Oaga v Jomo Kenyatta University of Agriculture and Technology (Constitutional Petition E223 of 2021) [2023] KEHC 1122 (KLR) (Constitutional and Human Rights) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E223 OF 2021

AC MRIMA, J

FEBRUARY 23, 2023

BETWEEN

JANE ACHIENG' OAGA ..... PETITIONER

AND

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY ..... RESPONDENT

JUDGMENT

Background

1. The Petitioner, Jane Achieng' Oaga is a 5th Year Pharmacy student at Jomo Kenyatta University of Agriculture and Technology (JKUAT), the Respondent herein.

2. On 6th November 2020, the Dean of JKUAT School of Pharmacy informed the Petitioner that she had failed 6 units in her 5th year of study and was required to repeat the year.

3. In protest of the news, the Petitioner, served upon the dean a demand letter on 9th November 2021 indicating discrepancies to the effect that the unit codes of the units allegedly failed in the repeat letter did not match with her results slip.

4. On 10th November 2020, the dean offered to have the Petitioner's exams remarked on condition that she withdrew the demand letter, a fact she claims she did under duress.

5. It is her case that the lecturers remarking her papers told her that they would 'sort out' one exam so that she could proceed to do the rest (four exams) as supplementary exams.

6. On 16th November 2020, the Petitioner sat Endocrine Clinical Pharmacy Examination. In the exam room, she claimed that she had a pouch, like other students in the room, which she kept under her lab stool.

7. It is her case that about 3 – 5 minutes into the examination, whilst signing the attendance sheet, the invigilator singled her out and asked her to place her pouch on the table.

8. The Petitioner claimed that the invigilator subsequently asked her to unlock her phone which was in her pouch and hand it over to him.

9. The Petitioner claimed that the invigilator took pictures of the notes on her phone and purported that she was using the material in the phone in the examination. To that end, the invigilator indicated to the lecturer of the unit, Dr. Julia Kimondo of the malpractice.

10. It is her case that the lecturer subsequently wrote an exam cheating report which the Petitioner claims was made to sign in the middle of the examination under duress.

11. The Petitioner claimed that the lecturer searched all the other students in the room and whereas most of them had their phones in their bags no action was taken against them.

12. The Petitioner claimed that there had been systematic vindictive vendetta against her which begun when she made the demand to the school through her lawyer.

13. She further asserted that the school's pursuit of information about her mental wellness through her friends, Mr. Brian Ombura and Ms. Victoria Wanjugu subjected her not only to torture but also violated her right to privacy and personal dignity.

14. She referred Court to the Affidavit of Victoria Kamau Wanjugu, her colleague at the School of Pharmacy, deposed to on 15th June, where Victoria deposed that after the meeting I had with the Dean, the Dean would call her (Victoria) and Brian Ombura (our mutual friend) to inquire about my personal matters including my whereabouts, whether I travelled too much and my marital and mental health status.

15. Further, she posited that as a result of the irregularity in the Endocrine Clinical Pharmacy Examination, the Petitioner was informed of Examination Disciplinary Committee meeting through the notice dated 9th February 2021.

16. It is her case at that time she was out of the Country in Switzerland and her Advocates informed the School of her whereabouts, and her inability to return to the country due to Covid19 constraints and other issues through the email dated 24th February 2021.

17. In addition, the Petitioner claimed that in her email she requested the school to facilitate her with a copy of the charges to enable her prepare for the hearing, a virtual link through which she could appear for hearing, the specific time to appear for the hearing due to time difference, and the person whom she would address in response to the allegations.

18. The Petitioner claimed that despite fervent reminders, her requests were never responded to.

19. She further asserted that her advocate's effort to deliver her evidence, three affidavits and a letter to the school of pharmacy, before the disciplinary committee were dismissed by the staff manning the front desk.

20. She pleaded that her advocate was directed to the legal officer despite the issue being ad academic one pending before the disciplinary committee.

21. It is her case that despite the foregoing, her advocate left copies of her evidence at the front desk.

22. The Petitioner asserted that on 10th March 2021, during the disciplinary hearing, the committee refused to create a virtual link and her advocate, Mrs. Perpetual Wanjiku, could not be heard on account that during such hearings one is expected to appear in person.

23. Subsequently, the Petitioner was informed through a letter dated 29th March 2021 that she had been condemned to redo the examination in question and undergo mandatory counselling sessions before doing the examinations.

24. It was her case further that the dean indicated to her that her four examination results would not be released until she did the repeat examination in question.

25. Expressing dissatisfaction on the decision contained in the letter dated 29th March 2021, the Petitioner asserted that she filed an appeal to the Vice-Chancellor on 14th April 2021.

26. The petitioner contested the fact that the decision was arrived at without being heard and in ignorance of the evidence she had presented to the school through her advocate.

27. The Petitioner relied on the Affidavit of her Advocate Perpetual Wanjiku Ndegwa deposed to on 17th June 2021 to demonstrate the foregoing.

28. In the said affidavit, Ms Ndegwa deposed that she was dismissed while trying to deliver 3 Affidavits in defence of the Petitioner.

29. It was her deposition that on the hearing date, 10th March 2021, she was dismissed and turned away by a lady named Alice when Board concurred that they were unable to create a virtual link for her.

30. The Petitioner was further aggrieved that there were no reasons given for the decision and that the decision compelling her to attend counselling before sitting for examination was whimsical and capricious. It was also her case that the requirement that her examination for Endocrine Clinical Pharmacy be cancelled was draconian and unreasonable.

31. Contained in her appeal was also the contest that the Senate's decision to have her reapply to the school afresh after undergoing counselling, yet she had not been expelled, was unreasonable and without justification.

32. The Petitioner's prayer before the Vice Chancellor was to have the decision to undergo counselling be set aside. She also requested to be given results for the supplementary examinations and that she be allowed to access her marked examination booklets for those supplementary examinations that were not subject to the disciplinary hearing.

33. The petitioner also requested to be given an exact date when she could avail herself to redo the clinicals.

34. The Petitioner's appeal to the Vice Chancellor did not elicit any response. It is her case that instead, the Legal Department responded taking issue with her representation whilst ignoring the various grounds of appeal.

35. It is on the foregoing sequence of events that the Petitioner pleaded that her academic future and fate was draconianly sealed in violation of her constitutional right to education.

36. She posited that the Respondent's failure to accord her a hearing, coupled with the denial of legal representation and the lack of evidence to support the claim that she cheated was unreasonable and unjustifiable under *the constitution*.

37. It was her case that the Respondent disregarded both the precepts of fair administrative action and the principles of natural justice in their actions and decision.

38. It is her case that the decision was made in bad faith and failed to meet her legitimate expectations and failed to meet the proportionality test which seek to strike a balance between adverse effects of a decision on an individual's liberties.

39. The Petitioner further identified the constitutional infractions the Respondent as being invasion of her right to privacy by the invigilator when she forced her to unlock her phone and scrolled it for more than an hour while she was doing the examination.

40. She pleaded that the invigilator's action breached the fundamental right to protection of personal data and to inherent dignity protected under Article 28 of *the Constitution*.

41. With respect to the conduct at the disciplinary hearing, the Petitioner posited that there was violation of Article 25 which decrees for fair trial, a right which cannot be limited.

42. She asserted further Article 47 of *the Constitution* that calls for administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was infringed upon and that the dictates Article 48 which obligates state to ensure access to justice for all person were not facilitated.

43. The Petitioner contended that the actions of the Respondent fell below the dictates of Article 24 which makes it a requirement that no right or fundamental freedom in the Bill of Rights can be limited except only to the extent such limitation is reasonable and justifiable and does not derogate from the rights or freedom's core value.

44. It was further her case that her right to access information, education and freedom of expression guaranteed under Article 35, 43 and 33 of *the Constitution* respectively was violated by the respondent's conduct.

45. Through the Petition dated 17th June 2021, supported by the Affidavit of Jane Achieng Oaga deposed to on 14th June 2021, the Petitioner challenged the conduct of the Respondent as elaborated in the preceding paragraphs. She prayed for the following reliefs;

    A. A declaration that the Petitioner's rights enumerated at paragraphs 60 to 68 were violated, threatened and infringed by the Respondent.

    B. A declaration that the hearing of the Examination Disciplinary Committee of the Senate held on 10th March 2021 was unfair, unprocedural thus illegal and is null and void.

    C. A declaration declaring that the letter of 29th March 2021 or such letters and decision thereto by the University or any person acting under its authority is null and void ab initio and without any legal effect whatsoever.

    D. An order requiring the examination booklets for the impugned examinations PHA 2503A pharmaceutical Chemistry VII A (CNS), PHA 2506 Pharmaceutical VII, PHA 2501A; Veterinary Dermatology Pharmacology, PHA 2504a Pharmaceutical Chemistry VIIA to be released to the Petitioner for scrutiny.

    E. An order compelling the University to reinstate the marks withheld illegally in PHA 2503A pharmaceutical Chemistry VII A (CNS), PHA 2506

Pharmaceutical VII, PHA 2501A; Veterinary Dermatology Pharmacology, PHA 2504a Pharmaceutical Chemistry VIIA.

F. An order that the Petitioner's name appears in the next graduation list.

G. Damages for mental anguish and distress.

H. General damages and exemplary damages for the highhandedness, harsh and unconscionable conduct of the Respondent.

I. Damages for loss of opportunities and loss of time.

J. The University be condemned to pay the costs of this Petition on a full indemnity basis.

K. Such other orders this Honourable Court shall deem fit in the interests of justice.

The Submissions

46. Through written submissions dated 30th September 2021, the Petitioner identified nine issues for determination.

47. On the first issue regarding whether The Petitioner had exhausted the remedy of right of appeal prior to instituting the suit, it was her case that she indeed exhausted the internal mechanism through the appeal filed on 14th April 2021 before the Vice Chancellor, and being dissatisfied with the decision contained in the letter dated 29th March 2021, made after the disciplinary hearing of 10th March 2021, appealed to the Vice Chancellor against the decision on the grounds that the committee erred.

48. It was her case that at the time of filing the Petition, the Vice Chancellor had not substantively delivered the decision on the appeal but had delegated the appeal to the university's legal department.

49. The Petitioner submitted that it is after that unsatisfactory response was made that the present petition was filed.

50. It was her case that the failure to make a substantive ruling was a derogation of his right under Article 47 of *the Constitution* as read Section 2 and 4 (1) of the *Fair Administrative Action Act*

51. The Petitioner buttressed her case by relying on the decision in Jesse Waweru Wahome & Others Vs. Kenya Engineers Registration Board and Egerton University & Others (2012) eKLR where the Court of Appeal decision in Civil Appeal No. 52 Of 2014, Oindi Zaippeline & 39 Others Versus Karatina University & Moi University was quoted wit approval when it observes as follows;

> " in a country like ours where citizens place a premium on university education, it is not right to leave graduates in a suspended state where they do not know their fate especially where parents have made sacrifices to educate their children, students have taken out loans from the Higher Education Loan Board and are expected to re-pay these loans and the State has invested taxpayers money....This is a situation that cries out for justice."

52. In submitting on the issue regarding denial of the right to legal representation, it was the Petitioner's case that on 10th March 2021, date of hearing, the Petitioner's counsel physically went on The Petitioner's behalf to request for a virtual link and to be given audience but the members present for the meeting not only declined to create a virtual link but dismissed the Petitioner's Advocate stating that in such disciplinary matters one is expected to appear in person.

53. The Petitioner buttressed violation of her rights to fair hearing by relying on the decision of the Supreme Court in Petition No. 5 of 2015 Republic -vs- Karisa Chengo & 2 Others [2017] where it was observed;

> -"the right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more."

54. In submitting on violation of the right to privacy, Petitioner stated that the actions of the Respondents unlocking her phone and scrolling it over an hour while she was doing her examinations was a derogation of her right to Privacy and Dignity guaranteed under Article 31 and 28 of *the Constitution* respectively.

55. Support of the foregoing legal entitlement was sourced from the decision of the Supreme Court in Coalition for Reform and Democracy (CORD) & 2 others -vs- Republic of Kenya &10 Others [2015] eKLR where the Court made reference to the academic works of B. Rossler in his book, The Value of Privacy (Polity, 2005) p. 72 as follows;

> " The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies.
>
> ..."Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part"

56. On the issue of discrimination, it was the Petitioner's case that it was discriminatory of the Respondent to single her out and be asked to pick her pouch and place it on the table when the rest of the students who had similar pouches and tote bags and or duffel bags were not subjected to the same treatment.

57. It was her case that the differential treatment was meant to frame her that she was using the phone.

58. The Petitioner referred to the decision in Petition 150 & 234 of 2016 (Consolidated EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Another where discrimination was discussed as follows;

> " it is safe to state that *the Constitution* only prohibits unfair discrimination. In our view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization."

59. On the issue of being denied access to information being held by the State, it was her case that the Dean's failure to grant her full access to the information on when the disciplinary hearing would be held, when the examination would be done and a chance to see the exam booklets for the units she had "failed" in order to verify that the results were accurate and fair violated her right to information guaranteed under Article 35.

60. The Petitioner relied on the decision in James Humhrey Oswago v Ethics and Anti-Corruption Commission [2014] eKLR where the right to information was discussed in reference to section 29 of the EACC Act as follows;

...the right to information is an undisputed right, to which all citizens are entitled as of right with regard to information held by the state and all state organs, and with respect to information held by any other person if such information is required for the enjoyment or protection of a fundamental right or freedom.

61. It was the Petitioner's case that despite the right to information not being absolute, the conduct of the Respondents was unreasonable and cannot be said to have met limitation provided for under Article 24 of *the Constitution*.

62. On violation of the right to Education otherwise guaranteed under Article 43 of *the Constitution*, the Petitioner submitted that the refusal to release her results for four examinations; the failure by The Senate to consider the evidence she presented; the decision that she reapplies for admission to the school afresh and the refusal to be informed when examinations would be done to enable her prepare adequately and complete her studies curtailed her right to education.

63. The Petitioner relied on the ICESCR Committee General Comment 13 (21st Session, 1999 on "the right to education" where it was observed inter-alia;

> " Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.

64. Based on the foregoing violations, the Petitioner submitted that the Respondent's conduct was inexcusable and amounted to abuse of power which ought not to be allowed in a democratic space founded on national values and principles of governance.

65. It was her case that she was entitled to an order of compensation in the form of damages as per the provisions of Article 23(3) of *the Constitution*.

66. In praying for the sum of Kshs. 10 Million for damages, she pegged the figure on loss of merited employment opportunities, loss of career growth, loss of opportunity to further education (University of Basel), anxiety and mental anguish and loss of reputation.

67. In the end, she urged the Court to allow the Petition with costs.

The Respondent's case:

68. Jomo Kenyatta University of Agriculture and Technology opposed the Petition on two fronts.

69. Firstly, through the Preliminary Objection dated 24th September 2021, and substantively, through the Replying Affidavit of Dr. Esther T. Muoria, The Registrar Academic Affairs and a further Affidavit of Alex, Muriithi, The Dean School of Pharmacy both deposed to on 24th September 2021.

70. In the Preliminary Objection, the Respondent stated as follows;

    a. That this Court lacks jurisdiction to hear and determine the Petition dated the 17th day of June 2021 (Petition)

b. That the Petitioner has failed to exhaust the Respondents internal appeal mechanism established under Regulation 8(e) of the Common Examination Regulations and the Rules and Regulations Governing the conduct and discipline of students at the University.

c. That the Petitioner has failed to make an application to be exempted from such exhaustion of the Respondent's internal appeal mechanism.

71. In the Replying Affidavit, Dr. Esther T. Muoria gave the chronology of events by deposing that upon the Respondent receiving the Petitioner's letter dated 9th November 2020 where she complained about unfair, erroneous and irregular assessment and marking of her units, the Respondent investigated the Petitioners claims.

72. The investigations yielded the results in her first trimester results for her fifth year of study, the Petitioner 's results slip indicated that she failed five units.

73. Ms. Muoria deposed that the Petitioner did not raise any complaints nor pursued a remark for that trimester.

74. She deposed further that for the Petitioner's second trimester, the results slip indicated that she failed two units.

75. It is the Respondent's case that on release on provisional results of the academic year, the Petitioner was placed on eternal repeat in accordance with the Respondent's regulation 9.7.1 for failing six units.

76. Ms. Muoria deposed that it is upon the Petitioner being informed of her results that she sought legal action where the Respondent was issued with a demand letter.

77. He deposed that the Respondent did an investigation into the Petitioner's fifth year of study and came out that the fifth year first trimester had erroneously been done. The Petitioner had failed 4 units and not 5 units as indicated. She had not failed PHA 2500 B CNS Pharmacology which had erroneously been included in her failed units.

78. It was further her deposition that the end of year provisional results showing that the Petitioner had failed 6 units were a true record of the Petitioner's results and that further she had not sat for oral examinations in PHA 2506 A Pharmaceutics VII A and PHA 2506 B in Pharmaceutics VII B.

79. It is her case that on 11th November 2020 the Respondent requested to sit for the oral examination she had missed. She was allowed to sit the said oral examinations. It is her case that she passed PHA 2506 A Pharmaceutics VII A but failed in PHA 2506 B in Pharmaceutics VII B

80. She deposed that the Petitioners first trimester results slip was corrected on the foregoing findings. She was accordingly placed on supplementary for failing five units namely; PHA 2503 A Pharmaceutical Chemistry VII A (CNS), PHA 2506 B Pharmaceutics VII B, PHA 2509 B Clinical Pharmacy IV B (Endocrine Disorders), PHA 2501 A Veterinary & Dermatology Pharmacology and PHA 2504 A Pharmaceutical Chemistry VIII A.

81. On the foregoing, Ms. Muoria deposed that the respondent had marked and graded the Petitioner's examinations fairly and in accordance with the University Act and would not graduate until she has passed all their course units.

82. The Deponent further stated that the Respondent as a matter of policy does not release raw marked examinations slips to its students as it would undermine the Respondent's academic procedures and its administration and management of examinations.

83. She deposed that the Petitioner is on fishing expedition for having failed to follow and exhaust the mechanisms and the procedure for the access of the marked examination scripts as sought in the Petition.

84. On the issue of seizure of the Petitioner's phone, Ms. Muoria deposed that the Petitioner had activated her phone in the examination and was cheating in respect of section B of PHA 2509 B Clinical Pharmacy IV B (Endocrine Disorders).

85. It was her deposition that the Petitioner had failed to furnish the Court with evidence to demonstrate that any other student was seized using their phone and or written notes and no action was taken against them.

86. Ms. Muoria defended Dr. Julia Kimondo by deposing that it is not true she (Dr. Kimondo) coerced the Petitioner into unlocking her phone. It was her case that the Doctor is one of the reputable and distinguished lecturers and the Petitioner's allegations are without basis.

87. It was her deposition further that the invigilators treated the Petitioner fairly in the administration of the examination in question and the Petitioner has failed to furnish the Court with any evidence of systemic vengeance targeted at her.

88. On the claim that the Respondent had sought the Petitioner's private information, it was Ms. Muoria's deposition that no evidence was before Court that demonstrated such occurrences.

89. The Respondent rebutted the Petitioner's claim of unfair hearing by stating that vide the letter dated 19th February 2021, the Respondent summoned the Petitioner to appear before the Disciplinary Committee on 10th March 2021 at 8.30am to answer to charge of violating examination regulation and to that end was told to submit her written response.

90. She deposed further that in the letter the Petitioner was informed in accordance to Respondent's Regulation 8(b) that failure to present herself would not deter the disciplinary committee from reaching a verdict.

91. It is her deposition that the Petitioner neither appeared before the disciplinary committee nor submitted her written statement in accordance with the Respondent's Common Examinations Regulations which require in person appearance of students before the Committee.

92. On foregoing premises, he deposed that the Disciplinary Committee found the Petitioner guilty as charged. To that end, her PHA 2509 B Clinical Pharmacy paper was cancelled and was directed to repeat the unit as a supplementary examination and to undergo mandatory counselling.

93. It was her case that as a standard procedure, all students facing Disciplinary Committee, whether found guilty or not have to undergo counselling, which is a student welfare initiative.

94. Ms. Muoria further deposed that the Petitioner was informed of the right to appeal the decision to the Vice Chancellor within 14 days.

95. To that end, it was her case that the Petitioner through her advocates wrote to the Vice Chancellor expressing dissatisfaction with the Committee's decision.

96. She deposed that the Respondent's Chief Legal Officer responded to the Petitioner's appeal where the school's position as per the Regulations were restated.

97. It was her deposition that the Petitioner's appeal is yet to be determined and as such the internal mechanisms are yet to be exhausted.

98. In the end, it was urged that the Petition is frivolous and an abuse of Court process.

99. In the Respondent's further affidavit Mr. Muriithi, The Dean School of Pharmacy, reiterated the depositions of Ms. Muoria regarding the units sat and the results released and deposed that the Petitioner's results slip was a true record and reflection of the examinations undertaken by the Petitioner.

100. He, however, added that he had never informed the Petitioner that she had failed her course units because of travelling too much and missing lessons. He stated that in any case, there was no evidence.

101. With respect to the Petitioner's claim that he (Mr. Muriithi) had informed him that her husband had wrote a 'dirty' email to the Registrar, a cause for toxic environment in the School of Pharmacy, it was his deposition that there was no evidence to that end.

102. He also deposed that he had never called Brian Ombura and Ms. Victoria Wanjugu asking them personal questions about her mental capacity.

The Submissions

103. The Respondent filed written submissions dated 14th October 2021. It identified five issues for determination.

104. On claim of failure to exhaust internal mechanisms, it was submitted that the Petitioner's case is caught up by section 9(2) of Fair Administrative Actions Act which prohibits High Court from reviewing an action or decision unless internal mechanism are exhausted first.

105. While relying on the decision in Republic -vs- Kenya Revenue Authority Ex-Parte Style Industries Limited, it was its case that the Respondent had failed to demonstrate exceptional circumstances to warrant this Court's Jurisdiction.

106. On the basis that the Petitioner's appeal is yet to be heard, which the Vice Chancellor can only do, it was submitted that the letter written to her by the legal department was on a without prejudice bases and not a determination of the substantive merits of the Petitioner's appeal.

107. On the basis of the provisions of section 5(2) of the Fair Administrative Actions Act, the Respondent was of the position that the Petitioner ought to have pursued redress under the Commissions on Administrative Justice Act.

108. To buttress the foregoing, the Respondent referred to the Court of Appeal decision in Civil Appeal No. 141 of 2015, The Commission on Administrative Justice -vs- Kenya Vision 2030 Delivery Board & 2 others.

109. On the claim regarding illegality or unfairness on the part of the Respondent for seizing the Petitioner's mobile phone, it was submitted that the petitioner was using it in violation of the Respondent's Examination regulation 6.1(b).

110. As for the charged levelled against her, the Respondent submitted that the Petitioner was aware of it.

111. In reference to the decision in Geothermal Development Company Limited -vs Attorney General & 3 Others (2013 (eKLR) it was submitted the Petitioner was given a reasonable opportunity to defend herself.

112. On the issue whether the Respondent marked and graded the Petitioner's examination in accordance with the law, it was submitted that the Respondent has always marked and graded examinations in accordance with its mandate under University's Act.

113. Reliance was placed on the decision in Republic -vs- Kenya National Examination Council & Another Ex-parte Kipkuri Michelle D Jeruto & 34 Others where it was observed;

...as has been repeatedly pointed out by this Court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters...

114. On the issue regarding the Petitioner's asserted right to access her examination booklet, it was submitted that the right is not absolute and the Respondent's policy not to release marked scripts to the students in in tandem with its mandate in the administration, evaluation and grading of examinations.

115. While relying on the case of Paragon Electronics Liited -vs- Njeri Kariuki, it was its case that the Petitioner ought to have challenged the denial of information through the means provided for under section 14 of the *Access to Information Act*.

116. In totality of the foregoing submissions, the Respondent stated that to grant on order to change and reinstate examination marks as sought be the Petitioner would open the respondent to ridicule, scandal and infamy with to every examination issued to the Respondent's students. The Court's attention was drawn to the decision in Benjamin Morara Ondari -vs- Kenya School of Law & Another where it was observed that;

...A Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to statutory bodies...

117. In the end, the Respondent urged the Court to find the Petition to be without merit and to dismiss it with costs.

Analysis:

118. From the reading of the material before Court, several issues arise for discussion. However, the most paramount one is the jurisdictional challenge taken by the Respondent. Given the nature of such an objection, this Court will adopt the direction of the Supreme Court in Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR that 'jurisdiction is a pure question of law and should be resolved on priority basis'.

119. The Court will, hence, determine whether it has the requisite jurisdiction over this matter in light of the objection. The gist of the Respondent's objection is that the Petitioner failed to exhaust the Respondent's internal appeal mechanism established under Regulation 8(e) of the Common Examination Regulations and the Rules and Regulations Governing the conduct and discipline of students at the University. To that end, the Respondent called upon this Court to dismiss the Petition and to down its tools.

120. The Respondent made solemn submissions on the objection and referred to several decisions in support of the position. On its part, the Petitioner diametrically opposed the objection. It also referred to decisions to that end.

121. The objection is mainly based on the doctrine of exhaustion. In Kenya, the doctrine traces its origin from Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

> 159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-
>
> (a) ...

(b) ...

(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

122. Clause 3 is on traditional dispute resolution mechanisms.

123. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR. The Court stated as follows:

> 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
>
> 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
>
> Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> 42. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:
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> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

124. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
>
> What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)
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> 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
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> 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
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> 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

125. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR held as follows: -

> The jurisdiction of the High Court is derived from Article 165 (3) and (6) of *the Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of *the Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
>
> At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of *the Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of *the Constitution* became automatic. And in our view, it could not be ousted or substituted.

126. Further, in Civil Appeal 158 of 2017, Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

> 23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

127. From the foregoing discussion, the doctrine of exhaustion is a complete bar to the jurisdiction of a Court save in cases where any of the exceptions apply.

128. Applying the above to this matter, there is no doubt that the Respondent has an established internal disciplinary mechanism which includes the lodging of an appeal from the decisions of the Senate to the Vice- Chancellor. Indeed, the Petitioner complied with the said mechanism.

129. There is evidence that the Petitioner on being dissatisfied with the decision of the Senate Disciplinary Committee preferred an appeal to the Vice Chancellor. The Memorandum of Appeal is dated 14th April, 2021. The appeal raised serious issues of law and procedure.

130. The appeal was yet to be dealt with at the filing of the Petition in June 2021 which was 2 months post the delivery of the decision by the Senate Disciplinary Committee. With the exception of a letter dated 18th May, 2021 by the University's Chief Legal Officer addressed to the Petitioner's Advocates nothing of substance had since taken place.

131. This Court has carefully considered the said letter and finds it lacking any probative value and does not in any way amount to a decision in respect of the appeal to the Vice Chancellor on two grounds. First, the letter was written on a without prejudice basis. Second, the appeal is to the Vice Chancellor and not to the Legal Department. The Office of the Vice Chancellor is a statutory one with defined holder and specific responsibilities. Such duties cannot be discharged by the Legal Department.

132. The upshot is that as at the time of filing the Petition, the appeal had not been dealt with. There was, as well, no indication from the Vice Chancellor on when the appeal was to be heard.

133. Given that the Petitioner was then in her final year of study and had already secured a position at the University of Basel to pursue a Masters in Drug Sciences and was required to supply her final year results to the institution, then every single day counted. The deafening silence on the part of the Respondent coupled with the urgency of the matter meant that the Petitioner would be compelled to seek all and any other means of intervention.

134. To that extent, the Respondent cannot be heard to allege that the internal dispute resolution mechanism was not adhered to. To the contrary, and in the unique circumstances of this case, the said internal appellate mechanism could not accord the Petitioner the quality of audience which was proportionate to the immediate interests the Petitioner wished to advance in the matter for there was no indication as to when the appeal would be dealt with. As such, the second exception to doctrine discussed above applies to this case.

135. It is, therefore, this Court finding that the doctrine of exhaustion would not be applied in this matter to deny this Court the jurisdiction over the Petition and to dismiss the claim.

136. Having said so, this Court, however, notes and regrets the time taken to render this decision. The reasons for the delay shall be tendered the end of the judgment. However, the inordinate delay herein definitely brings a complete dimension to the matter. The Court is not aware of the current state of affairs. It may be that the Petitioner eventually completed her studies at the University. It may also be that the Petitioner is still waiting for the outcome of her case.

137. In order to take care of the limbo this Court finds itself in, it is prudent that the matter be referred back to the Vice Chancellor. The Vice Chancellor will be best placed to take the appropriate steps going forward. If for instance the Petitioner graduated and has no further claim arising out of the appeal, then the parties are likely to settle the matter amicably. In the event the Petitioner still wishes to pursue

the matter, then the Vice Chancellor shall proceed to hear and determine the appeal within a timeline set by this Court.

138. It is this Court's position that the foregoing approach will take care of and balance the interests of both parties as propounded in this matter.

139. Coming to the end of this judgment, this Court wishes to profusely apologize for the late delivery of the decision. 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.

140. From the above discussion, the Petition is hereby determined as follows: -

a. The Respondent's Vice Chancellor shall, within 30 days of this order, hear and determine the appeal lodged by the Petitioner vide the Memorandum of Appeal dated 14th April, 2021.

b. On compliance with order (a) above, the Petition herein will stand determined as such and the Respondent shall bear the costs of the Petition.

c. In the event the Respondent's Vice Chancellor fails to hear and determine the appeal as ordered in (a) above, the Petition dated 17th June, 2021 shall stand allowed in terms of prayers B, C, D, E, F and J.

d. In the further event of the Respondent's Vice Chancellor failing to hear and determine the appeal as ordered in (a) above, and further to (c) above, the matter shall then be placed before the Presiding Judge of the Division for purposes of addressing prayers G, H and I of the Petition dated 17th June, 2021.

141 Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 23RD DAY OF FEBRUARY, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss Ndegwa for Petitioner

Mr. J. B Macharia for the Respondent

Regina/Chemutai – Court Assistants