, they rely on Kenya Airways Ltd v. Aviation & Allied Workers Union Kenya & 3 Others [2014] (Court of Appeal) for the proposition that an employer or appointing authority has discretion to decide whom to hire, provided no unlawful discrimination is involved. The Respondents argue that the selection process remained lawful and competitive, and that the omission of the Petitioners and the leaving of two positions vacant pending further action does not render the appointment of the other four members or the Chairperson illegal. They submit that the Gazette Notice of 12th July 2024 was valid to the extent of the appointments made, and that the remaining vacancies can be filled later in accordance with the law – implying that no irreversible prejudice has been caused to the public or to the Petitioners.

17. Finally, as a preliminary point, the Respondents challenge the form and precision of the Petition itself. They argue that the Petitioners have not met the threshold for constitutional petitions because they allegedly failed to plead with specificity the exact constitutional provisions violated and the manner of violation. In this regard, the Respondents invoke the oft-cited precedent of Anarita Karimi Njeru v Republic (No. 1) [1979] KLR 154, as reaffirmed by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR, which requires a petitioner to set out the constitutional provisions alleged to be infringed and the factual particulars of the alleged infringements. They contend that the Petitioners have merely cited "omnibus" constitutional

provisions without clearly linking them to specific acts or omissions of the Respondents, and on that ground alone, the Petition should be dismissed.

18. The Kenya Editors Guild (1st Interested Party) and the Kenya National Commission on Human Rights (4th Interested Party) supported the Petition. They underscored the broader public interest in ensuring that the Media Complaints Commission is constituted in strict compliance with *the Constitution* and the law, and that it remains free from what they termed "Executive interference". The 1st and 4th Interested Parties both argued that Article 34 of *the Constitution* guarantees freedom of the media and envisages self-regulation or independent regulation of the media. They argued that allowing the Executive, in the form of the 1st and 2nd Respondents, to arbitrarily veto or manipulate the appointment of Commission Members would set a dangerous precedent and would erode the independence of the Media.

19. The Law Society of Kenya (3rd Interested Party) added that the rule of law and adherence to due process in public appointments must be exercised fairly, reasonably, and for lawful purposes.

20. The Interested Parties are united in their support for the Petitioners' positions, and their submissions uniformly urge the Court to grant the Petition and thereby reinforce the constitutional values of transparency, accountability, and institutional independence.

21. Having set out the foregoing background, the Court distills the key issues for determination as follows.

    a. Whether the Petition meets the requisite threshold for a constitutional petition;

    b. Whether the Petitioners' constitutional rights were violated by the Respondents' actions and omissions;

    c. Whether the 1st and 2nd Respondents' rejection of the Petitioners for appointment was unlawful or ultra vires;

    d. Whether the appointment (gazettement) of other individuals to the Commission, while excluding the Petitioners, was conducted in accordance with the law; and

    e. What reliefs or orders are appropriate

Analysis and Determination

Threshold of the Petition – Precision and Justiciability

22. The first issue is whether the Petition is pleaded with sufficient precision and thereby meets the threshold for a constitutional petition. The Respondents argue that the Petition is defective for vagueness, invoking the principle in Anarita Karimi Njeru v Republic (No.1) [1979] that a person seeking redress for constitutional violations must "set out with a reasonable degree of precision what he complains of, the provisions said to be infringed, and the manner in which they are alleged to be infringed." This requirement, often referred to as the Anaritarule, has been a cornerstone in Kenyan constitutional litigation. It survived the transition to the 2010 Constitution and was affirmed by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR. The rationale is to ensure that a respondent knows the case to meet and that the Court's constitutional jurisdiction is properly invoked only where a genuine constitutional dispute exists, rather than a mere grievance dressed as a constitutional issue.

23. Having carefully reviewed the Petition and supporting documents, this Court is satisfied that the Petitioners have indeed delineated the substance of their complaints with adequate specificity and precision. At Paragraphs *9* through 13 of the Petition (under "The Violations" and "Applicable

Constitutional Provisions"), the Petitioners explicitly cite the constitutional provisions they claim were breached – including Articles 34(5), 47(1), and 50(1) of *the Constitution* – and these are not cited in a vacuum. The Petition then elaborates, in the factual narrative (Paragraphs *19–27*), how exactly the Respondents' alleged conduct allegedly infringed those provisions of our Apex Law.

24. The Respondents' contention that the Petition only cites "omnibus provisions" without particulars is not borne out by the record. On the contrary, the pleadings, read as a whole, fully enable the Respondents and this Court to understand the precise nature of the complaints.

25. In constitutional litigation, the Court is mindful that form should not trump substance – especially under the 2010 Constitution which commands courts to administer justice without undue regard to procedural technicalities (Article 159(2)(d)). Where a Petition has reasonably identified the issues and facts, a pedantic and hyper-technical approach should be avoided. As the Court of Appeal cautioned in Mumo Matemu, the Anarita principle is not intended to obstruct substantive justice; it is meant to ensure clarity that enables the Respondents know and understand what is being alleged of them and to be in a position to formulate a defence to those allegations.

26. In the present case, there is no doubt what dispute is before the Court: whether the exclusion of the Petitioners from appointment to a public body was lawful or violated *the Constitution*. This is a justiciable controversy squarely within this Court's jurisdiction under Articles 22 and 23 (enforcement of fundamental rights) and Article 165(3)(d) (interpretation and application of *the Constitution*).

27. Accordingly, the Court finds that the Petition is competent and admissible. The Petitioners have met the threshold of pleading with reasonable precision the constitutional provisions at issue and the alleged manner of infringement, in line with the Anarita Karimi Njeru rule. We therefore reject the Respondents' invitation to strike out or downplay the Petition on this basis. The case shall be determined on its merits.

Alleged Violation of Constitutional Rights and Values

28. The core of this Petition is whether the Petitioners' constitutional rights were violated by the manner in which the Respondents handled their intended appointments. The relevant rights claimed include the right to fair administrative action (Article 47), the right to a fair hearing (Article 50(1)), and the guarantees of media freedom and independence (Article 34, specifically Article 34(5)). Additionally, the Petitioners implicate broader governance values like the rule of law, transparency and accountability (Article 10), and meritocracy in public service (Article 232). This Judgment shall examine the key complaints in turn, though they are interrelated.

a. Fair Administrative Action – Article 47(1)

29. Article 47(1) of *the Constitution* provides that "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." This right is given effect by the *Fair Administrative Action Act*, 2015 (FAAA), which elaborates the requirements for lawful administrative decision-making. There is no doubt that the 1st Respondent's decision communicated through the 2nd Respondent's letter of 8th July 2024 and the subsequent Gazette Notice to reject the Petitioners as members of the Commission was an administrative action within the meaning of Article 47. It was a decision taken by a public authority, affecting the legal rights or interests of the Petitioners – specifically, it denied them an opportunity (which they had otherwise earned) to serve in a public office, and it sullied their professional standing by branding them "unsuitable." Such a decision had to comport with the standards of lawfulness, reasonableness, and procedural fairness set by Article 47.

30. On the facts presented, the Court finds that the Petitioners' right to fair administrative action was breached in multiple respects:

i. Lack of Procedural Fairness (Audi Alteram Partem)

31. Procedural fairness lies at the heart of Article 47. It requires that a person to be affected by an administrative decision be given adequate notice of the case against them and a fair opportunity to be heard before the decision is made. In this case, the Petitioners were never informed that any adverse material had arisen from the so-called "background checks" that would militate against their appointment. They were not told what specific issues were allegedly uncovered, nor were they invited to explain or rebut any concerns. The 2nd Respondent's letter gave only a conclusory statement that unspecified agencies found the Petitioners "unsuitable" and that their appointment "will not be favourable to the sector". This vague reference did not disclose any facts – whether it was an integrity issue, a conflict of interest, a security concern, or otherwise. Moreover, by the time this letter was written on 8th July 2024, the Petitioners had already undergone comprehensive vetting (submission of police clearance, EACC clearance, etc.) as part of the application process and no disqualifying issues had surfaced.

32. If new allegations arose thereafter, basic fairness demanded that the Petitioners be confronted with those allegations and allowed to respond before a decision on their fate was reached. Instead, the Respondents unilaterally decided to reject the Petitioners and only informed the Selection Panel not even the Petitioners directly. This private handling flies in the face of the audi alteram partem rule – no person should be condemned unheard. Even if Article 50(1) (fair hearing) might strictly apply to judicial or quasi-judicial proceedings, the principles of a fair hearing are equally pertinent to administrative decisions that have a serious effect on an individual's rights or legitimate expectations. The *Fair Administrative Action Act*, at Section 4(3), explicitly requires that where an administrative action is likely to adversely affect someone, the person has the right to be given prior notice of the proposed decision, an opportunity to be heard and to make representations, notice of the right to appeal or seek review, and reasons for the decision. The Respondents did not comply with these dictates at all. The Petitioners were ambushed by the outcome, learning after the fact that they had been stigmatized as "unsuitable" with no chance to defend themselves. This was manifestly unprocedural and unfair, thus violating Article 47(1).

ii. Lack of Reasonableness and Transparency:

33. Fair administrative action also encompasses substantive aspects – the decision must be reasonable and based on lawful, relevant grounds. *The Constitution* and Section 27(5) of the *Media Council Act* both demand that any rejection of a nominee by the 1st Respondent be founded on "reasonable grounds". The burden is on the decision-maker to demonstrate what those grounds were, especially when challenged. In the present case, the Respondents have asserted that the Petitioners were found unsuitable by "relevant agencies" and imply there were reports justifying that conclusion. However, no actual report or evidence of misconduct, incompetence or other disqualifying factor has been produced to this Court. The Respondents, in effect, ask the Court to take their word for it that the Petitioners failed some undisclosed vetting criteria. That is not acceptable.

34. As was observed in Adrian Kamotho Njenga v Attorney General & 3 others [2020] eKLR – a case remarkably analogous to this one – it would be absurd to expect a court to uphold an appointment decision as "reasonable" when the basis of the decision is kept secret from both the affected persons and the court. In the Adrian Kamotho case, which dealt with the President's failure to appoint judges recommended by the Judicial Service Commission on the ground of alleged adverse intelligence reports, the High Court emphatically held that withholding the substance of such adverse reports

violates the affected persons' rights to fair administrative action and undermines public confidence. The Court in that case noted that if the executive could arbitrarily refuse appointments in reliance on undisclosed information, the constitutional process of appointment would be negated. Likewise, here the 1st Respondent's reliance on unexplained "background checks" is opaque and arbitrary. The decision cannot be termed "reasonable" when neither the Petitioners nor the Court is told what facts informed it. Reasonableness entails a rational connection between the evidence and the decision made; in this instance we have assertion in lieu of evidence.

35. The Respondents' failure to disclose the specific reasons to the Selection Panel (and ultimately to the Court via affidavit) suggests that either there was no credible reason or, if one existed, it could not withstand scrutiny. In either scenario, the opacity of the process breached the transparency and accountability expected under Articles 10 and 47. As the Petitioners aptly pointed out, even if some further vetting were deemed necessary, it ought to have been conducted and concluded prior to the nomination stage, not surreptitiously after the Petitioners' names had been forwarded. By conducting a belated, behind-the-scenes reassessment, the Respondents acted outside the contemplation of the law and in a manner that was both unreasonable and unjust.

iii. Unlawfulness (Ultra Vires considerations)

36. The lawfulness aspect of Article 47 overlaps with the ultra vires analysis which we will delve into under issue 3 below. However, in brief, Article 47 is violated when an administrator acts without legal authority or contrary to the prescribed procedure. The Petitioners have shown prima facie that the 2nd Respondent (PS) had no statutory authority to decide on nominees, and that the process set out in the *Media Council Act* – which requires "reasonable grounds" and substitution through the Panel if a nominee is rejected– was not followed. These procedural illegality points strengthen the finding that Article 47(1) was infringed.

37. In sum, the Court finds that the Respondents' actions toward the Petitioners did not meet the constitutional threshold of fair administrative action. The process was procedurally unfair (no hearing, no notice of specific allegations), substantively unreasonable and lacking transparency (no proven "reasonable ground" for rejection has been demonstrated), and tainted by illegality (apparent misuse or abuse of power). This conduct violated Article 47 of *the Constitution* and also ran afoul of Section 4 of the *Fair Administrative Action Act*.

b. Right to a Fair Hearing – Article 50(1)

38. Article 50(1) guarantees every person the right to a fair hearing before a court or independent tribunal in the determination of their rights or obligations. Strictly speaking, Article 50(1) is commonly applied to judicial or quasi-judicial proceedings. The appointment of members to a Commission is an administrative process, not a judicial proceeding. However, Kenyan courts have often treated the right to fair hearing as overlapping with the principles of natural justice in administrative matters. In other words, even if Article 50 is not directly applicable, its fundamental ingredients (like the right to be heard, to be informed of the case, to have an impartial arbiter, etc.) inform the scope of Article 47 and general due process. The Petitioners pleaded Article 50(1) likely to underscore the gravity of being denied any chance to defend themselves against derogatory findings. They were essentially condemned as unfit in absentia.

39. In evaluating this claim, the Court notes that the factual basis of the Article 50 complaint is identical to that of Article 47 – the lack of an opportunity to be heard. We have already found that to be a violation of Article 47's fairness requirement. To avoid duplicative analysis, the Court would simply state: to the extent Article 50(1) may be deemed applicable, the process in question was certainly not a "fair

hearing" by any measure. There was no hearing at all – the Petitioners were not heard by the Selection Panel or the Minister on the issue of their suitability after the vetting, nor was there any independent tribunal involved in vetting that they could approach. However, rather than make new jurisprudence on extending Article 50 to such processes, it suffices that the denial of a chance to be heard is squarely addressed as a violation of Article 47 as discussed. Therefore, the Court's finding under this head is that the Petitioners were denied a basic tenet of a fair hearing – the right to make representations – which reinforces the conclusion that the process was unconstitutional.

c. Media Freedom and Commission Independence – Article 34(5)

40. Article 34 of *the Constitution* protects freedom of the media. Crucially, Article 34(5)(a) provides that "Parliament shall enact legislation that provides for the establishment of a body, independent of control by government, commercial interests or political interests, to set media standards and regulate and monitor compliance." Pursuant to this mandate, the *Media Council Act* establishes the Media Council of Kenya and under it the Media Complaints Commission, with provisions clearly intended to ensure independence from executive or other improper influence. The integrity of the appointments process is a vital part of that independence: if those who oversee media standards can be hand-picked or vetoed for ulterior reasons by the Executive, the spirit of Article 34(5) would be defeated.

41. The Petitioners and Interested Parties argued that the 1st Respondent's actions amounted to interference with the independence of both the Selection Panel and the Media Complaints Commission itself. I agree with this contention. The scheme of the *Media Council Act* places the primary responsibility for evaluating applicants' qualifications and suitability on the Selection Panel (3rd Respondent). The Panel – which includes representatives from the media industry, professional bodies, and other stakeholders – is deliberately created to dilute any one person's influence and to ensure a broad-based, merit-focused selection process. The 1st Respondent's role, though important, is largely formal: to receive the nominees and officially appoint them, unless a nominee is so unsuitable that appointment cannot be justified. Even then, the power is limited to rejecting that name with reasons, and deferring to the Panel to propose an alternative. This process underscores that the independence of the Commission is anchored in the integrity of the selection by the Panel. Once the Panel has made its choice on merit, the Executive is not meant to lightly overturn it; doing so could allow extraneous considerations (political or personal preferences) to creep in.

42. In the present case, the 1st Respondent effectively set aside the Panel's decision as regards the Petitioners and attempted to impose a different outcome – either leaving those slots vacant or seeking different names. The Petitioners characterize this as an attempt by the CS to get persons "beholden to him or the executive" onto the Commission, thereby diluting its independence. That characterization, while speculative as to motive, is supported by the objective effect of the CS's move. Bypassing the Panel's vetted nominees and either keeping positions vacant or filling them through a non-transparent process indeed opens the door to patronage. It sends a message that only candidates acceptable to the Executive will ultimately serve, which undermines the Commission's functional independence. As the Petitioners noted, this risks reducing the Panel to a mere "rubber stamp" if its decisions can be casually disregarded. The Court finds that the 1st Respondent's conduct violated Article 34(5) in that it asserted a form of government control or influence over the composition of a body that is by law to be independent of such control. *The Constitution* wanted bodies like the Media Council/Complaints Commission to be insulated from exactly this kind of interference.

43. Additionally, Section 30 of the *Media Council Act* explicitly states that the Complaints Commission shall operate independently in performing its duties. While Section 30 speaks to the Commission's functioning after establishment, its spirit certainly extends to the manner of appointment of its

members. The executive action here was opposing to that independence. The Court is persuaded by the analogy to the judicial appointments case (Adrian Kamotho Njenga v AG & others, supra): just as the President cannot "pick and choose" which judges to appoint once recommended, the Cabinet Secretary cannot pick and choose which Commission members to appoint out of a properly selected list, except on genuine, demonstrable grounds permitted by law. To do otherwise is to reassert executive domination in an area *the Constitution* deliberately shielded from such domination.

44. Therefore, I conclude that the Respondents' actions particularly those of the 1st Respondent through the 2nd Respondent contravened Article 34(5) of *the Constitution* by undermining the independence of the Media Complaints Commission's appointment process. This in turn implicates Article 10 values of the rule of law, good governance, and integrity in public service, which bind all state officers. The 1st Respondent, as a state officer, is bound to uphold *the Constitution* and the law in executing the "critical duty" of appointments to this Commission. In this instance, he failed to do so.

d. Legitimate Expectation

45. The Petitioners also implicitly raise the doctrine of legitimate expectation. Having successfully navigated the competitive selection process and even obtained formal clearances, they had a legitimate expectation that they would be appointed in accordance with the law, or at the very least that if any problem arose it would be addressed fairly and transparently. The law itself (Section 29 of the Act) creates an expectation of a merit-based outcome. Legitimate expectation is a facet of both Article 47 and Article 10 (good governance). The actions of the Respondents negated the Petitioners' legitimate expectation without due cause, further supporting the conclusion that the Petitioners were treated unfairly.

46. In summary on Issue 2, the Court finds that the Petitioners' constitutional rights were indeed violated. Specifically, the right to fair administrative action (Article 47) was breached in its procedural and substantive dimensions; the right to a fair hearing (Article 50(1)) was implicated by the denial of any opportunity to be heard; and the interference with the independent selection process violated Article 34(5) and the values underpinning it. These violations also amount to a failure by the Respondents to adhere to Article 10 values (rule of law, transparency, accountability) and Article 232 principles (fair competition and merit in appointments).

Lawfulness of the Rejection of the Petitioners – Ultra Vires and Abuse of Power

47. This issue zeroes in on whether the Respondents' rejection of the Petitioners' appointments was within their lawful authority and followed the correct legal procedures. Several sub-issues arise: (a) whether the 2nd Respondent (Principal Secretary) had the legal mandate to issue the rejection letter on behalf of or instead of the 1st Respondent; (b) whether the decision (whoever made it) complied with Section 27(5) of the *Media Council Act* (i.e., was it based on "reasonable grounds" and properly communicated for replacement); and (c) whether the 1st Respondent impermissibly bypassed the procedure set by law, thereby acting ultra vires (beyond his powers).

a. Delegation of Power – The Role of the 2nd Respondent

48. Under the *Media Council Act* (Part IV of the Act dealing with the Complaints Commission), the power to appoint members of the Commission – and concomitantly the power to reject a nominee – is vested in the Cabinet Secretary (the 1st Respondent). The 2nd Respondent, as the Principal Secretary of the Ministry, is the accounting and administrative officer of the Ministry but is not named in the Act as having any role in the appointment process=. In the present case, the critical letter conveying

rejection of the Petitioners came under the hand of the Principal Secretary, not the Cabinet Secretary. This raises a question: can the Principal Secretary validly make or communicate such a decision?

49. The Respondents assert that the Principal Secretary was simply acting on behalf of the Cabinet Secretary, with the latter's authorization. However, they have provided no evidence of such authorization – no written instrument, Gazette notice, or affidavit from the 1st Respondent confirming that he instructed the 2nd Respondent to issue the letter. Even assuming the Principal Secretary was directed to communicate the decision, there is a significant legal issue whether the power to reject a nominee is delegable at all. The maxim "delegatus non potest delegare" (a delegate cannot delegate) is a long-standing principle of administrative law and is applicable to statutory powers granted to a particular office-holder, unless the statute expressly or by clear implication permits sub-delegation. Here, the power to accept or reject nominees is given to the Cabinet Secretary personally. It is a high-level executive function that calls for the exercise of discretion and judgment by the person in whom the public has reposed that trust (the Cabinet Secretary), presumably because he is accountable at a political level for such decisions. There is no provision in the Act allowing the Cabinet Secretary to assign that decision to another officer.

50. The Court therefore finds that the 2nd Respondent had no independent authority to reject nominees, nor to act as the decision-maker in this context. If the Cabinet Secretary made the decision but had the Principal Secretary merely communicate it, one might argue it's a matter of form over substance. However, the distinction is important: if the law required the Cabinet Secretary to personally apply his mind and give reasons, a letter from the Principal Secretary – especially one that does not even state it is on the CS's behalf – calls into question whether the proper decision-maker actually exercised the power. The letter in question is phrased as if the findings of unsuitability are a conclusion of the unnamed "relevant Government agencies," without any indication of the Cabinet Secretary's own assessment. It thus appears that the decision may have effectively been made by those agencies or by the Principal Secretary, sidelining the Cabinet Secretary's statutory responsibility. In any event, even if the Cabinet Secretary was behind it, having the Principal Secretary issue the rejection is a procedural irregularity. The Petitioners rightly point out that the statutory power "donated" to the 1st Respondent is non-delegable, and doing so violated fair procedure. The High Court in Adrian Kamotho Njenga v AG [2020] addressed a similar issue where letters excluding certain nominees (judges in that case) were issued by officers other than the appointing authority; the Court held that such actions were unconstitutional since the President could not abdicate his appointment role to others. By the same token, Prof. Kisiangani (2nd Respondent) overstepped his bounds in penning the letter of 8th July 2024. The letter was ultra vires his office, and thus null in law.

51. It bears mentioning that under Article 135 of *the Constitution*, decisions by a Cabinet Secretary can, where required by law, be made in writing and signed. While that provision directly applies to Presidential decisions, as a matter of good governance a Cabinet Secretary's decision of this nature (rejecting nominees) ought at least to have been formally recorded or communicated by him or by an authorized officer explicitly on his behalf. The lack of any such formalization here strengthens the conclusion that due process of law was not observed.

52. Therefore, the Court finds that the 2nd Respondent's issuance of the impugned rejection letter was without legal authority. The Respondents' failure to demonstrate any lawful delegation or authorization reinforces the Petitioners' claim that the letter was ultra vires ab initio. On that ground alone, the decision falls to be quashed. The 1st Respondent cannot hide behind his Principal Secretary's pen; if the law required him to act, the failure to do so properly is fatal to the decision's validity.

b. Compliance with Section 27(5) – "Reasonable Grounds" and Procedure for Rejection

53. Even assuming arguendo that the 1st Respondent's decision could be regarded as properly made, we must examine whether it was made in accordance with the substantive and procedural requirements of the *Media Council Act*. Section 27(5) of the Act states in effect that the Cabinet Secretary may decline to appoint a person nominated by the Selection Panel, but if so, he must have reasonable grounds for the rejection and must inform the Selection Panel of such rejection to allow the Panel to substitute another suitable person. This provision is the statutory check-and-balance intended to align with Article 47 – it prevents arbitrary refusals and ensures that if a nominee is rejected, the process continues lawfully by having the Panel choose a replacement from qualified candidates.

54. In the present case, did the 1st Respondent have "reasonable grounds" to reject the Petitioners? The Respondents maintains that adverse background information was a reasonable ground. Certainly, if solid evidence had emerged that, for example, a nominee had falsified qualifications, had a serious criminal conviction, or a conflict-of-interest incompatible with service, those could constitute reasonable grounds. But simply citing the existence of unspecified adverse reports is not sufficient. "Reasonable grounds" implies that the grounds are legitimate, rational, and supported by some factual basis that can be articulated. Here, no concrete ground was articulated beyond the catch-all term "unsuitable." The phrase "not favourable to the sector" is particularly nebulous; it could mask anything from personal animus to unsubstantiated rumor. The Court cannot conclude that the constitutional and statutory test of reasonable grounds was met. On the contrary, the manner in which the decision was carried out suggests an absence of demonstrable merit-based justification.

55. Moreover, the procedure envisaged by Section 27(5) was not followed to completion. The law requires that upon rejecting a nominee, the CS is to request the Selection Panel to give another name from those already shortlisted. What happened here? The 1st Respondent gazetted four names and left two positions vacant. There is no indication that, before gazetting the four, the 1st Respondent gave the Selection Panel an opportunity to substitute the Petitioners with other candidates from the shortlist. If the Panel had been asked, for instance, to replace the Petitioners with the next two best-ranked interviewees, and then those names were gazetted, that would be closer to compliance with Section 27(5). But the timeline shows that by 12th July 2024, only four names were gazetted and the Petitioners' slots remained empty. The Respondents in their submissions seem to suggest they intended to fill those later, but that is not what the law contemplates. The Act does not authorize partial or piecemeal appointments in a manner that leaves the process hanging indefinitely. While pragmatic considerations might force a slight delay (as happened when one nominee took another job), any delay or staggered appointment must still adhere to the framework: rejection → request Panel for replacement → appoint replacement. The Respondents did not follow through that sequence for the Petitioners' positions. Instead, they unilaterally aborted the Petitioners' appointments and did not immediately task the Panel with finding substitutes. This procedural lapse renders the rejection decision not only unreasonable but illegal for non-compliance with the Act's provisions. It supports the Petitioners' assertion that the gazettement of fewer names than the available positions was ipso facto irregular.

56. The Court also notes that if indeed the 1st Respondent had reasonable grounds, he was duty-bound to furnish those grounds to the Selection Panel (and by extension, one would expect, to the nominees themselves). The letter of 8th July 2024 did not enumerate any specific ground; it just gave a conclusion . In judicial review terms, that is akin to failing to give reasons, which is itself a ground for quashing a decision under Article 47(2) and the *Fair Administrative Action Act*. The Selection Panel – presumably surprised by the turn of events – was left with nothing to act upon except being told to note the

two were unsuitable. The Panel could not intelligently exercise its function of picking replacements, because without knowing why the Petitioners were rejected.

57. In conclusion on this point, the Respondents' actions did not meet the requirements of Section 27(5) of the *Media Council Act*. The rejection was not shown to be based on objectively reasonable grounds, and the proper procedure for handling a rejection (including transparency of reasons and referral back to the Panel for substitution) was not observed. This renders the rejection decision ultra vires the Act and unlawful. It was, in the words of the Petition, "issued in excess of jurisdiction, illegal, null and void".

c. Excess of Authority by the 1st Respondent – Acting as an Appellate Body

58. The Petitioners argued that the 1st Respondent wrongly arrogated to himself a role of re-evaluating candidates, effectively sitting on appeal or reviewing the Selection Panel's decisions, which power he does not have. The Court finds merit in this argument. The legislative scheme did not intend for the Cabinet Secretary to conduct a parallel vetting or to overrule the Panel's assessment of merit and suitability, except in the limited circumstance of rejecting a nominee on clear, articulable grounds and then deferring to the Panel for an alternative choice. By commissioning what appears to be an independent "background check" after receiving the nominees, the 1st Respondent went beyond his remit. If additional vetting was necessary, the proper course would have been to integrate that into the Panel's process or require that as part of application prerequisites (indeed police clearance and EACC clearance were already required and provided). Instituting a new vetting stage that was neither in the initial requirements nor in the law amounts to moving the goalposts. It was an abuse of power for the 1st Respondent to subject the nominees to an undefined second round of scrutiny and then use undisclosed outcomes of that scrutiny to undo the Panel's work.

59. By doing so, the 1st Respondent also interfered with the functional independence of the Selection Panel, as alleged. The Panel is meant to be independent in how it evaluates candidates; the Cabinet Secretary's proper role is not to second-guess the comparative assessment of the Panel, but only to ensure no manifestly unfit person is appointed. In this case, all indications are that the Petitioners were fit and qualified (the Panel chose them on merit; they held all clearances). The 1st Respondent's actions suggest either a misapprehension of his powers or a deliberate circumvention of the lawful process. Neither bodes well under the rule of law.

60. In sum, the rejection of the Petitioners was ultra vires on multiple fronts: the wrong official took the action; the action did not comply with statutory conditions; and the action was taken in a manner that exceeded the intended scope of the 1st Respondent's discretion. It was, therefore, null and void ab initio. The logical consequence in law is that the Petitioners remained validly nominated members of the Commission, and the decision purporting to deny them appointment is of no effect (subject to formal quashing by this Court).

1. Legality of the Partial Appointment of Other Members

61. The next issue is the legal propriety of the appointment of the other members (and Chairperson) via Gazette Notice published on 12th July 2024, which excluded the Petitioners. The Petitioners have not challenged the credentials or merits of the four individuals who were gazetted as members, nor the Chairperson. Their complaint is with their own exclusion. However, because we find that exclusion unlawful, it follows that the Gazette Notice in its current form is incomplete and tainted.

62. Legally, since the decision to exclude the Petitioners is void, the Gazette Notice which omitted them is incomplete and requires correction. The Court has authority to quash administrative decisions by an order of certiorari and to give directions to ensure the law is followed by orders of mandamus or appropriate declaratory relief.

63. One approach could be to quash the Gazette Notice in part, i.e. only to the extent that it failed to include the Petitioners as members. However, a Gazette Notice is a single instrument; you cannot practically quash a void part and leave the rest. Instead, the Court can declare that the omission of the Petitioners' names was unlawful and of no effect and direct the 1st Respondent to forthwith gazette the Petitioners as members as originally nominated in effect bringing the composition to what it should have been. This would cure the defect without disturbing the already appointed members or Chairperson, who – it is important to note – were validly selected by the same process and whose appointments are not individually impugned here. The Petitioners in fact seek an outcome that installs them alongside those other appointees, not one that removes those appointees.

64. Thus, to the extent an order of certiorari is needed, it would be to quash the 2nd Respondent's letter of 8th July 2024 (the decision rejecting the Petitioners) and any consequential decision that there be two vacancies. In practical effect, quashing that decision means the Court recognizes the Petitioners' nomination by the Panel as still standing and awaiting formal appointment. An order of mandamus can then issue compelling the 1st Respondent to perform his duty under the law – which is to gazette the Petitioners as members of the Media Complaints Commission without further delay. This is precisely what the Petitioners have prayed for.

65. Regarding the appointment of others, the Court finds nothing per se unlawful about the four individuals who were appointed – they went through the same interview process and presumably were beneficiaries of the Panel's merit selection. However, the process by which the Gazette Notice was issued was flawed due to the Petitioners' unlawful exclusion, which means the Gazette Notice as published was not fully in compliance with the law. It omitted two lawfully selected persons. The Respondents' suggestion that leaving vacancies is acceptable and can be corrected later is not persuasive; doing so was not in line with the Act's intent for an expeditious and complete appointment of all qualified persons. It also left the Commission shorthanded and the public deprived of the services of a full Commission.

66. Therefore, to answer the issue: the appointment of the four members and Chairperson is lawful except for the fact that it excluded the Petitioners, which exclusion was unlawful. The appropriate remedy is not to disturb the lawful appointments already made, but to integrate the Petitioners into the Commission via a court order, effectively completing the process as it should have occurred. If, hypothetically, the Respondents had proceeded to fill the two vacant positions with different individuals (not from the original list or through a fresh process) without resolving this dispute, such appointments would certainly have been illegal and subject to being nullified. Fortunately, that scenario did not fully materialize, likely due to the timely intervention of this Court through conservatory orders. The media reports of protests and the involvement of stakeholders also likely forestalled any hasty move to replace the Petitioners improperly.

67. It is worth noting that one of the vacancies was initially caused by a nominee taking up another job (as mentioned in paragraph 19 of the Petition). That vacancy was apparently resolved by the Panel picking another person (since the Gazette Notice had four names, implying the one who left was replaced). The remaining two vacancies correspond to the Petitioners. Thus, there is no scenario of "vacancy could be filled later" beyond the Petitioners themselves. The only lawful way to fill their spots would have been to ask the Panel for alternatives; but the Panel could not meaningfully do so in the shadow of an unfair rejection. Now that we find the rejection invalid, the simplest and fairest outcome is to enforce the original nomination.

2. Reliefs

68. Having found in favor of the Petitioners on the substantive issues, Article 23(3) of *the Constitution* empowers this Court to grant a wide range of relief in constitutional petitions, including declarations of rights, injunctions, conservatory orders, judicial review orders (such as certiorari, mandamus, prohibition), and any other appropriate remedy, including an order of compensation if warranted.

69. The Petitioners specifically seek the following principal reliefs (paraphrased):A declaration that their fundamental rights and freedoms have been violated by the Respondents.A declaration that the decision communicated in the 2nd Respondent's letter (dated 8th July 2024) to the 3rd Respondent, purporting to reject the Petitioners' appointments, was ultra vires (and thus null and void).An order of mandamus directing the 1st Respondent to gazette the names of the Petitioners as members of the Media Complaints Commission.An order prohibiting or halting the swearing-in of any other persons as members of the Commission in place of the Petitioners (so that only the Petitioners fill those slots) .Any other relief that the Court deems fit, plus costs of the petition.

70. In view of the analysis above, the Court will grant a declaration that the Petitioners' constitutional rights were violated. Specifically, I declare that the Respondents (primarily the 1st and 2nd Respondents) violated Articles 47(1) and 34(5) of *the Constitution* by the manner in which they treated the Petitioners' appointments. This declaration will vindicate the Petitioners' rights and make clear that the impugned actions were unconstitutional. The Court is satisfied that such a declaration is merited to underscore the breach of the rule of law in this instance.

71. Although the Petitioners did not use the term "certiorari" in their prayers, the substance of their second prayer is to nullify the 2nd Respondent's letter and the decision it bears. The Court therefore issues an order quashing the decision contained in that letter – effectively invalidating the rejection of the Petitioners as Commission members. The result is that the recommendation of the Selection Panel as regards the Petitioners stands unmarred by any lawful objection.

72. Given my findings, the logical next step is to compel the formal appointment of the Petitioners. Ordinarily, this Court has power remit the matter to the decision-maker to reconsider the decision in accordance with the law. However, in the present case, there is really no new decision to be made – the Selection Panel's decision was clear and, absent any valid reasons to the contrary, the Petitioners should have been appointed long ago. There are no indications of any disqualifications other than the alleged vetting which we have held to be improperly handled. To remand for "reconsideration" would serve no purpose except to delay justice and perhaps invite new extraneous manoeuvers. The circumstances warrant a definitive order to conclude the process. The Court is fortified in this approach by the analogous Adrian Kamotho case (judicial appointments matter), where the Court issued orders of mandamus compelling the appointing authority to formally appoint the judges who had been recommended, rather than leaving it open for another round of potential stonewalling. Similarly here, an order of mandamus shall issue directing the 1st Respondent to gazette the Petitioners as duly appointed members of the Media Complaints Commission forthwith (within a specified short timeframe). Upon gazettement, the Petitioners should be sworn in before a High Court Judge as required and commence their duties like any other members.

73. The Petitioners also sought to halt the swearing-in of any other persons to those two positions. As of now, the Court is not aware of any other persons having been gazetted or sworn in to those positions. The relief may largely be preventative. For completeness, the Court will issue an order restraining the Respondents from appointing or gazetting any person other than the Petitioners to the two member positions that the Petitioners were selected for. This will ensure that the Respondents do not attempt

to bypass the effect of this judgment by installing alternate candidates. In essence, it cements the mandamus by forbidding contradictory action.

Conclusion

74. For the reasons detailed above, the Court makes the following orders and issues the following reliefs:

a. A declaration be and is hereby issued that the 1st and 2nd Respondents' actions in omitting the Petitioners from appointment as members of the Media Complaints Commission – after the Petitioners had been duly shortlisted, interviewed, and nominated by the Selection Panel – violated the Petitioners' constitutional rights to Fair Administrative Action under Article 47(1) of *the Constitution*;

b. A declaration be and is hereby issued that 1st and 2nd Respondents impigned actions and decisions the undermined the independence of the media as guaranteed by Article 34(5) of *the Constitution*, and they were also inconsistent with the national values of the rule of law, transparency, and accountability as espoused in Article 10;

c. An order of certiorari be and is hereby issued quashing the decision contained in the 2nd Respondent's letter dated 8th July 2024 which purported to reject the nomination of Ms. Lucy Minayo Lugalia and Mr. Antony Nzau Musau as Members of the Media Complaints Commission on grounds of unsuitability;

d. An order of mandamus be and is hereby issued compelling the 1st Respondent, the Cabinet Secretary for ICT, to appoint and gazette the Petitioners – Ms. Lucy Minayo Lugalia and Mr. Antony Nzau Musau – as Members of the Media Complaints Commission, as per the names originally submitted to him by the Selection Panel; and the 1st Respondent shall cause such appointment to be gazetted in the Kenya Gazette within Fourteen (14) days of the date of this judgment;

e. A permanent order be and is hereby issued prohibiting and restraining the Respondents, jointly or severally, from swearing in, appointing, or recognizing any person other than the Petitioners to the two vacant member positions of the Media Complaints Commission that the Petitioners were nominated to fill; but the already sworn-in Chairperson and the other four members who were gazetted on 12th July 2024 are not affected by this order and shall continue in office alongside the Petitioners once the Petitioners are sworn in, thereby constituting the full Commission; and

f. The Petitioners are awarded the costs of this Petition, to be borne jointly and/or severally by the 1st 2nd, and 4th Respondents.

75. Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 15TH DAY OF MAY 2025

.....

BAHATI MWAMUYE

JUDGE

In the presence of:

Petitioner's Counsel – Ms Gikonyo h/b Mr Thuita

1st & 2nd Respondents – Mr Terel

4th Interested Party – Mrs Omutimba

Court Assistant – Ms Neema