



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 12 OF 2019

MUTIMBA CRESER MASAYI JOSEPH.....PETITIONER

AND

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY....RESPONDENT

JUDGMENT

1. The petition, dated 29th August 2019, was brought at the instance of Mutimba Creser Masayi Joseph, to be known hereafter as the petitioner, citing several constitutional violations of his rights. He has brought the suit against the Masinde Muliro University of Science and Technology, which is a public university established under the Masinde Muliro University of Science and Technology Act, No. 18 of 2006, to be referred hereafter as the respondent.
2. The case by the petitioner is that the respondent wrote a letter to him, dated 6th May 2019, cancelling his degree certificate, serial number 071030, and reprinted another certificate for him without reference to him. He says that he got employment with the Teachers Service Commission using the degree certificate that the respondent was purporting to cancel, and he feared that he could lose his employment should the cancellation be upheld. He complains that the reprint of another certificate was unnecessary and inconsistent with a court order made in Kakamega CMCCC No. 384 of 2017, which had found that he had met all academic requirements and graduated with a degree on 6th December 2013, even though the court finally declined to grant him the orders that he sought, for the court had not been approached properly. He states that he was making efforts to settle the arrears of fees, but the effort was frustrated by the cancellation of the certificate.
3. The factual background is that the petitioner was at the respondent, meet all the academic requirements and graduated with a Bachelor of Education (B.Ed)(Arts) on 6th December 2013. After graduation, he was employed by the Teachers Service Commission, vide a letter dated 14th November 2016, from 2nd January 2017, and was assigned TSC Number 688887, and posted to St. Mary's Girls High School, in Kisii County. He did not get his salary for November 2017, whereupon he made enquiries with his employer, who informed him that the same had been stopped following communication from the respondent about the petitioner's failure to clear his university fees. Prior to that the respondent had published the petitioner's name, alongside others, in a national newspaper on 9th June 2017, indicating that it had withdrawn degrees on account of counterfeit degrees, financial fraud or pending cases. At the employer's offices, the petitioner was advised to resolve his issues with the respondent. He thereafter visited the offices of the respondent, where he was informed that his degree had been cancelled on account of fees that he owed the university, standing at Kshs. 198, 800.00. He had graduated while that amount was still owing. According to him, the respondent was adamant in not hearing him, despite seeking the assistance of alumni, and proceeded whimsically, without justifiable reasons, to cancel the degree.
4. He decided to take the step of taking the matter to court, by instituting a suit at the Kakamega Chief Magistrate's Court, being Kakamega CMCCC No. 384 of 2017, seeking injunctive orders to stop any prejudicial action based on the cancellation, and interim relief was granted. Despite that order, his employer did not pay his salary, which prompted him to file a suit at the Employment and Labour Relations Court, being Nairobi ELRC JR No. 7 of 2018, and on 7th March 2019, an order was issued barring the employer from withholding his salary. On 18th October 2018, the court, in Kakamega CMCCC No. 384 of 2017, delivered a judgment where it established that the petitioner had met all academic requirements and had graduated with a degree on 6th December 2013, but the court declined to grant the orders sought in the plaint since the court had not been approached properly. In the wake of that, the petitioner engaged the respondent on how to settle the outstanding fees, but the respondent proceeded to revoke his degree and purport to print another. He states that the act of reprinting the degree certificate was likely to affect him adversely as the employer had written to him, on 16th August 2019, saying that the purported reprinting risked his being removed from employment.
5. The petitioner contends that as a result of the conduct of the respondent his fundamental rights and freedoms were infringed and or contravened, specifically the rights to fair administrative action, fair hearing and human dignity, provided in Articles 28, 47 and 50 of the Constitution of Kenya, 2010, which I shall hereafter refer to as the new Constitution.
6. The Petitioner seeks the following reliefs:

- (1) a declaration that the decision by the respondent to cancel the degree certificate issued to the petitioner on 6th December 2013 and to print another certificate was illegal and unlawful for violating his right to fair administrative action and fair hearing;
- (2) a declaration that the publication of a notice in national newspapers on 9th June 2017, communicating that the degree certificate issued to the petitioner had been withdrawn or recalled on account of financial fraud violated his human dignity;
- (3) an order of *certiorari* to quash the decision to cancel the degree certificate issued to the petitioner, being No. 071030, issued on 6th December 2013, and the communication of the decision by respondent through the letter of 13th June 2017;
- (4) damages for violation of the rights of the petitioner fair hearing, human dignity and fair administrative action; and
- (5) Costs.

7. The petitioner swore a detailed affidavit, on 29th August 2019, to verify the petition, by disposing to the facts set out in the petition, and attaching copies of the documents that he relies on to advance his case. Much of what is deposed in the affidavit is a reiteration of the averments made in the petition, although there are a few additions. One of them is that he is currently undertaking a postgraduate degree at Masters level with the Kenyatta University, and that he fears that cancellation of the certificate may have an impact on his postgraduate studies. He further argues that the action of revocation or cancellation of his degree certificate without affording him a hearing breached the rules of natural justice and was illegal, unfair, unproportional and unjust for reasons that he has set out in the affidavit. The reasons are that he was never given notice of the accusations against him concerning the degree despite his having graduated on 6th December 2013, he was never called for a hearing or given opportunity to be heard before the decision was made, the material information and evidence informing the decision was never supplied to him, the notice by the respondent to his employer indicated that the decision was prompted by the fact that he still owed fees to the respondent yet that did not amount to financial fraud since no criminal proceedings had been initiated nor findings made against him on the alleged financial fraud, despite a lower court finding that he had met all the academic requirements the respondent still went ahead with its actions ignoring the holding by that court, the fact that university fees were owing did not justify the action taken by the respondent, and that there was inordinate delay of six years between the date the certificate was issued and the date of cancellation.

8. As stated above, the petitioner has attached a number of documents to his affidavit. He has attached a copy of the degree certificate dated 6th December 2013 and copies of undergraduate academic transcripts. He has also attached the letter of employment from his employer dated 14th November 2016, a letter from the respondent to the petitioner's employer, dated 13th June 2017, listing the names of seven persons, including the petitioner, whose degree certificates had been cancelled. The other document is a notice/press statement published by the respondent in the *Standard* of 9th June 2017, inviting the graduates to collect their degree certificates by a certain date failing which the respondent would levy a charge for storing the certificates. The same document listed names of persons whose degree certificates had been cancelled, and who included the petitioner. There is also a copy of a student fees structure, dated 8th December 2017, raised with respect to old students, which indicates that the petitioner owed the respondent Kshs. 196, 800.00. He has also attached copies of the pleadings, orders and other filings in Kakamega CMCCC No. 384 of 2017. There are also copies of pleadings, filings and orders in ELRC JR No. 7 of 2018, a suit against the Teachers Service Commission, where the respondent was named as an interested party. There are copies of correspondence exchanged between the advocates for the parties hereto and the Teachers Service Commission, where the petitioner proposed that the suit in ELRC JR No. 7 of 2018, be marked as settled upon his paying the outstanding university fees of Kshs. 196, 800.00. The respondent was agreeable to that save that it could not commit to reissuance of the cancelled certificate, but was ready to issue the new degree certificate. The Teachers Service Commission indicated that they would only recognize the old certificate, since that was the basis of the employment, and if the old certificate could not be reissued, then then the petitioner would have to apply to be employed afresh based on the new certificate. The last batch of documents relate to the petitioner's registration as a postgraduate student at Kenyatta University.

9. The respondent's case, on the other hand, is stated in the response, comprised in the replying affidavit sworn on 17th September 2019, by Thomas Sakwa, an acting academic registrar with the respondent. It is averred that the petitioner became a student with the respondent sometime in 2009, after joining the institution's Faculty of Education and Social Sciences, to pursue a course leading to award of a degree of Bachelor of Education (Arts). The petitioner was said to have had difficulties paying fees, and had often to seek temporary or late registration for examinations pending payment of his university tuition fees. He completed his studies, after he had sat and passed all the required examinations, despite not clearing his fees. The respondent included his name in the graduation list of 6th December 2013, albeit erroneously, as he was yet to clear his university fees, which had accumulated to Kshs. 198, 800.00. Although the petitioner was allowed to graduate, by error, the respondent opted not to release his degree certificate to him until he paid the outstanding fees in full. The respondent then went ahead to print academic certificates for all the persons who had graduated in the ceremony of 6th December 2013, as was the usual practice, and that included the certificate for the petitioner, but the certificates were only released to such graduates as had cleared with the respondent, including paying any outstanding university fees. A degree certificate was prepared for the petitioner, and was assigned serial number 071030, to await collection by him, subject to him clearing with the respondent, and settling the outstanding university fees. It is averred that the petitioner did not collect his degree certificate and academic transcripts according to the respondent's records, as he did not sign the certificates collection record maintained by the respondent for graduates who collected their academic certificates and transcripts. It is further averred that sometime in June 2015, during routine stock-taking, the respondent discovered that the degree certificate for the petitioner and academic transcripts were among were missing from the store. His was among other ten students. The respondent attempted to contact the petitioner by telephone, from the contacts in its possession, to no avail. The respondent managed to reach three graduates, who indicated that they had not collected their degree certificates and transcripts. A report of the fact of the missing records was made to the police for investigation, which, it is averred, are still ongoing. Further to reporting the matter to the police, the respondent, through its senate and council, and according to its statutes, resolved to, and indeed, cancelled the missing degree certificates, to re-issue the graduates with fresh degree certificates bearing different serial numbers to avoid illegal use of the certificates by undeserving persons or whoever might have had stolen the certificates. Subsequent to that, the respondent caused a notice to be published in the *Standard* newspaper of 6th June 2017 of the cancellation of the said degree certificates which had not been officially collected by the graduates, but which were missing from the place where the respondent usually stored such materials. After publication of the said notice, a person, who claimed to be an agent of the petitioner, approached the respondent, sometime towards the end of 2017, and requested to pay the petitioner's fees by instalments so as to allow the petitioner continue serving as a teacher with the Teachers Service Commission. It is asserted that the petitioner never personally contacted the respondent, and that he only did so, through proxy, after his salary was stopped by the Teachers Service Commission.

10. The respondent avers that it was at the stage of the stoppage of the petitioner's salary by the Teachers Service Commission that it was realized that the missing degree certificates and academic transcripts belonging to the petitioner were illegally in his possession, having been either stolen or fraudulently obtained without the petitioner having cleared the outstanding university fees and without having officially collected them from the university. The respondent has itemized or particularized what it considers to be acts of fraud or forgery by the petitioner. These include the fact, according to the respondent, that the petitioner had not officially collected the said certificates and signed against his name in the official certificate collection register; the petitioner had not offered any explanation to the court or to the respondent as to how he obtained them without signing against his name in the certificate collection register to acknowledge collection and without clearing with the respondent and upon payment of the outstanding university fees; the certificate collection register maintained by the respondent indicated that the degree certificate and academic transcripts for the petitioner have not been officially collected from the respondent since 2013 to date; the petitioner was uttering before the court documents that were missing from the custody of the respondent and which had not actually be officially collected by him; the petitioner was an accomplice in fraud and forgery as he was fully aware that he had not cleared with the respondent and had not paid fees in full to enable him collect the degree certificate and the transcripts from the respondent; he was in possession of a degree certificate and transcripts which had been in custody of the respondent and which had mysteriously gone missing from the respondent's said custody; he admitted owing fees to the respondent which would disentitle him to collect the degree certificate and transcripts; and that he was purporting to have had acquired legal possession of the degree certificate and the transcripts after he had properly collected them from the respondent upon clearance. It is asserted that the petitioner obtained employment with the Teachers Service Commission using a degree certificate and academic transcripts that had been stolen from the respondent, and in respect of which he had not cleared with the respondent, inclusive of not paying in full the outstanding university fees.

11. The respondent further contends that although the case against the petitioner was still under investigation by the police, a number of the other graduates whose degree certificates were cancelled at the same time with the petitioners were arrested and arraigned in court, charged with offences related stealing. It is asserted further that the petitioner was a suspect for theft, and it is argued that by uttering the lost degree certificate and transcripts in court and purporting to be in legal possession of the same amounted to admission of a criminal offence, and it is submitted that the petitioner ought not to found his claim on an illegality. Consequently, the respondent avers, the petitioner has no right to claim that his rights and fundamental freedoms under the Constitution were violated by the respondent, since such rights and freedoms cannot be founded on an illegality. It is argued that the court ought not aid a claimant who founded his case on an immoral or illegal act as doing so would be a violation of both the law and public policy. The respondent avers that it has not violated the alleged rights and freedoms as alleged.

12. Three documents are annexed to the replying affidavit. The first annexure is a bundle of two letters, one dated 10th September 2009 and the other undated, purportedly written by the petitioner, to the respondent, asking to be allowed to register late or temporarily owing to non-payment of fees, and pleading to clear the balances outstanding promptly. There are endorsements on the two letters, presumably made by the officials of the respondent, allowing temporary registration. The second annexure is an extract from what the respondent has called the certificates collection register, indicating that the petitioner, and another student, Musumba Kevin Kombo, had not collected their degree certificates.

13. Directions on the disposal of the petition were given on 18th September 2019, for the canvassing of the petition through written submissions, to be highlighted. The parties confirmed filing of the written submissions on 14th July 2020, but opted not to highlight them, for they asked me to give them a date for judgment. I have perused the record before me, and noted that both sides have filed their respective written submissions. The petitioner's written submissions are dated 19th October 2019 and were filed in court on 22nd October 2020. The respondent's written submissions are dated 6th November 2019, and were filed in court on even date.

14. The petitioner has identified three issues in his submissions as for determination by the court – whether the action of the cancellation of his degree by the respondent without a hearing amounted to a fair hearing and fair administrative action, whether the said action was proportional and justified in the circumstances, and whether his right to earn a living and human dignity have been breached.

15. On the first issue, he submits that once an academic degree is issued by a university it cannot be withdrawn or cancelled capriciously. He cites Article 47 of the Constitution to argue that his right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. He also cites various sections of the Fair Administrative Action Act. He states that a person who was likely to be affected by a decision should be given an opportunity to be heard. He also submits that any administrative action must be taken expeditiously. He argues that cancellation of a degree certificate five years after graduation meant that the decision was not taken expeditiously. He submits that after graduation, the petition had ceased to be a student, and the respondent had no control over him. He also submits that the respondent did not dispute that the petition had qualified for award of the degree in question. He argues that although the fact that the degree certificates were missing was established in June 2015, no action was taken on the matter until June 2017. He further argues that the respondent was purporting to cancel a degree certificate that had not yet been released. He has cited decisions in *Waliga vs. Board of Trustees of Kent State Univ.*, 488 NE 2d 850, 852 (Ohio 1986), *Eliud Nyauma Omwoyo & 2 others vs. Kenyatta University* [2014] eKLR, *The Kenya National Examinations Council vs. Republic, ex parte Kemunto Regina Ouru*, Nairobi Civil Appeal No. 127 of 2009, and *Republic vs, Kenya National Examinations Council, Ex parte HN G suing as a friend and parent of AHN* [2016] eKLR.

16. On the second issue, he submits that the cancellation of his degree more than five years after graduation, on alleged non-payment of university fees, was unproportioned. It is submitted that the decision did not strike a proper balance between the accusation and the punishment. He asserts that the main issue appears to be the non-payment of university fees, and the respondent had no issue at all with the validity of the academic qualifications. He wonders why the respondent cannot just claim the fees due instead of cancelling the degree. He points out that the consequence of the reprinting of the degree is that he will lose his job, and it is also likely to affect his postgraduate studies. He also raises the issue of the publication of his name in national newspapers and communicating with his employer as having committed financial fraud with regard to proportionality. He submits that he had made efforts to resolve the matter amicably to no avail. He cites the decision in *James Opiyo Wandayi vs. Kenya National Assembly & 2 others* [2016] eKLR.

17. On the third issue, that is regarding breach of the petitioner's right to human dignity, he submits that he was painted a fraudster when a notice was carried in media about financial fraud, yet no criminal proceedings relating to the matter were ever initiated against him, neither had any decision been made as against him. He submits that he was a teacher by profession, and the said publication had affected his dignity, respect, reputation and self-worth. He points to the fact that his salary was stopped, and was only reinstated after he obtained an order in

ELRC JR No. 7 of 2018. The said action was regard by the respondent, and it meant that the petitioner went without a salary for five months. He submits that the respondent had no evidence that he obtained employment on the basis of stolen documents, and accuses the institution of malice. He cites *National Media Ltd and others vs. Bogoshi* (579/960[1998] ZASCA 94, to support his contention.

18. In its written submissions, the respondent argues that the degree certificate in possession of the petitioner was illegitimate and unlawfully acquired without clearing with it. It accuses the petitioner of filing multiple suits: Kakamega CMCCC No. 384 of 2017 which was dismissed; and ELRC JR No. 7 of 2018, where he obtained interim relief, and which suit is still unheard. It is submitted that the issues raised in this petition were also raised in those other two suits. The respondent identifies only one issue for determination, whether in law or equity the constitutional court can lend constitutional aid to a petitioner who founds his claim of constitutional rights on an illegality. It is argued that the judgement in Kakamega CMCCC No. 384 of 2017 had found that the plaint was defective and the Chief Magistrate's court had no jurisdiction.

19. It is submitted that the remarks of the trial magistrate on the veracity of his claims were made *obiter dicta*. It is submitted that the petitioner had financial problems during his studies and on numerous occasions had tuition arrears, he did not clear and has not cleared his university fees, he had not cleared from the respondent university, had not officially collected his university degree certificate and academic transcripts and had not signed the certificate collection register, the petitioner's degree certificate went missing from the respondent's custody, the said documents were in the possession of the petitioner, the petitioner had not explained how he came to be in possession of the said documents, the loss of certificates was reported to the police, there was a criminal case pending before the criminal courts arising from that loss affecting one of the graduates involved, and the petitioner got employment based on a degree certificate that the respondent had reported as lost. The respondent submits that the said certificate and other documents were forged or fraudulent, and were *void ab initio* on account of having been illegally taken possession of from it, and, therefore, the petitioner was stopped from uttering the said documents to the court. It is submitted that the court had no jurisdiction to aid a petitioner who stole, or irregularly and unlawfully took possession of a degree certificate from the respondent, and the petitioner founds his cause of action and alleged violation of rights and freedoms on an illegality. Several cases have been cited to support that contention, being *David Sironga ole Tukai vs. Francis arap Muge & 2 others* [2014] eKLR, *Kenya Ports Authority vs. Fadhil Juma Kisuwa* [2017] eKLR, and *Nakuru Industries Limited vs. Vinod Shah & 2 others* [2016] eKLR.

20. It is also submitted that the petitioner should not be permitted, to rely on a degree certificate obtained without clearing tuition fees and without clearing with the respondent, seek employment based on it and then purport to enforce his alleged constitutional rights over the illegally acquired or "possessed" degree. It is reiterated that the petitioner obtained the degree certificate and official transcripts from the respondent by fraud, and submitted that the petitioner cannot purport to lament violation of his constitutional rights founded on that fraud. *Lazarus Estate Ltd vs. Beasley* [1956] 1 All ER 341 and *Nabro Properties Ltd vs. Sky Structures Ltd & 2 others* [2002] eKLR have been cited to support these contentions. It is submitted that the petitioner authored an illegality, and he should not take advantage of that illegality to allege violation of his otherwise non-existent constitutional rights and fundamental freedoms. It is submitted that he cannot avail himself of his own wrongdoing. It is also argued that the court should not be used to legitimize illegal and fraudulent actions of a party who obtained documents through fraud. It is also submitted that it would be against public policy for the court to lend a hand to a party who has committed an illegality, which illegality is the basis of his alleged violation of the rights and fundamental freedoms. *Alberta Mae Gacie vs. Attorney-General & 4 others* [2006] eKLR and *Christ for All Nations vs. Apollo Insurance Co. Ltd* [2002] 2 EA 366 are cited to support that argument.

21. It is also argued is that the petitioner had admitted that he had outstanding tuition fees, of Kshs. 198, 800.00, which he did not clear with the university, he never collected his degree certificate, and he did not sign the certificate collection register. It is submitted that the degree certificate mysteriously disappeared from the respondent university, and the petitioner now acknowledges to be in his possession, and that he used the degree certificate to obtain employment. It is submitted that the petitioner had not done equity. It is submitted that the petitioner's self-worth and self-respect was thrown out of the window by himself when he got possession of the degree certificate irregularly, unlawfully, illegally and through deceit and approached the court through misrepresentation and material nondisclosure. It is submitted that the violation of constitutional rights to fair administrative action, fair hearing, dignity, legitimate expectation and proportionality are irrelevant and inapplicable, since fraud unravels it all.

22. The second argument is with relation to compliance with the respondent's university statutes, particularly the one which provided that a candidate for a bachelor's degree could be conferred with a degree provided that they pay such fees as may be determined by the respondent's organs from time to time, or he otherwise complies with other respects of the requirements of the degree. It is submitted that the petitioner had not complied with the requirement on payment of fees. It is argued that when he learnt of the fact of the cancellation of his degree certificate and the reprinting of a fresh one with a serial number, he attempted, through proxy, to clear the balance of the tuition fees, on condition that the degree was not recalled. It is submitted that even though the petitioner's name had been erroneously entered in the graduation list, the petitioner had not satisfied the respondent's statutes, and the respondent had decided to recall the certificate pending fulfilment of that requirement. It is submitted that the respondent acted lawfully in withholding the petitioner's degree certificate, and in recalling it, and should not be lambasted for allegedly violating the petitioner's nonexistent constitutional rights. *Disa Enterprises Ltd vs. Kenya Power & Lighting Co Ltd* [2013] eKLR, is cited to support that argument. It is argued that fair administrative action and fair hearing are constitutional rights that cannot be predicated on an illegality, fraud, deceit, misrepresentation and material nondisclosure. It is submitted that the decision whether or not to confer a degree on a student or to retain a degree certificate obtained illegally was at the sole discretion of the respondent. *Nyongesa & 4 others vs. Egerton University College* [1990] eKLR and *John Owino Obunde (suing for and on behalf of 82 others) vs. Technical University of Mombasa & another* [2016] eKLR are cited for the purpose of that argument. The respondent's statutes are cited for the proposition that the respondent reserved the right to cancel a degree certificate of a graduate involved in some fraud or misconduct likely to bring the image of the respondent into disrepute. It is submitted that the conduct of the petitioner amounted to fraud. It is submitted that the petitioner had not proved that his constitutional rights were proved, and it is emphasized that it is trite law that he who alleges must prove, and failure to prove an allegation must be dismissed, as was stated in *Daniel Toroitich arap Moi vs. Stephen Mureithi & another* [2014] eKLR. It is pleaded that the petition be dismissed, with costs being awarded to the respondent. *Hussein Jan Mohamed & Sons vs. Twentsche Overseas Trading Co. Ltd* [1967] EA 287, is cited to support that contention.

23. Let me address something that appears not to come out clearly from the pleadings. The petitioner complains about recall or withdrawing or cancellation of his degree. There is also talk of a fresh degree certificate being printed. What I understand to be the case is that the respondent has purported to cancel a degree certificate but not withdraw the degree itself, for the question of the petitioner having validly

earned it is not in question. The issue appears to me to be that the respondent discovered that degree certificates that it had in its custody, that is to say certificates that had not yet been given out to or collected by the graduates, were missing from the store or the place where they were normally kept. Attempts were made to contact the eleven (11) graduates affected, who included the petitioner, and when the respondent failed to reach most of them, it was decided, by the respondent, that the matter be reported to the police, and later that the degree certificates in question be withdrawn and fresh certificates printed with new series numbers, to obviate situations where the said certificates fall into the hands of the wrong persons, and who would then use them to the disadvantage of the actual holders. That is what I understand the respondent to be saying. The intent was not to recall the degree certificates permanently. However, since the certificates were withheld because the graduates had not cleared their fees, it was resolved that the graduates would collect only upon them settling the outstanding fees fully.

24. It would appear that the cancellation and the printing of fresh certificates had unintended consequences. It would appear that seven (7) of the graduates had since been employed by the Teachers Service Commission, and the respondent, decided to notify the said employer of the said cancellation and reprinting of the certificates, vide a letter, since the fact of the cancellation had been published in a paid notice in the *Standard* newspaper. It would appear to have been a fairly simple and straightforward matter, that could have been resolved by issuance of fresh certificates with new serial numbers, with the expectation that the Teachers Service Commission would amend its records accordingly.

25. However, the stance taken by the respondent in the pleadings appears to be only one side of the story. Whereas the respondent appears to say that the cancellation was intended to avoid the certificates falling into the hands of the wrong people, and with a view of the certificates being later reprinted upon the graduates paying the outstanding fees in full, the advertisement in the *Standard* stated that the said certificates were either counterfeit, or obtained through financial fraud, or were subject to pending cases; and went on to inform employers to whom the same might have been presented that the same were invalid. The letter to the Teachers Service Commission, was intended to explain, for the benefit of the seven employed by that entity, that the cancellation had something to do with financial fraud, the certificates had been found missing during stock taking exercise and that the graduates still owed the respondent. When the Teachers Service Commission received that information it stopped the salary of the petitioner, and required him to resolve the issue with the respondent. The Teachers Service Commission made it clear that a reprint of the same certificate with a new serial number would not resolve the matter, since the petitioner had been employed on the basis of the old certificate, and cancellation of the old certificate meant that he ought to be removed from the register, and apply afresh for employment using the new certificate with the fresh serial number. It is this little matter of stoppage of salary, removal from employment and reapplying for employment that triggered the litigation.

26. The petitioner argues that the decision by the respondent would have the profound effect of him losing his employment, yet he had in fact successfully completed his university studies, passed his examinations, graduated and had in his possession a degree certificate issued by the respondent, which he had presented to his employer, who had accepted it. Because of the profound consequences of that decision, the petitioner argues that the respondent ought to have taken fairer administrative action and given him a fair hearing before it made the decision. He appears to say that it was the respondent who allowed him to graduate and who issued him with the degree certificate that he used to obtain employment, and the respondent cannot now take a decision to cancel the certificate with the consequence that he could leave his employment.

27. To that the respondent counters that, although the petitioner had in fact passed all his examinations, qualifying him for graduation, there was the small matter of university fees that he had not paid or cleared before he graduated. It is conceded that the respondent did allow the petitioner to graduate despite not paying his fees in full, but it is argued that the same was by error, and it was hence justified to recall the certificate. Secondly, it is argued that since the petitioner had not cleared his university fees, the respondent had decided to retain his certificate as lien until he had paid in full, and that explained why his degree certificate was still in the institution's possession. The respondent then discovered that the degree certificate was no longer in its possession, at a routine stock-taking, and thereafter attempted to contact the graduates in question, to establish whether or not they had their certificates. They were not able to reach the petitioner. The respondent appears to imply that the fact that the petitioner turned out to have his degree certificate meant that he had something to do with how the certificates disappeared from its custody, since he had not officially collected the same from the respondent, as he was yet to pay the university fees in full. According to the respondent, it also meant that he must have come into possession of the said degree certificate through an unlawful manner. The unlawfulness of the process, whatever it was, that placed the certificate in his possession meant that the certificate was not authentic or valid, and could not be uttered for the purpose of the petitioner's employment.

28. The petitioner has not sought to explain how he came to be in possession of the certificate. He did not file a response to the replying affidavit filed on behalf of the respondent, and, therefore, the allegations made in there are not controverted. He has not explained whether he collected the certificate from the respondent, and whether he signed the relevant registers or other relevant records. That would imply that he never collected the certificate as alleged by the respondent, but he asserts that he was not responsible for the clearance to graduate. He further argues that being allowed to graduate cleared the way for issuance of the degree certificate, and that there was no wrongdoing on his part. He also argues that he is also not to blame for being issued with the certificate before he cleared fees, and the fact that there was an outstanding balance was not a good enough excuse to cancel his certificate, for the respondent could use other means to enforce payment.

29. The petitioner alleges that his rights to fair administrative hearing and fair trial, as envisaged, in Articles 47 and 50 of the Constitution, have been violated by the respondent. He further alleges that the respondent's acts have also violated his rights as provided for under Article 28 of the Constitution, as the same have depicted him as one who cannot be trusted, and as a person who was in breach of the Teachers Code of Conduct. The question that I have to first grapple with is whether there was violation of the petitioner's constitutional rights as alleged.

30. Article 47 of the Constitution provides:

“(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.”

31. The Court of Appeal, in *Judicial Service Commission vs. Mbalu Mutava & another* [2015] eKLR, stated as follows, with regard to Article 47:

“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.”

32. In *Dry Associates Limited vs. Capital Markets Authority and another Interested Party Crown Berger (K) Ltd* [2012] eKLR, the court observed:

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”

33. In *Standard Resource Group Ltd vs. Attorney General & 2 Others* [2016] eKLR, the court stated:

“31. Article 47 of the Constitution as implemented by Fair Administrative Action Act No. 4 of 2015 is clear that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair (Section 4(1)). Under Section 4(2) thereof every person has the right to be given written reasons for any administrative action that is taken against him. 3) where an administrative action is likely to adversely affect the right or fundamental freedoms of any person, the administrator shall give the person affected by the decision.

32. The Act further lists other essentials as follows:

- a. Prior adequate notice of the nature and reasons for the proposed administrative action;
- b. An opportunity to be heard and to make representations in that regard;
- c. Notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. A statement of reasons.
- e. A notice of the right to legal representation, where applicable;
- f. Notice of the right to cross examine, or where applicable.”

34. The court in *Kenyan Human Rights Commission & another v. Non-Governmental Organization Co-ordination Board & another* (2018) eKLR, stated:

“40. ... Administrative actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. Accordingly a party, a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

41. This court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”

35. The petitioner herein contends that the respondent did not accord him any hearing before taking the adverse action that it intended to take on his certificate, especially taking into account that he had met all the academic requirements and graduated. The respondent submits that the decision to have the certificates cancelled and fresh ones issued was because the certificates were missing, and that it was taking precautionary measures to avoid a situation where the said certificates were misused to the detriment of the respondent and that of the graduate. It was the respondent’s case that it tried to contact to petitioner, and the other affected graduates in vain, hence the decision to revoke the lost certificates, and the issuance of fresh ones.

36. It is trite that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and point out how the same have been or will be infringed in respect of him. It was stated in *Leonard Otieno vs. Airtel Kenya Limited* (2018) eKLR:

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

(See also *Githunguri Dairy Farmers Co-operative Society Ltd vs. Attorney General* [2016] eKLR).

37. The respondent defends its action on the basis that the certificate went missing while in its possession, and that it was apprehensive that the same could have fallen into hands of unscrupulous persons, who could possibly misuse it. The respondent feared so as the persons whose names appeared in the certificates had neither cleared with the respondent nor officially collected the said certificates. It alleges that the petitioner had a pending fee balance that he was yet to settle to facilitate or pave way for release of the degree certificate to him. The petitioner does not dispute that contention. He also does not give an explanation as to how he obtained or came to be in possession of the said certificate. The respondent has stated that it tried to contact the petitioner but all was in vain. The petitioner has, despite having gained employment, not settled the fees balance owed by him to the respondent. Although the respondent stated that it had reported the matter of the missing certificates to the police, and that there is an ongoing criminal case arising therefrom, no concrete evidence was placed before the court, of the alleged reports or an existing criminal case connected to the petitioner. The applicant herein has not yet been charged and the matter is still pending investigation.

38. According to the respondent, the subject certificates and transcripts were lost hence the decision to cancel them. The petitioner has not given an explanation as to how he obtained the same without the knowledge of the respondent. Had he informed the respondent that he had possession of the documents, perhaps there would have been no need for the respondent to make a decision to cancel them. From the evidence, it is clear the circumstances that gave rise to the decision to cancel the certificates was not one that would give rise to administrative action that necessitated a hearing. In the circumstances the respondent legitimately thought that it still had possession of the documents, and that the disappearance of the documents was its responsibility. The respondent, from the evidence, was clearly taking measures to protect its interests and those of the petitioner on the basis of the “lost” documents. There is no law barring the respondent from reporting lost documents to the police, and having them cancelled to shield itself from liability for any misuse of the lost documents. The petitioner has not demonstrated how he expected the respondent to have acted given that it was not aware that he had in fact taken possession of the documents. It is, therefore, my finding that the petitioner has failed to justify and prove the violation of Articles 47 and 50 of the Constitution that he has alleged.

39. On the other issue, as to whether the petitioner’s rights, as provided under Article 28 of the Constitution of Kenya 2010, were violated, the petitioner contends that the respondent’s act of publishing a notice in a newspaper of nationwide circulation, announcing that the said certificates were either counterfeit or obtained by financial fraud or subject to pending cases, was malicious, and was detrimental to him. The evidence presented provides support for this allegation as the respondent also wrote to the petitioner’s employer stating that the certificates were cancelled for reasons that had something to do with financial fraud. The respondent has stated that the matter of the lost certificates was reported to the police and the case relating to the petitioner was still under investigation by the police. As stated elsewhere, the petitioner is yet to be charged with the alleged financial fraud or any other charges related to the missing certificates. It was, therefore, improper for the respondent to have imputed financial fraud or theft on the part of the petitioner in the absence of a conviction. It would appear that it was also improper to write to his employer alleging that the certificate he had used when he sought employment was counterfeit, given the background that he had passed all his examinations and had in fact graduated. It is trite law that one is always presumed innocent until proven guilty. The respondent’s actions, cited above, constituted a violation of the petitioner’s rights to human dignity. See *JWN vs. Securex Agencies (K) Limited* [2018] eKLR.

40. The next issue for consideration is whether the court can grant orders of *certiorari* against the decision by the respondent to cancel the applicant’s certificate. The court in *Kenya National Examination Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, discussed the circumstances under which the court could issue a *certiorari* order, and said:

“...the Order of Certiorari can quash a decision already made as an Order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or so such like reasons.”

41. The broad grounds upon which the court exercises judicial review jurisdiction were stated in *Pastoli vs Kabale District Local Government Council & Others* [2008] 2 EA 300, as follows:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.

...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

42. So was the decision of the respondent irrational, unreasonable and procedurally improper? As stated above, the respondent did what it did to ensure that the certificates did not fall into the wrong hands, and, therefore, it cannot be said that the respondent acted irrationally, unreasonably or procedurally improperly in making the decision to cancel the certificates. Moreover, the petitioner has not demonstrated how the decision was irrational, unreasonable or procedurally improper to warrant granting of the orders sought.

43. Having established that the applicant's right to dignity was violated, the court is mandated to determine whether he has established sufficient grounds to warrant being compensated for that breach.

44. The Court of Appeal, in *Gitobu Imanyara & 2 others vs. Attorney General* [2016] eKLR, expressed itself on the matter of damages as compensation for violation of fundamental rights, where it said:

"The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of Siewchand Ramanoop vs. The AG of T&T, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminus with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.

All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award". (emphasis ours)

45. The instant case arose from the disappearance of certificates that were in the custody of the respondent. As stated above, the respondent was performing its ordinary duty to protect itself and the petitioner, when it made the decisions that it made. The petitioner has not come clean on how the certificate, meant for him upon its disappearance from the custody of the respondent, came to be in his possession. Secondly, the petitioner, despite working for several months, after getting employment using the said certificate, that disappeared from the custody of the respondent in unclear circumstances, and came into his possession in a manner that he has been unwilling to explain, has not seen it fit to clear the moneys that he owes the respondent as outstanding fees. Thirdly, I note that the petitioner has the money to pay for postgraduate studies, when he still owes the respondent the moneys for his undergraduate tuition and boarding fees. It is a well-known maxim of equity that "he who comes to equity must come with clean hands." It is my finding that the petitioner's hands were not clean from the word go. He should be the last person to point an accusing finger at the respondent. I am not persuaded that this is a proper case to award damages, for the justice of it does not favour grant of damages.

46. In the end, they only order that I should make, in respect of the petition before me, is the declaration that given the circumstances of the case there was violation of the petitioner's rights under Article 28 of the Constitution. The petitioner is, however, not entitled to damages for that violation, for the reasons given above. There shall be no order as to costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 16th DAY OF October 2020

W MUSYOKA

JUDGE