



**Dak v Eldoret College of Professional Studies & another (Constitutional Petition
13 of 2020) [2022] KEHC 16750 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION 13 OF 2020
RN NYAKUNDI, J
DECEMBER 23, 2022**

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 24, 28, 35,
43, 47, 48, 159 & 165 OF THE CONSTITUTION OF KENYA**

BETWEEN

GABRIEL TURIK DAK PETITIONER

AND

ELDORET COLLEGE OF PROFESSIONAL STUDIES 1ST RESPONDENT

THE UNIVERSITY OF ELDORET 2ND RESPONDENT

JUDGMENT

1. The Petitioner is an adult and a citizen of the Republic of South Sudan and currently a resident of Kenya with an alien Identity Card No. 8xxxx7.
2. The 1st Respondent is a tertiary institution and registered by the Ministry of Education, Science and Technology in accordance with Section 15 (2) of the *Education Act* Cap 211 of the Laws of Kenya.
3. The 2nd Respondent is a public university established under the *Universities Act*, 2012.

The Petitioner's Case

4. The Petitioner's case is that at all material times the 1st Respondent in collaboration with the 2nd Respondent offered courses together.
5. The Petitioner deposed that he has been a student at the 1st Respondent institution and pursued a certificate course in Business Management which he completed in the year 2017 and was awarded with a provisional academic transcript. According to the Petitioner, the provisional transcript made him eligible for graduation that was held at the University of Eldoret on or about November, 2017.



6. At the same institution, the Petitioner further pursued a diploma in Public Administration to completion and was issued with provisional transcripts for the first and second year of study indicating that he had done all the courses to completion and thereby making him eligible for the graduation that was held at the University of Eldoret on or about the year 2018.
7. The Petitioner deposed that he has made several and countless visits to the 1st Respondent offices regarding the issue of his graduation and has only been informed that the same is being worked on.
8. The Petitioner contends that he has also made countless attempts to get his final transcripts from the 1st and 2nd Respondents to no avail. Further the Petitioner contends that the 1st and 2nd Respondents have denied him, his right to get the said transcripts even though he has paid all the requisite fees, has attended all the classes and has sat for the all the exams as required.
9. The Petitioner argues that the 1st and 2nd Respondents have breached his legitimate expectation to graduate after meeting all the requisite requirements.
10. The Petitioner contends that the acts and or omissions of the Respondents have violated his fundamental rights to education, right to fair administrative action as well as the right to equal protection of the law.
11. The Petitioner maintains that the failure by the Respondents to issue him with his Diploma Certificate and original transcripts has denied him the chance to continue with his education and as such his pursuit for further education has been halted.
12. As a result of the alleged violations, the Petitioner seeks the following reliefs;
 1. A declaration that the Petitioner's fundamental rights as enshrined under Articles 19, 20, 24, 27, 43 (f) of the Constitution of Kenya, 2010 have been contravened and infringed upon by the Respondents.
 2. A declaration that the Petition is entitled to be paid damages and compensation for the violation and contravention of his fundamental rights by Respondents under Articles 19, 20, 24, 27, 43 (f) of the Constitution of Kenya, 2010.
 3. The Respondents be and are hereby ordered to immediately and unconditionally release the Petitioner's final official transcripts and original diploma certificate for Public Administration and his certificate for Business Management.
 4. The Respondents be and are hereby ordered to allow and or facilitate the Petitioner's graduation from their institutions in 2020 or within such other near graduation ceremonies conducted by the 2nd Respondent.
 5. Costs of this petition.
 6. Any other relief that the Honourable Court may deem fit.

The 1st Respondent's Case

13. Through the replying affidavit of Michael Onkoba Nyankuru sworn on 30th October, 2020 the 1st Respondent deposed that it is not in a position to release the transcripts and academic certificates if any that the Petitioner seeks.
14. The 1st Respondent maintains that the transcripts and certificate if any can only be released by the 2nd Respondent.



15. The 1st Respondent's case is that it entered into a Memorandum of understanding with 2nd Respondent, whereby it was to admit and offer courses that would be directed and examined by the 2nd Respondent. The 1st Respondent further deposed that as per the Memorandum of understanding, the 1st Respondent's role was to offer the courses on behalf of the 2nd Respondent at an agreed fee which was to go into the administration and supervision of exams and issuance of transcripts and certificates among other terms. The 1st Respondent maintains that the Memorandum of understanding enabled it to admit students to pursue studies in its campuses.
16. The 1st Respondent deposed that the Petitioner as per his academic certificate for Kenya Certificate of Secondary Education (KCSE) could only qualify to undertake a certificate course.
17. The 1st Respondent denied having admitted the Petitioner for a diploma Course in its institution. Further 1st Respondent maintains that it is not in a position to confirm whether the Petitioner met the requirements for an award of Diploma.
18. The 1st Respondent added that it has no role to play in the processing and release of the academic transcripts and certificates to the Petitioner. The 1st Respondent contends that if their any then the same should be released by the 2nd Respondent.
19. The 1st Respondent maintains that the reliefs sought by the Petitioner can only be addressed by 2nd Respondent.
20. The 1st Respondent deposed that the Petitioner herein was enrolled in its college in the year 2017 to pursue a certificate course.
21. The 1st Respondent contends that the Memorandum of understanding between the 1st and 2nd Respondent was to run for a period of (5) years effective from 4/3/2014 up to 3/3/2019.
22. The 1st Respondent maintains that it is not anyway blameworthy for the predicament of the Petitioner.

The 2nd Respondent's Case

23. The 2nd Respondent's case was made through the affidavit of Professor Ruth N. Otunga, the Deputy Vice-Chancellor Academics & Student Affairs for the University of Eldoret.
24. The 2nd Respondent *vide* a replying affidavit dated the 16th of October 2020 indicated that the 2nd Respondent following the revised regulations by the Commission on University Education published under the [Universities Act](#) No.42 of 2012 and revised in 2016 and the subsequent Quality Inspection Audit by the Commission on University Education, all collaborating institutions including the 1st Respondent were directed to cease admission of new students based on the former circular that was KNEC equivalent. The 2nd Respondent deposed that this was well communicated to the various stakeholders including the 1st Respondent in 2015 and further discussed in great detail in a joint meeting of the university with collaborating institutions held on 10th April, 2015 in which the 1st Respondent was represented.
25. The 2nd Respondent contends that it has no direct agreements with the students from the collaborating colleges including the Petitioner herein. The 2nd Respondent maintains that its engagements were solely based on the Memorandum of Understanding between it and the 1st Respondent which was effectively brought to an end by operation of law. As such, allowing the Petitioner to graduate would be illegal.
26. The 2nd Respondent further deposed that the Petitioner was admitted to the 1st respondent institution in January 2017, well outside the collaboration period which ceased in 2015 and that the 2nd



Respondent did not participate in the admission, training nor examining of the petitioner and as such cannot be compelled to graduate and award him with academic certificates.

27. The 2nd Respondents contends that the Petitioner has not tendered any evidence to show that he has met all the requirements set for the conferment of a Diploma or Certificate for the approval by the 2nd Respondent's senate.
28. The 2nd Respondent maintains that graduating in a public institution is a legal process governed by the laws of Kenya, the University Charter and regulations and as such, a Court of law ought to proceed with utmost caution when making a decision that would in essence adversely affect such a process.
29. The petition was canvassed *vide* written submissions. The Petitioner filed his submissions dated 4th October, 2017, the 1st Respondent filed its submissions 6th October, 2022 whereas the 2nd Respondents filed its submissions dated 5th October, 2021 and also filed supplementary submissions dated 25th April, 2022. I have carefully read the said submissions and need not reproduce same here.

Determination

30. I have carefully considered the petition, affidavits, submissions, cited authorities and the Law. I find the following issues are for determination: -
 - a. Whether the Petitioner's rights under Articles 19, 20, 24, 27, 43 (f) of the Constitution of Kenya, 2010 were violated by the Respondents.
 - b. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petitioner's rights under Articles 19, 20, 24, 27, 43 (f) of the Constitution of Kenya, 2010 were violated by the Respondents.

31. A party who seeks relief under the Constitution must state with specificity the right which he alleges had been violated and how it has been violated in respect to him (See Anarita Karimi Njeru v Republic (No.1) [1978] KLR 154 as affirmed by the Court of Appeal in Mumo Matemu v Trusted Society for Human Rights Alliance & 5 Others NRB CA Civil Appeal 290 of 2012 [2013] eKLR). In the instant case, the Petitioner was categorical that his rights under Articles 19, 20, 24, 27, 43 (f) of the Constitution of Kenya, 2010 were violated by the Respondents.
32. The Petitioner claims that his rights and fundamental freedoms, right to equality and freedom from discrimination and right to education were violated by the Respondents.
33. The Petitioner however save mentioning the violation of his Constitutional rights under Articles 19, 20, 24 and 27 have been violated. He did not demonstrate to the Court how the said rights were violated and the manner in which the Respondents herein violated the said rights.
34. Article 43(1) of the Constitution expressly provides for economic and social rights 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.”

35. Article 13 of the *International Covenant on Economic, Social and Cultural Rights* expounds the primacy of the Right to Education in the following terms: -

“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially, marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from hazardous labour and social exploitation, promoting human rights and democracy and protecting the environment and controlling the population growth.

36. The gist of the Petitioner’s case pegged on the violation of his right to education as provided for under Article 43(f) of the *Constitution*. The Petitioner submitted that while applying to join the 1st Respondent’s institution he believed that the 1st and 2nd Respondents have a Memorandum of Understanding to offer the courses in questions. The Petitioner contends having completed the course work he had the legitimate expectation of graduating from the 2nd Respondent’s institution a desire that has never materialised as he has never been given his certificate for the Business Management course and his Diploma Certificate in Public Administration. The Petitioner further submitted that as result of the actions by the Respondents, he has been unable to pursue further studies due to the lack of the issuance of the original transcripts and certificates by the Respondents. In doing so the Petitioner contends that the Respondents have breached his right to education as envisaged by the Kenyan Constitution.
37. The Petitioner on his part has attached copies of provisional transcripts as proof that he was in fact admitted at the 1st Respondent’s institution to pursue both a certificate course in Business Management and a Diploma course in Public Administration.
38. The 1st Respondent on the other hand does not dispute that the Petitioner was admitted as a student in Eldoret College of Professional Studies to pursue a certificate course in Business Management. The 1st Respondent admits to have admitted the Petitioner in its institution in the year 2017 to pursue a certificate course in Business Management. The 1st Respondent however denies having admitted the Petitioner for a Diploma Course at the said institution. The 1st Respondent’s case is that it had a Memorandum of Understanding with 2nd Respondent to offer courses of its behalf. the 1st Respondent maintains that it was the business of the 2nd Respondent to offer academic and certificates transcripts if any to the Petitioner.
39. The 2nd Respondent on its part has however denied the averments by the Petitioner. The 2nd Respondent submitted that it has no directed agreements with students from collaborating colleges including the Petitioner herein but rather had a Memorandum of understanding with 1st Respondent which was effectively brought to a conclusion by operation of law.
40. The 2nd Respondent submitted that in view of the revised regulations by the Commission on University Education published under the *Universities Act* No.42 of 2012 and revised in 2016 and the subsequent Quality Inspection Audit by the Commission on University Education, all collaborating



institutions including the 1st Respondent were directed to cease admission of new students based on the former circular that was KNEC equivalent.

41. The 2nd Respondent further submitted that 2nd Respondent did not participate in the admission, training nor examining of the Petitioner and thus cannot be compelled to graduate and award academic certificates as this could amount to sacrificing the quality of graduates being released to unsuspecting public which is against the provisions of Article 46(1) and (3) of the Constitution of Kenya, the University of Eldoret Charter and the Universities Act, 2012.
42. The 2nd Respondent argued that the Petitioner was admitted to the 1st Respondent's institution in 2017, which period was truly outside the collaboration period which ceased in 2015. The 2nd Respondents contends that power of approving graduation having been trained, examined and qualified is only vested with its Senate and the same can only be challenged by way of judicial review.
43. It is without a doubt that the Petitioner herein was at some point a student at the 1st Respondent's institution. The 1st Respondent admits that the Petitioner was enrolled at its institution to pursue a certificate course in Business Management but had denied the fact that the Petitioner pursued a Diploma course in Public Administration at the said institution.
44. Regarding the Diploma course, I have keenly perused the Petitioner's transcripts on record and note that the same are uncertified and thus the Court cannot verify their authenticity at this juncture. To my mind an admission letter perhaps would have aided this Court in making an informed decision as to when the Petitioner was in fact admitted and was a student at the 1st Respondent's institution and the courses that were undertaken during the said period.
45. Regarding the Memorandum of Understanding between the 1st and Respondent, it is in deed true that the 1st and 2nd Respondent's enter into a Memorandum of Understanding in the year 2014, in which parties were to collaborated in the following areas;
 - a. Collaborate in carrying out research in fields of mutual interest
 - b. Jointly perform outreach activities geared towards improving income and livelihoods especially for the people within Kenya and the region.
 - c. Collaborate in the training of Kenyans and others at Certificate and Diploma levels in the fields specified in the MOU.
 - d. Establish mentorship programmes between the two institutions where possible
 - e. Collaborate on professional development and field research programmes as appropriate and
 - f. The UOE reserves the right to reject the physical environment of ECPS in accordance with the Physical Planning Act of 1996 and the Environmental Management and Co-ordination Act of 1999 and any other relevant law.
46. From the MOU on record, some of the 2nd Respondent's obligations entailed; moderating and producing the final examinations for administration, awarding upon successful completion of courses, the respective UOE's certificates and preparing academic transcripts showing grades obtained in each unit. The 1st Respondent on the other hand was charged with; admitting students to the programmes they qualify as specified by UOE admission criteria, teach, set and submit marked examinations together with scripts, mark-sheets, marking scheme and question paper of students admitted and registered under this joint MOU and entered into the data base of both institutions.



47. However, in light of the directive from Commission on University Education, all collaborating institutions including the 1st Respondent were directed to cease admission of new students based on the former curricular that was not KNEC equivalent.
48. The 1st Respondent case is that Memorandum of Understanding between the 1st and 2nd Respondent's was to last for a period of (5) years and would run from the year 2014 to 2019.
49. A perusal of the copy of letter dated 18th August, 2016 from the 2nd Respondent to the 1st Respondent however reveals that 1st Respondent was fully aware and informed of the new directive by the Commission for University Education that ultimately brought to a conclusion the collaboration between it and the 2nd Respondent. From the letter it is further evident that the 2nd Respondent would only continue working the 1st Respondent with regard to students who had been admitted before the expiry of the duration given by the Commission for University Education. A reading of the said letter further reveals that 2nd Respondent cautions the 1st Respondent against advertising programmes in the media which was contrary to the directives given by the Commission for University Education.
50. The 1st Respondent however on its own motion decided to admit the Petitioner for a certificate course in Business Management in 2017, this is even after the collaboration period between it and the 2nd Respondent had been effectively brought to a conclusion by operation of law.
51. From the record, it is evident that the Petitioner herein, truly believed that he was a legitimate student at the 1st Respondent's institution and that there was a Memorandum of Understanding between the 1st and 2nd Respondents allowing him to pursue his studies therein. He did whatever needed to be done with the hope that in end he would be furnished with his academic transcripts and certificates. The 1st Respondent on the other hand, all along knew that this was in fact a futile cause on the part of the Petitioner but yet still admitted him to its institution.
52. Having said so, it is my finding that that the 1st Respondent breached the Petitioner's right to education. The 1st Respondent violated his legitimate expectation that he would in the end graduate and be furnished with his academic transcripts and certificate.

Whether the Petitioner is entitled to the reliefs sought

53. De Smith, Woolf & Jowell, in "*Judicial Review of Administrative Action*" 6th Edition, Sweet & Maxwell at page 609 state as follows: -

A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public.

54. The award of damages for constitutional violations of an individual's right are reliefs under public law remedies lies within the discretion of a trial court and that such discretion is limited by what is "appropriate and just" based on the facts and circumstances of each case.
55. The Privy Council in *Alphie Subiah v The Attorney General of Trinidad and Tobago Privy Council Appeal No. 39 of 2007* pronounced itself on the same point stating that:

"The Board's decisions in Ramanoop, paras 17-20, and Merson, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The



Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in Merson’s case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of Ramanoop, and Merson, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 516 D-E) for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim’s constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasized in *Merson*, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression.”

56. Similarly, in the South African Case of *Dendy v University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 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.”

57. It is therefore clear that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. What this means is that in certain instances an award of reasonable damages may be called for in addition to the declaration taking into account not only the Petitioner’s interests but also the public policy considerations and the wider interests of the society.

58. In the present case, I am of the considered view that in light of the breach by 1st Respondent, the Petitioner is at a great loss because he has nothing to show for years spent at the 1st Respondents institution. His time there can never ever be redeemed. Although, the Petitioner was led to believe that he was pursuing a legitimate course at the 1st Respondent’s institution. The collaboration between the 1st and 2nd Respondent was no longer in force and thus rendering his pursuit for education a totally



nullity. The Court cannot therefore compel the 2nd Respondent to issue academic certificates in vain whereas there was a clear directive barring any new student admissions at the time.

59. The conduct of the 1st Respondent in the circumstances, calls for the exercise of this court's discretion to award damages for the aforesaid constitutional violation.

60. I therefore, find that an award of compensation is merited in this case so as to give effect and meaning to the Petitioner's constitutional rights. Consequently, I award the Petitioner Kshs.1,000,000/=as general damages for violation of his right to education.

61. In view of my findings above, I am satisfied that the Petition has merit, and I therefore grant the following orders:

- i. A declaration hereby issued that the 1st Respondent breached the Petitioner's rights and fundamental freedoms guaranteed under Article 43(f) of the *Constitution* of Kenya.
- ii. I hereby award the Petitioner Kshs1,000,000/- as general damages with interest thereon at Court rates from the date of this judgment until payment in full. For clarity purposes the damages to be paid by the 1st Respondent herein.
- iii. The 1st Respondent shall bear the costs of the Petition.

62. It is ordered so.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23TH DAY OF DECEMBER, 2022

R. NYAKUNDI

JUDGE

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