REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 63 OF 2018

WESLEY MDAWIDA CHARO..PETITIONER

VERSUS

UNIVERSITY OF NAIROBI..RESPONDENT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE............INTERESTED PARTY

JUDGMENT

Petitioner's Case

1. The petitioner's through certificate of urgency and chamber summons application dated 23/11/2018 and petition filed on 26/11/2018 brought under the constitution under Articles 35(2) and 47(1) and the Access to information Act (No. 21 of 2006), section 5,17(2) and 13 seeks the following orders:-

a) The respondent be stopped from compiling the graduation list and/or holding graduation ceremony;

b) The court do adopt as its decree the order of the Commission on Administrative Justice (Office of the Ombudsman) herein the Interested Party, in Inquiry File No.CAJ/UON/013/1285/16-NK Wesley Mdawida Charo versus The University of Nairobi dated 01/08/2017 finding that the Respondent to:-

i) Amend the name of the Complainant, herein the Petitioner from David Wesley Mnyika to Wesley Mdawida Charo in all his academic records within the University.

ii) That the Respondent should review its policy on change of name by the students to align to the Constitution.

iii) That the Petitioner be granted leave to enforce as a decree of this Court the Order by the Interested Party herein.

iv) That the Respondent do include the Petitioner in its immediate graduation list using his correct assumed name Wesley Mdawida Charo.

v) That the Respondent be condemned to pay costs.

Respondent's Response

2. The Respondent in response to the petition's chamber summon, filed a Replying affidavit sworn by Prof. Isaac M. Mbeche, Deputy Vice Chancellor *(Administration & Finance)* sworn on 27th February 2019. It is Respondent's case that; the petitioner was enrolled at the University of Nairobi as David Wesley Munyika sometimes in 2009 to pursue Diploma in Business management; and that his admission was assessed and based on his Kenya certificate of Secondary Education **(K.C.S.E)** and name appearing therein being David Wesley Munyika.

3. That the admission regulation and policy of the Respondent is informed by the Kenya National Examination Council **(KNEC)** certificate and there is no policy to review or change of name of students and allowing the petitioner's change of name without academic trace; will highly jeopardise the quality of academic certificates and expose the University to academic dishonesty, further eroding academic consistency, truth, honesty and integrity of academic certificates.

4. It is further contended by the Respondent that the award by the interested party herein is non-binding to the Respondent and cannot be enforceable as the Respondent has no mandate to determine how names of prospective applicants appear in the Kenya National Examination Council **(KNEC)** so as to appear into the University programs certificates. The Respondent has further advised on several times and implored the petitioner to first seek change of name in his Kenya certificate of Secondary Education **(K.C.S.E)** qualification but in vain.

5. The Respondent further argue the application is premature, ill-advised and made in bad faith for the Respondent and the interested party herein were corresponding on the matter to which the Applicant is fully aware. The Respondent further contend that the interested party has no powers to make determination on violation of constitutional rights and the purported award is said to be void *ab initio.*

Interested Party's Response

6. The interested party filed replying affidavit sworn by Leonard Ngaluma sworn on 30th November 2018 averring inter-alia; that the interested party is a constitutional commission established under Article 59(4) of the constitution and section 3 of the Commission on Administrative Justice Act, 2011 charged *inter-alia* with the mandate to investigate any conduct in state affairs, or any acts or omission in public administration by any state organ, state or public officer in National and County Government that may result in any impropriety or prejudice. It is further contended that the commission is conferred by the Access to Information Act, 2016 with the oversight and enforcement functions and powers to give effect to Article 35 of the constitution which provides the Right to access information held by the state.

7. It is interested party's contention that upon analysis of the facts and the law and in exercise of the powers conferred on the commission under section 21(f) and 23(2) of the Access to Information Act, 2006, it made a determination dated 1/8/2017 with a finding that the Respondent's action was in violation of the Applicant's right to correction of untrue or misleading information under Article 35(2) of the constitution and section 13 of the Access to Information Act. The interested party further ordered the Respondent to grant the Applicant's request for correction of the information.

8. It is interested party's contention that there being no appeal on its decision, the court may order that the determination made therein be enforced as a decree and executed in the same manner as an order of the High Court. The interested party pray that the decision it made on 1/8/2017 be enforced as a decree of the honourable court.

Analysis and Determination

9. I have considered the petitioners' chamber summons, the Respondents Replying affidavit, and the interested party, Replying affidavit, the applicant's written submissions, the interested party's submissions as well as the Respondent's submissions and from the above the following issues do arise for consideration.

a) Whether the Respondent can abrogate its own policy to determine the names that appear on the Deed poll and not Kenya National Examination Council (KNEC) so as to appear into the University programs certificates?

b) Whether the interested party can interpret the constitution?

c) Whether the decision of the interested party is enforceable as a decree of the court?

d) What relief can the court grant?

A) Whether the Respondent can abrogate its own policy to determine the names that appear on the Deed poll and not Kenya National Examination Council (KNEC) so as to appear into the University programs certificates?

10. The petitioner seeks to compel the Respondent to correct his academic records to reflect his new and adopted name of Wesley Mdanida Charo. The interested party had made a finding on 1/8/2017 in favour of the petitioner. The petitioner meanwhile had charged his name through a deed poll and took a corrected National Identity Card and as a result he urges he was now unable to graduate because the Respondent had refused to update the petitioner's name to his new name insisting on using his since abandoned name.

11. It is petitioners averment that in a letter of 22nd December 2016 addressed to the interested party and annexed to the replying affidavit of Leonard Ngaluma as annexture **"LN-3"** the vice-chancellor to the Respondent acknowledged that the petitioner had changed his name but the University's change of Name policy made it not possible to update the Respondent's records to reflect the petitioner's new name.

12. The interested party argue that under Article 35 of the constitution it provides for the citizens' right of access to information, which it is urged includes the right of every person to the correction or deletion of untrue or misleading information that affects the person. It is further asserted that to actualize this right, the parliament enacted the Access to Information Act No. 31 of 2016. The interested party urge that the act confers on the Commission on Administrative Justice, the mandate to oversight and enforce its provisions; in enforcing the right of access to information the interested party urge it is required to among others, review decision of entities, both public and private on granting of or declining requests of access of information.

13. It is interested party, averment that the petitioner filed his request for a review of the decision of the Respondent in declining to grant the petitioner's request for correction of his names in his academic records within the institution pursuant to section 14(1) (h) of the Act. The Respondent had declined to correct the names citing its institutional policy. The interested party in undertaking the review, it enquired from

the Respondent on the matters and upon considering its response, it made its determination pursuant to section 23(2) of the Act. The interested party made the following orders:-

The University of Nairobi;-

> **i) Amend the name of the complainant from David Wesley Munyika to Wesley Mdanida charo in all of his academic records within the university.**
>
> **ii) The university should renew its policy on change of name by students to align it to the constitution."**

14. The Respondent is opposed to the application for name change and in this particular case, were it is change of the complete name. It is averred that the admission of a student into the university is premised on the academic certificates as presented at the time by the student.

15. The Respondent further assert in the year 2009, the petitioner made an application for admission to pursue a Diploma in Business management using his Kenya Certificate of Secondary Education **(KCSE)** certificate under the name David Wesley Munyika and which is the name in the Respondent's system and student portal, which has been so for the past Nine (9) years. It is contended by the Respondent that the name on the certificate determines and defines the manner in which the petitioner's Diploma certificate will be issued and the name to appear therein on his Degree/Diploma certificate.

16. The Respondent aver that its policy does not make allowance for change of student name on the basis of a deed poll for it is not an academic test tool but the academic certificate are.

17. It is worthy to note that reliance on academic certificates from **(KNEC)** guarantees academic trace to maintain quality certificates, keep the consistency and safeguard integrity of academic certificate. It is for that good reason that the Respondent's policy do not make allowance for change of student name on basis of a deed poll or for change of particulars in the identity card in the student's academic certificates.

18. The academic certificates especially **KCSE** certificates are issued by Kenya National Examination Council **(KNEC)** as authors and issuers of academic certificates upon students having been tested and passed academically. In view of this the petitioner and the interested party went overboard by demanding the respondent to effect change of the petitioner's name in his academic certificates. The Respondent was correct in rejecting the interested party's request as the request was impractical to carry out since it is not in the realm of the Respondent to amend or change names in the academic certificates based on deed polls.

19. The remedy available to a student seeking prayers similar to ones sought herein by the petitioner is provided for under **Rule 9 of the Kenya National Examination Council (Kenya Certificate of Secondary Education Examination) Rules 2009** where it is provide:-

> **"1) A certificate awarded to a candidate shall show the name of the candidate, the candidates' index number, the name of the school in the case of a school candidate, and all the subjects taken by the candidates in the examination with the respective codes and the grades obtained in all the subjects taken.**
>
> **2) All certificates shall be issued to the head teachers and to private candidates through the Provincial Directors of Education or the District Education Officers.**
>
> **3) The Council may at any time withdraw a certificate for amendment or for any other reason where it considers it necessary."**

20. From the above-mentioned Rule 9, the Council is the only approved body that may at any time withdraw a certificate for amendment or for any other reason where it considers it necessary. The petitioner is therefore under duty to liason with **(KNEC)** to have his **KCSE** withdrawn and a fresh one if necessary be issued in the names he is proposing. He can therefore armed with changed certificate approach the Respondent with certificate bearing the desired names as this will not only protect the academic integrity, consistency and honesty of academic certificates and degrees issued by the Respondent but it will legally and rightfully transfer the mandate to amend and/or withdraw the certificate to **KNEC** under **Rule 9(3) of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009.**

21. From the above, I find that the Respondent has demonstrated that it cannot abrogate its own policy to determine the names that appear in the deed poll and not Kenya National Examination Council **(KNEC)** so as to appear into University Programs certificates. I further find the petitioner has failed to show any illegality, unconstitutionality and/or procedural impropriety nor violation of his rights on part of the Respondent's policy to justify granting of the orders sought in this petition.

B) Whether the interested party can interpret the constitution?

22. Article 259 of the constitution enunciates what entails a constitutional interpretation.

23. In the case of **Republic vs Kenya National Examination Council & another ex-parte Audrey Mbugua Ithibu (2014) eKLR** the court while issuing an order of mandamus to compel **KNEC** to recall and replace Applicant **KCSE** certificate issued in the name of **Ithibu Andrew Mbugua to Audrey Mbugua Ithibu** stated thus:-

> **"According to Rule 9(3) of the Rules, KNEC may withdraw a certificate for amendment or for any other reason where it considers it necessary. It therefore has the legal backing to comply with the Applicant's request. This should be done within**

45 days from the date of this judgment and will be subject to payment of a reasonable fee, if necessary, by the Applicant."

24. From **Rule 9(3) of the Rules, KNEC,** it is the mandate of **KNEC** to amendment or correct a certificate in respect of **KCSE** certificate but not the Respondent as the interested party and petitioner are seeking to compel the Respondent to do. **Rule 9(3)** of the Rules, **KNEC** is clear as regards change of name or replacement of the certificates. The petitioner should have sought the change of name from **KNEC** The interested party's order was addressed to the wrong party, thus the Respondent who has no mandate to call or withdraw **KCSE** certificate and correct or amend the names. The decision by the interested party is void, impracticable and an abuse of the powers conferred upon it. Under Article 259 of the constitution the court is enjoined to interpret the constitution in a manner that promotes its purpose, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of rights and in a manner that contributes to good governance.

25. In the case of **Mugambi Imanyara & another vs Attorney General & others (2017) eKLR** the court stated:-

> **"The constitution is the supreme law of the land; it's a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles"**
>
> **In the celebrated case of Ndyanabo vs Attorney General (22) Samatta CJ had this to say:-**
>
> > **"We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows: first, the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As Mr. Justice E.O. Ayoola, former Chief Justice of Gambia stated….**
> >
> > **"A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the constitution a stale and sterile document." Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our democracy not only functions but grows, and the will and dominant aspirations of the people prevail. Restrictions of fundamental rights must strictly be construed."**

26. Further in the case of **Minister of Home Affairs & another vs Fisher & another (1980) A.C 319:-**

> **"i) A constitutional instrument was a document sui generis, to be interpreted according to principles to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation (see page 26 c d, post).**
>
> **iii) Provisions in a constitutional instrument dealing with individual rights were therefore to be interpreted according to the language used and the traditions and usages which had influenced that language."**

27. From the above I find the purported constitutional interpretation by the interested party is void as the impracticality of the decision does not give a purposive liberal interpretation desired in the constitution. I find the attempt to interpret the constitution by the interested party does not in effect meet the purpose of guaranteeing constitutionalism. The interpretation of constitutional provision must be one which does not destroy the other but sustain each other.

C) Whether the decision of the interested party is enforceable as a decree of the court?

28. The petitioner and the interested party contended that under section 23 of the Access to Information Act 2016 the orders it issued are enforceable. It is urged its orders are to be adopted as an order of the court and be enforced as decree of this court. That the order stands as it has not been appealed against.

29. The Respondent refer in response to the case of **Republic vs Kenya Vision 2030 Delivery Board & another ex-parte Eng. Judah Abekch (2015) eKLR,** where Hon. Justice W. Korir on the enforcement and binding nature of the decision of the Commission of Administrative Justice, stated thus:-

> **"That the proviso of the Commission on Administrative Justice ("Commission") Act (CAJA) does not give coercive powers over the organizations it investigates. Section 42 of CAJA provides that where a state organ, public office or organization declines to implement the recommendations of the Commission, the only action the Commission can take is to make a report to the National Assembly detailing the failure. Had the National Assembly desired that courts should enforce the recommendations of the Commission, it would have clearly stated so."**

30. Further the interested party sought to rely on the case of **Linus Simiyu Wamalwa vs University of Nairobi & another (2015) eKLR.** This case is not relevant to the present suit as it was dealing with an issue of error on computation of grade award and not change or correction of name as is the case here. The petitioner in this case did not seek correction of academic transcript and degree but change of name.

31. From the above I find the interested party's decision dated 1/8/2017 compelling the Respondent to amend petitioner's name is not

binding and the Respondent should not be bound to implement the same as it is impractical and devoid of legal basis.

D) What relief can the court grant?

32. The petitioner herein prays for damages urging that the Respondent is not a law unto herself and her impunity should be stopped forthwith. It is urged the Respondent should be condemned to pay the petitioner Kshs.4, 000,000 per annum from 1st August 2017 till compliance with the orders of the interested party issued on 1/8/2017.

33. The Respondent's response is that he who seeks constitutional relief or any other reliefs whatever from this Honourable Court must come to the court with clean hands. The Respondent aver that it has on several occasions and times implored on the petitioner to avail a **KCSE** bearing the desired name, but he has failed to do so. It is Respondent's averment the petitioner is still adamant to correct his name with **KNEC.** That if the petitioner has suffered misfortunes, the Respondent urges it is not to blame for the same. On the issue of claim for damages, the burden of proof lies with the petitioner. He has in his petition not placed evidence in respect of claim for damages. No evidence is on record in support of question of damages.

34. In the case of **Romauld James vs AGT (2010) UKPL**

> **"In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice had developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasised that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated."**

35. From the above I find it is not sufficient for a petitioner to seek damages in the submissions; when the same has not been pleaded in the petition and when there is no single paragraph in the petition on the claim for damages. Further apart from the pleading it is the duty of the party seeking an award of damages to ensure he places evidence in support of damages allegedly suffered before the trial court; as a result of the breach of the constitutional right to enable the court exercise its discretion to access and/or award damages in the nature of compensatory damages. It is in my view, only if some damage has been demonstrated, that the court can exercise its discretion whether or not to award compensatory damages. I find that in the instant petition or case there is no evidence of damage suffered as a result of the alleged breach and which breach I have found have not been proved, for which the Petitioner/Applicant can be compensated.

36. Upon considering this petition I make the following findings:-

> **a) Rule 9(3) of the Rules, KNEC clearly sets out details on how to make changes in the academic certificates, which is a mandate that is statutory placed on KNEC and not the Respondent.**
>
> **b) The petitioner has failed to establish how the Respondent policy is unconstitutional and/or that there was an illegality in the decision of the Respondent.**
>
> **c) The petitioner before filing the petition herein had not wholly exhausted the available mechanism for correction of name in his certificate as implored on by the Respondent.**
>
> **d) The interested party's decision is unenforceable and void.**
>
> **e) The reliefs sought are not available to the petitioner.**

37. I therefore proceed to make the following orders:-

> **i) The petition is without merits and dismissed.**
>
> **ii) The decision by interested party dated 1/8/2017 be and is hereby recalled and quashed.**
>
> **iii) The Respondent is awarded costs of the petition.**

Dated at **Nairobi** this **2nd day** of **April, 2020.**

Delivered on 29th day of April 2020.

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J .A. MAKAU

JUDGE