



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**  
**PETITION NO. 40 OF 2014**

**BETWEEN**  
**CREN SOLITEI KIPOOPO (suing on his behalf and that of the**  
**General Public)..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KAJIADO..... 1<sup>ST</sup> RESPONDENT**  
**THE GOVERNOR OF KAJIADO COUNTY.....2<sup>ND</sup> RESPONDENT**

**AND**

**JOHN MWAURA NJOROGI ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. This matter concerns the appointment of Kajiado County officers and consists of two distinct claims. One concerns the failure to give regard to personal integrity, character, competence and suitability when making appointment for the County Government of Kajiado. The second one, which affects both the Respondents and the Interested Party, is the appointment of John Mwaura Njoroge as Chief Officer in the Department of Public Service and E-Government for the County Government of Kajiado.
2. The Petitioner is a resident of Kajiado County and an official of the Kajiado County Congress heading the docket of Community Affairs and covers over 4000 members, and sues on the strength of article 2, 3, 19, 21, 22, 23, 25, 73, 165, 259, 165, 260 and Rules 4, 10, 11, 13 and 23 of the Constitution ..
3. The 1<sup>st</sup> Respondent is the County Government of Kajiado created pursuant to Article 176 of the Constitution. The 2<sup>nd</sup> Respondent is the Governor of the 1<sup>st</sup> Respondent and the Interested Party is the Chief Officer in the Department of Public Service and E-Government of the 1<sup>st</sup> Respondent.

**Case against the respondents**

4. The Petitioner being one of the officials of Kajiado County Congress avers that the 2<sup>nd</sup> Respondent

appointed the John Mwaura Njoroge, the Interested Party (IP) as the Chief Officer of Public Service and E-Government for the 1<sup>st</sup> Respondent without having regard to character and integrity. The IP was formerly a primary school teacher under the Teachers Service Commission (TSC) working at Iltlal primary school. On 6<sup>th</sup> November 1996 he was interdicted for having carnal knowledge of a student resulting in pregnancy. On 9<sup>th</sup> February 2001 he was suspended by the TSC over the misconduct and later he was dismissed from Service for deserting duty and joining a private institution on 28<sup>th</sup> November 2002. The criminal actions of the IP caused the girl to prematurely drop out of school, she got married away from home and the IP has never been charged. The IP remains a person without integrity and therefore unconstitutional to appoint him as the Chief Officer for the 1<sup>st</sup> Respondent.

5. The Petition is on the grounds that by appointing the IP, the 2<sup>nd</sup> Respondent acted in an improper manner, it is unlawful and a violation of the constitution. In making the appointment, the 2<sup>nd</sup> Respondent did not have regard to the IP character and integrity as there was a duty to consider his suitability under the Constitution on matters of integrity. The failure to consider the constitutional provisions was a breach and amounted to an abuse of powers conferred upon the Respondents in law. This was also in breach of the legitimate expectation to a fair, transparent, reasonable and constitutional selection of leadership in the County. The Court has powers to avert the appointment of the IP as it is in breach of the Constitution and the discretion given to the respondents.

6. The Petitioner seeks the following reliefs;

1. *A declaration be issued under Article 73 of the Constitution as read with the Fifth and Sixth Schedule to the constitution, the Respondents are under a duty to have regard to personal integrity, character, competence and suitability when making the appointment of the Chief officer in the Department of Public Service and E-Government for the County Government of Kajiado*
2. *That a declaration be issued that the Respondents have failed to have regard to personal integrity, character and suitability when making the appointment of Chief officer in the Department of Public Service and E-Government for the County Government of Kajiado.*
3. *That a declaration be issued to the Respondents to ensure that regard is had to personal integrity, character, competence and suitability when making the appointment of the Chief Officer of the County Government of Kajiado.*
4. *The appointment of John Mwaura Njoroge to the position of Chief officer in the Department of Public Service and E-Government for the County Government of Kajiado is therefore null and void ab initio and ought to be struck down to pave way for the genuine and constitutional appointment of a candidate.*
5. *That an order do issue directing the Respondents to take steps to ensure that regard to personal integrity, character, competence and suitability when making the appointment of the Chief officer in the Department of Public Service and E-Government for the County Government of Kajiado.*
6. *That an order do issue directing the Respondents or any other Public body to desist, stop and or avoid appointing Mr John Mwaura Njoroge to any Public office position due to his personal integrity and character.*
7. *That costs of and incidental to this Petition be awarded to the Petitioner against the respondents*
8. *This Court is pleased to grant such further order as may be just and appropriate.*

### **Petitioners' Case**

7. The Petition was heard by filing of written submissions on 17<sup>th</sup> November 2014. The Petitioner submitted that he is an official of the Kajiado County Congress, a community based organisation that acts as a platform for voicing community concerns within the Kajiado County. There are over 4,000 members and the Petitioner is responsible for community affairs. The Interested Party was appointed by the Respondents as the Chief Officer in the Department of Public Service & E-Government for 3 years. He was formerly a school teacher, TSC No 313514 at Iltlal primary school but on 6<sup>th</sup> November 1996 he was interdicted for having carnal knowledge of his own student one Peninah Lankau which resulted into a pregnancy. On 9<sup>th</sup> February 2001 the Interested Party was suspended from TSC and later dismissed for deserting duty and joining a private institution. No criminal charges have been levelled against him.

8. Information was passed to the 2<sup>nd</sup> Respondent on 4<sup>th</sup> March 2014, the swearing ceremony was delayed and the County Assembly was advised to look on a new selection exercise as the approval of the Interested Party had contravened Chapter Six of the constitution. The County Assembly blamed the 2<sup>nd</sup> Respondent for nominating the Interested Party. The Petitioner is therefore concerned that the appointment of the Interested Party is of a person without integrity and therefore unconstitutional, illegal and unlawful.

9. It is the petitioner's case that this Court has the requisite jurisdiction to hear this case the same having been transferred by the High Court under the provisions of Article 165(5) read together with article 162(2) of the Constitution and on the basis of the holding in **United States international university (USIU) versus Attorney General [2013] eKLR**. The Court has the jurisdiction and powers to review the process of appointment to state or Public offices for procedural infirmities and legality. A proper review would entail an examination as to whether proper inquiry was made to ensuring the appointing authority met constitutional requirements as held in **Human Rights Alliance versus the AG & 2 Others, Petitioner No.229 of 2012**.

10. the Petitioner thus submitted that under the provisions of Article 22(1)(2)(b) of the constitution, as a concerned citizen he has *locus standi* to file the current Petition under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. In this case there is an infringement of the Constitution and acting on his own self and as a member of a groups of people Interested in the matter thus has filed the Petition as under article 258(2)(b). The Petitioner represents the interest group of Kajiado County Congress.

11. it is the petitioner's case therefore that the Respondents were under the obligation to consider the provisions of Chapter Six of the constitution, the Leadership and Integrity Act, County Government Act, Public Appointments (Parliamentary Approval) Act and the Public Officers Act, before appointing the Interested Party as an officer. The Interested Party is a person lacking in integrity, suitability, conduct and character and it is thereof unconstitutional, illegal and unlawful for the Respondents to appoint him to any position of leadership in the county. The appointment offends article 2, and 73 of the Constitution and the Interested Party has lost Public trust for lack of integrity as held in **Trusted Society of human Rights Alliance versus the AG & others**. Having been appointed as a Public officer to work in a Public entity. The Interested Party appointment should have been conducted in view of the provisions under Chapter Six of the Constitution which is lacking here. This cannot be eroded by the Interested Party getting a Police Clearance Certificate. Even where the TSC did not confirm that the Interested Party was cleared of any disciplinary action, there was a complaint of him having carnal knowledge of his student that resulted in pregnancy and he was punished with a suspension. By serving his suspension, this is evidence that indeed the Interested Party committed the acts as he never challenged his punishment. According to Maasai culture, a girl who is impregnated in the nature of Peninah Lankau is married off away from her clan to an old person and that is what happened in this case. The punishment meted out on the Interested Party was not adequate as the suspension he got is not as under section 145 of the Penal Code. Being in an appointive position, the Interested Party should have been subjected to the criteria of checking on his personal integrity, competence and suitability. In this case, the Interested Party fell short of Chapter Six requirements and hence the Petition before court.

12. The Petitioner therefore submits the Court can grant the prayers and declarations sought as there is an express violation of Chapter Six of the constitution.

### **Respondents' Case**

13. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by Dr Kennedy Ole Kerei, the County Secretary. written submission were filed noting that the 2<sup>nd</sup> Respondent under powers conferred on him under section 45 of the County Government Act appointed the Interested Party as a Chief officer following a vetting process in which members of the Public were invited to participate by attending the vetting sessions and submitting information about the candidates. Before appointment of the Interested Party the 2<sup>nd</sup> Respondent had no credible information against him, it was only received upon such

appointment but before he could be sworn in which caused the 2<sup>nd</sup> Respondent to write to the County assembly expressing his reservations as to the fitness but this was overruled by the assembly. The Interested Party has since been called to clear his name.

14. The 1<sup>st</sup> Respondent also submitted that the Petition is based on the question of integrity against the Interested Party on account of him being found guilty of carnal knowledge of his student and impregnating her and that he was dismissed by the TSC from his Service with them. The Interested Party was however never charged or found guilty of such an offence. The Interested Party has admitted being dismissed by TSC but for the issue of deserting duty as he was away recovering from extensive injuries following a road accident.

15. The 1<sup>st</sup> Respondent also submitted that the question of jurisdiction is moot this matter having been filed before the Human Rights Division of the High Court and then transferred here and for ease of access to justice, the Court should proceed and address the petition. The questions that face the Respondents are addressed under article 73(2) of the Constitution on the issue of integrity, competence and suitability of an officer appointed so as to serve in discipline and commitment. The Interested Party as a state officer has challenged the allegations against him for the Court to decide. These are serious allegations that cast doubt as to the character and integrity and if proved it would render the Interested Party unfit to hold state office in light of Chapter Six of the constitution.

16. The 2<sup>nd</sup> Respondent, the Governor, County Government of Kajiado did not enter appearance or file any record.

### **The Interested Party's Case**

17. On his part, the Interested Party filed his Replying Affidavit and written submissions and stated that he was appointed the Chief Officer in the Department of Public Service and E-Government of the 1<sup>st</sup> Respondent from 26<sup>th</sup> February 2014 after a successful interview and vetting. This involved a consideration of educational qualifications, experience and personal integrity, character, competence and suitability to serve and has since been moved to the Department of Co-operative & Enterprise Development. That in 1996 there were false allegations that he had carnal knowledge of a pupil resulting in pregnancy and he was interdicted to pave way for investigations. The TSC convened a hearing but the complainant did not attend and such allegations remain not proved. He was reinstated and resumed duties but was later dismissed for deserting duty following a serious road accident where he was severely injured. He reported about his accident and injuries to his then school and sought to have sick off but he never received any reply only to be dismissed. There are no criminal charges against him or any record of having carnal knowledge of his pupil. He was cleared for his current position following vetting and happy to serve in the County where he was born and brought up. The Petition is filed in bad faith to hound him out of office and should be dismissed.

18. In submissions the Interested Party states that the Petitioner lacks the *locus standi* to file the Petition as a community based organisation as this is not a legal entity in law that is based on any law recognised for the purpose of being sued and suing in that regard. Only the officials of such an organisation should have sued which is not the case here. The issues raised in the Petition have been explained and noting the 2<sup>nd</sup> Respondent never entered appearance or filed any responses herein is enough proof that the process the Interested Party was taken through of vetting was beyond reproach. Nothing arose with regard to the conduct of the Interested Party before appointment and what was raised after the event he was cleared by the County Assembly. The Petition can only be in bad faith noting that the County Assembly already directed the 2<sup>nd</sup> Respondent to forward the matter to the County Public Service Board that determined the Interested Party suitability to serve which the 2<sup>nd</sup> Respondent has failed to do. The events accompanied of arose in 1996 and it has taken over 20 years for such matters to be raised, all in bad faith.

19. The Interested Party also submits that the Petition fails to outline what constitutional violations exist noting that various articles are cited without an enumeration of what exists in that regard. No

particulars are given. The appointment of the Interested Party was lawful upon consideration by the various organs of the 1<sup>st</sup> Respondent and the Petition fails to outline the basis of their allegations as set out in the case of **Mumo Matemu versus Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012**. That it is not just enough for the Petitioner to make serious allegations, they must prove them. In this regard the Interested Party admits to have been dismissed for deserting duty but has explained without challenge that this was due to a serious accident resulting in severe injuries while the allegation of having carnal knowledge of his pupil has not been proved. The Petitioner relies on evidence that cannot be held as conclusive, information from TSC which is not conclusive and in any case, there was no conviction by the TSC. The suspension issued was to facilitate investigations only and not a sign of guilt. The issues herein were resolved and no criminal guilt can be assigned on the Interested Party. The Petition should therefore be dismissed.

### **Determination**

20. I have considered the pleadings, depositions and submissions made for and on behalf of the parties. Several issues were canvassed in both the pleadings and written submissions. I will first deal with the preliminary issue of jurisdiction. Though not a contested issue noting the circumstances under which the matter was transferred to this Court from the Human Rights Division of the High Court it is important to restate here that The Employment and Labour Relations Court as constituted under the **Industrial Court Act, 2011** and competent to interpret the Constitution and enforce fundamental rights and freedoms in matters arising from disputes falling within the provisions of **Section 12** of the **Industrial Court Act, 2011**. (See **United States International University (USIU) v Attorney General Nairobi Petition 170 of 2012, George Onyango v Board of Directors of Numerical Machining Complex Ltd & 2 others, Petition No. 417 of 2012**).

21. This matter was filed before the Human Rights Division of the High Court and *transferred* to this court. The Petition raises fundamental challenges with regard to the enforcement of constitutional requirements in the employment of the Interested Party by the Respondents under the powers granted to the 2<sup>nd</sup> Respondent under section 45 of the County Government Act, which matters essentially though bordering on employment, the constitutional violations outlined may fall with this Court or under the High Court. In the interests of justice, and noting the mandate of this Court this stands moot in view of parties having to move from one Court to the next and I note **Kipkurui Langat v The Police Commissioner/Inspector General and Another, Nairobi Constitutional Petition No. 224 of 2011** where the Court held;

*It was in my view within the court's jurisdiction and in the interests of justice, particularly bearing in mind the principle contained in Article 159(2) (b) that 'justice shall not be delayed' to hear and determine the matter."*

22. I therefore find and hold that I am properly seized of this matter.

23. The other issue that arose is the *locus standi* of the Petitioner to sue as herein on behalf of a Community based organisation without citing the law under which such an entity is registered and the contest that this is not a legal person. In note the principles now settled in the case of **Anarita Karimi versus The Republic (1976-1980) 1272** and the holding that constitutional Petition must be pleaded with reasonable precision. Articles 22 and 258 of the Constitution of Kenya, 2010 allow any person to institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the Public interest. In the Petition the Petitioner has filed the same in his own name, suing on his own behalf and on behalf of the general public, but outlines his interest as comprising that of the members of Kajiado County Congress where he is an official. The Petitioner thus beats the *locus standi* rule herein by initiating the Petition in his own name and then cites the other parties, persons and publics that are linked to his person. The position thus set out, I find the Petitioner has the requisite standing to proceed before the court.

### ***Issues for Determination***

1. Whether the appointment made by the Respondents of the Interested Party met the provisions of Chapter six;
2. Whether the Court can grant the reliefs sought.

24. Chapter Six of the Constitution outlines the requirements of leadership that bind both national and County governments especially the responsibility vested upon state officers in their leadership and integrity. This is aptly captured by the Court of Appeal in **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others Court of Appeal at Nairobi, Civil Appeal No. 290 of 2012** thus;

**Leadership and integrity are broad and majestic normative ideas. They are the genius of our Constitutional fabric. However, their open-textured nature reveals that they were purposefully left to accrue meaning from concrete experience. Whereas these concepts germinate from the ground of normativity, they grow in the milieu of the facticity of real experience. Their life blood will therefore be our experience, not merely the abstract philosophy or ideology that may underlie them**

25. In this regard, the Petition is premised on the facts that the Respondents failed to take into account the leadership and integrity concerns faced by the Interested Party who had a record of having carnal knowledge of his pupil at Itilal Primary School some time in 1996 which caused his interdiction by the TSC on 6th November 1996. The Petitioner further outlines that the Interested Party lack the requisite leadership and integrity as he was dismissed from duty by the TSC to deserting duty. Those matters are serious and should have been put into account by the Respondents when appointing the Interested Party to the position of Chief Officer in the Department of Public Service & E-Government.

26. The question of integrity and leadership being thus a constitutional requirement should receive much consideration where such matters arise. The Leadership and Integrity Act, 2012 which Parliament enacted give effect to, and establish procedures and mechanisms for effective administration of Chapter Six of the Constitution that apparently address moral and ethical issues. The role of the Court is set out in *Trusted Society of Human Rights Alliance vs. The AG & 2 others* Petition Number 229 of 2012 and it is to review the process of appointment to state or Public offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process included an examination of the process to determine if the appointing authority conducted proper inquiry to ensure that the person appointed met constitutional requirement.

27. It is admitted here that the Interested Party went through the vetting process and was nominated by the 2<sup>nd</sup> Respondent for appointment to the Office of Chief Officer in the Department of Public Service & E-Government. Prior to the appointment, the Interested Party was taken through vetting and a Public notice calling of information on him was issued out alongside others. Before appointment by the County Assembly, the process of swearing in was stopped for the availed information to be addressed with the County Assembly sending back information to the 2<sup>nd</sup> Respondent to refer the matter to the County Service Board which had taken the Interested Party through vetting.

28. Questions then emerge as to the existing information that was to be investigated with regard to the integrity of the Interested Party that forms the basis of the Petition herein. These being that the Interested Party had had carnal knowledge of his pupil impregnating her and were interdicted by the TSC and that he was dismissed for deserting duty. On the one hand as submitted by the Petitioner, allegations of having carnal knowledge are regulated under section 145 of the Penal Code. Under the Penal code such carnal knowledge must be *unlawful carnal knowledge of a girl under the age of fourteen*. The criminal elements must therefore be established for the *carnal knowledge* to have the force of establishing guilt and then infer the question of integrity with the force to impinge on the character, standing and challenge the moral uprightness of the Interested party. *Carnal knowledge* in itself cannot be a sufficient ground to impose questions of integrity as with it becomes a mere fact relative in various situations but the *carnal knowledge of a girl under the age of fourteen* that is established as such to be *unlawful* is itself a criminal act that has sanction and touches on the moral and criminal character of a person.

29. The Petitioner admits that the Interested Party has never been charged with a criminal case over the carnal knowledge of his pupil. That under Maasai culture, where such a girl is involved, she must be

married off away from her home to an old man. Where there is no criminal record on the Interested Party as to his guilty of having *unlawful carnal knowledge of a girl under the age of fourteen* then the cultural yardstick as to the moral standards required of such an act where committed must be established. This is not just for the Petitioner acting on his own behalf but on the person alleged to have suffered the abuse or violation. As matters of integrity of a Public officer do not just touch the individual character but also the perceptions society has on the person. Such perceptions must however where challenged and reviewed by the Court as to their correctness in view of the constitutional requirements and the applicable legislation the Leadership and Integrity Act. Apart from cultural or social expectations, such an assessment once before Court must reflect on the constitutional morality.

30. These were similar questions the Court was faced with in the case of **J.W.N. versus the Teachers Service Commission, Cause No.62 of 2013 (Nyeri)** where the Court held;

*Whereas it may be true that the proceedings before tribunals are not at par with those before a court, where the allegations before such tribunals are serious in nature with the possible consequence that the outcome can deprive the person accused of his livelihood, the quality of evidence to prove such allegations must be above average. The claimant was accused of a very serious offence both under the respondent's code of regulations and penal laws of the land. On one hand, a young girl's education and further life had been put in jeopardy. On the other hand the person found responsible faced the risk of imprisonment for a long time and or termination of professional career. It therefore behove those tasked with the responsibility of determining the dispute to do so with care and caution. It is disturbing that it took about five months for the complainant to tell her mother of her pregnancy. [Emphasis added].*

31. It is therefore not just enough to allege *carnal knowledge*. Such *knowledge* must be established to be *unlawful ... code of regulations and the penal laws of the land*. It cannot be that proceeding before a tribunal that established workplace misconduct is equal to establishment of criminal guilt or gross misconduct at the workplace is tantamount to criminal sanction. This cannot be as the degree of prove required in civil cases is not similar to that of criminal misconduct. In this case, where the Interested Party is said to have engaged in misconduct while at work, the Petitioner admits that he was suspended pending investigations, he was interdicted and his salary withheld and later reinstated and had never been charged with a criminal offence over the carnal knowledge of his pupil. At the point where the Respondents were seized of the Interested Party candidature for the position of Chief Officer in the Department of Public Service & E-Government, there existed no criminal record with regard to any unlawful carnal knowledge of his pupil at Iltlal Primary School. Even as the appointment was stopped at the County Assembly level, no such record existed. Further reference to the Public Service Board will yield similar fruits; they will find no such record as to infer criminal conduct on the part of the Interested Party so as to challenge his appointment under the provisions of charter Six of the constitution. I equally find no such criminal record as to impinge on the character, person, or integrity of the Interested Party as appointed by the Respondents to serve as the Chief Officer in the Department of Public Service & E-Government.

32. The second limb of the integrity challenge against the Respondents in appointing the Interested Party is that he was dismissed from Service due to desertion of duty. Desertion of duty is defined under section 44(4) of the Employment Act as a matter of gross misconduct subject to summary dismissal. Such matters are however based on workplace practice that does not touch on the character, personality or integrity of the employee. Where an employee deserts there workplace without due cause, the sanction is summary dismissal. This I find are not matters that are set out under Chapter Six of the Constitution or the Leadership and Integrity Act so as to cause the removal of the Interested Party as appointed by the respondents.

33. it would be drastic to condemn the Interested Party on allegations which amounted to felonies for which he had neither been investigated nor charged as this would amount to condemning him unheard if he was denied his appointment as a Public officer under section 45 of the County Government Act to participate in the development activities and growth of his County on the basis of suspicions. Moreover, there is a legal process that establishes criminal guilt and where sentenced, the Interested Party as a Public officer would automatically lose his position where all avenues for appeal or review of the conviction and

sentence have been exhausted. I find no evidence that the Interested Party was ineligible to apply for the position of Chief Officer in the Department of Public & E-Government on moral or ethical grounds. The petitioner's assault on the Interested Party appointment from this front is founded on quicksand; the reports that had been cited by the Petitioner were not sufficient grounds to challenge the decision by the 2<sup>nd</sup> Respondent to nominate for appointment of the Interested Party for the position held at the 1<sup>st</sup> Respondent.

**Reliefs**

34. on the remedies sought, I find the 2<sup>nd</sup> Respondent followed due process at the time of nominating the Interested Party for appointment by the County Assembly; there were sufficient and good grounds and the action of allowing the Interested Party to take up his position/appointment at the 1<sup>st</sup> Respondent as the Chief Officer in the Department of Public & E-Government was not unconstitutional. On the costs sought I find that In order to develop jurisprudence on the Constitution, the Court ought to display more latitude to people who have the courage to seek interpretation of the various values and principles contained in it. An order for costs is therefore to be made only in those cases where it is sufficiently demonstrated that the Petitioner was not furthering the development of constitutionalism. The Petitioner has raised saline issues that are constitutional value and even though without successes he should not be penalised in costs. Integrity and Vetting process for Public officers is a new phenomenon in Public participation hence litigation arising out of the process cannot be in any manner of interpretation be considered insubstantial. The Court would in the circumstance order that each Party bore their own costs.

Petition dismissed.

**Delivered in open Court , dated and signed in Nairobi on this 10<sup>th</sup> day of June 2015.**

**M. MBARU**

**JUDGE**

**In the presence of**

**Lilian Njenga: Court Assistant**

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