



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.106 OF 2019

PAULPETER MAKANDA MAKOKHA.....PETITIONER

VERSUS

UNIVERSITY OF NAIROBI.....1ST RESPONDENT

DR. ROBINSON OCHARO.....2ND RESPONDENT

JUDGMENT

1. The Petitioner, Paulpeter Makanda Makokha, was admitted to the 1st Respondent, University of Nairobi, in August 2009 for a Masters degree and commenced his coursework in January, 2010. Upon completion of his coursework he was assigned the 2nd Respondent, Dr. Robinson M. Ocharo, in 2012 as the supervisor of his project.

2. It is the Petitioner's case that due to the unavailability and lack of cooperation by the 2nd Respondent he ended up graduating in December 2016. According to the Petitioner, the 2nd Respondent's actions violated a number of his constitutional rights.

3. Through the petition dated 13th February, 2019, the Petitioner therefore prays for orders as follows:

A. DECLARATION that the conduct of Dr. Robinson M. Ocharo evinced by frustrating the Petitioner and taking him in circles during the process of supervision of the Master's Project causing a two-year programme become a seven-year one and that of the University of Nairobi in failing to quickly respond to the plight of the Petitioner and other students contravened; *inter alia*, Articles 25, 28, 43(1)(f), 47 & 48 of the Bill of Rights as enshrined in Chapter 4 of the Constitution of Kenya 2010.

B. DECLARATION that the conduct of Dr. Robinson M. Ocharo evinced by frustrating the Petitioner and taking him in circles during the process of supervision of the Masters Project causing a two-year programme become a seven-year one and that of the University of Nairobi in failing to quickly respond to the plight of the Petitioner and other students contravened; *inter alia*, Articles 2, 10, 19, 20 & 232 of the Constitution of Kenya 2010.

C. DECLARATION that any future conduct of the 1st Respondent by itself or through its agents that fails to consider the need for timely completion of academic studies where such completion is merited violates Articles 2, 10, 19, 20, 25, 28, 43(1)(f) & 232.

D. ORDER OF COMPENSATION in favour of the Petitioner and to be borne by Respondents jointly and severally for purposes of redressing the harm that the Petitioner has had to suffer on account of violation of Articles 2, 10, 19, 20, 25, 28, 43(1)(f) & 232 of the Constitution of Kenya 2010.

E. ORDER OF JUDICIAL REVIEW in the nature of MANDAMUS compelling the 1st Respondent to put in place measures to ensure that the Constitution and the values espoused by the Charter of Service Delivery are complied with.

4. The respondents opposed the petition through a replying affidavit sworn on 9th September, 2019 by the 2nd Respondent.

5. A perusal of the pleadings filed in this petition discloses that the only issue for the determination of this Court is whether the Petitioner should be granted all or any of the reliefs sought. I say so because the issue of liability was determined through a decision issued on 5th August, 2015 by the Commission on Administrative Justice (Office of the Ombudsman) in Inquiry File No. CAJ/UON/013/735/14 Paulpeter M. Makokha v The University of Nairobi. That decision remains unchallenged to date.

6. The Petitioner had complained to the Ombudsman about unfair treatment by the 1st Respondent which had resulted in delay in the completion of his postgraduate studies. After hearing the parties, the Ombudsman recommended remedial action as follows:

“18. Based on the foregoing, we hold and find that the conduct of Dr. Ocharo was unfair and unprofessional, which action impugned Article 59(2) (h-k) of the Constitution and Section 2 and 8(a), (b) and (d) of the Commission of Administrative Justice Act.

19. In light of the above, the Commission in exercise of its powers under Article 59(2)(j) of the Constitution and Section 8(g) and 26 of the Act, FINDS the University should:

(a) Direct a review of the complainant’s research Project by another Supervisor.

(b) Put measures in place to ensure accountability of supervisors and regular monitoring of supervision standards.

(c) Ensure that the Regulations and Guidelines are strictly enforced.

(d) Ensure that the complainant’s research Project is efficiently reviewed and supervised to allow him the opportunity to graduate at the earliest opportune time.”

7. It is noted that although the Ombudsman is empowered by Section 8(g) of the Commission on Administrative Justice Act, 2011 to **“recommend compensation or other appropriate remedies against persons or bodies”** to which the Act applies, no such recommendation was made in respect to the Petitioner’s complaint. The Act does not provide room for appeal to the courts against the decision of the Ombudsman therefore leaving judicial review as the only available remedy. The Petitioner did not pursue this option.

8. The respondents through their written submissions dated 22nd November, 2019 claims that the Petitioner did not exhaust the alternative dispute resolution mechanisms. This assertion is without merit. Firstly, the issue is not pleaded in the replying affidavit and secondly, the alternative dispute resolution mechanism which the Petitioner is alleged not to have exhausted is not identified.

9. My only discomfort with the instant petition is that it has been brought after the Petitioner had taken the same dispute to the Ombudsman for resolution. None of the parties has raised issue with the Petitioner’s action. Even without the benefit of the submissions of the parties on the issue, I am of the view that a person who approaches the Ombudsman is not barred from approaching the courts if the person is not satisfied with the remedy provided by the Ombudsman.

10. I have already stated that the issue of liability was determined by the Ombudsman. The 2nd Respondent, however averred at paragraph 14 of the replying affidavit that **“the verdict by the Commission on Administrative Justice should not form the basis of the petition as its’ findings are outside the mandate of the Ombudsman hence the verdict is void.”**

11. I only need to point out that the respondents did not seek to void the decision of the Ombudsman by way of judicial review. The finding by the Ombudsman therefore remains undisturbed.

12. Additionally, and if this will give any comfort to the respondents, my finding based on the material placed before the Court is that the respondents treated the Petitioner unfairly. The Petitioner has placed SMS messages before this Court showing that he sought appointments with the 2nd Respondent without success. At times he would travel to Nairobi all the way from Kakamega only for the 2nd Respondent to be unavailable. It is also noted that the 2nd Respondent never responded to the Petitioner’s messages or answered his calls. The 2nd Respondent admitted to this fact in the proceedings before the Ombudsman.

13. Indeed, the 2nd Respondent in the replying affidavit accepted that there was delay on his part. In that regard he averred that:

“9. THAT, my unavailability was adequately addressed and the Petitioner was allocated another Supervisor....

11. THAT my unavailability and the Seven Year delay were addressed by both the 1st Respondent and the Commission on Administrative Justice.”

14. The 2nd Respondent also deposed that the Petitioner was not guaranteed that he would take exactly two years to complete his studies; that writing a thesis proposal is an academic process and not an event thus the process entails fulfillment of academic standards before one can be cleared to proceed to the next level of writing; and that at some point the Petitioner sought deferment of his Masters studies.

15. From the evidence placed before the Court it is apparent that the 2nd Respondent’s averments are without basis. The admission letter dated 10th August, 2009 at paragraph (c) clearly indicated that the Masters programme was two years for students undertaking the course on full time basis. The Petitioner averred that he was a full-time student. The Petitioner’s averment that he was ready and willing to subject himself to the supervision of the 2nd Respondent was not rebutted. Therefore, the 2nd Respondent’s deposition that writing a thesis proposal is an academic process and not an event is without basis.

16. It is also noted that the respondents have not placed any evidence before the Court to show that the writing of the thesis was delayed by the Petitioner. Indeed, it is evident from the material placed before the Court that once the supervisor was changed the Petitioner was able to quickly finalise his thesis and graduate.

17. On the claim that the delay was caused by the Petitioner's request to defer his studies, I find the 2nd Respondent's averment disingenuous. The Petitioner sought deferment of his studies to January, 2010 and that request was acceded to through the 1st Respondent's letter dated 3rd November, 2009. The deferment has nothing to do with the Petitioner's complaint which relates to the period starting in 2012 after the 2nd Respondent was assigned to him as a supervisor up to the time he graduated in 2016.
18. The next question is whether the constitutional rights and fundamental freedoms of the Petitioner were violated by the respondents. Through written submissions dated 4th November, 2019 the Petitioner asserts that his right to freedom from torture and cruel, inhuman or degrading treatment or punishment provided under Article 25(a) of the Constitution was violated by the respondents. According to the Petitioner the respondents caused him to make several unsuccessful trips to Nairobi in a bid to meet his supervisor; ignored all communication made by him to the supervisor; frustrated his every attempt to change his supervisor until directed by the Ombudsman; frustrated his chances of securing employment due to the incomplete Masters studies; and tainted his resume since it now indicates that he took seven years to complete a two-year programme which certainly affects the perception of potential employers as to his capabilities. The decision in **Frankline Kithinji Muriithi v Loyford Riungu Muriithi & 4 others [2014] eKLR** is cited as defining inhuman treatment to include physical or mental cruelty so severe that it endangers life or health.
19. The Petitioner also contends that his right to human dignity as protected by Article 28 of the Constitution was violated. It is pointed out that the right to human dignity is protected by international instruments. It is, however, not expressed in what manner the respondents' actions violated the Petitioner's right to human dignity.
20. On the allegation that his right to education was violated, the Petitioner cites Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as protecting the right to education. It is urged that education in all its forms and at all levels should be available, accessible, acceptable and adaptable. Stating that acceptability means the form and substance of education, including curricula and teaching methods, have to be acceptable to the students, the Petitioner contends that unreasonably and unnecessarily delaying a two-year programme for seven years without fault by the student is neither acceptable to any student nor can it be described as a functional programme. The Petitioner relies on **Gabriel Nyabola v. Attorney General & 2 others [2014] eKLR** as holding that the State has an obligation to respect, protect and fulfil the right to education.
21. The Petitioner concludes by asserting that he is entitled to the reliefs sought in the petition. Reference is made to the decision in **Erickson Kenya Limited v Attorney General & 3 others [2014] eKLR** as affirming the principle that a court of law, after finding in favour of a party under Article 23 of the Constitution, has a duty to frame appropriate reliefs to vindicate the rights.
22. In opposition to the grant of the reliefs sought, the respondents contend that compensation cannot issue against them as no evidence has been placed before the Court on how the Petitioner has suffered on account of violation of Articles 2, 10, 19, 20, 25, 28, 43(1)(f) and 232 of the Constitution.
23. It is the respondents' position that the Petitioner has failed to prove his case against them. They therefore urge the Court to dismiss the petition with costs. They rely on the decisions in **Eugenia Kathoni Miriti v Assistant Chief Ngaina Sub-Location & 2 others [2018] eKLR**; and **Charles Muturi Macharia v Standard Group & 4 others [2017] eKLR**.
24. From my analysis above, it is evident that the Petitioner's right to fair administrative action under Article 47 of the Constitution was violated. The Petitioner has also established that the unwarranted delay in the completion of his Masters studies violated his right to education. He had legitimate expectation that he would complete his degree course within two years as indicated in the letter of admission. There is no evidence that he contributed to the delay in the completion of his studies. However, I find that apart from the violations to the rights of fair administrative action and education, the Petitioner has not discharged the burden of proof in respect of the other rights allegedly violated by the respondents.
25. In constitutional petitions declaratory orders are sometimes sufficient remedy by themselves. Some violations may however call for monetary compensation in addition to the declaratory orders. In the case at hand, the Petitioner has demonstrated that he incurred travel expenses between Nairobi and Kakamega in attempts to meet and consult the 2nd Respondent. The Ombudsman found that Petitioner incurred expenses totaling KShs.40, 000/-. Although the Petitioner provided receipts to show that he did indeed pay money for transport, he did not specifically plead any claim for special damages.
26. In my view, the mistreatment meted upon the Petitioner by the 2nd Respondent with the acquiescence of the 1st Respondent should attract monetary compensation. Universities should not admit students if they do not have the capacity to teach and supervise the students.
27. None of the parties has proposed what should be an appropriate award as general damages in the circumstances of this case. It is noted that the period in which the Petitioner had problems fell between 2012 and 2015. After he was given a new supervisor everything ran smoothly. In deciding the amount to award the Petitioner as general damages, I should also take into account the fact that the 1st Respondent complied with the decision of the Ombudsman and changed the supervisor for the Petitioner.
28. I am also alive to the fact that the money to be paid as compensation will be sourced from the public purse by virtue of the 1st Respondent being a public university. In **Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR**, the Supreme Court awarded each petitioner the sum of KShs. 200,000/- as general damages after finding that the Engineers Registration Board had violated their rights by declining to register them as engineers.
29. Taking into account the expenses incurred by the Petitioner, and considering the delay of about five years in the completion of his studies, I find that an award of KShs.500,000/- is appropriate as general damages in the circumstances of this case. That is what I award the Petitioner.

30. In summary, judgment is entered in favour of the Petitioner and against the respondents as follows:

(a) A declaration is hereby issued that the actions of the respondents in delaying the completion of the Petitioner's Masters studies violated his constitutional rights under Articles 43(1)(f) and 47 of the Constitution;

(b) The Petitioner is awarded KShs.500,000/- as general damages for the violation of his rights by the respondents; and

(c) The Petitioner is awarded costs of the proceedings against the respondents.

Dated, signed and delivered virtually at Nairobi this 29th day of October, 2020.

W. Korir

Judge of the High Court