



Kenya Human Rights Commission & 3 others v Attorney General & 4 others (Constitutional Petition E412 of 2023) [2024] KEHC 16369 (KLR) (Constitutional and Human Rights) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E412 OF 2023**

EC MWITA, J

DECEMBER 20, 2024

BETWEEN

**KENYA HUMAN RIGHTS COMMISSION 1ST PETITIONER
BOAZ WARUKU 2ND PETITIONER
ELIMU BORA WORKING GROUP 3RD PETITIONER
THE STUDENTS' CAUCUS 4TH PETITIONER**

AND

**THE ATTORNEY GENERAL 1ST RESPONDENT
CABINET SECRETARY FOR EDUCATION 2ND RESPONDENT
THE HIGHER EDUCATION LOANS BOARD 3RD RESPONDENT
THE TRUSTEES OF THE UNIVERSITIES FUND KENYA 4TH RESPONDENT
KENYA UNIVERSITIES AND COLLEGES CENTRAL PLACEMENT
SERVICE 5TH RESPONDENT**

The new university funding model is discriminatory.

The petitioners filed a petition against the Variable Scholarship and Loan Funding Model—to replace the Differentiated Unit Cost Model on grounds that it was discriminatory and unconstitutional. The court declared the new Variable Scholarship and Loan Funding Model unconstitutional, citing violations of the law, discrimination, and lack of public participation. It found that the model contravened the Universities Act by introducing a new funding framework without legislative backing. The court also ruled that the model unfairly categorized students based on financial background, type of school attended, and age, leading to discrimination. Additionally, it held that the abrupt implementation violated students' legitimate expectations. The court



prohibited the model's enforcement until constitutional and legal requirements were met, emphasizing the need for parliamentary oversight and meaningful public participation.

Reported by John Ribia

Constitutional Law – *interpretation of the Constitution – article 27(4) of the Constitution – implication of the word, “including” in listing prohibited grounds of discrimination - whether the use of the word, “including”, in article 27(4) of the Constitution meant that the listed prohibited grounds of discrimination were not conclusive.*

Constitutional Law – *fundamental rights and freedoms – right to equality and freedom from discrimination – university funding model – transition from Differentiated Unit Cost Model to the Variable Scholarship and Loan Funding Model – consideration of the Variable Scholarship and Loan Funding Model of income, schools attended, et al - whether implementation of the Variable Scholarship and Loan Funding Model that categorized students based on earnings was discriminatory - whether the Variable Scholarship and Loan Funding Model that categorized the funding available to students based on the school they attended in determining financial need was discriminatory and a violation of the right to education – Constitution of Kenya, article 27; Higher Education Loans Board Act, (Cap 213) section 3 , and 6; Universities Act (Cap 210) section 45(4)(e); 53; 53(1); 54; 54 (4) and 56(1).*

Constitutional Law – *national values and principles of governance – public participation – transition from Higher Education Loans Board to the Variable Scholarship and Loan Funding Model – public participation in the implementation of the Variable Scholarship and Loan Funding Model - whether the Variable Scholarship and Loan Funding Model was subjected to public participation - Constitution of Kenya article 10.*

Administrative Law – *legitimate expectation - transition from Differentiated Unit Cost Model under the Higher Education Loans Board (HELB) to the Variable Scholarship and Loan Funding Model – expectation of KCSE candidates to be placed and funded under HELB - whether the students who sat for their KCSE examinations between October and November 2022 and applied for university placement had a legitimate expectation that their placement was based on the old funding model (HELB) and not the Variable Scholarship and Loan Funding Model.*

Brief facts

On September 30, 2022, the President appointed a Presidential Working Party on Education Reform through Gazette Notice No. 11920. The working party was tasked with reviewing and recommending a governance and financing framework for technical and university education. Upon concluding its mandate, the working party presented a report dated June 9, 2023 to the President, recommending the introduction of a new higher education funding model—the Variable Scholarship and Loan Funding Model—to replace the Differentiated Unit Cost Model. However, the President launched the new model on May 3, 2023, before the report’s official release.

The new funding model required students to apply for government scholarships and loans, with funding determined by a Means Testing Instrument (MTI) based on financial need. Students were categorized into four levels: vulnerable, extremely needy, needy and less needy. The Kenya Human Rights Commission, Boaz Waruku, Elimu Bora Working Group, and the Students’ Caucus filed a constitutional petition challenging the legality and constitutionality of the new model. They argued that the model violated students’ rights, was discriminatory, lacked public participation, and had no legal basis.

The respondents, including the Attorney General and the Cabinet Secretary for Education, defended the model as a necessary reform to address declining government funding for public universities. They asserted that the MTI ensured equitable resource allocation and that the government retained its obligation to fund higher education.

Issues

- i. Whether the use of the word, “including”, in article 27(4) of the Constitution providing that, “the State shall not discriminate directly or indirectly against any person on any ground, including ...” meant that the listed prohibited grounds of discrimination thereunder were not conclusive.



- ii. Whether implementation of the Variable Scholarship and Loan Funding Model that categorized students based on earnings was discriminatory.
- iii. Whether the Variable Scholarship and Loan Funding Model that categorized the funding available to students based on the school they attended in determining financial need was discriminatory and a violation of the right to education.
- iv. Whether the students who sat for their KCSE examinations between October - November 2022 and applied for university courses and placement then had a legitimate expectation that their placement were based on the old funding model (HELB) and not the Variable Scholarship and Loan Funding Model.
- v. Whether the Variable Scholarship and Loan Funding Model was subjected to public participation.

Held

1. Section 53 of the Universities Act (the Act) established the Universities Fund. The Fund provided funds for universities, and identified sources of money for funding public universities. The primary source of the funds was Parliament. Under section 54, the Board of Trustees which managed the Fund, was responsible for establishing the maximum differentiated unit cost for the programmes offered in public universities, in consultation with the public universities. The differentiated unit cost as a funding model was a creature of statute.
2. Section 53 of the Act was clear on the funding for public universities so that Parliament had a duty to provide funds to public universities making funding of public university and university education predictable. Under the model, the government funded 80% of the differentiated unit cost while parents funded the shortfall of 20% through loans from the 3rd respondent. The model provided certainty so that once placed, a student knew that the government would fund 80% of the differentiated unit cost while the family would meet 20% of the cost and the student could apply for a loan from the 3rd respondent, a statutory body whose mandate was to grant loans to assist students obtain higher education.
3. Students seldom got from the 3rd respondent the 20% funding needed to bridge the gap left by the government funding. Their families still had to dig deeper to meet the balance, depending on the loan amount given by the 3rd respondent. The differentiated unit cost and loans from the 3rd respondent were predictable certain and less cumbersome because they were statute based.
4. The new funding model was to be based on Mean Testing Instrument. It identified funding as:
 1. Government scholarship-an average of 61%;
 2. government loan-an average of 35.5%;
 3. household contribution-an average of 3.5%.
5. The new funding model was not anchored on any law and the respondents did not point out any such law. The new funding model was also not clear on who would provide loans and how since one of the recommendations in the report by the working party, was the repeal of the Higher Education Loans Board Act (HELBA) and folding up of the Higher Education Loans, the 3rd respondent.
6. The respondent admitted that the government was responsible for the problems public universities faced due to reduced funding and could not be attributed to Kenyans. Education was a public good. Kenyans paid taxes so that the government could provide public goods. It was the duty of the State to fund public universities. It should not pass over more of its responsibility to its citizen who dutifully pay taxes and already shared in funding the higher education of their children.
7. The new funding model affected not only the intent of section 53 of the Universities Act, but also the operations of the Higher Education Loans Board and could not be implemented in the manner it was without legislative backing.
8. The new funding model, not being a creature of law, could not replace a funding model provided for by statute. The working party submitted recommendations whose implementation could only be done through legislation since it sought to replace a funding model provided for by a law enacted



- by Parliament. Such legislation would also allow Parliament scrutinize the efficacy and utility of the proposed funding model and exercise its oversight mandate under the Constitution. In the absence of legislation, the respondents acted unlawfully by attempting to implement the new funding model and bypassed Parliament's oversight mandate.
9. Whereas funding under the old model was uniform to all students, the new funding model effectively introduced classes among students, so that students would know themselves as vulnerable, very needy, needy or less needy. That was so, despite the constitutional decree that everyone was equal before the law and be afforded equal benefit of the law.
 10. The new funding model again categorised anyone earning between Kshs. 70,000 and 200,000 per month as less needy, with the likely result that children from families with such earnings may access low level of financing. It was also not clear whether the earnings were gross or net. It was unrealistic, if not unfair, to consider someone earning Kshs. 70,000 a month less needy considering the level of taxation in Kenya. Even though one may on paper appear to earn Kshs. 70,000, that may not be sufficient to meet family obligations, including university education for children.
 11. Article 27(1) of the Constitution provided that every person was equal before the law and had the right to equal protection and equal benefit of the law; that equality included the full and equal enjoyment of all rights and fundamental freedoms. The State was prohibited from directly or indirectly discriminating against any person on any ground. the Constitution used the word, "including" which meant the prohibited grounds of discrimination were not conclusive.
 12. The Constitution abhorred all forms of discrimination so that one's social standing or financial position may not be a ground for treating him differently. The Constitution prohibited both direct and indirect discrimination on any ground. Under the old funding model, all students were treated equally and provided equal opportunities to pursue higher education. According to the respondents, all students placed in public universities were entitled to 80% government funding while the 3rd respondent gave loans to those who were unable to raise the difference. The new funding model had introduced clusters categorising families and students as vulnerable; very needy; needy and less needy using Mean Testing Instrument based on some indicators, including statistics from Kenya Bureau of Statistics thus, creating a distinction and discrimination based on one's earnings.
 13. Although the categorisation appeared innocent and well-intended, it was not without problems when students were prominently placed in categories. It was not clear how the categorisation was achieved and whether it was fool-proof. For instance, the reference to "household" income as one of the factors to be considered in determining the student's level of need was ambiguous. What was "household" and what did household income entail? That term was broad and had not been defined leading to ambiguity.
 14. One's financial ability was not a communal issue that may be correctly represented by statistics. It was also possible that some people from areas designated as marginalised may be better-off than some in non-marginalised areas, yet designation of an area as marginalised was a factor in determining a student's level of financial need.
 15. Determination of a student's level of need was to be done arbitrarily based on a person's view and judgment which was subject to human frailty and abuse of discretion leading to unintended mis-categorisation resulting into discrimination.
 16. There could be no worse discrimination than using the type of school a student attended in determining his/her level of financial need. A school one attends was not necessarily evidence of ones' financial ability to meet higher education. Many parents were known to struggle to have their children attend private schools in order to get better education, score good grades and secure not only university entry grades but also get admitted to study good courses.
 17. Assuming that a parent or guardian who took his child to a private school was less needy, was to get the point wrong. Parents took their children to private schools not because they were financially able. They



- sacrificed to ensure that children got a good foundation in preparation for higher education. It could also be a pointer that something was wrong in public schools which should make the government ask itself what that could be instead of using it to tag one as less needy. That was discriminatory.
18. Applying such a standard was not only misleading but also discriminatory and a violation of articles 27, the right to education under article 43 (1)(f) of the Constitution and article 13 (2)(c) of the International Convention on Economic, Social and Cultural Rights which obligated States to ensure full realisation of higher education and make it accessible to all. Using the type of school a student attended might also be a reminder that the government was following on the attempt that was once made to give preference to students from public primary schools in admission to national secondary schools ahead of those from private schools notwithstanding their performance. Allowing use of a school a student attended as a means of determining their level of need was discriminatory and a violation of the Constitution.
 19. The circular that provided that no student should be denied funding on account of age and that students under 18 years be allowed to use their KCSE Index Numbers, if any, remained a circular. There was no logical explanation why such a recommendation was made in the first place and what it was intended to achieve. The recommendation remained and the court could not be persuaded by a mere promise and hope that the recommendation would not be implemented. It was discriminatory to use age as a basis for treating students differently given that age was one of the prohibited grounds of discrimination in article 27(4) of the Constitution and could not be allowed was a democratic state.
 20. The new funding model may also bring about unintended consequences on the choices of courses students make. Students not being sure of the categories in the hierarchy of needs they will be placed, may opt for less costly courses thereby allowing only those financial able to take courses that cost more and were usually prestigious thereby creating an imbalance in favour the few financially able and as a result, thwarting dreams of many students to pursue certain courses.
 21. Article 43(1)(f) of the Constitution provided that every person had the right to education, a socio-economic right the State had an obligation to respect and protect. Education being a public good, the government had a positive obligation to ensure that Kenyan students had access to the courses they desired without hindrance through prohibitive policies and tendencies such as the new funding model exhibited. Some of the recommendations and measures contained in the new funding model were discriminatory and violated the Constitution.
 22. The first students who have been subjected to the new funding model sat for their KCSE examinations in October - November 2022 and applied for university courses and placement then. Their applications for placement were based on the old funding model and they had expectations that they would be placed and funded under that model. The students made their choices based the old funding model with the expectation that they would be funded through the differentiated unit cost and loans from the Higher Education Loans Board, the funding model in law.
 23. Legitimate expectation enabled affected people to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. Students had chosen courses and units on the foundation of the existing funding model and had planned their education based on the certainty of the differentiated unit cost funding model and loans from the Higher Education Loans Board. The certainty of the funding based on the law that was still in place lifted their expectation as they planned to join higher learning.
 24. The abrupt and unexpected change through introduction of the new funding model violated students' legitimate expectation and planning which was also based on the law, that the government would fund 80% of their education through the differentiated unit cost model and loans from Higher Education Loans Board.
 25. Principles in article 10(2) of the Constitution bound every person whenever formulating or implementing public policy decisions. Recommendations which appeared to be of a policy nature



- should be subjected to public participation if their implementation had consequential effects. The new funding model as recommended had the effect of touching on the law and should have been subjected to public participation to allow people give their views even if for its improvement and clarity before implementation. That would also have given Kenyans not only information about the funding model but also opportunity comment on it and its implications before implementation. Although the word used in article 10(1)(d) was “makes” or “implements” public policy decisions, implementing a public policy with fundamental consequences to the people’s lives required peoples’ input before its implementation.
26. The essence of public participation was to allow people an opportunity to have a say on issues that affected them and touch on their lives. An issue as emotive as the new funding model which fundamentally affects people’s lives should have been subjected to public participation before being implemented. The views given before the working party were intended to enable the team come up with a report and recommendations. It was the recommendations that were to be implemented without going through a legislative process, like the new funding model which were to affect lives of the people, that should be subjected to public participation prior to implementation.
 27. The implementation of the recommendations on the new funding model was not subjected to public participation despite the drastic and fundamental shift it introduced in the funding of higher education in the country. Implementation of the new funding model without public participation violated the principle in article 10 of the Constitution.
 28. The new funding model was not anchored on any law. The body to which appeals lay was unknown; its composition was unknown and so was its procedures. It could be an *ad hoc* body that may decide appeals arbitrarily, capriciously and at whims. It may also be subject to abuse. That was not a guarantee that all would be well where lives of millions of students were affected, yet there was certainly a working funding model, however imperfect it may be perceived to be.
 29. The new funding model violated the law, namely; section 53 of the Universities Act. The section identified the differentiated unit cost as the funding model with funds allocated by Parliament among other sources. The new funding model provided for a specific sharing of higher education funding without onboarding it to statute thus, introducing a funding model through a policy in conflict with the law.
 30. The new funding model was discriminatory in some respects, introduced classes based on perceive financial ability; discrimination among students based on the type of school a student attended whether private or public and introduced age as a factor in accessing funding. It also introduced an ambiguous and unknown term “household” income as a basis for accessing funding. All those violated article 27 of the Constitution.
 31. The new funding model violated the legitimate expectation of students and their families. The current group of students chose universities, courses and units based on the differentiated unit cost and the loans from Higher Education Loans Board as the funding model but found themselves confronted with the abruptly introduced Variable Scholarship and Loan, a new funding model they were not aware of. Having planned their university affairs based on the differentiated unit cost funding model, the abrupt implementation of the new funding model was a violation of their legitimate expectation.
 32. The new funding model was not subjected to public participation despite its fundamental effects to the country’s education system. The implementation of the funding model also bypassed Parliamentary oversight in violation of article 95(5)(b) of the Constitution.

Petition allowed.

Orders

- i. *Declaration issued that the implementation of Variable Scholarship and Loan Funding Model as it existed contravened section 53 of the Universities Act and the mandate of the Higher Education Loans Board and was unlawful.*



- ii. *A Declaration issued that the Variable Scholarship and Loan Funding Model was discriminatory and violated students' legitimate expectation.*
- iii. *Declaration issued that that the Variable Scholarship and Loan Funding Model was unconstitutional for lack of public participation.*
- iv. *An order of prohibition was issued prohibiting implementation of the Variable Scholarship and Loan Funding Model until the government complied with constitutional and legal requirements where necessary.*
- v. *No order as to costs.*

Citations

Cases

Kenya

1. *Atwal, Rapinder Kaur v Manjit Singh Amrit* Matrimonial Cause 122 of 2006; [2007] KEHC 2729 (KLR) - (Mentioned)
2. *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Followed)
3. *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission (Interested Party)* Petition E002 of 2022; [2022] KEHC 955 (KLR) - (Followed)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2015] KESC 13 (KLR) - (Explained)
5. *Gakuru, Robert N & others v Governor Kiambu County & 3 others* Petition 532 of 2014; [2014] KEHC 7516 (KLR) - (Mentioned)
6. *Gichuru v Package Insurance Brokers Ltd* Petition 36 of 2019; [2021] KESC 12 (KLR) - (Mentioned)
7. *In the matter of the Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR) - (Mentioned)
8. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR) - (Followed)
9. *Kenya Medical Practitioners, Pharmacists and Dentists' Union v University of Nairobi & Universities Funding Board* Constitutional Petition E265 of 2021; [2021] KEHC 13442 (KLR) - (Mentioned)
10. *Kenya Revenue Authority & 2 others v Darasa investments Limited* Civil Appeal 24 of 2018; [2018] KECA 358 (KLR) - (Mentioned)
11. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* Miscellaneous Civil Application 743 of 2006; [2007] KEHC 3680 (KLR) - (Explained)
12. *Kiambu County Government & 3 others v Robert N. Gakuru & Others* Civil Appeal 200 of 2014; [2017] KECA 459 (KLR) - (Mentioned)
13. *Kiongo, Jane & 15 others v Laikipia University & 6 others* Petition 596 of 2017; [2019] KEHC 11480 (KLR) - (Mentioned)
14. *Kithinji, Dickson Mwenda v Gatirau Peter Munya & 2 others* Civil Appeal 38 of 2013; [2014] KECA 884 (KLR) - (Mentioned)
15. *Manana, Jacqueline Okeyo & 5 others v Attorney General & another* Petition 36 of 2018; [2018] KEHC 9395 (KLR) - (Explained)
16. *Matemu v Trusted Society of Human Rights Alliance & 2 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Mentioned)
17. *Mugo & 14 others v Matiang'i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Parties)* Constitutional Petition 4 of 2019; [2022] KEHC 158 (KLR) - (Mentioned)



18. *Mutemi, Michael Mutinda v Permanent Secretary, Ministry of Education & others* Constitutional Petition 133 of 2013; [2013] eKLR - (Mentioned)
19. *Mwai, John & 3 others v Kenya national Examination Council & 2 others* Petition 15 of 2011; [2011] KEHC 1696 (KLR) - (Mentioned)
20. *Ngoge, Peter O v Francis Ole Kaparo & 4 others* ? 22 of 2004; [2007] KEHC 1412 (KLR) - (Mentioned)
21. *Nthuki, Gladys Nduku v Letsbege Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* Civil Case E007 of 2021; [2022] KEHC 2227 (KLR) - (Explained)
22. *Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (Interested Parties)* Petition E242 of 2022; [2022] KEHC 11630 (KLR) - (Mentioned)
23. *Peter K Waweru v attorney General* [2006] eKLR - (Explained)
24. *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex parte Council of County Governor & another* Miscellaneous Application 291 & 314 of 2016; [2017] KEHC 4133 (KLR) - (Followed)
25. *Republic v Kenya Revenue Authority; Proto Energy Limited (Ex parte)* Judicial Review Application E023 of 2021; [2022] KEHC 5 (KLR) - (Followed)
26. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Mentioned)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly & Others* (CCT1205) [2006] ZACC 11 - (Mentioned)
2. *Masetbla v President of the Republic of South Africa* Case CCT 0107; [2007] ZACC2 - (Mentioned)
3. *Minister for Health v New Chicks South Africa Pty Ltd* CCT 5904 - (Explained)
4. *South African Veterinary Council v Szymanski* 2003(4) SA 42 (SCA) - (Mentioned)

India

State of Kerala & another v NMT Thomas & others Civil Appeal No 1160 of 1974; (1976 AIR 490 1976 SCR (1) 906) - (Mentioned)

Canada

Canada (Attorney General) v Mavi 2011 SCC 30 [2011] 2 SCR 504 - (Explained)

Texts

Parliament (2019), *Policy Framework for Reforming Education for Sustainable Development in Kenya* Kenya-Sessional Paper No 1 of 2019

Statutes

Kenya

1. Basic Education Act (cap 211) In general - (Cited)
2. Constitution articles 4(2); 10(1); 10(2)(a); 21(2); 24 ; 27; 27(6); 43(1) (f); 46(1)(a); 47; 53(1)(b); 56: 95(5)(b); 118; 131(2); 132(3)(b) - (Interpreted)
3. Data Protection Act (cap 411C) In general - (Cited)
4. Fair Administrative Action Act (cap 7L) section 5 - (Interpreted)
5. Higher Education Loans Board Act (cap 213) sections 3 , 6 - (Interpreted)
6. Universities Act (cap 210) sections 45(4)(e); 53; 53(1); 54; 54 (4); 56(1) - (Interpreted)

Instruments

1. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 article 13(2)(c)

Advocates

None mentioned



JUDGMENT

1. On September 30, 2022, the President appointed a Presidential Working Party on Education Reform (herein the working party) through Gazette Notice No 11920. The mandate of the working party included; to review and recommend a governance and financing framework for TVET training and development, university education, research and training.
2. On concluding its mandate, the working party presented a report dated June 9, 2023 to the President with several recommendations. Key among the recommendations, was introduction of a new higher education funding model called Variable Scholarship and Loan Funding Model (herein new funding Model) to replace the Differentiated Unit Cost Model (herein old funding model). The President launched the new funding model on May 3, 2023 earlier than the date of the report.
3. The new funding model raised immediate concerns in the country leading to the filing of this petition challenging the legality and constitutionality of this new funding model. Kenya Human Rights Commission, Boaz Waruku, Elimu Bora Working Group and the Students' Caucus, (the petitioners), brought this petition against the Attorney General; Cabinet Secretary For Education; the Higher Education Loans Board; the Trustees of the Universities Fund Kenya and Kenya Universities and Colleges Central Placement Service as (the 1st to 5th respondents).

Petitioners' Case

4. The petitioners argued that the new funding model has introduced funding through a combination of loans, government scholarships and household contributions whereby scholarships and loans are apportioned according to the category a student is placed either, vulnerable; very needy; needy or less needy.
5. Students are expected to apply for the loans and scholarships and their applications are considered by use of Mean Testing Instrument (MTI) to determine the student's level of financial need.
6. The petitioners asserted that the new funding model violates students' rights and is thus, unconstitutional. The new funding model is also ultra vires, illegal and violates legitimate expectations. The new funding model is arbitrary, obscure, expensive and an affront to the right to education, a violation of article 43(1)(f) of the *Constitution*.
7. The petitioners further argued that by implementing the new funding model, the respondents abrogated their duty under article 21(2) of the *Constitution* and article 13(2)(c) of the [*International Covenant on Economic, Social and Cultural Rights*](#) (ICESCR).
8. The petitioners took the position that the new funding model is also discriminatory and violates article 27 of the *Constitution* because it requires that a student be above the age of 18 to apply for funding. The model further discriminates against millions of students because it subjects them to classifications that are based on their families' financial ability.
9. The petitioners take the further position that in launching the model, the President breached his prerogatives in article 131(2) of the *Constitution* and usurped the mandate of Parliament under article 94(5) of the *constitution*. There was also no public participation before the launch of the model in violation of article 10(2)(a) of the *Constitution*. The decision to implement this model was arbitrary, capricious, unlawful and ultra vires and a violation of article 47 of the *constitution* and section 5 of the *Fair Administrative Action Act, 2015*.



10. The petitioners asserted there was no consultation regarding the removal of HELB facilities nor public participation regarding the categorization of students and the consequential and differential funding expectations of each of these categories. Legitimate expectation of students in higher learning institutions has been violated through implementation of the new funding model.
11. The petitioners again stated that the respondents have violated sections 53 and 54 of the *Universities Act, 2012*, in seeking to usurp the statutory mandate to manage university funding. They are acting ultra vires in taking over the responsibility of the Universities Fund. They argued that the 4th respondent is also acting ultra vires by sharing its exclusive mandate of funding universities without any legal basis. The respondents are acting *ultra vires* section 45(4)(e) of the *Universities Act* in implementing the new funding model.
12. According to the petitioners, education is a public good and a state responsibility hence the shift of responsibility to the learner and parents should be justified in the precincts of article 24 of the *Constitution*. Failing to do so amounts to a breach of article 43(1)(f) of the *Constitution*.
13. The petitioners argued that given that the differentiated unit cost is the lawful funding model, a change to a new funding model must be justified as making higher and quality education more accessible to students. The respondents have not demonstrated how they have met this criterion.
14. The petitioners stated that the new funding model violates article 21 of the *Constitution*. They relied on the decisions in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR and *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & others* [2013] eKLR.
15. The petitioners submitted that the respondents failed to subject the new funding model to real, inclusive and meaningful public participation in compliance with article 118 of the *Constitution* and the Supreme Court decision in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR.
16. Any public participation with respect to the new funding model, they argued, was carried out prior to the preparation of the model; the respondents did not outline the ways in which public participation exercise prior to drafting the working party's recommendations was conducted.
17. The petitioners placed reliance on the decisions in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others ex parte Council of County Governor & another* [2017] eKLR; *Mugo & 14 others v Matiangi & Another; Independent Electoral and Boundaries commission of Kenya & 19 others (Interested Party)* (2022) KEHC 158 (KLR); *Kenya Medical Practitioners, Pharmacists and Dentists' Union v University of Nairobi & another* [2021] eKLR and *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR.
18. The petitioners again argued that sections 53 and 54 of the *Universities Act, 2012* provide for the management, allocation and apportionment of money in the Universities Fund and for the differentiated unit cost. It was unlawful and ultravires to implement the new funding model without amending or repealing sections 53 and 54. Reliance was placed on *Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (Interested party)* [2022] KEHC 11630 (KLR).
19. The petitioners also argued that the new funding model violates article 27 of the *Constitution* by failing to provide for different classes of students, including those living with disabilities in a manner that



- would promote affirmative action programmes or any other policy measures as required by articles 27(6) and 56 of the *Constitution*. The new funding model, they argued, sets very narrow categories based purely on financial ability. They relied on the decisions in *Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 (KLR) and *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission (Interested Party)* [2022] eKLR.
20. The criteria for determining financial needs of students is not clear, transparent and inclusive. While it claims to consider the financial and educational institution backgrounds of the students, it fails to consider other socio-economic factors such as the increased costs of living and rising risk of unemployment.
 21. The criteria employed though said to be intended to correct inequality, violates article 27 of the *Constitution*. Students who previously attended private learning institutions, students from two parent family backgrounds and students from higher earning family backgrounds despite family size will be deemed unworthy of government funding, despite being in need of financial assistance and backgrounds. They relied on *John Mwai & 3 others v Kenya national Examination Council & 2 others* [2011] eKLR.
 22. The petitioners asserted that the new funding model caters for only tuition fees and ignores accommodation, upkeep and costs of study materials which still exposes students from poor backgrounds who are not able to meet these costs dangers of abandoning education.
 23. The petitioners further asserted that the respondents are in breach of the legitimate expectations of university students and parents who had already joined university prior to the *Constitution* of the working party and its consequent report. As such, the new funding model is unlawfully and unjustly applied to them to their detriment. They relied on *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) and *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* [2022] KEHC 5 (KLR) on legitimate expectation.
 24. On the basis of the above concerns, the petitioners sought several declarations and orders against the respondents targeted at nullifying the new funding model as follows:
 1. A declaration that the implementation of variable scholarship and loan funding (VSLF) Model (or New Higher education Funding Model) as it currently stands is unconstitutional, null and void.
 2. A declaration that the respondents are in contravention of sections 53 and 54 of the *Universities Act*, and to that extent their actions are unconstitutional, null and void.
 3. An order or prohibition or injunction restraining the implementation or coming into force or continued operation or the higher funding model until all the respondents comply with all the constitutional requirements.
 4. An order of prohibition restraining the respondents either jointly or severally by themselves, officers subordinate to them, agents, assigns, representatives, employees, servants or otherwise howsoever from taking any steps to enforce or in any way implement the variable scholarship and loan funding model (or new higher education funding model).
 5. An order that the respondents are to report back to this honourable court regularly, as the court may direct, to update the court on the measures taken to correct and prevent further infringement of the breaches of fundamental rights and citizens occasioned by the unjust



implementation of the variable scholarship and loan funding model (or new higher education funding model) and the measures taken to ensure equitable access to higher education.

6. A declaration that the students' right to legitimate expectation has been infringed by the respondents.
7. Any other relief that this honourable court deems fit to grant in the interests of justice and that may become apparent and necessary in the course of these proceedings.

1st and 2nd Respondents' Case

25. The 1st and 2nd respondents opposed this petition through a replying affidavit sworn on December 27, 2023 by Dr Beatrice Muganda Inyangala and written submissions. The 1st and 2nd respondents argued that by virtue of articles 43(1)(f), 46(1)(a) and 53(1)(b) of the *Constitution*, the 2nd respondent is obligated to develop relevant legal and policy frameworks including laws, regulations and standards to ensure access to quality education, effective regulation and governance in educational and training institutions and financing of tertiary education.
26. The 1st and 2nd respondents further stated that although the *Basic Education Act*, 2013 and the International Human Rights Instruments provide for free basic and compulsory education, secondary and higher education should be made accessible to all, on the basis of capacity through appropriate means.
27. They argued that due to tremendous growth in the university education sector and Technical Vocational Education Training Institutions, it has resulted into the need for more resources to fund tertiary education but government funding has not increased at the same level, necessitating reforms to ensure sustainability. This was also identified in the policy governing education in Kenya-Sessional Paper No 1 of 2019 on [*Policy Framework for Reforming Education for Sustainable Development in Kenya*](#).
28. It was in recognition of these challenges in the education sector and the need to address them, that the President appointed the working party to review the existing legal, policy administrative and governance frameworks in the education sector and make recommendations. The working party recommended the new funding model to replace the old funding model which expected the government to meet 80% of differentiated unit cost for the program a student was enrolled for. Student and their families were to fund the 20% and those not able to raise the 20% would apply for loans from Higher Education Loans Board, the 3rd respondent.
29. The 1st and 2nd respondents contended that the old funding model was not effective because government funding of public universities had been declining over the years leaving most public universities burdened with debts. The old funding model did not also take into account the cost of postgraduate courses, did not consider the cost of TVET courses in public universities and generalized all universities without addressing the unique challenges each institution faced.
30. They stated that under the new funding model, students will apply for financial assistance, including government scholarships, loans and bursaries. This is different from the old model where all students placed at universities or TVET institutions through the 5th respondent were entitled to government funding.
31. The 1st and 2nd respondents maintained that the new funding model will promote equity by avoiding uniform automatic government funding for all students placed by 5th respondent which did not take into account those who could afford to contribute some money towards education of their children



- and disadvantages of those from vulnerable and needy backgrounds. Funding will be based on the levels of need established through a Mean Testing Instrument to determine the level of funding for government scholarships, loans and bursaries.
32. According to the 1st and 2nd respondents, the new funding model is not discriminatory against certain classes of students; classification of students according to their level of need was not done arbitrarily and the distinction does not have the effect of impairing equal treatment in education.
 33. The 1st and 2nd respondents argued that contrary to the assertions that the new funding model has no legal basis, it is responsible for matters concerning universities which include university funding. A key function of the board of the Trustees of the University Fund under section 54(4)(a) of the *Universities Act* is advising the Cabinet Secretary in matters of university funding and related policy issues.
 34. They urged that the Universities Funding Board had effectively discharged its mandate in setting the criteria for funding and disbursing funds under the new funding model pursuant to section 54(4)(b) and 54(4)(c) of the *Universities Act*.
 35. The establishment of the working party was not ultravires; the President was discharging his functions under article 132(3)(b) of the *Constitution*; the implementation of the new funding model did not contravene section 5 of the Fair Administration Action Act and the petitioners did not demonstrate the manner in which the funding model violated students' rights.
 36. The 1st and 2nd respondents maintained that they have not contravened article 43(1)(f) of the *Constitution* and article 13(2) of the *ICESCR*. It is their case, that the new funding model has ensured that the right to education guaranteed under article 43(1)(f) of the *Constitution* is protected and preserved while at the same time ensuring sustainable financing of tertiary education.
 37. The 1st and 2nd respondents further argued that the right to education is not absolute and can be limited in terms of article 24 of the *Constitution* which was done under the new funding model. The classes and/or categories developed under this model were formulated not to discriminate against any class of students or impair their equal treatment in the attainment of education.
 38. The 1st and 2nd respondents maintained that the new funding model was meant to achieve sustainability in financing tertiary education because the old model had become ineffective. They argued that article 43 rights are subject to progressive realization in terms of article 21(2) of the *Constitution* which they are in full compliance with in formulating the new funding model. They urged that article 13(2) of the *ICESCR* must be read and interpreted with regard to the principle of progressive realization of rights. They relied on *re the Matter of the Principle of Gender Representation in the National Assembly and the Senate*(*supra*).
 39. The 1st and 2nd respondents reiterated that they met the threshold of public participation as shown in the 2nd respondents replying affidavit. Participation does not also mean all views given must be accepted. They relied on *Doctors for Life International v Speaker of the National Assembly & Others* (CCT1205) [2006] ZACC 11; *Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR; *in the matter of the Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy and 17 others* [2015] eKLR, among other decisions.
 40. The 1st and 2nd respondents further relied on articles 131(2) as read with articles 132(1)(c)(i)(ii) and 132(3) of the *constitution* to argue that the President's directive and the subsequent implementation of the new funding model was legal, constitutional and within the powers delegated to the President by the *Constitution*. They urged this court to accord the executive sufficient latitude to discharge its mandate under the *constitution* and the law and the doctrine of separation of powers. They relied



on *Masehla v President of the Republic of South Africa Case* CCT 0107[2007] ZACC2 and *Mumo Matemu v Trusted Society of Human Rights Alliance and 2 others* [2013] eKLR.

41. The 1st and 2nd respondents took the view, that the new funding model promotes equality among all students and guards against non-discrimination of any student. They relied on article 27(6) of the *Constitution* to contend that student funding will be based on a student's level of need established through a Means Testing Instrument that will determine the level of funding for government scholarship, loans and bursaries unlike the old funding model that was based on a uniform grant to all students, including those whose parents could afford to contribute some money towards their education.
42. The 1st and 2nd respondents argued that under the new funding model no student will be disadvantaged and/or discriminated against including those who come from extremely vulnerable and needy backgrounds. The 1st and 2nd respondents urged the court to consider the decision in *State of Kerala and another v NM Thomas and others*, Civil Appeal No 1160 of 1974 (1976 AIR 490 1976 SCR (1) 906).
43. The 1st and 2nd respondents denied violating legitimate expectation of university students. In any event, they argued, legitimate expectation cannot override provisions of the law and relied on the decisions in *Jane Kiongo & 15 others v Laikipia University & 6 others* [2019] eKLR and *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR.
44. The new funding model will ensure that all students regardless of their extreme vulnerability and or needs will receive government funding equally according to their level of need which will enhance sustainability of financing tertiary education. Students who have not attained the age of 18 years and do not have national identity cards will be granted scholarships and loans to fund their education by use of their Kenya Certificate of Secondary Education Index Numbers.
45. The 1st and 2nd respondents urged the court to consider that implementation of the *constitution* is ever continuing. They relied on *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR and *Speaker of the Senate and another v Attorney General and 4 others* [2013] eKLR and prayed that the petition be dismissed with costs.

3rd Respondent's Case

46. The 3rd respondent also opposed the petition through a replying affidavit sworn on November 14, 2023 by Charles Mutuma Ringera. The 3rd respondent is established under section 3 of the *Higher Education Loans Board Act* and is managed by a Board established under section 4 of the Act. It discharges its mandate in accordance with section 6 of the said *Act*.
47. The 3rd respondent's mandate includes managing the Fund to be used for granting loans to assist Kenyans students obtain higher education in recognized institutions within and outside Kenya and for matters incidental thereto and connected therewith.
48. Pursuant to article 43(1)(f) read with articles 53(1)(b), 54(1)(b), 55(a) and 56(b) of the *Constitution*, the 3rd respondent is obligated to either directly or indirectly through its agencies, develop rules, policies and standards to promote and uphold the realisation of the right to education by the citizens.
49. The 3rd respondent stated that in order to achieve the objectives in article 43(1) of the *Constitution* and make tertiary education accessible to all Kenyans, the government has over the years and on need basis, adopted various approaches depending on availability of resources *vis-à-vis* demand for financing.



50. Over the years, enrolment of students in universities and TVET institutions has grown and prior to 2016, government sponsorship in public universities was based on minimum cut-off points scored in KCSE influenced by available resources. However, in 2017, the government adopted the differentiated unit cost funding model which has not been effective.
51. Since the adoption of the old funding model, the highest funding was provided in the financial year 2017/18 at 66.4 % of the differentiated unit cost. Over the years, there has been a progressive decline in funding reaching a low of 48 % in the financial year 2022-2023 and it has been projected that differentiated unit cost funding would keep declining to 21.4 % by the year 2027-2028.
52. The reduced funding has constrained public universities financially and caused accumulation of pending bills which stood as about Kshs 77.7 billion as at September 30, 2023, necessitating the appointment of the working party.
53. The working party conducted an analysis of the education sector, collected views and submissions from the public, including Kenyans in the diaspora, heard from stakeholders in Town hall meetings at county level including from learners, elected leaders, civil societies and development partners among others. It also conducted interviews with key stakeholders and relevant representatives of government ministries, department and agencies.
54. The working party proposed the new funding model for public universities and TVET institutions which was to take effect with those joining universities and TEVT institutions in the 2023-2024 academic year. Continuing students were to continue being funded under the old funding model. The 3rd respondent argued that the new funding model is a dynamic shift from institutional to student centred approach with the aim of shifting from equality to enhancing equity in education.
55. To obtain equity, the new funding model proposed funding of students based on a student's level of need which is represented broadly by household weighted income levels and/or expenditure, namely, level 1(vulnerable); level 2 (Extremely Needy); Level 3 (Needy) and Level 4(Less Needy). In determining the student's level of financial need, the scientific Mean Testing Instrument is used. It assesses the student's financial level of need by scoring on various parameters derived from probability of poverty indices provided by the Kenya National Bureau of statistics (KNBS) and equity, social justice and protection of the marginalised as envisaged under article 10 of the *Constitution*. There is an appeal mechanism if the applicant is dissatisfied with the amount awarded.
56. According to the 3rd respondent, students who have not attained the age of majority and do not have national identification documents, can apply for loans under both the new and old funding models. There is no discrimination on ground of age.
57. The 3rd respondent stated that in compliance with the [Data Protection Act](#) (2019) Data Protection Impact Assessment was done and filed with the office of Data Protection Commissioner. The Data Sharing Agreements have been signed with the Kenya Revenue Authority, National Hospital Insurance Fund, Kenya National Bureau of Statics, NEMIS, Safaricom and IPRS.
58. The government is still financing the greater part of the cost through loans and scholarships in the new funding model and it is intended that the loans will create a revolving fund through repayments to ensure sustainability for funding future eligible applicants.
59. The categories the new funding model sets is for internal use determined by the Mean Testing Instrument to assist in determining how much funds may be allocated to an applicant. The scholarships and loans levels are not arbitrary but are based on a scientifically tested and proven Mean



Testing Instrument used and improved over time since 1995. Consequently, the new funding model is not discriminatory but allows all students to apply for scholarships and loans.

60. During programme selection and subsequent placement by the 5th respondent, applicants were informed of their choices, the declared programme costs offered by all higher learning institutions and the type of institutions.
61. On May 3, 2023 the President addressed the nation and reasons for the new funding model were given to the public. The online application portal also has additional information on the new funding model. There was no violation of article 47 or legitimate expectation.

4th Respondent's Case

62. The 4th respondent filed a replying affidavit sworn on November 14, 2023 by Geoffrey Monari in opposition to the petition. The 4th respondent stated that the new funding model was prepared through a consultative process where the working party received oral and written submissions from Kenyans across all the 47 counties and from those in the diaspora.
63. The new funding model was informed by the principles of fairness and equity and aims at increased access to quality and affordable education. This model does not impede on any student's right to education but offers scholarships and loans to all students who pursue tertiary education in Kenya.
64. The 4th respondent asserted that contrary to the petitioners' arguments, the new funding model is based on the household capability of each applicant and evaluates the financial capacity of each household before allocating the scholarship category through Mean Testing Instrument which addresses equitable access and inclusion in education benchmarks.
65. The new funding model does not exclude students under the age of 18 from accessing scholarships and loans. They have been provided with an alternative form of application using their KCSE index numbers. The 4th respondent posited that all the respondents have a legal mandate to provide access to tertiary education through provision of funding and policy formulation.
66. The 3rd and 4th respondents relied on several decisions to support their positions.

5th Respondent's Case

67. The 5th respondent opposed the petition through a replying affidavit and written submissions. The 5th respondent stated that under section 56(1) of the *universities Act*, its mandate includes, among others, to co-ordinate the placement of government sponsored students to universities and colleges and disseminate information on available programmes, their costs, and areas of study prioritized by the government.
68. in exercising that mandate, it has designed a platform that offers the Placement Management Information System for purposes of placing students and posting the programs offered by universities and colleges.
69. The 5th respondents asserted that despite undertaking the above measures, many students were locked out from accessing education at the tertiary level due to increasing regional, gender and socio-economic disparities. This led to the development of policy framework for reforming education and training for sustainable development in Kenya.
70. To implement the policies highlighted in the sessional paper, various strategies were proposed for its implementation to enable institutions increase enrolment of students with special needs



through affirmative action and continue to support the marginalized and the poor to ensure broader participation in priority programmes, among others.

71. In order to ensure that no student was left behind in pursuing tertiary education, it has ensured all students with a minimum of C+ KCSE are given a chance to select and pursue a program of their choice in the university. It has overseen placement of students to tertiary institutions increasing progressively.
72. Sponsorship of students was based on the old funding model but due to the increasing number of student placement, financing through the old model has been decreasing thus, compromising the allocation of government sponsored students. As a result, the working party recognized several challenges based on the old funding model over and above the inadequate funding to universities. This led to the new funding model which was proposed to mitigate the increasing demand for financing the number of students seeking to be placed in tertiary institutions and ensure equity financing.
73. The 5th respondent relied on the decisions in *Peter O Ngoge v Francis Ole Kaparo & 4 others* [2007] KEHC 1433 (KLR) and *Rapinder Kaur Atwal v Manjit Singh Amrit* [2007] eKLR for the argument that the petitioners have not demonstrated any constitutional breaches on its part.
74. The 5th respondent again relied on the decision in *Gladys Nduku Ntbuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR that the matters raised in the petition are not within its legal mandate. Placement of students has been delinked from funding hence it was wrongly joined into these proceedings.
75. Based on the above arguments, the respondents collectively urged that the petition be dismissed with costs.

Determination

76. Upon considering the petition, responses and arguments by parties. I have distilled the following issues for determination, namely; whether implementation of the new funding model violates the law; is discriminatory; violates legitimate expectation of students and should have been subjected to public participation.

Violation of the Law

77. The petitioners' case is that the new funding model violates the law and in particular sections 53 and 54 of the *Universities Act*.
78. The respondents on their part, maintained that the new funding model is lawful, will bring equity and enable even the most vulnerable students access funding while sustaining universities whose funding had decreased and fallen into unsustainable debts. According to the respondents, students whose families are able to support their education should receive limited funding while needy students get scholarships and loans to finance their university education. The new funding model is not discriminatory and does not violate legitimate expectation. There was also public participation.
79. The grievance in this petition arose following the implementation of the new funding model proposed in the report by the working party appointed by the President and submitted to the President on 9th June 2023. The report recommended a new model called Variable Scholarship and Loan Funding to replace the Differentiated Unit Cost. The new funding model is said to have been launched on May 3, 2023 and affected students joining universities and TVETs in the 2023/24 academic year.



80. The petitioners' first grievance is that the new funding model violates sections 53 and 54 of the *Universities Act*. It is their case, that the new funding model is intended to replace the differentiated unit cost, a model recognised in law without first amending the law.
81. Section 53(1) of the *Universities Act* establishes the Universities Fund whose object and purpose is to provide funds for financing universities. Monies paid into the Fund comes from Parliament; money received by the Board in the form of donations; money specifically designated for the Fund by the Board out of its own Funds; income generated by investments made by the Trustees; and endowments, grants and gifts from whatever source designated for the Fund.
82. Subsection (4) provides for expenditure to be paid out of the Fund, that is; any expenditure approved by the Trustees for the funding of public universities; any expenditure approved by the Trustees for conditional grants and loans to private universities; and any expenditure authorized by the Trustees to be incurred in connection with the administration of the Fund.
83. The Fund is to be managed by a nine-member Board of Trustees appointed by the Cabinet Secretary (s 54). The function of the Trustees is to generally manage the Fund and more particularly to—
- (a) advise the Cabinet Secretary in matters of university education funding and related policy issues; establish the maximum differentiated unit cost for the programmes offered;
 - (f) mobilize and receive funds for purposes of the Fund from the Government, donors, and from any other source; and (g) exercise any other power for the better performance of its functions under this Act.
 - (d) in consultation with the public universities,
 - (c) apportion funds to universities in accordance with criteria established;
 - (b) in consultation with the Cabinet Secretary, develop a transparent and fair criteria for allocation of funds to universities;
84. As can be seen from section 53, it is the Fund that is to provide funds for universities, and identifies sources of money for funding public universities. The primary source of the funds is Parliament. It is also true that under section 54, the Borad of Trustee which manages the Fund, is responsible for establishing the maximum differentiated unit cost for the programmes offered in public universities, in consultation with the public universities. The differentiated unit cost as a funding model, is therefore, a creature of statute.
85. According to the respondents, under this model (the differentiated unit cost model), the government meets 80% of the differentiated unit cost for the program a student is enrolled for while the student's family meets the 20%. Those not able to raise the 20% apply for loans from the Higher Education Loans Board, the 3rd respondent.
86. The new funding model, on the other hand, introduces what is called Variable Scholarship and Loan Funding. This funding model is based on a Mean Testing Instrument, a scientific method which will determine the level of financial need of a student. The new funding model also introduces different sources of funding and categorises students into; vulnerable; extremely needy; needy and less needy. Students will apply for financial assistance, including government scholarships and loans which is different from the differentiated unit cost model where all students placed in public universities through the 5th respondent are entitled to government funding to the extent of 80% of the differentiated unit cost.



87. It is this new arrangement that the petitioners argued, violates not only the law but also the article 43(1)(f) right and categorises students into classes which is discriminatory, making the whole scheme not only unlawful but also unconstitutional.
88. It is true that the law (section 53 of the *Universities Act*), recognises the differentiated unit cost as the funding model and establishes a Fund whose object and purpose is to provide funds for financing public universities. The section also identifies clear sources of funds to be channelled into that Fund, the primary sources being the government through Parliament. The section identifies other sources such as grants, donations, income generated by investments made by the Trustees; endowments and gifts from whatever source designated for the Fund.
89. Section 53 is therefore clear on the funding for public universities so that Parliament has a duty to provide funds to public universities making funding of public university and university education predictable. This is so, because under this model, the government funds 80% of the differentiated unit cost while parents fund the shortfall of 20% through loans from the 3rd respondent. This model provides certainty so that once placed, a student knows that the government will fund 80% of the differentiated unit cost while the family will meet 20% of the cost and the student can apply for a loan from the 3rd respondent, a statutory body whose mandate is to grant loans to assist students obtain higher education.
90. Students seldom get from the 3rd respondent the 20% funding needed to bridge the gap left by the government funding. Their families still have to dig deeper to meet the balance, depending on the loan amount given by the 3rd respondent. The differentiated unit cost and loans from the 3rd respondent are thus, predictable certain and less cumbersome because they are statute based.
91. On the other hand, the new funding model is to be based on Mean Testing Instrument. (see Appendix 10.2 on Higher Education Funding Model). It identifies funding as follows: (a) Government scholarship-an average of 61%; (b) government loan-an average of 35.5%; (c) household contribution-an average of 3.5%. This new funding model is not anchored on any law and the respondents did not point out any such law. The new funding model is also not clear on who will provide loans and how since one of the recommendations in the report by the working party, is the repeal of the *HELB Act* and folding up of the Higher Education Loans, the 3rd respondent.
92. The petitioners argued that the government is passing over its responsibility to parents, which the respondents denied. The respondents contended that there has been an increase in the number of students placed in public universities and other tertiary institutions while government funding in universities has progressively decreased. As a result, universities are facing problems, including heavy debts. That was why the new funding model was proposed. This is a clear admission that the government is responsible for the problems public universities face due to reduced funding and cannot be attributed to Kenyans.
93. Education is a public good. Kenyans pay taxes so that the government can provide public goods. In that respect, it is the duty of the state government to fund public universities. It should not pass over more of its responsibility to its citizen who dutifully pay taxes and already share in funding higher education of their children.
94. There is no doubt that the new funding model affects not only the intendment of section 53 of the *Universities Act*, but also the operations of the Higher Education Loans Board and could not be implemented in the manner it was without legislative backing.



95. I agree with the petitioners that the new funding model, not being a creature of law, cannot replace a funding model provided for by statute. The working party submitted recommendations whose implementation could only be done through legislation since it sought to replace a funding model provided for by a law enacted by Parliament. Such legislation would also allow Parliament scrutinize the efficacy and utility of the proposed funding model and exercise its oversight mandate under the *Constitution*. In the absence of legislation, the respondents acted unlawfully by attempting to implement the new funding model and bypassed Parliament's oversight mandate.

Discrimination

96. The petitioners again argued that the new funding model has a discriminatory effect in that funding will be based on classes. The respondents dispelled this notion, contending that the new funding model will in fact encourage equity so that all students will have equal access to high education unlike under the differentiated unit cost funding model.

97. The new funding model has introduced criteria for identifying students' level of need for funding purposes. These are; academic performance, (KSCE); affirmative action; marginalised as defined by the Commission on Revenue Allocation; persons living with disabilities and household income bands classified according to the household monthly income.

98. Household classification will be based on income as follows:

- i. Vulnerable-0 income
- ii. Extremely needy-Kshs 23,672 and below per month.
- iii. Needy -23,672 to Kshs 70,000
- iv. Less needy -Kshs 70,000 to Kshs 200,000.

99. In determining the student's level of need, the Mean Testing Instrument will scientifically determine students' level of need, assign varied weights and score students based on:

- a. Parent's background-orphan, single parents, both parents, guardians
- b. Gender-male or female
- c. Course type-STEM, Arts, National Priority area etc
- d. Previous school type-private or public
- e. Expenditure on education-siblings in high schooltertiary institutions, among others.

100. The report on the new funding model states that placement by the 5th respondent will not be linked to funding of students; actual program cost will be disclosed to students during the application process through the 5th respondent's portal and students will be eligible to apply for financial assistance, including government scholarships, loans and bursaries upon receiving an admission letter from the respective university TVETs.

101. Whereas funding under the old model was uniform to all students, the new funding model effectively introduces classes among students, so that students will from now know themselves as vulnerable, very needy, needy or less needy. This is so, despite the constitutional decree that everyone is equal before the law and be afforded equal benefit of the law.



102. The new funding model again categorises anyone earning between 70,000 and 200,000 per month as less needy, with the likely result that children from these families may access low level of financing. It is also not clear whether the earnings are gross or net.
103. It is unrealistic, if not unfair, to consider someone earning Kshs 70,000 a month less needy considering the level of taxation in this country. Even though one may on paper appear to earn Kshs 70,000, this may not be sufficient to meet family obligations, including university education for children.
104. Article 27(1) of the *Constitution* provides that every person is equal before the law and has the right to equal protection and equal benefit of the law; that equality includes the full and equal enjoyment of all rights and fundamental freedoms. The State is prohibited from directly or indirectly discriminating against any person on any ground. the *Constitution* uses the word, “including” which means the prohibited grounds of discrimination are not conclusive.
105. The *Constitution* abhors all forms of discrimination so that one’s social standing or financial position may not be a ground for treating him differently. That is, the *Constitution* prohibits both direct and indirect discrimination on any grounds.
106. Under the old funding model, all students are treated equally and provided equal opportunities to pursue higher education. According to the respondents, all students placed in public universities are entitled to 80% government funding while the 3rd respondent gives loans to those who are unable to raise the difference.
107. The new funding model has introduced clusters categorising families and students as vulnerable; very needy; needy and less needy using Mean Testing Instrument based on some indicators, including statistics from Kenya Bureau of Statistics thus, creating a distinction and discrimination based on ones earning.
108. In *Peter K Waweru v attorney General* [2006] eKLR, the court defined discrimination to mean:
- [A]ffording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
109. In *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR, the court added that:
- [28]. [D]iscrimination simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based on such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups.
110. In this petition, although the categorisation may appear innocent and well-intended, it is not without problems when students are prominently placed in categories. It is also not clear how this categorisation is achieved and whether it is foolproof. For instance, the reference to “household” income as one of the factors to be considered in determining the student’s level of need is ambiguous. What is “household” and what does household income entail? This term is broad and has not been defined leading to ambiguity.



111. Second, ones' financial ability is not a communal issue that may be correctly represented by statistics. It is also possible that some people from areas designated as marginalised may be better-off than some in non-marginalised areas, yet designation of an area as marginalised will be a factor in determining a student's level of financial need.
112. Third, determination of a student's level of need will be done arbitrarily based on a person's view and judgment which is subject to human frailty and abuse of discretion leading to unintended mis categorisation resulting into discrimination.
113. During the hearing of the petition, the petitioners also argued that a student's background, including schools students attended will be used to determine their level of need which is arbitrary. Indeed, Appendix 10.2 of the report on Higher Education Funding states that in determining the student's level of need, the Mean Testing Instrument will scientifically determine the student's level of need and assign varied weights and score the student based on, among others; "(d)-Previous school type-private or public."
114. In my respectful view, there can be no worse discrimination than using the type of school a student attended in determining his/her level of financial need. A school one attends is not necessarily evidence of ones' financial ability to meet higher education. Many parents are known to struggle to have their children attend private schools in order to get better education, score good grades and secure not only university entry grades but also get admitted to study "good courses."
115. Assuming that a parent or guardian who takes his child to a private school is less needy, is to get the point wrong. Parents take their children to private schools not because they are financially able. They sacrifice to ensure that children get good foundation in preparation for higher education. It could also be a pointer that something is wrong in public schools which should make the government ask itself what that could be instead of using it to tag one as less needy. This is, but discriminatory.
116. Applying such a standard is not only misleading but also discriminatory and a violation of articles 27, the right to education under article 43 (1)(f) of the *Constitution* and article 13 (2)(c) of the *International Convention on Economic, Social and Cultural Rights* which obligates states to ensure full realisation of higher education and make it accessible to all.
117. Using the type of school a student attended might also a reminder that the government is following on the attempt that was once made to give preference to students from public primary schools in admission to national secondary schools ahead of those from private schools notwithstanding their performance. Allowing use of a school a student attended as a means of determining hisher level of need is discriminatory and a violation of the *Constitution*.
118. The petitioners further argued that the new funding model is also discriminatory in the sense that students under the age of 18 years will not get funding. The respondents countered, contending that a circular had been issued that no student should be denied funding on account of age and that students under 18 years be allowed to use their KSCE Index Numbers.
119. The respondents undoubtedly admitted that the petitioner's contention is correct. The circular, if any, remains a circular. There was no logical explanation why such a recommendation was made in the first place and what it was intended to achieve. The recommendation remains and this court cannot be persuaded by a mere promise and hope that the recommendation will not be implemented. It is discriminatory to use age as a basis for treating students differently given that age is one of the prohibited grounds of discrimination in article 27(4) of the *Constitution* and cannot be allowed is a democratic state.



120. The new funding model may also bring about unintended consequences on the choices of courses students make. Students not being sure of the categories in the hierarchy of needs they will be placed, may opt for less costly courses thereby allowing only those financial able to take courses that cost more and usually prestigious thereby creating an imbalance in favour the few financially able and as a result, thwarting dreams of many students to pursue certain courses.
121. Article 43(1)(f) of the *Constitution* is plain that every person has the right to education, a socio-economic right the state has an obligation to respect and protect. As already alluded to, education being a public good, the government has a positive obligation to ensure that Kenyan students have access to the courses they desire without hindrance through prohibitive policies and tendencies such as the new funding model exhibits.
122. I agree with the petitioners that some of the recommendations and measures contained in the new funding model are discriminatory and violate the *Constitution*.

Legitimate Expectation

123. The petitioners again argued that the new funding model violates students' legitimate expectation. According to the petitioners, students expected to get funding through the differentiate unit cost funding model and loans from Higher Education Loans Board but found themselves under the new funding model which they did not expect. They relied on among others, the decision in [*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*](#) [2014] KESC 53 (KLR).
124. The respondents denied violation of students' legitimate expectation. They contended that under the new funding model, students are made aware of the cost of the courses and units in each university during selection of courses and units so that they are aware of the cost at that point. The 5th respondent also stated that its portal has this information for the benefit of students as they apply for placement.
125. The first students who have been subjected to the new funding model sat for their KSCE examinations in October-November 2022 and applied for university courses and placement then. Their applications for placement were based on the old funding model and had expectation that they would be placed and funded under that model.
126. The working party was appointed in September 2022 and submitted its report on June 9, 2023 after students had applied for placement. The recommendation had not been made when students applied and they could not have been made aware of the cost of the courses and units in universities as well as the change in the funding model when they made their selections. The 5th respondent's argument that this information is on its portal for the benefit of students as they apply for placement cannot have been true as the new funding model was only brought to public attention at the point of its implementation.
127. It is therefore true that students who sat for KSCE in October-November 2022 made their choices based the old funding model with the expectation that they would be funded through the differentiated unit cost and loans from the Higher Education Loans Board, the funding model in law.
128. In [*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*](#) (*supra*), the Supreme Court stated that (Par 265) "an instance of legitimate Expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, is to show that it has locus standi to make a claim on the basis of legitimate expectation."

(See also [*South African Veterinary Council v. Szymanski*](#) 2003(4) S.A. 42 (SCA).



129. In *Canada (Attorney General) v Mavi*, 2011 SCC 30 [2011] 2 SCR 504, the Supreme Court of Canada stated:

(68) Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite...It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking.

130. Adverting to legitimate expectation in *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] eKLR, the court stated:

Legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all...which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration.

The court emphasised that legitimate expectation enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.

131. Students had chosen courses and units on the foundation of the existing funding model and had planned their education based on the certainty of the differentiated unit cost funding model and loans from the Higher Education Loans Board. The certainty of the funding based on the law that is still in place lifted their expectation as they planned to join higher learning.

132. I agree with the petitioners that the abrupt and unexpected change through introduction of the new funding model violated students' legitimate expectation and planning which was also based on the law, that the government would fund 80% of their education through the differentiated unit cost model and loans from Higher Education Loans Board.

Public Participation

133. The last issue is whether the new funding model should have been subjected to public participation. The petitioners again took issue with the new funding model arguing that it was not subjected to public participation in violation of article 10 of the *Constitution*. In the petitioners' view, once the report was presented to the President, recommendation on implementation of the new funding model should have been subjected to public participation. The respondent maintained that there was public participation during the formulation of the report and, therefore, there was no need for another round of public participation.

134. Public participation is a founding value in our constitution. Article 4(2) identifies Kenya as multiparty state founded on the national values and principles of governance in article 10. Article 10(1) then provides that national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the *Constitution*; enacts, applies or interprets any law; or (c) makes or implements public policy decisions.

135. Article 10 is the heart and soul of our nation. The principles in this article bind every person whenever among others, they make or implement public policy decisions. The argument by the petitioners was simple; that the report and especially implementation of the new funding model, should have been subjected to public participation first before being implemented. The respondents countered that



- there was public participation at the initial stage and therefore further public participation was not necessary.
136. Article 10(1) is clear that the principles in article 10(2) bind every person whenever formulating or implementing public policy decisions. The working party took public views to enable it come up with a report. The report made certain recommendations some them legislative. The recommendations that are of legislative nature, will be subjected to public participation once bills are prepared and tabled in Parliament.
137. Recommendations which appear to be of policy nature should be subjected to public participation if its implementation has consequential effects. The new funding model as recommended has the effect of touching on the law and should have been subjected to public participation to allow people give their views even if for its improvement and clarity before implementation. This would also have given Kenyans not only information about the funding model but also opportunity comment on it and its implications before implementation.
138. Although the word used in article 10(1)(d) is “makes” or “implements” public policy decisions, implementing a public Policy with fundamental consequences to the people’s lives requires peoples’ input before its implementation.
139. In *Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR), the Court of Appeal acknowledged the primacy given to public participation and stated:
- [20]...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. the *Constitution* in article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation.
140. In *Minister for Health v New Chicks South Africa Pty Ltd* CCT 5904, the Constitutional Court of South Africa observed that a reasonable opportunity is offered to the members of the public and all interested parties so as to know about the issue and to have an adequate say on it.
141. The essence pf public participation is to allow people an opportunity to have a say on issues that affect them and touch on their lives. An issue as emotive as the new funding model which fundamentally affects people’s lives should have been subjected to public participation before being implemented. The views given before the working party were intended to enable the team come up with a report and recommendations. It was the recommendations that were to be implemented without going through a legislative process, like the new funding model which were to affect lives of the people, that should be subjected to public participation prior to implementation.
142. There is no denial in this petition that implementation of the recommendation on the new funding model was not subjected to public participation despite the drastic and fundamental shift it introduced in the funding of higher education in the country. Implementation of the new funding model without public participation violated the principle in article 10 of the *Constitution*.
143. Overall, the respondents argued that despite the petitioners fears on the implementation of the new funding model, there is an appeal mechanism so that if one is not satisfied with level of need assigned to him or amount given, he can appeal. As already pointed out earlier, this funding model is not anchored on any law. The body to which appeals lie is unknow; its composition is unknown and so is its procedures. It can be an ad hoc body that may decide appeals arbitrarily, capriciously and at whims.



It may also be subject to abuse. This is not a guarantee that all will be well where lives of millions of students are affected, yet there is certainly a working funding model, however imperfect it may be perceived to be.

Conclusion

144. Having considered the petition and arguments by parties, I come to the following conclusion. First, the new funding model violates the law, namely; section 53 of the *universities Act*. The section identifies the differentiated unit cost as the funding model with funds allocated by Parliament among other sources. The new funding model provides for a specific sharing of Higher education funding without onboarding it to statute thus, introducing a funding model through a policy in conflict with the law.
145. Second, the new funding model is discriminatory in some respects, introduces classes based on perceive financial ability; discrimination among students based on the type of school a student attended whether private or public and introduces age as a factor in accessing funding. It also introduces an ambiguous and unknown term “household” income as a basis for accessing funding. All these violate article 27 of the *Constitution*.
146. Third, the new funding model violates legitimate expectation of students and their families. The current group of students chose universities, courses and units based on the differentiated unit cost and the loans from Higher Education Loans Board as the funding model but found themselves confronted with the abruptly introduced Variable Scholarship and Loan, a new funding model they were not aware of. Having planned their university affairs based on the differentiated unit cost funding model, the abrupt implementation of the new funding model is a violation of their legitimate expectation.
147. Fourth, the new funding model was not subjected to public participation despite its fundamental effects to the country’s education system. The implementation of this funding model also bypassed Parliamentary oversight in violation of article 95(5)(b) of the *Constitution*.

Disposal

148. Based on the above conclusions, the court makes the following declarations and orders:
 1. A declaration is hereby issued that the implementation of Variable Scholarship and Loan Funding Model as currently stands contravenes section 53 of the *Universities Act* and the mandate of the Higher Education Loans Board and is unlawful.
 2. A declaration is hereby issued that the Variable Scholarship and Loan Funding Model is discriminatory and violates students’ legitimate expectation.
 3. A declaration is hereby issued that the Variable Scholarship and Loan Funding Model is unconstitutional for lack of public participation.
 4. An order of prohibition is hereby issued prohibiting implementation of the Variable Scholarship and Loan Funding Model until the government complies with constitutional and legal requirements where necessary.
 5. This being a public interest litigation, there shall be not order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024

E C MWITA

JUDGE

