



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 90 OF 2019

STEPHEN MACHARIA GACHUGU.....1ST PETITIONER
PURITY KARURU MBIJIWE.....2ND PETITIONER
JARED ONYIEGO OMWENGA.....3RD PETITIONER
ELIZABETH WAGIKUYU MBUGUA.....4TH PETITIONER
LAWI KIPLAGAT CHEROP & 75 OTHERS.....5TH PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT
THE PHARMACY & POISONS BOARD OF KENYA.....2ND RESPONDENT

JUDGMENT

1. Stephen Macharia Gachugu (the 1st Petitioner), Purity Karuru Mbijiwe (the 2nd Petitioner), Jared Onyiego Omwenga (the 3rd Petitioner), Elizabeth Wagikuyu Mbugua (4th Petitioner) and Lawi Kiplagat Cherop & 75 others (5th Petitioner) through their petition dated 6th March, 2019 seek orders as follows:-

“ a) That a declaration do issue, declaring that for all purposes and intends, the Pharmacy and Poisons Act, 244 of 2015 is null and void and therefore unconstitutional.

b) That in the alternative and without prejudice to any other prayer a declaration do issue, declaring that Section 8(2) Pharmacy and Poisons Act, No. 244 of 2015 is null and void and therefore unconstitutional.

c) Costs of the petition.

d) The Honourable Court makes such other or further orders, issues such writs and gives such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the petitioners’ constitutional rights and freedoms.”

2. The Attorney General (the 1st Respondent) and the Pharmacy and Poisons Board of Kenya (2nd Respondent) opposed the petition through a replying affidavit sworn by the 2nd Respondent's Director of Pharmacy Practice and Regulation of Training, Dr Wilfred Ochieng.
3. A perusal of the petition and the affidavit of Lawi Kiplagat Cherop discloses that the petitioners seek a declaration that the Pharmacy and Poisons Act No. 244 of 2015, and in particular Section 8(2), is null and void and therefore unconstitutional for the reason that it violates Article 27 of the Constitution and breaches the petitioners' legitimate expectation that they would be registered under Section 8(2) upon training as pharmaceutical technologists.
4. The petitioners' case is that between 2000 and 2008 they trained at various public and private technical institutions where they were awarded certificates in pharmaceutical technology. They aver that the institutions in which they trained were fully accredited by the 2nd Respondent, Pharmacy and Poisons Board ("the Board"). However, when they attempted to collect forms for registration as graduate pharmacists, they were denied the application forms on the ground that they were not qualified to be registered.
5. It is the petitioners' case that they directly sought audience with the Board, and even through Parliament, in a bid to address their predicament but no solution was forthcoming. Instead, the Board through its Chief Executive Officer wrote to their lawyers Katwa & Kemboi Advocates on 18th February, 2019 as follows:-

“Reference is made to the above subject matter resting on your letter dated 1st February 2019 addressed to us under reference GENDEM.00100 whose contents are duly noted. We hereby wish to respond thus;

- a. That Pharmacy and Poisons Board (hereinafter “the Board”), as you may be aware is statutorily mandated to control the profession of pharmacy, registers pharmacists (degree holders) and enrolls pharmaceutical technologists (diploma holders) to practice pharmacy in Kenya. It is thus a stranger to the cadre known as “certificate holders”;**
- b. That Board only recognizes training institutions that offer Degree in Pharmacy and Diploma in Pharmaceutical Technology. It therefore denies the allegation that, between 1998 and 2008, it recognized some colleges to offer certificate course in pharmacy;**
- c. Lastly, we wish to clarify that Section 8 of the Pharmacy and Poisons Act 1989, as referred to by yourselves, was and is purely with regard to registration of pharmacists.**

In view of the above, and your enquiry on the modalities required, kindly advise your clients to acquaint themselves with the *Guidelines for Evaluation and Assessment for Registration of Pharmacists* and the *Guidelines for Evaluation and Assessment for Enrolment of a Pharmaceutical Technologist*.

Be therefore advised accordingly.”

6. The petitioners contend that the Board's decision had left them stagnant and without a future. It is also their averment that the institutions that offer pharmaceutical courses had in turn abandoned them by shutting any avenue for certificate holders to progress forward in terms of further studies. This, they depose, is different from those trained in other medical fields where provisions had been made for those with certificate holders to upgrade their qualifications by taking further courses.
7. It is the petitioners' case that the decision of the Board to refuse to register them had deprived them of their constitutional rights to attain the highest level of professional qualification and the legitimate expectation of being registered, recognized and to practice as a pharmaceutical technicians and gainful employment with full benefits that accrue therewith. Further, that pharmacists jobs available in the market

require one to be registered with the Board.

8. The petitioners state that the respondents have by their commissions and omissions subjected them to inhuman and degrading treatment from 1998 to 2019 and infinitely for the rest of their lifetime. Further, that the respondents have treated them in a discriminatory manner attributed wholly and mainly to circumstances not within their control. They contend that nursing and laboratory technicians who are holders of certificates are recognized by their boards and have the option of upgrading their qualifications to diploma, an opportunity that they have been denied. They therefore urge the court to allow their petition.

9. The respondents strongly opposed the petition. The respondents' take on the petition is that the petitioners have failed to identify with sufficient precision the provisions of the Constitution alleged to have violated and the manner in which these provisions were breached. They therefore aver that the petition contravene the principle on drafting of petitions as established in the case of **Anarita Karimi Njeru v Republic [1979] 1 KLR 154**.

10. Turning to the merits of the petition, Dr Wilfred Ochieng avers that the mission of the Board is to protect the health of the public by regulating the profession of pharmacy and ensuring quality, safety and efficacy of medical products and health technologies.

11. He deposed that some of the roles played by the professionals practicing pharmacy are the interpretation and communication of biochemical mechanisms and actions of drugs, therapeutic uses, side effects, potential drug interactions, and monitoring parameters in human and animal bodies; ensurance of quality and safety of medicines supplied to patients; ensurance that the supply of medicines is within the law; and advising other health care professionals about safe and effective medicine use, and safe and secure supply of medicine.

12. Dr Ochieng proceeded to give a history of the Pharmacy and Poisons Act ("the Act") stating that it came into force on 1st May, 1957 with a registered pharmacist being the only recognized professional under the Act. He avers that the Act was amended in 1993 vide the Statute Law (Miscellaneous Amendments) Act No. 11 of 1993 which commenced on 31st December, 1993.

13. Among the amendments effected was that of Section 8(b) which was changed from reading "**satisfies the Board that he holds a qualification (whether of Kenya or of some other country) which the Board considers acceptable, shall subject to this Act, be entitled to have his name entered in the register**" to read "**satisfies the Board that he holds at least a bachelor of pharmacy degree (whether of Kenya or of some other country) which the Board considers acceptable.**" This amendment, he avers, meant that for one to be a pharmacist he needed to satisfy the Board that he holds at least a bachelor of pharmacy degree, whether of Kenya or some other country, which the Board considers acceptable. He concludes that the petitioners do not meet the criteria set by the Act to be registered as pharmacists.

14. Dr Ochieng further deposes that through Statute Law (Miscellaneous Amendments) Act. No. 2 of 2012 which commenced operations on 7th June, 2002, Section 8 of the Act was amended by adding subsection (2) which provides that "**every person who satisfies the Board he holds a diploma in pharmacy approved by the Board of any college in Kenya or any other country shall, subject to this Act, be entitled to have his name entered in the Roll.**" This new provision, he deposes, allowed the Board to recognize and enroll, upon satisfying the requirements, those who hold diplomas in pharmacy.

15. According to Dr. Ochieng, nowhere does the law recognize certificate holders and since 1957 no person holding a certificate in pharmacy or certificate in pharmaceutical technology has ever been registered as a pharmacist.

16. Further, that the 1993 and 2002 amendments never contemplated certificate in pharmacy or certificate in pharmaceutical technology as a qualification under any profession of pharmacy.

17. Dr Ochieng avers that contrary to the averment at paragraph 21 in the affidavit in support of the petition, there were no amendments to the Act in 2012 regarding qualifications for registration by the Board.

18. It is the respondents' position that there is an elaborate criteria for evaluation and assessment of candidates through guidelines which outline the prerequisite for registration of pharmacists and enrolment of pharmaceutical technologists in Kenya and those guidelines can be accessed at the Board's website. Further, that nothing stops the petitioners from enlisting for a qualification recognized under the Act.

19. It is the respondents' case that there is a general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.

20. Turning to the averments by Lawi Kiplagat Cherop on his qualifications, Dr. Ochieng avers that it is not clear whether Lawi Kiplagat Cherop has a certificate in pharmacy or a certificate in pharmaceutical technology. Further, that the transcript attached to the affidavit demonstrates clear deficiency of key units required of the profession of pharmacy and therefore cannot constitute the body of knowledge that can enable one to qualify as a pharmacist or pharmaceutical technologist.

21. Finally, on the issue of breach of legitimate expectation, Dr Ochieng avers that the Board has always updated members of the public through its website and newspaper publications regarding recognized institutions offering bachelor's degree in pharmacy and diploma in pharmaceutical technology within Kenya hence the petitioners cannot have any legitimate expectation against clear provisions of the law. He therefore prays for the dismissal of the petition with costs.

22. Through submissions dated 29th April, 2019, counsel for the petitioners identified three issues for the consideration of this court. The first issue is whether or not Section 8 of the Act is unconstitutional and should be declared null and void. On the issue counsel submits that Section 8 of the Act discriminates against the petitioners by failing to recognize and register them as pharmacy technicians.

23. In the petitioners' view, the discrimination comes about owing to the fact that those who study and acquire certificates in other medical fields like community health nursing, nutrition and dietetics, medical engineering, orthopedic plastic technology and environmental health sciences are recognized and allowed to practice medicine without any harassment and discrimination.

24. It is their case that the Act is void as it does not make provision for pharmacy technicians. Further, that the Act does not distinguish between a pharmacist and a pharmacy technician and as a result the Board has failed to give them a fair hearing and register them as pharmaceutical technicians.

25. It is the petitioners' submission that a pharmacy technician is a medical professional working as an assistant to, and under the supervision of a registered pharmacist and therefore assists a pharmacist, who is a health care professional licensed to engage in pharmacy, in certain activities such as medication profile reviews for drug incompatibilities, typing of prescription labels, prescription packaging, handling of purchase records, inventory control, and even at times dispensing drugs to patients under the supervision of a registered pharmacist.

26. The petitioners cite the decision in the case of the European Court of Human Rights in **Willis v The United Kingdom (Application No. 36042/97)** as defining discrimination to mean treating differently, without any objective and reasonable justification, persons in similar situations. This according to the petitioners, is what the Constitution prohibits. Also cited as stating what amounts to discrimination is the case of **Nyarangi & 3 others v Attorney General [2008] KLR 688**.

27. Urging the court to find Section 8 of the Act discriminatory, the petitioners submit that Article 2(4) of the Constitution provides that any law, including customary law, that is inconsistent with the Constitution is invalid and that Article 27 stipulates that every person is equal before the law and has the right to equal protection and equal benefit of the law. Also that equality includes the full and equal enjoyment of rights.

28. The petitioners point to Article 165(3) of the Constitution as empowering this court to hear any question respecting the interpretation of the Constitution including the question of whether any law is inconsistent with or in contravention of the Constitution. It is the petitioners' contention that a law that is contrary to or in conflict with the Constitution should be declared unconstitutional. The decision in the case of **Aids Law Project v Attorney General & 3 others [2015] eKLR** is cited in support of the assertion.

29. The petitioners decry the rejection of their academic papers by the Board and stress that they trained and qualified in public institutions including Rift Valley Technical Training Institute, Kabete Polytechnic, Mombasa Polytechnic, Eldoret Polytechnic and Nairobi Technical Training College, and even private institutions like Thika Institute Technology and Tracom College, in which some of them trained, are duly accredited by the Government to offer medical courses. The decision of **Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR** is cited in support of the assertion that the duty of the Board is to consider, whether there is adequate training in their field of study and not to determine whether the colleges in which they trained were accredited by the Government.

30. The second issue identified by the petitioners is whether their legitimate expectation has been breached by the respondents. The petitioners cite Section 8 of the Act and submit that the Act is silent on pharmaceutical technologists and this created a legitimate expectation that they could undertake certificate courses in pharmaceutical technology and be recognized by the Board and allowed to work as such under registered pharmacists. They urge that in interpreting a statute, it must be presumed that it upholds constitutional values and principles including the Bill of Rights.

31. The petitioners contend that in undertaking their training, they had a legitimate expectation that they would be registered by the Board and absorbed in the job market or run their own pharmacies. This, according to them, is the legitimate expectation breached by the respondents. They cite **Martin Wanderi (supra)** for the holding that where students have done what is required of them, passed their exams and been awarded degrees from public universities, they have a legitimate expectation that they will be registered by the relevant board. It is the petitioners' case that the information given to the public on the recognized institutions offering bachelor degree in pharmacy and diploma in pharmaceutical technology in Kenya went out on 6th April, 2010 long after they had completed their training and obtained their papers. Further, that the institutions they attended between 1998 and 2008 were recognized by the Board. The petitioners contend that the Board had a duty to pass the information on recognized institutions prior to their enrolment.

32. The petitioners wrap up the second issue by stating that the failure by the Board to recognize them undermines their dignity contrary to Article 28, violates their right to property under Article 40(3) and the right to affirmative action and empowerment of the youth under Article 55 of the Constitution. They conclude that their suffering is aggravated by the acts of the Board's agents who constantly harass and subject them to fines whenever they get employment thus subjecting them to mental anguish.

33. The third and final issue identified by the petitioners is whether their petition meets the constitutional threshold. They assert that their petition is competent and refer to the case of **James Kugocha v Chief County Officer Department of Infrastructure [2018] eKLR** as defining the attributes of a competent petition. Further, that they have complied with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. They conclude by urging the court to allow the petition.

34. On its part the 1st Respondent through the submissions dated 11th June, 2019 flagged two issues for determination. The issues are whether the amendments to the Act discriminate the petitioners and whether the petitioners should be registered as pharmaceutical technologists. Counsel for the 1st Respondent submits that when it comes to professional requirements, discrimination cannot arise as each profession has its own standards. The decision in **Mohammed Abduba Dida v Debate Media Limited & another [2017] eKLR** is cited in support of the assertion that not every differentiation amounts to discrimination. Counsel contends that a certificate holder in pharmacy who attends a one year course cannot be said to have the same level of knowledge and expertise compared to a degree or diploma holder who is trained

for a minimum period of three years.

35. In the 1st Respondent's opinion, classifying the holders of certificates, diplomas and degrees in pharmacy in one cadre will not only dilute the professional standards but also affect the quality of the service rendered to the public.

36. Referring to the decision in the case of **Rachel Adhiambo Ogola & another v Council of Legal Education & another [2017] eKLR**, where it was held that the court should avoid any interpretation of a statutory provision, rule or by-law which would result in rendering the system unworkable in practice or create a situation that will go against clear provisions of the law governing the subject in issue, the 1st Respondent urged the court not to allow the petition.

37. Turning to the second issue, the 1st Respondent submits, that the petitioners cannot be registered as pharmacy technologists. Reference is made to the averment by Lawi Kiplagat Cherop in his affidavit in support of the petition that he commenced his studies in 2005. It is the 1st Respondent's case that this was long after Section 8(2) of the Act was introduced in 2002 and there was therefore no provision governing certificate holders at the time he went to college.

38. Moving to the question of legitimate expectation, counsel for the 1st Respondent submits that the petitioners have not met the parameters for enforcement of the doctrine of legitimate expectation as established by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**.

39. Further, that the amendment only sought to introduce and not delete any previously existing provisions. Additionally, that even prior to the amendments, the Act had not contemplated certificate holders being qualified to practice as pharmaceutical technologists.

40. Counsel for the 1st Respondent concludes her submissions by stating that every law enjoys presumption of validity and it is the duty of a petitioner to prove clear and unequivocal violation of the Constitution in order for the law to be invalidated. Further, that a law cannot be said to be discriminatory if there is some rationale for its enactment. The court is therefore urged to dismiss the petition with costs to the respondents.

41. In submissions dated 6th June, 2019 the 2nd Respondent identifies the following issues for the determination of the court:-

- a) Whether the petition meets the criteria set out in the case of **Anarita Karimi Njeru v Republic [1979] 1 KLR 154**;
- b) Whether the qualifications by the petitioners meet the requirements to warrant the registration of the petitioners in the roll;
- c) Whether the respondents violated the petitioners' rights under Article 27 of the Constitution;
- d) The constitutionality or otherwise of Section 8 of the Act; and
- e) Whether the respondents violated the petitioners' rights to legitimate expectation.

42. On the first issue, the 2nd Respondent contends that the petition does not set out with a reasonable degree of precision the petitioners' complaints, the constitutional provisions allegedly infringed and the manner in which the provisions were allegedly violated hence failing the test of a proper constitutional petition as laid in **Anarita Karimi Njeru v Republic [1979] 1 KLR 154**. The decision in **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of Banking Institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association and another [2018] eKLR** is cited as reaffirming the

said principle.

43. As regards the second issue, it is submitted for the 2nd Respondent that Section 8 of the Act is clear as to who should be registered as a pharmacist and the petitioners do not meet the statutory standards and cannot therefore be entered in the roll of pharmacists.

44. Turning to the third issue, the 2nd Respondent submits that in considering the question as to whether Article 27 of the Constitution has been violated, the court should consider the context in which an alleged differentiation is said to have occurred as was held in the case of **Tabro Transporters Ltd v Absalom Dova Lumbasi [2012] eKLR**. According to counsel, discrimination could only have been demonstrated by the production of evidence showing that there were other persons who were in the same category as that of the petitioners and who were afforded different treatment from that which the petitioners were afforded.

45. It is the 2nd Respondent's case that the argument by the petitioners that they should be allowed to work as pharmacists because certificate holders in other medical fields are allowed to work is misplaced. The 2nd Respondent contends that, firstly, the petitioners have not tabled any evidence in respect of the certificate holders in other fields and secondly, different legislations govern the various fields and the petitioners cannot make a case for discrimination by reference to other professionals in medical fields governed by other Acts of Parliament.

46. On the issue as to whether Section 8 of the Act is constitutional, the 2nd Respondent starts by submitting that as held in **Ndyanabo v Attorney General of Tanzania [2001] EA 495**, there is a rebuttable presumption that a statute or a provision in a statute is constitutional and the burden is always on the person alleging constitutional invalidity to prove the alleged invalidity.

47. The 2nd Respondent proceeds to submit that in considering whether to declare a statute unconstitutional, the court has to examine the purpose and effect of the impugned statute or provision as was held in the case of **Olum & another v Attorney General [2002] EA 508**.

48. The 2nd Respondent contends that the petitioners' submissions that the Act is unconstitutional by failing to provide for qualifications of pharmacy technologists and failing to distinguish between pharmacists and pharmacy technicians has no merit considering that Section 8 of the Act is clear on the qualifications of pharmacists. It is the 2nd Respondent's submission that Section 8 is founded on the understanding that the pharmacy profession is a unique one as it deals with issues which concerns human life through control of the trade in drugs and poison hence falling in line with the right of every person to have the highest attainable health standards under Article 43 of the Constitution. The provision, it is urged, is meant to weed out quacks from the profession in order to protect both the profession and members of the public. The decision in the case of **Eunice Nganga & another v Law Society of Kenya & 2 others, Petition No. 235 of 2017** is cited in support of this statement.

49. The 2nd Respondent asserts that the restriction as to who can be registered as a pharmacist is justifiable under Article 24 of the Constitution which provides for the limitation of rights and freedoms. Reliance is placed on the case of **Eunice Nganga (supra)** where it was held that the provisions in the Advocates Act for the qualification of advocates are meant to protect members of the public who seek services from advocates.

50. On the last issue of the alleged violation of the petitioners' legitimate expectation, counsel submits that the petitioners have not met the criteria set down by the Supreme Court in the already cited case of **Royal Media Services Limited** in order for the court to conclude that their legitimate expectation has indeed been violated. It is the 2nd Respondent's case that it has never made any promise to the public or the petitioners that they would be registered upon completion of the certificate courses which they undertook. Further, that legitimate expectation cannot be exercised contrary to the law.

51. The 2nd Respondent closes its submissions by stating that the petitioners' case must be distinguished from **Martin Wanderi (supra)** given that the petitioners in the cited case had met the requirements set out in the Engineers Act. The court is asked to dismiss the petition with costs.

52. A perusal of the pleadings and submissions placed before the court by the parties herein reveal that the core issue for the determination of the court is the constitutionality or otherwise of Section 8 of the Act.

53. Section 8 of the Act provides that:-

“8. Qualifications for registration

(1) Every person who—

(a) is at the commencement of this Act already registered as a pharmacist under the provisions of the Pharmacy and Poisons Ordinance (Cap. 128 (1948) (now repealed); or

(b) satisfies the Board that he holds at least a bachelor of pharmacy degree (whether of Kenya or of some other country) which the Board considers acceptable, shall, subject to this Act, be entitled to have his name entered in the register.

(2) Every person who satisfies the Board that he holds a diploma in pharmacy approved by the Board of any college in Kenya or any other country shall, subject to this Act, be entitled to have his name entered in the Roll.”

54. At the end of it all, the petitioners are saying that the impugned provision is unconstitutional on the ground that it discriminates against them vis-à-vis certificate holders in other medical fields.

55. Article 27 of the Constitution provides that:-

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by

individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than twothirds of the members of

elective or appointive bodies shall be of the same gender.”

56. In **Kenya Medical Research Institute v Dr Samson Gwer & 8 others**, Nairobi Civil Appeal No. **101 of 2015** the Court of Appeal held that:

“It would be ingenuous for one to suppose that the equality contemplated by the Constitution leaves no room for difference and seeks absolutism...”

For different treatment to amount to discrimination, it must fall within the definition of the term as found in BLACK’S LAW DISCTIONARY 10TH EDITION at P 1566 namely “differential treatment; esp a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.””

57. The Court proceeded to cited the decision in the case of **Federation of Women Lawyers FIDA Kenya & 5 others v Attorney General & another [2011] eKLR** as clearly articulating the difference between mere differentiation and differentiation or unequal treatment that is constitutionally proscribed.

58. In the **FIDA Kenya** case (as cited by the Court of Appeal) it was held that:-

“In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.”

59. The legislative provision challenged by the petitioners clearly provides that only a holder of a bachelor’s degree can be entered in the register as a pharmacist and only a diploma holder can be put in the Roll by the Board. The petitioners concede that they do not possess those qualifications.

60. The respondents averred that the training of a degree holder or a diploma holder in pharmacy is more intense and takes a longer period compared to the training the petitioners undertook. The petitioners did not controvert the assertion. The petitioners cannot therefore be heard to say that their discrimination is irrational because they underwent the same studies with degree and diploma holders but they have been locked out of the profession.

61. The respondents correctly submitted that the petitioners cannot use the treatment of professionals in other medical fields as evidence of discrimination. It is noted that each unique field is governed by its own legislation. The legislation applicable to a particular area of practice cannot therefore be applied to a different area of practice. It is also observed that the training in one area of practice is different from that of another area of practice.

62. The petitioners submitted that they had been locked out from upgrading their certificates to diplomas and even degrees. None of the respondents offers any training and it is the market that dictates the kind of training to be offered by colleges and universities. I do not think that any of the petitioners who is qualified to pursue a diploma course in pharmacy can be denied such an opportunity by a training institution.

63. The petitioners urged this court to declare the entire Pharmacy & Poisons Act of 2015 unconstitutional or in the alternative declare Section 8 of the Act unconstitutional. Not a single shred of evidence was placed before the court in support of the alleged unconstitutionality of the entire Act.

64. As for Section 8 of the Act, the respondents submitted that no amendment was made to the Section in 2015. The respondents are indeed correct. The amendment to Section 8 was done in 2002 before a

majority of the petitioners enrolled for the certificate courses, and even then section 8(1)(a) ensured that anybody who was already registered as a pharmacist retained their registration. No evidence was adduced to show that any of the petitioners was registered or enrolled prior to 2002 and had been denied an opportunity to practice.

65. The petitioners cannot, in the circumstances of this case, ride on the doctrine of legitimate expectation to obtain registration as pharmacists. There was no promise made to them by the respondents and neither was there any legal provision at the time of their studies which recognized certificates as appropriate for enrolment as pharmaceutical technologists or registration as pharmacists.

66. The respondents are also correct that the circumstances that prevailed in the case of **Martin Wanderi (supra)** are different from the facts of this case and the decision of the Supreme Court in that case cannot therefore be of any assistance to the petitioners.

67. A reading of sections 6, 7 and 8 of the Act together with the definition of the term “enrolled pharmaceutical technologist” in Section 2 of the Act clearly shows that only two cadres of professionals are recognized by the law in the pharmacy field. Degree holders are registered as pharmacists whereas diploma holders are enrolled as pharmaceutical technologists. According to Section 8(2) of the Act, pharmaceutical technologists must be diploma holders. Painful, as this pronouncement is, there is no place for certificate holders in the pharmacy industry.

68. Considering what I have already stated in this judgment, it follows that Section 8 of the Pharmacy and Poisons Act is constitutional. This petition is therefore without merit and is therefore dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 23rd day of January, 2020.

W. Korir,

Judge of the High Court