



REPUBLIC OF KENYA



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**Baraza v University of Nairobi (Petition E188 of 2022) [2023] KEHC 18088 (KLR)
(Constitutional and Human Rights) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18088 (KLR)

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

PETITION E188 OF 2022

HI ONG'UDI, J

MAY 26, 2023

**IN THE MATTER OF ARTICLES 22 AND 23 OF THE
CONSTITUTION OF KENYA**

**IN THE MATTER OF VIOLATION AND THREATENED
VIOLATION OF RIGHT AND FUNDAMENTAL FREEDOMS
UNDER ARTICLES 10 (C), 20(3) (B), 22(1), 23 (1) (3) (A-E),
27(1) (2) (4) (5) (6) (7) 43(F), 47(1), (2), AND 48, 55(A)
(C), 259 (1) (A) (B) (C) (D) OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF THE
CONSTITUTION AT ARTICLES 10, 27, 35, 47(1) (F) AND
CONSTITUTIONAL RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 35, 43(1) (2) AND 55(A) (C)
OF THE CONSTITUTION OF KENYA**

BETWEEN

BRIAN COSMAS BARAZA PETITIONER

AND

UNIVERSITY OF NAIROBI RESPONDENT



JUDGMENT

1. The petition dated April 13, 2022 was filed under articles 22 and 23 of the Constitution for the alleged violation of the Constitution at articles 10, 27, 35, 47(1) (f) and constitutional rights and fundamental freedoms under articles 35, 43 (1) (f), 47(1) (2) & 55 (a) (c) of the Constitution. He therefore seeks the following prayers:
 - a. A declaration that the petitioner’s rights and freedoms as enshrined under articles 26, 27, 28, 35, 43 and 47 of the Constitution of Kenya 2010, have been contravened and infringed by the respondents.
 - b. A declaration that the petitioner is entitled to payments and compensation to be assessed by the court for violation and contravention of his fundamental human rights by the respondent herein as provided for under articles 23(3)(e) of the Constitution of Kenya 2010.
 - c. That a declaration be and is hereby issued that the manner in which the respondent conducted himself resulting to the failure to issue exam results was in violation of the rule of law and in direct contravention of provision of the Constitution that guide the respondents and was therefore an abuse of office.
 - d. A compulsory order compelling the respondent to unconditionally release to the petitioner the official exam result for CSO 308-social statistics ii and all other necessary documents and to ensure that the petitioner graduates during the next graduation ceremony as scheduled by the respondent without the need to attend further classes nor to sit for CSO308-social statistics ii exam again.
 - e. Costs of this petition.
 - f. That this honourable court be pleased to grant such further order or orders as may be just and appropriate.

The Petitioner’s Case

2. The petitioner in support of his case filed a supporting affidavit sworn on April 13, 2022 and a further affidavit sworn on June 13, 2022. He deponed that he was a student at the University of Nairobi studying Criminology and Criminal Justice and registered as Student number CO1/0525/2014. It’s his averment that in December 2017 he sat for CSO 308 – social statistics II as part of semester examinations (exam) together with the rest of his classmates. When the respondent released the results, his were missing. As the issue was being sorted out the respondent advised and allowed him to proceed to the next class. He eventually sat his final exam and hoped to graduate in December 2018 which was never to be as his marks were still missing.
3. He continued following the issue but nothing fruitful came up (BCB 1(a) (d)). He deponed that he was advised in the year 2020 by Professor Owiti to take the exam again. He heeded the advice and registered for the unit and he was sent a link by Professor Owiti for purposes of attending classes (BCB 2). Before he could sit for the exam Prof Owiti fell sick and Dr Ocharo took over, creating a different link for classes. Dr Ocharo denied him a link and a chance to attend classes claiming he had previously been involved in “exam malpractice”.
4. He averred that he took the necessary steps to have this issue resolved in vain. His advocate wrote to the respondents two letters (BCB 3(a) & (b)) but nothing was done. He deponed that the respondent’s



failure to release his results has caused him to miss his graduation, employment opportunities, and to pursue of post graduate studies.

5. In his further affidavit in response to the replying affidavit he averred that he reported his issue of missing marks to Prof Lilian and Dr Ocharo as they are the ones who were teaching that unit. Further that there were two Registers for missing exams marks yet the respondent had only produced the one for 2021 leaving out the one for 2018 -2020 (JO4). He denied any investigations having been undertaken on the issue as he was never involved, as the complainant.
6. He took issue with the respondent's claims that he never attended class and had even been recommended for investigations. He has transcripts for 1st – 4th year issued by the 1st respondent which would not have been the case if he missed classes. He deponed that if there was any internal mechanisms to be undertaken then it was the respondent's duty to initiate such a process, as they had all the documentation.

The Respondent's Case

7. The respondent's filed a replying affidavit dated May 27, 2021 and a supplementary affidavit dated June 23, 2022 both sworn by Prof Julius A. Ogeng'o the deputy vice chancellor academic affairs of the respondent. He deponed that the petitioner is a student of the respondent since 2014/2015 academic year studying Criminology & Criminal Justice. He produced a document JO -1 showing the petitioner's performance. He averred that the petitioner only registered for CSO 308 in the 2018/2019 academic year. He denied that the Petitioner reported the issue of missing marks through the respondent's internal and permissive policies (JO-4). He further stated that the missing marks alone could not have made the respondent bar the petitioner from proceeding to the next academic year. After investigations it was found that the petitioner had no missing marks since he had not sat any exams (JO-5).
8. He averred that the petitioner only registered for the CSO 8 – Social Statistics II in the year 2021/2022 academic year, and does not appear in the respondent's exam mark sheet and attendance list for that year. Referring to the Petitioner's BCB 3 & 4 he stated that these were provisional results showing they were recommended for investigation because of the few course units taken. Besides claiming that the petitioner did not attend classes he has deponed that in the year 2016/2017 the petitioner who had not registered nor paid for the CSO 8 – unit ostensibly attempted to sit the exam in the said unit. After the exam sitting he took off with his answer booklet without handing it the same (JO07).
9. It's his averment that the respondent has policies and structures on how to accurately document, communicate and record students' progression and concerns while in the university which the petitioner did not adhere to. That the petitioner cannot be allowed to graduate since he is yet to sit and pass CSO – 308: Social Statistics II, which is a core unit. He has also laid out the process that leads to graduation (JO 8, 9 & 10).
10. In his supplementary affidavit he deponed that JO.3 is a self reporting by the petitioner for special exam on account of missing marks but it was established that the script was never submitted. That was he genuine he would have taken a special exam when next offered. He deponed that transcripts are only issued on completion of studies and clearance. Therefore none were issued to the petitioner. He stressed that this was a pure academic issue which ought to be handled by the respondent's senate & council in line with the efficacies of the [Universities Act 2012](#) and the University of Nairobi Charter 2013 and not through a pre-mature court process.



Parties Submissions

The petitioner's submissions

11. These are dated June 20, 2022 and filed by the firm of Orodo Tuli & company advocates. Counsel submitted that there is no evidence to show that the petitioner has a pending exam disciplinary case. He submits that on exhaustion of internal mechanisms, there is no clear and specific one set to deal with the kind of grievance before this court. He referred to petition No E208 of 2021 *Catherine Mwibaki Ngambi v Intenral Leadership University* [2022] eKLR where this court expounded on this requirement. He further submitted that the petitioner *vide* the communication BCB 1(a-d) & BCB 3 (a&b) communicated with the respondent which ignored him. Moreover the respondent has not informed the court on what the petitioner was to do but failed to do in respect to exhaustion of internal mechanisms.
12. Counsel submitted that by releasing results to other students' and not the petitioner the respondent discriminated against him hence breaching his rights to livelihood (article 26), education (article 43(1) (f)), access to information (article 35(a)) & fair administration action (article 47).
13. It's his contention that the respondent's conduct has resulted in the petitioner not graduating, and this should be condemned by the court. He therefore submitted that the petitioner is entitled to compensation by way of damages for what he has been through.

The Respondent's Submissions

14. These are dated June 23, 2022 and filed by Mr Collins F. Omondi advocate. Counsel submitted that the relationship between the petitioner and respondent is a contractual academic relationship and the subject matter under dispute – “CSO 308 Social Statics II, is an exclusive academic matter. That each of the parties had a role to play in this contract. He relied on the case of *Maharashtra State Board v Kurmasheti & others* (1985) CLR 1083 which held that courts should be reluctant in giving their own views in matters of academics and the institutions and departments controlling them. It's his contention that the documents “BCB 3 & 4 & JO3” show that the petitioner did not sit the exam in the unit in question. This is supported by the respondent's own investigations. He relied on the case of *Nyongesa & 4 others v Egerton University* (1990) eKLR 962 to support the argument that this being an academic matter the court should not interfere with it.
15. Counsel contended that the petitioner only cited omnibus provisions of the *Constitution* without showing the manner in which they were violated. This was therefore contrary to what is expected of a petition as outlined in:
 - i. *Anarita Karimi Njeru No 1* of (1979) eKLR
 - ii. *Mumo Matemu v Trusted Society of Human Rights Alliance* civil appeal No 290 of 2020 [2020] eKLR.He submitted that the petitioner failed to demonstrate that his constitutional rights and the law were violated on account of the self-reporting missing exam incident.” Further that he has not shown why he opted for the constitutional route and not other avenues of the respondent's institution.
16. Finally counsel while relying on the case of *Cherono Galdys v University of Nairobi* [2020] eKLR argued that the petitioner had failed to prove any violation of his constitutional rights. Further that the Catherine Mwihaki Ngambi case relied on by the petitioner was purely an administrative issue within the dispute resolution chain while the present case is purely an academic issue which ought to have been



reported to the head of department before taking any other steps. Further that the petitioner is yet to clear with the respondent before he can qualify for graduation. He called for dismissal of the petition.

Analysis and Determination

17. Upon careful consideration of the pleadings, responses submissions, cited authorities and the law I find the issues falling for determination to be:
 - i. Whether the petition meets the threshold for a constitutional petition.
 - ii. Whether the petition was filed pre-maturely (doctrine of avoidance)
 - iii. Whether the petitioner's constitutional rights under articles 26, 27, 28, 35, 43, & 47 were violated.
 - iv. Whether the petitioner is entitled to the reliefs sought.

Issue No. (i) Whether the petition meets the threshold for a constitutional petition.

18. It is the respondent's submission that the petition did not meet the threshold for filing constitutional petitions set out in the *Anarita Karimi Njeru* (supra) and *Mumo Matemu* (supra) cases. The main requirement in filing a petition is that it must be pleaded with reasonable precision and must be specific. This assists the parties to understand what the real point for discussion is. The petitioner did not address this issue in his submissions. He however referred to articles 10, 27, 35, 43, 47(1)(f) of the [Constitution](#) in his petition. At paragraphs 15 – 24 of the petition he has pleaded on how these rights were allegedly violated. His supporting affidavit did the same. Considering all this I find that the petition meets the threshold for filing of a petition.

Issue No(ii) Whether the petition was filed pre-maturely (doctrine of avoidance)

19. It was the respondent's submission that the petitioner did not exhaust the internal mechanism before filing the petition. In answer to this the petitioner submitted that he did all that he could to be assisted by the respondent who did not act. There is no dispute that the petitioner was enrolled at University of Nairobi (respondent) vide registration No CO/0525/2014 in the 2014/2015 academic year. Had everything gone well he should have graduated in December 2018.
20. In other words the respondent is claiming that the petitioner avoided the internal mechanisms. The Supreme Court in the case of [Communication Commission of Kenya & 5 others v Royal Media Services Ltd and 5 others](#) [2014] eKLR opined as follows:

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance.”

The principal of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in [S v Mhlungu](#), 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ articulated the principle of avoidance in his minority judgment as follows (at paragraph 59).

“I would lay it down as a general principle that where it is possible to decide any case, civil a criminal, without reaching a constitutional issue, that is the course which should be followed”.

(257) Similarly the U.S Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some



other basis upon which the case could have been disposed of [*Abswander v Tennessee Valley Authority*, 297 US 288, 347 (1936)]”

21. The replying affidavit at paragraph 9 refers to documents in a bundle tagged “JO-3”. One of them is the petitioner’s request for special exams in 2021/2022. Later at paragraphs 3 – 5 of his supplementary affidavit while referring to “JO – 3” he refers to the same documents as “Self-reporting” and not request for special exams. He adds that such self-reporting should be made to the Dean and Department. The issue then is whether that procedure of reporting was made known to the students, who included the petitioner.

22. Upon looking at the document (JO-3) which has been relied on by parties I note that its titled:

“Request For Special Examination”

The petitioner filled his part and forwarded it. The rest of the parts were to be filled by the administration. The JO-3 shows that the same was approved by the Dean who signed it. According to the replying affidavit this document is “self reporting” and so investigations were conducted, on it.

23. The other documents BCD (d) & BCD 2 which are on record are emails showing communication between the Petitioner and one Dr Robinson Ocharo & Dr Lilian Owiti who are lecturers for the said unit. The emails to Dr Ocharo are about missing marks and a re-sit. The email to Dr Owiti concerns the petitioner rejoining CSO 308 Social Statics II February 2021 class. Further there are two letters addressed to the respondent’s Vice Chancellor dated November 17, 2021 and December 15, 2021 respectively (BCD 3a & b). They were written by the petitioner’s counsel in respect of his plight. The first letter gives all the details. The deponent of the replying affidavit who is the deputy Vice Chancellor did not say anything about this communication. A student was raising concerns, even if he did not use the right procedure the respondent should have done something by responding to the mail. What was so difficult with the Vice Chancellor forwarding the letters to the right office at the institution or the internal dispute resolution mechanisms forum, or even dealing with it?

24. The petitioner in this instance was clearly ignored by the respondent’s representatives and he had no choice but to file this petition. One of the national values and principles of governance entrenched in article 10 of the Constitution is social justice. Had the Vice Chancellor, Dr Ocharo and Dr Owiti embraced this value they would have dealt with the petitioner’s issue and it would not have come this far.

Issue No. (iii) Whether the petitioner’s constitutional rights under Articles 26, 27, 28, 35, 43, & 47 were violated.

25. The petitioner claims that the respondents actions violated his right to life, access to information economic and social rights. The petitioner claims to have sat the CSO 308 Social Statics II exam in 2016/2017 but his marks were never released, to him. After a number of frustrations he decided to register for the unit again in 2021, but due to issues raised by Dr Ocharo he did not sit the exam. On the flipside the respondent has denied all these saying the petitioner never sat the exam. Availed to the court is the missing marks recording book (JO4), class attendance list, Exam attendees list for the unit for 2016 – 2018 (JO 6 & 7). The petitioners name does not appear anywhere in these lists, and the books. For the respondent this is not a case of missing marks but one where a student never sat an exam.

26. This is therefore a case of the petitioner’s word against that of the respondent. A duty therefore fell on the petitioner to prove his case. What has he presented before this court to prove that he indeed attended classes and above all else sat the exam? The Evidence Act provides as follows;



section 107 burden of proof

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

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side

109. Proof of particular fact

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

27. As the evidence now reveals it's not proved that the petitioner sat the CSO – 308 social statics II exams in the year 2016/2017. He had also claimed violation of his rights under article 27, through discrimination which he said was because exam results were released to others and not himself. Having found as above that he did not sit for the exam then the claim of discrimination cannot stand.
28. The “missing marks” being the basis of his claim for violation of his constitutional rights under articles 26, 27, 28, 35, 43 & 47 I find that the violation has not been proved. The court cannot therefore order for release of missing marks which have not been proved to exist, in the first place.
29. Another issue raised by the petitioner concerned his having registered for the same unit, which is true. He however confirmed that he never sat that exam in 2021.

Issue No. (iv). Whether the petitioner is entitled to the reliefs sought.

30. As stated above the only fault I find to have been committed by the respondent is failure to act on the petitioner's complaints raised in his emails and the letters sent to the Vice Chancellor by the petitioner's counsel. I therefore direct the respondent to address the issues raised in the letter dated November 17, 2021 (BCD 3 (a)) by Orondo Tuli & company advocates, and the petitioner must be allowed to sit for the next exam in CSO-308 Social Statistics II as per the University's Regulations. The petitioner has not made out a case for grant of exemplary damages.
31. The respondent confirmed that the petitioner has Kshs 16,000/= to his credit with the university. He should not be subjected to make further payments bearing in mind what he has been through since his classmates graduated in the year 2018.
32. Besides the above findings and orders I find the petitioner not deserving of the orders sought in prayers a – e of the petition which are dismissed. Each party to bear its own costs.

Orders accordingly.

Delivered virtually, dated and signed this 26th day of May, 2023 in open court at Milimani, Nairobi.

H. I. Ong'udi

Judge of the High Court

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