



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 1 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**NTUSIET ADERSON KISHAINE**

**RONALD KENNER SOIPEI**

**DUNCAN KISHAINE LERIONKA) ..... PETITIONERS**

**-Versus-**

**NELSON SAIROWA KIMA**

**SAMWEL MOKOIRI NAIDUYA**

**DEPUTY COUNTY COMMISSIONER, TRANS MARA**

**WEST DISTRICT SUB COUNTY**

**ATTORNEY GENERAL..... RESPONDENTS**

**JUDGMENT**

**Introduction**

This matter was originally filed as Kisii High Court Petition No. 5 of 2016. It was transferred to this court by order of the Court sitting in Kisii delivered on 7th December 2016 after parties had already taken directions and filed written submissions on the basis of which the judgment was to be prepared.

When the matter came up for mention for directions on 15th March 2017 I directed with consent of the parties, that the matter will proceed from where it had reached.

**Facts**

The Petitioners and the 1<sup>st</sup> Respondent are all male adults residing at Trans Mara West District, Kirindon Division, Kimintet Location, Kirindon Sub-Location. The 2<sup>nd</sup> Respondent is an administrative office within the National Executive arm of Government while the 3<sup>rd</sup> Respondent, the Attorney General, is the Principal Legal Advisor of the Government and has been sued in that capacity on behalf of the 2<sup>nd</sup> Respondent.

By an advertisement dated 30/6/2014 the Respondent called for applications for one (1) vacancy for

position of Chief and three (3) vacancies for position of Assistant Chiefs. Among the pre-requisite conditions for the positions of chief and assistant chief were *inter alia* that one had to be a social worker and be in possession of Kenya Certificate of Secondary Education (K.C.S.E) Mean Grade C+ in English or Kiswahili.

The Petitioners and the 1<sup>st</sup> Respondent all applied for the advertised post of Assistant Chief. The Petitioners aver that they were more qualified than the 1<sup>st</sup> Respondent in consideration to the advertised qualifications for the job given that the 1<sup>st</sup> Respondent is only a K.C.P.E holder from Kimintet Primary School and possesses no further educational nor vocational qualifications.

The Petitioners aver that on 7<sup>th</sup> March, 2016 the 1<sup>st</sup> Respondent was summoned by the 2<sup>nd</sup> Respondent with the view of arranging for his inauguration, notwithstanding the fact that he did not meet the minimum requirements for the position of Assistant Chief. They aver that the 1<sup>st</sup> Respondent was installed and has started to serve as the Assistant Chief of Kirindon sub location within Trans Mara West District.

The Petitioners aver that they have a right under the Constitution of Kenya 2010 to know their rights and not to be short changed. They contend that the Respondents have violated the principles of integrity, transparency and accountability and have called upon this Honourable Court to pronounce itself on the same. The petitioners contend that the 1<sup>st</sup> Respondent did not pass the acid test of the mirror reflecting the national soul and aspirations of the petitioners and have failed to articulate the values of bonding the people of Kenya. They contend that their constitutional rights have been violated and that consequent to the acts and/or omissions of the Respondents, the Petitioners are bound to suffer an infringement of their Constitutional and Fundamental rights thus requiring the protection of this Honourable Court.

The petitioners seek the following orders-

- a) Declaration be issued to the effect that the petitioners are entitled to protection under the constitution.
- b) Declaration that the enlistment, recruitment and/or employment of the 1<sup>st</sup> Respondent was without regard to the due process of the law, was unlawful, illegal, null and void.
- c) An order of judicial review in the nature of certiorari to issue to remove unto the Honourable court and quash the enlistment, recruitment and/or employment of the 1<sup>st</sup> Respondent.
- d) Costs for this suit.

The Respondents filed a replying affidavit of ALEX OUMA OMBEWA, the Sub County Human Resource Management officer, Trans Mara West Sub County in which he deposes that the vacancy of Assistant Chief II for Kirindon Sub-Location occurred following the retirement of the substantive holder, Mr. Sadiya L. Nanteya P/No.1989 043 336, with effect from 1<sup>st</sup> July, 2014. That prior to the retirement of Mr. Nanteya, the office duly initiated the process of filling the post by seeking and obtaining authority from the County Commissioner, Narok vide letter No. CONF/TM/W/E.5/51 of 29<sup>th</sup> May 2014. To fast-track the recruitment, the first advertisement was done vide letter No. TM/W/ST 1/2/vol.II/140 of 30<sup>th</sup> June 2014 Advert No. 6/2014. Due to failure to meet the required threshold by the potential applicants who responded to the advertisement, the post was re-advertised vide letter No. TM/W/ST 1/2/VOL.II/143 of 9<sup>th</sup> October, 2014 Advert No. 8/2014.

He deposes that once more the threshold was not met necessitating the post to be re-advertised for the third time vide letter No. TM/W/ST 1/2/VOL.II/144 of 26<sup>th</sup> January, 2015 – Advert No. 2/2015. This time 5 applications were received. Upon receiving applications meeting the required threshold number of candidates which was four and above, the bio-data of all five (5) candidates who had applied for the post was then compiled. All five (5) applicants were subsequently invited for interview scheduled for 15<sup>th</sup>

April, 2015.

He deposes that only four candidates were interviewed and graded according to performance by the interview Panel Members. Subsequently, the Deputy County Commissioner, Trans Mara West vide letter No.CONF/TM/W/5/62 of 30<sup>th</sup> April, 2015, submitted minutes of the Sub County Selection Board to the Regional Co-ordinator, Rift Valley Region for onward transmission to the Principal Secretary, Ministry of Interior and Co-ordination of National Government.

Three names were submitted for consideration for appointment at the discretion of the appointing authority as stipulated in the recruitment policy as follows:

- Nelson Naponu Muntui (1<sup>st</sup> Respondent)
- Anderson Ntusiet Kishaine (1<sup>st</sup> Petitioner), and
- Duncan Lerionka Kishaine (3<sup>rd</sup> Petitioner)

The authority to appoint the successful candidate was conveyed to the Deputy County Commissioner vide the Regional Co-ordinator's letter No.SR. ST.1/3/15 VOL.II/126 of 12<sup>th</sup> February, 2016. Upon receipt of the authority, the successful candidate who is the 1<sup>st</sup> Respondent was informed vide letter No.CONF/TM/W/5/80 of 4<sup>th</sup> March, 2016.

It is therefore the Respondent's position that interviews were conducted on 15<sup>th</sup> April, 2015 and **NOT** 16<sup>th</sup> April, 2015 as alleged, that academic requirement for appointment as Assistant Chief II was Kenya Certificate of Secondary Education (KCSE) mean grade C (Plain) and **NOT** KCSE MEAN GRADE C+ (Plus) as alleged, that the Public Service Commission of Kenya, vide letter No. 288/48 of 17<sup>th</sup> August, 2011, had granted temporary waiver on academic requirement of KCSE C+ (Plus) and KCSE C(Plain) with KCPE Certificate with respect of appointment of Chiefs and Assistant Chiefs, respectively for Trans Mara Sub County, that besides academic requirements, there were other requirements for appointment to the grade of Assistant Chief II as stipulated in the Scheme of Service for Chiefs and Assistant Chiefs and conveyed in the attached Advertisements, that the 2<sup>nd</sup> Petitioner did not apply for the post nor attended the interview as alleged hence being a non-suited party to the suit, that the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners are brothers who had applied and were interviewed and their names, together with the 1<sup>st</sup> Respondent, were subsequently submitted for appointment, that the Petitioners were not more qualified than the 1<sup>st</sup> Respondent as alleged as none of them had met the stipulated minimum requirements and that it is a requirement that for recruitment of Chiefs and Assistant Chiefs, three (3) names of candidates who were selected in order of merit must be submitted to the appointing authority who in turn appoints only one (1) to the post at his own discretion as was done in this case.

In the written submissions the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents argue that the Public Service Commission of Kenya (PSC), vide letter No. 288/48 of 17<sup>th</sup> August, 2011, granted a temporary waiver on the academic requirement of KCSE C (Plain) in respect of appointment of Assistant Chiefs for the sub-County in question. The PSC substituted this requirement with a KCPE certificate which requirement the 2<sup>nd</sup> Respondent met. This defeats the argument by the Petitioners that the 2<sup>nd</sup> Respondent does not meet academic qualifications for the position of Assistant Chief II.

It is submitted for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that **Article 234 (2) (g) of the Constitution of Kenya** provides that the Public Service Commission shall review and make recommendations to the national government in respect of conditions of service, code of conduct and **qualifications of officers in the public service**. It is pursuant to this constitutional power that the Public Service Commission issued its letter dated 17<sup>th</sup> August 2011 dispensing with the requirement that Assistant Chief II appointees must have a KCSE certificate.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submit that the rationale behind the decision of the PSC is beyond the scope of this matter, but it is sufficient to state that the realities on the ground in some rural parts of Kenya make

it difficult to find qualified applicants for positions such as assistant chief meet the stringent academic qualifications.

It is submitted that academic qualifications were not the only criterion used to determine the qualification of a person for the position of Assistant Chief II and that the applicants were also assessed on other important qualifications such as prior experience working with the community they were going to serve. This is an important qualification for an assistant chief since understanding the unique challenges and culture of the community is vital for effective service. It is submitted that it is nevertheless unnecessary to belabour this point since the petitioners have not averred that the 2<sup>nd</sup> Respondent does not meet the other qualifications for the position he was appointed to.

Based on the foregoing, the Respondents aver that this petition has no merit and urge the court to dismiss the same with costs to the Respondents.

## **Determination**

I have considered the pleadings and submissions of the 2nd and 3rd Respondents. The Petitioners appear not to have filed submissions as none is on the file that was received from Kisii High Court. The issues for determination are whether the 1st Respondent was qualified for appointment to the position of Assistant Chief II and if his appointment violated the principles of integrity, transparency and accountability in public appointments as envisaged by the Constitution of Kenya 2010. The third issue for determination is whether the Respondents infringed the constitution or any constitutional rights of the Petitioners.

From the evidence on record it is apparent that there was an advertisement for one position of Chief II for Poroko Location and three positions of Assistant Chief II for **Olololo Sub-location**, Kimintet location of Kirindon Division; **Kirindon Sub-location**, Kimintet location of Kirindon Division and **Olmotonyi Sub-location**, Moyoi Location, Lolgorian Division. All the petitioners and the 1st Respondent applied for the position of Assistant Chief II.

The 1st Respondent who (apparently) did not meet the minimum qualifications for the position was appointed as Assistant Chief II, Kirindon Sub-location by letter dated 4th March 2016 while the Petitioners who allege that they met the qualifications were not successful. It is the Petitioners' contention that since the 1st Respondent did not meet the minimum qualifications his appointment was a violation of their rights under the Constitution.

The 2nd and 3rd Respondents do not deny that the 1st Respondent did not meet the minimum qualifications for the position but state that the Public Service Commission vide letter dated 17th August 2011 granted a temporary waiver on academic requirements in respect of appointment of Chiefs and Assistant Chiefs for the sub county and that there were other requirements other than the academic qualifications as stipulated in the schemes of service for Chiefs and Assistant Chiefs. The Respondents further argue that the position was advertised 3 times but no qualified candidates applied and further that the petitioners were not more qualified than the 1st Respondent who was appointed.

From the documents before the court it is true that the vacant positions were advertised three times on 30th June 2014, 9th October 2014 and 26th January 2015 but none of the applicants met the qualifications in the advertisement. It is further evident from the record that the Petitioners did not meet the requirements just like the 1<sup>st</sup> Respondent as the 1st and 3rd Petitioners were only 27 years old while the minimum age for the position of Assistant Chief II was 35 years. The 2<sup>nd</sup> Petitioner appears not to have applied for any of the two advertised positions.

As deposed in the Replying affidavit, all the names of the applicants together with their bio-data were submitted to the Principal Secretary Interior and Coordination of National Government who after consideration of the qualifications of all the applicants authorised the appointment of the 1st Respondent by name from among the other applicants as conveyed in the letter dated 12th February 2016.

It is further evident that the appointment of the 1st Respondent was not by the Deputy Commissioner Trans Mara West Sub County, the 2nd Respondent, as alleged in the Petition. The appointment was by letter of authority from the Regional Coordinator, Rift valley Region, who is not a party in the Petition.

Besides the foregoing the Petitioners have not pinpointed their constitutional rights or the constitutional provisions alleged to have been infringed by the Respondents.

### **Conclusion**

As pointed out above the petitioners have not proved that any of their constitutional rights were infringed by the Respondent as none of them qualified for the position alleged to have been filled by an unqualified person. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have on the other hand demonstrated the reasons for the appointment of the 1st Respondent as the Assistant Chief II for Kirindon Sub-location which I find to be transparent being that none of the applicants was qualified and after considering the bio-data of all applicants the 1st Respondent was found to be the best among the applicants.

For these reasons I find no merit in the petition and dismiss the same. There shall be no orders for costs.

**Dated and signed and delivered this 29<sup>th</sup> day of September, 2017**

**MAUREEN ONYANGO**

**JUDGE**