



**Ali v Ministry of Interior and Coordination of National Government & 3 others; Public Service Commission & another (Interested Parties) (Petition E183 of 2021) [2022] KEELRC 1460 (KLR) (15 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1460 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E183 OF 2021**

**MA ONYANGO, J**

**JUNE 15, 2022**

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 2(1) AND (2), 3(1), 10(1), AND (2)(C), 19, 20 (1) AND (2), 21(1), 22, 23, 27(1) AND (2), 41 (1), 47, 232, 258 AND 259 (1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF APPOINTMENT OF YUSSUF OSMAN AHMED AS ASSISTANT CHIEF GRADE II OF MOROTHILE SUB-LOCATION, MOROTHILE LOCATION, ASHABITO DIVISION, MANDERA NORTH SUB-COUNTY**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007**

**BETWEEN**

**ABDULLAHI ABDIRIZAK ALI ..... PETITIONER**

**AND**

**MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT... 1<sup>ST</sup> RESPONDENT**

**COUNTY COMMISSIONER, MANDERA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, MANDERA NORTH SUB-COUNTY. .... 3<sup>RD</sup> RESPONDENT**

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

**AND**

**PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**



JUDGMENT

1. The petitioner is a resident of Mandera North Sub County. He has filed the instant petition against the 1<sup>st</sup> respondent being the Ministry responsible for coordinating all National Government functions and development projects and programmes in counties.
2. The 2<sup>nd</sup> respondent is a National Government Administrative Officer appointed under section 15 of the *National Government Co-ordination Act* No 1 of 2013 of the laws of Kenya with the mandate of coordinating national government functions at the county level of performing such other functions as may be assigned to them under the Act.
3. The 3<sup>rd</sup> respondent is a National Government Administrative Officer appointed under section 15 of the *National Government Co-ordination Act* No 1 of 2013 of the Laws of Kenya with the mandate of coordinating national government functions at the sub-county level of performing such other functions as may be assigned to them under the Act.
4. The 4<sup>th</sup> respondent is the Chief Government Legal Adviser as designated under article 156 of the *Constitution of Kenya 2010*.
5. The 1<sup>st</sup> interested party is an independent constitutional commission established under article 233 of the *Constitution of Kenya 2010* and mandated to appoint persons to hold or act in public service offices, and to confirm appointments.
6. The 2<sup>nd</sup> interested party was appointed by the respondents as the Sub-Chief Morothile Sub-Location, Morothile Location, Ashabito Division, Mandera North Sub-County, the legality of whose appointment is the subject matter of this petition.
7. The petition is anchored on articles 2, 3, 10, 19, 20(1) and (2), 21(10), 22(10), 23, 27(1) and (2), 41, 47, 232(1) and (2), 258(1) and 259(1) of the *Constitution of Kenya 2010*.
8. The petitioner applied for the said post and was invited for an interview on or about August 25, 2021, having been successfully shortlisted vide a letter dated August 25, 2021 authored by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. On September 8, 2021, the petitioner attended the interview.
9. It is the petitioner's averment that he was recommended for appointment as the most qualified candidate for the position by the Sub-County Selection panellists pursuant to a duly executed Recommendation, having scored a grade of 69%, the highest among the shortlisted candidates.
10. He avers that on November 18, 2021 he got wind that for appointment as the most qualified candidate for the position by the Sub-County Selection panelists pursuant to a duly executed recommendation, having scored a grade of 69%, the highest among the shortlisted candidates.
11. The petitioner contends that the 2<sup>nd</sup> interested party is not the most qualified candidate for the advertised position especially in light of the fact that he was rated second best in the interview; attained a much lower rating than the petitioner in the interview, of 57%; scored a lower grade in his Kenya Certificate of Secondary Education examination; and was assessed as having appeared combative and acted entitled (all negative character/personality traits). This is evident from the recommendation of the Sub-County Selection Panel.



12. The petitioner contends that the respondents, in approving the appointment of the 2<sup>nd</sup> interested party for the advertised position, have deliberately transgressed and ignored to be guided by the stipulated requirements for the advertised position.
13. The respondents have overlooked the petitioner's credentials, abilities, experience and qualities that meet the needs of the advertised position.
14. The petitioner avers the whole process of the appointment of the 2<sup>nd</sup> interested party was marred with irregularities, nepotism and partiality and was otherwise motivated by political considerations contrary to the stipulated considerations under the law and regulations.
15. It is the petitioner's contention that the whole process leading to appointment of the 2<sup>nd</sup> interested party was illegal, unconstitutional, wrong and thus null and *void ab initio*.
16. The petitioner further avers that the wholesome conduct of the respondents violated articles 2(1) and (2), 3(1), 10(1) and (2)(c), 19, 20(1) and (2), 21 (1), 22, 23, 27(1) and (2), 41(1), 47, 232, 258 and 259 (1) of the [Constitution of Kenya 2010](#), and sections 4-6 of the [Fair Administrative Action Act](#) No 4 of 2015.
17. It is the contention of the petitioner that article 2 and 3 of [the Constitution](#) states that:
  - "2. Supremacy of this [Constitution](#)
    - (1) This [Constitution](#) is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
  3. Defence of this [Constitution](#)
    - (1) Every person has an obligation to respect, uphold and defend this [Constitution](#)."
18. The petitioner avers that the respondents in appointing an unqualified candidate to the advertised position owing to his political association, nepotism and /or other unfathomable reasons best known to themselves, despite the petitioner having been recommended for appointment by the Sub-county Selection Panel, discriminated against the petitioner who is the competent and qualified candidate, violated the rule of law and the principles of transparency and accountability.
19. Article 19 cements the bill of rights as an integral part of Kenya's democratic state and provides that it is the framework for social, economic and cultural policies; created to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. It further states that the rights and fundamental freedoms in the bill of rights belong to each individual and are not granted by the State.
20. The petitioner avers that the respondents violated his right to fair labour practices and fair administrative action under the bill of rights. That the respondents failed to uphold the bill of rights and to ensure that the rights are availed to the petitioner as an individual, rather than granted by the State.
21. That article 23 provides that the High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. Clause 3 thereto states *inter alia* that in any proceedings brought under article 22, a court may grant appropriate relief, including--
  - (a) a declaration of rights;



- (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the bill of rights and is not justified under article 24;
  - (e) an order for compensation; and
  - (f) an order of judicial review.
22. The petitioner avers that this court has the jurisdiction to entertain this matter and grant the orders sought pursuant to the aforementioned article of the *Constitution of Kenya 2010*.
23. That article 41(1) provides that every person has the right to fair labour practices.
24. The petitioner avers that he had a legitimate expectation that he would be appointed to the advertised position in light of his emergence as the most qualified candidate with 69% rating and his recommendation for appointment by the Sub-County Selection panel, as he presumed such appointment to be based on merit. The right to fair labour practices requires that the most qualified candidate for a position be offered the said position. Unfortunately, the respondents have breached this constitutional right of the Petitioner by failing to appoint him to the position.
25. That under article 47, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Further, Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall, provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and promote efficient administration.
26. It is the petitioner's averment that the administrative action taken by the respondents to appoint a candidate to the advertised position was not lawful, reasonable, procedurally fair, and/or transparent or accountable. This is owing to the fact that the procedures that were put in place for the said appointment, including interview before the Sub-county Selection Panel who would then recommend a candidate for appointment, were evidently not complied with.
27. The petitioner avers that article 232 of the *Constitution* sets out the values and principles of public service as including: high standards of professional ethics, involvement of the people in the process of policy making, accountability and transparency, fair competition and merit as the basis of appointments and promotions and affording adequate and equal opportunities for appointment, training and advancement at all levels of public service.
28. That the values and principles of public service shall apply to public service in all state organs in both levels of government and in all state corporations.
29. The petitioner avers that the respondents did not adhere to the values and principles of public services. This is so because, the Respondents in approving and appointing an unqualified candidate who does not have the requisite qualifications for the advertised position was driven by extraneous factors and acted contrary to fair competition and merit which ought to be the basis of appointments and promotions.
30. That the appointment was unethical, a deliberate and pre-meditated scheme to deny the petitioner his meritorious position and as well propagate corruption, impunity and arbitrariness.



31. The petitioner avers that the wholesome conduct of the respondents in the approval and appointment of the 2nd interested party is in blatant violation of the Constitution, and the Fair Administrative Action Act No 4 of 2015 as they have failed to ensure the process was competitive and takes into account the petitioner's and 2nd interested party's qualifications in appointing him. The respondents throughout the entire process were influenced by nepotism, favouritism, other improper motives or corrupt practices.
32. The petitioner seeks the following reliefs: -
- a. That a declaration be issued under articles, 41, 47, 23 and 232(g) of the Constitution and sections 4-6 of the Fair administrative Action Act No 4 of 2015, that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are under a duty to have regard to competence and suitability, experience and qualities, merit and ability as assessed by the Sub-County Selection Panel through their recommendation when approving and appointing the 2<sup>nd</sup> interested party as the Sub-Chief Grade II Morothile Sub Location, Morothile Location, Ashabito Division, Mandera North Sub-County.
  - b. That a declaration be issued that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent have failed to have regard to competence and suitability, experience and qualities, merit and ability as assessed by the Sub-County Selection panel through their Recommendation when approving and appointing the 2<sup>nd</sup> interested party as the Sub-Chief Grade II Morothile Sub-Location, Morothile Location, Ashabito Division, Mandera North Sub-County.
  - c. That a declaration be issued that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent's failure and omission to have regard to competence and suitability, experience and qualities; merit and ability as assessed by the Sub-County Selection Panel through their recommendation when approving and appointing the 2<sup>nd</sup> interested party as the Sub-Chief Grade II Morothile Sub-Location, Morothile Location, Ashabito Division, Mandera North Sub-County, is illegal and unconstitutional.
  - d. That a declaration be issued that the approval and appointment of the 2<sup>nd</sup> interested party to the advertised position is therefore null and void ab initio and ought to be struck down so as to pave way for the genuine and constitutional appointment of a qualified candidate.
  - e. An order do issue to remove to this court and quash the decision of the respondents to appoint the 2<sup>nd</sup> interested party, contrary to the recommendation of the Sub-County Selection Panel, as the Sub-Chief Grade II Morothile SubLocation, Morothile Location, Ashabito Division.
  - f. That a permanent mandatory order do issue directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to approve and appoint the petitioner, as the candidate duly recommended for appointment by the Sub-County Selection Panel, to the position of Sub-Chief Grade II Morothile Sub-Location, Morothile Location, Ashabito Division, Mandera North Sub-County.
  - g. That the costs of, and incidental to, this petition be awarded to the petitioner against the respondents.



- h. That this court be pleased to grant such further order or orders as may be just and appropriate.
33. In support of the petition, the petitioner filed an affidavit deponed by Abdullahi Abdirizak Ali, the petitioner on November 17, 2021 in which he reiterates the averments made in the petition.
34. Given the urgency of the matter the petition was filed together with a notice of motion application filed under certificate of urgency seeking the following reliefs:
- i. That this application be certified as extremely urgent and service of the same be dispensed with in the first instance for purposes of prayers 2-4.
  - ii. That pending the hearing and determination of this application inter-partes, an interim order be and is hereby issued restraining and prohibiting the respondents from issuing the 2<sup>nd</sup> interested party with an appointment letter to the position of Assistant Chief Grade II of Morothile Sub-location, Morothile Location, Ashabito Division, Mandera North Sub-county.
  - iii. That pending the hearing and determination of this application inter-partes, an interim order be and is hereby issued restraining and prohibiting the 2<sup>nd</sup> interested party from assuming office, carrying on or in any way discharging his mandate as Assistant Chief Grade II of Morothile Sub-location, Morothile Location, Ashabito Division, Mandera North Sub-county.
  - iv. That pending the hearing and determination of this application inter-partes, an interim order be and is hereby issued suspending the appointment of the 2<sup>nd</sup> interested party as Assistant Chief Grade II of Morothile Sub-location, Morothile Location, Ashabito Division, Mandera North Sub-county.
  - v. That pending the hearing and determination of the petition, an order be and is hereby issued restraining and prohibiting the respondents from issuing the 2<sup>nd</sup> interested party with an appointment letter to the position of Assistant Chief Grade II of Morothile Sub-location, Morothile Location, Ashabito Division, Mandera North Sub-county.
  - vi. That pending the hearing and determination of the petition, an order be and is hereby issued restraining and prohibiting the 2<sup>nd</sup> interested party from assuming office, carrying on or in any way discharging his mandate as Assistant Chief Grade II of Morothile Sub-location, Morothile Location, Ashabito Division, Mandera North Sub-county.
  - vii. That pending the hearing and determination of the petition, an order be and is hereby issued suspending the appointment of the 2<sup>nd</sup> interested party as Assistant Chief Grade II of Morothile Sub-location, Morothile Location, Ashabito Division, Mandera North Sub-county.
  - viii. That this court be pleased to order the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to give access and avail to the applicant/petitioner all information regarding the following:
    - a. Copies of the applications, academic testimonials and all materials/documents received from all the applicants for the



position of Assistant Chief Grade II of Morothile Sub-location, Morothile Location, Ashabito Division, Mandera North Sub-county.

- b. A copy of the minutes of the meeting of the respondents approving and appoint the 2<sup>nd</sup> interested party to the position of Assistant Chief Grade II of Morothile Sub-location, Morothile Location, Ashabito Division, Mandera North Sub-county.
- ix. That costs hereof be provided for.

### **Respondents' Case**

- 35. In response to the petition and the application the respondent filed a replying affidavit deponed by Samson Diero Akatch, the Deputy County Commissioner, the 3<sup>rd</sup> respondent on January 31, 2022 in which he denied the allegations that the appointment of the 2<sup>nd</sup> interested party to the position of Assistant Chief Grade II was marred with irregularities, nepotism and partiality and/or political motivations.
- 36. He maintained that the recruitment process was conducted in accordance with the laid down regulation.
- 37. Mr Akatch deponed that the Deputy County Commission (DCC) Mandera North subcounty did cause the advertisement reference number MN/ADV/VOL 1 (17) dated June 8, 2021 inviting Applications for the position of Assistant Chief Grade II Morothile Sub location and received a total of 6 applications as per the attached list of applicants marked and annexed as SDA – 2 in the replying affidavit.
- 38. That all six (6) applicants, including the petitioner were shortlisted and invited for interview on September 8, 2021 out of which four candidates appeared before the Sub County Interviewing Panel.
- 39. The affiant stated that the results of the interview were transmitted to the Regional Commander through the office of the County Commissioner vide the letter dated September 29, 2021.
- 40. Subsequently, the Principal Secretary vide the letter reference number MICNG/SEC 5/1/6 dated November 10, 2021 granted authority for the appointment of the 2<sup>nd</sup> interested party to the position of Assistant Chief Grade II Morothile Sub Location.
- 41. The affiant maintained that the interested party was qualified to fill the position and that he met all the requirements for appointment as set out in the advertisement and more specifically he was a resident of Morothile Sub Location.
- 42. The affiant further averred that the petitioner's Identity Card shows that he hails from Mado Sub Location and not Morothile Sub Location giving the 2<sup>nd</sup> interested party an edge over the petitioner.
- 43. That the Senior Chief Morothile Location vide a letter Ref No ASH/ML/AD/VOL 1 138) dated September 21, 2021 confirmed the petitioner as a resident of Mado Location in Rhamu Dimtu Division and that he had never resided in Morothile Location. Further that vide a public memorandum, the residents of Morothile community confirmed that the petitioner was not resident in Morothile Sub Location.
- 44. The respondent further submitted that the County Commissioner through his letter reference number CC/MDR/CO.162/VOL 1 (147) dated December 9, 2021 addressed to the principal secretary informed him that from the record the petitioner had on May 21, 2020 applied for the



position of Assistant Chief, Grade II, Kalicha Sub Location in which application he indicated he was a resident of Kalicha Sub Location. That he was successfully short listed and interviewed for the position on November 26, 2020.

45. The respondents maintained that the petitioner is a dishonest person and had misled the interviewing panel about his area of residence, an act that informed their decision to disqualify him after the true position was established through background checks.
46. The respondent contended that the petitioner failed to meet key requirements as detailed in the advertisement and therefore was not a suitable candidate to fill the position of Assistant Chief Grade II Morothile Sub location.
47. The respondent further maintained that the recruitment process was guided by standards of objectivity, impartiality, integrity, merit and fair competition and that any allegations to the contrary by the petitioner have been made in bad faith and lack merit.
48. The affiant urged this court to find the petition as filed without merit and to dismiss it with costs to the respondents.

#### **Petitioner's Further Affidavit**

49. The petitioner filed a further affidavit sworn on February 23, 2022 in which he avers that the respondent conceded that he was the highest scoring candidate and the most qualified candidate to fill the position of Assistant Chief Grade II Morothile Sub Location.
50. He further maintained that the respondents are guilty of concealing material facts to this court as they failed to include minutes and report of the interview which clearly indicate that he was the preferred candidate. He attached handwritten minutes of the report annexed and marked appendix AAA 1 in the further affidavit.
51. The petitioner averred the appointment of the 2<sup>nd</sup> interested party was indeed marred with irregularities and nepotism, motivated by political consideration and/or corruption.
52. The petitioner denied the allegation that he was not a resident of Morothile Sub location as contended by the respondents and maintained that he is in fact a resident of the area a fact he averred was within the knowledge of the panellists. He maintained that it was after considering his background that the panellists found him best suited to fill the position.
53. The petitioner further relied on the recommendation signed by 100 residents of Morothile Sub Location who recommended him for appointment to the position, which recommendation he attached to his further affidavit and marked as AAA2.
54. The petitioner maintained that his petition is merited and urged this court to allow it and grant the reliefs sought.

#### **Submissions by the Parties**

55. In his submissions the petitioner maintained that this court is clothed with the requisite jurisdiction to hear and determine the instant petition this being an employment issue. To buttress this argument the petitioner relied on the findings in the Court of Appeal decisions in the case of *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR and *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR and the High Court decision in the case of *United States International University (USIU) v Attorney General* [2012] eKLR where the courts held that the Employment and Labour



Relations Court indeed had jurisdiction to hear and determine matters of infringement of rights in matters related to employment.

56. With regard to his alleged disqualification, the petitioner submitted that the respondents' decision was unfounded and that the same violated his rights as protected under article 47 (1 and 2) of the [Constitution, 2010](#) as read with section 4 of the [Fair Administrative Action Act](#).
57. He maintained the allegations levelled by the respondent were not true and he was neither informed of the alleged background check that confirmed he was not a resident of Morothile Sub Location nor was he furnished with the results of the investigations.
58. The petitioner further averred that he was never invited by the respondents at any point to defend or give any explanation to the allegations. He contended that he only became aware of his disqualification upon service of the respondents' replying affidavit.
59. The petitioner maintained that the decision to disqualify him was illegal, null and void and therefore urged this court to set it aside.
60. The petitioner urged this court to disregard the respondents' averment that he was not a resident of Morothile Sub Location.
61. For emphasis the petitioner relied on the Supreme Court decision in the case of [Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others](#) [2014] eKLR, and the cases of [John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others](#) [2021] eKLR, [Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others](#) [2018] eKLR, [Gregory Kitonga Wambua & 2 others v County Government of Kiambu](#) [2019] eKLR and [Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura](#) [2019] eKLR all on fair hearing.
62. The petitioner further submitted that the 2<sup>nd</sup> interested party was not qualified to fill the position of Assistant Chief Grade II Morothile Sub location as contended by the respondents as he did not meet the requirements as set out in the advertisement. He maintained that there was no indication from the selection panel that they had waived the minimum age requirement as the 2<sup>nd</sup> interested party had not met the same. For emphasis the petitioner relied on the court findings in the case of [Paul Kipkorir Kibet v Deputy County Commissioner, Marakwet West Sub County & 4 others](#) [2016] eKLR where the court found that an unjustified age waiver in favour of the appointed candidate was unlawful and unfair.
63. The petitioner contended that the 2<sup>nd</sup> interested party's appointment despite not meeting the minimum age requirement was in the circumstances illogical and unlawful.
64. The petitioner argued that the respondents' actions were in gross violation of his rights as protected under the [Constitution](#) and therefore urged this court to allow his petition in terms of the reliefs sought.

### **Respondents' Submissions**

65. The respondents submitted that the recruitment and selection process was above board and due diligence was conducted while recommending the appointment of the 2<sup>nd</sup> interested party as the Assistant Chief Grade II f, Morothile Sub Location. The respondents maintained that the decision was guided by standards of objectivity, impartiality, integrity, merit and fair competition. The respondents denied any bias or political influences and/or motives as contended by the petitioner.
66. The respondents further maintained that their actions were in compliance with the provisions of article 41 of the [Constitution of Kenya, 2010](#) as read with section 4(3) of the [Fair Administrative Action Act](#).



67. The respondents argued that the petitioner did not meet the minimum requirements as set out in the advertisement for the position. The respondents submitted that although the petitioner that he was among the three people recommended by the sub county selection panel, that recommendation was overridden by the fact that the petitioner was not a resident of Morothile Sub Location.
68. The respondents submitted that the appointment of the 2<sup>nd</sup> interested party was made on the basis of constitutional criteria and strict compliance with the provisions of article 10 and 73 of the [Constitution of Kenya](#). It denied any allegations of bias.
69. The respondents denied infringing any of the petitioner's rights as contended in the petition. The respondent submitted that his disqualification had been explained being that he was not a resident of Morothile Sub Location.
70. The respondents submit that the petitioner did not fault the procedure adopted but the substance of the appointment itself. They maintained that the procedure was backed by law and therefore the petitioner has no claim as against the respondents. For emphasis the respondents relied on the findings in the case of [Kenya Youth Parliament & 2 others v Attorney General & 2 others](#) [2012] eKLR.
71. The respondents urged the court to find that the Public Service Commission vide its letter Ref No PSC/1/67 dated June 12, 2014 had exercised its discretion and renewed academic waiver on requirements of the schemes of service for chiefs and assistant chiefs and granted minimum of Kenya Certificate of Primary Education (KCPE) for all applicants from North Eastern region. The further submitted that the 2<sup>nd</sup> interested party had therefore met the minimum requirement having scored a D- in his Kenya Certificate of Secondary Education (KCSE). For emphasis the respondents relied on the Court findings in the case of [Ntusiet Aderson Kishaine & 2 others v Nelson Sairowa Kima & 3 others](#) [2017] eKLR where the court held that the Public Service Commission had power to issue its letter dated August 17, 2011 dispensing with the requirement that Assistant Chief II appointees must have a KCSE certificate.
72. The respondents submitted that the petitioner had not proved his case as against the respondents and urged the court to dismiss the petition in its entirety with costs to the respondents. To buttress this argument the respondents relied on the findings in the case of [Ibrahim Mohamud Ibrahim & another v Kenya Wildlife Service & 4 others](#) [2019] eKLR where the court dismissed a petition for failure on the part of the Petitioner to discharge the burden of proving its case.
73. In conclusion the respondents urged this court to find the petition dated November 18, 2021.

### **Analysis and Determination**

74. Having considered the application, affidavits, petition, submissions filed by the parties and the authorities cited, the following are the issues of determination: -
  - a) Whether the petitioner is qualified for appointment to the position of assistant chief Grade II of Morothile Sub Location Ashabito;
  - b) Whether the 2<sup>nd</sup> interested party is qualified for appointment to the position of assistant chief Grade II of Morothile Sub Location Ashabito;
  - c) Whether any of the petitioner's rights have been violated as contended;
  - d) Whether the petition is entitled to the reliefs sought.



### **Whether The Petitioner Is Qualified For Appointment To The Position Of Assistant Chief Grade Ii Of Morothile Sub Location Ashabito**

75. The petitioner in his pleadings and submissions maintained that he was qualified to fill the position of Assistant Chief Grade II Morothile Sub Location, and that this fact was not disputed by the respondents.
76. The petitioner further insisted that he was better qualified to fill the aforementioned position having scored the highest in the interview garnering 69% and having been highly recommended to fill the position.
77. This court has perused the advertisement of vacancies dated June 8, 2021. The requirements for appointment as contained t are that the candidate must: -
- a) Be a Kenyan citizen.
  - b) Be in possession of Kenya Certificate of Secondary Education Mean grade C- or its equivalent from a recognized examination body.
  - c) Be not less than 30 (thirty) years of age.
  - d) Must be a resident of the above sub locations.
  - e) Certificate of good conduct.
  - f) Have good communication skills and
  - g) Have certificate in computer application skills from recognized institution.
78. The advertisement attracted a total of six (6) applicants among them the petitioner and the 2<sup>nd</sup> interested party. The respondents proceeded to shortlist and interview the candidates.
- 79 I have perused qualifications for all the shortlisted candidates. It is evident from the report that none of the candidates had a minimum of Kenya Certificate of Secondary Education mean grade C- or its equivalent from a recognized examination body.
80. The respondents however relied on a communication from the Public Service Commission dated June 12, 2014 which reads as follows:
- “ Ref PSC/1/67  
June 12, 2014  
The Principal Secretary Ministry of Interior and Co-ordination of National Government  
Nairobi  
Renewal of temporary waiver on requirement of scheme of service  
Ref No ESTAB 12/3 VOL XXIII/14 of May 13, 2014
- This is to inform you that the Public Service Commission has renewed the temporary waiver granted through our letter No. PSC/1/PA/15: 288/48 of 27.5.2013 on the requirements of the schemes of service for chiefs and Assistant Chiefs in your Ministry as follows:
- a. Minimum of Kenya Certificate of Primary Education (KCPE)
    - i. Rif Valley Province



- Nakuru
- Samburu
- West Pokot
- Laikipia
- Baringo; and
- Turkana
- ii. North Eastern Province
- iii. Eastern Province
- Marsabit
- Moyale and
- Isiolo
- b) Minimum of Kenya Certificate of Secondary Education (KCSE) mean grade D (Plain) or its equivalent;
- Coast Province
- Mombasa
- Kwale
- Kilifi
- Tana River
- Lamu; and
- Taita Taveta
- c) Minimum of Kenya Certificate of Secondary Education (KCSE) D plain or its equivalent for female candidates in all areas.
- d) Please take necessary action.
- (Signed)
- Alice A Otwala (Mrs), CBS
- Secretary/ CEO
- Public Service Commission”

81. This having been the case the advertisement for the position should have contained the requirements to be considered at the interview, including the lower threshold for academic qualifications.
82. It was unconstitutional for the respondents to change the requirements after interviewing the applicants. This locked out that persons who would otherwise have qualified under the reduced terms who were not given an opportunity to compete for the advertised vacancies.
83. Article 232 of the *Constitution* provide for values and principles of public service which include transparency, fair competition, merit as the basis of appointments as well as affording an equal opportunity for appointment to all.



84. Section 36(1) of the *Public Service Commission Act* further prohibits appointment of unqualified persons. The section provides that:
- (a) In selecting candidates for appointment or promotions, the Commission or other lawful appointing authority shall have regard to —
    - (a) merit, equity, aptitude and suitability;
    - (b) the prescribed qualifications for holding in the office;
    - (c) the efficiency of the public service;
    - (d) the provable experience and demonstrable milestones attained by the candidate; and
    - (e) the personal integrity of the candidate.
85. The respondents have pleaded that they conducted investigations and/or background checks on each of the applicants which unearthed that the petitioner was not a resident of Morothile Location but was in fact a resident of Mado Location in Rhamu Dimtu Division and that he had never lived in Morothile Location.
86. The respondents however did not distinguish between place of residence and place of birth. In the advertisement the requirement is that the candidate is a “resident” of the location. If this was an issue the petitioner ought to have been asked to clarify. A background check should not be used to secretly disqualify a candidate without giving him an opportunity to respond to the same. This amounted to a violation of the petitioner’s right to fair administrative action.

#### **Requirement That All Applicants Be Not Less Than 30 (thirty) Years Of Age**

87. From the applications, it is evident that all the applicants were less than 30 years of age at the time of making their respective applications.
88. In view of the above, I find that the petitioner did not meet the requirements set out in the advertisement to fill the position of Assistant Chief Grade II Morothile Location, Ashabito Division, Mandera Sub County.

#### **Whether The 2<sup>nd</sup> Interested Party Was Qualified For Appointment To The Position Of Assistant Chief Grade Ii Of Morothile Sub Location Ashabito**

89. As is the case of the petitioner, the 2<sup>nd</sup> interested party did not meet the requirements for appointment to the position of Assistant Chief Grade II of Morothile Sub Location Ashabito in terms of both age and academic qualifications.
90. The 2<sup>nd</sup> interested party’s age was below 30 years. In his application, the 2<sup>nd</sup> interested party stated that he was 29 years old at the time of his application and interview. There is no indication of any waiver of the age limit adduced by the respondents.
91. The record further shows that the 2<sup>nd</sup> interested party, like the petitioner, scored a D – (minus) in KCSE and therefore did not meet the academic qualifications as advertised.
92. In the circumstances I find that the 2<sup>nd</sup> interested party did not meet both the minimum age and academic requirements for the advertised position.
93. From the evidence on record, I find that none of the shortlisted applicants for the position of Assistant Chief Grade II Morothile Sub Location met the qualifications in the advertisement. I further find



that the respondents violated the petitioner's right to fair administrative action by disqualifying him without giving him an opportunity to be heard on the grounds for disqualification.

94. It is therefore my finding that the appointment of the 2<sup>nd</sup> interested party to the position of Assistant Chief Morothile Sub Location violated the provisions of article 232 of the Constitution.
95. It is further my finding that the variation of the advertised requirements for the position after the close of the advertisements violated article 232 as it locked out other persons who may have been qualified but had no opportunity to apply for the position.
96. For the foregoing reasons I make the following orders:
- (1) The appointment of the 2<sup>nd</sup> interested party is hereby declared null and void ab initio on grounds that he was not qualified to be appointed to the position of Sub Chief Grade II Morothile Sub Location, Morothile Location, Ashabito Division. The appointment is accordingly quashed and the appointment letter nullified.
  - (2) The respondent is directed to re-advertise the position and fill the same in accordance with the criteria and qualifications in the advertisement.
  - (3) There shall be no order for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF JUNE, 2022.**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the Constitution and the provisions of section 1B of the Civil Procedure Act (chapter 21 of the laws of Kenya) which impose on the court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**

