



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 196 OF 2019

IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED BREACH /INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF: ARTICLES 3,10,19,20,21,22,23,27,46,47,165,258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: TECHNICAL UNIVERSITY OF MOMBASA

AND

IN THE MATTER OF: THE MOMBASA POLYTECHNIC UNIVERSITY ORDER 2007

BETWEEN

DISMAS POLLE MWASAMBU.....PETITIONER

VERSUS

TECHNICAL UNIVERSITY OF MOMBASA.....RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGMENT

1. The Petitioner herein is an adult of sound mind and a student who successfully completed a four-year undergraduate degree course in the year 2018 under the registration no BBA/6281/014 at the Respondent university.

2. The Respondent is a public university chartered in January 2013 offering technical and vocational education and training programmes as well as degree programmes. The Respondent will henceforth be simply referred to as the University.

3. Through the petition dated 11/11/2019, the Petitioner seeks the following orders:

a. An order compelling the respondent to include the petitioners name for his inclusion in the respondents list of graduants for the graduation ceremony scheduled on 20/11/2019.

b. A declaration that the Respondent has violated the Petitioners right to human dignity as protected by Article 28 of the constitution, right to fair administrative action as protected by Article 49[1], right to a fair hearing as protected under Article 50 of the constitution.

c. A declaration that the Petitioner is entitled to compensation for breached of his fundamental rights as particularised

above.

d. The Respondent be condemned to pay the costs of this petition

e. Any other orders which court deems just and expedient.

Petitioner's Case

4. The Petitioner's case as stated in the pleadings filed before court is that he enrolled at the university sometime in September 2014 as an undergraduate student to undertake a four-year course in Bachelor of Business Administration, Human Resource Management Option. Upon completion of the said course he was issued with a letter of completion of the degree programme. He further states that he was shocked to learn that his name had been omitted from the graduation list for the year 2018 and upon inquiry he was informed that disciplinary action had been undertaken against him on 23/10/2018 even though he had not been served with a notice or made aware of the same.

5. The Petitioner avers that after several letters to the Respondent through his lawyers, he was subjected to the students Disciplinary Committee and whose findings he appealed against to the Vice Chancellors Appeals Committee where a verdict was rendered asking him to get clearance from the EACC before being considered for graduation. The Petitioner consequently submitted his application for clearance to the EACC who cleared him to graduate. However, to date, the university has refused to include his name in the list of graduants hence necessitating the petition before court.

6. It is further the Petitioner's case that the Respondent's decision to suspend him and further refusal to include him in the graduants list is a violation of his rights as envisaged under articles 47[1] and 27 of the Constitution of Kenya 2010.

Respondent's Case

7. The petition was opposed by a replying affidavit sworn on 13/11/2019 by one Dr. Gichuhi Paul Njihia the Registrar, Academic Affairs at the university. The deponent averred that by a letter dated 17/9/2018 the university was requested to verify whether a degree certificate no 4978 dated 30/11/2017 for Bachelor of Business Administration Human Resource Management option awarded to the Petitioner had indeed been issued by the university, that the records from the university indicated that the Petitioner was a student with registration no BBA/6281/014 and was undertaking a bachelor course in Business Administration Human Resource Management option and had not graduated from the said course and hence had never been issued with the purported degree.

8. It is the university's case that the findings which were made by the deponent herein were tabled to the Vice Chancellor of the university and eventually a response was made with regard to the authenticity of the purported degree. The response indicated that the degree certificate no 4978 was a forgery. The Respondent states that it received a letter by the Ethics and Anti-Corruption Commission raising allegations that the fake degree certificate had been used by the Petitioner to secure a job in a public entity and that they were seeking to confirm authenticity of the same. The EACC stated that the degree certificate was confirmed to be a forgery as the Petitioner was still a student at the institution and had not yet graduated. The Respondent's case is that the forged degree certificate was impugned and it was resolved that disciplinary action be taken against the Petitioner pursuant to Section 9.13 of the students' handbook which makes provision for criminal offences that lead to disciplinary action, including the offence of forgery, whose penalties include suspension.

9. It is the Respondent's case that by a letter dated 12/10/2018 the Petitioner was informed of the disciplinary proceedings against him and he was asked to avail himself for such on 23/10/2018. However, despite collecting the letter in person, the Petitioner did not appear before the disciplinary committee as was expected for the hearing of his case. It is stated that later on the Petitioner wrote a letter seeking for a chance to be heard and further did another letter lamenting on why his name had not been included in the graduation list. Vide a letter dated 5/2/2019, the university gave the Petitioner another chance to appear before it and he did make an appearance for the hearing of his case on 13/2/2019, where he denied the charges levelled against him and informed the university that he was serving as the County Executive Committee Member in the Tourism Department of the County Government of Lamu and had been vetted for the said position on 26/9/2017 and that as at that time he was in the 1st semester of his 2nd year of study. The university nonetheless made a decision that the Petitioner could not be allowed to graduate until the matter was concluded by the Ethics and Anti-Corruption Commission. The Petitioner was suspended indefinitely by the university. The Petitioner lodged an appeal against the Disciplinary Committee's decision and was asked to appear before the Vice Chancellor's Appeal Committee where he maintained that he had been framed by his political competitors. However, the Committee's verdict was that the Petitioner should clear his name with the Ethics and Anti-Corruption Commission. The university states that the Petitioner has not yet availed any letter to the university indicating that he had been cleared of the forgery charges levelled against him. The Respondent maintained that the Petitioner remained suspended from the university until such a time that he cleared himself of the allegations of forging a degree certificate. The university avers that its Senate and Council are the only bodies authorised to seal and classify certificates for graduants and that the forged certificate was a matter of concern to the university. The university urged the Court to dismiss the petition.

The Hearing

10. The petition was heard *viva voce*. **PW1 Dismas Polle Mwasambu** who is the Petitioner herein testified on 18/1/2021. He adopted the petition and the affidavit in support of the same as his evidence. He placed further reliance on his supplementary list of documents and stated that he had filed the petition after being denied an opportunity to graduate by the Respondent. That he had not been given any reason for not being allowed to graduate and that he was only told to get a clearance certificate from the Ethics and Anti-Corruption Commission before graduating. He testified that he had made several visits to EACC and had been informed by them that they on the contrary had no objection to him graduating. As a result of the back and forth he has failed to advance in his studies and career.

11. On cross examination the Petitioner testified that he had not graduated but there was a forged degree certificate circulating with the allegation that the same had been awarded to him by the respondent. He stated that he had been informed that he was under disciplinary

action pursuant to that allegation degree. This led him to face the committee on charges of being in possession of a forged degree certificate contrary to the students' handbook rules. At the disciplinary hearing the Petitioner confirmed having worked for the Lamu County Government and that the position he worked in required one to possess a bachelor degree. He stated that he did not possess a degree at that time and hence he did not qualify for the job. At the disciplinary hearing he informed the committee that the forged certificate was not his and it was witch-hunt by his political enemies. However, he was thereafter suspended, and he appealed the said decision to the Vice Chancellor where he was told to get clearance from EACC.

12. On re-examination the Petitioner stated that he had been given the position he held at the Lamu County Government by way of affirmative action and he did not present any degree certificate before being employed. He testified that the allegations being raised against him took place after he had completed his studies and was awaiting graduation and hence the student's handbook rules did not apply, and that in any event he has never been charged with being in possession of a forged certificate. He testified that the university did not show any letter indicating that he had been found guilty of forgery and despite availing a report from EACC, which cleared him, he had never been allowed to graduate since 2018.

13. DW1 Dr. Paul Njihia Gichui testified on the same date as the Petitioner. He adopted his affidavit dated 30/1/2020 and his witness statement. He stated that the university had been asked by the firm of Hamza advocate based in Lamu to verify documents from the Petitioner. That the Petitioner's admission records were checked and it was found that the Petitioner had not yet graduated and that the degree certificate was a forgery. The university then wrote back to Hamza advocate informing them that the Petitioner had committed a criminal offence as per the students manual and, the university had commenced criminal proceedings against the Petitioner. The Petitioner was asked to attend disciplinary proceedings but did not attend the same. That he was given another opportunity to attend disciplinary hearing, where he stated that he had served as an executive member at the Lamu County Government and denied having used the forged certificate. The witness further testified that the university learned that the EACC was independently investigating the matter and it is then that the Petitioner was suspended pending investigations by the EACC. However, to date the university had not received any information from the EACC and hence the Petitioner remained suspended. If the student is found guilty then he was to be suspended or expelled or asked to repeat the course. On re-examination the witness testified that the Petitioner had been suspended for a period of 3 years after his appeal failed, and the 3 years have not lapsed.

14. DW2 Josephat Kiprono Chirchir testified that he was an officer with the EACC at the offices based in Malindi. He adopted his statement filed on 30/11/2020 and stated that investigations had taken long due to lack of cooperation from officers from the Lamu County Government. On cross examination he stated that the graduation issue was entirely upon the university to determine as per its rules; that the ongoing investigations were with regard to irregular employment by the Lamu County Government and that no complaint had been raised by the university with regard to forged certificates. He agreed that the investigations had delayed but the same had not delayed the Petitioner's graduation as the university had not requested any information from them with regard to the Petitioner.

Submissions

15. The Petitioners submissions were filed on 25/1/2021. Mr. Jengo learned counsel for the Petitioner submitted that this Court had the jurisdiction to redress all the violations of the Petitioners rights by the Respondent; that Articles 10,27,43,46,47,50 and 55 of the Constitution enabled the court to deal with the petition before it as several rights envisaged under the said Articles had been violated. Reliance was place on the case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate & 4 Others [2013] eKLR**.

16. It was submitted that that the Petitioner had concluded his course and was awaiting graduation when the disciplinary proceedings were initiated against him; that the EACC was not interested in investigating the alleged forged degree certificate but the irregular recruitment of personnel at the Lamu County Government. Further that the indefinite suspension of the Petitioner was irregular as the students' handbook at regulation 9.14 was specific in terms of giving a specific period for suspension. Counsel further stated that the forged degree certificate emanated from the firm of Hamza & Company Advocates and not from the Petitioner and that the Lamu County Government had at no particular time written to the university seeking clarification on the authenticity of the alleged forged certificate or having any interest with regards to getting information over the same.

17. Mr. Jengo submitted that the university as a public body had an obligation to be transparent, accountable and to exercise the principles of good governance. That the university had acted against the principles of fair administrative action and violated the Petitioner's rights to fair hearing, education, dignity and had subjected the Petitioner to unfair treatment and degrading and contrary to the provisions of the students' handbook. The failure to allow the Petitioner to graduate and be at the same level at the job market with his peers was in contravention of Article 27 of the constitution. Further, the Petitioner was not accorded a fair hearing as envisaged under Article 47 of the constitution under Fair Administrative Action Act. Further, that the Petitioner had not been accorded a fair hearing as envisaged under Article 50 of the constitution as the disciplinary committee had taken from the Petitioner the presumption of innocence by asking him to present evidence before them to show he was innocent even before giving him an opportunity to be heard. Further, the whole process has not been concluded and has taken unreasonable delay and the Petitioner was given an indefinite suspension which is inhuman and degrading. It was submitted that the refusal to allow the Petitioner to graduate even after he had completed his studies and had no pending issues in terms of performance amounted to violation of the Petitioner's right to education under Article 43 and 55 of the Constitution. The Petitioner prayed for a declaration of breach of his rights, order allowing him to graduate and damages.

18. The Respondents' submissions were filed on 3/3/2021. Mr. Omondi learned counsel for the Respondent submitted that the university acted upon a letter of inquiry received from the firm of Hamza & Company Advocates which sought to confirm whether the Petitioner had graduated from the university with a bachelor degree in Business Administration Human Resource Management Option at the graduation ceremony held on 30/11/2017. Internal investigations commenced and revealed that the Petitioner was an ongoing student and had not yet graduated from the university. Therefore, the degree certificate No. 4978 which allegedly emanated from the university was a forgery. Further, the university received a letter from the EACC with information that the purported degree certificate No. 4978 had been used to secure a job from the Lamu County Government despite the same being a forgery. Disciplinary proceedings were commenced against the Petitioner as it was confirmed that he held the position of a County Executive Committee Member in the Lamu County. These disciplinary proceedings were in accordance with the students' handbook which gave the Petitioner an opportunity to defend himself against the allegations raised. It was submitted that the Petitioner disowned the certificate yet the Lamu County website captured the Petitioner as a

holder of the said degree certificate. The various disciplinary hearings were to establish whether the Petitioner was in possession of the forged degree certificate and whether he was properly suspended as per the provisions of the students' handbook. It was submitted that the findings of the Disciplinary Committee have not been appealed or challenged by the Petitioner and the Respondent's submit that they have sufficiently demonstrated that university had the power to exercise disciplinary action over the Petitioner. It was submitted that the Petitioner had not complained that the proper procedure for suspension had not been followed; the proper procedure had been followed in suspending the Petitioner and the right to education was not absolute in the sense that the Petitioner was expected and was under the obligation to abide by the rules laid by the university failure to which would lead to disciplinary action.

19. The interested party filed its submissions on 24/2/2021 where it was submitted that it was undertaking investigations with regard to the academic qualifications of the Petitioner and whether he held an undergraduate degree from the respondent at the time he had been employed by the Lamu County Government. Mr. Makori, learned counsel for the Interested Party submitted that the orders sought by the Petitioner could not in any way hinder the interested party from carrying on their investigations and further that the clearance form obtained by the Petitioner did not indicate that he had been cleared by the EACC from any criminal charges against him.

The Determination

20. I have considered the petition. The main issues for determination are whether or not the Petitioner herein is entitled to the prayers sought and whether or not the Petitioner's constitutional rights and freedoms rights were violated by the Respondent. I will address these issues concurrently. I will start with an analysis of the considerations of the principles and objectives of judicial review. In that regard **Lord Diplock in Civil Servants Union v The Minister for Civil Service [1985] AC** had this to say:

“Judicial review has, I think developed to a stage today when one can conveniently classify into three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality” the second, “irrationality”, and the third procedural “impropriety”. By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.... By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third as “procedural impropriety”, rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision.”

21. The Petitioner has stated that he was only made aware of the disciplinary case against him after finding out that his name had not been listed among those due for graduation in the year 2018. He stated that he had initially not been invited to any disciplinary hearing in order for him to give any explanation or exonerate himself from the charges levelled against him. That it was after he had made several inquiries via correspondence from his lawyers that he was informed of the disciplinary case. It is clear that the Petitioner's name had been omitted from the list of graduates even before he had the opportunity to face the disciplinary committee. The university has on the other hand stated that by a letter dated 12/10/2018 the Petitioner was informed of the disciplinary action against him and that he had collected a copy of the said letter in person. However, a perusal of the said letter which had been produced as exhibit no 8 does not show anywhere that the same was received by the Petitioner. Even though the Petitioner was granted another opportunity where he was heard, it is noteworthy that by this time the damage had already been done and the graduation list had been submitted.

22. From the foregoing it is clear that the Petitioner's right to fair administrative action under Article 47 of the Constitution was violated. The Court of Appeal in **Republic v Kenya Revenue Authority, Ex parte Yaya Towers Limited [2008] eKLR** stated as follows:

“... the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that of the authority constituted by law to decide the matter in question.”

23. The violation of the Petitioners' rights has been worsened by the Respondent's failure to allow the Petitioner to graduate on the allegation that the investigations over the forged certificate have not been concluded. The testimony of DW2 was that the interested party had no interest and or power to prevent the Petitioner from graduating. It was stated that the same was entirely upon the university since it was the mandate of its council and the university senate to issue degrees. The Petitioner has demonstrated that by the time the charges against him had been brought forth, he had already concluded the course and passed the relevant tests and was only awaiting graduation. It therefore beats logic not allowing him to graduate especially since he had lawfully studied and completed the course for which he enrolled at the university.

24. Further no material has been placed before this Court to confirm that indeed it was the Petitioner who was found to have been in possession of the allegedly forged degree. The evidence presented before court has been that the same emanated from the firm of Hamza & Company Advocates with a letter of inquiry. The Petitioner has stated to court that he was appointed to work for the county government on the basis of affirmative action as he had not graduated with a degree by then. The interested party has clearly stated that in the event that the Petitioner graduates it will not hinder them continuing to carry out the investigations over the alleged forged degree certificate. It was also their evidence that there has been lack of cooperation from the Lamu County officials and not the Petitioner.

25. The Petitioner has prayed for order compelling the Respondent to allow him to graduate by placing his name in the Respondent's list of graduants for the graduation ceremony scheduled on 20/11/2019. The said is a prayer for the order of Mandamus compelling the Respondent to perform a statutory duty they have declined to perform. Even though the same has been overtaken by events since the said graduation already took place, it is imperative to consider that the Petitioner has not graduated since then.

26. It is the finding hereof that the petition has been proved on a balance of probability and that the Petitioner is entitled to judgment orders

which I grant as follows:

(a) A declaration is hereby made that the Respondent has violated the Petitioners right to human dignity as protected by Article 28 of the constitution, right to fair administrative action as protected by Article 47, right to a fair hearing as protected under Article 50 of the constitution.

(b) An order is hereby made compelling the Respondent to include the Petitioner's name in the Respondents list of graduants for the graduation ceremony scheduled in the year 2021 and not later than that.

(c) General damages for violations under order (a) above assessed herein at Kshs. 250,000/=.

(d) Costs shall be for the Petitioner to be paid by the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Makori for Interested Party

Mr. Omondi for Respondent

Mr. Jengo for Petitioner

Ms. Peris Court Assistant