



**Okere & another v Public Service Commission & 7 others (Civil Appeal  
E059 of 2022) [2023] KECA 566 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 566 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL E059 OF 2022  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
MAY 12, 2023**

**BETWEEN**

**PROF. FRANCIS ANGAWA OKERE ..... 1<sup>ST</sup> APPELLANT**

**PROF. ISALIAH I.C WAKINDIKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**COUNCIL OF JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE  
AND TECHNOLOGY ..... 4<sup>TH</sup> RESPONDENT**

**AGGREY DANIEL MAINA THUO ..... 5<sup>TH</sup> RESPONDENT**

**ANTHONY OTIENDE OTIENDE ..... 6<sup>TH</sup> RESPONDENT**

**PROF. PETER ANYANGA OTIENDE WASAMBA ..... 7<sup>TH</sup> RESPONDENT**

**NICHOLAS OUMA ..... 8<sup>TH</sup> RESPONDENT**

*(eing an appeal from the judgment and orders of the Employment and Labour Relations  
Court at Kisumu (Radido, J.) dated and delivered on 26th January, 2022 in ELRC  
Petition No. 36 of 2021 As Consolidated With ELRC Petition No. E04 of 2021)*

**JUDGMENT**

**Judgment of J. Ngugi, JA**

1. This appeal arises from the judgment of the Employment and Labour Relations Court (ELRC) (Radido, J) dated January 26, 2022. The judgment relates to two separate petitions filed by Anthony



Otiende Otiende and Nicholas Ouma, the 7<sup>th</sup> and 8<sup>th</sup> Respondents herein. The petitions before the superior court, that is, Kisumu Petition No E04 of 2021 and Kisumu Petition No E036 of 2021, were consolidated and heard together.

2. The petitions were against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents herein, together with the 2<sup>nd</sup> Appellant herein. The said parties were the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents respectively, in the superior court. The petitions challenged the process, constitutionality and legality of the appointment of the 1<sup>st</sup> Appellant herein as the Deputy Vice Chancellor, Planning, Administration and Finance, Jaramogi Oginga Odinga University of Science and Technology, instead of the 5<sup>th</sup> Respondent herein, on the ground that he had not been recommended by the 4<sup>th</sup> Respondent. Thus, the petitioners sought: orders quashing the purported appointment of the 1<sup>st</sup> Appellant and secondly, orders compelling the 4<sup>th</sup> Respondent to appoint the 5<sup>th</sup> Respondent.
3. It was the petitioner's case in the superior court that the appointment of the 1<sup>st</sup> Appellant did not meet the threshold envisaged by national values and principles of governance required of public service as the 4<sup>th</sup> Respondent was not reconvened to reconsider the recommendation it had first made to the 2<sup>nd</sup> Respondent to appoint the 5<sup>th</sup> Respondent. The petitioners asserted that the withdrawal of the recommendation to appoint the 5<sup>th</sup> Respondent and the subsequent appointment of the 1<sup>st</sup> Appellant, was made on the basis of nepotism and was ultra vires.
4. The background of this case is that sometimes in January 2020, the 1<sup>st</sup> Respondent declared a vacancy in the office of the Deputy Vice Chancellor, Planning, Administration and Finance, Jaramogi Oginga Odinga University of Science and Technology and thereafter conducted interviews.
5. On March 3, 2021, the 1<sup>st</sup> Respondent wrote a letter to the 4<sup>th</sup> Respondent, notifying it on the outcome of the interviews and its recommendations. The 1<sup>st</sup> Respondent recommended three successful applicants who scored a total of 74, 73 and 72 respectively, for the position. Two of the said applicants were the 1<sup>st</sup> Appellant and the 5<sup>th</sup> Respondent, ranking third and first place, respectively.
6. On March 26, 2021, the 4<sup>th</sup> Respondent deliberated on the 1<sup>st</sup> Respondent's letter and resolved to uphold the results of the interviews; and recommended the appointment of the 5<sup>th</sup> Respondent. On March 30, 2021, the 2<sup>nd</sup> Appellant, being the chairperson of the 4<sup>th</sup> Respondent, wrote to the 2<sup>nd</sup> Respondent recommending the appointment of the 5<sup>th</sup> Respondent. However, on April 12, 2021, the 2<sup>nd</sup> Appellant issued an appointment letter to the 1<sup>st</sup> Appellant herein. Thereafter, through a letter dated April 15, 2021, the 1<sup>st</sup> Appellant accepted his said appointment. That set the stage for the proceedings before the superior court.
7. In their submissions at the superior court, the petitioners cited various statutes including, section 35(1) and 39 of the *Universities Act*, 2012; section 7(2) of the Fair Administrative Action Act; and various Articles of *the Constitution* including Articles 10, 73 and 232. They argued that the 2<sup>nd</sup> Respondent could only act upon the recommendation made by the 4<sup>th</sup> Respondent and there was no evidence that the 4<sup>th</sup> Respondent resolved to reverse its recommendation of the 5<sup>th</sup> Respondent and appoint the 1<sup>st</sup> Appellant, instead.
8. The petitioners further argued that the recommendation of the 5<sup>th</sup> Respondent created a legitimate expectation and the alteration of that decision violated his right to that expectation.
9. Additionally, the petitioners challenged the legal capacity of the 2<sup>nd</sup> Appellant herein as chairperson of the 4<sup>th</sup> Respondent on the ground that at the time of the said recommendation and appointment, he was serving as the Vice Chancellor of KCA University, which is a public office. Thus, he could not hold two public offices.



10. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein challenged the competency of the petitions and argued that the same did not meet the threshold outlined in the case of *Anarita Karimi Njeru v Republic* (No 1979) KLR 154, for failure to precisely plead the constitutional provisions violated and the manner of violation. They argued that the appointment of the 1<sup>st</sup> Appellant was meritorious as he was one of the three applicants who were recommended for appointment. They contended that the appointment of 1<sup>st</sup> Appellant was made after consultations between the 2<sup>nd</sup> Respondent and the 4<sup>th</sup> Respondent; unlike the recommendation of the 5<sup>th</sup> Respondent which was not preceded by consultations as required by law.
11. The 2<sup>nd</sup> Appellant herein, who was the 5<sup>th</sup> Respondent in the superior court, also challenged the petitions and basically reiterated the submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein.
12. Additionally, the 2<sup>nd</sup> Appellant argued that the doctrine of legitimate expectation was not available to the 5<sup>th</sup> Respondent herein as no promise had been made to him and neither was there past practice that would have entitled him to have such an expectation. He contended that the 4<sup>th</sup> Respondent had no obligation to appoint the best ranked applicant since the 1<sup>st</sup> Respondent had forwarded the names of three applicants to 4<sup>th</sup> Respondent and any one of them could be appointed.
13. Lastly, the 2<sup>nd</sup> Appellant contended that he was lawfully in office as chairperson of the 4<sup>th</sup> Respondent and his gazettement as such had not been challenged. He submitted that the petitioners did not provide evidence that he was a public officer as alleged at the material time.
14. On his part, the 5<sup>th</sup> Respondent herein contended that under section 35(1)(a)(v) of the *Universities Act, 2012*, the power to appoint a Deputy Vice Chancellor is exclusively vested upon the Council (4<sup>th</sup> Respondent) and the need to consult did not take away that legal power. As such, by recommending his appointment and thereafter reversing the same and appointing the 1<sup>st</sup> Appellant who had not been recommended by the 4<sup>th</sup> Respondent, abrogated the normative requirements of transparency, accountability, merit and equal opportunity to public office.
15. Counsel for the 5<sup>th</sup> Respondent alleged that a representative of the 2<sup>nd</sup> Respondent was present during the Council meeting, in which it was resolved to have him recommended for appointment, thereby creating legitimate expectation.
16. On the other hand, the 1<sup>st</sup> Appellant contended that the Council was not the ultimate authority in the appointment of a Deputy Vice Chancellor, as the *Universities Act, 2012*, provides for consultations with the 2<sup>nd</sup> Respondent. He stated that his appointment was preceded by consultations between the 2<sup>nd</sup> and 4<sup>th</sup> Respondents as provided for under section 35(1)(a)(v) of the *Act*.
17. In its decision, the superior court noted that under the epistolary jurisdiction of Article 22(3) of *the Constitution*, it could entertain informal proceedings; and thus found that the petitions were not determinable on the test outlined in the Anarita case.
18. The superior court also found that the 1<sup>st</sup> Respondent recommended for appointment, three applicants, two of whom were the 1<sup>st</sup> Appellant and the 5<sup>th</sup> Respondent herein. It further found that the purpose of the letter written by the 1<sup>st</sup> Respondent on March 3, 2021 was to forward the results of the interviews to the 4<sup>th</sup> Respondent to facilitate the appointment of the Deputy Vice Chancellor, Planning, Administration and Finance, after consultations with the 2<sup>nd</sup> Respondent as required by law. However, in its meeting held on March 26, 2021, the 4<sup>th</sup> Respondent upheld the results of the interviews and recommended the appointment of the 5<sup>th</sup> Respondent based on merit and performance as relayed by the 1<sup>st</sup> Respondent and the 4<sup>th</sup> Respondent's interrogation of the 5<sup>th</sup> Respondent's CV.



19. In the result, the superior court opined that following the resolution of the 4<sup>th</sup> Respondent, any consultations with the 2<sup>nd</sup> Respondent were to revolve around the appointment of the 5<sup>th</sup> Respondent and not the other two applicants who were recommended by the 1<sup>st</sup> Respondent. In other words, the 4<sup>th</sup> Respondent had made a firm resolution.
20. Further, the superior court found that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents did not provide any record that showed that the recommendation to appoint the 5<sup>th</sup> Respondent was subject to formal consultations with the 2<sup>nd</sup> Respondent, nor that the 2<sup>nd</sup> Respondent declined to endorse his recommendation. Similarly, they did not provide any record that showed evidence that formal consultations were held between the 2<sup>nd</sup> Respondent and the 4<sup>th</sup> Respondent, to arrive at the decision to substitute the 5<sup>th</sup> Respondent with the 1<sup>st</sup> Appellant. There was equally no evidence that there were consultations between the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Appellant in his capacity as the chairperson of the 4<sup>th</sup> Respondent and on behalf of the 4<sup>th</sup> Respondent.
21. Having drawn the foregoing conclusions, the superior court held that the 4<sup>th</sup> Respondent did not demonstrate that it gave its imprimatur to the appointment of the 1<sup>st</sup> Appellant as the Deputy Vice Chancellor since the consultations as envisaged under section 35(1)(a)(v) of the *Universities Act, 2012*, could not be conducted informally because the same were subject to values of transparency, accountability and equal opportunity in the public service. The superior court concluded that the reversal of the recommendation to appoint the 5<sup>th</sup> Respondent and the decision to appoint the 1<sup>st</sup> Appellant did not meet the normative standard set out by *the Constitution*. In the circumstances, it held that the petitions had merit and made orders quashing the appointment of the 1<sup>st</sup> Appellant as the Deputy Vice Chancellor on the ground that the same was unconstitutional, invalid and void.
22. Aggrieved by the decision of the superior court, the Appellants filed a Notice of Appeal dated January 28, 2022, and a Memorandum of Appeal dated January 24, 2022, in which they raised twelve (12) grounds of appeal. These are that the learned judge erred in law and fact by:
  1. Allowing a petition that did not meet the threshold of a constitutional petition.
  2. Holding that the appointment of the 1<sup>st</sup> Appellant did not meet the normative values expected in public service.
  3. Holding that there was no formal consultation between the 4<sup>th</sup> and 2<sup>nd</sup> Respondent in appointing the 1<sup>st</sup> Appellant as the Deputy Vice Chancellor, Planning, Administration and Finance.
  4. Disregarding the evidence placed before him demonstrating the consultative process undertaken between the 2<sup>nd</sup> Appellant on behalf of the 4<sup>th</sup> and 2<sup>nd</sup> Respondent.
  5. Invalidating the actions of the 2<sup>nd</sup> and 4<sup>th</sup> Respondents in appointing the 1<sup>st</sup> Appellant thereby usurping their statutory mandate.
  6. Holding that the reversal of the recommendation to appoint the 5<sup>th</sup> Respondent and the decision to appoint the 1<sup>st</sup> Appellant instead, did not meet the normative standard set by *the Constitution*.
  7. Disregarding the 1<sup>st</sup> Appellant's submission that the ultimate authority in the decision to appoint a Deputy Vice Chancellor does not rest with the 4<sup>th</sup> Respondent.
  8. Invalidating the results of the consultations between the 2<sup>nd</sup> and 4<sup>th</sup> Respondents despite their exclusive statutory mandate.



9. Disregarding the 2<sup>nd</sup> Appellant's contention that the doctrine of legitimate expectation did not avail to the 5<sup>th</sup> Respondent.
10. Failing to uphold the statutory provision as postulated by the 2<sup>nd</sup> Appellant that there was no obligation to appoint the best ranked applicant in the interview.
11. Finding that the appointment of the 1<sup>st</sup> Appellant was unconstitutional, null and void.
12. Invalidating the appointment of the 1<sup>st</sup> Appellant.
23. The Appellants prayed that the appeal be allowed, judgment of the superior court be set aside and the Appellants be awarded costs of this appeal.
24. During the plenary hearing of the appeal, learned counsels, Mr. Okore and Mr. Okumu, held brief for senior counsel, Prof. Tom Ojienda for the 1<sup>st</sup> Appellant; learned counsel, Ms. Otieno, appeared for the 2<sup>nd</sup> Appellant; learned counsel Mr. Kobimbo appeared for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents; learned counsel Ms. Mwangi appeared for the 5<sup>th</sup> Respondent; and Mr. Otiende, the 7<sup>th</sup> Respondent appeared in propria persona. There was no appearance for the 1<sup>st</sup> Respondent even though the record showed that they had been served with the hearing notice. The court was also informed that the 6<sup>th</sup> and 8<sup>th</sup> Respondents had never participated in the appeal. The Appellants and the 5<sup>th</sup> and 7<sup>th</sup> Respondents filed written submissions which they relied on entirely.
25. Learned counsel, Ms. Otieno, for the 2<sup>nd</sup> Appellant, informed the court that they filed a Notice of Withdrawal from the Appeal dated June 27, 2022, on behalf of the 2<sup>nd</sup> Appellant. As such, the court made an order that the appeal shall proceed for hearing in respect of the 1<sup>st</sup> Appellant only.
26. The 1<sup>st</sup> Appellant condensed his grounds of appeal into three as follows:
  - a. The superior court erred in law by failing to find that the petition does not meet the constitutionality threshold.
  - b. The superior court erred in law by holding that the appointment of the 1<sup>st</sup> Appellant was unconstitutional.
  - c. The superior court erred in law by usurping the powers of a statutory body.
27. On the first ground, learned counsel, Mr. Okore, contended that at the superior court, the petitioners alleged and merely pleaded that Articles 10, 20, 24, 27, 73 and 232 of *the Constitution* had been violated, without giving details and providing clarity on how each provision had been violated. He argued that the superior court entertained the petitions which were bad in law and ignored the long held doctrine set out in the case of *Anarita Karimi Njeru v Republic* (No 1979) KLR 154. The court in that case held that in matters involving reference to *the Constitution*, the complaints, provisions infringed and the manner in which the provisions are alleged to be infringed should be set out with a reasonable degree of precision. He also relied on the decision in *Mumo Matemo v Trusted Society of Human Rights Alliance* [2013] eKLR, wherein this court reaffirmed the doctrine set out in the Anarita case (supra).
28. Lastly, he argued that the superior court ignored the constitutional threshold set out by the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR, wherein it was held that although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated, infringed or threatened, a party invoking that Article has to show the rights said to be infringed, as well as the basis of the grievance; which principle emerges clearly from the decision in Anarita case (supra). On this pedestal, counsel argued, the Supreme Court held that it was necessary that there be a link



between the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement.

29. On the second ground, learned counsel argued that the appointment of the 1<sup>st</sup> Appellant was in accordance with section 35(1)(a)(v) of the Universities Act and relied on the decision in Okiya Omtatab Okoiti v Public Service Commission & 2 Others; Council, Garissa University & Another (Interested Parties) [2020] eKLR. The court in that case held as follows:

“The court reading of section 35(1)(a)(v) of the Universities Act is that the purpose is to give PSC an independent recruitment process outside of the organs of the subject university(ies) and the Minister/Cabinet Secretary, upon identification of suitable candidate(s) present a given list of successful candidates to the Cabinet Secretary and Council for appointment. Section 39(1) on the other hand vests the power to appoint the Vice Chancellor and Deputy Vice Chancellor in the Cabinet Secretary on the recommendation of PSC pursuant to section 35, as set out above.”

30. He stated that there are various judicial decisions on the obligation to consult and cited the case of Towett Geoffrey & Another v Thomas Kimeli Cheruiyot & 5 Others; Public Service Commission & 2 Others (Interested Parties) [2020] eKLR in which the court held that the process of appointment of Vice Chancellors, Deputy Vice Chancellors and Principals and Deputy Principals of Constituent Colleges should be undertaken in consultation with the Cabinet Secretary and the Council as provided for in section 35(1)(a)(v) of the Universities Act. He contended that the obligation to consult is not only provided for in the said Act, but it is also pegged in Article 259(11) of the Constitution which similarly provides for the obligation to consult before appointment and relied on the decision in Commission for the Implementation of the Constitution v Attorney General & Another [2013] eKLR and Agricultural, Horticultural and Forest Industry Training Board v Aylesbury Mushrooms Ltd [1972] 1 All ER 280 at 284.
31. Relying on the foregoing decisions, learned counsel submitted that there was “informal” consultation between the 4<sup>th</sup> and 2<sup>nd</sup> Respondents through the 2<sup>nd</sup> Appellant who wrote a letter in his capacity as the chairperson of the Council (4<sup>th</sup> Respondent) to the 2<sup>nd</sup> Respondent, and the same represented the position of the 4<sup>th</sup> Respondent. However, the learned judge completely ignored this evidence. He submitted that the appointment of the 1<sup>st</sup> Appellant adhered to the normative values and national principles set out under Article 10 and 232 of the Constitution.
32. Lastly, learned counsel rejected the argument that there was a requirement to appoint an applicant who ranked first in the interview as the DVC. It was his argument that Article 232 of the Constitution provided that other factors other than (academic) merit need to be considered when making appointments to public offices and relied on the decision in Andrew Omtatab Okoiti v Attorney General & 2 Others [2011] eKLR. In this context, he asserted that while considering the appointment of the applicants, the 4<sup>th</sup> Respondent noted that the 1<sup>st</sup> Appellant had certain strengths and had also been acting as the Deputy Vice Chancellor, Planning, Administration and Finance for two years; and as such, he was a good candidate for succession, planning and sustainability. He argued that the upon being forwarded the names of three successful applicants, the same amounted to an invitation to the 2<sup>nd</sup> Respondent to consider which one among them was the best fit for the position. In other words, he had the power to either approve or disapprove the recommendation of the 5<sup>th</sup> Respondent and subsequently proceed to do the final appointment.
33. On the third ground, learned counsel contended that the superior court usurped the statutory mandate of the 4<sup>th</sup> Respondent by invalidating a decision that was arrived at after consultation between the



4<sup>th</sup> and 2<sup>nd</sup> Respondents, contrary to section 35 of the *Universities Act* and relied on the decision in *John Waweru Wanjohi & 2 Others v The Attorney General & Others*, Petition No 373 of 2012 as consolidated with *Kipnetich Maiyo & Others v The Kenya Land Commission Selection Panel* Nairobi, Petition No 426 of 2012. In this case the court held as follows:

“The court must of course be careful not to usurp the powers and functions of the various constitutional and statutory bodies involved in appointments....

.....

I have evaluated the process of nomination and appointment of the chairperson and members of the National Land Commission on the basis of the case presented by the petitioners and I am satisfied that the procedure adopted by the Selection Panel, President and Prime Minister and the National Assembly achieved the Constitutional objectives and statutory requirements of competence, gender equity, regional and ethnic diversity. In the circumstances, I do not find any infraction of *the Constitution* or the fundamental rights of the petitioners....

34. Counsel for the 1<sup>st</sup> Appellant also relied on the decision in *Kenya Council of Employment and Migration Agency & Another v National Police Service Commission & 6 Others* [2016] eKLR.
35. Even though learned counsel Mr. Kobimbo, who appeared for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, did not file written submissions, he was given an opportunity to make oral submissions. He submitted that they supported the appeal and had nothing to add.
36. Opposing the appeal, learned counsel, Ms. Mwangi for the 5<sup>th</sup> Respondent, with regard to the first ground, submitted that an examination of the two petitions and their supporting affidavits showed in detail the manner in which the constitutional provisions were violated. To buttress this assertion, she stated that the petitioners clearly showed that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents: a) violated the values and principles under Article 10 of *the Constitution* by failing to meet the threshold of equity, equality, transparency and accountability; b) violated Article 47 of *the Constitution* by not following due process of the law and appointing a candidate who graded last and was not recommended for appointment; c) violated the requirements of Article 73(2) of *the Constitution*, which set out the guiding principles of leadership and integrity in the selection process on the basis of personal integrity, competence and suitability; and d) violated the requirements of Article 232(1) of *the Constitution*, which sets out the values and principles of public service, that is, fair competition and merit in appointments, adequate and equal opportunities in appointments and promotions and representation of Kenya’s diverse communities.
37. Learned counsel further submitted that the Respondents in the superior court understood with precision, the grievances of the petitioners in relation to the referred violations and filed comprehensive replying affidavits complete with annexures; and in addition, they responded comprehensively to the petitions to the extent that there was no misapprehension on the nature and claim made in the petitions. As such, the petitioners set out the claim against the 1<sup>st</sup> Appellant herein with a reasonable degree of precision. She added that the decision in the Anarita Karimi Njeru Case, having been delivered more than forty years ago, cannot have the same impact on pleadings within the context of the 2010 Constitution, as the same presented a new dawn in the manner in which courts should administer justice without being bound by technicalities. In this regard, she relied on Article 159 which requires that justice should be administered without undue regard to procedural technicalities whilst still protecting and promoting the purpose and principles of *the Constitution*.



38. The decision in *Mobamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 Others* [2016] eKLR was relied on for the proposition that while the Anarita Karimi Njeru Case and others cases decided prior to the 2010 Constitution were decided correctly in their context with their insistence on specificity, the constitutional text now presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times. In the said case, the Court held that it was satisfied that there was no doubt at all as to what Fugicha’s complaints were, against whom they were, and the provision of *the Constitution* alleged to have been violated. The Court further went ahead and stated that a proper reading of Fugicha’s entire affidavit did not warrant the draconian striking out of the cross-petition however presented. Learned counsel also relied on the decision in *Kibos Distillers Limited & 4 Others v Benson Ambuti Adega & 3 Others* [2020] eKLR, in which the court was faced with a similar issue and it dismissed the allegation that there was no reasonable degree of precision in the description and manner of constitutional provisions violated.
39. With regard to the second ground, learned counsel argued that by appointing the 1<sup>st</sup> Appellant, the 2<sup>nd</sup> and 4<sup>th</sup> Respondents violated the provisions of Article 10, 73 and 232 of *the Constitution*. She asserted that the appointment did not meet the substantive and procedural requirements laid down by express constitutional and statutory provisions as it was not competitive and could be equated to “mere handpicking.” Counsel added that the decision to appoint the 1<sup>st</sup> Appellant was discriminative and without transparency, openness and accountability since no explanation was given for the reversal of the recommendation for appointment of the 5<sup>th</sup> Respondent and subsequent appointment of the 1<sup>st</sup> Appellant; after alleged consultation between the 2<sup>nd</sup> and 4<sup>th</sup> Respondents, of which there was no evidence on record to demonstrate the same. In this regard, counsel relied on the decision in *Okiya Omtatah Okoiti v Attorney General & 2 Others; Francis K. Muthaura (AMB) & 5 Others (Interested Parties)* [2019] eKLR wherein the court, while referring to the decision in *Narok County Government & Another v Richard Bwogo Birir & Another* [2015] eKLR, comprehensively dissected the principle of fair competition and merit as envisaged under Articles 10, 73 and 232 as follows:
- “The Court adds that in matters of appointment or election to public office, the string that flows through *the Constitution* entails the application of the constitutional values, principles and standards such as the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized; good governance, integrity, transparency and accountability; sustainable development; selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; honesty in the execution of public duties; the declaration of any personal interest that may conflict with public duties; accountability to the public for decisions and actions; efficient, effective and economic use of resources; accountability for administrative acts; fair competition and merit as the basis of appointments and promotions; representation of Kenya’s diverse communities; and affording adequate and equal opportunities for appointment, training and advancement at all levels of the public service of men and women, the members of all ethnic groups, and persons with disabilities. The principles, values and tests are set out clearly in *the Constitution* including in Articles 10, 73 and 232.”
40. Learned counsel further submitted that if and when consultations take place, the same should be transparent as envisaged under Article 10 of *the Constitution*; and failure to give any reasons for reversing the recommendation of the 5<sup>th</sup> Respondent amounted to acting ultra vires and was a mockery of the recruitment role of the 1<sup>st</sup> Respondent under section 35 of the *Universities Act*.



41. Lastly, she asserted that the 4<sup>th</sup> Respondent only presented one name to the 2<sup>nd</sup> Respondent for appointment and as such, the 2<sup>nd</sup> Respondent did not have an option of appointing any of the top three candidates. In other words, as was rightly observed by the superior court, following the resolution of the Council, any consultations with the Cabinet Secretary were to revolve around the appointment of the 5<sup>th</sup> Respondent and not the other two candidates. The Council had made a firm decision.
42. With regard to the third ground, learned counsel rejected the assertion by the 1<sup>st</sup> Appellant that the superior court had no jurisdiction to entertain the grievances raised by the petitioners, and relied on the decision in *Kenya Council of Employment and Migration Agency & Another v National Service Commission & 6 Others* [2016] eKLR (supra), which was cited by the 1<sup>st</sup> Appellant in his submissions. According to learned counsel, the court was clear that its duty in reviewing the process of appointment was to ensure that it meets the test of legality. Therefore, in the instant case, the superior court rightly exercised its jurisdiction in invalidating the decision of the 4<sup>th</sup> Respondent.
43. Thus, in view of the decision to invalidate the appointment of the 1<sup>st</sup> Appellant, learned counsel submitted that the superior court had jurisdiction to order that the 5<sup>th</sup> Respondent be appointed as the Deputy Vice Chancellor, Planning, Administration and Finance, as sought for in the petition; and relied on the decision in *David Ndiu & Others v Attorney General & Others* [2021] eKLR, wherein the court held that Article 23 of *the Constitution* provides that a court “may grant appropriate relief” when confronted with violation of rights. She submitted that under Article 20 of *the Constitution*, the 5<sup>th</sup> Respondent had a right to the enjoyment of the fundamental freedoms in the bill of rights to the greatest extent, consistent with the nature of the right or fundamental freedom.
44. On his part, Mr. Otiende, the 7<sup>th</sup> Respondent also opposed the appeal and submitted that the bone of contention in this case was whether the consultation referred to by the 1<sup>st</sup> Appellant and the 2<sup>nd</sup> and 4<sup>th</sup> Respondents took place and if yes, whether it was in accordance with the law. In this regard, he contended that the purpose of consultation was to ascertain the level of compliance with the statutory procedures and constitutional values and principles. In other words, consultation does not equate to usurpation of powers conferred upon the Council by statute to provide a path way for political or other expedient considerations.
45. Mr. Otiende contended that if at all there was consultation, the same was informal as there is no record or evidence to demonstrate that the 4<sup>th</sup> Respondent reconvened to reverse their recommendation of the 5<sup>th</sup> Respondent and which parameters were considered in the said consultation. It was his argument that the decision to reverse the recommendation of the 5<sup>th</sup> Respondent was not a collective decision but an individual one.
46. This being a first appeal, we are required to re-evaluate and re-analyze the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact, bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle v Associated Motor Boat Co. Limited* (1968) EA 123). In addition, we must be cognizant of the fact that we should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane v Olenja* (1968) KLR 661).
47. Having considered the pleadings in the record of appeal, the judgment of the trial court, the 1<sup>st</sup> Appellant’s grounds of appeal and the rival submissions of the parties, three issues present themselves for determination in this appeal:



- a. First, whether the petitions in the superior court met the specificity threshold required of constitutional petitions.
  - b. Second, if the petitions survive the procedural bar of specificity, whether the recommendation of the 5<sup>th</sup> Respondent and the process of appointment of the 1<sup>st</sup> Appellant adhered to the prescribed statute and Constitution.
  - c. Third, if the answer to (b) above is in the negative, what the appropriate reliefs should be.
48. Were the two petitions before the superior court so obscurely un- specific as to deny the court jurisdiction to entertain them on account of the due process rights of the Respondents to be specifically informed of the case they faced? This is, essentially, the first complaint, fashioned on the famous Anarita Karimi Njeru Case, the 1<sup>st</sup> Appellant makes against the superior court judgment. This Court reformulated the rule of law in the Anarita Karimi Njeru Case in *Mumo Matemo v Trusted Society of Human Rights Alliance* [2013] eKLR in the following words:
- “(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.
  - (42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.” (Emphasis added)
49. So did the two petitions which were before the superior court comply with the principle requiring that constitutional petitions are pleaded with reasonable precision?
50. Looking at the pleadings and depositions placed before the superior court, it seems clear, as was observed by the learned judge, that the petitions challenged the process, constitutionality and legality of the appointment of the 1<sup>st</sup> Appellant as the Deputy Vice Chancellor, Planning, Administration



and Finance, Jaramogi Oginga Odinga University of Science and Technology, instead of the 5<sup>th</sup> Respondent. The facts pleaded, which are uncontroverted, are concisely laid out in the petitions. The articles in *the Constitution* and sections in the statute allegedly violated are specifically cited; and the arguments linking the two clearly highlighted. If the facts alleged in the petitions are concisely laid out; and the Articles of *the Constitution* at issue specifically identified, it is sufficient to say that the principle laid out in Anarita Karimi Njeru Case as reformulated in Mumo Matemu Case was satisfied in this case. It is unnecessary to belabor this analysis. Nothing turns on this ground of appeal.

51. I will now turn to the second issue. As rehashed above, the central question in this case revolves at the intersection of appropriate constitutional standards applicable to public appointments; the need to strictly adhere to statutory procedures in the appointment process; and the role of the courts in policing the process.
52. The facts of the case are largely uncontested. The PSC conducted interviews for the position of DVC. It sent the results to the 4<sup>th</sup> Respondent. The results transmitted contained the three top candidates based on the PSC's assessment. The PSC was categorical in its assessment that all three were qualified to be appointed to the position of DVC. Among the three candidates were the 1<sup>st</sup> Appellant, who was ranked third; and the 5<sup>th</sup> Respondent, who was ranked first.
53. The 4<sup>th</sup> Respondent met to discuss the three names. It unanimously resolved to "recommend" the 5<sup>th</sup> Respondent to the position. That was the name sent – vide a letter by the 2<sup>nd</sup> Appellant -- to the 2<sup>nd</sup> Respondent for appointment. However, in subsequent communication, the 2<sup>nd</sup> Appellant, who is the chair of the 4<sup>th</sup> Respondent, wrote to the 1<sup>st</sup> Appellant appointing him as the DVC. The 1<sup>st</sup> Appellant insists that the communication by the 2<sup>nd</sup> Appellant was after "informal" consultations between the 2<sup>nd</sup> Respondent and the 4<sup>th</sup> Respondent members including the 2<sup>nd</sup> Appellant. The 5<sup>th</sup> and 7<sup>th</sup> Respondents, on the other hand, deny that there was nosuch consultation; and in any event, argue that "informal" consultations do not rise to the statutory standard required under section 35(1) of the *Universities Act, 2012*.
54. A good starting point to frame the issue presented in this case is the relevant statutory position. Section 35(1)(a)(v) of the *Universities Act, 2012*, provides as follows:
  - “(1) In addition to the provisions of its Charter, a university shall establish the following organs of governance or their equivalent
    - (a) a Council, which shall –  
.....
    - (v) in the case of public universities, appoint Vice Chancellor, Deputy Vice Chancellors and Principals and Deputy Principals of Constituent Colleges, in consultation with the Cabinet Secretary, after a competitive process conducted by the Public Service Commission; ....”
55. It is clear from this provision that the University Council is responsible for appointing the Deputy Vice Chancellor of the University. However, the law stipulates two conditions precedents before doing so: there must be a competitive process conducted by the Public Service Commission; and the Council must consult with the Cabinet Secretary.



56. This case puts in sharp relief the outer limits of the requirement of “consultation” in public appointments when seen against the background of the constitutional principles of transparency, accountability, and the constitutional principles of appointment to the public service outlined in Article 232 and 73 of *the Constitution*. The specific questions presented are whether the 4<sup>th</sup> Respondent torpedoed the principle of consultation in forwarding only one name to the Cabinet Secretary; and, in turn, whether the Cabinet Secretary usurped the role of the 4<sup>th</sup> Respondent in participating in a process that led to the appointment of a person other than the name forwarded to him by the 4<sup>th</sup> Respondent. A related question is whether it can be said, for purposes of the statute, the change in recommendation for appointment – from the 5<sup>th</sup> Respondent to the 1<sup>st</sup> Appellant – was the outcome of statutory consultations or illegal usurpation of statutory authority.
57. I will reverse the questions and begin with the latter. Can it be said that the change from the 5<sup>th</sup> Respondent to the 1<sup>st</sup> Appellant as the appointee for DVC position was the outcome of lawful and legitimate consultations between the 4<sup>th</sup> Respondent and the 2<sup>nd</sup> Respondent as anticipated by section 35(1)(a)(v) of the *Universities Act, 2012*?
58. The word “consultation” usually means interaction between at least two parties – the consultor on the one hand; and the consultee(s) on the other -- for the purpose of obtaining advice, or exchanging opinions on issues, plans, or management actions with a view to evolving a satisfactory solution to a pending issue. It follows that the consultation must be directed to the essential points of the subject and must enable the consultor to consider all the pros and cons of an issue before coming up with a decision. The decision must, in all cases, remain with the consultor. However, it would be considered an abuse of discretion (reviewable by the Court) for the consultor to ignore the advice of a consultee without good reason.
59. In statutory and constitutional law phraseology in relation to appointments, “consultation” is understood as part of the constitutional efforts to attain transparency, accountability, public participation, equitable and merit-worthy appointments and public appointments. Consultation ensures that a public appointment becomes a collective, participatory, constitutional function with the attendant checks and balances as opposed to a “despotic” determination by a single agency or person.
60. In the case at hand, it is easy to see why the statute has the requirement of mandatory consultation with the Cabinet Secretary for Education. As the 1<sup>st</sup> Appellant has urged, while the competitive process of recruitment of a candidate by the Public Service Commission might yield a candidate who is highest ranked on the (mostly academic) parameters set by the PSC, both the PSC and the University Council might not be privy to certain panoramic and sector-wide information that the Cabinet Secretary has. This would include information about the ethnic and regional make-up of other high-ranking public university officials in the country as well as in other related sectors. Such factors must be taken into consideration as required by Article 232(h) and (l) of *the Constitution*. Additionally, the Cabinet Secretary might have cabinet-level information regarding the personal integrity and suitability of the individuals selected – another consideration required under Article 73 of *the Constitution*.
61. It is important to reiterate, however, that where consultation is mandated in our law as in this case, our case law has stably required that it must be done in accordance with the other constitutional values and principles: transparency, accountability, public participation, equitable and merit-worthy appointments and public appointments. In this sense, section 35(1)(a)(v) of the *Universities Act, 2012* must be read in tandem with Articles 232 and 73 of *the Constitution* on the one hand; and Article 10 on the other hand.



62. With this harmonious reading of these constitutional and statutory provisions, a scan of our case law yields a number of principles which are transcendental from this constitutional law phraseology of “consultation” in relation to public appointments:
- a. “Consultation” means that the party with the authority to make the decision – the consultor -- must give the other party – the consultee – reasonable notice and opportunity to provide his views regarding the contemplated decision.
  - b. “Consultation” must be conducted at a time when proposals are at a sufficiently formative stage to lead to an open- minded consideration of the contemplated decision.
  - c. “Consultation” does not give the consultee veto power over the decision; but it does not permit the consultor to disregard the input of the consultee without good reason.
  - d. Because our constitution is a “constitution of justification”, “consultation” with respect to public appointments must be “formal” and documented as a built-in check for abuse of power.
  - e. The level of formality required in a “consultation” process will depend on the circumstances but it must involve some documentation to ensure effective consultation especially where there is disagreement. This requirement is also a built-in check for abuse of power and ensures due circumspection in decision-making.
63. Applying these principles to the case at hand immediately yields the following outcomes:
- a. The 4<sup>th</sup> Respondent eminently exceeded its remit when it resolved to recommend only one name to the 2<sup>nd</sup> Respondent for appointment as the DVC. By recommending only one name, the 4<sup>th</sup> Respondent was no longer “consulting” but impermissibly directing the 2<sup>nd</sup> Respondent. By offering only one name at the tail end of its decision-making, the 4<sup>th</sup> Respondent was, also, violating the principle that requires the consultor to conduct consultation at a time when the proposals are a sufficiently formative stage to lead to an open-minded consideration.
  - b. The process that took place between the 2<sup>nd</sup> Appellant and the 2<sup>nd</sup> Respondent cannot be said to be “consultation” as contemplated by the statute for three reasons:
    - i. First, the process of the alleged consultation is not documented at all. It is not enough for a decision- maker to state that there was consultation; and such consultation would not be assumed absent proof of documentation.
    - ii. Second, the process led to the “usurpation” of the role of the 4<sup>th</sup> Respondent by the 2<sup>nd</sup> Respondent who caused the change in recommendation sans explanation or documentation.
    - iii. Third, while there was evidence of a collegiate decision by the 4<sup>th</sup> Respondent recommending the 5<sup>th</sup> Respondent for the position, there is no such evidence of a collegiate decision or even deliberation countermanding that decision by the 4<sup>th</sup> Respondent.
64. The upshot, then, is that the process of recruitment of the DVC amounted to a still-birth for two separate reasons. First, the 4<sup>th</sup> Respondent erred by exceeding its mandate by forwarding only one name to the 2<sup>nd</sup> Respondent. In doing so, the 4<sup>th</sup> Respondent was impermissibly “recommending” the individual for appointment (akin to the mandate of the Judicial Service Commission under Article



172(1)(a) of *the Constitution*) rather than “consulting” with the 2<sup>nd</sup> Respondent as mandated by section 35(1)(a)(v) of the *Universities Act, 2012*.

65. Second, the action taken by the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Appellant in unilaterally appointing the 1<sup>st</sup> Appellant was not, constitutionally speaking, a product of “consultation” but usurpation of the legitimate role of the 4<sup>th</sup> Respondent. The action further suffers the infirmity of lack of minimal formalities and documentation.
66. The obvious conclusion I come to, then, is that both the recommendation of the 5<sup>th</sup> Respondent by the 4<sup>th</sup> Respondent as well as the appointment of the 1<sup>st</sup> Appellant by the 2<sup>nd</sup> Appellant as the Deputy Vice Chancellor, Planning, Administration and Finance, Jaramogi Oginga Odinga University of Science and Technology did not adhere to the constitutional standards and statutory provisions. The former is the product of the exercise of excess authority by the 4<sup>th</sup> Respondent while the latter is the product of both an illegality and exercise of excess power by the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Appellant. Both cannot stand. They must be undone.
67. Is it to usurp the constitutional role of other constitutional and statutory bodies for the Court to reach the conclusion that it has reached and order appropriate relief under Article 23 of *the Constitution*? Hardly so. Perhaps it is sufficient to cite the Court in *Resley v The City Council of Nairobi* [2006] 2 EA 311 as follows:

“In this case there is an apparent disregard of statutory provisions by the Respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the Respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the Respondent’s statements that the Court’s role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed.

68. In the premise, the superior court was correct in finding that after the competitive recruitment process conducted by the 1<sup>st</sup> Respondent, the recommendation and appointment process carried out thereafter by the 4<sup>th</sup> and 2<sup>nd</sup> Respondents did not adhere to the prescribed statutory requirements and neither did it meet the constitutional threshold and the normative requirements of transparency, accountability, merit and equal opportunity to public office.
69. The question that readily recommends itself, however, is what properly calibrated relief is warranted in this case given the fact that the first phase of the recruitment process was procedurally and effectively conducted by the 1<sup>st</sup> Respondent without any procedural or substantive infirmities and given the cost implications and the potential risks in delaying the appointment of a Deputy Vice Chancellor, Planning, Administration and Finance at Jaramogi Oginga Odinga University of Science and Technology any further. Taking both these factors into consideration, I would conclude that nullifying the whole recruitment process and requiring that it starts afresh is a relief too draconian.



Since no questions whatsoever have been raised to effete the competitive recruitment process conducted by the 1<sup>st</sup> Respondent, it would be more prudent to preserve that outcome and re-start the process from that stage. The process should, therefore, kick off at the stage where the 4<sup>th</sup> Respondent has the three names submitted by the 1<sup>st</sup> Respondent. The 4<sup>th</sup> and the 2<sup>nd</sup> Respondents should, then, play their rightful roles consonant with the guidelines given in this decision.

70. The upshot is that I would propose that the appeal be disposed of by only partly allowing it in terms of paragraph (67) above. I would also propose that each party bears its own costs.
71. Orders accordingly.

### **Judgment of Kiage, JA**

72. I have had the advantage and pleasure of reading in draft the erudite judgment of my learned brother Joel Ngugi, J.A, with which I am in full agreement.
73. I concur that each of the three fine professors whose names were presented to the University Council by the Public Service Commission, after a competitive process, is eminently qualified for appointment as Deputy Vice-Chancellor Planning, Administration and Finance. They emerged as the top-three, separated by a single percentage point between 72 and 74. Indeed, in forwarding the names to Council, the PSC was categorical that the three were qualified to be appointed.
74. It is, therefore, quite inspired and patently pragmatic that even as we partly allow the appeal, the constitutionally-and statutorily- compliant completion of the process of appointment must restart at the Council's being seized with the three names so as to proceed with appointment but upon proper, meaningful and documented consultation with the Minister. My learned brother has set out in sufficient detail the meaning, rationale and the parameters of such consultation as well as the law thereon, and I need not engage in the superfluity of verdant verbiage. The concerned parties both in this appeal and all those charged with the task of appointment "after consultation" would do well to familiarize themselves therewith, and be properly guided.
75. Ultimately, then, and as Tuiyott, JA is in concord, this appeal be and is hereby disposed of in the terms proposed by Joel Ngugi, JA.
76. Order accordingly.

### **Judgment of Tuiyott,JA**

77. I have had the advantage of reading in draft the judgment of Joel Ngugi, JA, with which I am in full agreement and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**JOEL NGUGI**

**JUDGE OF APPEAL**

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**P. O. KIAGE**

**JUDGE OF APPEAL**

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**F. TUIYOTT**



**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

