



**Wagoy & 3 others v University of Nairobi (Petition 335 of 2020) [2022] KEHC 16498 (KLR)
(Constitutional and Human Rights) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16498 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 335 OF 2020
HI ONG'UDI, J
DECEMBER 20, 2022
(FORMERLY KISUMU HIGH COURT PETITION NO. 5 OF
2020)
IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23,
47, 165 AND 259 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10, 27, 28,
29(D), 43(1)(F) AND 47(1) OF THE CONSTITUTION OF
KENYA, 2010
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013
AND
IN THE MATTER OF THE UNIVERSITIES ACT NO. 42 OF
2012
AND
IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT,
2015
AND
IN THE MATTER OF CONTRAVENTION OF RIGHTS AND**



**EDUCATION, EQUALITY AND FREEDOM FROM
DISCRIMINATION, HUMAN DIGNITY AND RIGHT TO FAIR
ADMINISTRATIVE ACTION
AND
IN THE MATTER OF THE DOCTRINE OF LEGITIMATE
EXPECTATION**

BETWEEN

JERRY WAGOYI 1ST PETITIONER
DON ALPOHONCE OBONGO 2ND PETITIONER
SHAMIM ASMAN 3RD PETITIONER
ELIZABETH KILONZO 4TH PETITIONER

AND

UNIVERSITY OF NAIROBI RESPONDENT

JUDGMENT

1. The petitioners who are law students at the University of Nairobi, Kisumu campus filed the petition dated December 1, 2020 seeking the following orders:
 - i. A declaratory order do issue that the respondent has breached the petitioners' following rights and fundamental freedoms under the *Constitution* of Kenya, 2010, *inter alia*:
 - a. Right to equality and freedom from discrimination,
 - b. Fair administrative action
 - c. Right to non-discrimination,
 - d. Right to freedom from psychological torture,
 - e. Right to dignity,
 - f. *Fair Administrative Action Act*.
 - ii. A declaratory order do issue that by denying the petitioners the right to graduate on the premise of new regulations, the respondent violated the petitioners' legitimate expectation.
 - iii. An order do issue in the nature of *certiorari* to bring before this court for the purpose of quashing the decision of the respondent contained in circular issued on November 24, 2020 excluding petitioners' names from the graduation list.
 - iv. An order do issue in the nature of mandamus to compel the respondent to unconditionally include the names of the petitioners in the graduation list of December 11, 2020.



- v. A declaration that the petitioners' qualifications for graduation are only subject to the provisions of the law and regulation which existed at the time of their admission and for avoidance of doubt, for the years 2012.
 - vi. An order for general damages as against the respondent for subjecting the petitioners to psychological torture, anguish, suffering, mental torture and breach of the petitioner's constitutional rights and fundamental freedoms.
 - vii. An award of exemplary damages to the petitioners for violation and breach of their constitutional rights and fundamental freedoms and loss of opportunities of jobs, promotions and further studies.
 - viii. Costs of and incidental to these proceedings.
 - ix. Such other, further, additional, incidental, and/or alternative reliefs of remedies as the honourable court shall deem just and expedient.
2. The petition is supported by the supporting and supplementary affidavits of Jerry Wagoyii (1st petitioner) sworn on December 1, 2020 and February 6, 2021 respectively. The 2nd, 3rd and 4th petitioners authorized the 1st petitioner to swear the supporting affidavit and all subsequent affidavits or other legal instruments in respect of this matter. The authority to act letter (JW1) is dated December 1, 2020 and was filed with the petition among others.
 3. It is the petitioners case that they were all admitted to study bachelors of law, degree at the University of Nairobi, Kisumu campus in the year 2012. The course was to take four (4) years. He gives their registration numbers as:

G34/31761/2013, G34/4664/2012, G34 54468/2012 and G34/49891/2012 respectively.
 4. It is their case that during their period of study they paid all fees, attended classes, undertook continuous assessment tests, examinations, did take away assignments and projects which they handed over accordingly. (JW-2') are documents downloaded from the university portal.
 5. They did not graduate as expected in the year 2017 because of missing marks in some of the units. On October 7, 2019 one Alex George sent an email to all students requesting those with missing marks to communicate on the same by October 8, 2019, in preparation for the December 2019 graduation (JW3').
 6. He averred that he was together with Alex able to retrieve his missing marks in some of the units from 2018. For those others with missing marks they were compelled to redo the examinations and everything was sorted by November 2020. They were cleared by the respondent and their names were included in the provisional graduation list set for December 11, 2020.
 7. They however received an email from the respondent on November 24, 2020 giving instructions on the new curriculum where they had to do 6 more units at a cost of Kshs 3000/= (JW4'). He deponed that this was news to them as no one had informed them about this. They read mischief in it, as the rules were being applied retrospectively.
 8. It is their case that the respondent has through its actions violated several of their rights e.g. article 27 (equality) article 28 (human dignity), article 29(d) (subjected to psychological torture), article 43(1)(f) (education) article 47 (fair administrative action); right to legitimate expectation was also violated. They aver that the rules of engagement in this matter were changed just before they had their graduation which was unfair. That having been enrolled in the old curriculum they ought to



have graduated under the same. They further aver that due to the tossing up and down they have lost support from their sponsors making them lose their human dignity. Further that the new regulations are unconstitutional and should be declared null and void *abinitio*.

9. In his supplementary affidavit he lists the courses they were to undertake as provided for under the [Legal Education Act](#) 2012. Besides this were the 4 extra units introduced by the respondent, within a very short time. That the information on the extra units came to them very late in the day, as they prepared to graduate. They do not see why they have been asked to do the extra units over and above the twelve (12) semesters already undertaken.

The Respondent's Case.

10. The respondent in opposing the petition filed a response dated January 20, 2021 by its advocate Mr F.C Omondi. The gist of the response is that the petitioners were admitted at the respondent's Kisumu campus in 2012 or thereabout to pursue the bachelor of laws degree programme. The curriculum in use then was reviewed and amended in 2013, making some course core in keeping with the requirements of the [Legal Education Act](#) 2012 ([Legal Education Act](#) No 27 of 2012 section 23(1)) and the second schedule of the Act. The respondent indicates that the regulations in the Almanac and curriculum must be complied with.
11. Further that all new students including the petitioners were supplied with the handbook containing the regulations in the Almanac. They were therefore aware of all the requirements plus the new units. In short the petitioners prolonged stay at the university was caused by their failure to work hard in their studies and examinations. They failed in numerous units and were made to resit the failed units and examinations.
12. In the replying affidavit by Michael P Otieno Okelloh the respondent's examination officer and dated January 20, 2021 the respondent has annexed the regulations (MPOO-1), copy of the summarized handbook (MPOO-2), current curriculum (MPOO-3) and senate admission policy (MPOO-4). The deponent has given a very detailed academic analysis and progression of each of the petitioners (paragraph 14) page 4 – 13) marked as MPOO5-8).
13. He averred that all the petitioners have not undertaken at least four (4) new curriculum courses at Kisumu campus. On the other issues he deponed that the petitioners had no missing marks under the old curriculum. They have been aware of the need to complete their studies under the old curriculum under which they were admitted and which was phased out in 2013. That the petitioners signed and committed themselves to abide by the university admission regulations. The regulations apply to all students without any discrimination. There are over 30 students from the old curriculum who are yet to graduate.
14. He deponed that the petitioners being private students have to pay the necessary tuition fees per unit in line with the university fees policy. The payment of Kshs 3000/= is to facilitate the credit transfer from the old to the new curriculum. The sitting and passing of the law examination is regulated by the [Legal Education Act](#) 2012 and the curriculum changed before the petitioners completed their studies under the old curriculum. Further that the petitioners had failed to prove that their fundamental freedoms and rights and legitimate expectations have been denied, violated, infringed or threatened by the respondent.
15. In his further replying affidavit dated March 8, 2021 Mr Michael P Otieno Okelloh averred that the Kisumu campus is accredited by the Council for Legal Education on the basis of courses covered under the 2018 curriculum and not 2012/2013 curriculum which has additional courses beyond those covered under the said second schedule to the Act. That the petitioners are continuing students



and are therefore expected to sit for examinations in at least the four (4) units and pass them. He annexed various policies namely admissions policy, examinations policy, academic integrity policy, student handbook, regulations for individual programmes, QMs procedures for teaching and learning, UoN QMs, procedures for graduation and issuance of certificates (MPOO-2); CUE requirements (MPOO03) and Senate approval (MPOO-4).

16. He further explains at paragraphs 15 & 16 the detailed process of preparing for the graduation. He adds that it's the senate that approves the results and the graduation list which was done (MPOO-5). The students are then notified and they appear to verify their details (MPOO-6) before clearance is done where the following are required:
 - a. Duly signed certificate of clearance
 - b. Academic clearance from all departments
 - c. Fee statement showing zero balance
 - d. Full compliance with SMIS and biometric registration.
17. It's his averment that the petitioners never went through the said process. The appearance of their names in the provisional graduation list was for administrative purposes within the campus subject to verification and confirmation by the school board, college board, academic registrar and approval by the senate and council. No evidence was produced by the petitioners to show that the respondent's academic registrar prepared the graduation list with names for presentation to the senate and council for approval and graduation.

Submissions

18. The petitioners filed their submissions dated February 16, 2021 through Mulanya and Maondo advocates. Counsel submitted that there was no communication to the students informing them when the new curriculum was supposed to take effect. They ought to have graduated in 2018, 2017, 2018 & 2017 but surprisingly they were retained in school being offered examinations and being misled. That they were informed by the respondent's administrator that their names were on the graduation list just for this to be changed.
19. Referring to article 47 of the *Constitution* Counsel referred to *Judicial Service Commission v Mbalu Mutava and another* [2015] eKLR at paragraphs 23. He submitted that the petitioners issue is on the manner in which the revised curriculum was handled much to their disadvantage. That they only learnt of it two weeks to their graduation. The element of missing marks had also been an issue.
20. It is counsel's submission that the principle of legitimate expectation should not be confined only to a past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed *Republic v Attorney General and another ex parte Waswa & 2 others* [2005] 1 KLR 280. He also cited the case of *National Director of Public Prosecutions v Phillips & others* [2002] (4) SA 60(W) paragraph 28, HEHE J as cited in *Tom Parsaloi & another v Agricultural Finance Corporation & another* [2020] eKLR at page 5 and submitted that the petitioners all along knew they were proceeding with the old curriculum. Infact it is their "missing" marks which caused them delays in completing their studies on time. Being notified of the new requirement just two weeks to their graduation was a surprise to them. In support reliance was placed on *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* [2014] eKLR.
21. Counsel contends that the petitioners' provisional transcripts show that they passed all units registered as at October 2020. The same has been confirmed by the respondent. He therefore argues that there is



sufficient evidence of the representation made and the conduct by the respondent as to the possibility of graduation by petitioners in 2020 thus violation of their legitimate expectation.

22. Its counsel's submission that under article 27 of the Constitution all persons are equal before the law. That there are students who were allowed to graduate in 2019 after the expiry of the alleged 6 years for clearance of the law programme. The petitioners were however not able to get the full details of such students. Reliance was placed on Florence Amunga Omukanda & another v the Attorney General & 2 others [2016] eKLR.
23. On loss of opportunities and human dignity counsel submitted that the petitioners do not have degree certificates and so can't be employed and can't apply for admission at Kenya School of Law. All they do is unpaid internships. Their standards of living have therefore been compromised and they blame the respondent for that. They urge the court to enter judgment in their favour.
24. The respondents submissions are dated March 4, 2021 and have been filed by Fredrick Collins Omondi. Counsel submitted that in reference to the petitioners annexures JW 3 & 4 and the attendant bonds signed by them, sufficient time and communication was made in good time for them to put their academic records in good order. That the documents JW 2a, 2b, 2c and 2d are for UNSA elections and not academic ones. In his submission that the petitioners were adequately and promptly communicated to on the aspect of the need to confirm the correctness of pending units and what they expected during their stay in the university concerning the four units. The court cannot therefore interfere with that he argues.
25. Its counsel's submission that the petitioners' right to education is not absolute as its subject to the rules and regulations governing studies /education in the respondent's institution. Thus the petitioners cannot be cleared for graduation before they sit and pass at least four (4) units in the new curriculum. Reference was made to the case of Maharashtra State Board v Kurmarsheth & others (1985) CLR 1083 where it was stated:

“So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations.....”

In the above case identical court emphasized the need:-

“...to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them.”

Also see Rachel Adhiambo Ogola & another v Council of Legal Education & another [2017] eKLR.

Counsel further submitted that the petitioners having signed the university bonds plus their exhibits they have to do the 4 units required of them. The delay in their graduation is by their inability in passing the exams.

26. Counsel contended that a provisional graduation list is a sign of work in progress. The same has to be approved by the senate and council before it can be relied on. It could not therefore create any legitimate expectation, still on the provisional graduation list counsel relied on;
 - i. Steven Mugwanja Nyambura v Kenyatta University & 3 others [2018] eKLR.
 - ii. Republic v Kenya National Examination Council ex parte Martin Phiri [2014] eKLR,



27. He submitted that despite averring that they were in the provisional graduation list they adduced no evidence to show that they had started the clearance process. That the following documents would have been very critical for their case.
- a. Duly signed certificate of clearance
 - b. Academic clearance from all departments
 - c. Fee statement showing zero balance
 - d. Full compliance with SMIS and biometric registration.
28. Counsel argued that the requirement for clearance for graduation is not a self-propelling process and the petitioners cannot apply directly to the court for the enforcement of graduation requirements. Even the provisional graduation list (precaution or ad interim list) for December 2020 was never produced and the respondent was not requested to produce one. That there is no evidence to show that the petitioners were in the provisional list and considered for clearance and graduation.
29. He referred to *H. W. R Wade & C.F Forsyth* [18] @pages 449 – 450 on legitimate expectation and argued that an unlawful decision cannot be the basis of a legitimate expectation. To support this he relied on:
- i. *Daniel Ingida Aluvaala & another v Council of Legal Education & another* [2007] eKLR
 - ii. *National Land Commission v Johnson Okiro Misiga* [2021] eKLR.
- He thus submitted that for the standard of legal training to be maintained the petitioners must sit and pass the examinations in the four (4) units before being allowed to graduate.
30. Finally counsel submitted that the prayers sought by the petitioners are academic in nature and rest with the respondent in offering the bachelor of laws degree programme. The programme is a regulated course and being in the university sector, the rules and regulations thereto apply that the court cannot make an order as to academic rights because it is not the right body to do so. To purport to do so would mean usurping of a function not bestowed on it by any law. He thus urged the court to dismiss the petition with costs.

Analysis and Determination

31. I have carefully considered the petition, affidavits, annexures, submissions, case law and the law and I find the issues arising for determination to be the following:
- i. Whether the respondent erred in asking the petitioners to do the four (4) units in its new curriculum.
 - ii. Whether the petitioners can graduate without studying and being examined in the said four (4) units.
 - iii. Whether the petitioners rights complained of have been violated.
 - iv. Whether the petitioners are entitled to the reliefs sought.
 - v. Who will pay the costs.



Issues No (i)& (ii). Whether the respondent erred in asking the petitioners to do the four (4) course units in its new curriculum;

Whether the petitioners can graduate without studying and being examined in the said four (4) units.

32. There is no dispute that the petitioners joined the University of Nairobi Kisumu campus in 2012/2013 academic year and ought to have graduated at most 6 years later in 2018. It is the petitioners' case that they were not able to graduate despite undertaking their studies seriously and doing everything right because of missing marks which the respondent was unable to account for. They finally re-did the examinations and passed and their names were even put in the provisional graduation list only for them to be removed later.
33. The respondent's position is that it adopted a new curriculum in May 2013 (MPOO-3) as per the legal counsel of education. Any student who was in the old curriculum was allowed to finish his/her cycle under that curriculum within the maximum time permitted (6 years). After that period all continuing students were to ensure that they have done the core/compulsory units under the current curriculum to be eligible to graduate.
34. The evidence presented before this court and which has not been rebutted is as follows:
 - i. The 1st petitioner Jerry Wagoyi Reg No G34/317661/2013 ought to have graduated by 2016 and latest 2018.
 - ii. Dan Alphonse Obongo 2nd petitioner, Reg No G34/46641/2012 ought to have graduated by 2015 and latest 2017.
 - iii. Aswan Shamim Awuor 3rd petitioner Reg No G34/54468/2012 ought to have graduated by 2016 and latest 2018.
 - iv. Elizabeth Mbaki Kilonzo Reg No G34/49891/2012 ought to have graduated by 2015 latest 2017.
35. A detailed analysis and progression of the petitioners academic performance has clearly been set out at paragraph 14 (pages 3 – 16) of the replying affidavit by Michael P Otieno Okelloh the respondent's examinations officer. The analysis shows that the petitioners performed poorly in a number of subjects which caused them to do resits and supplementaries.
36. It took them seven years to complete their studies under the old curriculum. This was the same period the new curriculum had been in place. It is on the basis of this that the letter dated November 28, 2020 (JW 4) was sent to all the 2011 & 2012 cohort studies informing them of the position. Had they completed the course under the old curriculum at least within the maximum period of six (6) years things would have been different.
37. The requirement of them doing the compulsory four (4) units is funded on the Council of Legal Education Regulations & Rules. There is no way the Kenya School of Law would accept them without them having undertaken and passed those units.
38. As was held in the case of *Daniel Ingida Aluvaala & another v Council of Legal Education & another* [2007] eKLR, courts will restrain themselves from reviewing academic matters. The Council of Legal Education has the mandate to run the academic affairs of the law schools. The courts will only interfere where it is clearly shown that the decision made is unsustainable.
39. The petitioners tried to explain that the respondent had misplaced their marks, severally year after year causing them to do resits. There is no evidence of any complaint raised by them to the university



administration in respect of this. Secondly the analysis and progressive report by the respondent has not been challenged at all by the petitioners. My finding in the face of all this is that the petitioners have no one but themselves to blame for their prolonged stay at the respondent's Kisumu campus. They cannot claim to have been at the campus since 2012 and yet did not know of the changes in the curriculum. There is no way they will escape undertaking and passing the four (4) compulsory units before they can be allowed to graduate.

Issue No (iii). Whether the petitioners rights complained of have been violated.

40. The evidence on record shows that besides the petitioners there are other students in the 2011 & 2012 cohorts who are yet to graduate for various reasons. The claim of being discriminated against has no standing. The psychological torture complained of has greatly been caused by the petitioners non-performance. The respondents is simply undertaking its mandate. The petitioners should sit down, study and pass their examinations to be able to move forward.
41. The petitioners claimed that their names were in the provisional list but were later removed. They did not avail before this court the alleged provisional list which had their names. That therefore remains a mere allegation. I find that the petitioners have failed to establish any violation of their rights. They had a duty to do that, under section 107 – 109 of the *Evidence Act*.

Issue No (iv). Whether the petitioners are entitled to the reliefs sought.

42. In view of the above findings I find that the petitioners are not entitled to any of the reliefs sought. Instead they are directed to prepare themselves, study and sit for examinations in the four units namely:
- (i) Communication skills for lawyers GPR 115
 - (ii) Research paper GPR 421
 - iii. Law, democracy & governance GPR 422
 - iv. Equality law GPR 438
43. The award of costs is discretionary and considering that the petitioners are students who thought that they could sincerely get a way through by means of this petition, I will not order them to pay costs. The upshot is that this petition lacks merit and is dismissed.
- Each party to bear their own costs.
- Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 20TH DAY OF DECEMBER 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. Ong'udi

Judge of the High Court

