



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 574 OF 2017**

**IN THE MATTER OF ARTICLES 2(1), 2(5), 3(1), 10, 19, 20, 22(1), 23(3) & 24 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION AT ARTICLE 10 AND CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 26, 27, 28, 35, 43 AND 47 OF THE CONSTITUTION OF KENYA.**

**BETWEEN**

**DOUGLAS MOTURI NYAIRO.....PETITIONER**

**AND**

**THE UNIVERSITY OF NAIROBI..... RESPONDENT**

**JUDGMENT**

**PETITIONERS CASE**

1. The Petitioner herein, who describes himself as a Kenyan citizen and a former post- graduate student of the Respondent university, claims that upon the successful completion of his undergraduate course in Bachelor of Business Administration (Procurement in Supply Chain Management) from Kenya Methodist University, he applied to the respondent university ( hereinafter “the university”) for admission to pursue post graduate studies leading to the degree of Master of Business Administration in the 2013/2014 academic year.
2. His application was accepted by the respondent who then issued him with an admission letter dated 6<sup>th</sup> September 2013 after which he commenced studies in January 2015 and upon completing the course, the respondent, on 17<sup>th</sup> November 2016, issued him with a provisional transcript indicating that he had passed all the examinations and was therefore eligible for graduation with the award of degree of Master of Business Administration. It was the petitioner’s case that he thereafter cleared from the university on 21<sup>st</sup> November 2016 and was issued with a clearance certificate. He attached copies of the post graduate studies application form, letter of acceptance/ admission, provisional transcript and clearance certificate to the affidavit in support of the petition as annexures “DMN14”, “DMN2”, “DMN4”, and “DMN7” respectively.
3. The petitioner’s case was that upon successful completion of the post graduate course and after complying with all the conditions preceding the graduation, he was placed on the graduation list for the graduation ceremony that was held on 6<sup>th</sup> December 2016 when he physically presented himself for the graduation donning the graduation gown issued to him by the respondent. He attached a copy of the graduation list and a photograph taken during the said graduation to his affidavit in support of the petition as annexures “DMN9” and “DMN-10a” respectively.
4. The petitioner further stated that he thereafter made several attempts to obtain official copies of his transcripts and degree certificate from the respondent which attempts did not bear any fruits and that by a letter to the respondent dated 17<sup>th</sup> February 2017, he sought the release of the said documents which letter was unanswered. A copy of the said letter was attached to his affidavit in support on the petition and marked “DMN-11”.
5. The petitioners claim is that he later on discovered that his name had been unilaterally and unprocedurally removed from the graduation list in an erratum to the initial graduation list without any notice or communication to him. He then instructed his advocates to write to the

respondent and seek information regarding the reasons for the removal of his name from the graduation list and the withholding of his academic documents. He adds that his advocate's letter did not yield any response from the respondent thereby leaving him with no option but to institute the instant petition in which he claims that his rights under Articles 26, 27, 28, 35, 43 and 47 of the Constitution have been violated by the respondent.

The petitioner seeks the following reliefs against the respondents:

- 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 violation and contravention of its 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 respondents to unconditionally release to the petitioner the official transcripts and original official Master of Business Administration degree certificates;**
- d. Costs of Petition;**
- e. Any other relief that this honourable court may deem just to grant.**

#### **Respondent's case.**

6. Through the replying affidavit of **Professor Henry W. Mutoro** sworn on 6<sup>th</sup> April 2018, the university admitted that the petitioner applied for admission for a post graduate program and that his application was accepted after which he was admitted to the said university. He averred that the petitioner had previously enrolled at the university for an under graduate course but that he was expelled for engaging in examination malpractice contrary to the respondent's Rules Governing the Organization, Conduct and Discipline of Students (RGOCDs) and explained that the university's policy prohibits students who have previously been expelled for examination malpractice from enrolling to the respondent university for other or further programs.

7. He further deposed that the petitioner concealed and/or failed to disclose the fact that he had previously been expelled from the university to the respondent at the time he applied for the post graduate course and that the petitioner's admission was therefore erroneous and was only discovered after he had completed his studies. He also stated that the petitioner's inclusion on the graduation list was also erroneous but was corrected through an Addendum/Erratum which he attached to the replying affidavit and marked as Annexure "A". It was the respondent's case that the university aims at the maintaining high academic standards and that allowing the petitioner to graduate despite his serious misconduct would dilute its standard of education and reputation as a leading university in the region.

8. He added that it is the tradition of all universities within the Commonwealth not to readmit students who had previously been expelled for any or other academic programs in the same university. The respondent maintained that since the petitioner's previous expulsion had not been lifted or reversed, he could not graduate or be given the degree certificate. The respondent denied that any of the petitioner's constitutional rights had been violated and stated that the petitioner was the author of his own misfortune as he failed to disclose his previous expulsion before proceeding to take further studies at the respondent university.

#### **THE PETITIONERS SUBMISSIONS.**

9. In his oral submissions made before this court Mr Oduor, learned counsel for the petitioner submitted that the respondent did not furnish the petitioner with reasons or notice of his removal from the graduation list and neither was he accorded a hearing before the adverse action was taken against him. He further submitted that no information was given to the petitioner and his advocates regarding the reasons for his removal from the graduation list despite written requests for the said information.

10. On the right to fair administrative action under Article 47 of the Constitution the counsel submitted that the petitioner was entitled to a hearing before any adverse action could be taken against him and further that he ought to have been given written reasons for his removal from the graduation list. On the respondents claim that the petitioner's certificate was withheld because he did not disclose that he had previously been expelled from the university, counsel submitted that the petitioner learnt about this reason, for the first time, through the respondent's replying affidavit and argued that the petitioner was not under any obligation to disclose his previous expulsion to the respondent as the respondent was the custodian of its records and ought to have scrutinized the same before admitting the petitioner if indeed previous expulsion was critical factor in determining whether or not to admit a student to the post graduate programme.

11. Counsel faulted the respondent for failing to comply with provisions of Section 4 of the Fair Administrative Action Act which requires any administrative body to give adequate notice of the intended administrative action, in order to give an opportunity to the person affected by the said action to be heard and to give statement of reasons for the administrative action before any administrative action is taken. Counsel relied on the case of **Judicial Service Commission -vs- Mbalu Mutava & Another [2015] e KLR** wherein the 3 features of natural justice were identified to be the right to be heard by an unbiased tribunal, right to have notice of the charges of misconduct and the right to be heard in answer to those charges.

12. The Petitioner maintained that the respondent flouted the above ingredients of natural justice when making the decision to remove his name from the graduation list and subsequently, in refusing to issue him with the certificate and official transcripts which also amounted to an infringement of Article 47 of the Constitution and a breach of his legitimate expectation. Counsel relied on the case of **Communication Commission of Kenya and 5 Others -Vs- Royal Media Services Limited & 5 Others [2014] e KLR** wherein the principles of legitimate expectation were discussed.

13. Counsel further submitted that the petitioner's right to access to information under Article 35 of the Constitution was violated when the respondent failed to inform him of the reasons for his removal from the graduation list despite his numerous requests to be furnished with such information.

14. It was further submitted that the petitioner's right to equal treatment under the law as envisaged under Article 27(4) of the Constitution was violated by the respondent when it issued other students with certificates and transcripts and left out the petitioner despite the fact that he had qualified to be issued with the same. The Petitioner cited the case of **Florence Amunga Omukanda & Another -vs- The Attorney General and 2 Others [2016] e KLR** wherein it was held that treating persons who had gone through the same calamity differently amounted to forbidden discrimination.

15. Counsel further submitted that the petitioner's right of livelihood under Article 26 of the Constitution was violated when the respondent refused to give him the academic certificates that he could have used to secure a better life for himself by securing better employment upon graduating with a masters degree.

#### **RESPONDENT'S SUBMISSIONS.**

16. **Mr. Lutta**, learned counsel for the respondent submitted that it was an uncontroverted fact that the petitioner's name was removed from the graduation list and this did not graduate because he had previously been expelled from the respondent university for cheating at under graduate level and that his re-admission for the Master of Business Administration course was therefore in error. He faulted the petitioner for failing to disclose the fact that he had been expelled from the university due to his involvement in examination malpractices at the under graduate level. He argued that the orders sought by the petitioner are discretionary in nature and that failure to disclose material facts to the court denies the guilty party the privilege of obtaining the discretionary orders. He relied on the case of **GOTV Kenya Ltd vs Royal Media Services and 2 others [2015] e KLR** wherein Mabeya J discussed the requirements that a party does not conceal material facts from the court.

17. He further faulted the petitioner for making contradictory statements when on one hand he claimed that he did not know the reasons for the withholding of his certificate and transcripts and on the other hand states that he learnt that he had been removed from the graduation list through an erratum which he attached to his affidavit as annexure "DMN 13".

18. According to the respondent, the mere fact that the petitioner attended the graduation ceremony did not mean that he graduated as he was not conferred with any degree following his removal from the graduation list.

19. Counsel submitted that the petitioner's prayer to be issued with the academic certificates was not capable of being granted in the absence of an order quashing the erratum. He referred to the case of **Paul Murenge Muiru vs Patrick Thindiu Muiru [2006] e KLR** wherein the court declined to issue orders upon noting that the decision of the tribunal had not been set aside and that the act complained about had therefore not been quashed. He further relied on the case of **Nyambari Traders & Welfare Association vs County Government of Kiambu & 2 Others [2016] e KLR** wherein Aburili J. declined to issue orders of mandamus in the absence of an order of certiorari.

20. On the prayer for damages, counsel submitted that the petitioner had not established the grounds for his entitlement to damages as he had not demonstrated that he had suffered any loss or injury as a result of the actions complained about and neither had he addressed the court on the quantum of damages payable to him.

21. On the right to access information, counsel submitted that the respondent was not a state organ to which Article 35 of the Constitution could be applicable.

22. On discrimination under Article 27 of the Constitution the respondent submitted that the petitioner had not demonstrated that he was discriminated against by showing that there are students who despite having been expelled in circumstances similar to his, were admitted to the university, and allowed to graduate. He added, while relying on the case of **Nzoia Sugar Company vs Kungututi [1998] KLR 399**, that a corporation, which is not a living being, is not capable of being malicious as alleged by the petitioner.

#### **ANALYSIS AND DETERMINATION**

23. Upon careful consideration of the pleadings and the submissions of the parties herein, I find that it is first and foremost necessary to determine if the respondent was justified in removing the petitioner's name from the graduation list and further for withholding the petitioner's degree certificate and transcripts upon the successful completion of the post graduate degree course. I will thereafter consider the question of whether or not, in doing so, the respondent violated the petitioner's constitutional rights, and lastly whether the prayers sought in the petition should be granted.

24. It was not in dispute that the petitioner formally applied for admission to the respondent university for a post graduate degree course in business administration. A sample of the application form was produced before this court as exhibit "DMN-14". An admission letter in support of the petitioner's said admission was produced as exhibit "DMN-2". It was also not in dispute that the petitioner successfully completed his said post graduate course and was slated to graduate in December, 2016 as shown in the graduation list that was produced as exhibit "DMN-9". However, in the turn of events that precipitated the instant petition, the petitioner's name was removed from the graduation list as seen in the copy of an erratum marked as exhibit "DMN-13".

25. In its defence, the respondent explained that it was justified in removing the petitioner's name from the graduation list because he had previously been expelled from the said university, at the undergraduate level, following his involvement in examination malpractices as shown in the respondent's exhibits marked "b" and "c" and that the petitioner did not, at the time of his application for admission to the post graduate course, disclose his said expulsion record to the respondent. According to the respondent, the petitioner was admitted for the post graduate course in error and contrary to the university policy and tradition of all universities in the commonwealth which stipulates that once

a student is expelled, the said student cannot take any other academic program in the same university.

26. This court is however not satisfied with the respondent's explanation for its action against the petitioner for the following reasons; Firstly, while I note that it is true that the petitioner was expelled from the respondent university at the undergraduate level and that he completed his bachelors' degree course in another university, nowhere in the respondent's expulsion letter was it indicated that the petitioner would not be eligible for admission to the said university for any other course.

27. Secondly, I have carefully perused the respondent's post graduate studies application form and I note that nowhere in the said form was it indicated that an applicant was required to make any disclosure of his past expulsion from the said university so as to justify the respondent's position that the petitioner was guilty of material non-disclosure of his said expulsion. I find that if indeed it was a policy and/or tradition of the respondent not to admit students with past expulsion records, then nothing would have been easier than for the respondent to include a clause/requirement to that effect in the application form so as to give sufficient notice to any would-be applicants of the said policy/tradition. I further note that no material was placed before this court to support the respondent's claim that it was their policy or commonwealth universities' tradition not to admit students who had previously been expelled from the university.

28. Lastly and most importantly, I find that the respondent, as the custodian of all the records of its current and past students, the petitioner herein included, had ample opportunity to peruse its records before admitting the petitioner, or any other student for that matter, so as to ascertain if they met the criteria for admission for the post graduate course. I therefore find it ironical that the respondent expected the petitioner to disclose to it material that is well within its own knowledge and records. In this regard, I find that if indeed it was the respondent's policy not to admit those who had previously been expelled from the university, nothing could have stopped the respondent from scrutinizing its records, upon receiving the applicant's application for admission, so as to confirm if he had any previous expulsion record before admitting him for the post graduate course. I further find that the fact that the petitioner could slip through the respondent's scrutiny machinery, if at all such a machinery existed, and proceed with his post graduate studies, unnoticed, to the end, only for the respondent to realise at the eleventh hour that he had previously been expelled, is a serious indictment on the capacity of the respondent, as a reputable institution of higher learning, to protect the integrity of its academic programs.

29. My take is that his previous expulsion notwithstanding, the petitioner made a fresh application for admission to the respondent university for an entirely new course. The respondent accepted the application and the petitioner began his studies on a fresh slate, as it were, which course he successfully completed without any hitches or breaches. My analysis of the pertinent facts and applicable law makes me conclude that upon accepting the petitioner's application for admission to the university and upon complying with all the conditions of the course, the petitioner had a contractual and legal relationship with the respondent university in respect to award and conferment of a degree.

30. Under the above circumstances, I find that the petitioner had the legitimate expectation that he would graduate and that he would at the end of his course be furnished with all his academic certificates and transcripts. I therefore find that it was unreasonable, unfair and unjust for the respondent to belatedly purport to 'reject' the petitioner's application when he was already due to graduate on the basis that he was admitted in error following his previous expulsion.

31. Legitimate expectation is founded on the basic principle of fairness which ought not to be thwarted and that in judging a case, courts have held that a Judge should achieve justice and weigh the relative strength of expectation. In the case of **Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others, Petition No. 14 of 2014** the Supreme Court stated as follows on the emerging principles on legitimate expectation:

- 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 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.**

32. In the instant case, as I have already found in this judgment, the petitioner was admitted by the respondent to undertake studies leading to the award and conferment of a masters' degree in Business Administration. It is my humble view that by admitting the petitioner to undertake the said course, the respondent made a promise and representation to the petitioner that upon successfully undertaking the course of study, it shall award and confer its degree to the petitioner. I find that a clear and unambiguous promise or representation was made by the respondent to the petitioner and the doctrine of legitimate expectation is therefore applicable in this case.

33. My further finding is that if indeed there was any error in admitting the petitioner to the university, then the party to be penalized for the said error should be the respondent's agent(s) who admitted the petitioner contrary to the respondent's alleged policies and not the petitioner who had complied with all the requirements for the said post graduate course.

34. In sum, I find that the respondent was not justified in removing the petitioner's name from the graduation list or in withholding his academic certificates and transcripts.

#### **WHETHER THE PETITIONER'S RIGHTS WERE VIOLATED**

35. Turning to the issue of whether the petitioner's constitutional rights were violated, it is now a well hackneyed principle that a party who seeks relief under the Constitution must state with specificity the right which he alleges had been violated and how it has been violated in respect to him (see **Anarita Karimi Njeru v Republic (No.1) [1978] KLR 154** as affirmed by the Court of Appeal in **Mumo Matemu v Trusted Society for Human Rights Alliance & 5 Others NRB CA Civil Appeal 290 of 2012 [2013] eKLR**). In the instant case, the petitioner was categorical that his rights under Articles 26, 27, 28, 35, 43 and 47 of the Constitution were violated by the respondent.

Article 26 of the Constitution provides as follows with regard to the right to life:

1. **“Every person has the right to life.**
2. **The life of a person begins at conception.**
3. **A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.**
4. **Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”**

Concise Oxford English Dictionary 11<sup>th</sup> Edition defines life as here under:-

**“The condition that distinguishes animals and plants from inorganic matter, including the capacity for growth, functional activity, and continual change preceding death – living things and their activity.”**

36. Both the Constitution and the dictionary refer to the literal meaning of life as the activity of living or the absence of physical elimination. Life cannot however occur in the abstract as there must be a conducive environment or circumstances under which life can be said to occur, the denial of which may result in the deprivation of life.

37. The petitioner urged this court to adopt an expansive interpretation to the right to life beyond the literal meaning of life so as to include the right to livelihood. He contended that the respondent’s continued withholding of his master’s degree certificate had curtailed his ability to secure a better employment opportunities so as to enable him improve his standard of life. He relied on the definition of the right to life given in the case of Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR wherein the case of Peter K. Waweru –v- Republic (2006) 1 KLR (E&L) 677 was cited. In the said Peter K. Waweru case (supra) the court found as follows with regard to the meaning of the right to life under Section 71 of the old Constitution:

**“We have added the dictionary meaning of life which gives life a wider meaning, including its attachment to the environment. Thus a development that threatens life is not a sustainable and ought to be halted. In Environmental law, life must have this expanded meaning.”**

38. The Supreme Court of Pakistan in its decision in Zia –v- Wapda PLD (1994) SC 693 that was cited in Peter K. Waweru –v- Republic (supra) had the following to say in respect to the provisions of section 9 of the Pakistan Constitution that no person shall be deprived of life or liberty except in accordance with the law:

**“The Constitution guarantees dignity of man and also right to ‘life’ under Article 9, and if both are read together, the question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment.”**

Article 43(1) of the Constitution expressly provides for economic and social rights as follows:

**“(1) Every person has the right—**

- a. **To the highest attainable standard of health, which includes the right To health care services, including reproductive health care;**
- b. **To accessible and adequate housing, and to reasonable standards of sanitation;**
- c. **To be free from hunger, and to have adequate food of acceptable quality;**
- d. **To clean and safe water in adequate quantities;**
- e. **To social security; and**
- f. **To education.”**

Article 28 provides for the right of inherent dignity of every person and the right to have that dignity respected and protected.

39. It is therefore evident from the foregoing provisions of the constitution that their purpose is to ensure that persons to whom they apply attain a dignified and reasonable livelihood. Education forms part and parcel of the basic minimums that guarantee not only the dignity of man but also his inalienable right to life. This court is alive to the fact that the reason why most people pursue education is so that they can attain a higher standard of living through the acquisition of better paying jobs, upon graduating, and this must have been the force that drove the petitioner to seek admission in the respondent’s university for a post graduate degree course. The petitioner did not however demonstrate, through tangible evidence, that he missed employment opportunities or that his standard of living and dignity was compromised/lowered following the respondent’s refusal to release his academic documents to him and on this score, I find that the claim

that his right to life was violated was not proved.

## **Article 27 of the Constitution**

Article 27 sets out the non-discrimination provisions as follows:

- 1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.**
- 2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**
- 3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**
- 4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**
- 5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**
- 6. To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.**
- 7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.**
- 8. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.**

40. The petitioner argued that his right to equal treatment under the law as envisaged under Article 27(4) of the Constitution was violated by the respondent who left him out while issuing degree certificates to other qualified graduates. It was not in disputed that the petitioner qualified to be issued with his degree certificate at the end of his studies at the respondent university. The respondent explained, albeit in an unsatisfactory manner as I have already found in this judgment, the reasons for its decision to withhold the petitioner's academic certificate. My finding is that the petitioner's claim on discrimination was not proved, when considered in the context of the respondent's aforesaid explanation. On this point, I am in agreement with the respondent's submission that the petitioner did not establish that there were students who were issued with degree certificates despite having been previously expelled from the said university so as to justify his claim that the respondent discriminated against him.

## **ARTICLES 35 AND 47 OF THE CONSTITUTION**

41. The petitioner's case was that his rights to information and fair administrative action under Articles 35 and 47 respectively were violated. He stated that despite qualifying to graduate with a masters' degree in business administration from the respondent university, the respondent removed his name from the graduation list at the eleventh hour without according him a hearing and for reasons that were not made known to him on time or at all as all his letters to the respondent seeking to know the reasons for his removal from the said list were unanswered.

42. It was not disputed, by the respondent, that the petitioner was not accorded a hearing before his name was removed from the graduation list and neither did the respondent state that it notified the petitioner before the adverse action of striking his name out of the graduation list was taken. Furthermore, the respondent did not respond to the petitioner's letters in which he sought to know the reasons for his removal from the graduation list.

Article 35 of the Constitution provides that;

**Every citizen has the right of access to—**

- a. Information held by the State; and**
- b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.**
- c. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**
- d. The State shall publish and publicize any important information affecting the nation.**

43. In its defense, the respondent argued that Article 35 of the Constitution is not applicable in this case as the respondent is not an authority or the state so as to be under an obligation to comply with the said Article. My finding is that the right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. In the instant case, I find that the respondent is a public university and a body corporate acting on behalf of the state in providing education to the citizens. In this regard, the respondent cannot be seen to state that Article 35 of the Constitution does not apply to it. In any event, Article 35 (1) (b) is clear that the right access to

information extends not only the information held by the state, but also to the information held by another person and is required for the exercise or protection of any right or fundamental freedom.

44. I find that as a bona fide student of the university, the petitioner was entitled to know why his name had been removed from the graduation list and as a public institution, the respondent was under an obligation to make the right to information attainable. The Constitution is clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.

45. For purposes of actualizing Article 35, parliament enacted Access to Information Act 2016 (hereinafter “the Act”). Section 4 of the Act which is material, to this petition provides for the procedure to access information as follows:

1. **“Subject to this Act and any other written law, every citizen has the right of access to information held by—**

**a. He State; and**

**b. Another person and where that information is required for the exercise or protection of any right or fundamental freedom.**

2. **Subject to this Act, every citizen's right to access information is not affected by—**

**a. Any reason the person gives for seeking access; or**

**b. The public entity's belief as to what are the person's reasons for seeking access.**

**3. Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.**

**4. This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.**

**5. Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.(Emphasis)**

46. In the present petition the respondent did not deny that it received letters from the petitioner seeking information regarding his removal from the graduation list. It was not disputed that the respondent did not respond to the said letters by either giving access to information, or declining to disclose and giving reasons for that. Section 9 of the Act states in no uncertain terms that the state or state organs should give information within 21 days or respond to the request within that period. This clear legal provision notwithstanding, no access to information was given or reason given; either that the respondents did not have the information or that they would not disclose the information and give justification for it. It is therefore my finding that the respondent violated the petitioner’s right to access information as it withheld crucial information that the petitioner was entitled to in order to protect his right to education.

47. The petitioner’s case was that his right to fair administrative action under Article 47 of the Constitution was violated. He said he was not accorded a hearing before a decision was made to remove his name from the graduation list and to withhold his academic documents.

48. Courts have held that the right to fair administrative action is an integral part of the Bill of Rights and an essential feature of our Constitution as it strikes at the heart of a democratic society without which democracy and the rule of law cannot be said to exist. This right is now firmly embedded in our Constitution as a way of ensuring that administrative actions meet the standards set by the Constitution.

Article 47 of the Constitution of Kenya provides as follows:

**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. 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 tribunal or authority entrusted with the mandate of making the decision must act fairly. In the case of **Judicial Service Commission vs. Mbalu Mutava (supra)** the Court of Appeal 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.”**

50. The importance of fair administrative action as a Constitutional right was stated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, at paragraphs 135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

**“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...”**

In **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817** 6 it was held:

**“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”**

51. The ingredients of fairness or natural justice that must guide all administrative decisions are; firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

**Halsbury Laws of England, 5<sup>th</sup> Edition 2010 Vol. 61** states as follows at para. 639:

**“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”**

52. The above cases and principles emphasize the fact that whatever form of proceedings adopted by an authority must meet the basic, minimum irreducible elements of fairness. In this case, it is clear that an adverse action of removing the petitioner’s name from the graduation list was taken without any notice or information to him and without inviting him to defend himself or argue his case. Article 47 of the Constitution envisages that the petitioner would have been heard on his case before a determination to exclude him from the graduation list was made. This court notes that all the letters from the petitioner and his advocate to the respondent seeking to know the reasons for the adverse action did not elicit any response from the respondent and that indeed, the petitioner only learnt that he was removed from the graduation list because of his previous expulsion from the respondent’s replying affidavit filed herein.

In the case of **Geothermal Development Company Limited v Attorney General & 3 others 2013] eKLR** it was held:

**“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well..... Hilary Delany in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2<sup>nd</sup> edition, at page 272, notes that, “Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.”**

53. In the instant case, the respondent did not make any efforts whatsoever to respond to the petitioner’s queries and neither did it make any attempts to communicate to him over the reasons for their adverse action. The totality of the evidence tendered before this court clearly points to the fact that the respondent remained completely mute and did not explain to the petitioner why it had taken arbitrary action against him.

54. I find that as a reputable public institution dealing with the critical business of providing higher education and awarding degree certificates to students, the respondent was under an obligation to promptly communicate any adverse action to the petitioner. It is instructive to note that to date, and despite the fact that the petitioner lodged this petition before this court seeking the enforcement of his constitutional rights, the respondent has not made good any of the petitioner’s claims so as to mitigate his loss. I therefore find and hold that the petitioner’s right to fair administrative action under **Article 47(1)** of the Constitution was violated by the respondent when he was not informed of the any disciplinary action against him and when his name was arbitrarily removed from the graduation list without any notice to him and further, when the respondent failed, refused and/or neglected to release the petitioner’s academic certificates and transcripts. In a nutshell I find that the university violated the petitioner’s rights under Articles 35 and 47 of the Constitution.

## **RELIEFS**

55. Having found that the petitioner’s constitutional rights were violated, I now turn to deliberate over the reliefs available to the petitioner.

Article 23(3) of the Constitution stipulates as follows on the reliefs that the court may grant upon finding that a right has been violated:

**(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.**

56. Courts have held that what amounts to an appropriate relief depends on the nature and circumstances of each case (see [Nancy Makokha Baraza v Judicial Service Commission and 9 Others Nairobi Petition No. 23 of 2012 \[2012\] eKLR](#) and [Bidco Oil Refineries Ltd v Attorney General and 3 Others Nairobi Petition No. 177 of 2012 \[2012\] eKLR](#)).

57. In the present case, the petitioner sought orders for declarations that the respondent had infringed on his fundamental rights and freedoms under Articles 26, 27, 28, 35, 43 and 47 of the Constitution. He also sought orders for the payment of damages for the violations, an order compelling the respondent to unconditionally release to him the original transcripts and Master of Business Administration degree Certificate, costs of the petition.

58. On the prayer for orders of mandamus to compel the respondent to release the petitioner's academic documents, the respondent argued that such an order cannot be granted in view of the fact that the erratum had not been quashed.

59. Cambridge English Dictionary meaning of erratum is "***a mistake in a printed or written document***". Oxford Dictionary on the other hand defines erratum as "*an error in printing or writing* ***1.errata*** *A list of corrected errors appended to a book or published in a subsequent issue of a journal.*" Blacks Law Dictionary defines erratum as "*an error that needs correction*".

60. In light of the above definitions, I find that an erratum is not an order capable of being quashed through an order of certiorari. Indeed, no material was placed before this court to show that any tribunal or body sat and made a decision to remove the petitioner's name from the graduation list so as to justify the respondent's position that the erratum had to be quashed before an order compelling the respondent to release the petitioner's academic documents could be issued

61. On the claim for damages, the respondent argued that the petitioner is not entitled to an award of damages in view of the fact that he had not established the grounds or injury suffered that would entitle him to the damages sought. The respondent also argued that the petitioner did not submit on the quantum of damages that would be due to him. I have already found the respondent liable for violating the petitioner's constitutional rights. My further finding is that a declaration of violation of rights will however not be sufficient to make good the loss and inconvenience that the petitioner has suffered since December 2016 when his academic certificate and transcripts were withheld by the respondent. I find that the facts of this case speak for themselves and it cannot be said that the petitioner did not suffer an injury or loss as a result of the respondent's said violations.

62. The common law principle is that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is under consideration. The principles applicable to award of damages for constitutional violations under the Constitution were explained exhaustively by the Privy Council in the famous case of [Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004](#) wherein it was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

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

**An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of Substantial size, may need to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches.(emphasis) All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution,**

punishment in the latter sense is not its object. Accordingly, the expressions “punitive damages” or “exemplary damages” are better avoided as descriptions of this type of additional award.” (Emphasis)

63. In the Tamara Merson v Drexel Cartwright and Ag (Bahamas) Privy Council Appeal No. 61 of 2003 the Privy Council held that in some cases, a suitable *declaration* may suffice to vindicate the right which has been breached. The Court quoted the postulation by Lord Scott of Foscote in Merson (supra) in which, after citing a passage from Ramanoop (supra) including the paragraphs set out above, stated thus:

“[18] *These principles apply, in their Lordships’ opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that ‘constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course’ (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.*”

The Privy Council in Alphie Subiah v The Attorney General of Trinidad and Tobago Privy Council Appeal No. 39 of 2007 pronounced itself on the same point stating that:

“The Board’s decisions in Ramanoop, paras 17-20, and Merson, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in Merson’s case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of Ramanoop, and Merson, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in Thompson v Commissioner of Police of the Metropolis [1998] QB 498, 516 D-E) for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress whether an additional award should be made to vindicate the victim’s constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasized in Merson, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression.”

The position of the Privy Council was adopted in the South African Case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

In Peters v. Marksman & Another [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in Fuller v A-G of Jamaica (Civil Appeal 91/1995, unreported), where the Court held that:

“It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable...Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.”

The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 to include, a remedy that will :

- 1. Meaningfully vindicate the rights and freedoms of the claimants;**
- 2. Employ means that are legitimate within the framework of our constitutional democracy;**
- 3. Be a judicial remedy which vindicates the right while invoking the function and powers of a court; and**
- 4. Be fair to the party against whom the order is made.**

64. The dictum in the above cited cases is that the award of damages for constitutional violations of an individual's right are reliefs under public law remedies lies within the discretion of a trial court and that such discretion is limited by what is "*appropriate and just*" based on the facts and circumstances of each case. It is therefore clear that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. What this means is that in certain instances an award of reasonable damages may be called for in addition to the declaration taking into account not only the petitioner's interests but also the public policy considerations and the wider interests of the society.

65. In the instant case, I am of the considered view that the conduct of the respondent of not only taking a unilateral decision to remove the petitioner's name from the graduation list but also in refusing to divulge to the petitioner the reasons for such removal and persisting in its refusal to release the petitioner's academic certificates to him to date, call for the exercise of this court's discretion to award damages for the aforesaid constitutional violations.

66. I therefore find that an award of compensation is merited in this case so as to give effect and meaning to the petitioner's constitutional rights. Consequently, I award the petitioner Kshs. 400,000/- as general damages for violation of his right to access to information and fair administrative action. Needless to say, the petitioner has also incurred costs in filing this petition in order to enforce his constitutional rights and since he has succeeded in this claim he is entitled to costs which I award him. I assess the costs of the case at Kshs. 80,000/- all inclusive. I further find that an order compelling the respondent to release the petitioner's academic documents to him will be necessary.

#### **DISPOSITION**

In view of my findings above, I am satisfied that the petition has merit, and I therefore grant the following orders:

- a. I hereby declare that the petitioner's right to access to information and to fair administrative action under **Articles 35 and 47** of the Constitution were violated when the respondent, arbitrarily and without taking him through the due process, removed his name from the graduation list, failed to respond to his request for information, withheld his degree certificate and refused to release his original transcripts.
- b. I hereby award the petitioner Kshs. 400,000/- as general damages with interest thereon at court rates from the date of this judgment until payment in full.
- c. I hereby issue an order of mandamus compelling the respondent to unconditionally and within 7 days from the date of this judgment hereof, release to the petitioner, the original transcripts, and original Master of Business Administration degree certificate.
- d. I hereby award the petitioner Kshs. 80,000/- as all-inclusive costs.

**Dated, delivered and signed in open court at Nairobi this 27<sup>th</sup> day of June 2018**

**W. A. OKWANY**

**JUDGE**

**In the presence of**

Mr Oduor for the petitioner

Mr Akwabi holding brief for Mr Lutta for the respondent

C.C. Kombo