



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**PETITION NO. 5 OF 2016**

NTUSIET ANDERSON KISHAINE.....1<sup>ST</sup> PETITIONER

RONALD KENNER SOIPEI.....2<sup>ND</sup> PETITIONER

DUNCAN KISHAINE LERIONKA.....3<sup>RD</sup> PETITIONER

VERSUS

NELSON SAIROWA KIMA.....1<sup>ST</sup> RESPONDENT

DEPUTY COUNTY COMMISSIONER.....2<sup>ND</sup> RESPONDENT

TRANSMARA WEST DISTRICT SUB-COUNTY.....3<sup>RD</sup> RESPONDENT

ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

**JUDGMENT**

1. In their undated amended petition filed on 13<sup>th</sup> May 2016, the Petitioners sought the following orders:
- a. Declaration be issued to the effect that the petitioners are entitled to protection under the constitution.
  - b. Declaration that the enlistment, recruitment and/or employment of the 1<sup>st</sup> respondent was without regard to the due process of the law, was unlawful, illegal, null and void.
  - c. An order of judicial review in the nature of certiorari to issue to remove into the Honourable Court and quash the enlistment, recruitment and/or employment of the 1<sup>st</sup> Respondent.
  - d. Costs for this suit.

3. The petition is premised on the grounds that 1<sup>st</sup> respondent herein, NELSON SAIROWA, was appointed as an Assistant Chief II of Kirindon Sub-location within Transmara West District notwithstanding the fact that he did not meet the requirements for that position of Assistant chief. The petitioners case was that the advertisement posted by the 2<sup>nd</sup> Respondent for the position of Assistant Chief II stated that applicants must possess a Kenya certificate of Secondary Education (KCSE) mean grade C which requirement the 1<sup>st</sup> respondent did not meet as he is a holder of a Kenya Certificate of

Primary Education (KCPE). In a nutshell, the petitioners claim that the 1<sup>st</sup> respondent, being a holder of a KCPE certificate, did not meet the requirements for the position of the Assistant Chief II and therefore he ought not to have been appointed to the said position.

3. The petitioners contend that by appointing an unqualified person to the position of the Assistant Chief, the respondents violated the principles of integrity, transparency and accountability in public appointments as envisaged by the Constitution of Kenya 2010.

4. Upon perusing the pleadings herein, I note that the main prayers sought are those that deal with the declaration that the employment, recruitment and or enlistment of the 1<sup>st</sup> respondent was unlawful, illegal and therefore null and void. In effect, the petitioners seek the quashing of the said employment/recruitment of the 1<sup>st</sup> respondent.

5. To my mind, the nature of the prayers sought herein places this case within the purview/Jurisdiction of the Employment and Labour Relations Court and not this court. More so because the 1<sup>st</sup> respondent is reported to have already taken up his appointment as an Assistant chief II of Kilindon Sub-location.

6. In the case of **Prof. Daniel N. Mugendi vs Kenyatta University, Benson I. Wairegi, Eliud Mathiu & Prof Olive Mugenda, CA No. 6. Of 2012 at page 11**, the Court of Appeal held as follows:-

**“Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertains to Industrial and Labour Relations matters. It is only just and proper that the Industrial Court do exclusively entertain those matters in the context and with regard to Article 165 (5) (b). And in order to do justice, in the event where the High Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other courts, It should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect necessary transfers among themselves until such time as the citizenry is well acquainted with the appropriate form for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.”**

7. Having regard to the subject matter of this case, I am of the opinion that this court lacks jurisdiction to entertain this matter and I therefore direct it to be placed before the Employment and Labour Relations Court at Kisumu for hearing and determination.

**Dated, signed and delivered in open court this 7<sup>th</sup> day of December, 2016**

**HON. W. A.OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the Petitioners
- Miss Ochwal for the Respondents
- Omwoyo court clerk