

THE REPUBLIC OF UGANDA
KYAMBOGO UNIVERSITY STAFF TRIBUNAL HOLDEN AT KYAMBOGO
APPEAL CASE NO. 02 & 03 OF 2018

(Appeal from a decision of the Appointments Board & Council of Kyambogo University confirmed on 29th June 2018)

- 1. NAKIGULI CHRISTINE APPELLANTS**
- 2. KIZITO SSENGOOBA**

-VERSUS-

KYAMBOGO UNIVERSITY RESPONDENT

CORAM: **MR. ELIJAH MUWANGA WANTE, CHAIRPERSON**
 MR. ADAM TUSIIME MUGARURA, MEMBER
 MR. BRIGHT MUGISHA, MEMBER
 MS. NORAH NAMPOMBA, MEMBER
 DR. STEPHEN KASUMBA, MEMBER
 REV. DR. GRACE LUBAALE, MEMBER

RULING OF THE TRIBUNAL

18.07.2019

INTRODUCTION

This is an appeal from the decision of the Respondent’s Appointments Board whereby the University Council declined to confirm the appointment of the Appellants on promotion to the positions of Assistant Secretary and Deputy Bursar respectively as recommended by the Appointments Board

BRIEF BACKGROUND.

The facts of this appeal as derived from the submissions of both the Appellants and Respondent are that;

The 1st and 2nd Appellants are employed as an Administrative Secretary and Senior Assistant Bursar respectively by the Respondent University. They responded to an internal advert in which the Respondent was seeking to recruit persons to fill the positions of Assistant Secretary and Deputy Bursar respectively. They applied for the said positions and were shortlisted for interviews to which they sat and passed with scores of 63.5% and 67.7% respectively. The Appointments Board forwarded their names to the University Council for approval which it declined to do. By a letter dated 17th September 2018, the Director Human Resources, informed the Appellants of the Council’s decision

that the report of the Appointments Board which recommended that the Appellants be appointed on promotion was not approved based on the reasons given against each candidate.

The Appellants appealed to this Tribunal on the grounds that;

- 1. The University Council erred in law and fact when they declined to appoint the Appellants to the positions as recommended by the Appointments Board.*
- 2. The Appointments Board/ Council erred in fact when they considered irrelevant aspects outside the advert and job description of the positions of the Assistant Secretary and Deputy University Bursar.*
- 3. The Appointments Board/ Council erred in fact when they purported to rely on human resource competence Audit report to decline the appointment of the 2nd appellant to the position of Deputy University Bursar.*
- 4. The Appointments Board/ Council erred in fact when they purported to rely on procurement and information technology to decline the appointment of Nakiguli Allen Christine to the position of Assistant Secretary.*

The Appellants prayed to this Tribunal to allow the Appeal, the appellants be appointed to the positions of Assistant Secretary and Deputy University Bursar respectively and award costs to the Appellants.

REPRESENTATION

The Appellants were represented by Counsel Tugumisiriza Innocent while Ms. Ninsiima Clare, the Senior Legal Officer and Mr. Sam Herbert Mukwatiriri, the Legal Officer, both appeared for the Respondent.

At the mentioning of the Appeal, Counsel for the Appellants requested that the parties be allowed to adopt the procedure of written submissions in order to expedite the process which was unopposed by the Respondent's counsel and was adopted.

The Appellants were present at the hearing of the appeal but there was no representative of the Respondent.

SUBMISSIONS BY THE APPELLANT.

With regard to Ground 1 of the appeal, Counsel for the Appellants submitted that it was important to

examine the statutory function of the University Council versus that of the Appointments Board. He cited *Section 38(1) of the Universities & Other Tertiary Institutions Act 2001* which establishes the University Council and membership thereof.

Counsel also cited *Section 50(1)* of the same Act which establishes the Appointments Board as a committee of the University Council and finally *Section 43(1)* which he submitted that it gives power to the Council to appoint different committees and boards which includes members of the Appointments Board. It was Counsel's submission on this point that Parliament established the Appointments Board well aware that the University Council had power to appoint different committees and boards and so the legislators were creating a semi-autonomous body to carry out specific duties though the Board had to report to the Council.

Furthermore, Counsel submitted that under the Act, the Appointments Board is a unique body and cited *Sections 33, 34, 35, 36 and 37* of the said Act submitting that inference from the cited Sections is that the appointments therein are by the University Council upon recommendation by the Appointments Board whereas those envisaged under *Section 50(3)* do not require further approval or further appointments by the Council.

Counsel submitted on Grounds 2, 3 & 4 of each Appellant together.

For the 1st Appellant, Nakiguli Allen Christine, Counsel submitted that for the Appointments Board to have shortlisted the Appellant for the post of Assistant Secretary, it had been satisfied that she possessed the minimum qualification. He further submitted that the Board interviewed the Appellant and she obtained the pass mark, however, the Board noted that the Appellant needed to enhance her skills in areas of management.

Counsel submitted that the advert which was put forward did not require special skills nor did it state that the 1st Appellant should have a comparative advantage.

Counsel further submitted that to fault the Appellant on such a ground and considering irrelevant skills by the Respondent was so unfair.

Counsel further submitted that the Appointments Board misled the University Council that these skills were required yet they were not indicated in the job advert.

In respect to the 2nd Appellant, Counsel submitted that the Appellant was shortlisted after he had met the minimum requirements for the position. It was Counsel's submission that the Respondent claimed

the Appellant did not have CPA yet the job advert did not place emphasis on CPA as the position was open to those with ACCA which the 2nd Appellant indeed possessed.

Counsel submitted that it was unfair to fault the 2nd Appellant for not having registered for CPA. He further submitted that the purported competence gaps had never been highlighted or brought to the attention of the Appellant so as to be addressed. Counsel submitted that the University needs to develop a culture of developing and training its staff in case they really have competence gaps and not to use such excuse to deny them growth within the organization.

Counsel prayed that the appeal be allowed and the Appellants be appointed to the positions since they qualified.

SUBMISSIONS BY THE RESPONDENT.

On Ground 1, Counsel for the Respondent submitted that the University Council is the supreme governing body of the University and it is responsible for the overall administration and ensuring the due implementation of the objectives and functions of the University. Counsel cited *Section 40 of the University and Other Tertiaries Institutions Act, 2001 as amended*.

Counsel submitted that the University is established as a body corporate under *Section 23* of the same Act and the University Council as a governing body delegates the day to day running of the University to Top Management and also performs its functions through various committees and boards of Council including the Appointments Board.

Counsel further submitted that the Appointments Board is established under *Section 50 of the Universities and Other Tertiaries Institutions Act* and that *Section 50(3)* provides that the Appointments Board shall except where provided otherwise be responsible to the University Council for the appointment, promotion, removal from service and discipline of all staff of the University.

Counsel submitted that to be responsible means to be accountable to the person who gave the responsibility. That the Appointments Board must ensure that in executing its obligation, it does so in the best interest of the University Council and the University at large which in Counsel's view is a control measure aimed at checking the authority given to it.

Counsel submitted that the Board is given authority to appoint academic, administrative and support staff of the University in accordance with the terms and conditions of employment put in place by the

University Council. That in the case of Kyambogo, the terms and conditions are contained in the Human Resources Manual which is a point of reference when undertaking matters of Human Resources management of all staff of the University under which matters of promotion fall.

Counsel further submitted that **Chapter 8** of the Manual provides for promotions and **Regulation 8.1.1** is to the effect that promotion is an appointment to a higher office and it is accompanied with a higher rank, responsibility and salary.

Counsel further referred to **Regulations 8.1.2, 8.2.2, 8.2.2(a) and 8.2.8** which provide for the aim of promotion as provision for career advancement while at the same time recognizing outstanding performance, basic principles of promotion which include equal opportunity, non-discrimination where choice is made on merit and factors which are considered when making a selection among which is job knowledge and technical competence and that for an employee to be eligible for promotion to the next rank, that employee should demonstrate potential for further development and possess relevant experience, qualifications and attributes prescribed for the position respectively.

Counsel submitted that the conduct of Council was not in error whether in law or fact since the assessment by the Appointments Board showed gaps in the Appellants' competencies which reference can be made to **Minute 341.1 of the 76th Meeting of Council held on 24th May 2018**.

Counsel submitted that the Board may have failed to align their comments with the final score but Council did not keep a blind eye on the comments. Instead, Council exercised its supervisory mandate in order to ensure that the terms and conditions of service which it put in place are adhered to. Appointing the Appellants with the identified gaps would mean that Council was by-passing a policy it put in place which would be seen as an illegality. Counsel cited the principle as highlighted in the case of **Makula International Ltd Vs. His Eminence Cardinal Nsubuga & Anor. (1982) HCB 11** which states that "a court cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings including admissions made therein". He submitted that what was illegal in the instant case was the failure to follow the principles highlighted in **Regulations 8.2.2 and 8.2.8** of the Human Resources Manual.

Counsel submitted on Grounds 2, 3 and 4 of the appeal together and contended that her earlier submissions answer the complaint of the Appellants in Grounds 2, 3 and 4. Counsel further submitted

that assessment of a candidate is not limited to a job advert and specifications. Counsel submitted that there was no merit in Grounds 2, 3 and 4 and the same should be dismissed as well as the entire appeal as it lacked merit.

CONSIDERATION BY THE TRIBUNAL.

We have carefully perused the authorities cited and considered the submissions of both Counsel.

This Tribunal as a first appellate body is empowered under *Section 57(2) of the Universities and Other Tertiary Institutions Act, 2003(as amended)* to confirm, vary, amend or set aside the decision appealed against or give such decision as the case may require.

It is well settled law that an appeal is a creature of statute and not inherent. See *Attorney General Vs. Shah, [1971] EA 50.*

In *Baku Raphael Obudra & Obiga Kania vs. Attorney General, Supreme Court Civil Appeal No.1 of 2005, Hon. Justice B. J Odoki CJ (as he then was)* noted that;

“It is trite law that there is no such a thing as inherent Appellate jurisdiction. Appellate jurisdiction must be specifically created by law it cannot be inferred or implied.”

The Respondent raised a preliminary objection on the points of law to challenge the scope, competence and the jurisdiction of this Tribunal, that is, ***whether the Tribunal can hear appeals from decisions of the University Council.*** In regard to this objection, we wish to note that this Tribunal is empowered to hear appeals from the Appointments Board as stated under *Section 57 of the Universities and Other Tertiary Institutions Act, 2003(as amended)*

However, when this Section is read together with *Sections 43, 50, 52 of the Act* and *Rule 5.2(c) of the Kyambogo University Council Charter* (which governs the Rules of Procedure for Kyambogo University Council), the decision is one of the Appointments Board but approved by Council.

Section 43 provides;

(1) “The University Council may-

(a) Appoint committees and boards consisting of such number of its members and other persons as it may deem necessary;

(2) A University Council may, subject to the limitations that the Council may deem fit, delegate any of its functions to any Committee appointed under subsection (1), but the Council shall not delegate the power to approve the budget or the final accounts of the Public University.”

Section 50 provides;

- (1) *“There shall be a Committee of the University Council to be known as the Appointments Board.*

The Appointments Board shall consist of nine members under Section 43.

The Appointments Board shall, except where provided otherwise under this Act, be responsible to the University Council for the appointment, promotion, removal from service and discipline of all officers and staff of academic and administrative service of the University, as may be determined by the University Council.”

Section 52 states;

- (1) *“Subject to the provisions of this Act, academic staff, administrative staff and support staff shall be appointed by the Appointments Board on terms and conditions that may be determined by the University Council in respect of each category of staff.*
- (2) *All members of staff shall be subject to the general authority of, and responsible to the University Council and the Vice-Chancellor through the immediate relevant authority and, except where it is otherwise provided, be deemed to be on full-time service.”*

Rule 5.2(c) of the Kyambogo University Council Charter provides;

“A recommendation or other decision of a committee shall be of no force or effect unless and until it is approved by Council and including the decisions of the Appointments Board.”

Section 57 of the Act states;

- (1) *“A member of staff may appeal to the University Staff Tribunal against a decision of the Appointments Board within fourteen days after being notified of the decision.”*

It is clear from all the above provisions that even where the Appointments Board is considering appointment of staff described under *Section 52* of the Act (where the Appellants fall), the decision taken after its proceedings will have no effect unless and until approved by Council.

In essence, this means that the final decision approved by the Council becomes the decision of the Appointments Board which would fall within the ambit of *Section 57 of the Act* relating to appeals to the Staff Tribunal.

In the case of *Dr. Peter Okello vs. Kyambogo University & Anor, His Lordship Justice Ssekaana Musa held at page 7 of his Judgment that it is important that bodies created under any legislation by Parliament are given an opportunity to operate and resolve their disputes since they possess better knowledge, skill and expertise in such areas.*

To argue that the Staff Tribunal does not have jurisdiction since the decision communicated to the Appellants on the 17th day of September 2018 by the Director Human Resources was headed '*COUNCIL DECISION ABOUT THE REPORT OF THE APPOINTMENTS BOARD*' would be undermining this principle since all decisions of committees and boards are approved by the Council Under *Rule 5.2(c) of the Kyambogo University Council Charter* to be effective, otherwise no appeal would ever lie to the Staff Tribunal.

In view of the foregoing analysis, it is our considered view that the Appellants in this appeal had a right of appeal to this Tribunal and this Tribunal has jurisdiction to entertain this appeal.

Therefore, the Respondents preliminary objection is overruled. We will therefore consider the rest of the issues that were raised for determination.

ISSUE ONE

Whether the University Council erred in law and fact when they declined to appoint the Appellants to the positions as recommended by the Appointments Board.

Put in another form, the question is;

Whether Council has the mandate to approve or disapprove Appointments Board decisions?

Counsel for the Appellants submitted that under *Sections 38,43,50 of the Universities and Other Tertiary Institutions Act, 2003*, the appointment of administrative and support staff was solely vested in the Appointments Board and its decisions should be final at that level with no further approval from any other organ, specifically, the Council in this regard.

The Respondent's Counsel on the other hand submitted that Council is the supreme governing body of the University and is responsible for the overall administration and ensuring the due implementation of the objectives and functions of the University.

It is evident from the above cited provisions of the law that the Appointments Board is a committee of the Council and committees do not make final decisions but their decisions are subject to approval

by the Council which oversees what is done. To argue that the Board is clothed with all the mandate to appoint staff under *Section 52 of the Act* would be taking away powers vested in the University Council as the supreme organ of the University under *Sections 38, 40, 50(1),(2)&(3), 52(1)&(2) of the Universities and Other Tertiary Institution Act, 2003(as amended)*. The Council has powers under the said Act and the University Charter to approve or disapprove the decisions of the Appointments Board and any committee or board of the Council.

This 1st issue is therefore resolved in the negative. The Council lawfully declined to appoint the Appellants as recommended by the Appointments Board as such powers are vested in it by the Act.

ISSUES TWO & THREE IN RESPECT OF THE 2ND APPELLANT (KIZITO SSENGOOBA)

(2) Whether the Appointments Board/ Council erred in fact when they considered irrelevant aspects outside the advert and job description of the positions of the Assistant Secretary and Deputy University Bursar.

(3) The Appointments Board/ Council erred in fact when they purported to rely on the human resource competence Audit report to decline the appointment of the 2nd appellant to the position of Deputy University Bursar.

With regard to the 2nd Appellant, Counsel for the Appellants submitted that the Appellant was shortlisted after he had met the requirements of the minimum requirement for the position. It was Counsel's submission that the Respondent claimed that the Appellant did not have CPA yet the job advert did not place emphasis on CPA as the position was open to those with ACCA which the 2nd Appellant indeed possessed and that it was unfair to fault the 2nd Appellant for not having registered for CPA

In response Counsel for the Respondent submitted that assessment of a candidate is not limited to a job advert and specifications and therefore there was no merit in grounds 2 & 3 of the appeal and the same should be dismissed.

In regard to the submissions of both Counsel, the Tribunal examined the Minutes of the Appointments Board and Council meetings presented before it and also the advert which the Appellants responded to. It was discovered that the qualifications for the post of Deputy University Bursar as stated in the advert were;

- a) *“Must possess a Master’s degree in Commerce, Accounting and Finance or Business Administration (Accounting or Finance option)*
- b) *Bachelor’s degree in Commerce, Economics (Finance Option) Accounting and Finance or Business Administration.*
- c) *Full Professional Accounting Qualification such as ACCA,CPA or CIMA*
- d) *Must be a Member of a recognized professional accounting body like the Institute of Certified Public Accountants of Uganda ICPAU or equivalent*
- e) *Three (3) years working experience at the level of Senior Assistant Bursar or equivalent level from a reputable organization.”*

The General Comments and Recommendations by the Appointments Board were;

- a) *“The candidate exuded confidence, coherence and answered well questions on leadership and management areas.*
- b) *However, he was generally not well conversant about financial issues and answered a few questions correctly though not conversant with Integrated Financial Management System (IFMS), Internal Public Standards and Reforms.*
- c) *The candidate had key competence gaps as identified in the Human Resource Competence Audit Report. The DVC (F&A) should help him to develop his Capacity Development Road map and should be encouraged to register for CPA. The Board further noted that he required mentorship both formally and informally to enhance his capacity.*
- d) *The Board recommended that the candidate should be sponsored and mentored to train in financial issue as part of capacity building and career growth.”*

It should be observed that both CPA and ACCA are professional courses at the same level one being obtained locally (CPA) and another internationally (ACCA). It would therefore not be proper for the Board to recommend that the Appellant registers for CPA yet he had ACCA.

It can be deduced from the above that the recommendation was as to qualification (d) as stated in the advert which was that the candidate must be a Member of a recognized professional accounting body like the Institute of Certified Public Accountants of Uganda (ICPAU) or equivalent.

Counsel for the Respondent submitted that the job advert did not place emphasis on CPA, however, the advert spelt out the qualifications and one had to have them to qualify for the job and the Appellant lacked the certificate from the Institute of Certified Public Accountants of Uganda (ICPAU) or an equivalent.

It is also our view that the Appointments Board/ Council did not err in fact to refer or rely on the Human Resource Competence Audit Report to identify the gaps with regard to the 2nd Appellant because it had the right and powers to do so. However, it is not clear from the evidence or any of the Counsel's submissions whether these gaps were known by or had been brought to the attention of the Appellant.

Issues 2 and 3 are therefore resolved in the negative. Council rightfully declined to appoint the 2nd Appellant as recommended by the Appointments Board since he lacked the certificate of membership from the Institute of Certified Public Accountants of Uganda (ICPAU) or an equivalent which was a requirement as per the advert.

ISSUE FOUR IN RESPECT OF THE 1ST APPELLANT (NAKIGULI CHRISTINE ALLEN)

Whether the Appointments Board/ Council erred in fact when they purported to rely on procurement and information technology to decline the appointment of Nakiguli Allen Christine the 1st Appellant to the position of Assistant Secretary.

Counsel for the Appellant submitted that for the Appointments Board to have shortlisted the 1st Appellant for the post of Assistant Secretary, it had been satisfied that she possessed the minimum qualification. He further submitted that the Board interviewed the Appellant and she obtained the pass mark. However, the Board noted that the Appellant needed to enhance her skills in areas of management.

Counsel concluded by submitting that the advert which was put forward did not require special skills nor did it state a comparative advantage against which the 1st Appellant would be faulted. To do the same by the Respondent was so unfair.

Counsel further submitted that the Appointments Board misled the University Council that these skills were required yet they were not indicated in the job advert.

In response, Counsel for the Respondent submitted that the Board may have failed to align their comments with the final score but the Council did not keep a blind eye on the comments, Instead, the

Council exercised its supervisory mandate in order to ensure that the terms and conditions of service which it put in place are adhered to.

He further submitted that appointing the Appellant with the identified gaps would mean that Council was by-passing a policy it put in place which would be seen as an illegality. Counsel cited the principle as highlighted in the case of *Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor. (1982) HCB 11* which states that; “a court cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings including admissions made therein.” That what was illegal in the instant case was the failure to follow the principles highlighted in *Regulations 8.2.2 and 8.2.8 of the Human Resources Manual.*

The Tribunal has carefully considered the submissions by both Counsel, the evidence presented before it including the advert which the Appellant responded to. The qualifications for the post of Assistant Secretary were stated in the advert as follows;

- a) *“Master’s degree from a recognized University.*
- b) *Three years working experience in Administrative services of a University or reputable Organization.”*

The General Comments and Recommendations by the Appointments Board were;

- *“Though the candidate got the pass mark, the Board noted that she would need to enhance her skills in the areas of management, procurement and Information Technology.”*

It is our considered view that the Board irregularly or improperly referred to aspects of management, procurement and Information Technology which were not stated or a requirement in the advert for the position of Assistant Secretary.

If the competence gaps raised were so critical, then the candidate could not have scored the pass mark of 63% and the skills in the areas of management, procurement and information technology would have been specified in the advert as critical areas for the job.

This issue is therefore resolved in the affirmative. The Council improperly relied on matters or skills/ gaps that the Appointments Board considered and were not in the advert and were not critical to decline to appoint the 1st Appellant to the position of Assistant Secretary.

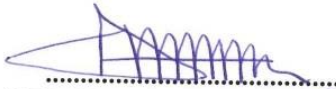
In the result the Tribunal decides as follows;

- 1) The decision to decline to appoint the 1st Appellant to the post of Assistant Secretary was irregular and is hereby quashed for reasons stated herein above.
- 2) The decision by the Appointments Board/ University Council to decline to appoint the 2nd Appellant to the position of Deputy University Bursar was proper and the appeal by the 2nd Appellant is therefore dismissed for reasons stated herein above.
- 3) Each party shall bear its own costs of this appeal.

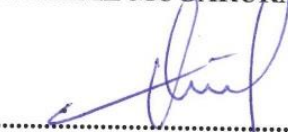
Dated at Kyambogo this 18th day of July 2019.



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MR. ELIJAH MUWANGA WANTE, CHAIRPERSON



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MR. ADAM TUSIIME MUGARURA, MEMBER



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MR. BRIGHT MUGISHA, MEMBER



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REV. DR. GRACE LUBALE, MEMBER



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MS. NORAH NAMPOMBA, MEMBER



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DR. STEPHEN KASUMBA, MEMBER