



**Magak v Jomo Kenyatta University of Agriculture & Technology (JKUAT) &  
2 others (Constitutional Petition E440 of 2021) [2023] KEHC 1090 (KLR)  
(Constitutional and Human Rights) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1090 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E440 OF 2021**

**AC MRIMA, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**HUXLEY MAGAK ..... PETITIONER**

**AND**

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY  
(JKUAT) ..... 1<sup>ST</sup> RESPONDENT**

**FREDAH K RIMBERIA WANZALA ..... 2<sup>ND</sup> RESPONDENT**

**ELECTORAL COMMISSION OF JOMO KENYATTA UNIVERSITY STUDENTS'  
ASSOCIATION ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background:**

1. The Petitioner herein, Huxley Magak, is a student at the Jomo Kenyatta University of Agriculture & Technology (hereinafter referred to as 'JKUAT' or 'the 1<sup>st</sup> Respondent' or 'the University'). He is pursuing a degree in Bachelor of Science in Electrical & Electronic Engineering alongside a Diploma in Business Information Technology.
2. The Petitioner is aggrieved that the University, in conjunction with Prof Fredah K Rimberia Wanzala and Electoral Commission of Jomo Kenyatta University Students' Association (the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein respectively) unfairly disqualified him from vying for the position of Chairperson, Jomo Kenyatta University Students Association (hereinafter referred to as 'the Chairperson').



### **The Petition:**

3. Through the Further Amended Petition dated November 10, 2021, supported by the Petitioner's Affidavit deposed to on a similar date, and a Supplementary Affidavit deposed to on February 21, 2022, the Petitioner approached this Court to vindicate the alleged violation of his constitutional rights.
4. The Petitioner pleaded that he joined the University in 2016 to pursue a degree in Bachelor of Science in Electrical & Electronic Engineering, a course he is about to conclude.
5. In September 2021, the Petitioner posited that he registered for Diploma in Business Information Technology (hereinafter referred to as 'the Diploma Course').
6. It is his case that, in compliance with the Constitution of the JKUAT Students' Association (Reviewed Edition 2017) (hereinafter referred to as 'the JKUSA Constitution'), he expressed interest in vying for the Chairperson's position.
7. To that end, the Petitioner used the Diploma course to fill the nominations forms for the Chairperson's position and subsequently submitted them to the office of the 2<sup>nd</sup> Respondent herein, who was the Returning Officer.
8. It is the Petitioner's case that despite meeting the criteria set out under Schedule 1 of JKUSA Constitution, he was disqualified from the electoral process through the notice issued on October 13, 2021.
9. Dissatisfied with the disqualification, the Petitioner pleaded that by a letter dated October 13, 2021, he appealed to the 2<sup>nd</sup> Respondent's assuring that he had met the set criteria.
10. It is his case that by a letter dated October 15, 2021, the 2<sup>nd</sup> Respondent rendered her decision affirming his disqualification.
11. The 2<sup>nd</sup> Respondent's reason for disqualification was that, the Petitioner was a fifth (final) year Student and would conclude his studies before the lapse of 12-month period as required by JKUSA Constitution.
12. The 2<sup>nd</sup> Respondent further stated that despite the Petitioner having registered for the Diploma course, it was unprocedural and unfair to consider it a basis of meeting the 12-month rule prescribed under the JKUSA Constitution.
13. Lastly, the 2<sup>nd</sup> Respondent was of the position that the Petitioner had registered for the Diploma course with the sole objective of meeting the 12-month criterion.
14. It is the Petitioner's case that the foregoing turn of events locked him out and one other competitor for the Chairperson's seat, leaving one Mr Mark Mwangi Thiong'o elected unopposed.
15. The Petitioner was aggrieved that Mr Mark Mwangi Thiong'o was approved to contest despite not meeting the criteria under the JKUSA Constitution, for being a supplementary examination candidate, having failed an examination.
16. The Petitioner, therefore, pleaded that the Respondents could not approbate and reprobate by disqualifying some candidates from contesting while allowing others with respect to failed examinations.



17. With respect to his candidature, the Petitioner was aggrieved that the reasons given by the 2<sup>nd</sup> Respondent were not only unlawful but also unfounded since he is an ordinary member of JKUSA as defined by the JKUSA Constitution and was a duly registered Diploma Course student.
18. On the foregoing, it was his position that it was not open for the 2<sup>nd</sup> Respondent to disregard his qualifications whilst considering extraneous and remote factors not provided under the JKUSA Constitution.
19. The Petitioner reiterated that whether or not studies commence in a particular course was an irrelevant factor in determining whether one is an ordinary member or qualifies for candidacy under JKUSA Constitution.
20. The Petitioner asserted that, having paid JKUSA annual subscription fee of Kshs 700/- he was a member and as such was entitled to participate in the activities of the Association, including vying and competing in the activities of the Association as guaranteed under Article 36 of the Constitution.
21. He posited, therefore, that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted *ultra-vires* in purporting to disqualify him and by considering factors not provided for under JKUSA Constitution.
22. It was his case further that the 2<sup>nd</sup> Respondent's decision was neither in the University statutes, Regulations nor the JKUSA Constitution since none of them provide the issue of registering for a secondary course (Diploma) as a criterion for qualifying or disqualifying a contestant from vying for the Chairpersons seat.
23. The Petitioner asserted that it was irrelevant whether or not he had enrolled for a Diploma Course less than two months to the election date.
24. The Petitioner asserted that the 2<sup>nd</sup> Respondent's conduct amounted to Wednesbury unreasonableness which ought to be corrected by this Court pursuant to Article 23(f) of the Constitution.
25. It was further his position that clearing other students who had candidacy issues to vie was discriminatory against him in violation of Article 27 of the Constitution as well as the right to right to access justice and fair administrative action under Article 48 and 48 of the Constitution respectively.
26. On the foregoing factual and legal backdrop, the Petitioner sought the following reliefs: -
  - a. A Declaration that the decision of the 2<sup>nd</sup> Respondent dated October 15, 2021 amounts to an error of law and is contravention of the provisions of the Jomo Kenyatta University Students Association Constitution.
  - b. A Declaration that the decision of the 2<sup>nd</sup> Respondent dated October 15, 2021 fails to meet the standard of Wednesbury unreasonable.
  - c. A Declaration that by disqualifying the Petitioner from participating in the elections, the Respondents herein, infringed the Petitioner's Freedom of Association as provided for under Articles 36 of the Constitution.
  - d. A Declaration that the Respondent's decision in connection herewith infringed the Petitioner's right to equality and freedom from discrimination as provided for under Article 27 of the Constitution.
  - e. An Order setting aside the decision of the 2<sup>nd</sup> Respondent dated October 15, 2021.
  - f. An order for award of compensation for such amount as may be assessed by the Court for the violation of the Petitioner's fundamental human rights.



- g. That the amount awarded under prayer (f) above damages do attract interest at court rates from date of filing suit until payment in full.
- h. A declaration that the Petitioner has met the criterion for qualifying as a candidate to contest for the Seat of the Chairperson of the Jomo Kenyatta University Students Association (JKUSA).
- i. An Order nullifying the elections of the Chairperson of the Jomo Kenyatta University Students Association (JKUSA) elections undertaken on 26<sup>th</sup> October, 2021 and the swearing in of the current Chairperson of JKUSA and subsequent thereto declare the seat of the Chairperson of JKUSA as vacant.
- j. An Order directing the Respondents to conduct the elections of the Chairperson of the Jomo Kenyatta University Students Association, within twenty -one (21) days of the date of the Judgement of this Court or within such a time as this Court may direct.
- k. Subsequent thereto, an Order directing the Respondents to allow and facilitate the participation of the Petitioner in the elections for the JKUSA Chairperson's position on such a date as may be directed by the Court.
- l. Costs of the suit herein.
- m. Any other order as this Honourable Court may deem fit.

**The Submissions:**

- 27. The Petitioner filed two sets of written submissions. The initial one is dated February 23, 2022 and the subsequent one is dated May 1, 2022.
- 28. The Petitioner largely reiterated his case as in the Petition save to add that he faulted the Respondent for misconstruing the provisions of JKUSA Constitution by stretching and importing words not expressly provided for with respect to the application of the 12-month rule under paragraph f(vii) of the First Schedule to JKUSA Constitution.
- 29. In reference to the decision in *Republic v Kenya School of Law* [2019] eKLR, it was his case that the Court made it clear that the meaning of a statute or any other written law must be interpreted as it is. It was observed;
  - "24. Words, spoken or written, are the means of communication. Where they are possible of giving one and only one meaning there is no problem. However, where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out.
  - 25. Therefore, a court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but, without demeaning the others, the most important rule is the rule dealing with the statute's plain language."
- 30. Pursuant to the foregoing it was the Petitioner's case that under the JKUSA Constitution one can only vie for an elective post if they inter alia, meet the 12 -month rule. It does not make any reference as to whether such a student is pursuing either a primary or a secondary course.
- 31. It was hence the Petitioner's case that it was not open in law for the Respondents to stretch the provisions of an enactment to cover issues not expressly provided for.



32. The Petitioner claimed that the decision of the 2<sup>nd</sup> Respondent of October 13, 2021 was tainted with illegalities for considering extraneous factors. He drew support from the decision in Republic v Kenya School of Law (*supra*), where the Court emphasized that: -

The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist.

33. In submitting on violation of the right to fair administrative action, the Petitioner stated that the Respondents' conduct failed to align with Article 47 of the Constitution and Section 7(2) of Fair Administrative Action Act which call for efficient, lawful and procedurally fair action by State and non-state agencies in exercise of administrative authority.

34. On Wednesbury unreasonableness, the Petitioner drew Court's attention to the decision in Republic v Kenya Medical Supplies Authority Ex-parte Nairobi Enterprises Limited & 4 others [2018] eKLR where it was observed *inter-alia*: -

... Irrationality as fashioned by Lord Diplock in the Council of Civil Service Unions Case takes the form of Wednesbury unreasonableness explicated by Lord Green and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it....

35. The Petitioner further submitted that there was open biasness and bad faith in clearing other students who did not meet the qualifications whilst barring him. To that end, he relied on the decision in Republic v Non-Governmental Organizations Ex parte Linda Bonyo & 4 others; Philip Opiyo Sadjah & 5 others (Interested Parties) [2020] eKLR, where the Court observed as follows: -

"69. Bad faith can be inferred where there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied." [Emphasis ours]

36. The Petitioner further submitted that his right to association provided for under Article 36 of the Constitution was violated. To demonstrate its importance, he cited EG v Non-Governmental Organisations Co-ordination Board & 4 others [2015] eKLR where it was observed;

84. The right to freedom of association is an essential component of democracy, providing individuals with invaluable opportunities to, inter alia, express their political opinions, engage in literary and artistic pursuits, and form social bonds with others in an association...

37. It was submitted that the violation of his rights by the Respondent was not in accordance to Article 24 of the Constitution which provides for limitation of rights or fundamental freedom.

38. While relying on the Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR the Petitioner submitted that he had attained the threshold for prayers sought in the Petition on including the award of damages. In the case, it was observed: -

...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not



what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed....

39. In the end, the Petitioner prayed that the Petition be allowed as prayed.

**The Respondents' case:**

40. The Respondents opposed the Petition through the Replying Affidavit of Richard Wokabi Kariuki, the 1<sup>st</sup> Respondent's Legal Officer, deposed to on December 17, 2021.
41. Mr Kariuki deposed that the Petitioner's intention in enrolling for the Diploma course was informed by subterfuge and ulterior motive of bypassing the requirement under page 36(f) of JKUSA Constitution which requires a candidate to be able to serve for a period of not less than 12 months before he can vie for an election.
42. He deposed, therefore, that the Petitioner, despite being an Ordinary Member of JKUSA did not fulfil the requirement for vying for an elective position under the JKUSA Constitution on account of being in his fifth-year semester two in his primary degree course as such would not serve for the momentum prescribed period.
43. It was his case that it would be irregular and unfair of the 1<sup>st</sup> Respondent to consider his secondary degree course for his nomination as it was the intention of the drafters of the JKUSA Constitution for students to vie for the elective position during the period they join the 1<sup>st</sup> Respondent institution and not in infinity as attempted by the Petitioner by enrolling for secondary courses.
44. Mr Kariuki deposed that it is on the foregoing basis that the Petitioner failed to meet the criteria for vying for any elective seat.
45. With respect to the claim of clearing other students, it was his deposition that as at the Chairperson elect submitted his nomination papers, he had no outstanding supplementary examination. That is the reason he was approved upon being vetted.
46. The deponent denied bad faith and bias stating that the Diploma Course was not the defining criterion used to disqualify the Petitioner from elections rather, the requirements under Schedule 1 of JKUSA Constitution is to ensure aspiring candidates serve for a full tenure of one year before the student can complete his studies.
47. The Respondents denied the claim of being unreasonable and to that end cited the decision *Nelson Andayi Havi v Law Society of Kenya & 3 others* (2018) eKLR where it was observed that the test of reasonableness is not applied in a vacuum but in the context of life's realities.
48. It was deposed therefore that there was no discrimination. It was his position that not every differentiation amounts to unfair discrimination.
49. It was his deposition further that the Petitioner's right to fair administrative action was protected since he was given an opportunity to be heard at all times during the process and every decision reached was communicated in the manner prescribed by the JKUSA Constitution.
50. In rebutting the claim of violation of the right to Association under Article 36 of the *Constitution*, it was submitted that the provisions of schedule 1(f), clause (ii), (iv), (vi) and (vii) of JKUSA Constitution have not limited the Petitioners rights to association since the decision to disqualify was just and reasonable.



51. In conclusion it was his deposition that the Petition was an abuse of Court process and ought to be dismissed with costs.

**The Submissions:**

52. In the submissions dated March 30, 2022, the Respondents fortified the position that the Petitioner fell short of the provisions of Schedule 1(f)(vii) of the JKUSA Constitution which requires a candidate to serve for a period of not less than 12 months if elected

53. It was its case that had they allowed the Petitioner to vie using his secondary degree, they would have opened a pandora box for other students to be doing the same and that would beat the purpose of Schedule 1(f)(vii) of the JKUSA Constitution.

54. It was reiterated that contrary to the Petitioner's assertions that Schedule 1(f) (ii). (iv) and (vii) of the JKUSA Constitution limited his rights and freedoms, the same is fair just and reasonable in an open democratic society in the context of an academic institution.

55. It was submitted further that the decision bar the Petitioner was informed by the need to allow and promote uniformity across board and prevent giving some students undue advantage over other students by considering primary degree course for all students as the common eligibility requirement.

56. In urging the Court to consider the provision of schedule 1(f)(vii) of the JKUSA Constitution in its rightful context, the Court was referred to Stephen Wachira Karani & another v Attorney General & 4 others (2017) eKLR, where it was held that Courts should avoid a construction that produces an absurd result to one that creates anomaly to otherwise produces and irrational or illogical result.

57. On the foregoing and the fact that the Petitioner was accorded hearing, an appeal platform and the result communicated, it was submitted that there was no violation of the right to fair administrative action.

58. It was submitted that the Respondents abided by the JKUSA Constitution and their response of October 15, 2021 did not promote differential treatment against the Petitioner.

59. To buttress propriety of their decision in as far as Article 36 goes, support was drawn from the decision in *Council of County Governors v Attorney General & another* [2017] eKLR, where limitation of enjoyment of the right to freedom of Association under Article 36 of the *Constitution* was discussed as follows: -

... A law aimed at promoting the legitimate state interest in fair, honest, and orderly elections is in my view consistent with the provisions of the *Constitution* that require elections to be credible. The provisions of the *Constitution* must be read and interpreted in a wholesome manner. The rights to freedom of association must be read and appreciated with the constitutional rights that guarantee a free, fair, credible and transparent elections and the provisions that mandate the IEBC to manage elections in accordance with the *Constitution* and best practice....

60. In the end, the Respondents urged the Court to find their decision to be fair and made in students' interest and in accordance to Schedule 1(f) (ii), (iv), (vi) and (vii) of the JKUSA Constitution.

61. It urged the Court to dismiss the Petition with costs.



## Analysis:

62. This matter raises one fundamental issue for consideration. It is whether the Petitioner was rightly so and in accordance with inter alia the JKUSA Constitution disqualified from running as the Chairperson.
63. the *Constitution of Kenya, 2010* (hereinafter referred to as ‘the CK 2010’) is the supreme law of the land. Article 2(4) thereof has it that any law, including customary law, that is inconsistent with the *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of the *Constitution* is invalid. In other words, every law, regulation, constitution of an entity, among others is always subordinated to and cannot override the *CK 2010*.
64. Article 2(3) thereof superimposes the validity or legality of the *CK 2010* in that the CK 2010 cannot be subject to challenge by or before any Court or other State organ.
65. Article 2(1) affirms the position that the CK 2010 binds all persons and all State organs at all levels of government whereas Article 3 calls upon every person to respect, uphold and defend the CK 2010.
66. Article 10 provides for the values and principles of governance. They include patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development. The 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 CK 2010, enacts, applies or interprets any law or makes or implements public policy decisions. In sum, the CK 2010 binds every one in every area of life.
67. Article 38 provides for political rights. It states as follows: -
  - (1) Every citizen is free to make political choices which includes the right-
    - (a) to form, or participate in forming, a political party;
    - (b) to participate in the activities of, or recruit members for, a political party; or
    - (c) to campaign for a political party or cause.
  - (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for –
    - (a) any elective public body or office established under this Constitution; or
    - (b) any office of any political party of which the citizen is a member.
  - (3) Every adult citizen has the right, without unreasonable restrictions-
    - (a) to be registered as a voter;
    - (b) to vote by secret ballot in any election or referendum; and
    - (c) to be a candidate for public office, or office within political party of which the citizen is a member and, if elected, to hold office.
68. Article 81 of the CK 2010 sets out the general principles on which any electoral system must be hinged on. It provides as follows: -



The electoral system shall comply with the following principles: -

- (a) freedom of citizens to exercise their political rights under Article 38;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities;
- (d) universal suffrage based on the aspirations for fair representation and equality of vote; and
- (e) free and fair elections, which are –
  - (i) by secret ballot;
  - (ii) free from violence, intimidation, improper influence or corruption;
  - (iii) conducted by an independent body;
  - (iv) transparent; and
  - (v) administered in an impartial, neutral efficient, accurate and accountable manner.

69. The Supreme Court of Kenya in the Presidential Election Petition No 1 of 2017 between *Raila Amolo Odinga & another v IEBC & 2 others* (2017) eKLR summed up the integrity aspect of an election as follows: -

[200] The principles cutting across all these Articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiable; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.

70. Having laid down the constitutional background generally guiding elections in Kenya above, it is now the duty of this Court to ascertain whether the impugned election in this case, and as challenged in the Amended Petition, stands the test of time.
71. The impugned election of the Chairperson was carried out courtesy of the JKUSA Constitution.
72. The JKUSA Constitution has a Preamble that resonates so well with the CK 2010. Article 1(3) of the JKUSA Constitution defines the area of operation to include all faculties, schools, centres, campuses, colleges, and any other institutions of JKUAT as determined by the University's Senate. Article 2 provides for the objects of the JKUAT Students' Association (hereinafter referred to as 'the Association'). The provision ring-fences the position that the Association shall not practise any form of discrimination based on any ground.
73. The membership of the Association is defined in Article 3 of the JKUSA Constitution. It provides for ordinary and associate membership. Both membership cadres have the right to participate in all legal, valid and legitimate activities of the Association. That includes taking part in elections.
74. Schedule 1 of the JKUSA Constitution provides for the nomination and election process. Part (f) thereof is on the requirements for candidacy. It lists out 11 eligibility requirements. One of them is Part (f)(vii) which has it that a candidate must be able to serve for a period of not less than 12 months from the election date.
75. It is that requirement in Part (f)(vii) of the Schedule 1 of the JKUSA Constitution that disqualified the candidature of the Petitioner as he was in the second semester of his final year.



76. Resulting from the disqualification, the Petitioner lodged an appeal to the Dean of Students (the 2<sup>nd</sup> Respondent). The appeal was considered and rejected. The decision was communicated to the Petitioner vide the University's letter dated October 15, 2021.
77. Being dissatisfied with the appellate decision, the Petitioner launched the instant proceedings.
78. The JKUSA Constitution defines a 'student' as
- 'a person who is registered as a student of JKUAT during a current academic year for a first or higher degree, diploma, certificate or such other qualification or course of the University as may be approved by the Senate as qualifying a person for the status of a student, but does not include a student of an honorary institution who is registered for examinations leading to the degree, diploma, certificate and other academic award of the University.'
79. It is such students who become eligible to join the Association by way of registration. Once registered as a member of the Association, a student is at liberty to offer himself/herself for elections pursuant to the JKUSA Constitution.
80. In defining who a student is, the JKUSA Constitution makes no distinction between the students who are pursuing primary degree courses or otherwise. As long as one is registered by the University as a student, the JKUSA Constitution allows such a student who becomes a member the latitude of offering to vie for an appropriate elective position.
81. The myriad of reasons given by the Respondents in justifying the disqualification of the Petitioner cannot hold. I say so because a plain reading of the JKUSA Constitution yields that the Association did not intend to segregate between the various cadres of students. The interpretation offered by the Respondents, therefore, is an attempt to craft an interpretation unknown to the Association. Had the Association intended to bar some students from offering their candidature on the basis of primary and secondary courses, then it would have expressly so stated.
82. In this case, the Petitioner was a student undertaking two courses namely a degree in Bachelor of Science in Electrical & Electronic Engineering and a Diploma in Business Information Technology. This fact is not disputed by the Respondents.
83. It, therefore, matters not the rationale behind the subsequent registration of the Petitioner into the diploma course. It may have been for purposes of becoming eligible to vie as alleged by the Respondents or it may have been in pursuit of a genuine desire to pursue further studies as alluded to by the Petitioner himself. Either way, there is no evidence that the Petitioner acted contrary to the law.
84. On the basis of the foregoing, the disqualification of the Petitioner on the allegation that he would not serve more than 12 months if elected was not correct. The Petitioner had a whole semester in his final year and a couple of years for the Diploma course. The cumulative studentship period passed the 12 months requirement by far. The Respondents' decision to disqualify the Petitioner was, therefore, not supported by any law or the JKUSA Constitution. In fact, the decision went contra the JKUSA Constitution.
85. A closer look at the manner in which the Respondents arrived at their decision depicts a calculated ill-motive by considering very extraneous matters not provided for in the JKUSA Constitution. As such, the decision was irrational, unfair and unreasonable. It was plainly made in bad faith. The decision cannot stand.



86. The above is aptly captured in *Republic v Fazul Mahamed & 3 others ex-parte Okiya Omtatah Okoiti* [2018] eKLR where the common wrongs in public law were discussed as follows: -

25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 others v The County Government of Nyeri & Ano*[39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.

Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

Irrationality and proportionality- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*: -

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

87. The totality of the above is that the impugned decision disqualifying the Petitioner infringed upon the rights guaranteed under Article 36 (Freedom of Association), Article 38 (Political rights) and Article 27(1) (Right to equality before the law and to equal protection and benefit of the law) of the *Constitution*.

88. Having found that the Petitioner's rights and fundamental freedoms were variously infringed thereby resulting to an unfair disqualification, the Petitioner is entitled to appropriate remedies. To that end, the Petitioner prayed for declarations, orders in the nature of judicial review (including a repeat of the elections) and compensation.

89. Schedule 1 Part (f)(x) of the JKUSA Constitution states as follows:

A member of the Student Council shall hold office for a term of one year and may be eligible for re-election for one final term.

90. According to the record, the impugned elections were conducted on October 26, 2021. Therefore, pursuant to Schedule 1 Part (f)(x) of the JKUSA Constitution, the candidate who was eventually declared as the Chairperson of the Association must have served the entire period of one year ending sometimes in October 2022. As such, any orders nullifying the said elections, declaring the Chairperson's position vacant and ordering for a repeat election stand overtaken by events.



91. Be that as it may, the Petitioner is indeed entitled to appropriate declarations and reasonable compensation.

**Disposition:**

92. Save that the Petition was largely overtaken by events, in principle the Petitioner had a valid cause of action against the Respondents. It is for that reason that this Court will endeavour to grant other appropriate reliefs.

93. Coming to the end, this Court wishes to profusely apologize for the late delivery of this judgment. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest. The Court was also transferred in July 2022, on need basis, to a new station which had serious demands that called for urgent attention. The totality of it all yielded to the delay herein. Galore apologies once again.

94. In the end, the Petition is determined as follows: -

- a. A Declaration hereby issues that the decision to disqualify the Petitioner from vying as a candidate for the Jomo Kenyatta University Students' Association (JKUSA) Chairperson during the elections held October 26, 2021 as contained in the Respondents' letter dated October 15, 2021 was in violation of the Petitioner's rights and fundamental freedoms under articles 27(1), 36 and 38 of the *Constitution*.
- b. An Order of Certiorari hereby issues bringing the decision to disqualify the Petitioner from vying as a candidate for the JKUSA Chairperson during the elections held October 26, 2021 as contained in the Respondents' letter dated October 15, 2021 before this Court for quashing. The said decision and letter dated October 15, 2021 are hereby declared unconstitutional, null and void ab initio and of no legal effect. They are hereby quashed.
- c. The Petitioner is hereby awarded the sum of Kshs 2,500,000/= (Kenya Shillings Two Million Five Hundred Thousand Only) as damages for the infringement of his rights and fundamental freedoms. The sum shall attract interest at Court from the October 15, 2021 until payment in full.
- d. The Respondents shall jointly and severally bear the above award of damages and costs of the Petition.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr Barasa for Mr Wachira, Learned Counsel for the Petitioner.

Mr Wajala for Washwa, Learned Counsel for the Respondents.

Regina/Chemutai – Court Assistants

