



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 459 OF 2016

MARTHA KERUBO MORACHA.....PETITIONER

VERSUS

THE UNIVERSITY OF NAIROBIRESPONDENT

JUDGMENT

1. By a petition dated the 3rd November 2016, the Petitioner sought final orders as follows:

“PETITIONERS PRAYERS SOUGHTS DATED 3RD NOVEMBER 2016 THAT;

- a) A declaration that the petitioner’s fundamental rights and freedoms as enshrined under Articles 35(1)(b) and 48 of the Constitution of Kenya 2010, have been contravened and infringed upon by the respondent in refusing to furnish sought information by the petitioner;*
- b) An order of Honourable Court compelling the respondent to within seven (7) days of the Order of court, release to the petitioner the letter suspending the petitioner from the university, letter initially expelled the petitioner from the University and letter expelling the petitioner from the University upon appeal;*
- c) Costs of this petition.”*

2. The petition was supported by the affidavit of the petitioner sworn on 3rd November 2016 setting out the facts of the case that she had, on allegations on examination irregularity in the final semester of her final year, been suspended by the University and subsequently expelled from the university and her subsequent appeal with the institution was rejected, but she had been unable to secure, despite request therefor, documents on her suspension letter, letter of expulsion and letter on expulsion upon appeal.

3. The grounds of the Petition were set out in the grounds to a Notice of Motion dated 3rd November 2016 for expedited hearing of the Petition as follows:

“GROUNDS

- 1. The petitioner is a former student of the respondent university’s School of economics wherein*

she was pursuing a course leading to the award of a degree in bachelor of Economics and Statistics.

2. The respondent is a public authority.

3. The petitioner was expelled from the respondent's institution on contested facts. The petitioner was in her last year of study, in her last semester.

4. The respondent is the custodian of the proceedings of the alleged hearing, letters of suspension, expulsion and expulsion upon appeal, which the petitioner now seeks;

5. Despite diligent efforts taken by the petitioner in acquiring the aforesaid documents, the respondent has refused to release the information sought, which event is a flagrant violating of Article 35(1)(b) of the Constitution of Kenya and section 4, 5, 8 and 9 of the Access to Information Act (No 31 of 2016)

6. The petitioner requested for the documents formally in writing through a letter dated 30th August 2016 and more than 21 days later the respondents have not yet replied to her request which is a complete flouting of sections 4, 5, 8 and 9 of the Access to Information Act, 2016.

7. The petitioner's request for the aforementioned documents is necessitated by her need to use them to agitate and/ or enforce her fundamental rights and freedoms inter alia the right to livelihood under article 26 of the Constitution of Kenya.

8. It is in the interest of justice that the reliefs of the application are granted to protect and enforce fundamental rights under the constitution of Kenya 2010 and the Access to Information Act, 2016.”

4. The respondent did not, despite service, enter appearance and defend the Petition.

Issue

5. The issue before the Court is whether the respondent has violated the petitioner's right to information and to access to justice, respectively, under Article 35 (1) and 48 of the Constitution of Kenya.

Determination

6. The question whether the petitioner was qualified for the award of the degree and therefore certification according is not before the Court. The Court needs only determine whether there was failure to give the information on the petitioner's suspension and expulsion from the University and whether that has further infringed on her right to access justice by proceedings in pursuit of protection of the right to livelihood.

7. The petitioner is before the Court for the protection of her right to information, and the want of the letters of suspension and expulsion from the University has not affected her locus or ability to approach the Court under Article 48 of the Constitution. It is not difficult to extrapolate the neglect or refusal by the respondent to give the letters of suspension and expulsion to a violation of the petitioner's right to access to justice under Article 48 because the petitioner needs the said letter to launch proceedings challenging the action of the respondent in enforcements of her alleged right to livelihood under Article 26 of the Constitution.

8. The intended proceedings need not be proceedings which must end in the grant of the orders sought or otherwise succeed. I think it is sufficient that the information sought is necessary for mounting the proceedings, although as observed below the reasons for seeking the information is not material under the relevant Statute to the existence of the right to information.

9. Article 35 (1) of the Constitution is in the following terms:

“35. (1) 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.”

10. The Respondent is a public University established under an Act of Parliament and must be considered an organ of state within the meaning of Article 35 (1) of the Constitution because Article 260 thereof defines state thus-

““State”, when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution;”

Being information sought for purposes of exercise of the petitioner’s right to access to justice in seeking the protection of the petitioner’s right to livelihood, the right to information would still be applicable under Article 35 (1) (b) even if the respondent were not a state organ in the technical sense.

11. The right to information has also been given statutory underpinning under section 4 of the Access to Information Act, 2016, as follows:

“4. Right to information

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

(a) the 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.”

12. As shown in section 4 (1) (2) of the Access to Information Act, 2016, the reason given for the request for information or the respondent’s view as to the such reason is irrelevant. As the respondent did not file any response, the Court is not able to speculate that the refusal, neglect or delay in supplying the information sought is affected by the exceptions or qualifications set in section 6 of the Access to Information Act, 2016 as follows:

“6. Limitation of right of access to information

(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

(a) undermine the national security of Kenya;

(b) impede the due process of law;

(c) endanger the safety, health or life of any person;

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.”

13. Without a replying affidavit, the Court is also entitled to accept on a balance of probability the petitioner’s case that the respondent has despite request made by the petitioner and her counsel declined to give the information sought.

14. The Petitioner’s own letter of demand through counsel dated 30th August 2016 indicates that the respondent may already have supplied the information sought—

“We are instructed that though the said letters may have been dispatched to her, for some explainable circumstances (sic) they never reached her, and are not in her possession at the present....

We shall be grateful if the said documents are handed to our client or mailed to our Office in seven (7) days hereof. Our client undertakes to settle you charges of photocopy and incidental reasonable charges.” (sic)

15. The Court considers itself bound to make orders to ensure the greatest enjoyment of rights in accordance with Article 20 (3) of the Constitution, which provides as follows:

“20 (3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

Conclusion

16. I therefore consider that in refusing or neglecting to give the information sought by the petitioner by way of suspension and expulsion letters and letter or ruling rejecting her appeal, despite intimation that the letters which it may have despatched were not received by the respondent, and consequently a request with offer to pay photocopy charges, that copies of the documents be handed over to the petitioner or to her counsel’s office, is an unreasonable denial of the request for information and, in my view, amounts to a violation of the petitioner right to information which is entrenched in Article 35 (1) of the Constitution and given effect through the Access to Information Act, 2016.

17. Accordingly, the Court must make a declaration that the respondent has violated the petitioner's right to information, and make consequential orders as appropriate.

Orders:

18. For the reasons set out above, the Petitioner's Petition herein dated 3rd November 2016 is allowed to the extent that –

a. A declaration is issued as prayed in Prayer (a) of the Petition in terms “*A declaration that the petitioner's fundamental rights and freedoms as enshrined under Articles 35(1)(b) and 48 of the Constitution of Kenya 2010, have been contravened and infringed upon by the respondent in refusing to furnish information sought by the petitioner*”.

b. An order in terms of Prayer (b) of the Petition that “*An order of Honourable Court compelling the respondent to within seven (7) days of the Order of Court, release to the petitioner the letter suspending the petitioner from the university, letter initially expelling the petitioner from the University and letter expelling the petitioner from the University upon appeal*”

19. There shall be no order as to Costs.

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2016.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Echessa & Bwire, Advocates for petitioners.

No appearance for the Respondent.