



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 373 OF 2018

IAN GURU MUIRURIPETITIONER

VERUS

ST. PAUL'S UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Petitioner, Ian Guuru Muiruri, was admitted as a student at St. Paul's University, the Respondent, on 25th August, 2015 to undertake a degree course leading to the award of a Bachelor of Business & Information Technology.
2. The Petitioner's case is that he diligently underwent through the academic process and sat all the exams as required of him. At the conclusion of his academic programme he was informed by his lecturer one Mr Samuel Kango that the Respondent's Senate had passed his credit hours which stood at 171 hours against the minimum of 161 hours. This was despite the fact that he had failed one unit namely BCS 3101. He also observed that the graduation link on his portal had been activated and he paid the graduation fee of Kshs.6,500. He went through all the pre-graduation motions and was indeed issued with a graduation gown and two invitation cards for his guests. Even the Respondent's official magazine, the Voice, carried his photograph at page 51 as among the students being awarded a Bachelor of Business & Information Technology degree.
3. It is the Petitioner's case that when he went for rehearsals a day before the graduation, he found his seat missing. It was then that he was referred to the dean who informed him that it had been decided that morning that he was not eligible to graduate. No reason was given for the decision and none had been given by the time the petition was filed.
4. It is the Petitioner's case that the Respondent's action violated his right to life, right to human dignity, and economic and social rights as protected by Articles 26, 28 and 43 of the Constitution. It is the Petitioner's averment that the right to life has an expansive interpretation and extends to the right to livelihood and the right to earn a living. Further, that Article 28 provides that every person has inherent dignity and to have that dignity respected.
5. Citing Article 43, the Petitioner avers that he joined the Respondent for a degree course to better his life and that of his future family and to exercise his right to education under Article 43(1)(f). He therefore contends that the Respondent's failure to supply him with a certificate infringes his right to education. Further, that he had lost various employment opportunities due to lack of a certificate and this has affected his livelihood.
6. It is the Petitioner's case that Article 28 of the Constitution was violated in that despite spending a lot of money to advance his education so as to secure his future, the actions of the Respondent exposed him to ridicule among his former classmates and the community, which is an affront to his human dignity.
7. Stating that his right to equality and freedom from discrimination as protected by Article 27 of the Constitution had been violated, the Petitioner avers that upon meeting the Respondent's course study requirements, he had a legitimate expectation to be treated equally as his former classmates.
8. The Petitioner deposed that the Respondent's actions of unilaterally removing him from the graduation list and failing to offer reasons for withholding his certificate and transcripts despite repeated enquires is an infringement of his right of access to information as protected by Article 35 of the Constitution.
9. According to the Petitioner, the Respondent's failure to give reasons for its actions in writing and the fact that he was not offered the right to be heard infringed his right to fair administrative action that is expeditious, efficient, lawful reasonable and procedurally fair which is guaranteed by Article 47 of the Constitution.

10. In his petition dated 29th October, 2018 the Petitioner seeks reliefs as follows:-

- (a) **A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 26, 27, 28, 35, 43 and 47 of the Constitution of Kenya, 2010, have been contravened and infringed upon by the Respondent;**
- (b) **A declaration that the Petitioner is entitled to the payment of damages and compensation to be assessed by the court for the violation and contravention, of its (sic) fundamental human rights by the Respondent herein as provided for under Articles 26, 27, 28, 35, 43 and 47 of the Constitution of Kenya, 2010;**
- (c) **A compulsory order compelling the Respondent to unconditionally release to the Petitioner the original official transcripts and original official Bachelor of Business & Information Technology degree certificate;**
- (d) **Costs of this Petition;**
- (e) **Any other relief that this Honourable Court may deem just to grant."**

11. In a response filed on 30th November, 2018, the Respondent rejects the Petitioner's assertions stating that the Petitioner could not graduate because he had failed one core unit being BCS 3101 Object Oriented Programming II. It is the Respondent's case that it does indeed adhere to the constitutional rights of every citizen but it could not allow the Petitioner to graduate in breach of its regulations. Further, that the Petitioner's approval by the system for graduation was erroneous.

12. In submissions dated 21st February, 2019, counsel for the Petitioner submitted that Article 47 of the Constitution guarantees the right to fair administrative action that is expeditious, effective, lawful, reasonable and procedurally fair. It is the Petitioner's case that the Respondent did not give him any written reasons for denying him a chance to graduate and he was only verbally informed on the eve of his graduation that he would not be graduating. It is his case that the import of Article 47 of the Constitution requires administrative bodies to inform the person to be affected by an adverse action in writing the reasons for such action.

13. Further, that the right to fair administrative action is a right to that must not be abrogated or compromised. It is the Petitioner's position that it is now trite law that even in cases where there is no express requirement that a person be heard before a decision is made, the decision-maker must act fairly. In support of the submissions, counsel cited the decisions in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR; Civil Appeal No. 52 of 2014** and **President of the Republic of South African Rugby Football Union & others (CCT 1 16/98)(1)SA. 1** (full citation not provided).

14. It is the Petitioner's case that the Respondent failed to fulfill the conditions for fair administrative action as envisaged by the Constitution by failing to inform him in advance and in writing, of the adverse decision taken against him. He asserted that in such circumstances he had a legitimate expectation that he would graduate after complying with all the steps, required of him by the Respondent. The decisions of **Douglas Moturi Nyairo v University of Nairobi [2018] eKLR** and **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others, Supreme Court Petition No. 14 of 2014** are cited as stating the applicability and the ingredients of the doctrine of legitimate expectation.

15. In conclusion the Petitioner urged this court to find that his petition is not without precedent pointing out that in **Douglas Moturi Nyairo** (supra) the court was faced with a similar scenario and it did not hesitate to grant orders.

16. Opposing the petition, the Respondent University submitted that the Petitioner was indeed admitted as a student at the university where he studied for four years. It is the Respondent's case that Section 8.3 Clause e (Graduating System and Classification) of its Examination Regulations and Student Handbook requires all the students to pass all prescribed courses in order to be awarded a certificate for their respective programme of study. The Respondent submitted that the Petitioner's right to education was subject to the various rules and regulations of the university.

17. According to the Respondent, one of the requirements was that a student needed to pass a series of examinations before being awarded a degree. The Respondent therefore asserted that failure by the Petitioner to meet such conditions cannot be deemed as a violation of the right to education. The Respondent pointed out that the Petitioner had admitted in paragraph 8 of his affidavit in support of the petition that he had failed BCS 3101 Object Oriented Programming II, which was a core unit in his degree programme.

18. The Respondent submitted that it would therefore be unfair to compel it to award a degree certificate to the Petitioner before he passes the failed unit. According to the Respondent, the Petitioner still has an opportunity to apply and re-sit the failed unit and it is only after passing the examination that he can be awarded a degree certificate and given his original transcripts.

19. The Respondent denied violating the Petitioner's rights as guaranteed by Article 47 of the Constitution stating that the Petitioner had been given the reason for his removal from the graduation list as failure of the examination in BCS 3101 Object Oriented Programming II. The decision in the case of **Rachel Adhiambo Ogola & another v Council of Legal Education & another [2017] eKLR** is cited in support of the assertion that a certificate cannot be awarded to a person who has failed examinations of an institution.

20. On the prayer for award of damages, the decision of Lenaola, J (as is then was) in **Eliud Nyauma Omwoyo & 2 others v Kenyatta University [2014] eKLR** is cited as establishing the principle that damages cannot be awarded in certain circumstances even where it is established that constitutional violations have occurred.

21. The question that needs to be answered in this petition is whether the Petitioner has established violation of rights and if so, the nature of the remedy available to him. The facts in this petition are not disputed. The Petitioner was set to graduate from the Respondent University

when on the day of the rehearsal for the graduation he was informed that he was not eligible to graduate. It is the Petitioner's case that he was not given reasons for this development.

22. It is not disputed that the Petitioner's removal from the graduation list was not communicated to the Petitioner in writing. The real question in this case is whether the Petitioner actually believed that he was due to graduate. The parties agree that the Petitioner had sat and failed examinations twice in the BCS 3101 (Object Oriented Programming II) unit. The Respondent states that the said unit was core to the Petitioner's degree program and the Petitioner could not graduate before passing the examination for that unit. The Petitioner did not rebut the Respondent's averment. It is therefore clear that the Petitioner was not due to graduate although the system and communication from the University by way of the Voice Magazine 2018 showed that he was due to graduate.

23. This, however, does not mean that the Petitioner had any legitimate expectation that he would graduate. He knew from the time he entered the University the number of study units he needed to clear and the core units that he was expected to study and pass. The doctrine of legitimate expectation does not aid unconstitutionality or illegality. The maker of the decision must have the competence and authority to make the decision upon which the legitimate expectation is anchored.

24. In the case at hand, the Petitioner relies on an irregularity to ride on the doctrine of legitimate expectation. The University's rules and regulations did not allow him to graduate and he cannot use the fact that the University's digital system allowed him to register to force the university to award him a degree certificate. I therefore agree with Mativo, J in **Rachel Adhiambo Ogola & another v Council of Legal Education & another [2017] eKLR** when he states at paragraph 19, while quoting another judgment he had delivered earlier, that:-

“Regarding the power granted by the law to the first Respondent I observed as follows:-

“Power to maintain standards in the course of studies confers authority not merely to prescribe minimum qualification for admission, courses of study, and minimum attendance at an institution which may qualify the student for admission to the examination, but also authority to refuse to grant a degree, diploma, certificate or other academic distinction to students who fail to satisfy the examiners' assessment at the final examination.”

25. I have read Okwany, J's decision in **Douglas Moturi Nyairo** and I find that the facts of the case therein are in not in any way similar to the facts in this case. In that case, the petitioner had passed all his post-graduate examinations and had graduated only for the respondent to deny him his transcripts and degree certificate on the ground that he was not qualified in the first place to be admitted for post-graduate studies.

26. In the case before me, the Petitioner has not met the conditions for the award of a degree certificate since he has not passed all the required units. I hope the Petitioner is not asking this court to award him a degree because courts have no powers to award degree certificates. Courts only enforce rights where a clear breach of such rights has been established. In this case the Petitioner has not established any violation of rights. He knew from the time he entered the university the number of core units he was to cover. He cannot therefore turn around and claim that he did not know why he was removed from the graduation list. In the circumstances of this case, the failure to inform the Petitioner why he was not graduating did not amount to violation of rights. He knew or ought to have known that he had not passed the examinations for one of the core units.

27. Even if the Petitioner had convinced me that his constitutional rights had been violated, I would not have awarded any damages based on the holding by Lenaola, J (as he then was), which I entirely agree with, in **Eliud Nyauma Omwoyo (supra)** that:-

“62. The Petitioners have asked the Court to make an award of damages in their favour for the violation of their rights. The Petitioners in this case were accused of tampering with examination grades. I have already held that the Respondent violated their right to fair administrative action and hearing by simply not granting them an opportunity to be heard prior to the removal of their names from the graduation list, informing them of the charge with sufficient details, and presenting them with the evidence in advance so that the Petitioners would have had adequate time to prepare their defence. I wish to adopt the holding of the Court in *Pet No. 261 of 2011 (Consolidated with Pet No. 276 of 2011) (supra)* whereby it was stated that;

“An award of damages in circumstances such as this would send the message that even if one is found to have tampered with examination results or grades, he or she may well get monetary compensation if one is removed unprocedurally from the respondent's graduation list. It would be against the public interest for students whose grades have been tampered with to either be permitted to graduate with such grades, or to be compensated in damages for removal from the graduation list... in the circumstances, though I do find that there was a violation of the right to be heard and of fair administrative action, and balancing the right of the petitioners to be heard against the greater public interest to ensure that students graduate from our institutions of higher learning with the grades that they deserve, and thus preserve the integrity of our tertiary education, I make no award of damages against the respondent.”

I am in agreement and the reasoning above is crystal clear as to why an award of damages cannot be made in the circumstances of these Petitions.”

28. The Petitioner cannot be allowed to benefit from his intentional disregard of the rules and regulations of the Respondent. For the reasons stated in this judgment, I find that the Petitioner's case has no merit. The petition is therefore dismissed with each party being directed to meet own costs of the proceedings.

Date, signed and delivered at Nairobi this 31st day of October, 2019.

W. Korir,

Judge of the High Court