



**Brian v Catholic University of Eastern Africa (Petition E119 of 2021)
[2024] KEHC 14444 (KLR) (Constitutional and Human Rights) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E119 OF 2021

LN MUGAMBI, J

NOVEMBER 21, 2024

BETWEEN

OTIENO VINCENT BRIAN PETITIONER

AND

CATHOLIC UNIVERSITY OF EASTERN AFRICA RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 8th April 2021 is based on the Petitioner's claim that the Respondent's has refused and or neglected to graduate him with Certificate and Diploma in Community Health and Development on grounds that the Petitioner has missing marks of which the Respondent is answerable but has snubbed all attempts to resolve the matter.
2. Consequently, the Petitioner seeks the following reliefs against the Respondent:
 - i. A declaration that the Respondent has violated the Petitioner's constitutional rights and fundamental freedoms.
 - ii. An order of mandamus do issue compelling the Respondent to regularize the Petitioner's academic record by awarding him his missing grades.
 - iii. An order of mandamus do issue compelling the Respondent to allow the Petitioner to graduate at the nearest graduation date.
 - iv. General damages against the Respondent for infringement of the Petitioner's constitutional rights and fundamental freedoms.



- v. General damages against the Respondent for curtailing the Petitioner's right to acquire gainful employment commensurate with his education.
- vi. An order do issue compelling the Respondent to pay for the Petitioner's further education at Degree level for two years at the same or equivalent Kenyan university of the Petitioner's choosing, subsequent to the Petitioner's graduation.
- vii. Costs consequent upon this Petition be borne by the Respondent.
- viii. The Court do make any such other or further orders as it may deem just and expedient in the circumstances in enforcing the constitutional rights and fundamental freedoms of the Petitioner.

Petitioner's Case

3. The Petitioner depones that he enrolled at one of Respondent's constituent colleges called Regina Pacis University College in January 2012 to pursue a Certificate course in Community Health and Development. He was issued with registration No. C/CHD/006/2013 and studied in the college up until December 2016 when it was closed.
4. He avers that when the college was closed, its students were transferred to the Respondent. He informs that following his transfer, he was issued with Registration No.1030539 in January 2017. The Petitioner makes known that he completed the Certificate course in the former college and proceeded to complete his Diploma course at the Respondent in August 2018.
5. The Petitioner claims that whilst at the Respondent, he paid all the requisite fees and did all the examinations. He avers unquestionably that it was his expectation that upon completion, he would graduate in October 2018. However, to his shock, his graduation application was rejected by the Respondent on account that he had missing grades.
6. He asserts that his attempt to have the matter resolved by the Respondent has been futile. He adds that when his mother intervened to enquire about the issue, she was informed that the Petitioner had a fee balance Ksh.8500 which she proceeded to pay. The Petitioner claims that despite this payment being made, the Respondent still did not issue him with his grades or transcripts. In effect, he has not been able to graduate since then.
7. The Petitioner further depones that he discovered that the Respondent had on 19th October 2018 awarded one, Isaura Wanja Githinji, a Certificate and Diploma in Community Health and Development bearing his registration no.1030539. According to him, the grades awarded to Isaura in the two courses, were his and the ones he had been denied. For instance, he noted that Isaura had been awarded his field attachment Project Unit marks of 72 his marks, yet had not undertaken the project work.
8. The Petitioner as well informs that his advocate's attempt to intervene in the matter was also fruitless as their correspondence dated 26th November 2020 was never responded to by the Respondent.
9. The Petitioner contends that he has suffered great prejudice and discrimination as a result of the Respondent's failure to issue him the missing grades. Moreover, that he has suffered great emotional distress and hardship as he is unable to secure gainful employment. In view of the foregoing it is alleged that the Respondent has blatantly violated the Petitioner's constitutional rights under Articles 27 (1), 28, 43(f), 40, 47 and 50(1) of *the Constitution*.



Respondent's Case

10. In response, the Respondent through its Student Recruitment and Admissions Co-ordinator, Marcellus Otieno filed a replying affidavit sworn on 27th May 2021. She began by deposing that the Respondent's constituent colleges such as Regina Pacis, have a separate and distinct ownership and that the Respondent only acts as an agent of the Commission of University Education for the purposes of auditing the institutions.
11. It is further stated that the Universities Act through a University's Senate under Section 35, provides a dispute mechanism procedure for all academic disputes. Where a party is aggrieved by the Senate's decision, it is averred that the party can make an appeal to the University Council. Considering this, it is alleged that the Petitioner failed to exhaust this remedy hence the Petition is premature.
12. He affirmed the Petitioner's averments in relation to his admission at the College and subsequently at the Respondent. He stated that for one to successfully complete and graduate under the Certificate course, they must complete 22 Units. He deposed that the Petitioner only completed 12 out of the 22 Units.
13. Further, a Diploma course has 31 Units. The Petitioner only completed 9 out of the 31 Units. The Respondent deposed that it is the Petitioner's failure to complete the requisite units made that him ineligible to graduate hence why the Petitioner's graduation application was rejected.
14. Disputing the assertion that the Respondent refused to resolve the issue after the Petitioner raised it, the Respondent claimed that a invitation to the Petitioner to prove that he had indeed completed all the Units as required was not honoured by the Petitioner. That the Respondent has consistently advised the Petitioner to apply for the remaining units but has been elusive. The Respondent assured that it is ready to issue to requisite certificates upon the Petitioner satisfying the set requirements.
15. The Respondent swore that the Petitioner never even applied for any exemption with regard to pending units to justify his claim. To the Petitioners' assertion that another student Isaura Wanja Githinji was awarded his coursework marks of 72%; the Respondent refuted that claim and stated that in fact, the Petitioner had scored 63 marks in the impugned unit.
16. The Respondent however admitted that it mistakenly issued her with a Certificate in Community Health and Development bearing registration no. as 1030539 which mistake it promptly realized and corrected and she now holds the correct Certificate.
17. The Respondent asserts that the Petition is founded on falsehoods, lacks merit and ought to be dismissed.

Parties' Submissions

Petitioner's Submissions

18. In the submissions dated 11th October 2023, Muge Law Advocates, made submissions on whether the Petitioner's rights and fundamental freedoms were violated by the Respondent and whether the Petitioner should be compensated.
19. The Petitioner submitted that the Respondent violated his right to a fair hearing because he was not heard before his graduation application was rejected and grades withheld. That he was not given any reasons for this action in a timely fashion. Additionally, that his right to a fair administrative was also breached as the Respondent failed to issue him with his transcripts and allow him to graduate.



Moreover, that the Respondent did not provide any explanation why it granted Isaura Wanja Githinji a Certificate bearing his registration number.

20. To buttress this point reliance was placed in *Michael Ouma Odero v Kenya Nutritionists & Dieticians Institute* [2020] eKLR where it was held that:

- “ 60. The impugned decision did not conform to the requirements of Article 47 of *the Constitution* and Fair Administrative Actions Act. At a minimum, to meet the constitutional and statutory threshold, the Respondent had to: -
- i. Ensure that the Notice to show cause was, in addition to its contents, accompanied with all the necessary information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 - ii. Inform the Petitioner the procedure to be used during the proceedings.
 - iii. Inform the Petitioner of his right to attend the proceedings, in person or in the company of an expert of his choice.
 - iv. Inform the Petitioner of his right to be heard and to make representations in that regard.
 - v. Inform the Petitioner of the right to cross-examine the witnesses.
 - vi. Inform the Petitioner of his right to legal representation.
 - vii. Inform the Petitioner of his right to where necessary to request for an adjournment of the proceedings.
 - viii. Include in the notice the Petitioner’s right to a review or internal appeal against an administrative decision.
 - ix. Send the link to the Petitioner notwithstanding the Petitioner’s response to the Notice to show cause.
 - x. Send to the Petitioner a statement of reasons pursuant to Section 6 of the *Fair Administrative Action Act*.
 - xi. Notify the Petitioner of its decision.”

21. Turning to the right to education, the Petitioner submitted that the right was violated by the Respondent owing to its failure to avail the missing grades so that he may be eligible to graduate. Correspondingly that this action also violated his right to a legitimate expectation that he would graduate upon completion. Reliance was placed in *Lennoxie Nafuma Lusabe v Catholic University of Eastern Africa* [2020] eKLR where it was held that:

“By virtue of my decision above on the violation of the Petitioner’s rights to fair administrative action and freedom from discrimination, it follows that any action taken following such infringement of rights would be unfair and unlawful. By suspending the Petitioner without giving him a proper hearing and opportunity to defend himself, the Respondent infringed upon his right to education. The right to education can only be



interfered with on legitimate grounds. The unconstitutional and unlawful suspension of the Petitioner cannot amount to legitimate reason for violating his right to education.”

22. Like dependence was placed in *Gabriel Nyabola v Attorney General & 2 others* [2014] eKLR.
23. Submitting on violation to the right to property, Counsel submitted that the Petitioner’s ability to improve his economic and social standing has been violated due to the Respondent’s actions. For this reason, he is unable to acquire gainful employment commensurate with his education. Equally, that the Petitioner’s right to dignity was violated by the Respondent in its decision to unfairly and unprocedurally withhold his grades, bar his graduation and assign his grades to another student.
24. Counsel submitted that owing to these violations, the emotional stress and financial loss caused to the Petitioner, it was clear that his case has been established. Furthermore, that the Respondent had failed to adduce evidence against the Petitioner’s claims. Consequently, it was argued that it was only right that the Petitioner ought to be compensated. Reliance was placed in *Onjira John Anyul v University of Nairobi* [2019] eKLR where it was held that:

“53. In the instant case, I note that the petitioner has been out of college since 8th March 2016 when he was first suspended pending the hearing of his disciplinary case. He was subsequently expelled from the university following the hearing by the disciplinary committee before the expulsion on 18th May 2016 converted to a 3year suspension. It therefore goes without saying that the petitioner’s peers and classmates have in the meantime proceeded with their studies as the petitioner stares into an uncertain future as a result of being subjected to a disciplinary process that does not stand the constitutional validity test. It is therefore my finding that the petitioner has undergone untold suffering and anxiety following his suspension from the respondent university for which he is entitled to be compensation in damages. Even though the parties did not make any submissions on the amount payable in damages this court is of the view that an award in the sum of Kshs 1,000,000/- will be adequate compensation for the violation of the petitioner’s rights.”

Respondent’s Submissions

25. The Respondent filed submissions dated 27th January 2024 through KW EW Advocates LLP. The issues for argument were identified as: whether the Petition is premature on grounds of failure of exhaustion of internal dispute; whether the Petitioner has met the minimum requirements for the award of Certificate and Diploma certificate in Community Health Development; whether the Respondent violated the Petitioner rights and whether the Petitioner is entitled to the relief.
26. From the Respondent’s perspective, the Petitioner did not utilize the internal dispute mechanism set out by the Respondent to deal with such disputes. It submitted that there are Regulations in the Respondent’s Student Handbook and also the provisions of the *Universities Act* on how such complaint ought to have been processed first.
27. The Respondent submitted that while the Petitioner had a grievance against it, he did not present this particular grievance before the relevant organs of the Respondent with the primary mandate to resolve such disputes. That the Petitioner did not report the matter to the Senate. That as a matter of fact, the Petitioner failed to attend a meeting which the Respondent officials had set with him in order to discuss the matter. That the Petitioner has directly approached this Court without demonstrating that



the alternative mechanism under the Respondent's charter was ineffective hence the Court should find that the Petition is prematurely before this Court.

28. Reliance was placed in *Gabriel Mutava & 2 others vs Managing Director Kenya Ports Authority and Another* (2016)eKLR where it was held that:

“Time and again it has been said there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the constitutional court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.”

29. Comparable reliance was also placed in *Daniel N. Mugenda v Kenyatta University & 3 Others* (2013)eKLR, *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslim for Human Rights & 2 Others (Interested Parties)* (2020) eKLR, *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habif Olaka -Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another* [2018] eKLR and *Patrick M usimba vs. National Commission & 4 Others* (2016)eKLR.

30. Turning to the second issue, Counsel submitted that contrary to the Petitioner's allegation that he was eligible to graduate, the Respondent deponed that the Petitioner had not completed all the Units as required. For this reason, it was argued that the Petitioner's expectation was not legitimate. Reliance was placed in *H. W.R. Wade & C. F. Forsyth* where it was discussed that:

“It is not enough that an expectation should exist; it must in addition be legitimate First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation.....Second, clear statutory words, of course, override an expectation howsoever founded.....Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy.”

31. Tying to this, Counsel was certain in the next issue that the Respondent had not violated the Petitioner's constitutional rights. This is because the Petitioner had not adduced any evidence to support his claim that he was eligible to graduate. Furthermore, Counsel submitted that the Petition did not meet the threshold set out for constitutional petitions as held in *Anarita Karimi Nieru vs Republic* (No.1) (1979) KLR 144. This is since, the Petitioner did not disclose with a reasonable degree of precision the manner in which his rights were violated. In sum therefore, Counsel submitted that the Petitioner was not entitled to the relief sought.

Analysis and Determination

32. It is my considered view that the issues that arise for determination in this matter are:
- i. Whether the instant Petition offends the doctrine of exhaustion.
 - ii. Whether the Respondent violated the Petitioner's constitutional rights under Articles 27(1), 28, 40, 43(f), 47 and 50(1) of *the Constitution* and his legitimate expectation.
 - iii. Whether the Petitioner is entitled to the relief sought.



Whether Petition offends the doctrine of exhaustion

33. The Respondent urged this Court to dismiss the Petition on the ground the Petitioner had not demonstrated that he had made use of the internal dispute resolution procedure before approaching this Court for a remedy. That according to the *Universities Act* and the University Charter, the primary mandate for resolution of such disputes lay with the Senate of the Respondent with an option to appeal to the University Council. That in any case, the Petitioner did not bother to attend a meeting which the Respondent officials had scheduled to listen to his grievance and try to find a solution. That without any justification that the alternative mechanism available at Respondent's were ineffective, this Court should not entertain this Petition as it is premature.
34. The doctrine of exhaustion of remedies has been judicially applied extensively by the Courts in this Country. Simply put, it is the requirement that a Party ought to utilize administrative remedies provided for in legislation or regulatory instruments before approaching or seeking a remedy in Court. Discussing the doctrine, the Supreme Court in *Sammy Ndung'u Waity vs Independent Electoral & Boundaries Commission And Three Others* (2019) eKLR stated as follows:

“(63) Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others*; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

35. Echoing similar sentiments, the Court in *John Githui vs Trustees, Nakuru Golf Club* [2019] eKLR held:

“25. There is no doubt that the doctrine of exhaustion of local remedies is one of esteemed juridical ancestry in Kenya. In *Republic v IEBC Ex Parte NASA-Kenya & 6 Others* [2017] eKLR, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion which the Respondents raised in a bid to preliminarily swat away the Applicants' suit in the following words:

This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:-



Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

36. Despite the hallowed place the doctrine of exhaustion of remedies occupies in our jurisprudential philosophy, exceptions to its application exist in limited circumstances as was observed by the Court in *Fleur Investments Limited vs Commissioner of Domestic Taxes & another* [2018] eKLR where the Court held thus:

“22. For this proposition the appellant called in aid this Court’s finding in the case of *Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546* where the Court expressed itself in relevant part as follows:-

“...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

23. ... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

37. One may not be able to make a decision on whether the Petition violates the doctrine of exhaustion of remedies without examining the relevant provisions of law that that are said to have been overlooked by the Petitioner in instituting this Petition before this Court.

38. I will begin with the Section 35 of the *Universities Act* which the Respondent cited. The same provides thus:

S. 35 Governing organs of a university

- (1) In addition to the provisions of its Charter, a university shall establish the following organs of governance or their equivalent—
 - (a) a Council, which shall—
 - (i) employ staff;



- (ii) approve the statutes of the University and cause them to be published in the Kenya Gazette;
 - (iii) approve the policies of the University;
 - (iv) approve the budget;
 - (v) in the case of public universities, appoint Vice-Chancellor, Deputy Vice-Chancellors and Principals and Deputy Principals of Constituent Colleges, in consultation with the Cabinet Secretary, after a competitive process conducted by the Public Service Commission; and
 - (vi) undertake other functions set out under this Act and the Charter.
- (b) the Senate, which shall be in charge of all academic matters of the university and shall undertake the functions assigned to it in the Charter of the university.
- (c) the Management Board, which shall—
- (i) be responsible for implementation of the policies of the university;
 - (ii) assist in the day-to-day management of the university; and
 - (iii) undertake such other functions as shall be set out in the Charter.
- (2) Notwithstanding the generality of the provisions of subsection (1), the Council of a private university shall be appointed in accordance with provisions of the Charter, and such a university may, with the approval of the Commission, establish additional governance organs, including a Board of Trustees or its equivalent, as the sponsor may deem appropriate.
- (3) A Board of Trustees established pursuant to subsection (2) or the sponsor of a private university shall, in addition to any other functions set out in the charter of the university—
- (a) appoint members of the University Council;
 - (b) raise funds for the benefit of the university in accordance with any written law or financing arrangement under section 51A;
 - (c) promote the objects of the university; and(d)appoint the university Chancellor.

39. From my reading of the above section, the Statute gives the Senate of a University the mandate over all academic matters. None is assigned to the University Council as was suggested by the Respondent. Further, in regard to the Senate, it is provided that the Senate shall undertake the functions assigned to it in the University Charter. It is thus imperative to examine the Charter for Catholic University Eastern Africa (hereinafter called the Charter). The Respondent annexed the same as annexure MO1 in the replying affidavit of Marcellus Otieno. The Charter at paragraph 17 sets out The Senate and



in 17 (5) assigns it powers and duties. Among the Senate powers and duties is what is contained at paragraph 17(5) (f) which reads as follows:

“(f) to settle academic matters within faculties and departments and to deal with academic disputes arising therefrom”

40. Reading Section 35 (1) (b) of the *Universities Act* together with the provisions of the Catholic University Charter particularly paragraph 17(5) (f) above, I am persuaded that the dispute before the Court was filed by the Petitioner prematurely without giving a chance to the internal dispute resolution mechanisms within the University Administrative structure to resolve it hence it was a violation of the doctrine of exhaustion of remedies.

Whether the constitutional rights of the Petitioner were violated

41. A constitutional petition should set out the particulars of violations of *the Constitution* with clarity and precision. This was Supreme Court’s holding in Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others (2014) eKLR which cited with approval the case of Anarita Karimi Njeru (supra). The Supreme Court stated:

“(349) ... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

42. Over and above framing violations to *the Constitution* with clarity and precision, the legal burden of proof must be discharged by the petitioner who must adduce credible and sufficient evidence to substantiate those allegations for the Petition to succeed. The Supreme Court fortified this position in the case of John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR where it held thus:

“299. As stated in both the Raila 2013 and 2017 decisions, the burden of proof, at all times, lies on a petitioner and generalized claims, without evidence that meets clear threshold, are of no value. The petitioner must supply evidence in support of their claims and this proof must be supplied to the required standard.”

43. Likewise, in EG & 7 others v Attorney General; DKM & 9 others (*Interested Parties*); *Katiba Institute & another (Amicus Curiae) (Petition 150 & 234 of 2016)* (Consolidated) the Court observed as follows:

“303. The general principal governing determination of cases is that a party who makes a positive allegation bears the burden of proving it. Moreover, the onus to establish the violation of alleged rights is not a mere formality. Differently put, the onus lies on he who alleges to prove every element constituting his or



her cause of action. This includes sufficient facts to justify a finding that the rights have been violated.

304. Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate his or her ability to exercise a fundamental right has been infringed. If the court finds that the law, measure, conduct or omission in question infringes the exercise of the fundamental right, or a right guaranteed in the Bill of Rights, the analysis may move to the second stage. In the second state, the party seeking to uphold the restriction or conduct will be required to demonstrate the infringement or conduct is justifiable in a modern democratic state and satisfies Article 24 test.

305. Cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:-

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

306. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

307. Decisions on violation of constitutional rights should not, and must not, be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses.”

44. The judicial position is an amplification of Sections 107 and 109 of the *Evidence Act* Cap 80 which provide as follows:

107. Burden of proof

- a. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- b. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

S. 109. Proof of particular fact



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

45. In instant Petition, the Petitioner pleaded that he studied for a Certificate in Community Health Development at Regina Pacis Institute of Health Sciences from 2012 to 2016 and thereafter transferred to the Respondent (Catholic University) where he was to complete his studies after Regina Pacis, which was a Constituent College of the Respondent was wound up. At the Respondent, he expected to be awarded a Certificate in Community Health Development and a Diploma in Community Health by end of his studies in 2018. Nonetheless, when he put in his application for graduation, it was rejected on account of missing grades.
46. The Respondent was categorical that the Petitioner could not be allowed to graduate because he had not done all the required units to enable him graduate either with a Certificate of Community Health Development or a Diploma in Community Health. That is because out of 22 units that he was required to study and pass at the Certificate level, he only did 12 units whereas at the Diploma level, out of 31 mandatory units, he had only completed 9 units out of 31. To dispute the Petitioner's assertion that he had satisfactorily completed the two courses, the Respondent annexed the Petitioner's transcripts in respect of the two courses which were exhibited in as per paragraphs 18 and 20 of the Respondent's replying affidavit. On the contrary, the Petitioner despite insisting that he had duly completed the two courses, he provided no evidence to substantiate this fact and had no way of rebutting the transcript evidence concerning the courses he had sat for and was examined and passed.
47. The Petitioner thus failed to substantiate his claim that he had studied and met all the requisite qualifications for the award of Certificate in Community Health Development or Diploma in Community Health which is the bedrock of his Petition. He attempted to present a certificate in the name of Isaura Wanja Githinji alleging that this person was awarded a Certificate using his grades because the registration number belonging to him had been printed in her certificate. The Respondent explained that this occurred as result of an error during printing of certificates and when it was detected, the certificate was recalled and the correct registration number of that student was inserted.
48. Apart from the registration number that the Petitioner hanged on to claim that the Certificate given to the student bearing the registration number was his, there was no other corroborative evidence to point to the fact that the Petitioner had in fact sat for all the examinable units and passed. I am reluctant to rely on a misprint in the certificates as proof of his medical qualifications yet the respondent has explained it and proved that it was in fact corrected. The Petitioner cannot simply take advantage of an error as proof of his qualifications.
49. The petitioner was all along fully aware why was ineligible for graduation, he had not satisfied the set requirements. He cannot thus claim that his right to fair administrative action under Article 47 was denied yet he was made aware why his application for graduation was rejected and the reason was units he had not done, not missing marks.
50. Moreover, the Petitioner cannot claim infringement of his right to education when it is clear it is he who that did not satisfy the set requirements for the award of the relevant certificates and not that the respondent had failed to impart on him the relevant skills by providing quality education as required by *the Constitution*.
51. Further, the Petitioner cannot complain of being denied the right to fair hearing when there is evidence that the Respondent, had by writing (email correspondence which the Petitioner did not rebut) tried to reach him to sort out the matter but the Petitioner did not show any interest.



52. In the circumstances, this Court finds none of the allegations put forward by the petitioner on violation of his Constitutional rights was proved.

53. Not even the claim of legitimate expectation could be substantiated based on facts relied on in this Petition given the decision of the Court of Appeal in Kenya Revenue Authority vs. Universal Corporation Ltd (2020) eKLR which defined legitimate expectation in the following words:

“a legitimate expectation arises where there is demonstration that: a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/ she/ it would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the public authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fell within the class of person(s) who were entitled to rely upon the representation(s) made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriment; there was no overriding interest arising from the decision maker's action and representation; the representation was fair in the circumstances of the particular case and that the same arose from actual or ostensible authority of the affected public authority to make the same; the promise related either to a past or future benefit; its main purpose is to challenge the decision maker to demonstrate regularity, predictability and certainty in their dealings with persons likely to be affected by their action in the discharge of their public mandate.”

54. In the instant Petition, there is not even an iota of evidence that the Respondent ever made a promise to the Petitioner to make him believe he would graduate without fulfilling the requisite academic requirements or that it was waiving any of the specified requirements. If anything, the Respondent's position to the Petitioner had always been clear that all the conditions for graduation had to be fulfilled, key among them sitting and passing all the units prescribed in the specified course of study.

55. For the reasons aforesaid, this Petition fails and is hereby dismissed. Each party to bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024.

.....

L N MUGAMBI

JUDGE

