



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 105 OF 2016**  
**LABAN NJUGUNA MUIRURI.....PETITIONER**  
**VERSUS**  
**KENYATTA UNIVERSITY.....RESPONDENT**  
**JUDGMENT**

1. The Petitioner, **Laban Njuguna Muiruri**, was placed by the Joint Admission Board (JAB) for admission at **Kenyatta University**, the respondent herein, to pursue a course leading to degree of Bachelor of Science Energy engineering), by letter dated 1<sup>st</sup> July 2005. This was after the petitioner had attained grade B (plus) in the Kenya Certificate of Secondary Education (KCSE) in 2003. This choice of degree was not the best option the petitioner wanted.

2. The petitioner had meanwhile re-sat KCSE in 2004 and obtained grade A(minus). When he joined the respondent University to study the degree course offered, he still wished to transfer to the School of Business to study Bachelor of Commerce (B COM). After the 2004 KSCE examination results, once again JAB admitted the petitioner to pursue a course leading to the degree of Architecture in Landscaping, this time at Jomo Kenyatta University of Agriculture and Technology (JKUAT), but he declined because he only wanted to study Bachelor of Commerce.

3. The petitioner who had deferred his studies at Kenyatta University reapplied to rejoin the University and was allowed to resume studies on 19<sup>th</sup> September 2011. On 5<sup>th</sup> October 2011, he applied for interschool transfer for the 2011/2012 Academic year using the 2004 grade of A(minus) The request was approved and the petitioner duly transferred to the School of Business to study a degree in Bachelor of Commerce and given Registration Number D33/1500/2015 and even got credit waives in some units.

4. The petitioner states that on 16<sup>th</sup> December 2011 the respondent reversed the interschool transfer for the reason that he had not met the cut off points set by JAB, (now Kenya Universities and Colleges Placement Services KUCCPS) for Bachelor of Commerce degree in his 2003 grade. The Petitioner was informed that if he wanted to pursue Bachelor of Commerce, he had to change from a JAB student to self- sponsorship.

5. The petitioner contends that his discontinuation from pursuing Bachelor of Commerce was not done in good faith since joining as a privately sponsored student would require higher fee than that paid by those on government sponsorship, thus the respondent was denying him his right to education and was being discriminated against.

6. The petitioner therefore filed this petition seeking the following prayers;

- a. A declaration that the petition possesses the fundamental right and an inalienable right to pursue and complete his education/degree pursuant to Articles 33, 53, 46 of the Constitution.*
- b. A declaration that failure to readmit the petitioner to pursue and complete his education is a violation of fundamental right contravening Article 33 and 55 of the Constitution or import information.*
- c. A declaration that the second KCSE in which the petitioner attained a Mean Grade of A(minus) is valid and meets KUCCPS cut off points to the petitioner's Course in school (sic) of Business Studies.*
- d. A declaration that the petitioner's right to fair administrative action under Article 47 of the Constitution was violated by the respondent.*
- e. An order that the respondent re admit the petitioner back to University in the school of Business Studies to continue with his degree in Bachelor of Commerce.*
- f. An order that KUCCPS puts the petitioner on Government Scholarship for the period the petitioner will be undertaking his studies.*
- g. An order that the respondent accord the petitioner protection from biased and ill treatment or discrimination of any kind for one quarters as a result of challenging the ill-informed actions of the University otherwise the respondent will be held responsible for violation of Article 28 of the Constitution.*

7. There are also prayers for compensation for time and resources lost as well as costs of the petition.

### **Respondent's Response.**

8. I have not been able to trace the respondent's replying affidavit on record. However from the petitioner's further affidavit sworn on 3<sup>rd</sup> of May 2016, the respondent seems to have filed a replying affidavit which responded to the petitioner's concerns. That response does not seem to be accepted by the petitioner.

### **Submissions**

9. Parties filed written submissions which counsel highlighted. **Mr Kubai**, learned counsel for the petitioner, submitted that the petitioner was qualified to join the School of Business to pursue Bachelor of Commerce. He also submitted that JAB was not involved in interschool transfers within the same University, which was an internal issue of the concerned university.

10. According to learned counsel, there was no reason why the petitioner was not allowed to continue with his studies in the School of Business. Counsel contended that it was the respondent's wish that the petitioner changes his student status from Government sponsored to private sponsorship, but not that the petitioner was not qualified.

11. Mr Kubai contended that the respondent's action was unfair, discriminatory and unreasonable. He relied on the case of *Mr V Secretary of State for Home Department Ex parte Mohammed Fayed* (1996) EWC of Civ 946 (13<sup>th</sup> November 1996) for the proposition that an administrative action taken pursuant to powers conferred by a statute should be exercised in a manner that is fair or in accordance to what was known as rules of natural justice.

12. Reliance was also placed on the case *Republic v Vice Chancellor, Kenyatta University, Ex parte Rwito Joseph Mungania* [2014] eKLR to the effect that administrative bodies must inform the affected

party and give him an opportunity to respond before any action is taken against him. Counsel further relied on the case of *Chamber of Associated Provincial Picture Hiruses Ltd v Wednesbury Corporation* 1947 Application 11/10 on the reasonableness of an action, and *Republic v Pharmacy and Poisons Board & Another Exparte Juliet Lihenu Aguja* Petition No 436 of 2014 for similar proposition.

13. Miss Wanjiru, learned counsel for the respondent, submitted that the petitioner was admitted by JAB and not the respondent. Counsel submitted that JAB had minimum cut off points for particular courses. According to counsel, the petitioner applied in 2003 and was admitted for the 2005/2006 academic year on the basis of the 2003 KCSE results of B plus to study Bachelor of Science (Energy Engineering). Counsel submitted that when the petitioner applied for interschool transfer, he used the 2004 KCSE grade of A (minus) and the inter school transfer was approved before it was realized that the petitioner had been admitted on the basis of the 2003 grade of B (plus) leading to the reversal of the transfer.

14. Learned Counsel went on to submit that having been admitted on the basis of the earlier grade, the petitioner was at liberty, to apply to JAB for change of the degree Course but could not use the 2004 grade when he was admitted on the basis of the 2003 grade. Miss Wanjiru contended that the petitioner was not at any time subjected to discrimination, but was asked to follow JAB procedures if he wanted to use the 2004 grade since they were responsible for his education fee. Counsel argued that the petitioner had not proved any wrong doing on the part of the respondent.

15. Counsel contended that the petitioners' right to education was not violated and made reference to the case of *John Mwai & 3 Others V Kenya National Examination & 2 Others* [2011]eKLR on the issue of Discrimination and *Oluoch Dan Owino V Kenyatta University* [2014]eKLR on the right to education.

16. Counsel submitted that the reversal of the petitioner's interschool transfer was not unlawful because the petitioner had lead the respondent into accepting the transfer when the petitioner failed to alert the respondent that he had used the 2004 results instead of the 2003 on the basis of which he had been admitted by JAB.

17. Counsel went on to submitted that the respondent did not violate the petitioners right to fair administrative action either, and contended that the petitioner was informed at all times with regard to each decision the respondent made, and was given written reasons for those decisions. Counsel argued that the respondent continued to engage the petitioner even after discontinuing his studies hence there was no violation of the right to fair administrative action.

18. Regarding the prayers, counsel submitted that the petitioner discontinued his studies and if he was ready to resume, all he needed to do was apply and the respondent would consider the application accordingly. Counsel prayed that the petition be dismissed.

### **Analysis and determination**

19. I have considered the pleadings herein, submissions by counsel and authorities cited. Three issues arise for determination, namely; whether the petitioner's right to education has been violated, whether the respondent acted unlawfully in reversing the petitioner's interschool transfer, and whether petitioner's right to fair administrative action was violated.

20. The petitioner has contended that his right to education has been violated by the conduct and actions of the respondent. It is undeniable that the petition sat for KCSE in 2003 and obtained grade B plus. He was admitted by JAB and placed at Kenyatta University to study Bachelor of Science (Energy Engineering), although that was not his preferred choice. His wish was to do inter School transfer to do Bachelor of Commerce.

21. In 2004, while awaiting admission to university, the petitioner re sat KCSE and obtained grade A(minus). JAB admitted him to Jomo Kenyatta University of Agriculture and Technology to study a degree in Bachelor of Architecture, Landscaping. He declined the admission because, in his own words, he only wanted to do Bachelor of Commerce.

22. The petitioner joined the respondent University based on the 2003 grade and applied to do an interschool transfer using the 2004 A Minus grade. He was allowed to transfer to the School of Business but soon after, the respondent discovered the anomaly and reversed the transfer. He now says that reversal violated his right to education.

23. The Constitution guarantees every one the right to education. Article 43(f) provides that **every person has the right to education**. Due to numbers and depending on performances JAB (now KUCCPS) determines cut off points that would enable a person join and pursue particular courses in Universities and Colleges. It then places students according to determined points.

24. The petitioner admitted that he did not meet the cutoff points for admission to Bachelor of Commerce in his performance in 2003. Having been admitted on the basis of the 2003 grade, he could only transfer to Schools or faculties and take a course in which he met the cut off points for that year as determined by JAB

25. The fact that the petitioner re sat KCSE and obtained a better grade, did not in my view, entitle him to transfer from the degree he had been admitted to on the basis of the grade he obtained in 2003 to another course using the 2004 grade. His transfer could only be on the basis of the grade on which his admission was based, that is, the 2003 grade. This is because his admission to the respondent was on the basis of the 2003 grade and any interschool transfer was to be based on that grade.

26. After re sitting the examination in 2004 got a better grade, the petitioner was again admitted to study Architecture in landscaping at Jomo Kenyatta University of Agriculture and Technology (JKUAT), but declined because he wanted to take Bachelor of Commerce and no other. Having been admitted a second time on the basis of the A minus grade he obtained in 2004, the petitioner had a good opportunity to apply for inter university transfer if JKUAT did not offer Bachelor of Commerce or do inter School or inter faculty transfer if the University offered Bachelor of Commerce.

27. His insistence that he must take Bachelor of Commerce at the respondent University using the 2004 grade when he was admitted on the basis of the 2003 grade which did not meet the requirements for Bachelor of Commerce was, in my view, unreasonable.

28. The petitioner cannot use Article 43(f) of the Constitution to dictate what degree course he must pursue and in which university. He must have attained the required grade in the year of admission under consideration and take studies where place, or apply for inter university or inter school transfer through the laid down procedure. On this, I agree with the court's observation in the case of **Oluoch Dan Owino v Kenyatta University** (supra) that **the right to education does not denote the right to undergo a course of education in a particular institution on one's terms**.

29. The petitioner had an opportunity to study Bachelor of Science (Energy Engineering) at the respondent University following his 2013 grades, or pursue Bachelor of Architecture at JKUAT following his A minus grade in 2004. No one denied him that right. He declined to take up admission himself and he did not have to set his own terms of study on the pretext of the right to education under Article 43(f) of the Constitution. I do not, therefore, find any basis for the submission that the petitioner's right to education was violated.

30. Closely related to this, is the petitioner's contention that the respondent's act of reversing the petitioner's interschool transfer was unlawful. For the petitioner to succeed in this submission, he had to show that the respondent acted in a manner that violated the law. An action can only be unlawful if done contrary to law or procedure, and it is the duty of the person to prove his allegation.

31. The procedure for admission of students to Public Universities is clear. Students apply through JAB (now KUCCPS), before results. Once results are out, students are given an opportunity to revise the choice of their preferred courses based on their performances in the KSCE examinations. There after JAB or KUCCPS, whatever the case may be, places students according to their performance and bed capacity in Universities. There are instances where students are even placed to pursue courses they did not choose

or apply for and which they may not like. The University's responsibility is then to issue admission letters to those students placed in that particular University.

32. It is therefore JAB or KUCCPS that is responsible in allocating degree courses and not the University. Any internal transfer by a JAB student must meet the cut off points set by JAB or KUCCPS for the particular course a student intends to transfer to.

33. In the present petition, the petitioner did not meet the cut off points in the 2003 KCSE for admission to the degree of Bachelor of Commerce. Although his transfer was approved, once the respondent discovered that the petitioner had used a different certificate, other than the one on the basis of which he was admitted to the University, the respondent was, in my respectful view, right in reversing the transfer.

34. The petitioner was informed that he could apply to JAB or KUCCPS for allocation of government sponsorship, or study as a private student, but he could hear none of it. The petitioner must appreciate that he was admitted to the respondent University as a 2003 KCSE student and not 2004 KCSE student. Any internal transfer had to be on the basis of the 2003 grade and no other. For that reason I don't find any unlawfulness in the decision by the respondent to reverse the interschool transfer which had been done irregularly. There was no unfairness in that decision either. The petitioner has not cited any law or procedure that was flouted by the respondent in the decision it made to reverse the interschool transfer.

35. The last issue is whether the respondent violated the petitioner's right to fair administrative action. Fair administrative action is now firmly anchored in our **Constitution**, and Parliament Enacted Fair Administrative Act to operationalize Article 47. Article 47 of the **Constitution** provides:

***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.***

36. The **Constitution** and the law now demands that any administrative action taken or to be taken must be expeditious, fair, and reasonable, making speedy, fair and reasonable disposition of administrative actions a constitutional imperative. Put differently, an administrative action should meet constitutional dictates for it to meet the constitutional test of reasonableness.

37. The petitioner was given letters explaining why the interschool transfer was reversed. I do not think one would say that the reversal was unfair when it was done to correct an irregularity. The interschool transfer having been done using a result other than the one that was used by JAB to admit the petitioner to the University, was itself an irregularity, and correcting such an irregularity cannot be said to have been an unfair administrative action.

38. In justifying its action, the respondent argued, and quite correctly in my view, that the petitioner was admitted by JAB and any changes using the 2004 grade could not be for the admission done on the basis of the 2003 grade. That could not be said to be an unfair action. For an action to be unfair and or unreasonable, it must be incapable of explanation and justification. Fairness of an action judged from the fact that the person against whom a decision or action is to be taken or made has been given an opportunity to be heard or explained to why the administrative action is to be taken or has been taken against him.

39. In the case of *Dumisani Zwane v Judge of the Industrial Court and others* Civil case no 404/2014 – 20145ZHC 122 cited in *Oluoch Dan Owino & 3 Others v Kenyatta University* (supra) the Swaziland High Court stated:

***" It is well settled that procedural fairness is the yardstick to determine whether the employer has conducted the hearing fairly and justly before imposing the penalty. The requirement of procedural fairness were developed by the courts from the rules of natural justice, and they have***

***nothing to do with the merits of the case. Procedural fairness also requires that the presiding officer must be impartial. This requirement enables the presiding officer to weigh up the evidence and make an informed and considered decision on the guilty or otherwise of the employee and if necessary on the appropriate sanction.”***

40. There is no doubt that the petitioner had communication from the respondent on why his transfer was reversed. The petitioner has attached those letters to his petition including one dated 25<sup>th</sup> November 2014, from the respondent to the petitioner’s Counsel which explained in detail the circumstances of the petitioner’s application for transfer and subsequent reversal. These are written reasons explaining why the respondent acted the way it did.

41. The respondent has also indicated that the petitioner’s place for the degree of Bachelor of Science (Energy Engineering) is still open and the petitioner is at liberty to reapply to continue with his studies. This being the position, I do not find any violation of the petitioner’s right to fair administration action. The petitioner received reasons why the transfer was reversed. He is also aware that he used the 2004 grade to seek the interschool transfer. The respondent even informed the petitioner that he could study as a private student or approach JAB to pay his fee as a private student if he wanted to pursue the degree of Bachelor of Commerce.

42. The petitioner has insisted that he must pursue the degree of Bachelor of Commerce. Well that is his dream but he must use proper procedure to achieve this dream. He cannot use a short cut and when discovered, summon the aid of constitutional provisions in the Bill of Rights blaming the respondent for breach of his fundamental rights. I am not persuaded that there was such violation.

43. For the above reasons I do not find merit in this petition. Consequently the petition dated 23<sup>rd</sup> March 2016 is dismissed with no order as to costs.

**Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> Day of September 2017**

**E C MWITA**

**JUDGE**