



**Mohamed & another v Deputy County Commissioner Wajir South Sub-County & 4 others  
(Petition E040 of 2022) [2022] KEELRC 13323 (KLR) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13323 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E040 OF 2022  
SC RUTTO, J  
NOVEMBER 25, 2022**

**BETWEEN**

**MOHAMUD BARE MOHAMED ..... 1<sup>ST</sup> PETITIONER**

**AYAN SALAH BAGAY ..... 2<sup>ND</sup> PETITIONER**

**AND**

**DEPUTY COUNTY COMMISSIONER WAJIR SOUTH SUB-COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

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

**ABDISALAN MUKTAR ALI ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The instant Petition seeks to challenge the recruitment and appointment of the 5<sup>th</sup> Respondent as the Chief of Burder Location. The Petitioners aver that the said recruitment and appointment was undertaken in contravention of *the Constitution*. The Respondents hold otherwise and contend that the process was above board and was guided by objectivity, impartiality, integrity, merit and fair competition.

**Parties**

2. The Petitioners aver that they are residents of Burder Location, Diif Sub-County, Wajir County.



3. The 1<sup>st</sup> Respondent is an administrative department of the National Government tasked with implementing the roles and policies of the National Government at Diif Sub-County within Wajir County.
4. The 2<sup>nd</sup> Respondent is a Ministry of the Executive arm of the National Government mandated with inter alia, National Government coordination, internal state functions and internal security affairs.
5. The 3<sup>rd</sup> Respondent is a constitutional body established under Article 233 of [\*the Constitution\*](#) mandated with performing the functions and exercising the powers under Article 234 of [\*the Constitution\*](#).
6. The 4<sup>th</sup> Respondent is established under Article 156 of [\*the Constitution\*](#) and is the principal legal adviser to the Government.
7. The 5<sup>th</sup> Respondent is the Chief of Burder location, Diff sub county, Wajir County, having been so appointed through a letter dated 25<sup>th</sup> February, 2022.

### **Factual background**

8. On 14<sup>th</sup> October 2021, the 1<sup>st</sup> Respondent advertised for the position of Chief II Burder Location in Diif Subcounty, Wajir County. The minimum requirements for appointment to the position were set out in the advertisement, being: Possession of Kenya Certificate of Secondary Education (KCSE) mean grade C (plain) or its equivalent from a recognised university; A Diploma in any of the refollowing areas: Public Administration, Management, Social Work, Community Development, Education, Governance, Conflict Management or an equivalent qualification from a recognised institution; not less than 35 years of age; a resident of the particular location; a certificate in computer Application packages from a recognised university; Certificate of good conduct/ police clearance certificate; and good communication skills.
9. Following the advertisement, nineteen applicants were shortlisted and invited to attend interviews. Subsequent to the interviews, the 1<sup>st</sup> Respondent recommended three applicants for appointment namely: Suleiman Siyad Bishar, Abdisalan Muktari Ali and Hussein Mohamed. It is worth noting that the 1<sup>st</sup> Respondent strongly recommended the 5<sup>th</sup> Respondent for the position. Subsequently, the 5<sup>th</sup> Respondent was appointed as Chief, Burder location.
10. It is the said recruitment exercise and appointment of the 5<sup>th</sup> Respondent that has provoked the instant Petition.

### **Petitioner's Case**

11. It is the Petitioners' case that the 5<sup>th</sup> Respondent was appointed to the position of Chief II, despite being 11 years younger than the required minimum age and not being a resident of Burder location. That his appointment was therefore contrary to the requirements set out in the advertisement, [\*the Constitution\*](#) and is therefore an indication of bias, improper motives and irrationality in the recruitment process.
12. The Petitioners further contend that the interviewing panel was openly hostile to the only two female candidates at the recruitment stage as they were subjected to demeaning, derogatory and sarcastic terms to the effect that women should not be appointed to public offices. That this was very different from how the male applicants were received warmly by the same panel. That the process was thus discriminatory against female applicants.



13. The Petitioners further assert that the Office of Chief is a public office and those appointed thereto must be above reproach in terms of integrity, competence and suitability. That appointing an unqualified person to that office would seriously jeopardize the delivery of important government services to the public.
14. That the recruitment process therefore failed to comply with the national values and principles of governance.
15. The Petitioners further aver that efforts to get information regarding the recruitment process on numerous occasions from the office of the 1<sup>st</sup> Respondent proved unsuccessful.
16. In addition, the Petitioners aver that the Court had issued interim orders on 29<sup>th</sup> day of March 2022, stopping the appointment of the 5<sup>th</sup> Respondent, pending the hearing and determination of their Application. That despite service, the Respondents disregarded the court orders and proceeded with the appointment of the 5<sup>th</sup> Respondent as Chief II for Burder Location.
17. The Petitioners further aver that the appointment of the 5<sup>th</sup> Respondent flies in the face of the rule of law and the Respondents should thus not benefit from disobeying court orders and making of a mockery of the justice system.
18. The Petitioners therefore seeks the following orders in their Amended Petition dated 16<sup>th</sup> May 2022:
  - a. A declaratory order that the recruitment exercise carried out on 14<sup>th</sup> October 2021 and the appointment of the 5<sup>th</sup> Respondent as Chief of Burder Location, Diif Subcounty, Wajir was in contravention of Articles 10 (2), 27(1) (3), 41 (1), 47(1), 73 (2) (a) (b), 232 (1) (g), and 234 (2) (g) of *the Constitution* and Section 36 of the *Public Service Commission Act* and is thus illegal, unconstitutional null and void.
  - b. An order of certiorari bringing to this Court and quashing the recruitment exercise and the appointment of the 5<sup>th</sup> Respondent as Chief Burder Location, Diif Sub-county, Wajir as carried out by the Respondents.
  - c. An order of Mandamus compelling the Respondents to repeat the recruitment exercise in tandem with *the Constitution* and Section 36 of the *Public Service Commission Act*.
  - d. That the Respondents do bear the costs of this Petition.
  - e. Any other reliefs this Honourable Court may deem fit to grant.

#### **1<sup>st</sup> to 4<sup>th</sup> Respondents' Case**

19. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents responded to the Petition through the Replying Affidavit sworn on 6<sup>th</sup> June, 2022 by Mr. Micheal O. Ololuaa, who describes himself as the Deputy County Commissioner, Diif Sub County, Wajir County. Briefly, he avers that:
  - i. The position for chief, Burder Location was left vacant in mid-2021 following the retirement of the previous holder.
  - ii. Consequently, his office was granted authority to advertise the vacant position by the Wajir County Commissioner's office on 1<sup>st</sup> October 2021 and an advertisement for the same was rolled out on 14<sup>th</sup> October 2021.
  - iii. Nineteen applicants were shortlisted and invited for interviews which were held on 24<sup>th</sup> November 2021.



- iv. The recruitment and selection process was above board and due diligence was conducted while recommending the appointment of the 5<sup>th</sup> Respondent.
- v. The 5<sup>th</sup> Respondent had the requisite qualifications set out in the vacancy notice though he did not meet the set out threshold of age but the interviewing panel decided to take advantage of the waiver normally granted to pastoralist communities hence used its discretion to look for the most qualified candidate.
- vi. The interviewing panel was friendly to all candidates.
- vii. The selection decision was guided by standards of objectivity, impartiality, integrity and fair completion.
- viii. As such, the petitioners' allegations lack merit and are made in bad faith.

### **5<sup>th</sup> Respondent's case**

20. The 5<sup>th</sup> Respondent opposed the Petition through his Replying Affidavit sworn on 16<sup>th</sup> June, 2022, through which he avers that:

- i. The recruitment process was based on merit and therefore above board.
- ii. He is a resident of Burder Location and that he finished his Kenya Certificate of Secondary Education in 2018 and attained a mean grade of C.
- iii. He holds a diploma in Animal Production and Health Management, which qualification he has used for the benefit of the people of Burder Location.
- iv. He is more qualified than the petitioners who only had a secondary education certificate.
- v. The petition herein relates more to access of information as to why the petitioners were not recommended for appointment as opposed to violation of *the Constitution*.
- vi. Failure to furnish the petitioners with information should not be a ground of revoking his successful appointment and that the same should not be visited upon him.
- vii. He received his letter of appointment on 25<sup>th</sup> February 2022 way before the Court issued the orders on 30<sup>th</sup> March, 2022.

21. The Petition was canvassed through written submissions.

### **Petitioners' Submissions**

- 22. It was the Petitioners' submissions that the office of a chief is a public office hence the selection and appointment thereof is subject to the leadership and integrity test espoused under Chapter Six of *the Constitution*, which includes selection on the basis of personal integrity, competence and suitability.
- 23. With regards to competence, the Petitioners argued that the 5<sup>th</sup> Respondent was not competent to hold the position of Chief as he did not have any work experience prior to his appointment. That prior work experience is an integral part of someone's competence and their suitability to hold office, their academic qualifications notwithstanding. In support of their submissions, the Petitioners relied on the cases of Godfrey Musaina & another vs Cabinet Secretary for Tourism & 7 others (2017) eKLR, Kenya



- Young Parliamentarians Association & 2 others vs Cabinet Secretary Labour & Social Protection & 3 others and Institute of Human Resource Management & another (Interested Parties) (2020) eKLR.
24. The Petitioners further argued that the tender age of the 5<sup>th</sup> Respondent and his lack of experience warranted him to be unsuitable to hold the office of Chief.
  25. That the recruitment exercise as conducted by the Respondents, was a total departure from the principles of appointment and promotion in the public service as required under Article 232 (1) (g) of *the Constitution* and the requirements set out in the advertisement, especially on age and being a resident of the particular location. That as such, the exercise was not based on merit and fair competition as is required by *the Constitution*.
  26. It was further submitted by the Petitioners that the interviewing panel had acted on its own motion in waiving the age requirement, an action that was outside its constitutional mandate. On this issue, the Petitioners invited the Court to consider the determination in Kenya Young Parliamentarians Association & 2 others vs Cabinet Secretary Labour & Social Protection & 3 others (supra), where the Court, faced with similar circumstances as this case held that the interviewing panel breached the provisions of Article 232(1)(g) of *the Constitution* despite having the authority to grant the said waiver.
  27. That further, they were entitled to information regarding the recruitment exercise from the Respondents as citizens who were concerned about their own location, which right was violated due to the failure to grant them the required information.
  28. The Petitioners further argued that the infringement of their right to access information under Article 35 of *the Constitution* as pleaded had not been controverted by the Respondents. As such, the Respondents' only obligation was to comply and provide the information requested or reject the same with reasons. That this had not been done. To this end, the Petitioners placed reliance on the case of Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016] eKLR.
  29. In closing its submissions, the Petitioners submitted that they had particularized and detailed the constitutional rights and provisions and the manner in which such rights and provisions were violated by the Respondents. As such, they argued that the Petition passes the standard set out in the case of Anarita Karimi vs. Republic (1979) 1 KLR 154 hence is merited and deserving of the orders sought.

#### **1<sup>st</sup> to 4<sup>th</sup> Respondents' Submissions**

30. The Respondents submitted that in promotion of Article 55 of *the Constitution* as read together with the Kenya Youth Development Policy 2019, the State is guided to take measures including affirmative action to ensure that the youths have opportunity to among others, be presented and participate in political, social, economic and other spheres of life, as well as access employment.
31. That the recruitment process was guided both by Articles 10, 73 and 232(1)(g) of *the Constitution* which ensured that the entire process was free, fair and conducted on the basis of fair competition and merit as a basis of employment. In addition, they argued that the 5<sup>th</sup> Respondent met and demonstrated the leadership and integrity requirement of a public officer under Chapter six of *the Constitution*.
32. It was further submitted by the Respondents that they had complied with Article 47 as read with Section 4(3) of the *Fair Administrative Action Act* which mandates an administrator to take administrative decisions in a lawful, effective and efficient manner.
33. On infringement of the Constitutional rights of the Petitioners, it was submitted that the Petitioners have failed to set out and show how their rights were violated. They argued that the waiver of the age



requirements was done in order to ensure compliance with the very Article 27 that the Petitioners allege has been infringed.

34. That further, the Petitioners have not demonstrated their case on a balance of probabilities and therefore it fails in totality. It was further argued that the Petitioners have attacked the substance of the appointment process and not the procedure adopted by the Respondents. To support its submissions, the Respondents placed on case of Kenya Youth Parliament & 2 others vs Attorney General & 2 others [2012] eKLR.
35. The Respondents further submitted that the Petitioners should not be granted the prayers sought as they had failed to prove that their constitutional rights were violated. To buttress this argument, the Respondents referred to the case of Ntusiet Anderson Kishaine & 2 others vs Nelson Sairowa Kima & 3 others (2017) eKLR.

#### **5<sup>th</sup> Respondent's Submissions**

36. The 5<sup>th</sup> Respondent submitted that the Petitioners have failed to establish that the Petition raises constitutional issues, which of their constitutional rights have been violated and how they have been violated. That the issues in the Petition have not been defined with reasonable precision. To this end, reliance was placed on the case of Kiambu County Tenants Welfare Association v Attorney General and another [2017] eKLR, Anarita Karimi vs Republic (1979) 1 KLR and the Trusted Society of Human Rights Alliance vs Attorney General & 2 others (203) eKLR.
37. Regarding the age limit as a precondition to qualify for the position of Chief, the 5<sup>th</sup> Respondent submitted that the Petitioners have not presented any empirical evidence that anyone below the age of 35 years of age is not agile enough to effectively engage the residents of Burder Location as their Chief and perform his official duties.
38. That Article 27 (4) of *the Constitution* further provides that the state shall not discriminate directly or indirectly against any person on any ground, including race sex, marital status, health status, ethnic or social origin, age, language or birth. In this regard, the cases of Soyinka Lempaa vs Teachers Service Commission & another [2019] eKLR and Jared Juma v Kenya Broadcasting Corporation & 3 others [2014] eKLR was cited in support of that argument.
39. The 5<sup>th</sup> Respondent stated in further submission, that there was no constitutional violation in appointing him as the most suitable candidate.

#### **Analysis and Determination.**

40. From the pleadings on record and the evidence placed before me, as well as the opposing submissions, the following issues stand out for the Court's determination:
  - i. Whether the Petition meets the constitutional threshold.
  - ii. Whether the recruitment exercise in issue was carried out in contravention of *the Constitution* and relevant statutory provisions.
  - iii. Whether the Petitioners' Constitutional rights have been violated.
    - i. Whether the Petitioners are entitled to the reliefs sought.



## Whether the Petition meets the constitutional threshold

41. This issue was raised by the 5<sup>th</sup> Respondent who contends that the Petition as framed, did not plead with reasonable precision the manner in which the constitutional rights of the Petitioners have been violated. The 5<sup>th</sup> Respondent further argues that the Petition has merely quoted omnibus provisions of *the Constitution* without stating the specific provisions that have been violated.
42. The principle on the legal threshold of a constitutional petition was established in the decision of Anarita Karimi Njeru vs Attorney General [1979] KLR 154 in the following manner: -
- “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.”
43. Therefore, where a person is petitioning the Court for an alleged violation of *the Constitution*, he or she is required to set out with a reasonable degree of precision, the right said to have been infringed and the manner in which it has been infringed.
44. This principle was further augmented under Rule 10(1) of the Mutunga Rules as follows:
- “[10](2) The petition shall disclose the following—
- (a) the petitioner’s name and address;
  - (b) the facts relied upon;
  - (c) the constitutional provision violated;
  - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
  - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
  - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
  - (g) the relief sought by the petitioner.”
45. This principle was further reaffirmed by the Court of Appeal in Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, thus:
- “(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court referred to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the



“epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> respondent.”

46. In the instant case, the Petitioners have highlighted a number of constitutional provisions they deem as constituting the Petition’s legal foundation. It is also apparent that the thread running through the body of the Petition is explicit that the Respondents have allegedly contravened the provisions of Articles 10(2) with regards to the national values and principles of governance. The Petitioners have also alleged violation of Articles 35(1) of *the Constitution* in that on numerous occasions, they unsuccessfully requested for information from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents regarding the recruitment exercise. Further, the Petitioners have cited the Respondents for violation of Articles 47(1), 73 and 232 of *the Constitution*.
47. Therefore, the specific rights alleged to have been infringed and the manner in which these rights are alleged to have been infringed can easily be discerned from the Petition. It is clear that the Petitioners have set out in an elaborate manner what they term as violations of Articles 3 (1), 10, 27, 35, 47, 73(2) (a) and (b), 232 of *the Constitution*. Indeed, the gist of the Petition is the manner in which the Respondents undertook the recruitment and appointment of the Chief of Burder location, Diff sub county in light of the identified constitutional provisions.
48. Subsequently, it cannot be said that the constitutional violations complained of by the Petitioners, cannot be discerned from the Petition. In that case, I am persuaded that the Petition has demonstrated with a reasonable degree of precision, the constitutional violations alleged by the Petitioners. The Petition therefore meets the constitutional threshold established in Anarita Karimi Njeru vs Attorney General (supra).
49. That said, I now move to determine the second issue.  
Whether the recruitment exercise in issue was carried out in contravention of *the Constitution*
50. At the heart of the dispute is the recruitment and appointment of the 5<sup>th</sup> Respondent as Chief, Burder location. The Petitioners allege that the 5<sup>th</sup> Respondent did not meet the minimum age requirement and was not from Burder Location, for which the recruitment was being made.
51. To this end, the Petitioners have cited violation of Article 73(2) (a) and (b) of *the Constitution* which provides for the guiding principles of leadership and integrity to include selection on the basis of personal integrity, competence and suitability, as well as objectivity and impartiality. The provisions of Article 232 of *the Constitution* which further provide for the values and principles of public service to include fair competition and merit based evaluations as the basis of appointments and promotions, was also cited.
52. On their part, the 1<sup>st</sup> to 4<sup>th</sup> Respondents maintain that the recruitment process was based on merit, fair competition and was above board. They further maintain that the 5<sup>th</sup> Respondent was qualified, and is a resident of Burder location and met the integrity test. Although admitting that the 5<sup>th</sup> Respondent did not meet the set out threshold of age qualification, the Respondents contend that the interviewing panel decided to take advantage of the waiver normally given to pastoralist communities.
53. On his part, the 5<sup>th</sup> Respondent maintains that he was qualified to hold the said position.
54. It is common ground that the advertisement dated 14<sup>th</sup> October, 2021 provided inter alia, the minimum age requirement of 35 years. From the record, it is evident that the 5<sup>th</sup> Respondent was 26 years old.



55. It is therefore apparent that the 5<sup>th</sup> Respondent did not meet the minimum age qualifications for the position of Chief II but was nonetheless appointed to the said position through a letter dated 25<sup>th</sup> February, 2022. Indeed, one wonders how he made it to the shortlist in the first place seeing that the minimum requirements ordinarily ought to inform the shortlisting process. In selecting the ideal candidate out of the pool of interested applicants, it is expected that the persons to be considered for the interviews, possess all the minimum qualifications.
56. The way I see it, the age requirement was an essential qualification for the holder of the position of Chief II, hence its inclusion in the advertisement. And if the same were not intended to be so, then nothing would have been as easy as to omitting it from the requirements. After all, the Respondents were the authors of the advertisement and were responsible for setting the minimum requirements.
57. The 1<sup>st</sup> Respondent has further averred that the interviewing panel exercised its discretion to waive the age requirement. Be that as it may, the basis of this waiver was not provided. Article 234 (2) (g) of *the Constitution* empowers the Public Service Commission to review and make recommendations with regards to qualifications of officers in the public service. In this regard, there was no evidence that the Public Service Commission made such a recommendation to review the requirements erstwhile stipulated in the advertisement. It may well be said that the interviewing panel usurped the powers of the Public Service Commission under Article 234(2) (g) of *the Constitution*, by unilaterally reviewing the qualifications of the Office of Chief II, Burder location. The interviewing panel had no authority whatsoever to tinker with the requirements which had been stipulated in the advertisement.
58. It is not in doubt that the Office of Chief is a public office and appointments thereto should be in accordance with Articles 10, 73 (2) and 232 of *the Constitution*. Of relevance to this case, is Article 10(2) which provides for the national values and principles of governance to include the rule of the law, good governance, integrity, transparency and accountability, while Article 73(2)(a) provides the guiding principles of leadership and integrity to include selection on the basis of personal integrity, competence and suitability, or election in free and fair elections. On the other hand, Article 232(1) (g) provides for values and principles of public service to include fair competition and merit as the basis of appointments and promotions.
59. In addition, section 36(1) (b) of the *Public Service Commission Act* requires any lawful appointing authority, in this case the Respondents, to have regard to amongst others, the prescribed qualifications for holding such office.
60. There being no proof of authority to waive the minimum requirements, it is evident that the interviewing panel acted ultra vires and abused their discretion and in the process violated Articles 10(2), 73(2)(a) and (b) and 232 (1) (g), and 234 (2)(g) of *the Constitution* as well as section 36(1) (b) of the *Public Service Commission Act*.
61. By overlooking the prescribed qualifications for holding the office of Chief II, changing the requirements midstream and consequently appointing a candidate who did not meet the requirements, rendered the recruitment process and appointment of Chief II, Burder Location irregular. Ultimately, the appointee, in this case, the 5<sup>th</sup> Respondent was not suitable to hold the position he was appointed to.
62. Concluding on this issue, I wish to echo the sentiments expressed by the Court in *Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others* [2012] eKLR thus:

“(73) 27<sup>th</sup> August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterised by open corruption, tribalism, nepotism,



favouritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. *The Constitution* signifies that the end of ‘jobs for the boys’ era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments.”

63. It is against this background that I hereby find and hold that the process of recruitment and appointment of the 5<sup>th</sup> Respondent as Chief, Burder location, Diif Sub county, Wajir County was carried out in contravention of *the Constitution* and the *Public Service Commission Act*.

### **Constitutional violations?**

64. The Petitioners aver that the Respondents violated the provisions of Article 35 (1) of *the Constitution* by failing to provide them with the information regarding the recruitment exercise in issue.

65. In support of their assertions, the Petitioners exhibited a letter dated 28<sup>th</sup> February, 2022 from their Advocates, addressed to the 2<sup>nd</sup> Respondent. It is clear from the said letter, that the Petitioners through their Advocate, sought information pursuant to Article 35(1) of *the Constitution*. The information requested for, was in respect of:

- i. Shortlisted candidates;
- ii. Scores and performance of the interviewed candidates;
- iii. List of candidates recommended for appointment; and
- iv. Qualifications of candidates recommended for appointment.

66. There is no evidence that the Respondents provided the information requested by the Petitioners. It is also notable that the 1<sup>st</sup> to 4<sup>th</sup> Respondents were able to exhibit the information initially requested for. What manifests from this is that the information was in its possession and was available. Indeed, no plausible reason has been advanced as to why the said information was not availed to the Petitioners, upon request.

67. Article 35(1) of *the Constitution* guarantees every Kenyan citizen the right to access information held by the state or any other person, where such information is required for the exercise or protection of any right or fundamental freedom. Therefore, by withholding the information without any justifiable cause, the Respondents violated the Petitioners’ right to access information as guaranteed under Article 35(1) of *the Constitution*.

68. With regards to discrimination of the female candidates who appeared before the interviewing panel, there was no evidence in whatever form or manner to support the said assertion. For instance, there were no affidavits to that effect from the said female candidates whose names were notably, not given. To this end, the allegation to that extent was not substantiated.

### **Disposition**

69. In as much as the 5<sup>th</sup> Respondent may be innocent of any irregularities in the recruitment and appointment process, he nonetheless benefited from the same, hence it would be unconscionable for him to retain the said benefit.

70. Ultimately, the Court allows the Amended Petition and makes the following orders:

- a. A declaration that the recruitment exercise and the appointment of the 5<sup>th</sup> Respondent as Chief of Burder Location, Diif Subcounty, Wajir County was in contravention of Articles 10 (2), 73



(2) (a), 232 (1) (g), and 234 (2)(g) of the Constitution and Section 36 (1) (b) of the Public Service Commission Act and is therefore, unconstitutional, null and void.

- b. The Respondents violated the Petitioners' right to access information contrary to Article 35 (1) of the Constitution.
- c. An order of certiorari does issue bringing to this Court and quashing the recruitment and appointment of the 5<sup>th</sup> Respondent as Chief, Burder Location, Diif Sub-county, Wajir County.
- d. An order of Mandamus does issue compelling the 1<sup>st</sup> to 3<sup>rd</sup> Respondents to repeat the recruitment exercise in tandem with the Constitution and the relevant statutory instruments.
- e. There will be no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**STELLA RUTTO**

**JUDGE**

Appearance:

For the Petitioners Mr. Abubakar

For the 1<sup>st</sup> to 4<sup>th</sup> Respondents Ms. Mwangi

For the 5<sup>th</sup> Respondent Mr. Kinaro

Court Assistant Abdimalik Hussein

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 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, this Court had 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 this 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.

