



**Kamau & another (Suing on their own behalf and on behalf of 80 University of Nairobi Law School Students) v The University of Nairobi & 2 others; Attorney General & another (Interested Parties) (Constitutional Petition E213 of 2020) [2020] KEHC 9221 (KLR) (Constitutional and Human Rights) (14 December 2020) (Judgment)**

Neutral citation: [2020] KEHC 9221 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**CONSTITUTIONAL PETITION E213 OF 2020**  
**AC MRIMA, J**  
**DECEMBER 14, 2020**

**BETWEEN**

**DANIEL CHEGE KAMAU ..... 1<sup>ST</sup> PETITIONER**  
**KELVIN MUGAMBI KUBAI ..... 2<sup>ND</sup> PETITIONER**  
**SUING ON THEIR OWN BEHALF AND ON BEHALF OF 80 UNIVERSITY OF NAIROBI LAW SCHOOL STUDENTS**

**AND**

**THE UNIVERSITY OF NAIROBI ..... 1<sup>ST</sup> RESPONDENT**  
**THE VICE CHANCELLOR UNIVERSITY OF NAIROBI ..... 2<sup>ND</sup> RESPONDENT**  
**COMMISSION FOR UNIVERSITY EDUCATION ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**HON. ATTORNEY GENERAL ..... INTERESTED PARTY**  
**NATIONAL ASSOCIATION OF PRIVATE UNIVERSITIES IN KENYA (NAPUK) ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petitioners are duly registered students in the Faculty of Law in the University of Nairobi. Some are pursuing undergraduate studies leading to the award of Bachelor of Laws degree whereas others are post graduate students undertaking Masters of Laws degree studies.



2. In the main, the Petition challenges the decision by the 1<sup>st</sup> Respondent to commence online classes and examinations as opposed to the physical class appearances which the Petitioners were undertaking before the advent of the Covid-19 pandemic. The Petitioners contend that they were not consulted before that decision was made. They also accuse the 3<sup>rd</sup> Respondent of dereliction of its duty to safeguard quality standards in the provision of legal education offered by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

### **The Petition and Submissions:**

3. The Petition is dated 22<sup>nd</sup> June, 2020. It is supported by three affidavits of Daniel Chege Kamau sworn on 19<sup>th</sup> June, 2020, 24<sup>th</sup> July, 2020 and 25<sup>th</sup> August, 2020 respectively. The affidavits are a Supporting Affidavit, a Further Affidavit and a Further Further Affidavit.
4. The Petitioners contend that sometime in 2019, some of them enrolled for Masters of Laws programme while others in diverse years enrolled for a Bachelor of Law degree programme with the 1<sup>st</sup> Respondent. It is averred that all the Petitioners enrolled for physical class-based programmes and not for online and or distance learning programmes and examinations.
5. The Petitioners further contend that they settled to pursue their studies from the 1<sup>st</sup> Respondent which institution they considered as the best in the region in terms of its academic staff and experience for the physical class-based programmes and not the online and or distance learning programmes.
6. The studies were, however, interrupted as a result of the deadly COVID -19 pandemic that hit Kenya and the world at large leading to closure of all learning institutions in Kenya. The 1<sup>st</sup> Respondent was, as well, affected and the institution was closed sometimes in March 2020.
7. In April 2020, the Petitioners contend that the 1<sup>st</sup> Respondent arbitrarily and without any consultation or involvement of the Petitioners made a unilateral decision to instead offer online academic programmes and examinations (hereinafter referred to as ‘the impugned decision’). It then issued a Memo on 13<sup>th</sup> May, 2020 informing the Petitioners that online classes would commence on 18<sup>th</sup> May, 2020. It is further contended that the online programmes attracted further fees instead of a reduction and required the Petitioners to purchase internet bundles or online services, laptops, e-books, e-content, among other gadgets and materials so as to facilitate and be able to fully participate in the online programmes.
8. The Petitioners protested. They sought a cessation of the online programmes pending deliberations. The Petitioners are also apprehensive that since the 1<sup>st</sup> Respondent requires at least two-thirds class attendance before students can sit for examinations, then the change of the mode of learning coupled with the enormous costs thereon makes it almost impossible for the Petitioners to fully participate in the online programmes more so due to the challenges arising out of the COVID -19 pandemic.
9. The 1<sup>st</sup> Respondent, it is alleged, declined to deliberate the matter with the Petitioners hence the filing of the Petition subject of this judgment.
10. The Petitioners aver that the impugned decision contravenes Articles 10(2), 26, 27, 29(a) & (d), 33, 43(1)f, 46(b) & (d) and 47 of *the Constitution*, the *Fair Administrative Action Act*, the *Consumer Protection Act* as well as the principles of the law of contract and violates their legitimate expectation and should therefore be rendered void.
11. The Petitioners, therefore, seek the following orders: -
  - a. A declaration that the respondents’ decision of commencing and conducting online classes contravenes Article 10(2), 22, 23(3), 24, 27, 33(1)(c), 43(1)(f), 46(a), (b) & (c) and 47(1) of



the Constitution and the Fair Administrative Action Act the Consumer Protection Act and the Universities Act are thus unconstitutional, illegal, irregular, null and void.

- b. An order of CERTIORARI quashing the decision of the 1<sup>st</sup> Respondent's Senate directing the commencement of online classes and examinations.
  - c. An order that the 1<sup>st</sup> Respondent, its agents, servants or employees be restrained from derogating from the physical class-based academic calendar or program and or be restrained from substituting the physical class-based with online classes.
  - d. An order of a permanent injunction restraining the 1<sup>st</sup> Respondent, its agents, servants or employees from continuing with online classes and conducting online examinations.
  - e. An order that any future online classes and examination be conducted after proper consultation and participation of the Petitioners.
  - f. An order that any online classes and examination be conducted after consultation and public participation be at reduced fees of 50 percent of the normal fees for the physical class-based program.
  - g. Any other relief that the Honourable Court may deem fit and just to grant.
12. The Petitioners filed submissions dated 25<sup>th</sup> August, 2020. The Petitioners submitted on five issues. The first issue is whether there was public consultation or participation in arriving at the impugned decision. It is argued that the 1<sup>st</sup> Respondent, being a public institution, and the 2<sup>nd</sup> Respondent, who is a public officer, are bound by Article 10 of the Constitution. (I will hereinafter refer to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents collectively as 'the University').
  13. It is further argued that the University did not adequately consult the Petitioners or carry out any meaningful public participation prior to coming up with the impugned decision. The decisions in Robert N. Gakuru & Others –vs- Governor Kiambu County & 3 Others [2014] eKLR, Javan Oscar Bulemi (Suing as Secretary General Tiriki Union (EA) v Permanent Secretary, Ministry of Internal Security and Provincial Administration & 2 others [2015] eKLR, Institute of Social Accountability & Another –vs- National Assembly & 4 others [2015] eKLR were referred to in buttressing the submission.
  14. The second issue is whether the Respondents' actions were discriminatory to the Petitioners. Citing Article 27 of the Constitution and the Court of Appeal decision in Mohammed Abduba Dida v Debate Media Limited & Another, the Petitioners submit that the Respondents discriminated against the Petitioners on the basis of economic status. To that end, the Respondents failed to consider the fact that the students had varying economic status and that if the impugned decision was to be implemented then all the students ought to have been placed on a level playing field by at least issuing all the students with sim cards and supply sufficient internet bundles for connectivity.
  15. To remedy the discrimination between the financially able students and the financially constrained students, it is submitted that the online programmes be made optional until the resumption of the face-to-face learning in the University.
  16. The third issue is whether the contract between the University and the Petitioners is justiciable in constitutional law and whether fees payable to the Respondent's institutions for online programme should be reduced by 50%. It is submitted that the contract between the Respondents and the Petitioners fall within consumer protection under Article 46 of the Constitution and Part III of



the Consumer Protection Act which legal regime offers protection to consumers against unfair and unconscionable practices and therefore the matter is justiciable before Court.

17. In citing SPG (Suing as parents and guardians of students minors currently schooling at Sabis® International School – Runda) v Directors, Sabis® International School - Runda & 3 others [2020] eKLR the Petitioners relied on the Court’s analysis on the justiciability of the consumer contracts where it was held that “in a number of respects, consumers benefit from human rights protection, being viewed in a broad context of consumer activity; for example, interest in human health and physical integrity – which indeed feed in to the right to life – one already well established in the case of protection; and then projection as consumer rights is then a matter of context.”
18. Laying a basis for the reduction of the fees by half, the Petitioners submit that the online classes do not accord the Petitioners the physical access to all the services that they used to access during the physical based programme, that the Petitioners will now bear the cost of the internet so as to access the classes and also bear the burden of securing a space and or place to conduct their studies. It is argued that it is, therefore, illogical and unreasonable for the University to charge fees for the online classes similar to physical based classes and the Petitioners submit that it can only be fair that the fees reduced by one-half.
19. The other issue is the integrity and quality of the online learning and examinations offered to the Petitioners. It is argued that to be able to offer quality online teachings and examinations, the 3<sup>rd</sup> Respondent, and not the University, has a duty to ensure that the University acquires duly qualified lecturers capable of competently offering the required services to enable the employability of the graduates as well as professional recognition of the Petitioners by their respective professional bodies for professional practice. On the strength of Kenya Medical Laboratory Technicians and Technologists Board & 4 others v Attorney General; Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties) [2020] eKLR, the Petitioners submit that the accreditation, licensing and recognition of university education is solely vested into the 3<sup>rd</sup> Respondent as opposed to multiple bodies manned by professional bodies.
20. The Petitioners further made a passionate case for the involvement of the professional bodies in accreditation of university qualifications and programmes. Citing the Supreme Court in Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR the Petitioners argued that even though the professional bodies have no mandate in accreditation of university qualifications, they still have a role in professional recognition for the purposes of professional practice and an institution of higher learning like the 1<sup>st</sup> Respondent has the responsibility to guarantee quality educational services and to ensure that the qualifications are recognized by the professional bodies in which the graduates ought to work or practice under in future.
21. The Petitioners submit that the Respondents did not ascertain the quality of the online classes and the integrity of the online examinations, so as to guarantee the professional recognition of the qualifications obtainable through the online programmes, thereby jeopardizing the academic progress of the Petitioners as well as their future careers and the utilization of the qualifications in the future in the professional practice.
22. The Petitioners also raised the issue of the Respondents limiting the Petitioner’s rights without attaining the threshold under Article 24 of the Constitution. Relying on the Supreme Court in Karen Njeri Kandie v Alassane Ba & Another [2017] eKLR the Petitioners submit that the Court held that the test to be applied in order to determine whether a right can be limited under Article 24 of the Constitution, is the ‘reasonable and justifiable test’, that must not be conducted mechanically but on a



- case-by-case basis, examining the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society.
23. The Petitioners therefore submit that the online programmes ought to be optional and students be allowed to carry on with their studies from the point they stopped at the time of closure of the institutions. It is also submitted that if the online classes are to be conducted then adequate public participation, remedial classes and examinations be offered to the Petitioners so as to protect the constitutionally-guaranteed rights of the Petitioners.
  24. On whether the Petitioners have pleaded with precision the violation of their rights, the Court of Appeal in *Mohammed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others* [2016] eKLR was relied on for the position that the constitutional text now doubtless presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times.
  25. The Petitioners submit that even though they pleaded with precision the violations or threatened violations of their rights under *the Constitution* from paragraphs 30 to 41 of the Petition, the strict insistence on formality in the particularization of the violations is an antithesis to the spirit and letter of Constitution in the promotion of human rights and fundamental freedoms.
  26. The Petitioners urged that the Petition is merited and ought to be allowed as prayed.

#### **The Responses and Submissions:**

27. The Petition is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents (The University) and the 2<sup>nd</sup> Interested Party. The 3<sup>rd</sup> Respondent and the 1<sup>st</sup> Interested Party did not take part in the hearing.
28. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on a Replying Affidavit sworn by Collins Omondi on 14<sup>th</sup> July, 2020.
29. It is deponed that the practice of distance learning in the University of Nairobi dates back to 1967 and that the University has since then recognized and sustained that mode of learning under *the Constitution*, the *Universities Act*, 2012 and the University of Nairobi Charter, 2013.
30. On the basis of Section 6 of the University of Nairobi Charter 2013 as read together with the Commission for Universities Education (Universities Regulations, Standards and Guidelines) 2014, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents further aver that in fulfilling the right to education, the University recognizes e-learning/visual learning as a means of delivering education through the use of print, audio-visual, electronic or other technical medium in order to offer learning opportunities to students and educators in an online environment in all the programmes the University offers.
31. Faced with the uncertainties resulting from the effects of the COVID-19 pandemic, the University discussed the possibility of resumption of the physical class programmes in the Senate and reached the impugned decision. It is contended that the University's Senate is the only organ under the University of Nairobi Act and the University of Nairobi Charter mandated to approve academic programmes and guidelines on classes and examination including but not limited to the delivery of classes and examination. As such, the impugned decision is both constitutional and legal.
32. On the issue of the Petitioners' public participation towards the adoption of the impugned decision, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the Petitioners were duly and fully represented by their Student Leadership and Class Representatives who sits in the Senate. That, the Senate held special online meetings on 31<sup>st</sup> March, 2020 and 8<sup>th</sup> May, 2020 where the Students Leadership and the



Class Representatives duly attended, and upon meaningful deliberations, the resolution to adopt the impugned decision was arrived at.

33. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further contend that the Letters of Offer by the University to the Petitioners and other students did not in any way exclusively state that the mode of instruction will be face-to-face. It is deponed that even the University's Standards and Guidelines 2014 PROG/STD/11 formulated by the 3<sup>rd</sup> Respondent clearly provide for various modes of instruction to the students and that the Council of Legal Education fully supports online instructions for the law programme at the University.
34. The University avers that the Senate, as its supreme organ, was well guided by *the Constitution* and the law and took into account all relevant considerations in arriving at the impugned decision. It is also averred that neither the University Students' leadership nor the Class Representatives, who were part of the Senate sittings, ever raised any issue against the impugned decision.
35. The University further avers that the impugned decision calls upon all students to participate in online classes and examinations and that those who, for any reason, are not able to undertake the online classes and examinations have an option of applying to defer their studies. According to the University, the unwillingness of a few students to adopt the online system of learning and examinations should not subject the entire body of students to unnecessary inconvenience and deny them their fundamental right to education.
36. It is deponed that the Petitioners did not avail any evidence on how the impugned decision does not stand the test of *the Constitution* and the law. It is further deponed that the impugned decision was arrived at upon the joint recommendation of the Ministry of Health and the Ministry of Education and that due to the ravaging effects of COVID-19 pandemic it is impossible for the University to offer face-to-face lectures and/or classes and that the online mode of delivery of the content and examinations remain the only viable means of learning, and in any case, the students have access to an online library.
37. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are opposed to the demand that the online based programmes be offered at a reduced fee of 50%. The University contends that despite the fact that the proposal is without any valid basis, it is tantamount to inviting the Court to interfere with the private contract between the Petitioners and the 1<sup>st</sup> Respondent. The University is confident that even with the online mode of delivery of instructions, the students will get value for their money and shall graduate within the required period.
38. The University further avers that it has so far made tremendous steps to effect and conduct online classes and examinations and in preparing the final year candidates for a virtual graduation. It is deponed that the application and the Petition have the effect of bringing to a halt all learning processes within the 1<sup>st</sup> Respondent's institution and which shall affect the right of education of almost 100,000 students. Accordingly, the University urges that the Petition is frivolous, without merit and only calculated to waste the Court's time and ought to be dismissed with costs.
39. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed submissions dated 2<sup>nd</sup> October, 2020. They submit on four issues.
40. On whether the University followed due process in coming up with the impugned decision, it is submitted that the 1<sup>st</sup> Respondent is cognizant of the significance of public participation as stated in *Okiya Omtatah Okoiti v County Government of Kiambu* (2018) eKLR where the Court cited with approval the case of *Doctors for Life International v the Speaker of National Assembly and Others* (CCT 12/05) 2006 ZACC II in which it was stated that "what matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about



the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

41. It is submitted that the resolution on the impugned decision met the threshold for public participation as required by law particularly Section 16 of the University of Nairobi Act. It is argued that there is no provision of the law or the Charter that requires the Respondent to consult all the students before making a decision since the only organ legally empowered to discharge that mandate is the Senate. The Senate therefore acted within the framework of the prescribed law.
42. The University submits that the allegation that the impugned decision did not put into consideration the preparedness of the Petitioners is not backed by any evidence and contends that the Senate was mindful of the need for continuity of learning programmes in these unprecedented times and considered all relevant factors. Accordingly, it is submitted that in reaching the decision the Senate was acting within its statutory powers under Section 16 of the University of Nairobi Act and the Charter and that in formulating the guidelines, the 1<sup>st</sup> Respondent followed the law and a reasonable opportunity was given to all the interested parties, through their representatives in the Senate, to participate in the resolution. Accordingly, the 1<sup>st</sup> Respondent complied with the provisions of Article 10 and 47 of *the Constitution* and the Petitioners’ allegation are not merited.
43. On whether the Petitioners are discriminated by the impugned decision, the decision in Council of Governors vs. Salaries and Remuneration Commission (2018) eKLR in which the term discrimination was defined and the Constitutional Court of South Africa in Mbona v Shepstone and Wylie (2015) ZACC II in which considerations that should be taken to determine whether an act is discriminatory were discussed, this Court was urged that “the first step is to establish whether the respondent’s policy differentiates between people. 11 The second step entails establishing whether that differentiation amounts to discrimination. 12 The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in Section 9 of *the Constitution*, it is presumed to be unfair”.
44. Subsequently, it is argued that the Petitioners have not tabled any evidence before this Court to show who and how one was favoured by the 1<sup>st</sup> Respondent as against the Petitioners and that the differentiation is without any merit. The Petitioners are alleging discrimination with a non-existent person. As such, there cannot be an unfair discrimination by the 1<sup>st</sup> Respondent against the Petitioners. It is vehemently argued that to prove discrimination, one has to demonstrate favorable treatment of another and/or bias against them. To buttress this argument, the University cited Nyarangi & 3 Others v Attorney General, HCCC No. 298 of 2008, which was cited with approval in Florence Amunga Omukanda & Anor v Attorney General & 2 Others (2016) eKLR and in which decision it was held that, “the law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.”
45. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue that the Petitioners have not tabled any evidence of how they have been discriminated from others or whether there was an unfavorable bias. On the contrary, the 1<sup>st</sup> Respondent’s decision affected each student equally and without favoritism. The Court is urged to take judicial notice that all the Petitioners are self-sponsored Master of Law students and that the 1<sup>st</sup> Respondent does not offer free Master of Law studies.
46. On whether a Court can legally alter the contractual relationship between the 1<sup>st</sup> Respondent and the Petitioners, it is submitted that the Petitioners have not shown whether there was any economic duress or undue influence or whether the decision was unconscionable and how this has affected their right under Article 46 of *the Constitution*. The University argued that a similar issue was considered



in LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & Others (2011) eKLR which was cited with approval in CIS v Directors, Crawford International School & 3 Others (2020) eKLR where the Court provided grounds on which a Court can interfere with consumer contract as follows: "...Firstly, the bargain must be oppressive to the extent that the very terms of the bargain reveals conduct which shocks the conscience of the court; secondly, the victim must have been suffering from certain types of bargaining weakness; and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that the behavior of the stronger party is morally reprehensible".

47. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also urged the Court to be guided by the decision in Nareth Kumar Vs. Director of Education & Another W.P (C) 2993/2020 as rightly cited at paragraph 131 of CIS v Directors, Crawford International School & 3 Others (supra) where the Court stated as follows: -
10. Significantly, the impugned Order, dated 17th April, 2020, notes the effort, on the part of certain private schools, to disseminate education online, as a welcome step, aimed at ensuring that students do not suffer, in their curricular activities during the 2020-2021 academic session. We wholeheartedly endorse this sentiment. Judicial notice may be taken, of the painstaking efforts, made by schools and teachers, in providing education, and holding classes, through online platforms. The effort in physically teaching students, in a regular classroom, cannot even remotely be compared with the effort that the teacher has to expend, in providing online education. It is a matter of common knowledge that, in doing so, the effort required to be put in, by the teacher, and the strain to which the teacher subjects herself, or himself, is tremendous, and the efforts of teachers - referred to, often, as the noblest among all noble professions - require to be commended in the highest terms. We unhesitatingly place, on record, our wholehearted appreciation, of the efforts of teachers, and schools, towards this end.
48. It is argued that having voluntarily entered into a contract where the 1<sup>st</sup> Respondent will offer academic services for a degree and the Petitioners will pay, the 1<sup>st</sup> Respondent continues to offer the services, albeit due to the Covid-19 pandemic, on an online platform. Furthermore, the lecturers remain the same, there is an online library accessible to the Petitioners and the degree awarded virtually will carry the same weight as any other. In fact, it is argued that the 1<sup>st</sup> Respondent is even spending more to ensure that the Petitioners right to education is not thwarted since embracing technology within a very short span of time is not cheap as observed in CIS v Directors, Crawford International School & 3 Others case (supra). The Respondents urge the Honourable Court to find that there was no infringement of the Petitioners' rights under Article 46 and to decline to alter the contractual relationship between the Petitioners and the 1<sup>st</sup> Respondent.
49. It is firmly argued that this Court has no power, in the circumstances given, to interfere with the private agreement between the Petitioners and the 1<sup>st</sup> Respondent. It is further argued that the Petitioners have not shown whether the classes or graduation services to be offered by the Respondents through the online classes will be of lower quality neither have they demonstrated how the Respondent has failed to avail the information necessary for them to gain full benefit from the service offered by the Respondents.
50. On the issue of whether the Petitioners' legitimate expectation has been violated and/or infringed, it is submitted that a right to legitimate expectation flows from Article 47 of *the Constitution* and what is legitimate expectation can be deduced from the case of Keroche Industries Limited v Kenya Revenue Authority & 5 Others (2007) eKLR. Accordingly, it is submitted that as stated in CIS v Directors, Crawford International School & 3 Others (supra), the decision of the 1<sup>st</sup> Respondent was in line with



the expectations of the Petitioners since it was aimed at ensuring that the students do not suffer in their curricular activities during the 2020-2021 academic session.

51. It is further submitted that the Petitioners' right to legitimate expectation is not violated since the Petitioners have not availed any evidence to show that they were admitted exclusively for physical classes. The impugned decision is hence not arbitrary but rather based on the power bestowed on the Respondent by the statute and necessitated by the current pandemic. It is also submitted that it is the Respondent's statutory duty to offer academic services to its students and to ensure that the students finish their course within the prescribed timeline and the decision therefore was meant to ensure that the 1<sup>st</sup> Respondent meets its obligations.
52. On the specificity of the Petition, the Respondents submit that it is trite law that he who alleges must prove and in a matter of allegation of a constitutional right, the violation must be particularly set out and demonstrated. This, is argued was succinctly laid out in *Anarita Karimi Njeru v Republic* (1979) eKLR and has been reiterated by this Honourable Court in *Japheth Odeda Origa v Vice Chancellor, University of Nairobi & 2 Others* (2018) eKLR where the Court stated that precision in pleading is vital in constitutional petitions because it enables the opposite party to fully understand the case they face and be in a position to adequately respond to it. It also enables the Court to decipher the issues brought before it for adjudication and helps in avoiding surprises and ambiguities in the litigation but more importantly it shows the link between the aggrieved party, the constitutional provisions at play and the possible infringement as also stated by the Supreme Court in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.
53. The Respondents summed up their submissions in urging the Court to find that the Respondents acted within their mandate, followed the due process and in any event, the Petitioners have acknowledged that they are not opposed to the virtual classes. The Respondents pray that the Petition ought to be dismissed with costs.
54. The 2<sup>nd</sup> Interested Party also relied on a Replying Affidavit in opposing the Petition. The Affidavit is sworn by Vincent Gaitho on 21<sup>st</sup> August, 2020. The deponent is the Secretary General of National Association of Private Universities in Kenya (hereinafter referred to either as "the 2<sup>nd</sup> Interested Party" or "Napuk").
55. Napuk contend that learning through physical classes has proved difficult due to the challenges brought by the COVID-19 pandemic and as a result, 40% of learning in the Universities has now moved to virtual and personalized teaching.
56. It is deponed that according to GSMA figures, Kenya has 83% mobile internet penetration and that electrification has improved by 75% and, as such, Napuk argues that it is important that institutions of higher learning adopt online learning in pedagogy and research to ensure the progression of University education to foster the objectives of university education as enshrined in Section 3 of the [\*Universities Act\*](#).
57. Napuk further argues that any decision which will be rendered by this Honourable Court will affect the interests of the Private Universities as they have also adopted alternative means of delivery of curriculum as per the standards and guidelines by the 3<sup>rd</sup> Respondent. Napuk contends that since the 3<sup>rd</sup> Respondent came up with guidelines for the conduct of virtual learning, then such encompasses the aspect of public participation, and as such, there is no need of any further public participation.
58. It is also argued by Napuk that the Petitioners have failed to demonstrate any irregularity, illegality and or irrationality of the decision by the University to offer online learning and in its view, the Petitioners



have not established any constitutional questions for adjudication by the Court with the requisite specificity. Accordingly, Napuk urges that the Petition be dismissed with costs.

59. The 2<sup>nd</sup> Interested Party filed written submissions dated 18<sup>th</sup> September, 2020. It submitted on three issues.
60. The first issue is the injunctiabilty of the matters raised in the Petition. It is submitted that the Petitioners have not demonstrated a justifiable right capable of adjudication in a constitutional petition. It is argued that the Petitioners have failed to set out in particularity how their alleged rights are being violated by the Respondents.
61. The 2<sup>nd</sup> Interested Party contend that the Petitioners position is that they are not opposed to either virtual or online study and examinations and only appear to urge the Court to stop the virtual learning and delivery of contents in order for the Respondents to carry out the public participation and or consultation among the Petitioners and stakeholders over the matter. This Court is called upon to take judicial notice that alternative mode of delivery of content is not a new phenomenon in the Universities and that the standards and guidelines by the 3<sup>rd</sup> Respondent issued explicitly provides for the same. Further, it was argued that the supervening event brought about by Covid-19 pandemic had the effect of terminating the contract between the Petitioners and the 1<sup>st</sup> Respondent and the policy framework laid out by the 3<sup>rd</sup> Respondent on alternative means of delivery of content was largely a mitigating factor. The decision in *Anarita Karimi Njeru v Attorney General (supra)*, *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR* and *Joseph Ododa Origa v Vice Chancellor University of Nairobi and 2 others (supra)* were variously referred to in support of the submission.
62. It is further submitted that there is no attempt by the Petitioners to demonstrate how their consumer rights have been violated. The failure to avail any fee structure in evidence and the failure by the Petitioners to demonstrate how they have come up with the 50% discount, is argued to be a self-shot by the Petitioners. The 2<sup>nd</sup> Interested Party is at a loss as to whether the Petitioners are pushing for a discount, for public participation or for the permanent injunction to stop the 1<sup>st</sup> Respondent from offering virtual learning.
63. It is also submitted that the entire Petition is devoid of good faith and seems to be a fishing expedition. In buttressing the submission, the 2<sup>nd</sup> Interested Party relied on *Leonard Otieno v Airtel Kenya Limited [2018] eKLR* where the Court held that “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 right 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.”
64. On public participation, it is submitted that public participation is a constitutional imperative enshrined in Article 10 of *the Constitution* and the basis of the same is to create a dialogical relationship between those who make policies that affect the citizenry in that they feel that there is adequate consultation but it does not mean that every person’s view must be taken into account. It presupposes that the majority will have their way and the minority will have their say as was held in the case of *Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 Others [2018] eKLR*. In the 2<sup>nd</sup> Interested Party’s view, the question to be answered is whether public participation in offering the virtual learning was a necessity in the circumstances.



65. The 2<sup>nd</sup> Interested Party further submits that virtual learning is entrenched in the policy directives issued by the 3<sup>rd</sup> Respondent which is established under the *Universities Act*, No. 42 of 2012 with its mandate provided under Section 5A. Indeed, it is argued that professional bodies, like the Kenya Veterinary Board, which have declined to recognize the qualifications of online studies have no such powers in light of Section 5A of the *Universities Act*.
66. Further, it is submitted that the Act being an Act of Parliament enjoys the presumption of constitutionality and the powers donated to the 3<sup>rd</sup> Respondent flows from this legislation and the policy framework for alternative delivery of content are legitimate functions of the 3<sup>rd</sup> Respondent.
67. The 2<sup>nd</sup> Interested Party further submits that the accreditation of programmes at the Universities is subject to the policy guidelines and there is absolutely no need for any form of public participation given that the 3<sup>rd</sup> Respondent is manned by all the stakeholders from the University academia and develops the policy frameworks with sufficient consultation. Moreover, the alternative mode of delivery was and is a mitigation factor to the effect of force majeure created by the Covid-19 pandemic. That, in any event, was the only responsive way by the 1<sup>st</sup> Respondent and other members of the 2<sup>nd</sup> Interested Party to safeguard the right to education of the Petitioners. The contrary would actually be in breach of their rights and would be unreasonable in a just and equitable society.
68. Lastly, it is also argued that the Petitioners should be dissuaded of the notion that every dispute with the university must always end up in a litigation when there are alternative means of dispute resolution laid out by the University which ideally should be exhausted first. Be that as it may, it is submitted that the issue of quantum of fees payable is a contractual dispute should belong to a Commercial Court, if at all. The decision in *Joseph Ododa Origa v Vice Chancellor University of Nairobi and 2 others* (supra) was relied on for the proposition.
69. The 2<sup>nd</sup> Interested Party closed its submissions in calling for the dismissal of the Petition.

**Issues for determination:**

70. I have carefully considered the Petition, the responses, the submissions and the decisions thereto, and, to me the following issues are for determination: -
  - a. Whether the Petition meets the threshold for adjudication.
  - b. Whether the impugned decision is in violation of Articles 10 and 47 of *the Constitution* for want of public participation, stakeholder consultations and administratively fair procedures.
  - c. Whether the impugned decision is discriminatory against the Petitioners.
  - d. Whether the contractual relationships between the Petitioners and the 1<sup>st</sup> Respondents are justiciable.
  - e. Disposition.

**Analysis and Determination:**

71. I will now address each of the identified issues in seriatim.

**Whether the Petition meets the threshold for adjudication:**

72. I recently dealt with alike issue in Nairobi Constitutional Petition No. 133 of 2020 *Scion Healthcare Limited & Others vs. DCI & Others* (unreported). This is what I stated: -



77. The first salvo in this matter was a preliminary issue. It was by the 10<sup>th</sup> Respondent. It was contended that the Amended Petition was devoid of clarity of the rights and fundamental freedoms allegedly contravened and that the manner in which those rights and fundamental freedoms were allegedly infringed. Counsel for the 10<sup>th</sup> Respondent referred to several decisions on the submission.
78. Since the parties did not highlight on their respective written and filed submissions, I did not have the advantage of the Petitioners' rejoinder on the issue. Nevertheless, I shall deal with the issue as raised.
79. Due to the unique nature of Constitutional Petitions, Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
  - (2) The petition shall disclose the following—
    - (a) the petitioner's name and address;
    - (b) the facts relied upon;
    - (c) the constitutional provision violated;
    - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
    - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
    - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
    - (g) the relief sought by the petitioner.
80. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -
- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
  - (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.



81. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.
82. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR had the following to say on Constitutional Petitions: -
- Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
83. A perusal of the Amended Petition in this case will no doubt reveal that the Petition fully complied with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements in *Communications Commission case* (supra). I must therefore find and hold, which I hereby do, that the submission that the Amended Petition is devoid of clarity cannot be maintained. The same is for rejection.
73. There is a difference between the form and the substance in a Petition. Form relates to how the Petition is drafted and issues framed. Substance relates to proof of the pleaded issues. In this Petition, the first issue for determination is on the form.
74. I have carefully considered the Petition. I have no doubt that the link between the Petitioners, as aggrieved parties, the provisions of *the Constitution* alleged to have been contravened and the manifestation of contravention or infringement are well pleaded. The Petition, as presented, raises clear issues for consideration. I find and hold that the Petition has clarity of issues, and as such, the first issue is answered in the affirmative.

**Whether the impugned decision is in violation of Articles 10 and 47 of *the Constitution* for want of public participation, stakeholder consultations and administratively fair procedures:**

75. A robust discussion on public participation and consultation under Article 10 of *the Constitution* was recently made by a Five-Judge Bench (Achode (Presiding), Ngugi, Nyamweya, Ogola & Mrima, JJ) in *Mombasa Consolidated Constitutional Petition Nos. 159 of 2018 and 201 of 2019 William Odhiambo Ramogi & Others vs. The Attorney General & Others* (unreported).
76. The analysis was as follows: -
115. The starting point is *the Constitution*. Article 2 inter alia declares *the Constitution* as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of *the Constitution* is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of *the Constitution* is invalid. Article 3 places an obligation upon every person to respect, uphold and defend *the Constitution*.



116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law or makes or implements any public policy decisions.
117. *The Constitution* also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -
- Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
118. Expounding on Article 10 of *the Constitution*, the Court of Appeal in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR held that:
- In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret *the Constitution* in a manner that promotes its values and principles.
- Consequently, in this appeal, we make a firm determination that Article 10 (2) of *the Constitution* is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.
119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR while referring to the South African decision in Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -
- According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.
120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10<sup>th</sup> Edition defines 'consultation' as follows: -



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

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

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

122. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR the Court addressed the concept of consultation in the following manner: -

.... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

(emphasis added)

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

124. The importance of public participation cannot be gainsaid. The Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (supra) while dealing with the aspect of public participation in lawmaking process stated as followed: -

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

125. In *Matatiele Municipality v President of the Republic of South Africa (2)* (CCT73/05A), the South African Constitutional Court stated as follows: -



A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and selfrespect...

126. The South African Constitutional Court in *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5 discussed the importance of public participation as follows: -

...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra)* referred to *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR stated as follows: -

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1<sup>st</sup> respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.

128. In *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others (supra)* the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

- a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.
- c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012. In relevant portion, the Court stated:



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

- d. Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
  - e. Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
  - f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.
77. The University posits that the deliberations leading to the impugned decision were undertaken through the University Senate. It further posits that the University students, including the Petitioners, are well represented in the Senate through the students’ representatives and leadership. Given the nature of the impugned decision, the University contends that the participation of the students’ leadership in the Senate in arriving at the impugned decision amounted to adequate public participation and consultation.
78. The University of Nairobi Act, Cap. 210 of the Laws of Kenya (hereinafter referred to as ‘the UoN Act’) is an Act of Parliament establishing the University of Nairobi and its control, government and administration; and for connected purposes. Section 16(1) of the UoN Act provides for the composition of the University Senate.
79. The provision states as follows: -
1. There shall be a Senate of the University which shall consist of—
    - (a) the Vice-Chancellor, who shall be the chairman;
    - (b) the Deputy Vice-Chancellors;
    - (c) the principal of each constituent college;
    - (d) the principal of each college within the University;
    - (e) the Deans of the faculties and directors of institutes and schools;



- (f) the chairmen of the teaching departments of the University; (g) not more than two professors who are not members of the Senate by virtue of this section elected by the academic board from within each college;
- (h) two members elected by the academic board or equivalent body (if any) of each constituent college from among the members of such board or body;
- (i) the librarian;
- (j) one representative of each of the boards of the faculties, institutes and schools appointed by that board from among those of its members who are not professors and are not members of the Senate by virtue of any other provision of this subsection;
- (k) six students to be elected by the students' organization of the University; except that the members of the students' organization shall not be entitled to attend deliberations of the Senate on matters which are considered by the chairman of the Senate to be confidential and which relate to the general discipline of students, examination results, the academic performance of students and other related matters.

80. The impugned decision was a shift in the manner in which the students were variously engaged in learning. Initially, the students engaged in face-to-face learning and physical examinations. The impugned decision introduced online learning and examinations.
81. The University stated that it has a student population of about 100,000 students. These students include the Petitioners. There is no dispute that the students take part in the affairs of the University through their leadership and representatives. The representatives are elected by the students and six of them sit in the University Senate.
82. I have carefully gone through the record, but did not find any disposition by the Students' representatives who sit in the Senate to the effect that there were no meaningful discussions or at all on the impugned decision in the Senate. Further, the said students' representatives have never raised any complaints in the manner the impugned decision was reached. In such circumstances, the only reasonable finding is that there were discussions in the Senate leading to the impugned decision and that the Students' representatives duly participated.
83. Whereas Article 10 of *the Constitution* bestows a duty upon public policy decision makers to accord those affected by their decisions opportunities to participate in the processes towards making such decisions, the adequacy, mode and extent of such participation largely depends on what is reasonable in the circumstances of each case. That is what is commonly referred to as 'the reasonability test'. As long as the necessary information is availed to the public or the class of people affected by the public policy decisions and they are afforded a forum in which they can adequately ventilate them, then the requirement of Article 10 of *the Constitution* is met.
84. The number of the students' representatives who sit in the Senate are statutorily provided for. That is in Section 16(1) of the UoN Act. The provision has neither been legally challenged nor declared unconstitutional or unlawful. It is, therefore, a valid provision of the law.
85. In the unique circumstances of this matter, I find and hold that although the impugned decision affected all the students, it was not necessary on the part of the University to accord all and every student an opportunity to give their views on the issue. This is a matter in which the participation of the students' representatives in the Senate, where the deliberations on the impugned decision took place and resolutions made, accorded the body of the students a reasonable representative opportunity to participate in the decision making process. I, therefore, further find and hold that there was adequate



public participation towards arriving at the impugned decision and that the students, including the Petitioners, were adequately so, represented by their students' representatives in the Senate.

86. Having so found, I must, as well, ascertain whether the impugned decision passed the test in Article 47 of *the Constitution*.

87. Article 47(1), (2) and (3) of *the Constitution* states that: -

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
  - b. promote efficient administration.

88. The legislation that was contemplated under Article 47(3) is the Fair Administrative Act. Section 5(1) thereof provides that: -

- (1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—
  - a. issue a public notice of the proposed administrative action inviting public views in that regard;
  - b. consider all views submitted in relation to the matter before taking the administrative action;
  - c. consider all relevant and materials facts; and
  - d. where the administrator proceeds to take the administrative action proposed in the notice—
    - i. give reasons for the decision of administrative action as taken;
    - ii. issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and
    - iii. specify the manner and period within which such appeal shall be lodged.

89. Section 2 of the Fair Administrative Act defines an 'administrative action' and an 'administrator' as follows: -

'administrative action' includes -

- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

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



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

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

91. In *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98* 2000 (1) SA 1, the South African Constitutional Court ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

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

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

These are: -

- a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.
- b. Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.



- c. Irrationality and proportionality- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated*

*Provincial Picture Houses Ltd*

*vs Wednesbury Corporation*: -

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

93. Drawing from the foregoing discussion, there is no doubt that the impugned decision was an administrative action. That is because the decision affected the legal rights and interests of the students including the Petitioners. As such, the impugned decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

94. On lawfulness, Section 16(2) and (3) of the UoN Act provides as follows: -

Notwithstanding the provisions of the *Universities Act* (Cap. 210B), the Senate shall have the following powers and duties—

- a. to satisfy itself regarding the content and academic standard of any course of study in respect of any degree, diploma, certificate or other award of the University and to report its findings thereon to the Council;
  - (b) to propose regulations to be made by the Council regarding the eligibility of persons for admission to a course of study;
  - (c) to propose regulations to be made by the Council regarding the standard of proficiency to be gained in each examination for a degree, diploma, certificate or other award of the University;
  - (d) to decide which persons have attained such standard of proficiency and are otherwise fit to be granted a degree, diploma, certificate or other award of the University;
  - (e) to initiate proposals relating to the conduct of the University generally, and to discuss any matter relating to the University and to make representations thereon to the Council;
  - (f) to make regulations governing such other matters as are within its powers in accordance with this Act or the statutes.
- (3) Notwithstanding any other provisions of this Act, the Council shall not initiate any action in respect of any of the matters mentioned in paragraphs (a), (b) or (c) of subsection (2) except upon receipt of a report or proposal thereunder, and the Council shall not reject any such report or amend any regulations so proposed without further reference to the Senate.



95. Section 35(1)(b) of the *Universities Act*, No. 42 of 2012 provides for the Senate as under: -

The Senate, which shall be in charge of all academic matters of the university and shall undertake the functions assigned to it in the Charter of the university.

96. In view of the above provisions, the University was, therefore, within its legal confines in dealing with the matters that led to the impugned decision.

97. As to whether the impugned decision was reasonable, the University and the 2<sup>nd</sup> Interested Party greatly dealt with the unique circumstances that led to the impugned decision. By and large, the decision was reached as a mitigating measure on the effects of the COVID -19 pandemic which rocked and devastated the whole world. To me, I do not have any difficulty in finding, which hereby do, that the impugned decision was and remain reasonable.

98. On procedural fairness, the students' representatives who deliberated on the matter in the Senate did not in any way challenge the manner in which the impugned decision was reached at. I, therefore, find no basis for any proposition that the impugned decision is procedurally unfair.

99. In the end, I find and hold that the impugned decision conformed to the requirements of Article 47 of *the Constitution* and Fair Administrative Actions Act. The impugned decision also complied with the requirements of Article 10 of *the Constitution*.

100. The impugned decision is, hence, constitutionally firm.

#### **Whether the Respondent's actions were discriminatory against the Petitioners:**

101. The Black's Law Dictionary, 10<sup>th</sup> Edition, defines discrimination as;

- (1) The effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship”
- (2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”

102. Article 1(a) of the Convention Concerning Discrimination in Respect of Employment and Occupation (1958) defines discrimination as follows: -

Any distinction, exclusion or reference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

103. In *Peter K. Waweru v Republic* [2006] eKLR, the Court defined of discrimination as follows: -

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

104. Discussing what discrimination entails, a Three-Judge bench of the High Court (Mwera, Warsame and Mwilu JJ., as they then were, before they were all elevated to the Court of Appeal shortly afterwards) in *Federation of Women Lawyers Fida Kenya & 5 Others vs. Attorney General & Anor* 2011 eKLR and



in recognition that justice, fairness or reasonableness may not only permit but actually require different treatment rendered themselves as follows: -

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

105. The South African Constitutional Court in National Coalition for Gay and Lesbian Equality –Vs- Minister for Justice [1998] ZAAC 15 further added its voice to the discussion as under: -

The present case shows well that equality should not be confused with uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of differences. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenization of behavior but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment – At best, it celebrates the validity that difference brings to any society.

106. Further, the South African Constitutional Court in City Council of Pretoria v. Walker [1989] ZACC 1 in considering direct and indirect discrimination made the following comment with which I respectfully agree: -

The inclusion of both direct and indirect discrimination, within the ambit of the prohibition imposed by section 8(2) [our Article 27(4)] of *the Constitution*, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) [our Article 27(4)] of *the Constitution*.

107. A common thread of reasoning flowing from the foregoing is that equal should be equally treated and unequal unequally treated as called for by the inequality.

108. In attaining that legal bar, Courts have developed guiding principles. In Mbona vs. Shepstone and Wylie (2015) ZACC 11, the South African Constitutional Court rendered itself on proof of direct discrimination. The Court stated that: -

26. The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of *the Constitution*, it is presumed to be unfair.... Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.

109. The English case of The Queen on the application of Sarika Angel Watkins Singh (A child acting by Sanita Kimari Singh her mother and litigation friend) vs. The Governing Body of Aberdare Girls'



High School and Anor [2008] EWHC 1865 (Admin) dealt with an analysis of proof of indirect discrimination. The Court developed the following four steps: -

- (a) to identify the relevant 'provision, criterion or practice' which is applicable;
- (b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;
- (c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally;
- (d) Whether this policy is objectively justified by a legitimate aim; and to consider, if the above requirements are satisfied, whether this is a proportionate means of achieving a legitimate aim.

110. I will now apply the above tests to this Petition. On whether the impugned decision directly discriminates against the Petitioners, there is evidence that the decision applied to all students. The students had enrolled in various programmes and, presumably, had paid the required fees and charges. One of the allegations put forth by the Petitioners is that the students are of different economic backgrounds and that the decision, which has financial implications, did not take such inequality into account. There is also an allegation that some students were provided with sim cards and internet bundles to access the online classes.

111. In this Petition, there is no evidence of categorization of the students into those who are from poor backgrounds and those of rich descents. There is, as well, no evidence that some students were provided with sim cards and internet bundles to access the online classes. At the risk of repetition, the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR held that: -

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

112. And, the Court of Appeal in Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR stated as follows: -

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

113. Having failed to prove the alleged disparity, the impugned decision cannot, therefore, be alleged to have failed to take into account the students' different economic backgrounds or favoured an unidentified or imaginary class of students.

114. As to whether making the online classes and examinations mandatory discriminated against the Petitioners, the Respondents posit that the resolution to adapt to online classes and examinations was necessitated by the Covid-19 pandemic following the Government directives to close all learning institutions and that the impugned decision applies to all students. Further, there is evidence that any



student who, for whatever reasons, is not able to undertake the online classes and examinations is at liberty to apply for deferment of studies.

115. In this Petition, I find and hold that, the Petitioners failed to render any admissible evidence on the alleged direct differentiation between the students. As such, a further analysis on the aspect of direct discrimination, must and hereby, comes to a halt.
116. Is there any evidence of indirect discrimination in the Petition? A correct answer to this question is not easily forthcoming without an analysis of whether the Petitioners have identified a category of other persons for the purpose of making a comparison of the relevant disadvantages between the categories. Further, the Petitioners must prove that the impugned decision personally disadvantages them. Respectfully, I have not, so far, found any iota of such evidence on record.
117. The Court also find that the impugned decision is objectively justified by a legitimate aim. The aim is that the students must be accorded opportunities to learn and undertake examinations even during the current challenging times resulting from the devastating COVID-19 pandemic. The implementation of the impugned decision is a proportionate means of achieving that legitimate aim. I now return a finding that the Petitioners did not prove any indirect discrimination.
118. In sum, the contention that the impugned decision and the manner it is implemented discriminates against the Petitioners fails. This issue is answered in the negative.

**Whether the contractual relationships between the Petitioners and the 1<sup>st</sup> Respondents are justiciable:**

119. On one hand, the Petitioners contend that they enrolled for a physical based study and not online classes and as a result, the impugned decision, violates their right to consumer protection under Article 46 of *the Constitution*. Further, the Petitioners posit that that since the online classes are not similar to the physical learning then there should be a reduction of fees by 50%.
120. The Respondents, on the other hand, argue that the University of Nairobi Charter as read with the *Universities Act* and the 3<sup>rd</sup> Respondent's Guidelines recognize online learning as a mode of delivery of university education. That, the intrusion of Covid-19 pandemic forced most institutions to adapt new ways of delivery of their services, online learning being considered one of the safest to minimize physical interactions and as a result contain the virus.
121. There are twin questions this Court is called upon to answer. They are whether by adapting online learning, the rights of the Petitioners, as consumers, are violated and whether this Court can legally interfere with the contractual relations between the parties, in the circumstances.
122. The High Court recently discussed the issues at length in *CIS v Directors, Crawford International School & 3 others* [2020] eKLR. The Court, rightly so, analyzed the issues as follows: -
  104. The CPA is therefore a law that seeks to implement the rights created by Article 46 of *the Constitution* and the lawmaker ensured that the manner of interpreting the law was provided. The term 'consumer' is clearly defined in Section 2. It is my observation that all the parties in this case do not dispute the fact that there was a contract for provision of a service between the individual parents and the School. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' attempt to deflect the application of consumer rights to the dealings between them and the petitioners finds no support in the evidence that was adduced before the Court. The 1<sup>st</sup> and 2<sup>nd</sup> respondents repeatedly stressed the existence of contracts between them and the petitioners. On their part the 3<sup>rd</sup> and 4<sup>th</sup> respondents consistently asserted that they cannot wade into the issue of fees



charged by private schools as the same falls into the realm of private service contracts. In the circumstances, Article 46 of *the Constitution* and the CPA are therefore applicable to the dispute before this Court.

105. The petitioners hold the view that the contracts should be viewed from the prism of *the Constitution*. The respondents are all of the firm view that this is a contractual dispute which must be addressed using the tools for resolving contractual disputes without resorting to *the Constitution*. They proceed to urge the Court not to interfere in contractual disputes and cited the decision of the Court of Appeal in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR that: -

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

106. However, the same Court of Appeal appreciated in the case of LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR that there are certain situations where the Court may interfere with a bargain between parties. The majority, through the judgement of Tunoi, JA (as he then was), clearly expressed the current legal position by stating that:-

"The equitable rule is that if the borrower is in a situation in which he is not a free agent and is not capable of protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so. In *Vanzant V Coates*. [1969] 14 D.L.O.R. 256 it was held that the transaction would, in the foregoing circumstances be rescinded.

The traditional view that "if people with their eyes open wilfully and knowingly enter into unconscionable bargains, the law has not right to protect them" - as held in *Fry V Lane* 1888 40 Ch. D 312 - has long been altered. Also I would think that this old traditional view cannot any longer hold ground after the enactment of the new Constitution and the coming into effect of the new Civil Procedure Regime which introduced the principle of "overriding objective" which require all courts to swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it.

The position in England in cases involving inequality of bargaining power was succinctly stated by Lord Denning M.r. In *Lloyds Bank Ltd Vs Bundy* [1975] Q.b. 326 And *Schroeder Music Publishing Co Vs Macanlay* [1974] 1 W.L.R. 1308, when he said that by virtue of it, the English law gives relief to one, who without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

107. It is therefore clear that the powerful statement of the Court of Appeal in the earlier case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, must be tempered by the current thinking that a sense of fairness should be infused into transactions between private persons. The strong party in a contractual relationship should not be allowed to steamroll over the weaker party. This is in line with the prevailing jurisprudential trajectory that requires constitutional values to be infused into contracts. If this was not so, the Kenyan people would not have found it necessary to include Article 46 in *the Constitution* and follow it with the enactment of the CPA to specifically protect the rights of consumers. The Court of Appeal in the just cited case of LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und



Enwicklungsgellschaft ('Deg') & others [2011] eKLR did indeed appreciate that the arrival of the 2010 Constitution had shifted the ground on this particular issue.

108. That courts have authority to infuse fairness in unconscionable contracts was also affirmed by the Court of Appeal in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR when it was stated that: -

It is not for the Court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd*. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case...

109. In the very recent case of *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12, the Constitutional Court of South Africa reaffirmed the importance of applying public policy to contractual relationships by stating (as per Nicholls AJ) that: -

All contractual agreements between private parties are governed by the principle of *pacta sunt servanda*, unless they offend public policy. Where it is alleged that constitutional values or rights are implicated, public policy must now be determined by reference to the values embedded in *the Constitution*, including notions of fairness, justice and reasonableness. The Parent Contract, in particular clause 9.3, must stand up to scrutiny, based on the test set out in *Barkhuizen*, where this Court authoritatively stated that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into consideration the necessity to do simple justice between individuals and is informed by the concept of ubuntu. What public policy is, and whether a term in a contract is contrary to public policy, must now be determined by reference to these values. This leaves space for enforcing agreed bargains (*pacta sunt servanda*), but at the same time allows courts to decline to enforce particular contractual terms that are in conflict with public policy, as informed by constitutional values, even though the parties may have consented to them.

110. Relevant to this case was the holding by the Court that: -

However, this finding fails to account for the peculiar nature of contracts that seek to impinge upon or regulate the fundamental educational rights of children under *the Constitution*. These cannot be equated with standard commercial contracts such as a lease. Contracts specifically dealing with the education of children are of a different species in that there are markedly different considerations at stake. While there is nothing offensive about the clause itself (*per se*), the enforceability of clause 9.3 and similar clauses may impact directly upon the educational and other constitutional rights of children....

The crucial issue is then whether independent schools, by providing education to children, assume constitutional duties and obligations that inhibit the free exercise of contractual rights. In this matter, these are the best interests of the child as entrenched in section 28(2)



of *the Constitution* and the right to basic education as protected in section 29(1)(a) of *the Constitution*. If independent schools do not have this duty, the children will have no independent right to expect their constitutional educational rights to be enforced through inhibiting free exercise of contractual rights. That the best interests of the child are paramount is accepted and embraced by the School. But, if a constitutional duty to provide basic education protects also those children who attend an independent school, may the School evade these obligations by attempting to contract out of it?

The Court went ahead and held that an independent school could not terminate a contract between it and a parent without giving a hearing to the child.

111. This position was earlier pronounced by Masipa, J of the South African High Court in *NFM v John Wesley School & another*, Case No. 4594/2016 when he held that: -

(67) The Basic Education Hand Rights Book-Education Rights in South Africa, chapter 20: Education Rights in Independent Schools discusses the provisions of s 29 of *the Constitution*. Amongst other considerations, it adopts the principles set out in *Juma Musjid Primary School*, the court found that s 28(2) of *the Constitution* imposes the horizontal application of the right to education on independent schools since it extends the application of the Bill of Rights to bind a natural or a juristic person to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. The court went further to set out that the purpose of s 28(2) was not to obstruct private autonomy or to impose on a private party the duties of the State, but rather to require private parties not to interfere with or diminish the enjoyment of a right. It found that there was a negative constitutional obligation not to impair the learners' right to a basic education.

(68) In *Juma Musjid Primary School, The Trust*, as the owner of the property, was entitled to seek eviction in view of its extensive but fruitless efforts to engage the MEC to alleviate the position of learners affected by the proposed eviction. That did not imply, however, that it was entitled to an eviction order. The Trust's constitutional obligation, once it had allowed the school to operate on its property, was to minimise the potential impairment of the learners' right to a basic education. This required consideration and compliance with guaranteed rights in ss 29(1) and 28(2) of *the Constitution*.

(69) Since *the Constitution* require private parties or bodies not to interfere with or diminish the right to basic education, independent schools must act in a manner that minimises any harm on the learner's right to basic education....

(77) I agree with the applicant that while the first respondent may be entitled to invoke its authority to exclude learners, a fair procedure must be followed. The exclusion must also be for a fair reason taking into account what is in the best interest of the child. In this regard, it should not matter whether the school is an independent school or a public school. This must apply regardless of whether such exclusion relates to the child's conduct or any breaches by its guardians or parents.

(78) A consideration of the best interest of the child goes beyond looking at other rights protected by *the Constitution*. Mr Shapiro's reference to an infringement of the right to equality and dignity seeks to limit the best interest of the child to such rights and cannot be correct. The concept is much broader than that. Any conduct, contractual or otherwise, which is contrary to the best interest of the child conflicts with s 28 *the Constitution*. Section 39 of *the Constitution* always calls for courts and other decision



makers to take into account the provisions of the Bill of Rights when deciding on matters.

(79) Mr Shapiro's argument that the Constitutional Court reserved the right for it to consider matters which can be said to be moot to it cannot be correct. This is because Pillay<sup>17</sup> made reference to the court and did not limit such powers to it. Where the interest of justice requires, any court with the requisite jurisdiction may hear the issues before it.

[80] While it is accepted that independent schools are autonomous, this does not exclude them from the operations of the Act and *the Constitution*. A finding in that suspending a learner from class due to non-payment of school fees was contrary to the provisions of s 28 (2) of *the Constitution* would apply similarly to independent schools.

112. A perusal of the pleadings and submissions made in this petition confirm that there is no dispute about the constitutionality of online education. It would indeed have been absurd for the petitioners to attempt to stand on the path of the unstoppable march of technology especially during this period of history when the Covid-19 pandemic has completely changed how human beings interact. It is also noted that the deployment of ICT in teaching is legalised by Section 2 of the BEA which states that: -
- ICT Integration and Education” means the seamless incorporation of information communication technologies to support and enhance the attainment of curriculum objectives, to enhance the appropriate competencies including skills, knowledge, attitudes and values and to manage education effectively and efficiently at all levels.
123. On my part, I can only add that *the Constitution* permeates into every corner of the land. Even transactions which are traditionally regarded as private must now stand the constitutional test. As stated in William Odhiambo Ramogi & Others vs. The Attorney General & Others case (supra): -
115. .... Article 2 inter alia declares *the Constitution* as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of *the Constitution* is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of *the Constitution* is invalid. Article 3 places an obligation upon every person to respect, uphold and defend *the Constitution*.
116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law or makes or implements any public policy decisions.
117. *The Constitution* also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -
- Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
124. Flowing from the above, the contracts between the Petitioners and the University can be variously vitiated including on the basis that they fail to meet any constitutional expectations. In other words, the contracts should not be constitutionally infirm.



125. In this matter, the contracts between the Petitioners and the University were not produced in evidence. As such, this Court is not in a possession to interrogate the relevant contractual terms accordingly. Therefore, the Petitioners' contention that they only contracted the University for face-to-face learning weighed against the University's contrary position that the institution is at liberty to offer learning via any legal means including online classes renders the Petitioners' averments unsubstantiated.
126. Further, the Petitioners failed to adduce any evidence in support of their claim that e-learning is inferior to face-to-face teaching thereby compromising on the quality of education. They also failed to demonstrate the basis for the fee reduction of upto 50%. No fee structures were availed. There was also no expert report to back the allegation that e-learning is inferior to face-to-face teaching and also that e-learning is cheaper in comparison with face-to-face physical learning.
127. In conclusion, it is the finding of this Court that any contractual relationships, whether public or private in nature, are justiciable. Such contracts must stand to the dictates of *the Constitution* and the law. It is also the finding of this Court that the Petitioners did not sufficiently prove that their rights under Article 46 of *the Constitution* were violated and that they are entitled to a refund of upto one-half of the fees paid, or a reduction of upto one-half of the fees payable, to the University.

### **Conclusion and Disposition:**

128. Having dealt with all the issues which I identified for determination, I now come to the end of this decision. As I do so, I remain most grateful to Counsel appearing before me for their industry in assembling jurisprudence from within the jurisdiction and further afield and for their cogent and incisive submissions which were of great assistance. If there is any authority I have not referred to, it is not for my non-consideration of it, but out of the satisfaction that the point is otherwise already amply made.
129. I must, as well, apologize for the late delivery of this judgment which was due on 10<sup>th</sup> December, 2020 but that was not possible for a technical problem on our part.
130. Flowing from the findings and conclusions, the disposition of the Petition dated 22<sup>nd</sup> June, 2020 is that the Petition is unsuccessful. It is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 2<sup>nd</sup> Interested Party.
- 131 Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 14<sup>TH</sup> DAY OF DECEMBER 2020.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr. Chege Kamau, Learned Counsel instructed by the firm of Messrs. Chege & Sang Company Advocates for the Petitioners.

Mr. Mola, Learned Counsel instructed by the firm of Messrs. Mereka & Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Mr. Muturi, Learned Counsel instructed by the firm of Messrs. Muturi S. K. & Company Advocates for the 2<sup>nd</sup> Interested Party.

Dominic Waweru – Court Assistant

