



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION NO. 321 OF 2019**

**IN THE MATTER OF ARTICLES 2, 3, 20, 21, 22, 23, 28, 29(D), 47 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER ARTICLES 27,28, 29(D) 47 OF  
THE CONSTITUTION OF KENYA, 2010;**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

**IN THE MATTER OF THE UNIVERSITIES ACT NO. 42 OF 2012**

**IN THE MATTER OF THE MOI UNIVERSITY CHARTER, LEGAL NOTICE NO. 202 OF 2013**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION**

**BETWEEN**

**VIOLET OMBAKA OTIENO.....1<sup>ST</sup> PETITIONER**

**OBEGI MALAK OCHWERI..... 2<sup>ND</sup> PETITIONER**

**NDIRANGU TABITHA.....3<sup>RD</sup> PETITIONER**

**VERAH SHAWIZA MANYONYI.....4<sup>TH</sup> PETITIONER**

**MAUREEN KWAMBOKA.....5<sup>TH</sup> PETITIONER**

**YVONNE AKHAGO BULUMA.....6<sup>TH</sup> PETITIONER**

**OMONDI LINDA AKINYI .....7<sup>TH</sup> PETITIONER**

**JOHN KAMAU MUTHONI .....8<sup>TH</sup> PETITIONER**

**SARAH KARANJA WANJIKU.....9<sup>TH</sup> PETITIONER**

**JAKOYO PAULLETE AKINYI.....10<sup>TH</sup> PETITIONER**

**RUTH WAMBOI MWANGI.....11<sup>TH</sup> PETITIONER**

**KARANJA SUSAN WAITHIRA.....12<sup>TH</sup> PETITIONER**

**PATIENCE MBITHI KAMUTU.....13<sup>TH</sup> PETITIONER**

**VERSUS**

**MOI UNIVERSITY .....RESPONDENT**

## JUDGMENT

### The Petition

1. The Petitioners herein are students at the Moi University, which is sued as the Respondent herein. The said University is a public university established under section 13 of the Universities Act of 2012, and clause 3 of the Moi University Charter, which was enacted and published pursuant to the provisions of the Act as Legal Notice 202 of 2013. In their petition dated 15th August 2019, the Petitioners claim that the Respondent has breached their constitutional rights to non-discrimination, fair administrative action, dignity and protection from torture, as well as violated their legitimate expectation, by failing to include them in the final list of students who are to graduate in the Respondent University's Graduation ceremony scheduled for 22nd August 2019.

2. The Petitioners therefore seek the following relief in their Petition:

(a) Declarations to the effect that the Respondent has breached the Petitioners' rights and statutory provisions inter alia:

i) right to equality and freedom from discrimination,

ii) fair administrative action,

iii) right to non-discrimination,

iv) right to freedom from psychological torture,

v) right to dignity,

vi) Fair Administrative Action Act.

b) An order of Prohibition to stop Moi University's 38th Graduation until the thirteen Petitioners are included in the graduation list of 22nd August 2019.

c) A mandatory injunction compelling the Respondent to include the names of all thirteen petitioners in the graduation list of 22nd August 2019.

d) Damages for harm, loss and injury suffered by the Petitioners.

e) Costs of and incidental to these proceedings.

f) Such other, further, additional, incidental and/or alternative reliefs or remedies as the Honourable Court shall deem just and expedient.

3. Due to the urgency of the matter, the Court (Mativo J.) directed that the main Petition proceed to full hearing by way of oral submissions on 20th August 2019 at Mombasa during the Annual Judges Colloquium. The Respondent was also directed to file and serve its response to the Petition, and the hearing was accordingly held at Mombasa. The parties respective cases from the pleadings and submissions made are as follows.

### The Petitioners' Case

4. The Petition is supported by a supporting affidavit sworn on 14th August 2019 by Ruth Wamboi Mwangi, the 11<sup>th</sup> Petitioner herein, and a Further Affidavit she swore on the same date that was filed in Court on 19th August 2019. The Petitioners aver that they were admitted to Moi University of Information Sciences, on various dates between 2015 and 2016, and ought to have graduated in December of 2018. However, that due to no fault of theirs and lecturers' strikes at the University, the graduation was pushed to August 2019, and the Petitioners therefore had legitimate expectations to graduate on 22nd August 2019. The Petitioners further affirmed that they paid their University fees as and when required, sat for their exams as and when required, and handed in their project work by the deadlines set. They provided evidence of their provisional academic transcripts and fees invoices as Annexures "M15"- "M28" to their supporting affidavit.

5. According to the Petitioners, in the first week of July 2019, about one and a half months to the graduation date of 22nd August 2019, they got concerned their marks for Editing and Publishing Skills, a unit they had taken in their third academic year (2016/2017). That they fundraised to facilitate their class representative, Daniel Shikoli to follow up the matter, including travelling to Eldoret, the main Campus for Moi University, for that purpose. That the class representative accordingly travelled on 12th July 2019. However, that the Respondent University's administration and lecturers did not address the issue, nor take responsibility for the missing marks. The Petitioners annexed various "What's up" messages sent on the subject as evidence. Further, that the Petitioners were concerned that the Respondent was not acting fast enough, and contacted the Office of the Cabinet Secretary, Ministry of Education for intervention, as a result of which the missing marks were released on 22nd of July 2019 and were variously reflected on the students portals from that day until 26th of July 2019.

6. The Petitioners contend that on 25th July 2019, their class representative posted to the class group a graduation list which did not have their names, to their shock and dismay. That after frantic communications with the University administration, some of the Petitioners met the Coordinator of the Communications Department of the Respondent's Nairobi Campus on 26th July, 2019, who promised that they would be included in the official list. However, that were shocked once more to find that their names were missing in the final graduation list as

published by the Respondent on 10th August 2019. Accordingly, that faced with barely a week to the graduation and a non-responsive Respondent's University administration, the Petitioners approached this court for urgent redress.

7. The Petitioners further stated in their Further Affidavit that they did not dispute that there are necessary procedures required to be followed for the scheduled graduation, and that their main contention is that the same are internal procedures to be carried out by the Respondent's staff, agents and representatives. Further, that their role in the said procedures and processes ended after they paid their fees, sat for their examinations as scheduled and handed in their project papers by the deadlines set, which they reiterated they did. In addition, that their responsibility was to confirm their examination results, spelling and order of names, and that it was not their responsibility to follow up the Respondent's University staff and administration to ensure they did their work. This notwithstanding, that the Petitioners went out of their way to ensure their marks were uploaded on time as explained in the foregoing. Therefore, that the delay in uploading their mission marks was therefore not caused by the Petitioners but by the Respondent University's staff and representatives.

8. The Petitioners also contended that they did not take units they are alleged to have missing marks in, and gave the details thereof. They also averred that some of the marks alleged to have been missing by 18th July 2019 were uploaded long before that date by their sheer efforts and determination. They claimed that the Respondent had therefore not come to Court with clean hands.

9. Ms. Eunice Nganga, the Petitioners' Advocate made oral submissions during the hearing of the Petition. The Advocate submitted that Article 27 guarantees every person the right to non-discrimination, and that the exclusion of the Petitioners in the list of graduands at the Respondent's 38th Graduation List scheduled for 22nd August 2019, and the inclusion of some of their classmates is a clear violation of the Petitioners' right to non-discrimination. Further, that Article 28 guarantees every person the right to dignity and the right to have that dignity respected and protected, and that the impunity exhibited by the Respondent University in addressing the exclusion of Petitioners from the graduation list is an infringement of their right to dignity.

10. In addition, that since the time the Petitioners learnt their the official list does not bear their names, coupled with the Respondent University's indifference to their plight had caused them untold psychological torture due to the uncertainty caused, contrary to Article 29(d) of the Constitution which guarantees every person the right to freedom and security of the person, which includes the right not to be subjected to torture in any manner, whether physical or psychological. Further, that the Petitioners have expended unwarranted amounts of time, money, and physical energy trying to sort the issue, which resources which could be utilized in more productive ways.

11. Article 47 (1) of the Constitution was also cited by the Petitioners on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Ms Ngang'a submitted that the Respondent University's decision to exclude the Petitioners from the list of graduands after they complied with all requirements for graduation without notice and reasons is unlawful, unreasonable and procedurally unfair. In addition, that Article 47 (2) of the Constitution and section 4(3) of the Fair Administrative Action Act requires a person whose right or fundamental freedom is likely to be adversely affected by administrative action, to be given written reasons for the action. However, that the University has not given reasons, whether written or even oral for the decision to exclude the Petitioners from the list of graduands. The Canadian decision in **Baker vs Canada (Minister of Citizenship and Immigration) (1999) 2 SCR 817** and the Kenyan Court of Appeal decision in **Judicial Service Commission v Mbalu Mutava & Another (2015) eKLR** were cited for these submissions.

12. Lastly, that the Petitioners have provided evidence that they had been cleared for graduation and there was thus a violation of their legitimate expectations. The Petitioners relied on the Canadian decision in **Canada (Attorney General) vs Mavi, 2011 SCC 30**.

13. In conclusion, the Petitioners also cited Article 23(3) of the Constitution for the reliefs sought, and submitted that there was no alternative remedy available to them after the publication of the final graduation list on 10<sup>th</sup> August 2019 given the timelines involved. Further, that it is only the High Court has the jurisdiction to deal with alleged infringement and/or threatened infringement of fundamental rights and freedoms, and not the internal dispute resolution mechanisms set by the Respondent. The decisions in **Leonard Otieno v Airtel Kenya Limited [2018] e KLR**, **Onkwani David v Egerton University (2019) eKLR**, **Charles Kaindo Kuria & 20 others v Technical University of Kenya (2019) eKLR**, **Jane Kiongo & 15 others v Laikipia University & 6 others (2019) eKLR** and **Dawda K. Jawara vs Gambia, ACmHPR 147/95-149/96** were cited in this regard.

### **The Respondent's Case**

14. The Respondent opposed the petition by way of a replying affidavit sworn on 19th August 2019 by Dr. Bernard Kibet Malakwen, its Director of Nairobi Campus, which was filed in Court on the same date. The Respondent averred that the Universities Act provides that a university shall be governed in accordance with the provisions of its Charter or Letter of Interim Authority granted under the Act and statutes made by its Council, and that a university shall specified organs of governance. It was averred in this respect that under the Respondent's Charter, it is its Senate that is in charge of all academic matters of the university. He also detailed the examination process and release of results and preparation of the graduation list as stated in the in the Respondent's **Common Rules and Regulations Governing Undergraduate Examinations as revised in May 2019** and the Respondent's **Quality Manual and Procedures May 2015-7<sup>th</sup> Edition**, copies of which were attached.

15. The Respondent further averred that on or about the end of June 2019, it communicated on its website that the students ought to ensure that that they confirm in their respective schools their marks, names and spelling by 18<sup>th</sup> July 2019, to allow enough time to have the students deal with any issues pertaining to their results and the graduation. Further, that the said notice in the website was specific that the Respondent's **38th graduation ceremony** would take place on **22<sup>nd</sup> August, 2019, and that** prospective graduands were also advised to clear any fee arrears or charges. Lastly, that those who will not have met all the requirements by 18th July 2019 would not be eligible for graduation. The Respondent annexed a copy of the notice.

16. Further, that from the records provided by the respective departments, it was clear that the Petitioners had issues in respect of the various marks, and that the affected students through their leadership did sent a representative who was advised that they ought to deal individually with the departments depending on the issues they had. The Respondent annexed a copy of details of the Petitioners' missing marks, and an

affidavit from the class representative from the Petitioners class in this regard. According to the Respondent, the specific deadlines were therefore known to the Petitioners, and it was upon them to ensure that they meet the deadlines as stipulated.

17. The Respondent contended that the respective examination Board sat on 22<sup>nd</sup> July 2019 to verify the authenticity of the results and approve the same for inclusion in the graduands' list, and that the Senate did sit on 24<sup>th</sup> July 2019 to verify the results and approve the graduands' list. Furthermore, that a candidate cannot be included in the graduation list without his or her results having been approved by the school board, and subsequently approved by the senate. The Respondent averred that is clear from their own annexures that the Petitioners procured their provisional transcripts after the deadline of 18<sup>th</sup> July 2019, and after the Senate had sat and approved the list of graduands and provided a table showing the dates the Petitioners received their transcripts.

18. On the remedies sought, the Respondent contended that the Petitioners did not seek to exhaust internal mechanisms to have their grievances addressed; as they did not seek audience with Deputy Vice Chancellor Academics or the Vice Chancellor himself. In addition, that the Respondent conducts two graduations in a year; in August and December, and that as a tradition the graduation for August caters for students who did not make it in the graduation list for the previous year, and that the December graduation caters for all and any candidate who could not make it to the August graduation.

19. Lastly, the Respondent averred that preparations for the graduation for 22<sup>nd</sup> August 2019 have been made, and that a stoppage of the graduation will cause disproportionate loss, damage, inconvenience and injustice to the Respondent and the about 3000 graduands and their families that met the conditions for graduation as follows:

- a) The University has already contracted and is liable to pay the service providers for the services incidental to graduation including printing the graduation booklets, the communication facilities, the infrastructure material to the graduation.
- b) The University has informed all those who have qualified to graduate numbering about 3000
- c) The approved graduands come from all over Kenya and as is the tradition come with family and friends to witness the event and celebrate the achievement and incur costs in the preparation.

20. Furthermore, that those who have been certified by the Respondent and who have legitimate expectation to graduate on 22<sup>nd</sup> August 2019 have not been made parties to these proceedings and the Court ought not to make adverse orders against them in violation of their equally constitutional rights.

21. Mr. Simiyu Wekesa, the Advocate for the Respondent, made oral submissions during the hearing and also availed written supplementary submissions at the hearing. The Respondent submitted that the Petitioners have not made out their case with precision required for this Court to find a violation of their rights, and have not brought themselves within the meaning of Article 22 of the Constitution for this Court to grant the orders sought. The Respondent relied on the holding to this effect in **Beatrice Wangechi Mwaniki v Kenya Methodist University (2015)e KLR**.

22. The Respondent further submitted that the Petitioners' allegations of violations of their right to equality and freedom from discrimination, fair administrative action, freedom from torture, right to dignity have no basis, and that the Petitioners were indolent and all they needed to do was well within their knowledge, and their colleagues who sat for the same paper still made to the graduation list.

23. On whether this Court has jurisdiction to include the Petitioners in the graduation list of 22<sup>nd</sup> August, 2019, it was submitted by the Respondent that for one to make the cut to the Graduation List one must meet the University thresholds to clear all fees and more importantly to have academic clearance as set out under the Moi University Common Rules and Regulations Governing Undergraduate Examinations and the statutes. Further, that Moi University Legal Notice No.202 at section 7 sets out the power of the university of conferment granting cancellation and withdrawal of degrees diplomas, certificates and other awards is granted to the Senate, including that of deciding which persons have attained such standard of proficiency and are otherwise fit to be granted a degree, diploma, certificate or other awards of the university.

24. The Respondent submits that the Petitioners' are relying on provisional transcripts that were procured after the Senate sitting on 24<sup>th</sup> July, 2019, and that the transcripts have not been certified and ought not to be relied on by this Court. Furthermore, that the names of the Petitioners were not before the Senate when it met on 24<sup>th</sup> July, 2019 and decided on who will graduate on 22<sup>nd</sup> August 2019. Therefore, that the Petitioners will have to await the next graduation in December 2019 if they meet the requirements of the University as by law established, and on approval by Senate of the Respondent.

25. It was also the Respondent's submission that matters of qualification of its students and deciding on which candidate has fulfilled the requirements for award of relevant certificates, degrees and diplomas are purely within the Respondent's mandate, and the Court is not best suited to dictate through orders as sought by the Petitioners, on who to include in the graduation list particular for graduation of 22<sup>nd</sup> August, 2019. Reliance was placed on decisions to this effect in **John Owino Obunde (Suing for and on behalf of 82 others) vs Technical University of Mombasa & another (2016) e KLR**; **Nyongesa & 4 others vs Egerton University College (1990) eKLR**; and **Republic v Vice Chancellor Kisii University Ex- Parte Muthamia Samuel Mwititi (2019) Eklr**. The Court was thus requested to exercise restraint and from appearing to be running the Respondent and granting degrees pursuant to its orders.

26. On the remedies sought, the Respondent submitted that the Order sought by the Petitioners seeking stopping of the Respondent from conducting the 38<sup>th</sup> graduation ceremony scheduled for 22<sup>nd</sup> August 2019 is disproportionate, and does not advance the Petitioners alleged contravened rights. Further, that it is calculated to embarrass, inconvenience, injure the reputation of, cause injustice, loss and damage to the Respondent and the over 3000 graduands who have been certified by the University under its statutes and organs to graduate. The decision in **Sacred Training Institute Limited v University of Eldoret [2008] eKLR** that it is not in the interests of justice that graduands who are not

a party to the the suit should be adversely affected was relied upon.

27. Further, that granting the order would be drastic and contrary to the rules of natural justice and public policy as over 3000 parties who will be affected by the order would not be heard, and that proportionality tilted in favour of the Respondent. Also cited for these positions were **National Gender and Equality Commission (NGEC) vs Independent Electoral & Boundaries Commission (IEBC) & 3 Others [2018] eKLR**, **Kibii Sally Jeruiyot v Chancellor, Vice Chancellor, Senate & Moi University Council [2016] eKLR**, and **Lazarus Awalaa Sewe v Technical University of Mombasa [2018] eKLR**.

28. Lastly, the Respondent sought to distinguish the authorities relied upon by the Petitioners for the following reasons.

- a) **Francis Mwangi Munyiri v AG (2017) eKLR** relates to physical torture in Nyayo Chambers and the instant Petition raises no physical torture.
- b) **Onkwani David v Egerton University (2019) eKLR** relates to expulsion of the student who sought to be included in graduation, which is not the case in the present case. That in any event, the petition therein was dismissed.
- c) In **Charles Kaindo Kuria & 20 others v Technical University of Kenya (2019) eKLR** the issue was that the students had been directed to re-sit the exams for marks that had been lost by the lecturer, which is not the case here.
- d) **Jane Kiongo & 15 others v Laikipia University & 6 others (2019) eKLR**, does not apply to this petition as it related to revocation of the units the petitioners had been exempted. That in any event, the Petitioners were included in the following graduation.
- e) In **Leonard Otieno v Airtel Kenya Ltd (2018) eKLR**, the facts are not similar to the present petition.
- f) **Judicial Service Commission v Mbalu Mutava & Another (2015) eKLR** relates to natural justice and right to be heard, which is not an issue in the present petition.

#### **The Determination**

29. The Respondent has raised a preliminary issue as to whether this Petition is properly before this Court, for reasons that the Petitioners did not first engage the Respondents' officials on their names not being included in the final graduation list. Exhaustion of alternative remedies is now a constitutional imperative under Article 159 (2)(c) of the Constitution, and also by section 9(20 and (3) of the Fair Administrative Action Act. It is exemplified by emerging jurisdiction on the subject, which was initially stated in **Speaker of National Assembly vs Karume (1992) KLR 21** in the following words:

**“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”**

30. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR** as follows:

**“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”**

31. While it is this Court's jurisprudential policy in this regard to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for, and this is also now required by section 9(2) and (3) of the Fair Administrative Action Act, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Where such an alternative remedy cannot be used by an applicant, this Court can exempt such an applicant from its application as provided by section 9(4) of the Fair Administrative Action Act.

32. Various considerations have been taken into account by Courts in considering whether an exception lies, and the list of exceptional circumstances is not closed. In **R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya (2017) eKLR** the High Court held as follows as regards the application of the exception:-

**“[46] What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.**

**[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on**

**Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others(2016)eKLR. ”**

33. The Petitioners allege that the Respondent has violated their constitutional rights, and the jurisdiction of the Respondent is limited in this regard to addressing the issue of the Petitioner’s marks and graduation. The mechanisms afforded by the Respondent cannot therefore be an effective remedy to the Petitioners when it comes to the issue of violation of constitutional rights and remedies thereof, and the exception in section 9(4) of the Fair Administrative Action Act therefore applies. Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The jurisdiction to hear and address such allegations of violations is expressly granted to this Court under Article 23 of the Constitution. For these reasons I find that the instant Petition is properly before this Court.

34. Coming to the substantive issues raised by the Petition, it is necessary to state at the outset that the applicability of the laws and procedures governing the Respondent’s graduation and in particular the Universities Act, the Respondent’s Charter and its statutes are not disputed. The main areas of dispute are whether there was non-compliance with the Constitution in the manner the said laws and procedures were applied, and if so, who should take responsibility for any non-compliance, and the effect thereof on the Petitioners.

35. In this respect, in addition to the Universities Act and the Respondent’s Charter, Statutes and Rules, there are now various norms and laws which regulate the manner in which the Respondent is required to perform its powers and functions, particularly those introduced by the Constitution of 2010. The Respondent’s Charter, Statutes and Rules must now be read and interpreted in a manner that is consistent with the Constitution. A number of values, principles, rights and duties in the Constitution directly impact on the Respondent, including the values and principles in Article 10 of the Constitution and the Bill of Rights.

36. It is notable in this respect that the values and principles in Article 10 apply to all State organs and any person when interpreting or applying the Constitution or any law, or when making or implementing any policy. Likewise, under Article 20 of the Constitution, the rights and corresponding duties in the Bill of Rights binds all state organs and persons. A person is defined under Article 260 of the Constitution to include a company, association or other body of persons whether unincorporated or incorporated. The Respondent is in this respect specifically established as a body corporate under its Charter.

37. Three substantive issues have been raised by the Petitioners. These are firstly, whether the Respondent has violated the Petitioners’ rights to non-discrimination, dignity, freedom from torture and fair administrative action. Secondly, whether the Petitioners’ legitimate expectations were violated and lastly, whether the Petitioners are entitled to the reliefs sought. An examination of these issues now follows.

***On Violation of the Petitioners Rights***

38. Article 23 of the Constitution gives this court the jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights. The jurisdiction of the High Court to determine issues of violation of fundamental rights is further cemented by Article 165(3) (b) gives the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

39. The Petitioners are required to show with precision that they have met the test set in the case of ***Anarita Karimi Njeru vs Republic (1979) eKLR*** where the court stated that a party who wishes the Court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it. This principle was re-stated in the case of ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR***

40. The Petitioners in this respect claim that their rights under Article 27, 28, 29, and 47 have been violated, and have particularised the violations as elaborated in their submissions. Article 27 provides for the freedom from discrimination and the right to equality before the law. It also prohibits unfair discrimination. The right to human dignity in Article 28 of the Constitution is an acknowledgement that human beings are entitled worthy and to be treated with respect and concern, and is a foundation for many other rights. It is also not in doubt that Article 29(d) of the Constitution now extends the right of security of the person to include protection of psychological integrity. Lastly Article 47 now imposes a right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

41. In interpreting these rights, Articles 20 and 259 of the Constitution obliges courts to promote *the spirit, purport, values and principles of the Constitution, advances and promotes the rule of law, human rights and fundamental freedoms in the Bill of Rights, contribute to good governance and promotes the values of an open and open and democratic society and enforcement of rights.* Constitutional provisions must also be construed purposively and in a contextual manner.

42. In the present Petition, it is not disputed that the Petitioners sat for all the relevant examinations and have paid the fees due, and the Petitioners in this respect annexed copies of their transcripts and fees invoices. The Petitioners also annexed various copies of the messages and communication engaged with the Respondent’s officials on missing marks of some of their examination units. Most of these annexures were not dated, and were “*What’s Up*” messages, whose admissibility is regulated by the requirements of the Evidence Act as regards production of electronic evidence. There was no compliance by the Petitioners with regard to the legal requirements on the production of this electronic evidence. This finding notwithstanding, the fact of such communications was not disputed by the Respondent, who acknowledged it in its response to the Petition and also produced an affidavit by the Petitioners’ class representative attesting to the Petitioners efforts in this regard.

43. What is relevant to this Court are the various transcripts that were annexed by the Petitioners to both their supporting and further affidavit, which were issued by the Respondent. Some of the transcripts were issued before July 2019. The Respondent disputes the veracity of the said transcripts and alleges that they were provisional transcripts. Whether provisional or not, the said transcripts demonstrated two allegations made by the Petitioners. Firstly, that they had marks for units in which the Respondent alleged that their marks were missing, and secondly, that the Respondent had represented to them that they had passed their examinations. At this point the burden of proof then shifted to the Respondent to show that there was compliance on their part, and that they did not violate the Petitioners rights.

44. The explanation in this regard by the Respondent was that it was for the Petitioners to ensure that their marks were included in the report that was tabled before Senate, and that the said marks were entered after the due deadline of 18<sup>th</sup> July 2019. This explanation is however insufficient, as the Respondent has not shown any duty or responsibility on the part of the Petitioners to actually enter their marks or present their marks to the relevant organs of the Respondent. On the contrary this was a duty placed on the Respondent's agents and organs by the Respondent's own rules, and culpability for non-compliance of the said rules cannot therefore be placed on the Petitioners.

45. In particular, the Respondent explained the examination process as follows in its replying affidavit:

**9. “THAT exam process and release is governed by the Respondent’s Common Rules and Regulations Governing Undergraduate Examinations as revised in May 2019 (hereinafter referred as the Rules)**

**10. THAT Section 1.9 of the Rules provides that the University Exam Process starts with the drafting of the question paper prepared by internal examiners and terminates with the publication of results approved by the senate.**

**11. THAT further Section 5, 5.1. vii of the Rules provides that All examination results shall be confidential until they have been considered by the School Boards of Examiners, and shall be provisional until approved by the Senate**

**12. THAT further Section 5.2 of the Rules provides that**

**a. Dean of students shall release provisional examination results to all candidates soon after the results have been considered and approved by the School Boards of Examiners, and should inform students of their status, that is proceeding to the next year of study and those on discontinuation**

**b. The Dean shall forward the consolidated mark sheets to the Chairman of the Senate through the College academic board where applicable for consideration and approval**

**c. The Deputy Vice Chancellor (Academics, research and extension) shall issue official transcripts to students one week after receiving consolidated mark sheets as approved by the senate.**

**13. THAT under section 5 ( 5.1) vii, viii and ix**

**a. All Examination results shall be confidential until they have been considered by the School Boards of Examiners and shall be provisional until approved by the Senate.**

**b. the Deans shall forward provisional results to senate through the college Academic Board in the case of Colleges/ Campuses headed by a Principal for consideration and approval**

**c. Senate may accept, reject or give directions on examination results presented to it by the School Boards of Examiners “**

46. There is no specified role or responsibility placed on the students by the said Rules save to present themselves for, and sit for the examinations after meeting all the necessary requirements. It is therefore evident that any lapses in the release of examination results once the students have completed their part can only be attributed to the Respondent. The Respondent's allegations about the students not having marks was also sufficiently rebutted by the evidence of transcripts brought by the Petitioners showing allocation of marks by the Respondents to the alleged subject units.

47. As a result of the delayed entry of the Petitioners' marks and results, this Court finds that this not only adversely impacted on their graduation and future activities, but has also had an unfair impact on the Petitioners in relation to the other students. This Court also finds that these adverse effects on the Petitioners' lives has been caused by the inefficiencies on the part of the Respondent, and that there has been a violation of their rights to non-discrimination, dignity and freedom from psychological torture as a result.

48. I would like to make additional observations in this regard on the Petitioners' right to fair administrative action. Article 47 of the Constitution, and the provisions of the Fair Administrative Act import and imply a duty to act fairly by a decision maker in any administrative action. Article 47 of the Constitution provides as follows in this regard:

**(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.**

49. Section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers in administrative actions as follows:

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

50. Section 2 of the Fair Administrative Action Act in this regard defines an administrative action to include—

a) the powers, functions and duties exercised by authorities or quasi judicial tribunals; or

b) 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.

51. In addition, under section 3, the said Act applies to all state and non-state agencies. Therefore, the provisions of the Act as regards fair action also bind Respondent not only as an administrative authority, but also as a body whose decision is likely to affect the rights and interests of the Applicant, and bring them under the supervisory jurisdiction of this Court.

52. At the core of the duty to act fairly and the requirement of fairness is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken, so that he or she has the chance to influence it. This requirement is what informs the key procedural steps set down by the law of giving of notice of an administrative action, and provision of the evidence that will be relied upon during that administrative action. The question of whether failure to observe any of these steps renders the decision making by an administrator unfair, will depend on how it effects a party’s ability to make representations.

53. In the present petition, the arguments made by the Respondent that the Senate only sits at defined times and could not therefore address the Petitioners’ concerns were raised clearly falls short of this Constitutional and legal requirements on fair administrative action. In addition, the Respondent’s Senate clearly made adverse decisions affecting the Petitioners by not including them in the list of graduands for its Graduation ceremony scheduled for 22<sup>nd</sup> August 2019, and has not brought any evidence to show that before or after approval of the graduation list, it did give adequate opportunity to the Petitioners to make representations. While this Court cannot purport to direct the Respondent on how to perform its duties in this regard, it can only emphasize that the performance of such duties and procedures must now be reoriented to be consonant with, and in compliance with the new constitutional dispensation. Where necessary, this may include legal amendments to align the Respondent’s statutes and rules to align them with the Constitutional requirements.

#### ***On Violation of the Petitioners’ Legitimate Expectations***

54. A five judge bench of this Court in the case of Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR exhaustively discussed the doctrine of legitimate expectation and various judicial decisions on the doctrine in a decision that was affirmed by the Court of appeal. The said bench observed as follows:

**“207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4<sup>th</sup> Edition, 2001 Reissue, of Halsbury’s Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:**

***“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.***

***The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act***

*contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker.”*

55. The Supreme Court in the Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) e KLR also explained the principle of legitimate expectation as follows:

**“[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.**

**[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”**

56. The said Court further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

**“[269] The emerging principles may be succinctly set out as follows:**

- a. there must be an express, clear and unambiguous promise given by a public authority;**
- b. the expectation itself must be reasonable;**
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and**
- d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”**

57. Applying these principles to the present case, this Court finds that the Petitioners did provide evidence of transcripts issued to them by the Respondents indicating that they had passed their examinations. This was adequate evidence of representations made and conduct by the Respondent as to the possibility of graduation by the Petitioners, and it is my finding that this legitimate expectation on their part was violated by their non-inclusion in the final list of graduands for the Respondent’s 38<sup>th</sup> Graduation ceremony to be held on 22<sup>nd</sup> August 2019.

#### ***On the Reliefs Sought***

58. Article 23 of the Constitution provides as follows as regard the remedies that can be granted by this Court in an action for enforcement of the Bill of Rights:

**(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

- (a) a declaration of rights;**
- (b) an injunction;**
- (c) a conservatory order;**
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
- (e) an order for compensation; and**
- (f) an order of judicial review.”**

59. In addition, section 11 of the Fair Administrative Action Act provides for the judicial review remedies that can be granted upon review of an administrative action as follows:

**“(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-**

- (a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**
- (b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**
- (c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**

(d) prohibiting the administrator from acting in particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.”

60. In view of the findings made in this judgment, the Petitioners have been largely successful in their claims, and are therefore entitled to the declarations sought on the violation of their rights and legitimate expectations. This Court however recognises that the Petitioners did not dispute that there are other persons who were not parties to this Petition who will be affected by the orders sought by the Petitioners to prohibit the holding of the Respondent’s 38<sup>th</sup> Graduation on 22nd August 2019, which is just one day away. It also notes that there are certain requirements that need to be fulfilled before the Petitioners can be put on the graduation list, and it is not the appropriate forum to determine if such requirements have indeed been met. Lastly, the Court also notes that the Petitioners’ Advocate did submit that the Petitioners were amenable to graduating in December 2019, if only the Respondent could give them the reasons and information on what is needed of them.

61. This Court is empowered by Article 23(3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. The definition of "appropriate relief" was given by the South African Constitutional Court in **Minister of Health & Others vs Treatment Action Campaign & Others, (2002) 5 LRC 216** at p. 249. thus:

**"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."**

62. I fully adopt this definition of "appropriate reliefs" and shall deploy it in the disposition of this Petition. Given that the Petitioners cannot be vindicated by the other remedies they seek of a mandatory order and prohibition for the reasons given in the foregoing, this Court is of the view that a nominal award of damages be made to the Petitioners for the infringement of their rights . This Court is in this regard persuaded by the holding of the Privy Council in **Siewchand Ramanoop vs The AG of T&T, PC Appeal No. 13 of 2004**, where it was held, that:

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

63. The Petitioners in this regard did plead that they are losing both time and money fighting for their inclusion in the graduation list and listed that loss they are likely to suffer to include:

(a) Loss of opportunities of promotions after graduation.

(b) Loss of opportunities of jobs after graduation.

(c) Loss of opportunities of further studies.

64. Likewise, this Court is of the view that this is an appropriate case for a structural interdict to issue to ensure that the Respondents do rectify the breach of the Petitioners rights’ and do not continue to infringe on the same.

65. In the premises, this Court orders as follows:

**I. A declaration be and is hereby issued that the Respondent’s action of not including the Petitioners in the final list of graduands for the Respondent’s 38th Graduation Ceremony scheduled for 22nd August 2019 was discriminatory, and violated the Petitioners’ rights to non- discrimination, dignity, freedom from psychological torture, and fair administrative action contrary to Articles 27, 28, 29(d) and 47 of the Constitution.**

**II. A declaration be and is hereby issued that the Respondent's action of not including the Petitioners in the final list of graduands for the Respondent's 38th Graduation Ceremony scheduled for 22nd August 2019 is a violation of the Petitioners' legitimate expectations.**

**III. An order be and is hereby issued granting each of the 1<sup>st</sup> to 13<sup>th</sup> Petitioners herein an award of Kshs 50,000/= as nominal damages for infringement of their rights under Articles 27, 28, 29(d) and 47 of the Constitution.**

**IV. The Respondent be and is hereby compelled to avail each of the 1<sup>st</sup> to 13<sup>th</sup> Petitioners herein the reasons for their non-inclusion in the final graduation list of the Respondent's the 38th Graduation Ceremony scheduled for 22nd August 2019 within 30 days of this judgement.**

**V. The Respondent be and is hereby compelled to undertake all the necessary internal procedures required to include the Petitioners in the next graduation list and graduation ceremony within 90 days of the date of this judgment.**

**VI. The Respondent shall file a written report to this Court on the progress made in compliance with Orders V and VI hereinabove within 90 days of the date of this judgment.**

**VII. The costs of the Petition shall be borne by the Respondent.**

66. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF AUGUST, 2019.**

**P. NYAMWEYA**

**JUDGE**