



**Maalim v Kenya National Qualifications Authority (Petition E124 of 2022)  
[2023] KEHC 2002 (KLR) (Constitutional and Human Rights) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2002 (KLR)

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

**PETITION E124 OF 2022**

**DKN MAGARE, J**

**FEBRUARY 17, 2023**

**BETWEEN**

**KALTUMA ABDULLAHI MAALIM ..... PETITIONER**

**AND**

**KENYA NATIONAL QUALIFICATIONS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. This matter was placed before me during the Rapid Result Initiative (RRI) for January, 2023 pursuant to directions given by Hon. Justice H L I Ongudi on 13<sup>th</sup> December, 2022. The matter is a fairly straight one and one that left our limits in terms of enforcement of our confirmation.
2. The matter involves an education journey of resilience and progressive development on part of the Petitioner. The journey appears have hit a snag when the Respondent declined to equate her decree from Kamplala International University. That was the genesis of this petition.
3. The Petitioner appealed twice to the Respondent and it appears, she was either not satisfied or the conditions placed for her compliance for equation were a herculean task for her to meet. She came to the court with this Petition dated 24/3/2022 which was strenuously opposed by the Respondent.

**Pleadings**

4. The petition dated 24<sup>th</sup> March 2022 is supported by a 17 page affidavit of even date and seeks the following prayers:-
  - a. That a declaration be and is hereby made that actions of the Respondent purporting to invalidate the Petitioner's qualifications is arbitrary, unlawful, unconstitutional and void *ab intio* (sic).



- b. That a declaration be and is hereby made that actions of the Respondent declining to recognise the Petitioner's qualifications were made in violation of Articles 47,48 and 51(1) of the Constitution for reasons that they were done without due regard to the requirements of Fair Administrative Actions and denied the Petitioner's(sic) a fair hearing before an impartial body and the decision thereof is unconstitutional, invalid and void ab intio (sic).
  - c. The honourable court be pleased to issue orders of certiorari, removing our quashing the decisions of the Director General /Chief Executive officer dated 24/7/2020, 6/7/2022 and 8/3/2021 refusing to recognise the Petitioner's degree certificate conferred by Kampala International University.
  - d. A declaration be and is hereby made issued that the Respondent's decision of denying the Petitioner (sic) the equation letter of her decree qualifications was arbitrary, unlawful, null and void as it offends Articles 2(1), 10(1),(2), 19(20,20(2), 21(1), 22, 23,27(1) 28, 43 (1)F, 47, 48,55, 258, 259 and 260 of the Constitution of Kenya and section 3(1) A And C,4(1), (2) (3) & 11 of the *Fair Administrative Actions Act*, no. 4 of 2015.
  - e. A declaration that acts and omissions of the Respondent complained of are unreasonable, unfair and in breach of the Petitioner's legitimate expectation for a process that is procedurally fair, Constitutional and law abiding.
  - f. The honourable court be pleased to issue orders of mandamus, directing the Respondent to issue the Petitioner with an equation letter in respect of her degree certificate obtained from Kampala International University;
  - g. ....
  - h. Costs of this petition to be borne by the Respondent.
5. The Respondent filed a replying affidavit sworn on by Dr. Juma Mukhwana, PHD, the Director General of the Respondent on 10/7/2022. He elucidates the genesis of this matter from the time it was triggered by the Petitioner's letter dated 10/7/2020 for equation.
  6. Both parties were impressive in their pleadings. The same are readable and less torturous to peruse. However, the pleading could be more concise. The petition leaves numerous gaps including the entire education history from birth, nursery, primary and secondary education of the Petitioner, facts which are essential in determining her eligibility for equation as it will be apparent in not so distant future.

#### **issues for determination.**

7. There are three issues that have crystalized in this petition, that is: -
  - i. Does the Respondent have the authority to make the decision it made.
  - ii. If the answer, to the foregoing question is in the positive, whether in making that decision there was adherent to the law in particular Article 47(2) of the Constitution .
  - iii. Whether answer to (i) above is positive or negative, what remedies, including costs available to parties.

#### **Petitioner's Submissions**

8. The Petitioner submitted that she had obtained a degree from Kampala International University. Before then, she had been awarded a certificate and Diploma in 2006 and 2008 respectfully from



Cefored Institute of Relief and Development. She stated that her certificate and Diploma were valid as they were issued by an institution registered by the ministry of Education Science and Technology as at the time of issuance of those qualifications.

9. The Petitioner identified the following 2 issues
  - a. whether the Respondent acted within their mandate in declining to equate the Petitioner's degree,
  - b. whether the Respondent were in breach of procedural fairness and
  - c. what reliefs should be granted.
    1. The Petitioner relied on several authorities including *Zacharia Wagunza vs Kenyatta University* (2013)eKLR, *Robert Uri Dabaly Jimma v Kenya School of Law* (2020)eKLR, *Joyce W Gichobi v Council for Legal Education & 2 Others* (2017) eKLR, *Monica Wambui Ng'ang'a vs Council for Legal Education and 4 Other* (2017)eKLR, *Alice Waniru Njuri v Kenya School Of Law And 16 Others* (2017) eKLR,

### Respondent's Submissions

11. The Respondent identified 2 issues, namely;
  - i. whether the action of declining to equate the Petitioner's foreign degree qualification was tainted with procedural impropriety, illegality and unreasonableness.
  - ii. Whether the said action violated the Petitioner's rights under Article 47 of the *Constitution*.
12. The Respondent argued that question of procedural impropriety comes out where the Respondent fails to act fairly expeditiously and Rule of natural justice. In other words, did the Respondent treat the Petitioner fairly when making the decision on the equation of her degree.
13. In respect of Article 47 and Article 27 the Respondent relied on *Kenya Revenue Authority Vs Menginya Salim Margani* (2018) eKLR.
14. They also question the competence of the Petition for lack of precision on points of law. They rely on *Anarita Karimi Njeru versus* (1979)eKLR and *Husus Mugiri Vs Music Copyright Society*(2018) eKLR, *Republic Versus Chief Magistrate Makindu & another Ex Parte Benard Musau Mailu*, (2016)eKLR, *Republic Versus National Employment authority and 3 others Ex Parte Middle East Consultancy service* (2018)eKLR, and *Pastoli v Kabale district local government council* (2008) 2EA 300.

### Factual Matrix

15. Apart from the detailed history set out in the pleadings, the factual matrix is not disputed. The Petitioner reportedly attended a certificate course at Cefored institute of Relief and development. Thereafter she undertook diploma from the same institution. The problem however is not whether the institution was registered but whether it was accredited to award certificates and diploma it was teaching. The Petitioner, annexed a copy of a registration certificate for Cefored Institute of Relief and Development.
16. There was no evidence of licence for Cefored Institute of Relief and Development to confer a certificate or diploma at the time the Applicant is said to have studied at the said college. I need to contextualise, a school like, Kisii School, Alliance High or a college like Eldoret National Polytechnic are registered to train students in various subjects and courses on part of the Polytechnic.



17. However, for the students are not examined by Kisii school or Alliance High but by the Kenya National Examination Council. The polytechnic offers a mixture. The first option is that it offers courses which it is licenced to certify students on Competence based Education and training.
18. This is monitored by the relevant quality standards body under TVET. On the other hand, they also train students and offer them to Kenya National Examination Council for Examination and award of relevant academic and professional certificates and diplomas. This is opposed to universities which are, registered to train and are certified to award various certificates, degrees and diplomas.
19. This came out clearly in the case of engineering students in the case of *Martin Wanderi & 106 others v Engineers Registration Board & 10 others* [2018] eKLR of Masinde Muliro University of Science And Technology where the court of Appeal posited as follows:-

“We are cognizant of the jurisprudence in Republic v Council for Legal Education ex parte James Njuguna & others, (above), which we reproduce:

“In academic matters involving issues of policy, the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable.” ...”

20. The court further stated, that matters of policy the courts are least qualified to deal. In this case, we are dealing not with the propriety of the degree but the qualification of the Applicant. In the said case, of *Martin Wanderi & 106 others*, the supreme court stated:-

“(159) As a Court, we agree that when it comes to matters of policy formulation, we have a very minimal role to play, in matters education as especially professional training. However, we are cognizant of the fact that where such policy decisions affect the fundamental rights and freedoms protected by the Constitution, then those actions invite this Court and courts in general to intervene and safeguard those rights and freedoms. In this regard, see *Community Advocacy and Awareness Trust & 8 Others vs Attorney General & 6 others* [2012] eKLR where it was held that the court is not the appropriate forum for issuing guidelines.

[160] Be that as it may, we urge the relevant parties herein that there is need to always act pragmatically during key decision-making forums. The fate of students, youth who are at the core of the learning institutions should always be considered. It is evident that with hind sight, the situation herein could have been handled differently.”

21. The duty of the Respondent is to consider the qualification of the Applicant herein. The duty is different if we were dealing with the degree certificate itself. The question is whether the Applicant was sufficiently qualified to undertake a degree from Kampala International University. To be qualified to undertake a degree does not arise from possession of the degree but possession of antecedent qualifications.



22. The Respondent may not question the validity of the degree but cannot equate a degree issued to a person without a paper trail on prior qualification. This duty was set forth in the supreme court decision of *Martin Wanderi & 106 others* case (Supra), as follows :-

“Through the proceedings right from the High Court and Court of Appeal, the Board has not submitted that the Petitioners did not meet the threshold of section 11 of the Engineers Registration Act. The Board’s case was that the degrees they held were not from universities accredited to issue engineering degrees. No evidence has been tendered that even, had the Board correctly interpreted its mandate, the Petitioners, or some of them would not have qualified to be registered. From the above, we hold that the Board exceeded its statutory mandate by confusing its duty to consider, whether there was evidence of adequate training in Engineering, with a non-existent power, to determine whether the Respondent universities had been accredited. Consequently, we see no other reason why the Board should not have registered the applicants. We hereby direct that the Board proceeds to register the applicants as engineers in light of the unique circumstances of the Petitioners and 2<sup>nd</sup> interested parties in Petition No.19 of 2015”.

23. In case of universities, there is clearly a body to accredit the courses. The accreditation has to be done for each course to be done. In case of Institute of Relief and Development, there was no accreditation. There is no dispute that one body accredited the institution as opposed to another. The supreme court stated at page 115 of *Martin Wanderi & 106 others* case continued as follows in regard to accreditation:-

“We also note that under The Universities Act, there is subsidiary legislation(s) made pursuant to section 21. One of the subsidiary legislations is the Universities (Establishment of Universities) (Standardization, Accreditation and Supervision) Rules, 1989. Under these rules ‘accreditation’ is defined thus:

“Accreditation” means public acceptance and confirmation evidenced by grant of charter under section 12 of the Act that a university meets and continues to meet the standards of academic excellence set by the Commission.

This clearly fortifies the argument that the legislation that dealt with accreditation of universities when this cause of action arose was not the Engineers Registration Act, but the Universities Act, which defines accreditation and provides the matrix on how to establish both private and public universities.”

24. From the case, it is clear that institutions are not only licenced to train, each course is specifically approved together with its curricula and specific course content. It is not enough to brandish a diploma and say I am qualified. My understanding of the qualification framework, is that specific hours have to be put into a course and that is what is approved, as a condition precedent for the next level.
25. The registration of Cefored Institute of Relief and Development is indicated at the foot to be done under Section 15(2) of the *Education Act*, Cap 211 (now repealed). This note is crucial to the eventual determination of this matter. It is also agreed that this was the institution that eventually awarded the Petitioner, a diploma and certificate.
26. The school had not been granted permission under Section 21 of the *Education Act*, cap 211(now repealed) to examine and award certificates and diplomas. What I understand the Respondent to be saying is that registration was for purpose of instruction or teaching. I agree that the mere fact that a school is registered does not make it an examining body. There needs to be a separate registration to



award diploma or certificates or have a different examination body, whose curriculum is being thought, carry out examinations.

27. Section 21 of the repealed act provides as doth:-

No unauthorized issue of certificates or diplomas

“No person except— (a) the persons and institutions named in the Second Schedule; or (b) a person who has received the consent of the Minister, given by notice in the Gazette, shall issue a certificate or diploma to any person indicating or purporting to indicate, that a person has successfully completed a course of education or training, or has attained a particular educational standard, or possesses any skill, knowledge or professional competence”

28. The second schedule to the Act provides as follows:-

“Second Schedule [section 21.] Persons Who Need Not Obtain The Minister’s Prior Written Consent To The Issue Of Certificates And Diplomas

- a. The Government.
- b. Any person issuing a certificate or diploma as a result of an examination for the conduct of which the Government, the Kenya Polytechnic or the Mombasa Technical Institute is responsible.
- c. Any institution of higher education.
- d. The Kenya Scouts Association.
- e. The Council of Legal Education.
- f. Egerton Agricultural College.
- g. The Girl Guides Association.
- h. The Kenya Polytechnic.
- i. The Kenya Red Cross.
- j. Pitmans Examinations Institute.
- k. St. John Ambulance Association.

(numbers added for ease of reference)

29. The repealed *education act*, cap 211, defines an institution of Higher Education to mean “a University or a constituent college or institution of a university. This thus excludes the Cefored Institute of Relief and Development.

30. Consequently, Cefored Institute of Relief and Development, being a school that is not set out in the second schedule, it was thus required to have prior written consent of the minster for the time being in charge of Education to offer certificates and Diplomas. This was not shown to have been done. The Applicant’s good stood cooked and eaten.

31. This explains why, for example, Kenya school of Law which is mandated to train students under the Advocates Training Program but the examinations are administered by the Council for Legal Education. I shudder that one day, someone will turn up with a diploma, where he has been examined and declared qualified by the Kenya school of law and pray to be admitted to the Roll of Advocates.



32. I therefore agree with the Respondent that mere registration does not allow a school to administer exams and award diplomas and certificates. This however does not solve the problems at hand, which are:-
- a. Did the Respondent have authority to go behind the degree issued by Kampala international university
  - b. Whether, the Petitioner was entitled to be heard and whether she was heard before the decision was made
  - c. Whether the Respondent exceeded authority when they declined to equate a degree duly issued by a competent authority within EAC. In other words, can the Respondent take upon itself and go behind a duly issued degree and pronounce itself.
33. The above questions will settle the issues of equating the Petitioner's degree in Business Administration. I will ask this question in a roundabout way, is the Respondent obligated go behind a degree and behind the prior qualifications in order to carry out equation. This means that this court has to consider the process of equation and find whether the Respondent was arbitrary, unfair, partial, acted unconstitutionally and as a result arrived at a decision that is null and void and as such liable to be removed to this curt and quashed.
34. The Petitioner avers implicitly that the Respondent was not bound to go behind the degree to find out whether the Petitioner was qualified to undertake the degree that she did. The Petitioner put forth 2 aspects as regards prior qualifications. The first one was that she was qualified to undertake a degree by virtue of the diploma and certificate she undertook in 2006 and 2008. Secondly, that in any case, that decision is not for the Respondent to make. It had already been made by Kampala International University, a university within East Africa and as such the Respondent was bound to recognise it.
35. The Respondent on the other hand maintains that they took into consideration relevant factors and as a result arrived at a correct decision. It is important to be alive to the fact that this court is not sitting on appeal from the Respondent's decision. The court is sitting as a Constitutional Court sieving the Constitutionality of the decision. If the decision does not pass the Constitutional test of rationality, proportionality and legality, then its fate is sealed. However, if it meets the Constitutional threshold, this court must as of necessity allow the same to stand.
36. The correct position was stated by the court of Appeal in *Judicial Service Commission v Mbalu Mutava & another*, [2015] eKLR where the fair hearing and fair administrative action by this words:
- “The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in *Ridge v Baldwin* (supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under Article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in Article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.”
37. This is the test we shall test the Respondent's conduct in Respect to this matter, remembering always that this is a court of law and not a court of mercy. This goes hand in hand with the issue of legitimate expectation raised by the petitioner.



## Legitimate expectation

38. The first issue we need to deal with is the issue of legitimate expectation. Legitimate expectation, in all its facets foresees a scenario where there is an expectation arising from estoppel or conduct that is lawful, resulting in the other party expecting lawfully, that action will be carried out in the same way. However, as the word indicates, the expectation must be lawful, Constitutional and with no tinge of illegality.

39. In *Stephen Kipkemei Rutto v Kenya School of Law & another* [2022]eKLR, Hon Justice J. A. Makau, had the following to say:-

“The principles on legitimate expectation were elaborated in *Royal Media Services Ltd and 5 others* (Petition No. 14 of 2014); in that, there must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which was competent and lawful for the decision maker to make; and there cannot be a legitimate expectation against clear provisions of the law or the Constitution. I do agree that the Petitioner’s legitimate expectation has been breached.”

40. The Court of Appeal had occasion to deal with legitimate expectation in the case of *Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others* [2005] 1 KLR 280 , the court succinctly posited as doth:-where it was held that:

“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence.

The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

41. Therefore, legitimate expectation arises out of lawful operation by a decision maker. It cannot arise out of illegality or out of feeling of entitlement flowing from wrong information or an illegal act. I have perused the entire petition, and I have not seen where the Petitioner had legitimate expectation that was not dealt with

42. What I gather is that the Petitioner made an application on 10/7/2020 and paid Ksh. 5,000/.=. The application letter was replied to on the same day as doth:-

“This is to acknowledge your application dated 10/7/2020 for equation of Bachelor in public administration awarded by Kampala International University, Uganda.

Your application is being evaluated and the authority will communicate the outcome once the process is complete.





Signed.”

43. At this point, the legitimate expectation was that the evaluation was to be done and correct results communicated. There were no reasons to expect to be heard on the degree, since the Respondent was dealing with documents. The Petitioner was not the author of those documents and there was no occasion that issues of the genuineness of the documents arose.
44. Section 4(3) a & b of the *Fair administrative actions Act*, no. 4 of 2015, provides that:-
- (3) where an action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-
- a. A prior and adequate notice of the nature and reason for the proposed administrative action.
  - b. An opportunity to be heard and make representative in that regard.
    1. In this particular case, there was no proposed action on part of the Respondent to take any administrative action. It is the petitioner who requested for an action, which is part of the core mandate of the Respondent. The Respondent acted on the request and gave “written reasons” within the meaning of section 4(3)(d) and 6 of the Administrative Actions Act.
    2. The question the Respondent was dealing with, is the prior qualification. The documentation needed for equation are set out in the Kenya national framework of qualifications Act and Regulations. Parole evidence could and does not change the state of documentation.
    3. Upon application, the applicant expected a decision The process does not become opaque when the decision goes the other way. If on other hand, the Respondent had received some information, from some rumour mills, without an application by the Petitioner that the Petitioner’s degree is not genuine, before dealing with it, they ought to infirm the Petitioner. However, in this case, being the initiator of the action, the legitimate expectation was that the Respondent will consider the Application and act fairly. This was done.
48. I am therefore satisfied that the Petitioner was properly heard, given that what was in issue are only documents. There is no legitimate evidence that can be adduced to change the character of the degree to be equated. Being heard orally cannot change the state of accreditation of the institution that issued the diploma or certificate was issued by an accredited institution.
49. The letter dated 8/3/2021 is quite clear on the reasons for the rejection of the bachelor qualification. This was due to,
- “prior qualification from Cefored Institute of Relief and Development in Kenya was not valid.”
50. The duty of the Petitioner after that was fairly simple, and I don’t think, the window was shut for the her to place before the authority contrary evidence. The authority was not asking for much. That window is and continues to remain open. The Petitioner is not being asked to comply with a law retrospectively.



51. There was also a disturbing element regarding the Petitioner’s qualifications. Outside 2 pieces of paper, named as diploma and certificate, there were no other document showing prior qualification. There was absolutely no evidence of transcripts, basic education certificates both for primary and secondary school education. There was no scintilla evidence that the Petitioner was qualified even to be admitted to the certificate course. I leave it at that.

### **Mandamus**

52. The other order sought is an order of mandamus. This is not an ease order, but an order directed to a public body, at the pain of contempt to do that which they have failed to do and which is their duty to do. The Petitioner was under duty, to show that there was a duty, not just an ordinary duty, a duty placed on the Respondent and no one else and the Respondent has failed to carry out that duty. It is a wakeup call to a body that has neglected its duties to be reminded painfully to do the same in order to do justice to the parties.

53. The duty on the Respondent is found in Kenya National Qualifications Framework Act, No. 22 OF 2014. Under section 3 of the Act, the guiding principles for the Respondent is stated to be:-

“The guiding principles for the framework shall be, among others, to promote access to and equity in education, quality and relevance of qualifications evidence based competence, and flexibility of access to and affordability of education, training assessment and qualifications”

54. The key aspect of their duty is to promote “quality and relevance of qualifications evidence based competence..”. What I understand this to mean is that there is always, a paper trail showing competence at all levels, including the competence of the bodies that are awarding those qualifications. The Petitioner was requested for evidence to enable the Respondent assess the same and equate the degree. This was not done.

55. In the current case, the only other documents the Petitioner is presumed to have, other than the degree, is the birth certificate. Even that was not produced to enable the Respondent equate her education even to level 1. Whereas I do not doubt the genuineness of the degree awarded, by Kampala International University, the question is whether she was qualified to undertake the same.

56. These are the very same reasons why the Respondent was formed ensure that there is a level of respectability of our academic credentials. I shudder to imagine, that whereas people are sweating it out sitting for exam, spending sleepless nights to qualify to join university, someone will walk, just with the birth certificate to a university somewhere North of the Limpopo River and South of the great Sahara, and emerge with a degree, and demand that the Respondent equates it.

57. History has shown that even the greatest universities of the world, such as the university of Timbuktu, the university of the Sudan and the university of Alexandria before then, people used to spend a great number of years before great teachers whose education backgrounds in medicine, literate, religion and rhetoric were renowned and time tested. It is high time that we learn that we must always climb a tree from the bottom.

58. We have a sad situation, where the only documents the Petitioner can show to lawfully have are the birth certificate and degree certificate and nothing else.

59. Education is a common heritage to all and as such cannot be played with. I therefore find and hold that without evidence based competence, the Degree certificate held by the petitioner, cannot truly be equated. the respondent did not err in declining to equate certificate without roots. The Respondent carried out the duty they were entitled to do.



60. In election petition no Voi HCEPA No. E001 of 2023- Peter Shambi -Versus- Doreen Taabu Rodgers & Independent Electoral And Boundaries Commission, (2023) eKLR, I had the occasion to review the effect of a nullity as enunciated by the Court of Appeal (Maraga, M’noti & Murgor, JJ.A.) in the case of Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others [2014] eKLR. Law Lords considered the matters before then and stated :-

“In *Macfoy Vs United Africa Co Ltd* (supra) Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularity is not void, but voidable. An act that is voidable is valid until it is made or declared void. It ceases to have effect after it is declared void; it is not void ab initio. What has been done or accomplished before, pursuant to that act, is not affected by the declaration. On the other hand, a nullity is really something that is void, a nothing right from the beginning. In the words of Lord Denning:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”

61. Arising from the foregoing I had come to an inevitable conclusion that, before you are declared to have achieved a higher level of learning, it is imperative that you show that you were qualified to pursue the level you are pursuing by showing the previous contribution. An academic qualification cannot be based on nothing. learn. You cannot build a degree on nothing. There are prior qualification for admission which must be met prior to qualification itself. If those prior qualifications must be built on others. This is evidence based qualifications.
62. The order of mandamus sought cannot issue. This is because the Applicant has not met any of the prerequisites for issuance of the same. The court of appeal set out in extensio the test for Mandamus in the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR where they expressed themselves as follows:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.



63. In Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano Civil Appeal No.24 of 1985 the Court of Appeal stated that:-
- “The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.”
64. The nature of mandamus is that it cannot quash what has already been done but order that which ought to have been done and has not been done, to be done.
65. Article 47 of the Constitution from which the Fair Administrative Action Act emanates is of a nature of merit review of administrative action. This is exemplified by Sections 7 (2) (f) and of the said the Act which recognise that judicial review can be carried out where relevant considerations were not taken into account or discretion was abused or is unreasonably applied.
66. The essence of merit review is the power to substitute a decision. Under the Fair Administrative Actions Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. The court can only order or direct, at the pain of contempt that the decision maker makes a decision, which is their duty to make.
67. The duty to make a decision still remains with the decision making body. The court cannot substitute it with its own decision. Decision making is not discretionally but based on the law. Where a lawful decision is made, this court cannot substitute its own sense of indignation, morality or sympathy as a fiat to impose a decision.
68. It is in common ground that the Petitioner took her degree in Business Administration after undergoing a certificate and diploma from Cefored Institute of Relief and Development. The only question was whether the institution was qualified or accredited to award the certificate and diploma, which they purported to award the Petitioner. In all fairness to the Petitioner, he may have been duped into studying in an unaccredited college. That however does not give her the right to be equated.
69. Education is like jurisdiction; it cannot be conferred by consent- Either you have education qualifications or you don't. As much sympathetic we may be, we cannot act out emotion when it comes to education qualifications. It is not that we do not recognise that the Petitioner spent a fortune studying a degree that may never be equated. The consolation she is that the knowledge she has will never be lost. Nevertheless, we owe it to ourselves and generations to come to maintain fidelity to training and certification standards.
70. The reliability and credibility of education depends on the ability of a country to show evidence of learning through a series of accreditations and certifications. There is no other way. I was conjuring that what if as I was concluding this judgment in the sweltering heat of Mombasa, I collapse and I am taken to the nearby hospital. As I am wheeled, to theatre, my wife discovers that the treating 'surgeon' never went to medical school. He only obtained some certification from his pastor that he can operate!
71. he Petitioner obtained a certificate in the year 2005 and Diploma in 2008. the petitioner used these documents to progressive and get a degree from Kampala International University. The Equation of this Degree is the issue that gave rise to this petition. The Respondent, maintained that the certificate and diploma was awarded by an institution that was not mandated to award such qualifications hence she was not qualified to be admitted to Kampala International University.



72. According to the Petitioner she was admitted to a University in the EAC Community and as she cannot be questioned by the Respondent to the Petitioner, since it is not the duty of the Respondent to approve the degree but to equate the same accordingly to the laid down Regulations and the Act. I respectively agree. The question is not the authenticity of the degree. It is not even whether she truly sat the examinations and passed. The question is whether as she was gaining entry into the university, she had the right to do so. Was she sufficiently qualified to do so. Did she meet the minimum entry requirements to enable her study the degree.
73. Article 47(2) of the Constitution which requires, nay, commands that:-
- “(2) if a right or fundamental freedom of a person has been or is likely to be adversely affected by the administrative action, the person has the right to be given written reasons.”
74. The decision of the Respondent to decline to equate the Petitioner’s degree is at the centre of the decision. To be able to arrive at a conclusion whether the decision was irrational or not, there is need to first find out what decision was made, how it was made and finally communicated. Did the Respondent reach a decision that no right thinking member of a tribunal, aware of the Constitutional imperatives, could not arrived at?
75. The decision, is contained in the letter dated 24<sup>th</sup> July, 2020 which also is referred in paragraph 9 of the Petition. The decision read in part.
- “In accordance with the Kenya National Qualification Framework Act (KNGF) your Act, No. 22 of 2014 and KNF Regulation 2018, form qualification is not recognized within the Kenya National Qualification Framework.”
76. The letter was not annexed to the petition. There is no way of ascertaining the contents. However, it is not denied by the Respondent. It is the Court’s view that such an important document ought to be annexed to the Petition to enable the Court reach a decision. The next proximate way of ascertaining the content of that letter is the first Appeal of 23<sup>rd</sup> December, 2020 which was filed as annexure KAM 4 in the Petitioner’s Affidavit. The last ground is quiet interesting and reads as follows:-
- “My qualification in Community Development Certificate was awarded by an Institution registered by the Ministry of Education and Higher Studies of the Government of Kenya.”
77. It is thus clear to the court, that the Petitioner knew or had been informed of the reasons for the decision made. It was also mind boggling such a crucial letter could be left out of the petition. Such an omission ought to be construed against the Petitioner, that had the letter been produced, it could have been adverse to the Petitioner. However, nothing turns on the letter as there is ample evidence of what transpired and we can as such reach a decision without undue regard to procedural technicalities.
78. The Petitioner failed to annex the same in her voluminous filings. Without having provided the one document that will help us to determine if reasons were given, the Petitioner left us globing in the dark. Section 107 of the evidence Act provides as doth;
- “i. whoever desires any Court to give judgment as to any legal right of liability dependent on existence of facts which he asserted must prove that those facts exists.



- ii. When a person is bound to proof the existence of any fact is said that the burden of proof lies on that person”

79. The impugned letter is with the Petitioner. She has not said that it is lost. She was bound to proof that no reasons were given. She did not do so and as such I hold that she was given the reasons for the decision. Further, she was not entitled to reasons prior to the decision, since she applied and was already informed that once evaluation was completed, she was to be informed.
80. The Court holds and finds that makes it clear that the reasons were supplied to the Petitioner otherwise he could not have raised aspects related to the prior qualification in her Appeal of 23/12/2020.
81. The courts are not armed with the wherewithal to determine who is qualified. The parties thus know that there is a need to place sufficient evidence before the court to show that from the type of education imparted to a person, one qualified one to be what the documents indicate her to be.
82. Each year thousands of young men and women are left out of universities because they have no requisite qualifications, some use a longer attain proper certifications. We must as such respect the sacrifices millions of young people make in order to obtain a degree. Effort must be appreciated at all levels.
83. I also note that one of the grounds of Appeal the Petitioner relied on in her Appeal to the Respondent was that her prior qualifications were awarded by Cefored Institute of Relief and Development who registered by the Ministry of Education. This means that she was supplied with the reasons.
84. The next question therefore is notwithstanding having been given reasons for the decision, can it be justified in an open and democratic society based on human dignity equality freedom taking into account all relevant factors, as provided under Article 24 of the Constitution.
85. Article 43 (f) guarantees the right to Education. The right to education brings with it the right to have qualification and age specific education. It is thus not an absolute right. There has to be away where education is measured and qualification for various crafts or professions established. This guarantees even consumer protection as the learners must at all times be able to fit the purpose for which they were trained, examined and certified.
86. Therefore, to set standards for award of various qualification, diplomas, certificates and Degrees does not amount to be discrimination. This was succinctly elucidated by the High Court in *Obonyo & Others Vs Kenya School of Law* annexed to the Petition to enable this Court reach a decision.

JKKKKKKKKH

87. Further, Hon justice Ec Mwita , in *Pauline Anna Benadette Onyango v Kenya School of Law* [2017] eKLR, stated as follows in paragraph 44:-

“The Respondent relied on the decision in the case of *Council of Legal Education Exparte James Njuguna & 14 others Misc app no. 137 of 2004* to argue that courts should have no reason to intervene where the Respondent had followed the applicable law and regulations, and that the Respondent had power and duty to insist on the highest professional standards for those who wished to qualify as advocates. That can only be correct where the Respondent applied the law properly.”

88. Further, the *Kenya National Qualifications Framework Act*, No. 22 of 2014 was enacted on 14<sup>th</sup> January, 2015 to:-

“establish the Kenya National Qualifications Authority to provide for



- a. The development of Kenya Qualifications Framework.
- b. Establish standards for recognising qualifications obtained in Kenya and outside Kenya.
- c. Develop a system of compliant lifelong learning and attained of National Qualifications.
- d. Align qualifications obtained in Kenya with global benchmarking in order to promote National and Transnational mobility of workers.
- e. Strengthen the national quality assurance system for national qualifications and
- f. Facilitate mobility and progression within education, training and career paths.

89. Therefore, the Respondent has a mandate to develop standards for recognising qualification. These say been no challenge on the Constitutionality of the KNQR Act, 2014. The Court therefore shall presume the statute as valid law. The foregoing is based on tenets on interpretations clearly enunciated in Kenya Human Rights Commission Versus Attorney General (2018) eKLR.

“There is a general but rebuttable presumption that a statute or statutory provision is Constitutional and the burden is on the person alleging unConstitutionality to prove that the statute or its provision is Constitutionally invalid. This is because it is assumed that the legislature as peoples’ representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In *Ndynabo v Attorney General of Tanzania* [2001] EA 495 it was held that an Act of Parliament is Constitutional, and that the burden is on the person who contends otherwise to prove the country.”

90. As a result, the Respondent established various Regulations to carry out its mandate. The last Iin respect of the matters covered by the petition is the Kenya National Regulations 2018. The said regulations provide in Regulation as doth in Regulation 18:-

18.

- (1) The Authority may recognize competencies or attainment through the following qualification types — (a) a Certificate;
  - (b) a Diploma;
  - (c) a Bachelors Degree;
  - (d) a Postgraduate Certificate or Diploma;
  - (e) a Masters Degree; and (f) a Doctorate Degree.
- (2) The recognition of attainment referred to in sub regulation (1) shall be guided by the volume of learning assessed based on credits earned, with one credit being equal to ten notional hours.
- (3) The volume of learning referred to in sub regulation (2) shall be specified in terms of the total minimum number of credits required, and in terms of the minimum number of credits



required at its specified exit level on the National Qualifications Framework and, where appropriate, the maximum number of credits from the preceding level may be specified.

- (4) The credits rating of a qualification shall not depend on the mode of delivery of learning.

91. The regulations go ahead and specify qualifications needed to attain a degree as doth:-

- (5) In determining the volume of learning for a qualification, the following guidelines on credits shall apply —
- (d) for a craft certificate, the minimum number of credits shall be one hundred and twenty;
- (e) for a Diploma, the minimum number of credits shall be two hundred and forty;
- (f) for a Bachelors Degree, the minimum number of credits shall be four hundred and eighty;

92. Regulation 21(8) provides as doth:-

- (8) The Authority shall promote recognition of qualifications attained in Kenya through various mechanisms that include — (a) aligning the National Qualifications Framework and progression pathways with best practices which supports internationally recognised standards;

93. The Petitioner is not challenging any of the Regulation of the Regulation of the Act. She is challenging the right to be heard under Article 47 and breach of her rights in Article 27 of the Constitution as read with other Article.

94. The breach is alleged to have occurred during the 2 Appeals the Petitioner filed and which were dismissed. In her letter dated 1<sup>st</sup> February, 2022 the Petitioner through her advocates posits that the qualification fit admission, is a matter within the Kampala International University.

95. In a letter dated 6<sup>th</sup> January, 2022 the Respondent had explained that the institutions which awarded her a certificate and diploma were registered to train and not to examine or award Diploma or Certificate.

96. From the annexures, there was no gazette notice of addition to the schedule of Institutions qualified to award diplomas or certificates as the case may be.

97. If there existed that gazette notice, the Petitioner ought to have either provided it to the Court to the Respondent. This is in line with Section 60(1) of the *Evidence Act* must reads

- o. All matters if general or local nationality.

If the Court is called upon by any person to take Judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it consists a necessary to enable it do so.

98. There is thus no evidence that the Institution was qualified to award certificates and diploma to the Petition in 2006 and 2008 respectively.





99. Now we turn to the question, whether, the finding that the institution that issued the Diploma and Certificates had no power to do so, has a bearing at all on the decision of the Respondent.
100. Was the Respondent entitled to go behind the Degree which was issued by a competent authority, that is, Kampala International University for prequalification. If so, was the Petitioner entitled to have a hearing before the decision was made. If so what kind of hearing was required. Did the Petitioner need to appear and be examined on prior qualifications in person.
101. It is common ground that the nature of the hearing that took place consisted of correspondence. The correspondence as instituted by the Petitioner by her making an application for regulation. It is not the same circumstances as disciplinary proceedings where the decision maker, initiates a process.
102. When the Petitioner applied and was required to pay Kshs.5000/= for equation, she knew or ought to have known that there could be investigations which could go either way.
103. There is nothing a party can explain regarding qualification than a supply of supporting documents. Documents speak for themselves. In the circumstances, I do not accept the view that there needed to be a another hearing or a notice prior to the decision.
104. The Duty of the Respondent is that of an investigator. It is not equating only one degrees. This is informed by common sense. The decision on equation was requested by the Applicant. She made the Application on 10<sup>th</sup> July, 2020. She paid for the same to enable the Respondent make a decision. The decision was expected and as such, there was no need of notice. “before a decision is made.”
105. This is unlike disciplinary matters, whose action is taken adverse to the employees, thus particular decision was requested by the Petitioner.
106. It is only that it turned out to be negative that I hereby now demanded. I do not see the utility of any other hearing. I have perused the 2 Appeals and the decisions and note that the decisions are succinct and cover all pertinent points.

### **Kampala International University Degree**

107. The Petitioner is of the view that Kampala International University Degree is genuine hence should be equated. I have read both the petition and responses. At no time did an issue arise whether or not the degree is genuine. That is a province outside the Respondent’s decision.
108. The decision of the Respondent was to undertake a degree at Kampala International University Degree
109. That the Petitioner was not qualified due to lack of prior qualifications. From the Regulations, it is noted that prior to attaining higher level of Education, you need to have qualified in the lower level. In the lowest level all you need is a birth certificate. Level 7 where masters is involved you need to have qualified in the previous level, that is a Bachelors program. In the petition before Court, we do not have any other qualification, other than the impugned diploma and certificate only. There is no evidence of the Petitioner ever undertaking any education that could be used to admit her to university. The right to dignity is fundamental to the people and ought to be guarded religiously.
110. However, in this matter the Respondent has not accused the Petitioner of any wrong doing. In the response dated 6<sup>th</sup> January, 2022 titled

“Appeal on equation of qualifications – Kaltuma Abdullahi Maaline” the Director General requested the following”-



“For avoidance of doubt on areas of contention that you raised – please furnish us with the following copies of below listed documents issued to aforesaid Institution of Relief and Development in 2005 (for the certificate qualification and 2008 (for the Diploma qualification)”

- a. Accreditation/Gazettement of the institution to award qualification.
- b. Accreditation of the Curricular leading to the said qualifications.

111. The two set of documents have not and were not attached either in the letter to the Respondent or in this petition.

112. The decision made was within the competence of the Respondent. As I understand it, it is not that the Respondent was under assessed or her degree declared false. It is that it has no equivalent due to lack of qualifications to undertake a University degree as she did. It cannot not that the Respondent carries out clerical duties of just finding a degree and automatically placing a grade. This can be done by any employer.

113. The presumption is rebuttable under Section 4 (a) of the evidence Act“whenever it is provided by law that a Court may presume a fact, it may reject such fact as proved unless and unfit. It is disproved or call for proof of it.”

114. Rebuttable presumption can be rebutted through evidence being called. In this petition, there is abundance if evidence that the college that awarded diploma and certificates to the Petitioner were not in law competent to do so.

115. Though not the fault of the Petitioner, the qualification for admission has been rebutted. Unlike the decision referred to in the matter the Applicant was not legible to undertake University education Justice C.M Mrima in Robery Uri (Supra stated that:-

“From A reading of University Act, it comes out that equation of any foreign certificate must be done when a person applies to enrol into any course in a University.”

116. The Petitioner did not apply for equation to settle the issue of her qualification. The decision on equation quoted by the Petitioner related to a decision regarding council for legal education and the duty to equate.

117. In this matter the Petitioner is not challenging a requirement for equation but results of the equation

118. The decision of the Respondent to decline to equate the Petitioner’s Degree Attained from Kampala International University Degree proper one. However, I do not agree that the petition does not meet the standard set out in Anarita Karimi Case( Supra). The case is properly brought with enumeration of particulars of breach. The only difference is that there is no sufficient evidence to support the petition.

119. As stated in Pastoli versus Kabale(supra), the petitioner should be able show, in order to succeed that:-

“the decision or act was tainted with illegality, irrationality and procedural impropriety. ..illegality is when the decision making authority commits an error of law in the process.

120. This was not shown in this matter.

121. In any case, if a documents as crucially the decision is not annexed, a Court should at the appropriate point, construe the non-enclosure against the person who had the issue bent did not annex it. In this



case, the Petitioner would be matter in that letter, if placed before this Court could be prejudicial to the Petitioner.

122. The right to be heard and the right to Fair Administrative Action are fundamental rights. The Right to be heard cannot be derogated from. The question is what consists the right to be heard. Is the right to be heard still a right if there are no oral hearings.
123. The answer to the above is in the negative. The right to be heard relates to the nature of the hearing. In this particular cause, the decision relates to the document only. Documents speak for themselves. There is no need of oral hearing to explain the contents of document. The document must speak within their four corners.
124. Oral hearings will not change the nature of documents. *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR*, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

125. The last question that remaining is whether, notwithstanding the reasons being valid, whether the decision is justified.
126. In the first instance, no evidence was led on discrimination under Article 27 of the Constitution. The Petitioner did not bring oral evidence in respect thereto.
127. It is this important that the dignity on the person of the Petitioner be respected. However, she cannot be given qualifications which she cannot account for.
128. A reading of the table for equation, the Petitioner does not fit into any table. As a result, it is clear that she misapprehends the decision of the Respondent has an effect within the global labour market in order to sustain highest International Standards that can be attained. Without valid prior qualification, the Respondent had no objection other than make the decision they did.
129. It will be a disaster of cataclysmic proposition of parties will walk into Universities with dubious qualifications and purport to be qualified. I shoulder to imagine, a standard 8 drop out, one deny walking into a University, studying and being award a PHD without prior O-Level, (or equivalent qualifications, Bachelors or Masters qualification. The progressive qualifications must be maintained in order to maintain the standards of education and protect the common heritage of man, in education document but all and finding in the breath of Kenya and elsewhere. The Supreme Court had this to say recently, in the case of *Ethics and Anti-Corruption Commission v Moses Kasaine Lenolkulal [2021] eKLR* regarding investigations. Justice J. WAKIAGA held as doth:-

“Unless specifically proved that there is violation of the applicant’s constitutional rights in the ongoing investigations, this court will be very reluctant in interfering with the plaintiff’s constitutional mandate as provided for in the constitution and the statute establishing the same. From the material supplied to the court, I find and hold that the plaintiff has accorded to the applicant an opportunity as required under the provisions of Article 47 of the constitution and the Fair Administrative Actions Act



130. It is a strong thing to allege that a body mandated to equate qualifications did not hear you when there are no documents supporting the degree.
131. In the end I find and hold that the petition dated 24/3/2022 is untenable in fact and in law as it lacks merit. The same is hereby dismissed.

### **Disposition**

132. The Court therefore makes the following Orders:-
- a. The Respondent did not breach the Petitioner's rights in declining to equate her degree on basis of her prior qualifications given that prior qualifications were not from an institution entitled in law to award those qualifications.
  - b. Petition dated 4<sup>th</sup> March, 2022 is hereby dismissed for lack of merit as the degree placed before the Respondent was not supported by evidence of prior qualifications to undertake the same.
  - c. Given that the lack of qualifications through the Diploma and Certificates was not through the faults of any of the parties and being a Constitutional Petition each party to bear its costs.
  - d. The file is hereby closed.
- 133 It is so ordered.

**DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 17<sup>TH</sup> DAY OF FEBRUARY  
THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.**

**HON. MR. JUSTICE DENNIS KIZITO MAGARE**

**JUDGE OF THE HIGH COURT, MOMBASA**

In the presence of:

.....the Petitioner

.....for the Respondent

