



**Shatsala & another v Kevin & 2 others (Petition 9 of 2023)
[2024] KEELRC 1022 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1022 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
PETITION 9 OF 2023**

**JW KELI, J
APRIL 16, 2024**

BETWEEN

ZACHARIA SHATSALA 1ST PETITIONER

HERMAN INGANJI 2ND PETITIONER

AND

SAGALA KEMOLI KEVIN 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND NATIONAL
ADMINISTRATION 2ND RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, KAKAMEGA CENTRAL 3RD
RESPONDENT**

JUDGMENT

1. The Petitioners are residents of Shirere Sub-Location, Kakamega Central Sub-County in the Republic of Kenya, and by dint of the Constitution of Kenya, filed the present Petition for the protection of the values of the Rule of Law and prudent management of Public affairs; under Article 50(1) of the Constitution, in exercise of their right to have any dispute resolved by application of the law and decided in a public hearing by a competent court, committee or tribunal and by dint of Article 259 of the Constitution, that they possess the Locus standi to institute these legal proceedings to defend the values and principles of the Constitution, whenever they are contravened or threatened to be contravened.
2. The 1st Respondent was appointed as an Assistant Chief of Shirere Sub-Location by the 2nd Respondent on the recommendation of the 3rd Respondent. The Petitioners filed the instant Petition dated 15th December 2023 seeking the following reliefs: -
 - a. A Declaration do issue that the appointment of Sagala Kemoli dated 24th October 2023 of the Assistant Chief Shirere Sub-Location in Shirere Location, Kakamega Central Sub county,



Kakamega County in the Republic of Kenya which is a result of advert by the 3rd Respondent referenced as (vacancy No. F8/AVOL.x201) is unconstitutional, unlawful and therefore null and void.

- b. An order do issue that the 2nd and 3rd respondents do re-advertise vacant position of the assistant chief of Shirere Sub-Location in Shirere Location, Kakamega Central sub-county Kakamega County in the Republic of Kenya.
 - c. An order do issue that 3rd Respondent be restrained from installing the 1st respondent into office and subsequently the 1st Respondent be restrained from assuming office, discharging any duties related to the office of the assistant chief of Shirere Sub-Location forthwith.
 - d. An order that costs of the petition be awarded to the Petitioners.
3. The Petition was supported by the verifying affidavit of the 1st Petitioner sworn on 15th December 2023, and on further grounds in the 1st Petitioner's supporting affidavit sworn on 15th December 2023 annexed to the Notice of Motion application dated on an even date, which were all filed on 15th December 2023; and additionally, supported by the un-commissioned supporting affidavit of the 2nd Petitioner dated 15th December 2023 and filed on 8th January 2024.
 4. On 12th February 2024, the 1st petitioner filed a supplementary affidavit sworn on an even date.
 5. The Petition was opposed. The 1st and 3rd Respondents filed a Replying affidavit each, all sworn on 23rd January 2023 and received in court on an even date accompanied by their annexures.

Written Submissions

6. The court directed that the Petition be canvassed by way of written submissions. The Petitioners' written submissions drawn by Oscar Wachilonga & Associates Advocates were dated 13th February 2024 and received in court on an even date. The Petitioners filed a notice of change of advocates to Mukavale Kevin & Co. Advocates on the 19th of February 2024 who on an even date filed further submissions which were expunged for lack of leave of court. The Respondents' written submissions drawn by the Principal State Counsel Dan Simiyu were dated 28th February 2024 and received in court on 29th February 2024.

Petitioners' case in summary

(The case as per petition, 1st Petitioner's supporting affidavit sworn on 15th December 2023 and the 1st Petitioner's supplementary affidavit sworn on 12th February 2024)

7. The Petitioners are residents of Shirere Sub-Location, Kakamega Central Sub-County in the Republic of Kenya, and filed the instant petition in the public interest, alleging that the 1st Respondent who was on 24th October 2024 appointed as the Assistant Chief of Shirere Sub-Location, Shirere Location in Kakamega Central sub-county in Kakamega County, was appointed so, in disregard of the rule of law and constitutional procedural requirements.
8. It is the Petitioners' case that the vacancy for the office of the Assistant Chief was advertised under Vacancy No. F8/AVOL.X201, with the applications open until 23rd November 2022 setting out the requirements of the position (ZS-2).
9. The Petitioners allege that on 30th October 2023, while at the Chief's Baraza in Shirere location, the chief informed them of the 1st respondent's appointment as Assistant Chief.



10. The Petitioners allege that they were shocked by the said appointment announcement and with the guidance of their council of elders, as a community, held a caucus on 6th November 2023 over the appointment and wrote a letter to the 2nd Respondent seeking the nullification of the appointment (ZS-1).
11. The Petitioners assert that there was no public participation in the appointment as required by the law and that the 3rd Respondent usurped powers and in exercising his mandate solely, made recommendations in favour of the 1st Respondent, causing the 2nd Respondent to appoint him.
12. The Petitioners allege that there was no report from the National Intelligence Service in support of the appointment and if there was any the same was founded on falsehoods.
13. The petitioners' case is that the 2nd Respondent failed to undertake independent investigations to establish whether the 1st Respondent was fit for the position of Assistant chief, but rather relied on the 3rd Respondent's dubious report.
14. The Petitioners assert that the 1st respondent is not fit to occupy the office of Assistant chief for Shirere Sub-location as, as the residents of Shirere sub-location cannot trace his roots, they have no knowledge about his family background. He has no house, wife, and children which makes it difficult for the community to trust him with leadership of the community.
15. The Petitioners allege that the 1st respondent had no fixed abode, he is not versed with matters of Shirere sub-location in relation to functions of the person of the office of the Assistant Chief.
16. The Petitioner allege that the 1st respondent's mother was an employee of the office of the Deputy County Commissioner (DCC) of Kakamega Central sub-county during and before the period of the entire recruitment process which raises more questions on the 1st Respondent's appointment.
17. The Petitioners' case is that the 1st Respondent's appointment contravened Chapter Six and Article 47 of the Constitution and it was contrary to the Fair Administrative Act, No. 4 of 2015.
18. The petitioners contend that the 1st respondent's appointment violates the Mwongozo Code of governance on integrity of appointments, and that at the same is inconsistent with the guiding principles on leadership and integrity under Article 73 of the Constitution.
19. The petitioners assert that the 3rd Respondent usurped the powers of the members of the public on public participation, and if the said issue is not addressed, checked, or sanctioned, such mischief will continue to be exercised by the 2nd and 3rd Respondents in disregard of the law and public interest.
20. The Petitioners allege that the sub-location known as Shirere was newly created 2 years ago while the Shirere Location was created 29 years as opposed to Bukhungu, evident on the 1st Respondent's identity card.
21. The Petitioners allege that at the time of the NIS Report, the 1st respondent was a resident of Shikhambi Location and not Shirere Location.
22. The Petitioners state that the 1st Respondent has not evidenced that he was born and raised in Shirere and only a sale agreement made in 2015 links him to the location when he was 21 years old.
23. The Petitioners allege that a sale agreement for the purchase of land without having a home established on the land does not suffice, as the same does not prove that title to the said land passed to the 1st Respondent under Section 6 and 8 of the Land Control Act.



24. The Petitioners allege that the NIS Report vindicates them as against the respondents as it confirms that the 1st respondent is newly married and has no children against the 1st Respondent's assertions that he was married in 2020 and has two children, and the documentation asserting (SKK-12) the same raises authenticity issues.
25. The Petitioners aver that the 3rd Respondent's report on the top three shortlisted candidates (NN-7) is marred by irregularities as it is altered and not countersigned.
26. The Petitioners allege that the 1st Respondent did not qualify to apply for the position of Assistant Chief, as he did not possess a good conduct certificate at the time of applying for the job or shortlisting, which is a mandatory requirement as evidenced under Paragraph 6(e) of the 1st Respondent's affidavit.
27. The Petitioners assert that the authenticity of the 1st Respondent's academic documents was neither done by the Kenya National Examination Council nor the National Intelligence Service and that exhibit SSK-5 Birth Certificate, was obtained on 11th October 2023, yet it is a requirement when one was a candidate for Kenya Certificate of Secondary Education.
28. The petitioners stress that the 1st petitioner's mother was an employee of the 3rd respondent as evident by exhibits 12 and 13 of the Respondent's documents and she was only transferred recently to the Ministry of Public Works, thus played a role in influencing the 1st respondent's appointment contrary to Article 10 of the Constitution.

Respondents' case in summary

(The case as per the Replying affidavit of Zacharia Shatsala and Ngalia Ndaya all sworn on 23rd January 2024)

29. Ngalia Ndaya, the Acting County Commissioner, and the previous occupant of office of the 3rd Respondent, states that the Ministry of Interior and Co-ordination of National Government, on or around August -September 2022 advertised the position of Assistant Chief - Shirere (NN-1- Authority to 3rd Respondent to advertise by County Commissioner).
30. That the qualifications and requirements for the position were outlined in the advertisement and the 1st Respondent availed his documents as below: -
 - i. Kenya Certificate of Secondary Education (KCSE) mean GRADE of C- or its equivalent Qualifications from a recognized institution (SKK-3);
 - ii. Qualifications from a recognized institution (SKK-4)
 - iii. Be not less than thirty years (30) of age (SKK-5- Birth Certificate);
 - iv. Be a resident of the particular Sub-Location (SKK-6- ID) & (SKK-7- Sale Agreement);
 - v. Have a Certificate of Good Conduct (SKK-8 dated 9th November 2022);
 - vi. Have good communication skills; and
 - vii. Have a Certificate in Computer Application skills course from recognised institution (SKK-9-2).
31. The 1st Respondent did not have a certificate of Good Conduct (SKK-9) at the time of applying for the position but availed it at the interview.



32. It is stated that eleven persons applied for the position of Assistant chief, and four were disqualified for reason of low academic grade, being over age and not attaching copies of both academic /professional certificate. That seven were shortlisted, among them the 1st Respondent, and they were interviewed on 12th July 2023 as per the minutes for shortlisting (NN-3) and recruitment (NN-4). That only six of the shortlisted showed up for the interview as evidenced by the interview Marking sheet (NN-6).
33. It is stated that, besides the qualifications, other requirements included confidential reports from the National Intelligence Service (NIS)(NN-5) and the Area County Commissioner.
34. The 1st Respondent applied for the position on 13th September 2022 (SKK-1 & SKK-2) on confirming he possessed the requisite qualifications.
35. The Respondents state that the interview conducted on 12th July 2023 at the County Commissioner's office in Kakamega was by a panel comprising the 3rd Respondent, two assistant County Commissioners, Human Resource Manager- Deputy County commissioner's office, the Registrar of the National Registration - Kakamega Central Sub-County and Director of Education -Kakamega Central Sub-County.
36. It is stated that after the interview and consideration of the NIS Report, three candidates emerged as the most suitable in order of their performance, with the 1st respondent scoring 72%, Dominic Mwela Shisundi with 67.5% and Dennis Lubialuli with 59.3% (NN-7).
37. It is stated that the 1st Respondent's name was forwarded for appointment (NN-8) and on 11th September 2023, the then County Commissioner directed the appointment of the 1st Respondent as Assistant Chief, subject to verification of his academic, personal and professional documents and testimonials (NN-9).
38. That on 12th September 2023, Ngalia Ndaya, the then 3rd Respondent, informed the 1st Respondent of the intention to appoint him and directed him to submit his academic, personal and professional documents and testimonials for verification (NN-10 letter of 12th September 2023). The 1st respondent submitted the said documents in a letter of even date (SKK-10).
39. It is stated for the respondents that on verification of the academic, personal and professional documents and testimonials, the 1st Respondent was on 25th September 2023 called and asked to collect his appointment Letter as the Assistant Chief of Shirere Sub-Location and he assumed his duties right away (NN-11/SKK-11).
40. The Respondents state that the recruitment was competitive and above board with no case of favoritism.
41. it is stated that the 1st respondent's mother works at the State Department of Infrastructure -Kakamega as support staff since 16th June 2022(NN-12) having been transferred from a Cleaning Supervisor in the State Department for Public Service where she had worked until 20th April 2022(NN-13).
42. The Respondents state that the Petitioners seek to mislead the court, as the 1st Respondent's mother has never worked for the Deputy County Commissioner to have influenced the recruitment of the 1st Respondent.
43. It is the 1st respondent's position that he is married (SKK-12-Marriage affidavit) with two children (SKK-13 & SKK-14)-birth certificates), although the same is not a requirement for the position of Assistant chief.



44. The 1st Respondent submits that, on 30th October 2023, the Chief introduced him before the Baraza and all present at the Baraza, including the Petitioners welcomed him cordially. The 1st Respondent states that, he took over his responsibilities under the orientation of the Chief and he has since then to date undertaken his duties.
45. It was the respondents' case that the 1st respondent was born, raised, schooled, and lives in the Shirere Sub-location, and thus qualified to hold the position of Assistant Chief, and furthermore, he was competitively recruited.
46. That the 1st Respondent has a right to equal protection and equal benefit of the law a freedom from discrimination under Article 27 of the Constitution.
47. That the 1st respondent should not be discriminated based on his marital status, ethnicity or social origin, age or language.
48. The respondents submit that the Petitioners have not demonstrated as per Article 47 and 73(chapter 6 of the Constitution), the Fair Administrative Act and the Mwongozo Code, how the 1st respondent's appointment violated any law and the requirement for Public participation was not necessary since the position was advertised publicly and several members of the Public applied for the same, were shortlisted and attended the interviews.
49. That the recruitment process was competitive and it followed a fair process devoid of any influence or malpractice and the Petitioners have not substantiated with sufficient and concrete evidence all their allegations. The 1st Respondent states that, the present suit is a witch hunt, as he is a vibrant man and of a different sub-ethnic group than the Petitioners.

Determination

Issues for determination.

50. The Petitioners did not specify any issues for determination and submitted that the 2nd and 3rd Respondents' actions of recruiting the 1st respondent are ultra vires and contrary to Chapter 6 of the Constitution and against the principles of fair administrative action.
51. The Respondents in their submissions addressed the following issues: -
 - a. Whether the 1st Respondent qualified to be appointed to the position of the assistant chief of Shirere sub-location
 - b. Whether the appointment of the 1st respondent as the assistant chief of Shirere sub-location was unconstitutional, unlawful and therefore null and void.
 - c. Whether the petitioners are entitled to the prayers sought in the petition.
52. The court discerned that the issues for determination under the Petition are as follows: -
 - a. Whether the petition meets the Constitutional threshold.
 - b. Whether the recruitment process was procedural
 - c. Whether the 1st Respondent was qualified for the position of Assistant Chief.
 - d. Whether the Petitioners are entitled to the reliefs sought.



Preliminary issue

53. The 2nd Petitioner filed a supporting affidavit dated 15th December 2023 which was uncommissioned. The law on commissioning of affidavits is the [Oaths and Statutory Declarations Act](#), Cap 15, Laws of Kenya, which, at section 5, states as follows:-
- ‘Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.’
54. The affidavit on record, purportedly sworn by Herman Iganji on 15th December 2023 does not bear the name of the Commissioner but rather a signature. It is not an oath. In fact, it is not an affidavit at all and the same is struck out. The affidavit had been purported to have been sworn by the 2nd Petitioner as a co-petitioner, in support of the averments by the 1st Petitioner in the suit. The effect of the striking out of the purported affidavit will not affect the petition nonetheless.

a). Whether the petition meets the constitutional threshold

55. The Respondents submit that the Petitioners’ petition has not set out in precision how the Respondents have violated their rights under the [Constitution](#) nor provided any evidence to back their assertions and relies on the case of [Anarita Karimi Njeru v Attorney General](#) (1979) KLR 154; [Trusted Society of Human Rights Alliance v AG & 2 others](#) (2012)eKLR and [Evans Ladtema Muswabili v Vihiga County Public Service Boar & 2 others; Marley Ezekiel Ayiego](#)(2021)eKLR..
56. The constitutional provisions upon which the petition before the court is premised are Articles 47, 50(1), 73, and 259 of the [Constitution](#).
57. Article 47 relates to Fair administrative action which is expeditious, efficient, lawful, reasonable, and procedurally fair.
58. Article 50(1) provides for the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
59. Article 73(1)(2) is located in Chapter Six of the [Constitution](#), which is about leadership and integrity. Article 73(1)(a) defines the authority assigned to a State officer. It is a public trust to be exercised in a manner that is consistent with the purposes and objects of the [Constitution](#); demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. Article 73(1)(b) states that such authority is vests in the the State officer or institution responsibility to serve the people, rather than the power to rule them. Article 73(2) lists the guiding principles of leadership and integrity. They include the selection of officers on the basis of personal integrity, competence, and suitability, or election in free and fair elections; objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; selfless service based solely on public interest; accountability to public decisions and actions; and discipline and commitment in service to the people. The emphasis is on accountability, competence, suitability, integrity, respect for the people, honour, dignity, public confidence, objectivity, impartiality, among others.
60. Article 259 provides for the interpretation of the [Constitution](#) in a manner to promote the rule of law and promote constitutional values and principles.



61. The petition before the court is framed as a constitutional petition, and for it to be properly anchored on constitutional provisions, Articles 47, 50, 73 and 259 are cited to support the argument that the respondents conducted themselves in a manner that did not accord with national values and principles of governance, the principles governing public appointments, and the values and principles that ought to govern such public appointments.
62. The case by the petitioners is that the respondents acted in a manner that did not measure up to the constitutional values and principles required of public bodies by the Constitution, in that they allowed themselves to be influenced by the 1st Respondent's mother whom they allege worked for the 3rd Respondent, to favour the 1st Respondent in the appointment as an Assistant Chief, and that the 2nd and 3rd Respondents without carrying out a public participation exercise, prepared a report that favored the 1st Respondent in the appointment. This means that the 2nd and 3rd respondents violated the Constitution in the process of the recruitment of the position of an Assistant Chief of Shirere Sub-Location.
63. The Court finds that the petition before the court is properly anchored in the Constitution, and to a large extent it meets the standard of what a constitutional petition should be about. Whether it meets the standard set in Anarita Karimi Njeru v Attorney General (1979) KLR 154, Meme v Republic [2004] eKLR and Trusted Society of Human Rights Alliance v AG. & 2 others [2012] eKLR, in terms of meeting the minimum test for pleadings in this realm, is what the court is asked by the respondents to consider.
64. The court in Anarita Karimi Njeru v Attorney General (1979) KLR 154, stated:-
“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”
65. As stated above, Articles 47 and 73 of the Constitution, are about fair administrative action and values and principles of governance generally and in relation to public affairs. The Petitioners under Paragraph 10 in their petition “Particulars Of The Violation Of the Constitution” state that the 1st Respondent's appointment was unlawful for contravening chapter 6 and article 47, by violating the integrity of appointments; and against leadership and integrity, as no public participation was carried out.
66. The 2nd and 3rd respondents are offices in the public sphere created under the Constitution or other legislation. They are bound by the values and principles articulated by the Constitution, and they are under an obligation to act fully in accordance with its provisions. They are accountable under the Constitution. Any person, who is aggrieved by any of the acts of the respondents, whether done under the Constitution or any other law, has a right to challenge the said conduct under Article 165(5)(b), where the respondents have conducted themselves in a manner inconsistent with or in contravention of the provisions of the Constitution in the recruitment and appointments in public service.
67. Under Anarita Karimi Njeru v Attorney General (1979) KLR 154, a petitioner must set out, with a reasonable degree of precision, that of which they complain, the provisions said to be infringed and the manner in which they are alleged to be infringed with the factual basis setting out how the violation came to play. The Factual basis of the petition has been set out in the petition and in the supporting affidavit sworn on 15th December 2023; The 1st Petitioner's supplementary affidavit of 12th February 2024, averring that the 1st Respondent did not qualify to be appointed as an Assistant Chief of Shirere



Sub-location, and they attached the letter from the Council of elders(ZS-1) which forms the basis of the petition that the 1st Respondent is not a resident of Shirere Sub-Location and that the 1st respondent's appointment was influenced by his mother who worked for the 3rd Respondent.

68. The petitioners contend that the appointment of the 1st respondent is against the law as he is not a resident of the subject sub-location for him to qualify for the said position in which he has been appointed. The Respondents have availed their documents in answer to the allegations to show they understood the Petitioners' concerns.
69. Consequently, the court finds that the petitioner has set out, with a reasonable degree of precision, that of which they complain, the provisions said to be infringed and how they are alleged to be infringed with the factual basis setting out how the violation came to play. The Court holds that the Constitutional Petition threshold set in *Anarita Karimi Njeru v Attorney General* (1979) KLR 154, has been met.

b. Whether the recruitment process was procedural

70. The petitioners allege that the process leading to the appointment of the 1st Respondent was influenced by the 1st Respondent's mother who they state was an employee of the 3rd Respondent, and thus the 1st Respondent was only appointed abused on the said influence.
71. The Respondents on their part stated that:- by the letter of 22nd August 2022(NN-1) the then County Commissioner, authorized the then 3rd Respondent to advertise the positions of Chief for Butsotso Location and Assistant Chief for Shirere Sub-Location respectively, as the previous office-holders had since been deployed to other positions.
72. That the positions were advertised(NN-2) setting out the qualifications for each position with requirements of the position of Assistant Chief II, job Group "F" as below:-
- viii. Have a Kenya Certificate of Secondary Education (KCSE) mean Grade of C- or its equivalent from recognised examining body);
 - ix. Be not less than thirty years (30) of age;
 - x. Be a resident of the particular Sub-Location;
 - xi. Have a Certificate of Good Conduct
 - xii. Have good communication skills; and
 - xiii. Have a Certificate in Computer Application skills course from recognized institution.
73. The 2nd and 3rd Respondents in the minutes of 18th October 2022(NN-3) set out that eleven candidates applied for the Assistant Chief Position in Shirere and based on the Revised Scheme of Service for National Government Administrative Officers, which requires shortlisting of persons possessing; a KCSE C- or its equivalent; be not less than thirty years; have a computer certificate from a recognized institution; seven candidates were shortlisted; and four disqualified for either being overage, having low academic qualifications and not attaching copies of academic and professional certificates.
74. The candidates shortlisted as per the minutes of 12th July 2023(NN-4) were Kemoli Sagala Kelvin; Dennis Lubialuli, Dominic M. Shisundi, Agnes V. Fedha, Faith Imbuhila, Fredrick M. Lubira and Petronila Itubukha. As per the minutes, apart from the qualifications set out above, the confidential reports from NIS(NN-5) and the area Assistant County Commissioner were considered.
75. All candidates apart from Faith Imbuhila showed up for the interview.



76. The panel comprising the 3rd Respondent, two assistant County Commissioners, a Human Resource Manager- Deputy County commissioner's office, the registrar of the National Registration - Kakamega Central sub-County and the Director of Education -Kakamega Central Sub-County conducted the interviews, using the interview marking scheme(NN-6) and each panelist graded the candidates(NN-7).
77. After the interview and consideration of the NIS Report, three candidates emerged as the most suitable in order of their performance, with the 1st respondent scoring 72%, Dominic Mwela Shisundi with 67.5%, and Dennis Lubialuli with 59.3% (NN-7).
78. The 1st Respondent's name was forwarded for appointment(NN-8) and on 11th September 2023, the then County Commissioner directed the appointment of the 1st Respondent as Assistant Chief, subject to verification of his academic, personal, and professional documents and testimonials(NN-9).
79. On 12th September 2023, Ngalia Ndaya, the then 3rd Respondent, informed the 1st Respondent of the intention to appoint him and directed him to submit his academic, personal, and professional documents and testimonials for verification(NN-10 letter of 12th September 2023). The 1st respondent submitted the said Documents in a letter of even date(SKK-10).
80. On verification of the academic, personal, professional documents and testimonials, the 1st Respondent on 25th September 2023 was called and asked to collect his appointment Letter as the Assistant Chief of Shirere Sub-Location and he assumed his duties right away(NN-11/SKK-11).
81. The Court finds that the Petitioners did not provide proof that the interview process was not carried out nor that the 1st Respondent did not apply for the position. They contended that the 1st Respondent's mother was an immediate employee of the 3rd Respondent and she had the influence to ensure her son's appointment.
82. There was no proof provided by the Petitioners that the 1st Respondent's mother had influenced the appointment of the 1st Respondent into the appointment, the Petitioners only claimed that the 1st Respondent's mother was an employee of the 3rd Respondent at Kakamega Sub-County.
83. The respondents availed letters from the Ministry of Transport, Public Works, Housing and Urban Development dated 16th June 2022(SKK-15) addressed to the Principal Secretary of the State Department for Infrastructure confirming that the 1st respondent's mother has reported to work as a cleaning supervisor(I) at the Kakamega office. The 1st Respondent's mother had been transferred/ released from the Ministry of Interior and Coordination of National Government on 8th June 2022(SKK-16).
84. Neither the petitioners nor the respondents produced in court a copy of the advertisement for the position of assistant chief for Shirere sub-location. The petitioners in their petition acknowledged that the vacancy had been advertised under vacancy Ref No. F8/AVol.X201 and it had a deadline for applications on 23rd November 2022, but did not avail a copy of the advert.
85. The 3rd Respondent annexed the authority to advertise for the said post (NN-1) which indicated that the position was vacant. The 1st respondent's mother had reported to work in the Ministry of Transport, Public Works, Housing and Urban Development on 16th June 2022.
86. The Court did not find any documentary evidence or other evidence otherwise that the 1st Respondent's mother influenced the 1st Respondent's appointment and thus this assertion of any interference with the recruitment exercise is not proved.



87. The Petitioners state that the Respondents failed to conduct public participation and that the rule of gender parity was neglected in the formation of the panel for interview.
88. The Petitioners acknowledged that the vacancy had been advertised under Vacancy Ref No. F8/AVOL.X201 and it had a deadline for applications on 23rd November 2022, (although no copy of the advert was attached), to signify that they were aware that a public advertisement on the vacancy in the office of the Assistant chief was to be filled. The call for filing the vacancy was in the public domain for it to have been seen by many people and it attracted eleven applicants, of whom seven were shortlisted among them the 1st Respondent.
89. Article 10 of the *Constitution* of Kenya binds all state officers and public officers to promote good governance, integrity, transparency, and accountability. The 2nd and the 3rd Respondent were bound by the provision in the recruitment of the Assistant chief.
90. The Court finds that the Petitioners have not provided evidence that the advertisement was private and that it was only availed to the 1st respondent. They confirmed that the advertisement was public and indeed acknowledged that the vacancy had been advertised under Vacancy Ref No. F8/AVOL.X201 and it had a deadline for applications on 23rd November 2022. Public participation was not necessary for an open and competitively recruited position where the candidates are appointed on merit and on set requirements. It can be said that the 2nd and 3rd Respondent by dint of their office and article 10 of the *Constitution* are expected protect the public interest in such recruitment by adhering to the set requirements in the recruitment.
91. The petitioners aver that exhibit 7 -which are the panelists' marking sheets are marred by irregularities as they had alterations that were not countersigned. The marking sheets were by six panelists and the Petitioners have not pointed out, which alterations are deemed irregular for the court to pronounce itself on the same. This assertion is vague and holds no value. The process is held to have been procedural.
- c.) Whether the 1st Respondent was qualified for the position of Assistant Chief.
92. The respondents did not provide the Revised Scheme of Service for National Government Administrative Officers, 2015, but provided an extract with the requirements that one must possess to be appointed as an Assistant Chief II as:-
- i. Have a Kenya Certificate of Secondary Education(KCSE)mean GRADE of C- or its equivalent from recognised examining body;
 - ii. Qualifications from a recognized institution
 - iii. Be not less than thirty years (30) of age;
 - iv. Be a resident of the particular Sub-Location;
 - v. Have a Certificate of Good Conduct
 - vi. Have good communication skills; and
 - vii. Have a Certificate in Computer Application skills course from recognised institution.
93. The court proceeds to consider each of the requirements.

Kenya Certificate of Secondary Education(KCSE)mean Grade of C- or its equivalent from recognised examining body;



94. The 1st Respondent applied for the position through a hand-written letter (SKK-1) which was availed although it was incomplete. He attached the Application form(SKK-2) for the position and submitted the KCSE certificate(SKK-3) for the examination year 2013 when he scored Grade B-. The required grade was C-, and it is clear the 1st Respondent complied with the first requirement.

Qualifications from a recognized institution

95. The 1st Respondent availed a diploma in Environmental Health Sciences from the Kenya Medical, Training College(KMTC)(SKK-4) in support of his application in fulfillment of the requirement.

Be not less than thirty years (30) of age;

96. On the age factor of “Be not less than thirty years (30) of age, the respondents state that the Birth Certificate showed that the 1st Respondent was of 30 years at the time of applying for the position. The 1st respondent was born on 16th August 1992, and based on the assertion by the petitioners, the deadline for applications was on 23rd November 2022. The application for the position was made by the 1st Respondent on 13th September 2022(SKK-1 & SKK-2) and at that time he was of thirty years of age.
97. The petitioners contend that the authenticity of the 1st respondent’s birth certificate is questionable, as it was issued on 11th October 2023(SKK-5) when one ought to have had it before when registering for his KCSE examination.
98. On the authenticity of documents, the Petitioners did not provide details of the alleged issue relating to the authenticity of the Birth certificate. But their issue is on the date the same was issued. There was no evidence provided by the Petitioners that the certificate was a forgery and the court cannot address the issue based on conjectures.
99. In any event, on the issue of the age of the 1st respondent, the 1st Respondent’s National Identity Card (SKK-6) was issued on 4th November 2013, and the date of birth is indicated 16th August 1992. The court finds that as at 13th September 2022 when the 1st Respondent applied for the impugned position he was over 30 years of age.

Be a resident of the particular Sub-Location;

100. On the issue of being a Resident of Shirere Sub-location, the 1st respondent’s national identity card showed that he was born in Kakamega Central, Bukhungu Location, and in Shirere Sub-location, his Birth Certificate also indicate that he was born in Shirere.
101. The Petitioners state that they do not know where the 1st respondent was born, they cannot trace his origin, and for one to be the Assistant Chief of a particular sub-location, one should be a resident of the sub-location by Birth. That the assertion that he resides on a plot Isukha/Shirere/6159, a land bought on 15th May 2015, when he was already an adult, indicates he is not a resident, and that the NIS Report shows that he resides in Shikhambi village which is not a village within Shirere Sub-Location. The 1st Respondent says that he has built a house on the land purchased by his mother and his national identity card shows that he has lived within the sublocation.
102. The 1st petitioner in the supplementary affidavit of 12th February 2024 stated that the Shirere sub-location was newly created two years ago, while Shirere Location was created 29 years ago as opposed to Bukhungu and thus the 1st Respondent could not have been a resident Shirere sub-location since birth.



103. The petitioners state that for one to be an assistant chief of a particular sub-location, one must be a resident of the said area, since birth. The petitioners further submit that the Shirere sub-location is newly created and this thus means that no one has been a resident since birth to be at the age of 30 years to apply for the position. The only possible applicants can thus be residents of the Shirere Location who have been residents in the area.
104. The *Black's Law Dictionary*, Bryan .A. Garner, Tenth Edition defines a resident as:- "1. someone who lives in a particular place. 2. someone who has a Home in a particular place. in a sense 2, a resident is not necessarily either a citizen or a domiciliary"
105. From the above definition, a Resident is not a person who is born in a particular area, but rather, a person who lives in a particular place or has a home in a particular place. There is no mention that one must have lived in a particular place since birth and that even a non-citizen or a person of another ethnic group who resides in an area can be a resident as long as they live in an area.
106. The 1st Respondent submitted that he has a home on Plot No. 6159/Isukha/Shirere and he is a resident in the said area. The Petitioners' assertion that the land on which the 1st Respondent has built a home on, having been bought in 2015, does not qualify him as a resident to be qualified for the position of assistant chief, does not hold water. The court holds that the 1st Respondent was a resident of Shirere sub-location.

Have a certificate of good conduct

107. The 1st respondent submitted that he did not possess the Certificate of Good Conduct at the time of applying for the position, but he availed it during his interview and the Certificate of Good Conduct was dated 9th November 2022.
108. The petitioners state that the 1st respondent having not had a good conduct certificate at the point of applying for the position, could not have applied for or qualified for the position to be shortlisted. The interviews for the position were conducted on 12th July 2023. The NIS Report (NN-5) further indicated that the 1st respondent's conduct had no adverse integrity issues.
109. The court takes judicial notice of the process of applying for a good conduct certificate, which in most instances may take a protracted period before one is issued due to administrative factors. The 1st respondent availed a Good Conduct Certificate at the interview, and it was only after the interview that all candidates were ranked based on the availability of the documents they provided. The Court holds that the 1st respondent complied with this requirement.

Have good communication skills;

110. Communication skills could only be tested by the panelist who awarded the marks as they saw fit, at their discretion.

Have a Certificate in Computer Application skills course from a recognized institution.

111. The 1st Respondent availed the certificate of computer packages from Pulp College of Accountancy(SKK-9).
112. On the authenticity of the Birth certificates of the 1st respondent's children and his marital status, the same were not issues for consideration for appointment to the position of Assistant Chief II and the Court is not to dwell on the same. The Petitioners can raise the issue with the proper authorities if they



find that the 1st respondent's documents raise any authenticity issues as no evidence has been placed before the court.

113. In the upshot the Court holds that the 1st Respondent duly met the requirements for appointment set out in the excerpt of requirements for the position provided by the 3rd Respondent.

Whether the Petitioners are entitled to the reliefs sought

114. The petitioners sought reliefs that:-

- a. A Declaration do issue that the appointment of Sagala Kemoli dated 24th October 2023 of the Assistant Chief Shirere Sub-Location in Shirere Location, Kakamega Central Sub-county, Kakamega County in the Republic of Kenya which is a result of advert by the 3rd Respondent referenced as (vacancy No. F8/AVOL.x201) is unconstitutional, unlawful and therefore null and void.
- b. An order do issue that the 2nd and 3rd respondents do re-advertise vacant position of the assistant chief of Shirere Sub-Location in Shirere Location, Kakamega Central sub-county Kakamega County in the Republic of Kenya.
- c. An order do issue that 3rd Respondent be restrained from installing the 1st respondent into office and subsequently the 1st Respondent be restrained from assuming office, discharging any duties related to the office of the assistant chief of Shirere Sub-Location forthwith.
- d. An order that costs of the petition be awarded to the Petitioners.

(a) A Declaration do issue that the appointment of Sagala Kemoli dated 24th October 2023 of the Assistant Chief Shirere Sub-Location in Shirere Location, Kakamega Central Sub-county, Kakamega County in the Republic of Kenya which is a result of advert by the 3rd Respondent referenced as (vacancy No. F8/AVOL.x201) is unconstitutional, unlawful and therefore null and void.

115. The petitioners did not avail any evidence that the process leading to the 1st respondent's appointment was unconstitutional or unlawful, as the process followed was set out by the then 3rd Respondent. The Petitioners' assertion that the recruitment was influenced by the 1st Respondent's mother does not hold water and thus the process was lawful.

(b) An order do issue that the 2nd and 3rd respondents do re-advertise vacant position of the assistant chief of Shirere Sub-Location in Shirere Location, Kakamega Central sub-county Kakamega County in the Republic of Kenya.

116. The 1st respondent met all the requirements for appointment as an Assistant Chief and had taken up the position. Having found that no illegality was occasioned in the appointment and that the 1st respondent met all the requirements for the position, the prayer to re-advertise cannot stand.

(c) An order do issue that the 3rd Respondent be restrained from installing the 1st respondent into office and subsequently the 1st Respondent be restrained from assuming office, discharging any duties related to the office of the assistant chief of Shirere Sub-Location forthwith.

117. The Court holds that the prayer is not available having held the process of recruitment was procedural and lawful.



d). An order that costs of the petition be awarded to the Petitioners.

118. Considering that the petition was filed in the public interest, no order as to costs.

Conclusion

119. In conclusion, the Court holds the Petition dated 14th November 2023 to be without merit and is dismissed.

120. This being a public interest petition the Court makes no order as to costs.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 16TH DAY OF APRIL 2024

J.W. KELI

JUDGE

In the presence of:

C/S Macheso

For Petitioners: Mbetera

For Respondents: Simiyu

