



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**PETITION NO. E19 OF 2021**

**KAWIRA MAGDALINE.....1<sup>ST</sup> PETITIONER**

**STANELY MATHETA KABERIA.....2<sup>ND</sup> PETITIONER**

**KUBAI ITHARUNI GEOFFREY.....3<sup>RD</sup> PETITIONER**

**THURANIRA JOSEPH NKUNJA.....4<sup>TH</sup> PETITIONER**

**MIRITI RAPHAEL MBUTURA.....5<sup>TH</sup> PETITIONER**

**KANOCIA EDITOR KATHAMBI.....6<sup>TH</sup> PETITIONER**

**VERSUS**

**DEPUTY COUNTY COMMISSIONER.....1<sup>ST</sup> RESPONDENT**

**PS-MINISTRY OF INTERIOR AND**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**ELIUD MUCHUI KARUTI.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. By a petition dated 24/9/2021, the petitioners who were the unsuccessful candidates for the position of Assistant Chief from Kiolo Kia Muuti sub-location, Igembe South –district seek, principally, the cancellation of the appointment of the 4<sup>th</sup> Respondent who was declared the successful candidate by the 1<sup>st</sup> Respondent in the recruitment process impugned as fraudulent and discriminatory citing Articles 27 and 28 of the Constitution. The Petitioners sue on behalf of themselves and other members of public.

2. The specific reliefs sought by the Petitioner were set out in the Petition as follows:-

“a. That the honourable court do issue a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents choice of the 4<sup>th</sup> respondent as the assistant chief

Kiolo Kia Muuti violated the constitution hence null and void.

b. A permanent order of injunction restraining the 1st and 2nd respondents from installing the 4th respondent as the assistant chief Kiolo Kia Muuti sub location based on the advert of 31st March 2021

c. That the honourable court do issue an order directing the 1st and 2nd respondent to re advertise and conduct fresh recruitment of an assistant chief Kiolo Kia Muuti sub-Location.

d. That Costs be provided for.”

3. The factual basis and legal contentions of the Petition were set out in the Petition as follows:-

**“FACTS OF THE CASE.**

1. THAT on or about 31st March 2021 the Ministry of Interior and Coordination of National Government placed an advert for the position of an assistant chief "Kiolo Kia Muuti" Njia sub-location of Igembe Central Sub-county 1. THAT the requirement for the appointment to this grade were: a) Have Kenyan certificate of secondary education(KCSE) Mean grade C minus or its equivalent from a recognized examining body. b) Be not less than 30 years of age. c) Be a resident of the particular sub location. d) Certificate of good conduct. e) Have good communication skills. f) Have certificate in computer application skills course from a recognized institution.

2. THAT the petitioners herein were among the 11(eleven) applicants who tendered their applications for the advertised position and were appropriately shortlisted and interviewed on 21st May 2021.

3. THAT surprisingly the 1st respondent forwarded the name of Eliud Muchui Karuti who never met the set qualifications, as the successful applicant and same was noted in a letter dated 2nd July 2021 from the office of County Commissioner Meru County.

4. THAT the County Commissioner Office in the letter dated 2nd July 2021 had requested for a repeat of the interview since the person selected never met the qualifications but instead of repeating the interview the 1st respondent issued the said unqualified candidate with a copy of the appointment letter as the winner of the interview.

5. THAT the 1st respondents act of choosing unqualified candidate for the post of assistant chief amounts to discrimination, unfair practice, injustice and unconstitutionality.

6. THAT the petitioner's fundamental rights and freedoms in the bill of rights have been denied violated and infringed or is threatened. 7. THAT unless conservatory orders are issued at this stage restraining the 1st respondent from installing the least qualified candidates as the successful Assistant Chief petitioners' rights and others remains violated.

8. THAT without the intervention of this Honorable court the petitioners' constitutional rights stand violated.

The petition was supported by the affidavit of the 1<sup>st</sup> Petitioner detailing the facts surrounding the recruit process.

4. The 1<sup>st</sup> Respondent filed a Replying Affidavit on behalf of the Respondents and set out the facts they rely on as follows:-

“2. That on or about 31st March 2021 my office advertised for the post of the Assistant Chief II for Antubetwee Njoune and Kiolo Kia Muuti. (Annexed hereto and marked 'MKK 1' is a copy of the Advert)

3. That after evaluating the Applications we shortlisted twelve candidates and 11 of them were interviewed between 20th and 21st May 2021. (Annexed hereto and marked 'MKK 2' is a copy of the minutes)

4. That among the interviewees three of them qualified and were awarded 97%, 96% and 95%, the 1st Respondent having the highest score.

5. That the panel resolved to waive the age requirement due to the exemplary performance of the 4th Respondent and in order to ensure that he was not unconstitutionally discriminated on the basis of age. This is a waiver that was also extended to the 6th Petitioner and the 1st petitioner who had both scored a D+ in their KCSE Examination against the minimum requirement of a mean grade of C- in order to ensure that there was gender balance as per the constitutional requirements. (Annexed hereto and marked 'MKK 4' is a copy of the attendance sheet)

6. It is therefore hypocritical of the Petitioners to aver that the 4<sup>th</sup> Respondent is not qualified for the position yet would not have qualified were it not for the waivers extended to them.

7. That the 4th Respondent was appointed by the County Commissioner vide the letter dated 20th August 2021 and the letter annexed in evidence by the petitioner dated 2nd July 2021 has never been received in my office and its author is unknown to us. (Annexed hereto and marked 'MKK 5' is a copy of the letter dated 20th August 2021)

8. That Further, to the aforesaid Appointment, the 4<sup>th</sup> Respondent sent his acceptance letter which is handwritten dated 23rd September 2021 and assumed office immediately and the unsigned letter dated 16th September 2021 annexed to the Petitioner's Affidavit is unknown to us and the source of the same is also unknown to us. (Annexed hereto and marked 'MKK 6' is a copy of the letter dated 23rd September 2021)

9. That the installation referred to herein by the Petitioners is just a ceremony that we conduct to celebrate the Appointment of the appointees and has nothing to do with the assumption of office or performance of duties pertaining to that particular office.

10. That the 1<sup>st</sup> Petitioner does not have proper authority to swear Affidavits on behalf of the other Petitioners therefore the suit is improper and should be struck out. (Annexed hereto and marked 'MKK 7' is a copy of an affidavit sworn by the 5<sup>th</sup> petitioner herein)

11. That I have been advised by counsel on record for the Respondents which advise I verily believe to be true that the Petitioners have not met the threshold for grant of conservatory Orders as they have failed to establish that they have a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that they will suffer prejudice as a result of the violation or threatened violation of the Constitution.

12. That Further the petitioners have failed to meet the threshold of a constitutional petition as set out in *Anarita Karimi Njeru vs. Attorney General* (1979) 1 KLR 154, for the reasons that they have failed to set out with reasonable degree of precision that of which they complain, the provision said to be infringed and the manner in which they are alleged to be infringed.

13. That the allegations raised in the Application and the Petition are baseless and a waste of Court's time and therefore an abuse of Court process. Therefore, the Application and the Petition ought to be dismissed with costs to the Respondents."

### **Submissions**

5. The applicant set out their submissions as follows:-

"The Petitioners herein have come before this honourable court to seek for redress for the violation and infringement of several constitutional rights which are at threat of further violation and infringement, for themselves and under public interest protection. Article 23(1) of the Constitution of Kenya 2010 grants the High Court the 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. Article 22 provides in sub-article (1) that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. My Lord, these provisions are further grounded on Article 20 (4) which states; "In interpreting the Bill of Rights, a court, tribunal or other authority shall promote- (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit,

purport and objects of the Bill of Rights" Your Lordship, we humbly invite this Honourable Court to take into consideration that this application has been made in the interest of the public at large as per Article 22 (2)(c), since the office and position in question is a public office at the lower levels of government charged with representing the functions and mandate of the office of the president at the sub-location level. As such, it is imperative that the citizens have trust in the office holder, and respect for the duly appointed public officer mainly emanates from the appointee having qualified and being appointed via a fair, free, transparent and equal interview process, free from any malpractice and discrimination. The requirements for appointment to the position of assistant chief as advertised by the Ministry of Interior and Coordination of National Government on 31st March 2021 were:

- a) Have a KCSE mean grade of C MINUS or its equivalent from a recognized examining body
- b) Be not less than thirty (30) years of age
- c) Be a resident of the particular sub location d) Certificate of good conduct
- e) Have good communication skills
- f) Have certificate in computer application skills course from a recognized institution.

The Petitioners and the 4th Respondents were among the applicants shortlisted for interview for the position despite some of them not meeting the above requirements as advertised. The 1st and 2nd Respondents proceeded to pick the 4th Respondent as the successful applicant and subsequently offered him the position of assistant chief despite failing to meet the age requirement as advertised as he is only 28 years. By its own admission in paragraph five of the replying affidavit sworn by the 1st Respondent dated 6th October 2021, it is averred that the interviewers' panel on their own motion, waived the age requirement and KCSE minimum grade requirement for some of the applicants during and after the interview process, without informing the general public via due process of public advertisement, thus denying this pertinent information to the public, subsequently locking out potential applicants. Your Lordship, it is clear from such admission that the instant recruitment process was flawed and marred with malpractices as it was discriminatory to other potential applicants who were kept in the dark without knowledge of such waivers and were thus locked out of the application process. It is our submission Your Lordship, that it is clear from the face of it in this petition and the annexures thereon, that the respective offices charged with conducting the interviews for the advertised position clearly did not adhere to the criteria of qualifications required as advertised even to shortlist the applicants, and the County Commissioner Meru County took notice of this and even addressed the issue vide a letter dated 2nd July 2021 to the 1st Respondent to repeat the recruitment exercise in line with the recruitment and selection process as advertised, but the same advice seems to have been ignored. This clearly is unfair and discriminatory to the public at large as such waivers and review of qualification requirements was not communicated nor known by other members of the public who may have met the new standards to tender their applications for consideration, hence the whole interview and appointment process is clearly flawed for lack of transparency, equality and obvious fraud, favouritism, possible corruption, collusion and lack of integrity, causing the discrimination of other potential applicants who were not made aware of the waived and reviewed qualification terms, and were subsequently locked out of the appointment process, and there is need to cure this violation of constitutional rights and prevent further threat of infringement of the same. In this instant case, it is our humble submission My Lord, that the interview process in its entirety was marred by non-transparency, discrimination, inequality, fraud and clear malpractice and as such, the whole exercise should be declared null and void and no appointment should be preferred until a whole new well and openly advertised recruitment process is initiated, starting from the advertisement stage, being free, fair, transparent and inclusive to all members of the public, provided they meet the advertised qualifications .. VIOLATION AND INFRINGEMENT OF CONSTITUTIONAL RIGHTS Chapter Four of the Constitution of Kenya provides for the Bill of rights and in Article 19 there is provision that the Bill of Rights is an integral part of Kenya's democratic state and it is the framework for social, economic and cultural policies. Additionally, it reads that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The actions of the Respondents of maintaining the flawed recruitment process and results therefrom as is, has occasioned the constitutional rights violations and infringement herein which we elucidate on hereunder. The recruitment exercise as conducted was not free and fair and has had the effect of infringing upon several fundamental human rights that are protected in the Constitution of Kenya under Chapter Four being the Bill of Rights to include: Article 27- Equality and freedom from discrimination The right to equal treatment free from discrimination as enshrined under Article 27 of the Constitution is a fundamental right necessitating the constitutional petition herein thus the alleged contravention of this right by the recruiting bodies of the 1st and 2nd Respondents, warrant the prayers sought by the Petitioners. To quote Article 27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. (3) Women and men have the right to equal

treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Here, we submit that, by not communicating to the general public information on the revised requirements for application to the position, many potential applicants were locked out from the process and unfairly denied of their equal opportunity to compete for appointment to the public office. This is discriminatory on various grounds such as age and status, since the Respondents waived the age and minimum education requirement for some of the applicants and picked a successful applicant for the position only after favouring him with a waiver on the age requirement unfairly, as he was 28 years old and not 30 years as required, without extending the same waiver equally to the general public which is a pool of many potential applicants who might be more qualified than the 4th Respondent.

1. Article 28- Right to Dignity We submit that by failing to uphold the protection of the fundamental human rights as recognized by the Constitution in the Bill of Rights as enshrined in Article 19, the Respondents inadvertently violated and lowered the dignity of the applicants who had met the advertised requirements, as well as the potential applicants who would have applied based on the revised qualifications. By not upholding the essence of the Bill of Rights which is integral to all persons, amounts to infringement upon the Article 28 right as read with Article 19.

2. Article 35- Access to Information The Respondents denied the general public their right to access information on the newly revised qualification requirements which ought to have been advertised afresh to allow for equal opportunity for any qualified person who meets the new criteria to apply, and as such, they locked out many potential applicants who might have been even better qualified to take up the position and serve the public better, as their appointment would have been through a free, fair, transparent and equal recruitment policy. We submit that such denial of communication of this pertinent information as pertains to the qualifications waivers and review amounts to infringement of the right of the general public to access information as enshrined in Article 35 and the prayers herein should be allowed and granted to cure this undue and unfair infringement. Article 35 provides that;- . (1) Every citizen has the right of access to a) information held by the State; and b) information held by another person and required for the exercise or protection of any right or fundamental freedom. ! 1. Chapter Six of the Constitution of Kenya This provides for guidelines and principles of leadership and integrity for State Officers. The office of the assistant chief is a representative of the national government and so by the same token, the principles and standards of integrity apply to all the Respondents herein as well as all applicants to this position. The advertisement dated 31st March 2021 additionally called for applicants to possess high qualities of leadership and integrity. From this, we submit that the Respondents have failed in upholding and respecting the principles and standards required for leadership and integrity by conducting a flawed and discriminatory recruitment process and should be stopped from further violation of the human rights and trust put in them by the general public.

## CONCLUSION

Your Lordship, it is our humble submission that the Petitioners herein have proven that the recruitment exercise for the position of assistant chief II was not free, fair and transparent, but rather discriminated against other potential applicants who were locked out for not being informed by the 1st and 2nd Respondents of the revised requirements, through a fresh advertisement in print media of wide circulation or other public forms of advertisement, yet the information was shared only to a select few who might likely have vested interests in who takes up such office.”

6. For the Respondent, it was contended that the Petition was incompetent for lack of particularity on the *Anarita Karimi Njeru vs. Attorney General (1979) KLR154* and for lack of merit in any event. as follows:-

### “Brief facts

2. The Petitioner avers that on or about 31st March 2021 the Ministry of Interior and coordination of national government advertised for the position of Assistant chief Kiolo Kia Muuti, Njia Sub location. The requirements for the appointment were as follows:

- a) Have Kenyan Certificate of Secondary Education (KCSE) Mean grade C- Minus or its equivalent from a recognized examining body
- b) Be not less than 30years of age
- c) Be a resident of the particular Sub- Location
- d) Certificate of good conduct

e) Have good communication skills

f) Have a certificate in computer applications from a recognized institution

3. The Petitioner further avers that the 1st Respondent forwarded the name of 4th Respondent who never met the set qualification, as a successful Applicant and the same was noted in an alleged letter from the office of the county commissioner.

4. The respondents herein filed a replying affidavit sworn by Michael Kinya Kioni on 6th October 2021. They aver that after evaluating the Applications they shortlisted twelve candidates and 11 of them were interviewed between 20th and 21st May 2021. That among the interviewees three of them qualified and were awarded 970/0, 96% and 95%, the 1st Respondent having the highest score.

5. That the panel resolved to wave the age requirement due to the exemplary performance of the 4th Respondent and in order to ensure that he was not unconstitutionally discriminated on the basis of age. This is waiver that was also extended to the 6th Petitioner and the 1st petitioner who had both scored a D+ in their KCSE Examination against the minimum requirement of a mean grade of C in order to ensure that there was gender balance as per the constitutional requirements. It is therefore hypocritical of the Petitioners to aver that the 4th Respondent is not qualified for the position yet would not have qualified were it not for the waivers extended to them.

6. That the 4th Respondent was appointed by the County Commissioner vide the letter dated 20th August 2021 and the letter annexed in evidence by the petitioner dated 2nd July 2021 has never been received in the Respondents' office and its author is unknown. Further to the aforesaid Appointment, the 4th Respondent sent his acceptance letter which is handwritten dated 23rd September 2021 and assumed office immediately and the unsigned letter dated 16th September 2021 annexed to the Petitioner's Affidavit is unknown to us and the source of the same is also unknown to the Respondents.

7. That the installation referred to herein by the Petitioners is just a ceremony that the Respondents conduct to celebrate the Appointment of the appointees and has nothing to do with the assumption of office or performance of duties pertaining that particular office."

#### **Issue of determination**

7. The following issues arise from the pleadings, affidavits and submissions of the parties:-

1. Whether the 1<sup>st</sup> petitioner has authority to make an affidavit on behalf of the petitioners and its impact on the petition.

2. Whether the petitioner meets the threshold of a constitutional petition set out in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154.

3. Whether the process of recruitment of the 4<sup>th</sup> Respondent as Assistant Chief Kiolo Kia Muuti, Sub-Location of Igembe South Sub-County offend the Constitutional provision, on right to dignity protection from discrimination under Articles 27 and 28 of the Constitution.

#### **Extraneous Argument by submissions**

8. The Petitioners sought to introduce another cause of action in infringement of the right to access to information under Article 35 of the Constitution, through the Submissions filed. This claim was not set out in the Petition and therefore the Respondent could not have responded to it. The court cannot allow the Petitioner to take up a new matter for argument through the Submissions filed in court when the plea was not made in previous pleadings which forms the basis of the claim to which the Respondent was called to respond.

#### **Determination**

9. Although the 5<sup>th</sup> Petitioner has in an affidavit sworn on 5<sup>th</sup> October, 2021 attached to the Reply Affidavit of the 1<sup>st</sup> Respondent stated that he did not consent to being included as a co-petitioner, Article 22 of the Constitution grants locus standi to any person to sue in public interest apart from being a representative of a group or class of persons. See Article 22(2) (a), (b), (c) and (d) of the Constitution. In any event, the rest of the 4 Petitioners have not retracted their consent or authority that the 1<sup>st</sup> Petitioner deposes an affidavit on their behalf by authority to swear dated 24/9/2021.

10. The object of the rule in *Anerita Karimi Njeru* for particularity of pleading in Constitution applications, indeed as in any other cause, is to ensure that the claim presented before the court is clearly set out on the facts and the legal provision relied on to enable, firstly, the respondent to understand the case made out against him to enable him make appropriate response and, secondly, for the court to understand the dispute it is called upon to adjudicate. This court has previously had opportunity to consider the import of the *Anerita Karimi Njeru* principle in NAIROBI HC PETITION NO. 284 OF 2016, *Bryson Mangla v. Attorney General & Others* as follows:

**“Particularity of pleading constitutional cases**

9. The requirement of setting out with specificity the particulars of the petitioner’s complaint under the Bill of Rights and other constitutional litigation (and indeed any pleading before the court) is a requirement of common sense that a claimant’s case should be clear and elaborate to enable the respondent know the case it has to meet and the court the question it will be asked to determine. Pleadings should not leave the Court guessing the case before it, as the court in *Anerita Karimi Njeru*, supra, did or the respondent the case he has to answer.

10. The context of the oft-cited holding of the High Court (Travelyan J. and Hancox, JJ.) in *Anerita Karimi Njeru v. Republic (No. 1)* (1979) KLR 154, 156 gives the background and motivation of the directions for precision in pleading constitutional infringement cases, which is applicable to all litigation:

“On the morning of the commencement of the hearing before this Court Mr Mutu representing the Republic raised a preliminary objection. After hearing it, we then invited Mr Mwirichia to give us further and better particulars of precisely that which he is alleging under the second head of his complaint, that is to say that the applicant was not given facilities to procure the attendance of witnesses other than Mr Mase. In the event he did not do so; and in our opinion he could not validly do so, for he is on record as having said to the magistrate, after he had returned to conduct the applicant’s defence, that the only evidence the defence wished to call was that of Mr Mase. Accordingly, in our view, the only complaint that can lie of an alleged refusal to afford the defence such facilities (and we accept that this means “reasonable facilities” under section 77(2) (e) of the Constitution) is as respects Mr Mase. We mention that we also sought to be enlightened as to which of the paragraphs of section 77 of the Constitution were thereby alleged to have been infringed, and Mr Mwirichia referred to his list of authorities (filed on to the day preceding the hearing) which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This was a rather curious manner of bringing a statutory provision to the notice of a court of law, but, at all events, we were prepared to permit Mr Mwirichia to develop his arguments under both paragraphs. In the event, on the second day of the hearing before us, Mr Mwirichia abandoned the position he had previously taken up under paragraph (c). 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 a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

11. I consider that the Petitioners claim that the Respondents recruitment process offended their own and public’s right to protection for discrimination and right to dignity was well set out and grounded on the Article 19 entrenchment of the Bill of Rights as an integral part of the Kenya state as set out in the paragraph 1-3 of the Section of the Petition entitled as follows:

**“CONTRAVENTION**

1. That the 1st respondents has violated the petitioners' inherent dignity and the right to have that dignity respected and protected as provided under Article 28 of the Constitution as shown by his illegal and unconstitutional actions.

2. That Article 19 of the 2010 Constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and the recognition and protection of Human Rights and fundamental freedoms is inter-alia to preserve the dignity of individuals.

3. That Article 27 of the 2010 Constitution provides further: c) women and men have the right to equal treatment, including the rights to equal opportunities in political, economic, culture and social spheres. d) That state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age disability religion, allegiance, belief, culture, dress, language or birth.”

”

As to whether there is merit in each of the contentious as another inquiring on the facts of the case.

### **Violation of Rights**

12. The facts are really not disputed and set out in Replying Affidavit of Michael Kinya Kiomi, the 1<sup>st</sup> Respondent of 6/10/2021 above. In concluding that the Petitioners had failed to set out their case with precision, the Respondent’s Counsel submits at paragraph 12 of the Submissions as follows:

12. Your Lordship, in the instant petition, the petitioners have failed to set out and show how the Respondents have violated or infringed their rights to dignity and the right not to be discriminated considering the fact that the 1st Petitioner and the 6th Petitioner, though, not having attained the requisite grade of C- Minus were shortlisted to ensure gender balance and the 4th Respondent shortlisted to ensure he was not discriminated on the basis of age. These waivers of the requirements were done in to ensure compliance with the very Article 27 that the Petitioners aver has been infringed. The procedure set out in the **Anarita** case was meant for furtherance of justice. It is imperative therefore to note that every petition is required to adhere to the set out procedure without undue departure from its tenets.

13. It was, therefore, admitted that during the interview of the applicant, the qualification as to educational grade and the age of applicants were waived to accommodate the candidates had responded to the advertisement from the position. These lies to problem. The qualifications for appointment to the position were changed midstream without re-advertisement to invite other members of the public who met the new revised criteria and who were desirous of taking up appointment to the office of Assistance Chief of Kiolo Kia Muuti Sub-Location.

14. The fatal default is in the failure to call for fresh applications when the decision to waive the age and academic requirements were waived. So that only a handful of persons qualified under the new criteria were able to benefit from the revised requirements. The court has no problem reading a breach of the right to equal benefit of law in this regard. The right to equal benefit of the law under Article 27 (1) of the Constitution must be taken to include equal benefit to any lawful requirements set for the qualification to appointment to a public office position as in this case. Such qualified person are, pursuant to equal protection of the law principle, entitled to apply for the vacant advertised positions, which opportunity is denied them by the consideration of persons who initially did not qualify for the position. The discrimination here is also complete under Article 27 (4) of the Constitution on the ground only that they had not applied for the position, which they could not do as they did not at the time qualify in view of the higher cut off points on age and qualification, which were subsequently reduced.

15. The real danger of the course of action adopted by the interviewer’s panel of waiving some of the qualifications at the interview stage without restarting the process, becomes clear when it is contemplated that the panel could well have waived all the qualifications previously advertised and consider only that the particular candidate was known to one, some or other of the interviewers or had made some bribe or a bribe had been made on his behalf to one, some or all of the interviewers. The appointment could also have been whimsical and without any relation to the pre-set criteria.

16. Most significantly, the waiver of qualification requirements at the interview stage had the unfair discrimination effect within Article 27 (1) and (4) of the Constitution for shutting out all persons who qualified under the new requirements upon waiver of the age and education qualifications. While there was an explanation for the departure from the set criteria in this case, the resultant discrimination against persons who qualified under the reset criteria but were not given an opportunity to apply makes it unconstitutional to let the appointment, no matter how inspired and well intentioned.

17. A process of recruitment that allows such discrimination to occur is clearly unfair and fraudulent, and it cannot be countenanced by a court of law and justice. A Constitutional Court must find the exercise unconstitutional for being discriminatory and unfair to



the willing members of the public who would have qualified for the post upon the revised criteria which waived the age and academic qualifications.

18. There could be no lawful appointment following discriminating recruitment process. The court is constrained to quash the letter of appointment to quash the letter of appointment of the 4<sup>th</sup> Respondent as the Assistant Chief of Kido Kia Muuti Sub-location.

19. However, the court is not convinced on the facts and the applicable law that any questions of loss of dignity of the petitioners or those who suffered discrimination by the impugned waiver of age and education qualifications.

20. For the reasons set out above, and considering the court's duty under Article 23 (3) of the Constitution to grant appropriate relief, the court finds that a remedy for the commencement afresh of the recruitment process as appropriate. Such remedy was declared in **Chama Cha Mawakili (C.C.M) v. Chairperson, Independent Electoral and Boundaries Commission and 2 others** [2020] eKLR, per Ongaya, J. with whom I respectfully agree.

### **ORDERS**

21. According, the court makes the following orders:-

1. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' appointment of the 4<sup>th</sup> Respondent as the Assistant Chief Kido Kia Muuti violated Articles 27 (1) and (4) of the Constitution and is, therefore, null and void; and the appointment letter dated 20/8/2021 by the County Commissioner Meru is quashed.

2. The court directs that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent shall re-advertise and conduct a fresh recruitment of Assistant Chief Kiolo Kia Muuti Sub-location within the next 60 (sixty) days.

3. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF JANUARY, 2022**

**EDWARD M. MURIITHI**

**JUDGE**

### **APPEARANCES:**

M/S Bebo & Mose Advocates for Petitioners.

Ms. E. Kendi, Litigation Counsel for the Attorney General.



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