Lungwe v Maseno University & another (Petition E487 of 2021)
[2023] KEHC 17752 (KLR) (Constitutional and Human Rights) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E487 OF 2021

HI ONG'UDI, J

MAY 26, 2023

BETWEEN

SIANGANI STEPHEN LUNGWE .... PETITIONER

AND

MASENO UNIVERSITY .... 1ST RESPONDENT

KENYA MEDICAL LABARATORY TECHNOLOGITS AND TECHNICIANS BOARD .... 2ND RESPONDENT

JUDGMENT

1. The petition dated 16th November 2021 was filed under Articles 19, 20, 21, 22, 23 and 165(3)(b) of *the Constitution* for the alleged violation of Articles 28, 47 and 55 of *the Constitution*. The petitioner seeks the following orders:

   a. A declaration that the respondents jointly and severally violated the petitioner's rights to legitimate expectation.

   b. A declaration that the respondents jointly and severally violated the petitioner's rights to fair administrative action, human dignity and economic rights under Articles 28, 43 and 47 of *the Constitution*.

   c. An award of general damages for the violation and/or infringement of the petitioner's rights under Prayer (a) and (b) above.

   d. An order compelling the 2nd respondent to immediately register the petitioner as a laboratory technician and/or technologist.

   e. Interest on prayer (c) above at court rates from the date of filing the suit until payment in full.

f. Costs of these proceedings and interest thereon at court rates.

g. Any other relief that the honourable court may deem just to grant.

The Petitioner's case

2. The petitioner in support of his case filed his affidavit dated 15th November 2021, and a supplementary affidavit dated 30th May 2022. He averred that he was admitted to Maseno University in the year 1999 where he pursued a Bachelor of Science (Biomedical Science and Technology) Medicine degree. That the 1st respondent being duly accredited to teach the course, he had a legitimate expectation that upon successful completion of his studies he would receive the required licensing to practice as a laboratory technician or technologist. He was able to successfully complete school in the year 2010. His late completion was due to financial constraints.

3. He deposed that after he obtained his degree, he sought to be registered as a laboratory technician or technologist with the 2nd respondent, who advised him to pay the registration fees which he did. Soon after he received a call from the 2nd respondent stating that his registration could not be processed because the 1st respondent had not been accredited to offer the Course he had pursued. He requested for written communication on the same from the 2nd respondent, but he never received despite his several visits to the said offices.

4. It is deposed that he also went to the 1st respondent offices seeking its intervention in the matter, but no action was taken. He next reached out to the Commission on Administrative Justice for help. The Commission in a letter dated 2nd August 2018 sought from the 1st respondent an explanation on the issue. The 2nd respondent was also copied in the letter, but none responded to it. He did another letter to the 2nd respondent dated 27th July 2021.

5. The petitioner decried the respondents' actions which he stated have caused him untold suffering and caused him to remain unemployed this far, as he does not have 2nd respondent's license to enable him operate as a laboratory technician and/or technologist. He added that he had not been able to pay his HELB loan of Ksh.169, 000/= and as a result had fallen into arrears of Ksh.800, 000 due to the accumulated interest and penalties as at 2021.

6. He filed this petition because he was aggrieved that the respondents actions had grossly violated his right to dignity under Article 28 and his economic rights under Article 43 of *the Constitution*. He added that being 42 years and having graduated as a youth from the 1st respondent his rights as a youth were violated under Article 55 of *the Constitution*. Likewise, that his right to a fair administrative action was also violated. He in consequence averred that he was entitled to the reliefs sought.

The 1st Respondent's Case

7. The 1st respondent in response filed a relying affidavit dated 26th April 2022 sworn by Professor Mary J. Kipsat, the Deputy Vice Chancellor in Charge of Academic and Students' Affairs. She deponed that the 1st respondent was established under Section 13(1) of the *Universities Act* and is governed by the Council, Senate and Management Board. Further that the Senate is responsible for all academic matters relating to formulation and implementation of academic programmes. She noted as such that the Senate is mandated to admit students to various programmes, confer degrees upon fulfilment and further recall any degree and/or students.

8. She further deponed that the 1st respondent was established in 1990 and accredited by the Commission for University Education (formally known as Commission for Higher Education). On the other hand,

the 2nd respondent was established under the Medical Laboratories Technicians and Technologist Act, 1999 Cap 253A which was enacted on 6th January 2000. She explained that at the time of the 1st respondent's establishment and subsequent admission of the petitioner in 1999, the 2nd respondent was non – existent, that the petitioner's course had however been accredited at the time it was offered by the Commission for Higher Education, but was not subjected to a professional body.

9. She deposed that in 2011 the 1st respondent learnt that it's graduates from the Bachelor of Science (Biomedical Science and Technology) Medical Laboratory course were facing challenges with registration by the 2nd respondent. After an audit of the course the 2nd respondent required that the 1st respondent add six more units to the programme so as to become eligible for registration with the 2nd respondent. Following this, the 1st respondent recalled the 79 students that were affected to undertake the six extra courses. The call was made through an advertisement in the local daily newspapers and the University website. Out of the 79 recalled students, only 21 returned and successfully completed the course. They subsequently graduated in 2012 with their previous degree being cancelled. She added that the petitioner has not returned to complete the course.

10. She denied the petitioner's alleged visit to their offices. She however admitted receiving the letter from the Commission on Administrative Justice dated 19th November 2018, which was responded to by the 1st respondent through their own dated 14th December 2018. It is her averment that the 1st respondent in handing the matter had acted within the law and the due process. Likewise, that the 1st respondent had demonstrated good faith by recalling back all the affected students. She averred that the petitioner's grievance was largely due to his own indolence in taking action in the matter. She thus termed as a non-starter with no cause of action, and was an abuse of the Court process.

11. The 2nd respondent did not file a response or submissions to the petition.

The Petitioner's Submissions

12. The petitioner through the firm of Lungwe and Associate Advocates filed written submissions and a list of authorities dated 30th September 2022, plus supplementary submissions dated 3rd March 2023. On whether the petition is competent revealing a reasonable cause of action, counsel answered in the affirmative. To him the essence of the petition is the alleged violation of the petitioner's rights to legitimate expectation and his constitutional rights under Article 28, 43 and 47 of *the Constitution*. He noted that Article 22 of *the Constitution* grants every person the right to institute court proceedings claiming that a fundamental right has been threatened, denied or violated. It was argued therefore that the petition had disclosed a reasonable cause of action which this court ought to interrogate and determine.

13. On the second issue, as to whether the petitioner's rights were violated, he submitting that the petitioner's legitimate expectation had been violated. He contends that the petitioner expected the 1st respondent to be duly accredited to offer the course and that upon successful completion and conferment of the degree, he would be duly registered with the 2nd respondent. This expectation was however not met. Counsel asserted that breach of this expectation cannot simply be legally cured by recall of the affected students as deposed by the 1st respondent. In support of this argument, he relied on the case of Kalpana H. Rawal v Judicial Service Commission and 4 others (2015) eKLR where it was held that a person may have a legitimate expectation of being treated in a certain way by an administrative authority. This may arise from a representation or promise made by the authority or from consistent past practice. Also see: (i) Oindi Zaippeline and 39 others v Karatina University and another (2015) eKLR (ii) Communication Commission of Kenya and 5 others v Royal Media Services Ltd and 5 others (2014) eKLR.

14. Counsel additionally argued that the relationship between the petitioner and the 1st respondent was contractual and ended upon conferment of the degree. In this way, the 1st respondent did not have any legal basis to recall the students once the contract was terminated. Moreover, he noted that the 1st respondent was insensitive to the delay and time wastage caused to the petitioner by requiring him to go back to school. Referring to the case of Republic v Vice Chancellor, Kenyatta Univeristy Ex – parte Rwito Joseph Mungania (2014) eKLR he submitted that jobs were scarce in this country and any small delay made a great difference.

15. Counsel further argued that the 2nd respondent as established under the *Medical Laboratory Technicians and Technologists Act*, 1999 was existent by the time the petitioner was pursuing his studies yet did not assert its supervisory capacity on the course that was being offered by the 1st respondent. He questioned why it was only after the petitioner presented his degree seeking registration that he was informed that he was not eligible.

16. Turning to the right to dignity and economic rights, counsel submitted that the respondents' actions denied the petitioner access to the job market and ability to get any gainful employment. This in turn caused the petitioner to lead an economically degrading life which effectively violated his rights under Articles 28 and 43 of *the Constitution*. To support this submission counsel cited the case of Jesse Waweru Wahome and 2 others v Kenya Engineers Registration Board (2012) eKLR where it was noted that the petitioners therein had studied under a system that was guaranteed by the state and did what was required of them at all the stages. To therefore leave them in a state where their chosen and cultivated path of success was uncertain was an affront to their human dignity.

17. On the right to fair administrative action, counsel submitted that the petitioner's plea and correspondence was never responded to. Challenging the 1st respondent's purported response to the Commission of Administrative Justice, he argued that there was no proof that the purported letter was ever dispatched or received by the Commission. He thus submitted that in this case the remedy for violation of the petitioner's constitutional rights is damages. Further that the award of compensation was an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the Constitution* as held in the case of Mutuku Ndambuki Matingi V Rafiki Microfiance Bank Limited (2021) eKLR.

18. Counsel argued that the petitioner's dream of working as a laboratory technician had been shattered and his academic years wasted. Further that considering the petitioner's age his chances to secure employment are almost nil, and even if he was to secure employment his active years in employment are significantly reduced. In view of this he submitted that a compensation award of Ksh.10, 000, 000 was just and fair in addition to the reliefs sought.

19. In the supplementary submissions, Counsel submitted that it was the duty of the 1st and 2nd respondent to liaise with each other to ensure that the students would be eligible for registration after successful completion of the Course. Further that the petitioner had been unable to take up the additional 6 courses due to the financial constraint that had also seen him graduate 10 years after joining the 1st respondent.

20. On the issues of laches, counsel noted that the back and forth interaction with the institutions in an attempt to acquire registration ended sometime in 2018 when the petitioner requested the Commission on Administrative Justice to intervene. When this was unfruitful he proceeded to file the instant petition. Nevertheless Counsel submitted that the Court of Appeal in the case of Chief Land Registrar and 4 others v Nathan Tirop Koech and 4 others (2018) eKLR had dismissed the doctrine of laches in the face of a constitutional rights violation claim.

The 1st Respondent's submissions

21. The 1st respondent filed written submissions dated 11th October 2022 and supplementary submissions dated 6th March 2023. On whether the law can be applied retrospectively, counsel submitted that the 1st respondent's course was accredited by the Commission for Higher Education before the enactment of the *Medical Laboratory Technicians and Technologists Act*, 1999. Upon its enactment the 2nd respondent was mandated to conduct regulation of the courses on medical laboratory as captured under Section 5 of the Act. It was only after the 2nd respondent's audit in 2011 that the 1st respondent became aware that the course required additional units.

22. In light of this counsel argued that the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective and retrospective effect is not to be given to them unless by express words or necessary implication it appears that this was the intention of the legislature as held by the Supreme Court in the case of Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others (2012) eKLR. Additional reliance was placed on the case of Eunice Cecilia Mwikali Maema v Council of Legal Education and 2 other (2013) eKLR.

23. On whether the petition had met the constitutional threshold set out in the case of Anarita Karimi Njeru v Republic [1979] eKLR, counsel submitted that the petitioner had failed to demonstrate how the 1st respondent had violated his rights or acted unlawfully in the period he was at the institution carrying out his studies. As such it was argued that there was no cause of action against the 1st respondent. On this counsel relied on the case of Mumo Matemu v Trusted Society of Human Rights (2014) eKLR.

24. Relying on the Supreme Court in the case of Communication Commission of Kenya and 5 others v Royal Media Services LTD and 5 others(2014) eKLR on what constitutes legitimate expectation, counsel submitted that the petitioner had not proved that the 1st respondent had violated his legitimate expectation. Counsel therefore argued that the 1st respondent's duty was only to admit, teach, examine and confer the degree. On the flipside, it was the student's discretion to decide what to do with the degree after that. He however questioned why the petitioner had failed to return to undertake the additional six units when the 1st respondent made the call back.

25. Turning to the allegation of violation of constitutional rights by the 1st respondent, counsel submitted that the 1st respondent had conducted its mandate as required by the law prior to the enactment and establishment of the 2nd respondent in 2000. In the same way that once it was notified of the missing courses it complied and even recalled back the affected students. In support reliance was placed on the case of Khelef Khalif and 2 others v IEBC (2017) eKLR where it was held that statutory bodies derive their authority from a legal instrument and may only do what the law authorizes them to do. Counsel therefore asserted that the 1st respondent had not violated the petitioner's rights.

26. Counsel further submitted that the petitioner was guilty of laches since he had brought the instant suit 11 years after conferment of his degree and without any explanation for the delay. He argued that equity does not aid the indolent as seen in the case of Andrew Omtata Okoiti and 5 others v Attorney General and 2 others (2010) eKLR. In light of the above arguments counsel submitted that the petitioner was not entitled to the reliefs sought. With reference to the claimed compensatory award of Ksh.10,000,000/=, he submitted that the same had not been quantified. It was further stated that the purpose of a constitutional remedy is not compensatory or punitive but its purpose is to prevent or deter any future infringements as held in the case of Claire Njoki Kirere v Council of Legal Education

and 2 others (2021) eKLR. To this end Counsel submitted that the petition lacks merit and as such should be dismissed.

Analysis and Determination

27. I have carefully considered the pleadings, submissions cited authorities and the law and I find the issues falling for determination to be as follows:

    i. Whether the petitioner is guilty of laches;

    ii. Whether the respondents' violated the petitioner's rights under Article 28, 43 and 47 of *the Constitution*;

    iii. Whether the petitioners legitimate expectation was violated by the respondents;

    iv. Whether the petitioner is entitled to the reliefs sought.

Issue No. (i). Whether the petitioner is guilty of laches

28. The 1st respondent opposed this petition arguing that the petitioner having brought this petition 11 years after his conferment with the degree award was guilty of laches. The petitioner in response argued that no individual can barter away an acquiesce to violation of fundamental rights. The Court of Appeal in the case of James Kanyiita -v- Attorney General and Another [2013) eKLR while defining what delay is opined as follows:

> " ...Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time."

29. On limitation of time for constitutional petitions, the court in the case of David Gitau Njau & 9 others vs. Attorney General (2013) eKLR observed as follows under paragraph 43:

> " To my mind, I do not know any law or a particular provision of the Repealed Constitution that provided that a claim based on fundamental rights and freedoms has a limitation period within which the claims ought to be filed. A claim made under *the Constitution* is neither a claim in tort nor contract that would necessitate the application of the *Limitation of Actions Act*, Cap 22 Laws of Kenya..."

30. While this has been the general view on constitution petitions, the same is not without its qualifications. The qualification is that there must be justifiable reasons that caused the delay. The Court in the case of Joseph Migere Onoo v Attorney General [2015] eKLR on this issue observed as follows:

> " 39.
>
> The principle that emerges from the cases cited above is that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defence..."

31. In answering this question courts must be alive to the delicate balance that is required in considering inordinate delay and the very real violation of a petitioner's rights. From the petitioner's explanation, it is observed that throughout the period prior to filing this petition he had engaged the respondents' in his quest to be registered as a laboratory technologist or technician. He noted that when all efforts

were fruitless he turned to the Commission on Administrative Justice for assistance then lastly to this court by filing this petition.

32. In the circumstances of this case as explicitly held in a number of authorities I am inclined to reject the 1st respondent's argument on laches. I say so because the petitioner's explanation is reasonable to the extent that he had engaged both respondents in the matter in the 11 year period before approaching this court. This court will in the circumstances not turn him away without hearing him.

Issue No. (ii). Whether the respondents' violated the petitioner's rights under Article 28, 43 and 47 of *the Constitution*;

33. It is not in dispute that the petitioner was a student at the 1st respondent's institution. What is in dispute is why the petitioner upon graduation with his degree was unable to register with the 2nd respondent for a licence to enable him practice his profession. The 1st respondent asserted that it was accredited by the Commission for Higher Education (as it then was). With the establishment of the 2nd respondent, the accreditation role was given to the 2nd respondent by the Medical Laboratories Technicians and Technologist Act, 1999 Cap 253A. By the time the petitioner finished the course, he was not eligible for registration. For the affected students to be eligible for registration, the 1st respondent was required by the 2nd respondent to add six additional units.

34. This scenario prevailing pushed the petitioner to filing this petition. I now wish to state what the rights complained of provide;

The right to dignity is provided for under Article 28 of *the Constitution*. It states as follows:

> " Every person has inherent dignity and the right to have that dignity respected and protected."

35. The Court in the case of M W K v another v Attorney General & 3 others [2017] eKLR while citing a number of authorities with approval discussed this right as follows:

> " 49.
>
> Article 28 provides no definition of dignity. However its role and importance as a foundational constitutional value has been emphasized in a number of cases. In the South African case of S v Makwanyane,[18] O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms:-
>
> "The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3."

36. Article 43 of *the Constitution*, provides for economic and social rights by stating as follows:

(1) Every person has the right -

a. to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

b. to accessible and adequate housing, and to reasonable standards of sanitation;

c. to be free from hunger, and to have adequate food of acceptable quality;

d. to clean and safe water in adequate quantities;

e. to social security; and

f. to education.

37. The essence of this right was captured in the case of Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR where it was stated as follows:

12. Apart from Constitutional provisions governing economic and social rights, Article 2(6) provides that treaties and conventions ratified by Kenya shall form part of the law of Kenya. Some of the relevant instruments include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic and Social Rights (ICESR) amongst others. Article 25.1 of the Universal Declaration of Human Rights (UDHR) provides that: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services." The Africa Charter on Human and People's Rights (ACHPR) guarantees every individual the right to enjoy the best attainable state of physical and mental health. The Charter requires States to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

13. I entirely agree with the eloquent and forceful submissions made by Dr Khaminwa on behalf of the petitioner that the success of our Constitution largely depends on the State delivering tangible benefits to the people particularly those who live at the margins of society. The incorporation of economic and social rights set out in Article 43 sums up the desire of Kenyans to deal with issues of poverty, unemployment, ignorance and disease. Failure to deal with these existing conditions will undermine the whole foundation of *the Constitution*."

38. The other right that was alleged to have been violated was the right to a fair administrative action as envisaged under Article 47 of *the Constitution*. It provides as follows:

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

39. The prominence of fair administrative action as a constitutional right was appreciated in the South African Constitutional Court in the case of President of the Republic of South Africa and others vs. South African Rugby Football Union and others (CCT16/98) 2000 (1) SA 1, at paragraphs135 -136 it was held as follows:

> "Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards

of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

40. The hallmark of our Constitution is embedded in a person's rights being upheld and safeguarded. This is set out under Article 2(1) of *the Constitution* which states:

> "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."

41. What is more, *the Constitution* stipulates that the values and principles of governance as captured under Article 10 of *the Constitution* bind all the stated persons whenever any of them applies, enacts or interprets the law. The values and principles under 10 (2) include:

    a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

    b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

    c. good governance, integrity, transparency and accountability; and

    d. sustainable development.

42. With these principles in mind, I will now turn to the matter at hand. The starting point in my view ought to be an examination of the mandate and roles of the cited organs so as to ascertain who the cause of action is against.

43. The 1st respondent is a public university that was established by the Maseno University Act (No 7 of 2000) under Section 3. (The 1st respondent was formerly Maseno University College which was a constituent college of Moi University). This Act has since been repealed by the *Universities Act*, No. 42 of 2012. Section 4 of the Act provided the functions of the 1st respondent as:

    a. to provide directly, or in collaboration with other institutions of higher learning, facilities for university education, including technological, scientific, professional education and research;

    b. ......

    c. ......

    d. to conduct examinations for and to grant such academic awards as may be provided for in the Regulations;

    e. ......

    f. ......

44. The Commission for Higher Education as it was back then was established by the *Universities Act* Cap 210B of 1985 under Section 3. The functions of the Commission then as captured under Section 6 of the Act were:

    a. ......

    b. to advise the Minister on the establishment of public universities;

    c. to accredit universities;

    d. ....

e. to promote national unity and identity in universities;

f. ....

g. to co-operate with the Government in the planned development of university education;

h. to examine and approve proposals for courses of study and course regulations submitted to it by private universities;

i. to receive and consider applications from persons seeking to establish private universities in Kenya and make recommendations thereon to the Minister;

j. ....

k. ....

l. ....

m. ....

n. ......

o. ......

p. to advise the Government on the standardization, recognition and equation of degrees, diplomas and certificates conferred or awarded by foreign and private universities;

q. to co-ordinate education and training courses offered in post secondary school institutions for the purposes of higher education and university admission;

r. ....

s. ....

45. The 2nd respondent on the other hand was established under Section 3 of the *Medical Laboratory Technicians and Technologists Act* No.10 of 1999. The preamble of the Act discloses the purpose of the Statute as 'An Act of Parliament to provide for the training, registration and licensing of medical laboratory technicians and technologists, to provide for the establishment, powers and functions of the Kenya Medical Laboratory Technicians and Technologists Board, and for connected purposes.'

46. The functions of the 2nd respondent under Section 5 of the Act are:

1. The object and purpose for which the Board is established shall be to exercise general supervision and control over the training, business, practice and employment of laboratory technicians and technologists in Kenya and to advise the Government in relation to all aspects thereof.

2. Without prejudice to the generality of the foregoing, the Board shall—

    a. prescribe, in consultation with the College and such approved training institutions as the Board may deem appropriate, the courses of instruction for laboratory technicians and technologists;

    b. Consider and approve the qualifications of laboratory technicians and technologists for the purposes of registration under this Act;

    c. Approve institutions for the training of laboratory technicians and technologists;

d. License and regulate the business and practice of registered laboratory technicians and technologists; and

e. regulate the professional conduct of registered laboratory technicians and technologists and take such disciplinary measures as may be appropriate to maintain proper professional standards.

47. From cited provisions a number of issues are made manifest. First, the 1st respondent was set up by its own Statute and as such the Act stipulated its mandate and operation. One of these mandates was to make a decision of what course or subject would be offered in the institution. This is provided under Section 4(e) of the Act. Essentially this means that the 1st respondent makes independent decisions in its courses without the need of a secondary body to accredit the courses as outlined in the Act.

48. The other issue as appreciated from the *Universities Act* Cap 210B of 1985 is that the Commission of Higher Education did not have any mandate over the affairs of public universities save for accrediting them under Section 6 (c) of the Act. This means that it did not recommend or examine the courses to be offered by public universities. The only instance that is stipulated is that of private universities under Section 6(h).Here the Commission would examine and approve proposals for courses of study and course regulations. Other than accrediting the 1st respondent as a University, the Commission had no power to accredit the courses it offered. This was solely within its mandate in line with its laws.

49. I perceive therefore that the general rule with reference to public universities is that being self-regulating, they enjoy the privilege of selecting their courses based on their own standards and policies as dictated by their Statutes. The exception to this rule is when an Act of Parliament clearly instructs that a University or other training institution is required to have accreditation from a regulatory body before offering courses under that body's jurisdiction. In essence, while the training institution can offer the course in this scenario, the Regulatory body is the one with the power to set and enforce the standards and guidelines that are to be upheld by the institutions while offering the Course.

50. The enactment of the *Medical Laboratory Technicians and Technologists Act*, 1999 shifted the qualification and regulatory dynamics in view of Laboratory Technicians and Technologists. With its enactment, the 1st respondent argued that the law could not be applied retrospectively since initially accreditation was done by the Commission. It should be noted that from the proceeding discussion, it is clear that the Commission did not have power to select the courses for the 1st respondent neither accredit them. It only accredited universities not courses. The 1st respondent in its Act was granted the power to select its own courses. So the qualification of a course was done by the dictates of its Act.

51. The question therefore becomes, how can a law be stated to apply retrospectively when there was no specific regulatory body charged with the power to accredit the training institution offering the course in the first place? The principle of retrospective application was examined by the Supreme Court in the case of Samuel Kamau Macharia (supra) where it was held as follows:

(59) Before considering this question, it is necessary to revisit the issue of retrospective or retroactive legislation. Black's Law Dictionary (6th Edition) to which we have been referred, defines retrospective law as:

" A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring , or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One

that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."

(60) Most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in Article 50 (2) (n) of *the Constitution*. That article provides that:

"Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law".

(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:

i. is in the nature of a bill of attainder;

ii. impairs the obligation under contracts;

iii. divests vested rights; or

iv. is constitutionally forbidden."

52. First of all, it is clear that retrospective application of a law is not unlawful. Furthermore, the retrospective application would be invoked where a right has already attained in its fullness and is owing. At the time of the enactment of the Medical Laboratories Technicians and Technologist Act, 1999 Cap 253A, the petitioner and affected students' rights had not been attained in their fullness. No degree had been awarded, and as such, the 1st respondent's argument would have rightly been applied say where one of the students had already graduated, been conferred with the degree and already working as a laboratory technician or technologist and the Act successively comes in force in 2000 requiring the person to fulfil the dictates of the Act. I find that in that instance application of the law retrospectively would have been offensive to the legal principles barring such application. In the context of this case, this right had not yet accrued to the petitioner.

53. All the same it is clear that the enactment of the Act altered the qualification and regulation of the petitioner's course. What was the effect of this? Did the Act repeal the 1st respondent's mandate having already offered the course in line with its law? I find guidance in the case of Republic v Council of Legal Education & another Ex-Parte Mount Kenya University [2016] eKLR where discussing a similar topic the Court deliberated as follows:

118. However for completion of the issues raised herein had I found that there was a conflict between the *Universities Act* and the *Legal Education Act*, I would have had no hesitation in finding that pursuant to the principle of 'leges posterior respriores contrarias abrogant' if there was any power of accreditation given to the Council before the enactment of the *Universities Act*, the same was repealed by the enactment of the later. That principle is to the effect new laws are given preference in case of an inconsistency with the older laws. In this case, it is not in dispute that the *Legal Education Act*, 2012 came into force on 28th September, 2012 while the *Universities Act* came into force on 13th December, 2012; three months after the *Legal Education Act* came into force, hence *Legal Education Act* preceded the *Universities Act* in time. Parliament by conferring the powers of accreditation on the Commission by the enactment of the *Universities Act* is presumed to have been aware of the provisions of the *Legal Education Act*, and by deliberately conferring such power on the Commission, notwithstanding the fact

that it did not expressly deal with such powers, as allegedly conferred on the Council, it must be inferred that it intended to repeal any provision conferring such powers on the Council. I gather support for this position from Street Estates Limited vs. Minister of Health [1934] 1 KB where it was held that:

"But it can also do it another way, namely, by enacting a provision clearly inconsistent with the previous Act; without going through them, four pages of Maxwell On The Interpretation Of Statutes are devoted to cases in which without using the word "repeal" Parliament has repealed a previous provision by enacting a provision inconsistent with it. In those circumstances it seems to me impossible to say that these words...have no effect."

119. I also rely on the holding in Elle Kenya Limited & Others vs. The Attorney General and Others (supra) that:

"It seems to me, in the first instance, plain that the legislature is unable, according to our Constitution, to bind itself as to the form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject matter shall there never be an implied repeal. If Parliament chooses in a subsequent Act to make it plain that the earlier statute is being to some extent repealed, effect must be given to the intention just because it is the will of the Legislature."

54. Accordingly drawing from this, the answer is yes. This is because the intention and language of the Medical Laboratories Technicians and Technologist Act, 1999 Cap 253A is clear. This is against the background that the legislature already knew that it had empowered public universities to offer their own courses based on the standard set in their respective Statutes. With the enactment of Cap 253A however, the legislature was clear that it required all training institutions offering the course to do so within its confines, which is clearly outlined under Section 5(2) of the Act.

55. This means that the 2nd respondent became the regulatory body of the affairs of the Laboratory Technicians and Technologists. In effect any institution seeking to train any such related course would have to first seek its approval before offering the course. This is informed by Section 18 of the Act that provides as follows:

Training institutions to be approved

1. No person shall, being in charge of a training institution in Kenya—

    a. admit persons for training with a view to qualifying for registration under this Act; or

    b. conduct a course of training or administer the examinations prescribed for the purposes of registration under this Act; or

    c. issue any document or statement implying that the holder thereof has undergone a course of training or passed the examinations prescribed by the Board for purposes of registration, unless such institution is approved by the Board for that purpose in accordance with this Act.

    2. A person who contravenes any of the provisions of subsection (1) commits an offence and is liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or to both.

    3. The Board shall, in regulations, prescribe the procedure for approving training institutions for the purposes of this section.

56. Inevitably, since the 1st respondent was offering the Bachelor of Science (Biomedical Science and Technology) Medicine course, it was required to be informed on the courses of instruction for laboratory technicians and technologists as guided by the 2nd respondent. This unfortunately was not the case. It took the petitioner and affected students being denied registration by the 2nd respondent for the 1st respondent to take action.

57. As discussed above some of the principles stipulated under Article 10 are good governance, integrity, transparency and accountability. The 1st respondent having chosen to offer the course was required to uphold the constitutional dictates and operate within the law. I accordingly reject it's assertion that its duty was only to offer the course. Section 7 (2) of the *Fair Administrative Action Act*,2015 that provides the grounds of review, indicate that this court can review a decision where any of the following were evident: bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

58. It would go against the dictates of *the Constitution*, the law and public interest, if a university would offer courses that would render graduates unemployable due to failure to comply with recognizable legal directives. As such this argument by the 1st respondent is unacceptable. While it is noted that eventually complied, the same does not absolve it from its duty to offer courses in line with the edicts of the law.

59. Under Section 5 of the Act the 2nd respondent had an active role from its inspection to ensure that the aspects of the petitioner's and other students careers were regulated accordingly. The question then is whether in the circumstances before this court, the 2nd respondent fulfilled this obligation. In this regard I find the analogy cited in the case of Mathew Okwanda (supra) useful to elucidate this point:

> " 15.
>
> ... The issue of progressive realization of economic and social rights has been dealt with in a number of cases. In the case of Mitu-Bell Welfare Society v Attorney General & 2 others, Nairobi Petition No. 164 of 2011 (Unreported) Mumbi Ngugi J. observed that, "[53] The argument that social economic rights cannot be claimed at this point, two years after the promulgation of *the Constitution*, also ignores the fact that no provision of *the Constitution* is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21and 43 require that there should be 'progressive realization' of social economic rights, implying that the state must begin to take steps, and I might add be seen to take steps, towards realization of these rights. [78] Granted, also, that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection.... Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans...
>
> 16.
>
> Therefore, even where rights are to be progressively achieved, the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question..."

60. It is presumed that prior to the enactment of the 2nd respondent's Act, a number of universities offered the petitioner's course. What can be gathered from the material placed before this Court is that the

affected parties were not aware of the directives of the Act. It is unfortunate that the same was only learnt almost 8 years later. The 2nd respondent being the governing body was also required to work in consultation with the training institutions. The 1st respondent did not adduce evidence that there had been a consultation with the 2nd respondent on the standard and quality of course it was offering. This consultation only materialized when its students failed to be registered.

61. This in my view was a failure by the 2nd respondent of its statutory duty to the persons it was given supervisory authority over by the law. In carrying out its functions the 2nd respondent is required to do so in a manner that does not violate constitutional rights and in compliance with the established values and principles. On top of this, the petitioner's effort to seek answers was continually frustrated despite his attempt to get a headway.

62. The case before this Court is one where two public bodies as a result of failing to carry out their mandate in line with constitutional principles and the law violated the constitutional rights of the innocent affected students. I am convinced accordingly that the manner in which the respondents carried out their statutory mandate was offensive to the values and principles of *the Constitution*. This in turn violated the petitioner's rights under Article 28, 43 and 47 of *the Constitution*.

Issue No. (iii). Whether the respondents' violated the doctrine of legitimate expectation

63. The petitioner averred that he joined the 1st respondent with the belief that it was accredited to offer the Bachelor of Science (Biomedical Science and Technology) Medicine course. He as such expected that upon successful completion of the course he would graduate and be registered with the 2nd respondent. When the registration failed to take place he was aggrieved that his legitimate expectation had been breached.

64. The Supreme Court of Kenya in defining legitimate expectation in the case of Communications Commission of Kenya (supra) stated that:

(264) In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

(265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation."

65. The Court went on state the principles of legitimate expectation as follows:

(269) The emerging principles may be succinctly set out as follows:

a. there must be an express, clear and unambiguous promise given by a public authority;

b. the expectation itself must be reasonable;

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

66. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

67. In addition the Court in the case of Republic v Kenya Revenue Authority Ex-parte KSC International Limited (In Receivership) [2016] eKLR speaking to this held as follows:

> " My view on this issue is informed by the need to achieve certainty in economic sphere. As was appreciated by Nyamu, J in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others HCMA No. 743 of 2006 [2007] KLR 240 at 295:
>
> "…legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Certainty of law is a major requirement to business and investment…certainty of law is an important pillar in the concept of the rule of law."
>
> Also see: in Republic vs. Attorney General & Another Ex Parte Waswa & 2 others [2005] 1 KLR 280.

68. I am guided by the acumen in the cited authorities and principles outlined by the Supreme Court. In the circumstances of this case, I find that the action of enrolling the petitioner in the 1st respondent's institution to pursue the course created a legitimate expectation that upon the successful completion he would indeed graduate and hopefully gain meaningful employment thereafter. This expectation was founded in law as the 1st respondent was an accredited university allowed by the law to offer training to students and confer awards (See: Section 9 of the 1st Respondent's Charter).

69. In light of the foregoing discussion, it is clear that the petitioner's expectation towards the 1st respondent was legitimate. I find thus that the 1st respondent breached the petitioner's right of legitimate expectation. The 1st respondent cannot thus disassociate itself from its obligation.

70. I do not find the same for the 2nd respondent. I say so because a legitimate expectation must be founded in law otherwise it is just an expectation. This means that the 2nd respondent as per the dictates of the law can only register students it has established fulfilled the accreditation requirements. It does not go looking for them I am also guided by the case of Khelef Khalif (supra)where it was held as follows:

> " 43.
>
> Statutory bodies derive their authority or jurisdiction from a legal instrument establishing them, and may only do what the law authorizes them to so. This is known as the principle of legality, which requires that administrative authorities not only refrain from breaking the law, but that all their content comply with *the Constitution* and particularly the Bill of Rights. Their decisions must conform to *the Constitution*; legislation; and the common law."

71. The petitioner as such would not expect the 2nd respondent to register him against the clear provisions of the law. The 2nd respondent can only act within its confines. As such although the petitioner had an expectation that his degree would secure his registration, this expectation does not qualify as a legitimate, expectation.

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

72. Having found that the petitioner's rights have been violated, the next issue for determination is whether the reliefs sought in the petition should be granted. It is set in law that there is no wrong without a remedy. The petitioner sought 7 prayers in his petition.

73. To begin with the petitioner's counsel in his submissions sought an award of Ksh.10, 000, 000 as compensation to vindicate violation of the petitioner's constitutional rights. The 1st respondent opposed this alongside his other prayers stating that a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent any future infringements. It is worthy to note however that the petitioner's counsel did not explain how he arrived at the stated figure and neither adduced evidence to support its justification. Without any reference as to how counsel computed this amount, I find that the claim cannot succeed.

74. Moreover, the Court of Appeal addressing the question of the nature of constitutional damages in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR pronounced itself as follows:

> " ...the South African Case of Dendy v University of Witwatersrand, Johannesburg & others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:
>
> "...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.
>
> "...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

75. In the case of Peter Mauki Kaijenja & 9 others vs Chief of the Defence Forces & another [2019] eKLR it was stated:

> " 96.
>
> Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion..."

76. The Court went on further to note that:

> " 97.
>
> Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than

a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law."

77. With reference to the claim for general damages, the Court in the case of Zipporah Seroney & 5 others v Attorney General [2020] eKLR observed as follows:

> " 124.
>
> Taking into account the cited principles, and considering that the award of general damages is not a mathematical exercise, the best guide is the awards previously made to persons whose constitutional rights were violated in circumstances similar to that of the deceased. This is the only way of determining a just and reasonable compensation considering that the parties did not make any proposals in their submissions on what they think should be the appropriate damages in this case."

78. Counsel for the petitioner did not submit authorities on the quantum of general damages to examine on a comparative basis how general damages in view of similar violations were awarded. Nevertheless one of the cases relied on by the petitioner which had comparable circumstances shed some light. The Court in the case of Jesse Waweru Wahome & 2 others (supra) opined as follows:

> " 119.
>
> Notwithstanding the fact that I have not awarded compensatory damages, I have no doubt that the petitioners and persons who have been affected by the conduct of the ERB have suffered loss and damages. In order to recognise this loss, I think general damages or damages at large are appropriate in the circumstances. This award recognises that the petitioners' rights have been violated. In the circumstances I think a sum of Kshs. 200,000.00 for each petitioner and each graduate affected by the unlawful action of the ERB is appropriate..."

79. In the instant case, I note that the petitioner completed his university education with the 1st respondent in the year 2010 and has remained unregistered with the 2nd respondent for 13 years. The petitioner indicated in addition to opposing the 1st respondent's recall that he had already been constrained financially throughout his course to add onto the financial burden. Equally, it was asserted that since his graduation the petitioner had not been able to secure employment to practice as a laboratory technician or technologist. This as was submitted prejudiced him greatly. It reasonable to construe that the petitioner's peers secured gainful employment while all the while, the petitioner's future remained uncertain. It is my humble conclusion that the petitioner has endured indescribable distress and unease following the 1st respondent's failure to acquire accreditation from the 2nd respondent and the 2nd respondent's inaction as required by the law which led to breach of his constitutional rights.

80. In light of the foregoing and bearing in mind the violation of the petitioner's rights by the respondents, I find an award of general damages of Kshs.500,000/= paid equally by the respondents to be fair and reasonable. This will be sufficient to vindicate the petitioner and compensate him for the violations suffered.

81. I find that prayer (d) in the petition should not be granted. This prayer is with reference to the 2nd respondent's mandate. The petitioner seeks to have this court compel the 2nd respondent to register him as a laboratory technician. As discussed in the discussion above, the law mandate's the 2nd respondent to only register students who are qualified to be registered as such. In the circumstances of this case the petitioner had not fulfilled the 2nd respondent's qualification criteria. Considering this, this prayer is untenable as its grant would be unlawful.

82. Turning to prayer (g) the petitioner asked this court to grant any other relief that it deems just and fair. Owing to the conclusion that the petitioner's rights were violated and the circumstances of this case, this court considers that a relief that would be just is to order and compel the 1st respondent to re-admit the petitioner to its institution to undertake the six pending units at no extra fee so that he can become fully complaint with the 2nd respondent's accreditation requirements.

83. The upshot of the foregoing and for the reasons set out herein, I find that the petition dated 16th November 2021 has merit and is accordingly allowed, and the following orders are issued;

   a. A declaration that the respondents jointly and severally violated the petitioner's rights to legitimate expectation.

   b. A declaration that the respondents jointly and severally violated the petitioner's rights to fair administrative action, human dignity and economic rights under Articles 28, 43 and 47 of *the Constitution*.

   c. An award of Kshs.500,000/= as general damages is made. The same to be paid by both respondents equally with interest at court rates.

   d. Prayer (d) not allowed.

   e. The 1st respondent to re-admit the petitioner to undertake the pending six (6) units at half the cost with immediate effect.

   f. Costs of the petition to the petitioner to be borne by both respondents.

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