



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CONSTITUTIONAL PETITION NO. 17 OF 2015

**IN THE MATTER OF ALLEGED INFRINGEMENT AND VIOLATION OF ARTICLES
27,45,55**

AND

IN THE MATTER OF ARTICLES 3, 22 & 258 OF THE CONSTITUTION

AND

**IN THE MATTER OF DISCRIMINATION, UNFAIR ADMINISTRATIVE ACTION AND
VIOLATION OF THE BILL OF RIGHTS AND PROVISION OF THE CONSTITUTION AS THE
SAME RELATE AND CONCERN THE APPLICANT**

BETWEEN

BRIAN MAKORI OMBONGI.....PETITIONER

AND

THE KENYA NATIONAL EXAMINATION COUNCIL.....RESPONDENT

JUDGMENT

1. The petitioner herein, **Brian Makori Obongi**, filed a petition dated 16th February 2015 under Articles 3,22,27,45,55 and 258 of the Constitution seeking orders as follows:

a. A declaration that the petitioner's human rights have been violated and is threatened with further violation.

b. An order of permanent injunction directed at the Respondent and restraining it from continuing to withhold and/or detain the petitioner's certificate for the 2012 KCSE Examination.

c. An order that by virtue of the said violation the petitioner has been deprived the right to be recruited into the Kenya Defence Force having been denied the right and opportunity to seek employment, has suffered great loss and damage for which he is entitled to compensation.

d. An order that the petitioner is entitled to compensation quantum of which shall be assessed by the court for the past violation and continued violation of his constitutional and human rights.

e. A declaration that the failure by the Respondent to release the Petitioners certificate for a period in excess of 2 years in spite of requests and demand amounts to dehumanizing threats and thus a violation of the constitution.

f. A declaration the Chief Executive Officer of the Respondent and its Council members having violated the Provisions of the Constitution by unconstitutional actions, are unfit to hold Public Office.

g. An order of judicial review in the nature of mandamus compelling the respondent to perform its statutory duty by releasing the certificate to the petitioner forthwith.

h. Such other or further relief this court deems just and fit to grant.

i. The costs of and occasioned by this petition be borne by the respondent.

Petitioner's Case

2. The petitioner's claim is that at all material times for four years up to the year 2012, he was enrolled as a learner at Moi Gesusu High School and the results of the Kenya Certificate of Secondary Examination (KCSE) released by the Respondent at the end of his studies revealed that he had scored a mean grade of "B(PLAIN .)" He states that sometime in the year 2014, the Kenya Defence Forces advertised opportunities/vacancies for applicants interested in being recruited in the forces and that he (petitioner) tendered his application for the opportunity after which he was shortlisted for an interview that was to be conducted at Lanet Barracks on the 24/9/2014.

3. The petitioner further claims that it was an express precondition that every interviewee was to attend the interview while armed with original documents including academic certificates. That at the time that he was shortlisted, the respondent had not issued the petitioner with his KCSE certificate thereby prompting the petitioner to make a trip to the respondents offices where he requested to be issued with the same for the purposes of his compliance with the requirements of the impending interview but he claims that the respondent totally, unlawfully, and unreasonably failed to release the certificates to him and persist in such failure to date. The petitioner further contends that as a result of the respondents said unlawful and unjustifiable refusal to furnish him with the certificate, he lost the chance to be interviewed and recruited in the forces thereby precipitating this petition. His case is that the respondent, in refusing to issue him with the said certificate, failed to perform its statutory duty as a State Agency Established under an Act of Parliament.

4. The petitioner attached his sworn verifying affidavit dated 22/4/ 2015 to petition.

Respondents Case

5. The respondents opposed the petition through the replying affidavit of **Mercy G. Karogo**, the respondent's Chief Executive Officer, dated 10th May, 2016 in which she deposes that **section 10(2) (a) of the Kenya National Examination Council (KNEC) Act No. 29 of 2012**, empowers the respondent to make Rules regulating the conduct of Examinations and for all purposes incidental thereto. She adds that pursuant to the Act, the Respondent promulgated KNEC KCSE Examination fees with effect from January 2013, which provided for the payment of "under protest" charge at clause 2.6 of the fees schedule. She attached a copy of the fees review marked as "**MGK 1**" to her said replying affidavit and further deposed that under **section 10(2) (d) of the KNEC Act No. 29 of 2012** the respondent is empowered to make rules to regulate the conduct of the issuance of certificates and diplomas and for all purposes incidental thereto in accordance with the KNEC Gazetted Rules of 2015 dated 10th July, 2015 Legal Notice No. 129. She attached a copy of the gazette rules marked as "**MGK 2**".

6. She further explained that the respondent did not delay in releasing the petitioner's certificate but that there were several integrity processes including the entry of the results in the databases that had to be undertaken before the certificates could be released to the candidates and that in the petitioner's case, a

result slip, which is a provisional certificate, had already been issued to him and that he could then use the said slip to pursue any career of his choice or to enhance his further studies.

7. She further deposed that the respondent went out of its way to request for the petitioner's certificate which was received at the respondent's Head Quarter on 18th April, 2016, She attached a copy of a letter addressed to the petitioner's lawyer, copied to the petitioner's school attaching the copy of the original certificate marked as "MGK 3." She stated that the said certificate was eventually collected by the principal of Moi Gesusu High School for onward transmission to the petitioner in accordance with the KNEC rules.

8. The respondent's case was that as a statutory body it handles over three million certificates annually for KCSE among other examination categories including primary, post school examinations in certificate and diploma levels and cannot therefore be held responsible for the delay of the petitioner's certificate which delay she attributed to the delay the petitioner's former school's management in failing to remit the requisite "under protest" charges to KNEC in time in accordance with the regulations.

9. It is thus the respondent's case that the processing of the certificate of the petitioner was done fairly, without bias and in compliance with the respondent's rules and regulations. The respondent sought the dismissal of the instant petition with costs.

10. When the petition came up for hearing before Karanjah J. on 7/11/2016 directions were given that the same be argued by way of written submissions which the parties subsequently filed and which I have perused.

Analysis and determination

11. After considering the petition, the respondents replying affidavit and the parties' written submissions, I note that the issue for determination is whether or not the petitioner is entitled to the orders that he seeks.

12. The petitioner alleges that his constitutional rights and more specifically his rights under **Articles 27, 47 and 55 of the Constitution** have been infringed by the respondent's delay in issuing him with his KCSE certificate. Upon considering the merits of the instant petition, I am of the view that even though the petitioner proved that his rights under Article 47 of the constitution were violated the same is not the case for his rights under Article 27 of the constitution. The threshold of proof in constitutional references was well articulated in the celebrated case of **Anarita Karimi Njeru v Republic(1979)KLR 154** where it was stated as follows:-

" We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

13. Article 27 of the constitution stipulates as follows:

"27. (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 realisation 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 *Constitution of Kenya, 2010*.”

14. In the instant case, the petitioner alleges that he was subjected to discrimination or unequal treatment having paid his examination fees when the respondent failed to issue him with a certificate in time and regularly with every other candidate who sat for the 2012 KCSE examination. In my view, the delay in releasing the petitioner's certificate does not *per se* amount to discrimination as the delay has not only been explained by the respondent in the replying affidavit but the petitioner has also not shown that the said delay was actuated by malice or ill will. According to the respondent, the delay in releasing the petitioner's certificate was occasioned by the failure of the petitioner to pay the under protest charges in good time. The respondent stated that the petitioner paid the charges on 5th September, 2013 after which it embarked on processing the certificate which was eventually released to the petitioner's school principal in May, 2016.

15. I however find that the petitioner's claim that he was denied an opportunity to training, education and or access to employment under Article 55 of the Constitution was proved. Article 55 of the Constitution stipulates as follows:

“The State shall take measures, including affirmative action programmes, to ensure that the youth—

(a) access relevant education and training;

(b) have opportunities to associate, be represented and participate in political, social, economic and other spheres of life;

(c) access employment; and

(d) are protected from harmful cultural practices and exploitation.”

16. The petitioner stated that he had been shortlisted for an interview to join the forces for which academic certificate was one of the requirements. This court takes judicial notice of the high unemployment rates in our country that have had the effect of making recruitment in the Kenya Defence Forces or in any organisation for that matter, very competitive due to the large number of applicants for such opportunities and in which lack of an academic certificate would amount to automatic disqualification of a candidate as was the case with the petitioner herein.

17. Article 47 of the Constitution provides that:-

1. "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by the administrative action, the person has the right to be given written reasons for the

action."

18. In the instant case, the reason advanced by the respondent for the delay in releasing the petitioner's certificate was that the petitioner had not paid the requisite under protest charges. The petitioner eventually paid the said charges in September 2013 after which the certificate was released to him in May 2016. I find that even though the petitioner could have delayed in paying the under protest charges, the respondents delay of more than 2 years before it could furnish the petitioner with the certificate has not been satisfactorily explained. As at October 2014, when the petitioner first approached the respondent to request for the release of his certificate, the petitioner had already satisfied the respondent's requirement for the payment of the "under protest" charges. The respondent was made aware of the petitioner's urgent need for the said certificate as he needed to present it during an interview, yet the respondent sat pretty and did not act on the petitioner's demand till May 2016, more than a year later long after the interview had already taken place. I reiterate that the importance of academic certificates to anyone who wishes to pursue further training or seek employment in this country cannot be gainsaid. The respondent cannot under the above circumstances be said to have acted on the petitioner's request **in** an expeditious, efficient, lawful, reasonable and procedurally fair manner. I find that the delay was unreasonable and amounted to an infringement of the petitioner's rights under Article 47 and 55 of the constitution.

19. As was held in **Kenya National Examinations Council vs. Republic ex parte Gathenji and Others [1997] eKLR:**

"If the Council refuses or neglects to mark the examinations within a reasonable time, or having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the papers or to declare the results as the case may be...The same goes for awarding diplomas or certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b). But the High Court would not be entitled to order the Council, when carrying out the process of marking the examination papers, to award any particular mark to any."

20. In this case the respondent was under a duty, both under the Constitution and the Kenya National Examination Council Act, to release the petitioner's certificate within reasonable time yet no plausible reasons were given for the delay which delay persisted even after the petitioner had filed this petition in court.

21. On damages, **Article 23(3) (e) of the Constitution** empowers this Court to award damages in compensation where breach of a constitutional right is established. In the instant case, I have already made a finding that the Petitioner's constitutional rights were violated and he is therefore entitled to damages.

22. 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. 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 be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."

23. In **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.

24. Taking cue from the above decisions, 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 by 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 or 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 emphasised 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."

25. In the South African Case of **Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291** 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.”

26. 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.”

28. 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.

29. Going by above decisions and jurisprudence, it is clear to me that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, which discretion, is limited by what is “*appropriate and just*” according to the facts and circumstances of a particular case. As stated in the above cited cases, 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. In some cases therefore, the appropriate determination will be the making of a declaration only, which is a powerful message that has a deterrence effect on future violations, will suffice to meet the ends of justice. It however of critical importance that the courts discretion in making the award be exercised with rationality and proportionality. In certain instance, an award of reasonable damages may be called for in addition to the declaration.

30. In light of my findings on the various issues set out in the judgment, I am satisfied that the petitioner made out a case of violation of constitutional rights, under Article 47 of the constitution, against the respondent and the award of damages that commends itself to me for the said violation is the sum of Kshs. 150,000/=. My final findings, for the avoidance of doubt, are as follows:

a. I find and hold that the respondent violated the rights of the petitioner guaranteed under Articles 47 and 55 of the Constitution.

b. I find and hold that the respondent shall compensate the petitioner in damages of Kshs. 150,000/=.

c. The respondent shall also pay the costs of this petition.

Dated, signed and delivered in open court this 11th day of April 2017

HON. W. OKWANY

JUDGE

In the presence of:

- Mr.Bosire Gichana for the Petitioner
- N/A for the Respondent
- Omwoyo: court clerk