



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

*(Coram: A.C. Mrima, J.)*

**CONSTITUTIONAL PETITION NO. E265 OF 2021**

**-BETWEEN-**

**KENYA MEDICAL PRACTITIONERS,**

**PHARMACISTS AND DENTISTS' UNION.....PETITIONER**

**-VERSUS-**

**UNIVERSITY OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**UNIVERSITIES FUNDING BOARD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction:**

1. Medicine is one of the courses offered in some of the institutions of higher learning in Kenya. In this case, the challenge is in the manner in which the academic fees applicable to some categories of the medicine course were reviewed upwards. It is a hotly contested matter more so given that the compulsory free education in Kenya extends only upto the basic primary school level.
2. The Petitioner herein, *Kenya Medical Practitioners, Pharmacists and Dentists' Union*, is a registered union under the Labour Relations Act. It represents a simple majority of medical practitioners, pharmacists and dentists employed by the National Government, County Governments, Kenyatta National Teaching & Referral Hospital, Moi Teaching & Referral Hospital and the public universities. It advances its members' issues and interests.
3. The 1<sup>st</sup> Respondent herein, *The University of Nairobi*, is public higher education institution established by Section 3 of the University of Nairobi Act and the University of Nairobi Charter, 2013.
4. The 2<sup>nd</sup> Respondent herein, *The Universities Funding Board*, is established under Section 53 of the Universities Act, 2012. It is a semi-autonomous Government agency run by Board of Trustees. Its mandate is to *inter alia* apportion funds to public universities and issuance of conditional grants to private universities. The 2<sup>nd</sup> Respondent is also mandated to develop the Maximum Differentiated Unit Cost criteria. According to the 2<sup>nd</sup> Respondent, the criteria is simply a computation of costs for running individual academic programmes used by the Government as a basis to finance universities. I will hereinafter refer to the current Maximum Differentiated Unit Cost criteria to as '***the DUC***').
5. I will now deal with the parties' cases.

**The Petitioner's case and submissions:**

6. A synopsis of the factual antecedents giving rise to the instant dispute is that, on 17<sup>th</sup> May 2021, the Executive Board of *The University of Nairobi*, the 1<sup>st</sup> Respondent herein, approved publication of its "*Handbook of Fees Payment (Policy, Schedules, Guidelines & Procedures* (hereinafter referred to as "***The Handbook***").

7. The Handbook contained the legislative and administrative frameworks for charging of academic fees as determined by the *Universities Funding Board*, the 2<sup>nd</sup> Respondent herein, through the DUC. The DUC also sets the maximum annual cost of mounting a particular degree programme per student with liberty to an individual public university to settle on the specific fees.

8. The Handbook as published by the 1<sup>st</sup> Respondent increased the fees payable to the university. It indicated that the transition and implementation of the DUC and revised administrative charges would commence in the month of August 2021 with the first year students.

9. Aggrieved with the changes brought about by the Handbook on the basis of the DUC, the Petitioner approached this Court with a Notice of Motion application dated 28<sup>th</sup> July, 2021. The application was filed under certificate of urgency and was supported by the Affidavit of *Dr. Davji Bhimji Atella* sworn on even date.

10. Simultaneously filed with the application was the main Petition dated 28<sup>th</sup> July, 2021. It was supported by the Affidavit of Davji Bhimji Atella deponed to on an even date.

11. In this case, the Petitioner was particularly aggrieved by the decision of the 1<sup>st</sup> Respondent to increase Academic (Tuition) Fees for Masters Programmes in respect of *Cluster I (Medicine: Pre-Clinical & Clinical)*; *Cluster II (Dentistry: Pre-Clinical & Clinical)* and *Cluster IV (Pharmacy: Pre-Clinical & Clinical)* (hereinafter collectively referred to as “*the Clusters*”). The Petitioner termed the impugned decision as unconstitutional.

12. The Petitioner further contended that the upward revision of the academic (tuition) fees resulted in threatened violation of the public’s right to the highest attainable standard of health and to education under Article 43(1)(a) and (f) of the Constitution respectively.

13. It further was its case that the implementation of the increased fees was done in violation of Article 47(1) of the Constitution as its publication and import amounted to unfair administrative action for want of lawfulness, reasonableness and procedural fairness.

14. The Petitioner claimed that the 1<sup>st</sup> Respondent’s implementation of the increased fee was in contravention of the right under Article 47(2) of the Constitution that entitles a person likely to be adversely affected by administrative action to be given written reasons for such action.

15. The Petitioner posited that the 1<sup>st</sup> Respondent’s publication of the DUC and the 2<sup>nd</sup> Respondent’s Handbook contravened the principles of openness and accountability, including public participation in financial matters as required in Article 201(a) of the Constitution.

16. The Petitioner further posited that the publication of the DUC and the Handbook did not accord with equitable society as the increment failed to consider marginalised groups as required in Article 201(b)(iii) of the Constitution.

17. It was also posited that the 1<sup>st</sup> Respondent’s actions were retrogressive steps with respect to the rights guaranteed under Article 43 of the Constitution and that the increment did not satisfy the threshold of values and principles of public service under Articles 232(1)(d), (e) & (f) of the Constitution.

18. Based on the foregoing factual basis, the Petitioner sought in the application interim conservatory orders suspending the implementation by 1<sup>st</sup> Respondent of the of Academic (Tuition) Fees for Masters Programmes in the Clusters pending hearing and determination of the application and the main Petition.

19. In the main Petition, the Petitioner prayed for the following orders:

*I. A declaration be and is hereby made that the 1st Respondent’s “HANDBOOK OF FEES PAYMENT (POLICY, SCHEDULES, GUIDELINES & PROCEDURES)” approved by the 1st Respondent’s Executive Board on or about 17th May 2021 and published on or about 19th May 2021 and on the 1st Respondent’s website revising the 1st Respondent’s Academic (Tuition) Fees for Masters Programmes in Cluster I (Medicine: Pre-Clinical & Clinical); Cluster II (Dentistry: Pre-Clinical & Clinical) and Cluster IV (Pharmacy: Pre-Clinical & Clinical) is unconstitutional and contrary Articles 21 (2), 43 (1) (a) & (f) and 47 (1) & (2), 201 (a), (b) (iii), 232 (1) (d), (e) & (f) of the Constitution of Kenya.*

*II. A declaration be and is hereby made that the 2nd Respondent’s undated and unsigned document titled MAXIMUM-DIFFERENTIATED-UNIT-COST-CRITERIA (<http://ufb.go.ke/wpcontent/uploads/2021/01/MaximumDifferentiated-Unit-Cost-Criteria.pdf>) for Masters Programmes in Cluster I (a) & (b) (Medicine: Pre-Clinical & Clinical); Cluster II (a) & (b) (Dentistry: Pre-Clinical & Clinical) and Cluster IV (a) & (b) (Pharmacy: Pre-Clinical & ED/CHR/NBI/PET/1/6/21 Clinical) is unconstitutional and contrary Articles 21 (2), 43 (1) (a) & (f) and 47 (1) & (2), 201 (a), (b) (iii), 232 (1) (d), (e) & (f) of the Constitution of Kenya.*

*III. This Honourable Court appropriately modifies any prayer herein above and/or grants and other prayer it considers just, fair, lawful and or equitable for the just, fair, lawful and or equitable determination of this Application and the Petition.*

*IV. The Respondents herein be jointly and/or severally condemned to pay the Petitioner the costs of their Petition.*

20. To further support its case, the Petitioner filed written submissions dated 17<sup>th</sup> September, 2021. It isolated the issues for determination as being whether the formulation of DUC required public participation; the effect of failure to involve the public and whether the Petition met the precision requirement in *Anarita Karimi Njeru*’s case.

21. On the limb of public participation, the Petitioner submitted that the Respondents are State organs for they are established by Acts of

Parliament and draw funds from Government. As such, they are subject to principles of public finance under Article 201 of the Constitution which includes accountability, openness and public participation.

22. It was its case that in formulating the DUC, the 2<sup>nd</sup> Respondent was dealing with public funds under Section 53 of the Universities Act, a mandate that falls within Article 201 explicitly requires public participation in all public finance matters.

23. The Petitioner submitted that the narrative by the Respondents that post graduate education was not funded by public funds was erroneous. To that end, it referred to the deposition of Dr. Davji Bhimji Atella where he gave affidavit evidence that there are post graduate students directly sponsored by the Ministry of Health.

24. It was its case that the reason the Ministry of Health sponsored some medical students in post graduate studies was an effort to align Kenya's health care delivery with Kenya's Vision 2030 blueprint and Kenya's Health Policy (2014 -2030) which required among others appropriate human resource training and continuous professional development and career progression of the health workforce.

25. In further impugning the formulation of DUC, the Petitioner submitted that the process failed to meet the requirement set by Section 5 of the *Statutory Instruments Act* that imposes the requirement upon regulation-making authority to make appropriate consultations with persons who are likely to be affected by the proposed instrument.

26. The Petitioner submitted that the 2<sup>nd</sup> Respondent's call for public participation and stakeholder engagement happened after filing of the instant Petition. It claimed that the Respondents have not demonstrated engagement of the public prior to formulation of DUC.

27. To buttress the importance of public participation, reference was made to a number of authorities among them *Wilfred Manthi Musyoka -vs- County Assembly of Machakos; Governor - County Government of Machakos & 2 Others (Interested Parties) [2019] eKLR; The Institute of Social Accountability & Anor Vs. The National Assembly & 7 Others [2017] eKLR and the Court of Appeal finding in Nairobi Civil Appeal No. 224 Of 2017 – Independent Electoral and Boundaries Commission & Others -vs- The National Super Alliance & Others* on justiciability and enforceability of Article 10(2) of the Constitution.

28. The Petitioners urged the Court to allow the Petition as prayed with costs.

#### **The 1<sup>st</sup> Respondent's case and submissions:**

29. The 1<sup>st</sup> Respondent opposed the Petition and the application through the Replying Affidavit and Supplementary Replying Affidavit of *Prof. Julius A. Ogeng'o*, the Associate Vice Chancellor, Academic Affairs deponed to on 23<sup>rd</sup> July 2021 and 9<sup>th</sup> September 2021 respectively.

30. He deponed that the 1<sup>st</sup> Respondent is an institution of higher learning, a non-profit entity dependent on state funding and student fees for its expenditure.

31. It was its case that due to establishment of new universities and expansion of existing ones, the total university student enrolment increased from 361,379 in the year 2013 to 537,733 in the year 2018 thus increasing challenges to the 1<sup>st</sup> Respondent to cope with the rising numbers.

32. In challenging Petitioners assertion that the increment was unconstitutional, Prof. Ogeng'o deponed that various departments, faculties and institutes of the 1<sup>st</sup> Respondent had analysed the cost of offering individual programmes in the year 2016 and found that the then fees would not sustain the cost of staff, materials and maintenance of infrastructure, facilities and amenities.

33. He deponed further that the 1<sup>st</sup> Respondent had not reviewed its fees in a long time and as such, the increment was in tandem and in parity with fees payable in other jurisdictions for post graduate education.

34. He further deponed that the criterion in the DUC ensured that Universities were funded according to the number of students in each subject area.

35. In justifying the increment, it was further deponed that the fees for self-sponsored students were lower than those of the Government sponsored students since the former were set before establishment of the DUC. That being the case, there was need to review the fees accordingly.

36. He also deponed that since there has been a rise in students enrolling for Module II programmes, the 1<sup>st</sup> Respondent had to hire more staff to satisfy the requirements of students and as such there was a corresponding need to ensure their services were paid for. Prof. Ogeng'o deponed that the fees for self-sponsored programmes had not been reviewed since inception of the programmes in 1998 and as such, it was not consistent with market value, cost of implementation of programmes and those charged by other peer universities.

37. Prof. Ogeng'o deponed that it is on the foregoing basis that the 1<sup>st</sup> Respondent's Senate resolved to align the fees charged for self-sponsored programmes to the DUC rates in its 220<sup>th</sup> meeting held on February 17, 2021.

38. He stated that the alignment of fees charged to Module II was aimed at raising extra revenue for the 1<sup>st</sup> Respondent to cover for the actual costs of administering mounted programmes pursuant to the University of Nairobi Charter, 2013 Part V Miscellaneous Provision Clause

29(1).

39. He also deponed that the new rate adopted under the DUC would start applying in the August/September 2021/2022 academic year intake and continuing students would not be affected by the implementation of the new rates.

40. On the position that the 1<sup>st</sup> Respondent complied with the constitutional requirement under Article 232(1)(d)(e) and (f) on public participation, Mr. Ogeng'o stated that the Vice-Chancellor's Committee, University of Nairobi Fees Revision Committee, University Executive Management Board, University Deans Committee; The University Senate (that includes Student Representatives, the University Council and External Stake holders) had consultative meetings, considered and approved the fee changes.

41. It was his deposition further that the right to education as guaranteed under Article 43(1)(f) of the Constitution is not absolute but subject to the rules and regulations governing education in a given institution, availability of resources/finances and relative policies enacted by the policy makers in the education sector.

42. He deponed that post graduate education in tertiary institutions is not compulsory basic education whose limitation can be classified as violation of constitutional rights.

43. It was the 1<sup>st</sup> Respondent's case that since the postgraduate and undergraduate self-sponsored students consume the same service and use the same facilities as Government sponsored students, the 1<sup>st</sup> Respondent's Council and Senate considered and approved alignment of fees for self-sponsored programmes to the DUC.

44. Based on the foregoing depositions, it was the 1<sup>st</sup> Respondent's case that no constitutional questions had been raised in the motion and the Petition. He stated that the Petition is an abuse of Court process. It was argued that the Petition was unsustainable for failing to satisfy the precision threshold required of constitutional issues.

45. The 1<sup>st</sup> Respondent also complained that it never received any formal complaints from the Petitioner on the subject matter and since it is not a stakeholder in fees matters it's claim to unfair administrative action was unfounded.

46. In the supplementary Affidavit, it was deponed that the Masters and Doctorate of philosophy degree programmes are not funded by the Government and that being the case, they have to maintain and sustain themselves.

47. In respect to the 143 students funded by the Ministry of Health he deponed that they are subject to an existing Memorandum of Understanding and the increment of fees does not affect them.

48. The 1<sup>st</sup> Respondent prayed that the Petition and the application be dismissed with costs.

49. In further support of the case, the 1<sup>st</sup> Respondent filed written submission dated 14<sup>th</sup> September 2021.

50. It was its case that according to the Universities Act 2012, the Petitioner is not a *Stakeholder* that had to be consulted prior to approval and implementation of the fees structure.

51. It asserted that it is the University's Senate as established under Section 35 of the Universities Act as read with section 19 of the University of Nairobi Charter 2013 that oversees all academic matters of the University.

52. It was further submitted that the composition of the Senate comprises of representatives of persons involved in education, training and research. It stated that the Senate and Vice Chancellor's Committee are internally and externally diversified and inclusive key stakeholder for purposes of effective and meaningful public participation on matters of increment in fees by the 1<sup>st</sup> Respondent.

53. To prove public participation in the decision to increase fees, reliance was place on the decision in ***William Odhiambo Ramogi & Others -vs- Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties)*** (2020) eKLR where it was observed that consultation or stakeholder's engagement gives more latitude for stakeholders to take part in the process towards making laws or formulation of administrative decisions.

54. The 1<sup>st</sup> Respondent also invited this Court to adopt the decision in Constitutional Petition No. 213 of 2020, ***Daniel Chege & Another -vs- University of Nairobi & Another*** (2021) eKLR to make the finding that there was effective and efficient public participation.

55. In a bid to justify the increment, reference was made to the Auditor General's Report which indicated that the 1<sup>st</sup> Respondent was technically insolvent and as such, its operation heavily depended on increment of tuition fees.

56. It was stated that the 1<sup>st</sup> Respondent was facing immense financial challenges including a Kshs. 1.4 billion deficits, a negative working capital of 1.2 billion, decline in capitation from parent ministry among others.

57. It submitted further that the DUC model of funding undergraduate programmes does not apply in funding postgraduate programmes. It was its case that there are emerging issues that were not addressed with the current DUC implementation which included allocation of Capital Development Grants, the unique challenges faced by individual universities, existing staff and personnel requirements, cost of post graduate courses and cost of TVET courses in public universities.

58. The 1<sup>st</sup> Respondent asked the Court not to substitute its decision with that of the Court. In doing so, it relied on the Indian case of *Maharashtra State Board -vs- Kumarsheth & Others* 1985 CLR 1083, where it was stated that;

So long as the body entrusted with the task of framing 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...

59. The Court was further asked not to intervene in the decision of the 1<sup>st</sup> Respondent based on the precedent made in *R -vs- Council of Legal Education* (2007) eKLR where it was observed that: -

... the other reason why this Court has declined to intervene is one of the principle that academic matters involving issues of policy the Courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by the statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should largely be non-justiciable.

60. It was its case that the Handbook and the Admission letters relate to the legitimate purpose of enabling the 1<sup>st</sup> Respondent fulfil its statutory mandate of ensuring that all admissions comply with the law and admitted students pay requisite fees.

61. In a separate attack on the Petition, the 1<sup>st</sup> Respondent submitted that the issue of increment of fees was a contractual matter between the University and prospective students and ought not to be the place of a commercial Court nor a constitutional Court. To that end reliance was placed on the decision of Lord Diplock in *Karrikisson -vs- Attorney General of Trinidad and Tobago* (1980) AC 265.

62. The 1<sup>st</sup> Respondent called for the dismissal of the Petition with costs.

#### **The 2<sup>nd</sup> Respondent's case and submissions:**

63. The 2<sup>nd</sup> Respondent opposed the Petition through the Replying Affidavit of *Geoffrey Monari*, the Chief Executive Officer.

64. It was deponed that the DUC is simply a computation of costs for running individual academic programmes used by the Government as a basis to finance universities. That, the 2<sup>nd</sup> Respondent applied the DUC to allocate funds to universities on the basis of the number of Government Sponsored Students as placed in different undergraduate programmes by the Kenya Universities and Colleges Placement Service (KUCCPS) and enrolled accordingly. It was further deponed that the funding under the DUC was only limited to undergraduate programmes in the universities due to limited financial resource.

65. The 2<sup>nd</sup> Respondent was categorical that it does not purport to influence or determine the amount of fees charged by universities especially when it applies to self-sponsored programmes.

66. Responding to the allegation of lack of public participation, the 2<sup>nd</sup> Respondent deponed that it is mandated to develop the DUC only with the Chairpersons of Councils of Public Universities, the Public Universities Vice Chancellors' Committees and other pertinent stakeholders.

67. The 2<sup>nd</sup> Respondent further deponed that the provisions of Articles 201 and 232 of the Constitution do not apply in the case of the formulation of the DUC. It further denied that it infringed any of the Articles of the Constitution either as alleged or otherwise.

68. This Court was urged to allow the DUC stand as it is applicable to all public universities and not just the 1<sup>st</sup> Respondent.

69. The 2<sup>nd</sup> Respondent filed written submissions dated 23<sup>rd</sup> August, 2021. It reiterated its mandate in developing the DUC, apportioning funds to public universities and issuing conditional grants to private universities.

70. It was its case that the current and applicable DUC was prepared in consultation with pertinent stakeholders including the Chairpersons of Councils of Public Universities, the Public Universities Vice Chancellors Committee among others.

71. It submitted that the 2<sup>nd</sup> Respondent applied the DUC to allocate funds to universities on the basis of the number of Government Sponsored Students as placed in different undergraduate programmes by the Kenya Universities and Colleges Placement Service (KUCCPS) and enrolled accordingly.

72. Based on the foregoing it stated that it does not purport to influence or determine the amount of fees charged by individual Universities especially when it applies to self-sponsored programmes.

73. It reiterated that it independently determines the fees payable on the various programmes offered in the university and faulted the Petitioner for challenging the validity of the DUC simply because the 1<sup>st</sup> Respondent utilized the DUC as a basis for determining the fees payable on the various programmes offered by the university.

74. It submitted further that it is not mandatory for universities to apply the DUC as a basis or criteria. As such, the decision by the 1<sup>st</sup> Respondent to elect to use it was an internal affair and not within the mandate of the 2<sup>nd</sup> Respondent.

75. The 2<sup>nd</sup> Respondent also submitted that it was wrong for the Petitioners to impugn the DUC based on wrong principles and had not shown any nexus between the allegations of unconstitutionality of the increased fee by the 1<sup>st</sup> Respondent and the statutory mandate for the 2<sup>nd</sup> Respondent in developing the DUC. It was its case that Universities are not mandated to align the fees payable on the various programmes based on DUC.

76. As to the claim regarding violation of socio-economic rights, the 2<sup>nd</sup> Respondent, in reference to Article 20(5), the claw back clause of rights under Article 43, as well as Article 21(2) on obligation of the state towards realization of the said rights, stated that the realization of these rights are within the available resources and allocation thereof.

77. It was its submission that its mandate under the Universities Act was to make the right to higher education realizable and it did so by developing the DUC as a criteria of funding public universities.

78. It was its case that the Petitioner had not demonstrated to the required standard the violation of Article 43 by formulation of the DUC. Reliance was placed on the case of *Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others* Petition 229 of 2012 where the decision in *Anarita Karimi Njeru* case was cited regarding the importance of precision in constitutional matters.

79. In response to the claim that there was no public participation, the 2<sup>nd</sup> Respondent submitted that there was evidence that the current and applicable DUC was prepared in consultation of various stakeholders including the Chairpersons of Councils of Public Universities, the Public Universities Vice Chancellors Committee and other pertinent stakeholders.

80. In reference to the South African Supreme Court in *King versus Attorneys Fidelity Fund Board of Control & Another* [2006] 1 SA 474 in respect of the threshold for public participation, the 2<sup>nd</sup> Respondent submitted that it demonstrated that it complied with the constitutional requirement of public participation by engaging the relevant stakeholders to develop the impugned DUC.

81. In the end the 2<sup>nd</sup> Respondent submitted that its mandate is limited to setting the criteria upon which the Government of Kenya funds various programmes in Public Universities and that mandate does not extend to setting fees that universities charge the consumer of its programmes.

82. It prayed that the Petition be dismissed with costs.

#### **Issues for determination:**

83. From the reading of the Court documents filed and consideration of the submissions of the Parties, I have identified the following issues for determination. They are: -

*i. Whether the Petition meets the threshold of reasonable precision.*

*ii. Whether the formulation and implementation of the DUC violate the Article 43 rights (social and economic rights) of the Petitioner.*

*iii. Whether the formulation and implementation of the DUC is in violation of Articles 10, 47, 201(a) and 232 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures.*

84. I will deal with each of the above issues sequentially.

#### **Analysis and determinations:**

##### **i. Whether the Petition meets the threshold of reasonable precision:**

85. This preliminary issue was raised by the 1<sup>st</sup> Respondent. It is claimed that the Petition does not meet the precision threshold required of constitutional Petitions as established by the famous finding in Miscellaneous Criminal Application 4 of 1979, *Anarita Karimi Njeru v Republic* [1979] eKLR.

86. The above case is hailed for establishing the following precedent in respect of constitutional Petitions: -

... if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...

87. The foregoing finding received endorsement from the Court of Appeal in Nairobi Civil Appeal No. 290 of 2012, *Mumo Matemu v Trusted Society of Human Rights Alliance* when the Learned Judges remarked on the importance of compliance with procedure under Article 159 of the Constitution, the overriding objective principle under section 1A and 1B of the Civil Procedure Act and need for precision in framing issues in constitutional Petitions. It was observed thus: -

(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual

claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

88. The Learned Judges further bolstered the foregoing finding by making reference to the decision of *Jessel, M.R in Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 where he made the following findings: -

... The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing....

89. In making a finding that the High Court was right in its assessment that the Petition before it had not been drafted with the necessary precision, the Learned Appellate judges reaffirmed the *Anarita Karimi Njeru* principles and made the following findings: -

(43) *The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.*

(44) *We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> respondent.*

196. The Apex Court has, as well, discussed the issue. That was in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR where the Court stated as follows: -

*Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic. (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.*

90. Having set out the principles required of constitutional Petitions, I will hence consider the craftsmanship of the instant Petition.

91. The Petition has five parts. They are the description of the parties, the legal foundations of the Petition, the prevailing national policies on education and health sciences, the violations complained of and the remedies sought.

92. In a synopsis, in paragraph 6 to 21, the Petitioner sets out in a detailed fashion the constitutional foundation of its complaint. It pegs the Petition on *Article 2(1), 3, 10, 19(1)(2), 20(1), 21(2), 22(2)(b), 43(1)(a), 47(1)(2), 201(a)(b)(iii), 232(1)(d)(e) &(f)* of the Constitution.

93. In paragraph 36(i) and (ii), the Petitioner describes the constitutional right to highest attainable health care and education and the manner in which the fees adjustments threatens its enjoyment.

94. In paragraph 36(iii) and (iv) the Petitioner describes the manner in which its right to fair administrative action was infringed upon by the Respondents when it failed to provide them with written reasons for fee increment. In paragraph 36(vi) and (vii) the Petitioner enumerated the constitutional obligation required of State Organs to uphold values and principles of public service in discharge of its duties and the manner in which the 1<sup>st</sup> Respondent failed.

95. Given the manner in which the Petition is drafted, this Court is satisfied that the Petition is in line with, and passes the threshold of reasonable precision, as discussed above. Further, the Petition is in consonance with Rule 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as ‘*the Mutunga Rules*’).

96. In the end, the first issue is answered in the affirmative.

**ii. Whether the formulation and implementation of the DUC violate the Article 43 rights (social and economic rights) of the Petitioner:**

97. The socio-economic rights allegedly infringed under Article 43 of the Constitution relates to the right to education and the right to highest attainable health care.

98. As captured elsewhere above, it is contended that the upward review of the university tuition fees under the Clusters curtails the public's right to education as the imposed fees are astronomical and way beyond the reach of many Kenyans. It is argued that, as such, many students will not afford such fees and will be forced to terminate the studies. The result, it is contended, will curtail the Government's effort to attain the right to highest attainable health care as there shall be no professionals to offer the much-needed specialized services. That, it is argued, will impugn on the right to highest possible attainable health care.

99. There is no doubt that the economic and social rights under Article 43 of the Constitution are aimed at sustaining the right to life and right to human dignity under Articles 26 and 28 of the Constitution respectively. Therefore, the right to life and dignity on the one hand, and the economic and social rights on the other hand, are all inter-connected and indivisible. It cannot be reasonably argued that one set of rights is more important than the other. All these rights must, of necessity, be respected, protected, promoted and fulfilled for a person to attain a reasonable livelihood.

100. Article 43 of the Constitution states 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.*

*(2) A person shall not be denied emergency medical treatment.*

*(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.*

101. In this discourse, I will, in the first instance, look at the right to education as one of the rights under Article 43 of the Constitution.

102. The right to education is a positive right as it places obligations upon the State to do as much as it can to secure its realization.

103. The right to education under Article 43(1)(f) of the Constitution must, however, be distinguished from the right to education under Article 53(1)(b) of the Constitution.

104. Whereas Article 53(1)(b) of the Constitution makes it compulsory to avail basic education to children, Article 43(1)(f) of the Constitution does not entitle every other person to such a right.

105. In other words, whereas the right to free and basic education is absolute and compulsory to every child in Kenya, that is not case in respect of the right to education in Article 43(1)(f) of the Constitution. The right under Article 43(1)(f) of the Constitution is only availed progressively and subject to availability of resources.

106. Constitutionally speaking, therefore, the right to basic education under Article 53(1)(b) of the Constitution is absolute and cannot be derogated from in anyway whatsoever. However, that is not the case with the right to education under Article 43(1)(f) of the Constitution.

107. The question as to what basic education entails is not new in our Courts. In Petition No. 72 of 2012, **Gabriel Nyabola v Attorney General & 2 others** [2014] eKLR, the Constitutional Court in reference to the Basic Education Act and the Constitution discussed at length what basic education is and who is entitled to such education, and as follows: -

...the State, through the Basic Education Act, 2013, has taken a much broader approach to the definition of basic education than that obtaining in international instruments and the Children Act. Under section 28 of the Act, every child has the right to free and compulsory basic education. A child under the Act and under the Children Act is any person who has not attained the age of eighteen years. These provisions taken together means that every person under the age of eighteen years is entitled to primary and secondary education in Kenya that is free and compulsory.

108. Coming back to the instant dispute, it is common ground that the Petition herein revolves around university education and at the Masters level. Such programmes in Kenya at the moment are self-sustaining and unless otherwise provided students undertaking such Masters programmes must shoulder the cost thereof.

109. Borrowing from the foregoing, university education at any level in Kenya does not fall under the compulsory basic education spectrum. As such, that education may be availed on reasonable conditions. One of such conditions is the imposition and payment of fees. The scenario in this Petition is akin to a parent or guardian enrolling a child into a private basic education institution and calling upon the State to pay the

requisite fees. That cannot be calling under Article 53(1)(b) of the Constitution. (See *I. K. & Another v. Principal M Academy & another* (2015) eKLR and *J. K. (suing on behalf of CK) v Board of Directors of R School & another* [2014] eKLR where the right to education for children in private institutions was ably discussed).

110. I will now consider the right to highest attainable health care. I have already captured the parties' arguments on this limb, hence, there is no need of regurgitating the same.

111. The right to highest attainable health care includes the right to health care services including reproductive health care. In view of the nature of this right, the Petitioner bears the burden to prove the infringement thereof.

112. For the Petitioner to succeed in proving infringement of the right to education and the right to highest attainable health care, the Petitioner need to demonstrate the manner in which the Respondents have caused harm or injury to the Petitioner or its members or the public. This burden of proof is provided under sections 107(1) (2) and 109 of the Evidence Act as follows: -

*(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

and

*109. Proof of particular fact*

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

113. The above was rightly captured by the Court of Appeal in Civil Application Nai. 31 of 2016, *Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others* [2016] eKLR when the Court stated thus: -

... we find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.

114. The Petitioner filed affidavits wherein it made various averments detailed in the foregoing as regards the manner of infringement by the Respondents. It also annexed various documents in support thereof.

115. The parties settled for the hearing of the Petition on the basis of the filed affidavits and documents. That is in line with Rule 20 (1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013*. They also filed written submissions.

116. A review of the evidence on record does not avail the position that the Petitioner proved the infringement of the right to education and the right to highest attainable health care. First, the allegation of infringement of the right to education fails in that the Masters programmes in issue in this Petition is not part of the rights under Article 53(1)(b) of the Constitution which obligates the State to ensure attainment.

117. Second, the Petitioner has failed to demonstrate how the upwards review of the fees curtails the right to highest attainable health care. Apart from the complaint that the fees are astronomical, there is no evidence that the impugned fees are unreasonable and unattainable such that potential students will not be able to undertake such studies or that the continuing students be forced to terminate their studies. Further, there is no empirical or expert evidence on the effects of the new fees on the overall health sector over time.

118. The upshot is that the allegations on infringement of rights under Article 43(1) of the Constitution are largely speculative. They remain unproved and cannot be a basis to find for the Petitioners.

119. In sum, this Court finds that the Petitioner has failed to prove that the formulation and implementation of the DUC infringes the right to education and the right to highest attainable health care either as alleged or at all.

120. The second issue is, hence, answered in the negative.

**iii. Whether the formulation and implementation of the DUC is in violation of Articles 10, 47, 201(a) and 232 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures:**

121. Again, the parties' cases on this issue are well captured above.

122. In the course of going through the parties' positions there was a disposition by the 2<sup>nd</sup> Respondent that Articles 201 and 232 of the Constitution are not applicable to this matter. Perhaps I should begin this discussion on that point.

123. Article 2 of the Constitution declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law

that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. Article 3 places an obligation upon every person to respect, uphold and defend the Constitution.

124. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.

125. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

*Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.*

126. On Article 10 of the Constitution, the Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR** held that:

*In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10(2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.*

*Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.*

127. I have, in many decisions, held the position that the Constitution remains the supreme law of the land and that it binds everyone. I do not, therefore, ascribe to any otherwise suggestion.

128. The 2<sup>nd</sup> Respondent described itself a semi-autonomous Government agency established under Section 53 of the Universities Act. It further availed its mandate as to *inter alia* apportion funds to public universities and issuance of conditional grants to private universities as well as to develop the DUC.

129. The 2<sup>nd</sup> Respondent has, hence, admitted that it is an entity dealing with public finance. As such, under Article 260 of the Constitution, the 2<sup>nd</sup> Respondent is a public office and its officers are public officers. The argument, therefore, that Article 201 (the principles of public finance) and Article 232 (values and principles of public service) are inapplicable to this matter is truly beyond comprehension. In short, Articles 201 and 232 of the Constitution apply to the 2<sup>nd</sup> Respondent.

130. That being the case, the Respondents are also constitutionally bound to, and in appropriate cases, undertake public participation in their decision making processes.

131. The concepts of public participation and stakeholders' consultation or engagement were discussed with precision in **William Odhiambo Ramogi & Others -vs- Attorney General & 4 Others; Muslims for Human Rights & 2 Others** case (supra) as follows: -

*119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR while referring to the South African decision in Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -*

*According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.*

*120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10<sup>th</sup> Edition defines 'consultation' as follows: -*

*The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.*

*121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR quoted with approval Ngcobo J in Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -*

.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....

132. The High Court in **Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others Machakos**, High Court Constitutional Petition 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR developed the following six principles to be taken into account whenever the application of the doctrine of public participation comes into issue:

*First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or public official who is to craft the modalities of public participation but in so doing the government agency or public official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*

*Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*

*Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*

*Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them....*

*Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or public official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.*

*Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or public official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

*Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*

133. Returning to the case at hand, the central contention is the manner in which the DUC was developed by the 2<sup>nd</sup> Respondent and its subsequent implementation by the 1<sup>st</sup> Respondent.

134. The 2<sup>nd</sup> Respondent contended that in coming up with the DUC it sought the views and input of the Chairpersons of Councils of public universities, the Public Universities Vice Chancellors Committees and other stakeholders who were the main stakeholders.

135. On its part, the 1<sup>st</sup> Respondent deponed that it consulted the Vice-Chancellor's Committee, University of Nairobi Fees Revision Committee, University Executive Management Board, University Deans Committee; The University Senate (that includes Student Representatives, the University Council and External Stake holders) prior to the formulation of the Handbook based on the DUC.

136. The Petitioner largely contended that there was no meaningful and adequate participation and consultation given that its views were not sought despite its centrality in the field of medicine.

137. That, therefore, brings the discussion to the adequacy of the participation and consultation.

138. In Petition No. 104 of 2020 **Kaps Parking Limited & Another vs. The County Government of Nairobi & Another** (2021) eKLR this Court discussed the manner in which public participation is to be carried out as follows: -

**137. The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic four parameters.** First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to

the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. Fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.

138. The effect of the above constitutional and statutory parameters is to ensure that public participation is realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affects them. In that way, the dictates of the Constitution and the law will be achieved. (See **Robert M. Gakuru's case** (supra) among others).

139. In **Petition Nos. 532 of 2013 & 12, 35, 36, 42 & 72 of 2014** and in **Judicial Review Miscellaneous Application 61 of 2014 (Consolidated)**, the adequacy of public participation was discussed as follows: -

... Whereas the magnitude of the publicity required may depend from one action to another a one-day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation. As was held in Doctors for Life International vs. Speaker of the National Assembly and Others (supra): -

Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens....[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few.....It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.....In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."

140. In this case, there is clear admission that the 2<sup>nd</sup> Respondent only consulted some stakeholders in the process of coming up with the DUC. Those stakeholders are mostly those referred to in the Universities Act. Apart from the selected few, the rest of the public was not reached out.

141. Whereas I fully agree that the stakeholders who were consulted in the process of coming up with the DUC deserved such opportunities, the nature and effect of the DUC called for a more elaborate and robust mode of involving the rest of the public. The simple reason for that is that the DUC has the effect of affecting the fees charged by public universities and thereby affecting the whole public. Further, such is the calling under Articles 10 and 201 of the Constitution.

142. By limiting the participation to the stakeholders listed under the Universities Act, the 2<sup>nd</sup> Respondent was not sensitive to Articles 10 and 201 of the Constitution. No doubt, the Constitution called upon the 2<sup>nd</sup> Respondent to do more. It was upon the 2<sup>nd</sup> Respondent to ensure that there was adequate involvement of the rest of the public including a robust involvement of the other stakeholders who may not have been in listed in the Universities Act. Such included the Petitioner.

143. I will now ascertain whether the formulation of the DUC is in contravention of **Article 47** of the Constitution and the *Fair Administrative Actions Act* No. 4 of 2015 (hereinafter referred to as '**the FAA Act**').

144. **Article 47** of the Constitution provides that: -

(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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

145. The legislation that was contemplated under Article 47(3) of the Constitution is the FAA Act. **Section 5(1)** thereof provides that: -

(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and material facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice—

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and

(iii) specify the manner and period within which such appeal shall be lodged.

146. Section 2 of the FAA Act defines an ‘administrative action’ and an ‘administrator’ as follows: -

‘administrative action’ includes -

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

147. Addressing itself to the above provisions, the Court of Appeal in **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** held that: -

*Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.*

148. Similarly, the High Court in **Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR** discussed the issue as follows: -

25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano* [39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

**Illegality**- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be “illegal”. Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.

**Fairness**- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

**Irrationality and proportionality**-The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute ‘irrationality’ or ‘perversity’ on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation**: -

*If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...*

149. Deriving from the above, an administrative action involves an act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The decision to come up with the DUC related to the future. Once the 2<sup>nd</sup> Respondent prepared the DUC, it is incumbent upon the respective public universities to implement it. It is on record that the DUC is yet to be implemented by several other public universities and that it may not even be so implemented.

150. It, therefore, comes out that the application of the DUC remain uncertain until a time when a public university decides to and applies it. As such, the decision to prepare the DUC *per se* cannot be deemed as an administrative action. An administrative action may arise when a public university decides to implement the DUC which may in a way affect the public or the students. At that point in time such an entity may be called upon adhere to *inter alia* the provisions of Article 47 of the Constitution and the FAA.

151. This Court, hence, finds that the decision to formulate the DUC by the 2<sup>nd</sup> Respondent was not an administrative decision *per se*, but it was a decision which called for compliance with Articles 10(2)(a) and 201(a) of the Constitution as discussed above. In view of that, the provisions of Article 47 of the Constitution and the FAA do not apply to the said decision.

152. There was also the contention as to whether the implementation of the DUC by the 1<sup>st</sup> Respondent through the Handbook was an administrative action and further whether such implementation adhered to the principle of public participation.

153. The 1<sup>st</sup> Respondent argued that the implementation of the DUC only affected the undergraduate students and not the students in the impugned clusters or any post-graduate studies. The Petitioner diametrically opposed the argument and contended that the Handbook took the DUC into account and that the two are inseparable.

154. I have perused the DUC which is on record. It is quite an elaborate and technical document and no doubt a lot of effort was employed in its formulation. The DUC in several instances gives comparative analysis of estimated student unit costs for different clusters in respect to Diploma, BTech, Bachelor's degree, Master's degree and Doctorate courses. It is out of such comparative analysis that the current DUC was arrived at. For instance, on the **Way Forward and Conclusion** (from page 111 thereof), the DUC makes specific proposals on the unit cost in respect to Diploma, BTech, Bachelor's degree, Master's degree and Doctorate courses. Such proposals also relate to the impugned clusters in the Handbook.

155. Whereas it is true that public universities may not even use the DUC in coming up with the fees for post-graduate courses, in this case the 1<sup>st</sup> Respondent opted to and considered the DUC in coming up with the Handbook. For instance, at page 7 (item 1.4) the Handbook states that *the transition and implementation date of the DUC and revised administrative charges will commence in August 2021 with the first year students*. That is the very Handbook which is challenged in this matter. Therefore, the 1<sup>st</sup> Respondent having opted to use the DUC in coming up with the Handbook cannot seek refuge in the contention that the DUC is not applicable in post-graduate studies.

156. Having said so, and given the constitutional infirmity of the DUC on account of want of public participation, I do not find any need to belabor whether the implementation thereof by the 1<sup>st</sup> Respondent through the Handbook was constitutionally in order. That is because the DUC did not pass the constitutional muster on the basis of want of public participation. The 1<sup>st</sup> Respondent's act of implementing the DUC through the Handbook was akin '*riding a dead horse*.' In other words, there was no constitutionally firm DUC for implementation by the 1<sup>st</sup> Respondent. The DUC arrived lifeless at the doorstep of the 1<sup>st</sup> Respondent. Therefore, the import of the unconstitutionality of the DUC renders the implementation thereof by the 1<sup>st</sup> Respondent through the Handbook legally untenable.

157. In the end, there is no difficulty in holding that the 2<sup>nd</sup> Respondent violated Articles 10(2)(a) and 201 of the Constitution for failure to undertake sufficient public participation prior to the preparation of the DUC. As such, the implementation of the DUC by the 1<sup>st</sup> Respondent through the Handbook amounts to a continuation of the violation of the Constitution.

**Disposition:**

158. As I come to the end of this judgment, I must state that from the material presented in this matter, the need for revision of the fees variously charged by the 1<sup>st</sup> Respondent is inevitable. That is the only way the 1<sup>st</sup> Respondent will remain viable and sustain its programmes. However, in doing so, the Respondents must keep within the legal confines. At the moment, this Court can only sympathise with the constrained financial environment the 1<sup>st</sup> Respondent finds itself in.

159. From the above analysis of the issues, the Petition has partly succeeded on account of lack of adequate public participation.

160. The disposition of the Petition and the Notice of Motion dated 28<sup>th</sup> July, 2021 is, therefore, as follows: -

**a. The claim that the Petition lacks precision is not proved and is dismissed.**

**b. The claim that the formulation and implementation of the Maximum Differentiated Unit Cost criteria was in violation of Article 43 of the Constitution failed and is hereby dismissed.**

**c. The claim that the Maximum Differentiated Unit Cost criteria is in violation of Articles 10(2)(a) and 201(a) of the Constitution for want of adequate public participation succeeded. The Court declares the Maximum Differentiated Unit Cost criteria as prepared by the 2<sup>nd</sup> Respondent and subsequently adopted and implemented by the 1<sup>st</sup> Respondent through the**

*Handbook of Fees Payment (Policy, Schedules, Guidelines & Procedures)* constitutionally infirm. The Maximum Differentiated Unit Cost criteria is hereby quashed.

**d. A declaration is hereby issued that the implementation of the Maximum Differentiated Unit Cost criteria by the 1<sup>st</sup> Respondent through the *Handbook of Fees Payment (Policy, Schedules, Guidelines & Procedures)* is unconstitutional and null and void *ab initio*.**

**e. For clarity, the 1<sup>st</sup> Respondent shall continue to charge its applicable fees based on the criterion which was in place before the impugned *Handbook of Fees Payment (Policy, Schedules, Guidelines & Procedures)*.**

**f. Each party shall bear its own costs in view of the public interest nature of the Petition.**

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021.**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Washuka**, Learned Counsel for the Petitioner.

**Mr. Collins Omondi**, Learned Counsel for the 1<sup>st</sup> Respondent.

**Mr. Kuria Thande**, Learned Counsel for the 2<sup>nd</sup> Respondent.

**Elizabeth Wanjohi** – Court Assistant