

**REPUBLIC OF**  
**KENYA IN THE COURT**  
**OF APPEAL**  
**AT NAIROBI**  
**[CORAM: W. KARANJA, TUIYOTT & NYAMWEYA JJ. A]**

**CIVIL APPEAL NO. 337**  
**OF 2019 BETWEEN**  
**DR. GABRIEL MUKURIA MUTURI**

.....  
**APPELLANT**

**AND**

**DIRECTOR, KENYA FORESTRY  
RESEARCH INSTITUTE (KEFRI).....1<sup>ST</sup>  
RESPONDENT**

**DR. JANE WANGU NJUGUNA.....2<sup>ND</sup>  
RESPONDENT**

*(An appeal from the judgment of the Employment and Labour  
Relations Court of Kenya at Nairobi (M. Onyango J.) delivered on  
24<sup>th</sup> May 2019*

*in*

***ELRC Judicial Review No. 25 of 2017)***

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**JUDGMENT OF THE COURT**

1. On 24<sup>th</sup> May 2019, the Employment and Labour Relations Court (ELRC) at Nairobi (***M. Onyango J.***) dismissed a suit filed by Dr. Gabriel Mukuria Muturi, the appellant herein, which he had filed in **ELRC Judicial Review No. 25 of 2017**. The appellant had sought two substantive orders in the said suit, which was brought by way of a judicial review application. The first was an order of certiorari to

quash the decision of the Director, Kenya Forestry Research Institute (KEFRI), the 1<sup>st</sup> respondent herein, to appoint Dr. Jane Wangui Njuguna (the 2<sup>nd</sup>

respondent herein) to the position of Senior Deputy Director Research and Development on 12<sup>th</sup> September 2017. The second was an order of mandamus to compel the 1<sup>st</sup> respondent to re-advertise the position of Senior Deputy Director Research and Development for the purpose of fresh recruitment. The genesis of the appellant's suit was an advertisement published on 29<sup>th</sup> May 2017 by the 1<sup>st</sup> respondent for the position of Senior Deputy Director, Research and Development in its organisation, which set out the necessary qualifications. The appellant and five other candidates, including the 2<sup>nd</sup> respondent, applied for the position. After conducting interviews, the 1<sup>st</sup> respondent communicated to the candidates that they had all scored the threshold requirement of a 65% pass, and awarded the 2<sup>nd</sup> respondent the said position.

2. The appellant's case was that the 2<sup>nd</sup> respondent lacked the minimum qualifications for appointment to the said position, and in particular, that an audit conducted in 2014 found that the 2<sup>nd</sup> respondent lacked the 10 years' experience required for the position she then held of Deputy Director, Forestry Productivity and improvement, and therefore could not in 2017 have met the requirement for the advertised position of 15 years of experience in research and development; the 2<sup>nd</sup> respondent's degree

was a Bachelor of Science General which was not equivalent to the required Bachelor's Degree in Forestry or other disciplines; and she had not published at least three (3) scientific papers

in refereed journal, or a relevant book chapter or policy briefs, nor was she the first author of two (2) verifiable papers in a scientific conference/ symposium proceedings as was required.

3. In response, the 1<sup>st</sup> respondent, in a replying affidavit sworn on 1<sup>st</sup> November 2017 by the then Director, Ben Chikamai, confirmed that the 1<sup>st</sup> respondent internally advertised for the position of Senior Deputy Director Research and Development on 29<sup>th</sup> May 2017 in implementation of its 5<sup>th</sup> Strategic Plan of 2013-2018, and 6 candidates applied for the advertised position including the appellant and the 2<sup>nd</sup> respondent and were all shortlisted and interviewed. Further, that after the interviews, the final average score for each candidate revealed the 2<sup>nd</sup> respondent as the best candidate with an average of 82.8%, while the appellant came in 3<sup>rd</sup> with 76.6%. Therefore, that the 2<sup>nd</sup> respondent's appointment was based on merit, and she was issued with a letter of appointment on 12<sup>th</sup> September 2017.
4. The 2<sup>nd</sup> respondent reiterated the 1<sup>st</sup> respondent's averments in a replying affidavit she swore on 8<sup>th</sup> November 2017, and averred that no individual had proprietary interest in a particular job position, and that the subject position was advertised, and filled fairly and competitively based on merit. The 2<sup>nd</sup> respondent asserted

that she joined the 1<sup>st</sup> respondent organisation on 3<sup>rd</sup> July 1987 after a successful interview,  
and had worked in various capacities for a total of 31 years in the

Research and Development department. She listed the academic qualifications she had attained, including a Doctor of Philosophy in Forestry Pathology and Mycology; certificates in a wide range of Forestry Biology from world class universities; a Master of Forest Science; and a Bachelor of Science degree in Botany and Zoology and not a general degree Bachelor of Science as alleged by the appellant. The 2<sup>nd</sup> respondent also averred that she had published many papers, technical notes, and book chapters; attended many international conferences and workshops; received many research grants and her resource mobilizing strategies have been commended.

5. She asserted that by the time she was appointed to the position of Deputy Director, Forest Productivity and Improvement in 2014, she had held various substantive management positions since 1997 and listed her achievements while in those positions, whereas, since his appointment as Deputy Director, Forestry Biodiversity and Environmental Management, the appellant had attended very few executive management meetings and he, therefore, did not have a grip of the issues facing the research implementation. Additionally, that the audit report by the Kenya National Audit was a management letter addressed to the 1<sup>st</sup> respondent's Board through the Director and was irrelevant at that point in time.

Accordingly, that the appellant's suit was brought out of malice and in bad faith and had not demonstrated any illegality,

irrationality and impropriety of procedure on the part of the 1<sup>st</sup> respondent's board of management which was the appointing authority, to warrant the orders sought. On the contrary, that the appellant sought to get orders by painting the 2<sup>nd</sup> respondent as unqualified on account of his own qualifications, and was asking the court to decide who is more learned.

6. After hearing the parties, the trial Judge found that no evidence was produced by the appellant to prove bias and illegality on the part of the 1<sup>st</sup> respondent, neither did he submit any evidence to demonstrate that the 2<sup>nd</sup> respondent did not meet the requirements for the job as advertised, or how the appointment of the interested party was against legitimate expectation. Further, that the 2<sup>nd</sup> respondent met the qualifications and scored the highest at the job interview, and the appellant's application did not, therefore, meet the threshold for the grant of the orders sought. Being dissatisfied with the decision of the trial court, the appellant lodged an appeal in this Court and has raised one ground of appeal in his Memorandum of Appeal dated 24<sup>th</sup> July 2019, namely that the trial Judge erred in law in failing to find that the appointment by the 1<sup>st</sup> respondent of the 2<sup>nd</sup> respondent to the position of Senior Deputy Director, Research and Development was procedurally unfair, biased, in abuse of discretion, against

the legitimate expectations, failed to take relevant considerations, and was against the material

procedure or conditions prescribed in the career progression (scheme of service) guidelines for the 1st respondent's parastatal and unlawful.

7. We heard the appeal on this Court's virtual platform on 4<sup>th</sup> December 2024. Learned counsel **Mr. Odukenya** and **Mr. Makhanu** were present appearing for the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent respectively. There was no appearance for the appellant, despite his advocates having been duly served with the hearing notice. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents informed the Court that the appellant had since been dismissed by the 1<sup>st</sup> respondent and had filed another case for compensation, and they sought dismissal of his appeal for non- appearance. We however noted that the appellant's advocates had filed two sets of submissions dated 28<sup>th</sup> February 2020 and 8<sup>th</sup> June 2020, which we shall rely on in our judgment. The two learned counsel who were present proceeded to highlighted their respective submissions dated 30<sup>th</sup> June 2020 and 12<sup>th</sup> May 2020.
8. In commencing the determination of this appeal, we are mindful of the duty of this Court as a first appellate court, which was reiterated and set out in the decision of **Selle and another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123**. We will therefore reconsider the

evidence adduced at the trial court, evaluate it, and draw our conclusions. In addition, we will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to

have acted on the wrong principles of law as was held in **Jabane vs Olenja [1986] KLR 661**, or where its discretion was exercised injudiciously as was held in **Mbogo & Another vs Shah [1968] EA 93**.

9. The issue before us is whether the appellant has established grounds that warrant our interference with the trial court's exercise of discretion in dismissing his judicial review application. These grounds were set out in the case of **United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR** as follows:

***“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”***

10. The appellant's advocates, while reiterating that the 2<sup>nd</sup>

respondent did not meet the relevant qualifications, submitted that the advertisement for the position of the Deputy Director, Research and Development was made in light of the 1<sup>st</sup> respondent's Career Progression Guidelines

(Scheme of Service) (Mwongozo) of May 2011, and the ELRC erred in not taking into consideration the arguments that the 1<sup>st</sup> respondent veered off the said guidelines and neglected the job description when making the appointment of the 2<sup>nd</sup> respondent, thereby prejudicing the appellant. Further, the 1<sup>st</sup> respondent observed and acknowledged that the career guidelines were the basis for the advertisement for the subject position, and contradicted itself by stating that there had never been any recruitment under the said guidelines when there had been prior recruitment of Senior Deputy Directors under the same, and erred in diluting the requirements on authorship position of scientific papers. Lastly, that the requirements for the position of the Deputy Director Research and Development were adulterated to favour the 2<sup>nd</sup> respondent, and the interviewing body was not qualified since the Chief Executive Officer who chaired the said interviews was illegally in office as was held by **Wasilwa J.** in **Petition No. 75 of 2016**, which decision was stayed by the Court of Appeal in **Civil Appeal No. 59 of 2016** .

11. The advocates cited various judicial authorities in support of the position that there should be strict adherence to the guidelines, that going against the guidelines amounted to unfairness, selfishness and against the principle of equality

before the law and which are prohibited by Article 27 (1) and (4) as read together with Article 10 (2) (b) of the Constitution; and there was in breach of the appellant's right to fair administrative

action that is expeditious, efficient, and reasonable and procedurally fair, as guaranteed by Article 47 of the Constitution and section 4 of the Fair Administrative Action. The decision in the case of **Republic vs National Social Security Fund Board of Trustee & another ex parte Town Council of Kikuyu [2014] eKLR** was cited for the submission that as an interviewee, the appellant had a legitimate expectation that the process would be fair, done above board, and to this extent there was no reasonable or justifiable basis for the sudden change in course of the recruitment process. Reliance was also placed on the explanation as to when a legitimate expectation arises, as set out in paragraph 81 of **Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 1 (1)** at page 151 and cited in **Kenya Revenue Authority & 2 others vs Darasa Investment Limited [2018] eKLR** .

12. The second argument put forth by the appellant was that the recruitment and ultimate appointment of the 2<sup>nd</sup> respondent was not done in conformity with the stipulated time. Whereas the deadline for applications for the recruitment to the position of the Deputy Director, Research and Development lapsed on 16<sup>th</sup> June 2017, the 2<sup>nd</sup> respondent's application was allowed on the 19<sup>th</sup> June 2017, 3 days post the deadline. Further, that the appellant raised this issue in the application and affidavit, however,

neither the 1<sup>st</sup> nor the 2<sup>nd</sup> respondent responded and the trial Judge did not address herself on the issue which

was thus was not determined . According to the appellant, the lack of an answer by the respondents creates an avenue for believing either that it was an inside job, an oversight, or an admission of error, and that the allowance given to the 2<sup>nd</sup> respondent was not transparent. Various decisions of the superior courts on unprocedural actions were cited by the appellant in this regard.

13. The 1<sup>st</sup> respondent's advocates on their part reiterated that the 2<sup>nd</sup> respondent had met the qualification and scored the highest at the interviews; the appellant had failed to demonstrate bias, illegality, and how the appointment of the 2<sup>nd</sup> respondent was against the legitimate expectation. On the Career Progression (Scheme of Service) of 1<sup>st</sup> May 2011, the counsel submitted that 2<sup>nd</sup> respondent was appointed after a competitive recruitment and the subject position was not in the career progression guidelines adopted by KEFRI on 1<sup>st</sup> May 2011 and the 1<sup>st</sup> respondent's 5<sup>th</sup> Strategic Plan 2013-2018 specifically provided that senior positions in the organisation be filled competitively in accordance with the law. On the constitution of the 1<sup>st</sup> respondent's board, counsel submitted that the issue was raised in the appellant's further affidavit in the ELRC as an afterthought, and while it was true that **Wasilwa J.** found in **Petition No 75 of 16**, that the 1<sup>st</sup> respondent's then Director and Board were illegally in office, the Judge did

not declare any duties performed by the then Director to be null and void, and the Court of Appeal stayed

the Judgment in **Civil Appeal No 59 of 2018**. In any event, the sieving of applications was done by the management and submitted as a report to the Research and Development Committee and the appellant did not provide any evidence that the then Director of the 1<sup>st</sup> respondent, Dr. Ben Chikamai, chaired the meeting and was one of the panellists conducting the interviews.

14. While citing the decisions in **Republic v the Kenya National Examination Council *exparte* Geoffrey Githinji and 9 others, Civil Appeal No 266 of 1996 and Pastoli v Kabale District Local Government Council and Others (2008) 2 EA 300** on the circumstances when orders of certiorari and mandamus can issue, counsel submitted that the allegation by the appellant that the 2<sup>nd</sup> Respondent was appointed through a biased process against was not proved by any evidence or at all. In addition, and while citing the decision of the Supreme Court of Kenya in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** on when an expectation is legitimate and warrants protection, that the appellant was never promised that he would be appointed into the impugned position or at all and no evidence had been produced of such promise.

15. The 2<sup>nd</sup> respondent's counsel submitted that the 2<sup>nd</sup>

respondent

produced evidence to prove that she had met the minimum requirement on publishing and stated that she handed in her application in time and

it was stamped 16<sup>th</sup> June 2017 and not 19<sup>th</sup> June 2017. Counsel also pointed out that the issue as to whether the 1st respondent's Board was properly constituted to recruit and appoint was not raised in the case filed by the appellant in the trial Court, and was an afterthought. In any event, that the Board had been preserved by an order of the Court of Appeal in **Civil Appeal No. 59 of 2018** when it stayed execution of the judgment in **Petition No. 75 of 2016**.

16. In responding to the issue of adulterating the requirement of appointment for the position of the Senior Deputy Director Research and Development to favour the 2<sup>nd</sup> respondent, counsel submitted that the position of Senior Deputy Director Research and Development was not provided for under the Career Progression Guidelines (Scheme of Service) of May 2011 and the appellant purported to equate the requirements for the position of Deputy Director Research and Development to that of Senior Deputy Director Research and Development. Therefore, that the trial court took into consideration all relevant evidence including the 2<sup>nd</sup> respondent's qualification to arrive at a just, fair and reasonable decision as it did, the requirements provided by the appointing authority as advertised were to be adhered to, and the issue of the appointment of the 2<sup>nd</sup> respondent

being against the legitimate expectation of the appellant did not arise.

17. We have given in-depth consideration to the arguments raised by counsel for the appellant and respondents. In sum, the appellant's argument is that the ELRC erred in not taking into account the requirements of the 1<sup>st</sup> respondent's Career Progression Guidelines (Scheme of Service) (Mwongozo) of May 2011; not finding that the skewed qualifications for the advertised position were in favour of the 2<sup>nd</sup> respondent, and that her application out of time. Therefore, that we should return a finding that the 1<sup>st</sup> respondent was biased and breached the appellant's legitimate expectations by appointing the 2<sup>nd</sup> respondent to the said position. A preliminary issue has also been raised by the respondents that some of these facts were not pleaded by the appellant.
18. In this regard, we note that the grounds for the appellant's judicial review application were that the decision of the 1<sup>st</sup> respondent in appointing the 2<sup>nd</sup> respondent for the position of Senior Deputy Director Research and Development was biased, unlawful and against legitimate expectation; procedurally unfair and failed to take into account relevant considerations; and was in abuse of discretion and against the material procedure or conditions prescribed in the 1<sup>st</sup> respondent's Career Progression (Scheme of Service) Guidelines. As regards the particulars of bias, the appellant set out the alleged

shortcomings in the 2<sup>nd</sup> respondent's qualifications *vis-a-vis* his own qualifications and averred that the internal advertisement for the position was adulterated,

restrictive and with a requirement of less years' experience as compared with related positions; and on illegality, that the 1<sup>st</sup> respondent's Director was illegally in office and its actions were null and void.

19. Further, that the 1<sup>st</sup> respondent exhibited procedural impropriety by accepting the 2<sup>nd</sup> respondent's application on the 19<sup>th</sup> June 2017 three days after the official deadline for submitting applications and the panel looking at the status of the applications showed clearly some applicants never met the requirements sought for within the prescribed deadline, but it recommended all candidates to the next stage . the appellant annexed a copy of an alleged register of the 1<sup>st</sup> respondent indicating when all candidates send their job applications to his further affidavit dated 28<sup>th</sup> February 2018. We accordingly find that the issues raised were adequately pleaded by the appellant in his application, save for the allegations relating to the Mwongozo Code of Governance for State Corporations, which was not pleaded in the grounds for the application. Additionally, for the allegations of illegality of the Director of the 1<sup>st</sup> respondent, the appellant relied on a judgment which was delivered on 31<sup>st</sup> January 2018 in **ELRC Petition 75 of 2016**, after the subject advertisement dated 29<sup>th</sup> May 2017, interviews, and appointment of the 2<sup>nd</sup> respondent on 12<sup>th</sup> September 2017

had taken place. It was, therefore, not only an irrelevant but also non-existent factor during the said interviews and appointment.

20. After a perusal of the evidence availed by the parties, it is notable that firstly, the subject advertisement for the position of Senior Deputy Director Research and Development set out clear requirements as to the qualifications for the advertised position which the 2<sup>nd</sup> respondent demonstrated she had met. In addition, while the said advertisement made reference to the 1<sup>st</sup> respondent's 5<sup>th</sup> Strategic Plan of 2013-2018, there was no reference made therein to its Career Progression Guidelines (Schemes of Service) 2011, nor any indication that the qualifications, if any, in the said guidelines were applicable. The appellant has also not contested the respondent's submissions that there was no position for Senior Deputy Director Research and Development provided in the said guidelines. It is also not contested that both the appellant and 2<sup>nd</sup> respondent applied for the position of Senior Deputy Director Research and Development in response to the internal advertisement dated 29<sup>th</sup> May 2017, were interviewed and evaluated with regard to the qualifications in the said advertisement. Both were found by the 1<sup>st</sup> respondent to have met the threshold with respect to the set qualifications, and the 2<sup>nd</sup> respondent attained a highest score after the interviews. We note that the 2<sup>nd</sup> respondent went to great lengths to demonstrate her qualifications in this regard, and that the

appellant did not indicate nor clarify the source or author  
of the

documents he relied upon to demonstrate bias and procedural impropriety on the part of the 1<sup>st</sup> respondent.

21. The document the appellant annexed to his further affidavit marked as "GMM 6" and which he alleged was as a copy of the register of the 1<sup>st</sup> respondent indicating when all candidates sent their job applications was neither titled as such, nor signed by an officer of the 1<sup>st</sup> respondent and its source or author is not indicated. In addition, contrary to the appellant's submissions, the 1<sup>st</sup> respondent did respond to this allegation and stated that *"the deadline for the advertisement was 16<sup>th</sup> June 2017 upon which 6 candidates had applied for the advertised position herein above and on 25<sup>th</sup> June 2017 the 6 candidates who had submitted their applications were pre-shortlisted by the panel constituted to look into the status of the applications"* and annexed a copy of the minutes of the meeting held on 25<sup>th</sup> July 2017. On the guidelines the appellant averred that *"KEFRI Career Progression Guidelines (Schemes of Service) 2011 is the institute's blueprint for human resource recruitment and career progression and that the position of Senior Deputy Director (KEFRI RF14) referred to in this motion is synonymous to Deputy Director Research and Development (KEFRI RF 14) in KEFRI Career Progression Guidelines (Schemes of Service) 2011."*

22. It is also notable that the trial Judge set out the above averments and arguments by the appellant in the impugned judgment and noted that

*“the ex-parte Applicant submitted some untitled documents at pages 55 to 66 of his bundle and the career progression Guidelines for KEFRI”* , before concluding that *“no evidence was produced by the ex parte applicant to prove bias and illegality neither did he produce evidence that the Interested Party (the 2<sup>nd</sup> respondent herein) did not meet the qualifications of the job as advertised. The Interested Party states in her affidavit that she holds the following qualifications ....She demonstrated the same by attachment of copies of the certificates.”*. We find no reason to fault these findings.

23. For the same reasons, we cannot fault the finding by the trial Judge that there was no breach of the appellant’s legitimate expectations. The Supreme Court of Kenya held in **Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others, [2014] eKLR** that for an expectation to be legitimate, it has to be founded upon a promise or practice by a public authority that was expected to fulfil the expectation, and stated that there must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision-maker to make; and there cannot be a legitimate expectation against clear

provisions of the law or the Constitution. In the present appeal, the express and clear promise by the 1<sup>st</sup> respondent was that of appointment of the best candidate in response

to the advertised position. The 1<sup>st</sup> respondent demonstrated that after advertising for the subject position, it received applications and interviewed all qualified candidates, and appointed the best qualified candidate. The 1<sup>st</sup> respondent therefore fulfilled the procedural and substantive expectations required of it, and it must be emphasised in this regard that there was no legitimate promise or expectation that it would appoint the appellant, but appoint the best candidate arising from the process. The appellant may have been legitimately disappointed that he was not considered the best candidate, but this is no basis for us to find that there was a breach of his legitimate expectation.

24. Consequently, it is our view that what the appellant is essentially seeking in this appeal is a merit evaluation of his qualifications *vis-à-vis* those of the 2<sup>nd</sup> respondent. This Court has held in various decisions including in **Suchan Investment Ltd vs Ministry of Natural Heritage & Culture & 3 others [2016] eKLR, Judicial Service Commission & another vs Njora [2021] KECA 366 (KLR)** and **Kabundu & another vs County Government of Mombasa; Clerk County Assembly of Mombasa & 7 others (Interested Parties) [2023] KECA 1330 (KLR)** that in appropriate cases and arising from the grounds for judicial review now set out in section 7 of the Fair

Administrative Action Act, an element of merit review may be required in judicial review, particularly in examination of whether a decision or action by a public authority is the legal,

constitutional and reasonable, as confirmed by the Supreme Court of Kenya in **Dande & 3 others vs Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)**.

25. The position as regards the nature and extent of merit review that may be undertaken was extensively addressed by the Supreme Court of Kenya in **Saisi & 7 others vs Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR)** as follows:

***“75. In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in Judicial Service Commission & another v Lucy Muthoni Njora, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some***

***measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of the Constitution which requires us to interpret it in a manner that***

***inter alia advances the rule of law, permits the development of the law and contributes to good governance...”***

26. The question we need to answer in this appeal is whether it is permissible in undertaking a merit review to analyse the appellant’s and 2<sup>nd</sup> respondent’s qualifications and make a determination as to who was the more qualified candidate for the advertised position. We are of the view that it is not permissible for two reasons. Firstly, as further held by the Supreme Court in **Saisi & 7 others vs Director of Public Prosecutions & 2 others [supra]** it is not the purpose and intent of a merit review in judicial review to undertake full-fledged inquiry into the merits of a matter. The Supreme Court explained as follows:

***“76. Be that as it may, it is the court’s firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to do so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and***

***(2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the Fair Administrative Action Act. The merits of a case are best analyzed in a trial or on appeal after hearing***

***testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.”***

**27.** Secondly, it is our view that the permissible limit of the courts’ merit view in the circumstances of the present appeal was to determine whether the decision by the 1<sup>st</sup> respondent to appoint the 2<sup>nd</sup> respondent to the position of Senior Deputy Director Research and Development was irrational and unreasonable. In this respect, we find that the appellant did not meet the required threshold of demonstrating that the 2<sup>nd</sup> respondent’s decision was perverse, outrageous or absurd, as held by various decisions on the test for unreasonableness, notably **Associated Provincial Picture Houses vs Wednesbury Corp. (1948) 1KB 223** and **Council of Civil Service Unions vs Minister of Civil Service (1985) 1 AC**

**374.** Our finding is informed by two considerations, the main one being that both the 1<sup>st</sup> and 2<sup>nd</sup> respondents demonstrated that the 2<sup>nd</sup> respondent held the necessary qualifications for the said position, and the impugned

decision cannot therefore be condemned as being absurd or outrageous.

28. The second consideration is that the circumstances of this appeal do not warrant a heightened merit review in applying the unreasonableness or irrationality test. As explained in text on **Judicial Review: Principles and Procedures (2013 Edition)** by Jonathan Auburn, Jonathan Moff and Andrew Harland at paragraphs 17.13 to 17.23, where the impact of a decision entails interference with important rights of an individual, the decision will be subjected to close scrutiny or a heightened merit review in determining its reasonableness. In such cases *“the heightened scrutiny approach will require the public body to justify its decision and put forward an explanation for the interference, with the court assessing whether it was reasonable for the public body to have concluded that there was sufficient justification for the interference. The most substantial the interference the more that will be required by way of justification before the court can be satisfied that the decision is a reasonable one”*.
29. On the other hand, in majority of other cases, a less rigorous approach is adopted in scrutinizing the reasonableness of decisions of public bodies, which approach is sometimes referred to as “light touch review”. One such instance is in challenges of decisions involving the application of specialist or technical expertise by a

public body, including decisions on matters of academic or pastoral judgment. The main reason for adopting the “light touch review” in such cases is that it is beyond the

practical competence and constitutional function of the courts to adjudicate upon the relevant subject matter. It was in this respect held by the English Court of Appeal in **R vs Ministry of Defense expertise Smith (1996) 1 QB 517** that *“the greater the policy content of a decision and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational”*. We similarly find that this Court is ill-equipped to undertake an in-depth merit scrutiny of the qualifications of the appellant and 2<sup>nd</sup> respondent for the advertised position .

30. Therefore, while it may well be that in his own estimation the appellant had better qualifications for the advertised position than the 2<sup>nd</sup> respondent, the courts cannot make a decision in this respect either way. In other words, it was not the duty of the court to determine who, as between the appellant and 2<sup>nd</sup> respondent, was the better candidate or had the better qualifications so to speak. In addition, undertaking such a merit review would entail the court substituting its decision with that of the 1<sup>st</sup> respondent, which is not the province of judicial review. We, therefore, find no reason to fault the learned Judge of the ELRC for finding that the 2<sup>nd</sup> respondent met the qualifications for the advertised position of Senior Deputy Director Research

and Development and that the appellant had not demonstrated bias or illegality, or breach of his

legitimate expectation by the 1<sup>st</sup> respondent in the appointment of the 2<sup>nd</sup> respondent to the said position.

31. We, therefore, find this appeal not to have merit, and it is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

32. Orders accordingly.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of January, 2026.**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

*I certify that this  
is a true copy of the  
original*

*Signed*

**DEPUTY REGISTRAR**