



REPUBLIC OF KENYA



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**Kimani v Kenyatta University & another (Petition E197 of 2023)
[2025] KEHC 6602 (KLR) (Constitutional and Human Rights) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E197 OF 2023

LN MUGAMBI, J

MAY 22, 2025

**REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. E197 OF 2023**

BETWEEN

NYAMBURA KIMANI PETITIONER

AND

KENYATTA UNIVERSITY 1ST RESPONDENT

DR LINDA KIMENCU 2ND RESPONDENT

JUDGMENT

Introduction.

1. The petition dated 9th June 2023 was amended on 5th February 2024 and is supported by the petitioner's affidavit in support of similar date and a further affidavit dated 19th October 2023.
2. The Petitioner's grievance is that the respondents have refused to release her Continuous Assessment Test (CAT) marks for the unit UCU 104 to enable her to graduate despite having exceeded the minimum threshold of 49 units required for one to be allowed to graduate.
3. She contends that the respondents' actions are in direct violation of her constitutional rights and in breach of legitimate expectation.
4. She thus prays for the grant of the following reliefs:
 - a. A declaration be issued that the actions of the 1st and 2nd respondents and/or their agents are unfair, unreasonable, irrational, illegal and has been made in abuse of power and mala fides in



contravention of Article 47 of *the Constitution* and Sections 4, 5 & 7 of the Fair Administrative Actions Act.

- b. A declaration that the petitioner's right to inherent dignity and the right to have that dignity respected and protected was violated by the respondents in contravention of Article 28 of *the Constitution*.
- c. A declaration that the petitioner's right to freedom of expression, which includes academic freedom and freedom of scientific research was violated by the respondents in contravention of Article 33(1)(c) of *the Constitution*.
- d. A declaration that the petitioner's right to education was violated by the respondents in contravention of Article 43(1)(f) of *the Constitution*.
- e. A declaration that the petitioner's rights under the provisions of Article 45(1) were violated by the respondents.
- f. A declaration that the petitioner's right to legitimate expectation under Article 47 of *the Constitution* has been infringed by the respondents.
- g. An order of mandamus compelling the respondents herein to release the CAT marks for UCU104 and allow the petitioner to be included in the earliest graduation list of the 1st respondent.
- h. An award of exemplary damages and or general damages for the violation of the petitioner's human rights and fundamental freedoms in the Bill of rights.
- i. Costs of this petition.
- j. Any other relief as this Court deems fit to grant.

Petitioner's Case.

5. The petitioner deposed that she enrolled as a student at the 1st respondent's institution in September 2009. She completed her coursework in December 2013. She was however not able to graduate owing to missing marks in seven units. She followed up and the matter was settled except in unit UCU 104.
6. She depones that she registered for this Unit a second time in the first Semester in the 2020/2021 academic year. Owing to technical issues, she was not able to undertake the online CAT prompting her to inform the 2nd respondent promptly. The 2nd respondent thus rescheduled a sit-in-CAT on 19th February 2021 which the petitioner did.
7. On 24th June 2022, she was shocked to be informed by the 1st Respondent the CAT results were not submitted and that only the main examination grades were available. She made more inquiries and the 2nd respondent issued her with yet another CAT via email on 24th June 2022. She completed the CAT and sent it back on 26th June 2022. Despite this, no CAT marks were submitted by the 2nd respondent and it is so to date.
8. The petitioner further asserts that she has completed 51 units which is more than the minimum requirement (49 units) threshold for graduation. She adds that she has also completed all the mandatory courses being UCU 100, UCU 101 and UCU 103. She contended that UCU 104 is no longer offered as a unit for Bachelor of Commerce (Marketing) students as a mandatory unit, it is elective.



9. She stated that she was issued with a letter dated 14th September 2021 by the School Exam Co-Ordinator that she was in good standing.
10. Following her Advocate's demand letter dated 7th December 2022, the petitioner stated that the 1st respondent requested her to withdraw UCU 104 since the same was no longer a mandatory unit. Guided by this, the petitioner wrote to the 1st respondent requesting withdrawal of the said unit on 8th December, 2022 (annexure NK-6).
11. When she went to deliver the letter physically at the University, the petitioner deposed that she was called in a boardroom and chastised by the lecturers for suing the 1st respondent. She stated as follows in paragraph 15 of the supporting affidavit sworn on 9th June, 2023:

“ That on the same day I proceeded to the office of the Registrar Academic to deliver the said letter. On arrival, I was paraded before lecturers in a boardroom and chastised for attempting to sue the 1st Respondent. I was then informed that due to my action to sue the University, the unit will not be withdrawn”
12. The petitioner brings this petition against the respondents on the grounds that the refusal to allow her to graduate when she has met the threshold is unreasonable, illegal and a violation of her legitimate expectation. She further alleges that the withholding of her CAT marks by the 2nd respondent in UCU-104 Unit is malicious and in breach of *the Constitution* and the *Fair Administrative Action Act*.
13. The petitioner avers that the respondents' actions have also caused her untold frustrations, depression and mental trauma that even caused her to miscarry her child. She urges the Court to intervene so as to stop the continued violation of her rights and the principles of good governance and the rule of law.

Respondents' Case.

14. In response, the respondents through the Registrar in-charge of Academic, Prof. Benard M. Kivunge filed a replying affidavit sworn on 20th July 2023.
15. He deposed that the petitioner enrolled in the 1st respondent in 2009 under registration number D33S43192009. As averred, the petitioner did not graduate in 2013 as expected due to missing marks in several units. He avers that the petitioner followed up on the issue three years later in a letter dated 25th July 2016. He alleges that he is not certain whether the 1st respondent received this letter as it does not bear the University's receipt stamp.
16. He avers that thereafter; the petitioner did not bother with the issue until 2020 when the petitioner registered afresh for the four units including UCU 104 in the first semester of the 20202021 academic year.
17. He informs that as per the Student's Handbook, students are required to attend two-thirds of the lectures so as to be eligible to sit for the examination. He alleges that the petitioner did not attend all her classes with regard to unit UCU 104. He informs that primarily the classes were held virtually with a couple physical classes. It is stated that the petitioner did not attend any of the virtual classes and only attended one physical class on 19th February 2021. Equally, the petitioner did not participate in group assignments, class participation and quizzes all of which account for 15% of the final grade.
18. He further asserts that the petitioner did not sit for the online CAT issued by the 2nd respondent. He stresses that all the other students were able to sit for the exam and thus claims the technical issue allegation is misplaced. He notes that the 2nd respondent in consideration of the petitioner alongside



other students who were unable to do the CAT, scheduled a mark -up CAT on 19th February 2021. He alleges that the petitioner did not sit for this CAT as well. Considering this, he avers that by the time the main examinations were due, the petitioner was missing 30% of her marks. He adds also that the petitioner did not sit for the main examination in UCU 104, set for 17th March 2021.

19. It is averred that the petitioner remained inactive until June 2022 when she misrepresented to the 2nd respondent that she had been allowed by the 1st respondent to do a make up CAT during the third semester. Guided by this erroneous information, it is alleged that the 2nd respondent issued the petitioner with an online CAT which the petitioner sat for on 26th June 2022 and submitted via email on 29th June 2022.
20. It is alleged that before the 2nd respondent submitted the marks, she realized that the petitioner was missing the attendant marks for attendance, group assignments, assessment test and final examination. On this premise, the 2nd respondent was unable to enter the marks into the mark sheet. The 2nd respondent proceeded to follow up on the matter with the petitioner and also enquire about her status as a student and whether she sat for the mark up CAT on 19th February 2021. This endeavor was not fruitful as she could not access the petitioner who was at work.
21. Furthermore, he denies the petitioner's reliance on conversations with the DVC Academic, Caroline Thoruwa, the registrar Academic, Prof. Kivunge and Student affairs officer, Karl, as the same are not verifiable hence cannot substantiate whether are accurate. A similar argument is registered with regard to the petitioner's letter dated 13th July 2022, 21st July 2021 and 23rd August 2022 to the 1st respondent.
22. In an attempt to resolve the issue, he avers that together with the DVC, the 2nd respondent and Prof. Caroline Thoruwa they called the petitioner on phone. He avers that during the call it was made manifest that the petitioner had not attended the class in the cited Unit and that was not aware of her group assignment colleagues or the group assignment. She was asked to issue the same but failed to do so.
23. He avers that soon thereafter; the 1st respondent was served with the petitioner's advocate demand letter dated 28th November 2022. In view of this letter and the 2nd respondent's response in the matter, the petitioner was on 7th December 2022 advised to retake Unit UCU 104. This is as well affirmed in the Student Handbook which provides that a Unit cannot be withdrawn outside the prescribed period. He denies the petitioner's allegations of withdrawal of the unit.
24. He affirms that the petitioner having completed 51 units has exceeded the minimum requirement of 49 units to be eligible for graduation. He however asserts that the petitioner who voluntarily registered for the cited unit is bound to complete the unit in order to be eligible for graduation.
25. To this end, he argues that contrary to the petitioner's averments, she failed to comply with the set requirements thus no fault on the respondents' part. On this basis he stresses that the respondents' actions were not in breach of the law and thus the petition lacks merit.

Petitioner's Submissions.

26. In the submissions dated 17th October 2024, Hussein and Omar Advocates LLP for the petitioner, highlighted the issues for discussion as: whether the petitioner is illegible for graduation from the 1st respondent, whether the petitioner's right to legitimate expectation has been infringed upon as a result of the respondent's unfair refusal to graduate her and whether the petitioner is entitled to damages.
27. Counsel submitted in the first issue that the respondents under paragraph 36(a) in their replying affidavit admitted that the petitioner had exceeded the required 49 units' threshold so as to qualify to



graduate. Reliance was placed in *Violet Ombaka Otieno & 13 others v Moi University* [2019] eKLR where it was held that:

“this Court finds that the Petitioners did provide evidence of transcripts issued to them by the Respondents indicating that they had passed their examinations. This was adequate evidence of representations made and conduct by the Respondent as to the possibility of graduation by the Petitioners, and it is my finding that this legitimate expectation on their part was violated by their non-inclusion in the final list of graduands for the Respondent’s 38th Graduation ceremony to be held on 22nd August 2019.”

28. Considering this, Counsel argued that the petitioner has met the required threshold thus there is no plausible reason why the respondents cannot allow her to graduate. The respondents’ argument that the petitioner must complete the elective unit is said to be unreasonable. Counsel noted that the Black’s Law Dictionary defines elective as ‘dependent upon choice’. It was stressed therefore that an elective unit is an optional unit which one can choose to pursue or leave out. As such, one cannot be compelled to action a matter that is only an option.
29. Counsel also submitted that the petitioner had on several occasions sat for the main examination and the CAT for UCU 104, but had her marks missing and no explanation granted by the 1st respondent for the same. Counsel argued that this goes against the constitutional underpinnings on a fair administration action as espoused under Article 47 (1) of *the Constitution*.
30. Like dependence was placed in *Violet Ombaka case*(supra) where it was held that:

“What is relevant to this Court are the various transcripts that were annexed by the Petitioners to both their supporting and further affidavit, which were issued by the Respondent. Some of the transcripts were issued before July 2019. The Respondent disputes the veracity of the said transcripts and alleges that they were provisional transcripts. Whether provisional or not, the said transcripts demonstrated two allegations made by the Petitioners. Firstly, that they had marks for units in which the Respondent alleged that their marks were missing, and secondly, that the Respondent had represented to them that they had passed their examinations. At this point the burden of proof then shifted to the Respondent to show that there was compliance on their part, and that they did not violate the Petitioners rights.”

31. On the second issue, Counsel submitted that the respondents’ actions of refusing to allow the petitioner to graduate despite meeting and surpassing the threshold is discriminatory, unfair, unreasonable, malicious, irrational and one made in bad faith in violation of Article 47 of *the Constitution*. This action is argued to violate the petitioner’s legitimate expectation when she enrolled with the 1st respondent. In that once she completed the set threshold she would graduate.
32. To buttress this point reliance was placed in *Communications Commission of Kenya and 5 others v Royal Media Services Ltd and 5 others* (2014) eKLR where the Supreme Court held that:

“In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.



The emerging principles may be succinctly set out as follows:

- 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 it 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*”

33. Like dependence was placed in *Kevin K. Mwiti & Others v Kenya School of Law, Council for Legal Education & Attorney General* [2015] KEHC 1271 (KLR), *De Smith, Woolf & Jowell*, in “Judicial Review of Administrative Action”, and *Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others* [2005] 1 KLR 280.

34. Consequently, Counsel was certain in the third issue that the petitioner is entitled to damages. Counsel argued that as a result of the severe and drastic damages that the petitioner had suffered due to the respondents’ actions, she was entitled to damages of Ksh.30,000,000.

35. Reliance was placed in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where it was held that:

“...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.”

36. Comparable reliance was placed in *Peter Mauki Kaijenja & 9 others vs Chief of the Defence Forces & another* [2019] eKLR.

1st Respondent’s Submissions.

37. The 1st respondent through Mohammed Muigai LLP filed submissions dated 4th December 2024 and highlighted the issues for discussion as follows: whether the petitioner is illegible for graduation from the 1st respondent, whether the petitioner’s right to legitimate expectation and fair administrative action has been infringed upon as a result of the respondent’s unfair and unreasonable refusal to graduate her and whether the petitioner is entitled to the reliefs sought.

38. The 1st Respondent’s Advocate answered the first issue in the negative. Relying on Clause 4.8.2 of the 1st Respondent’s handbook, (2022-2026), the 1st Respondent, through counsel, was unyielding and insisted that the petitioner is not eligible to graduate having failed to complete unit UCU 104. The Handbook states that the final classification award of a degree/diploma certificate will be based on all the



required Units (core and electives) taken during the programme. It was submitted on behalf of the 1st Respondent that no evidence had been adduced to prove that the petitioner had completed UCU 104 successfully per the 1st respondent's guidelines.

39. On the second issue, Counsel submitted that the respondents had not violated the petitioners' rights and legitimate expectation as alleged. Counsel further emphasized that it was not sufficient for the petitioner to merely state provisions of *the Constitution*. Counsel noted that the petitioner was required to demonstrate how the rights were violated so as to satisfy the threshold for a constitutional petition.
40. Reliance was placed in *Robert Amos Oketch v Andrew Hamilton & 8 others (Sued in their Personal Capacities and as Trustees of the National Bank of the Kenya Staff Retirement Benefit Scheme) & 4 others* [2017] eKLR where it was held that:

“First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of *Anarita Karimi Njeru v Republic* (supra). In that case, the court stated that where the Court stated that a party who wishes the Court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it.”

41. Counsel added that in the circumstances of this case, no legitimate expectation had actualized. To buttress this point Counsel also relied in *Pevans East Africa Limited v Betting Control and Licensing Board & 2 others; Safaricom Limited & another (Interested Parties)* [2019] eKLR where it was held that:

“A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. Second, if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.”

42. Equal dependence was placed in *Communications Commission of Kenya & 5 others*(supra).
43. Counsel as well submitted that the right to a fair administrative action is not an absolute right and so can be limited by law as held in *Judicial Service Commission v Mbalu Mutava & Another* [2015]eKLR. In this matter Counsel submitted that the petitioner had failed to comply with the requirements set out in the Student's Handbook and thus the claim of violation of this right fails.
44. Bearing these arguments in mind, Counsel submitted that the petitioner was not entitled to the relief sought as the 1st respondent's actions were lawful and in compliance with its regulations and procedures. On this account, Counsel submitted that this Court cannot quash the 1st respondent's decision. Reliance was placed in *Captain (Rtd) Charles Masinde V Augustine Juma & 8 others* [2016] eKLR where it was held that:

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds



too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

2nd Respondent’s Submissions.

45. The 2nd respondent through Ruthia Advocates filed submissions dated 15th October 2024 and outlined the issues for discourse as: whether the 2nd respondent violated the petitioner’s right to education under Article 43(1)(f) of *the Constitution*; whether the 2nd respondent violated the petitioner’s right to fair administrative action under Article 47 of *the Constitution* and the *Fair Administrative Action Act*, whether the 2nd respondent maliciously withheld the petitioner’s CAT marks and failed to submit them and whether the petitioner is entitled to the relief sought.

46. Counsel submitted in the first point that Section 60(1) of the *Universities Act* provides that universities have the sole mandate to regulate academic programs and evaluate student performance through continuous assessment tests, group work, and final exams. Moreover, Counsel stated that the right to education is not an absolute right thus subject to reasonable measures and regulations established by educational institutions. Reliance was placed in *Republic Vs University of Nairobi And Others* [2019] eKLR where it was held that:

“it is not in contention that the applicable rules in this regard are the 1st Respondent’s Regulations Governing the Institution, Conduct and Discipline of Students. The said Rules and Regulations are made by the 1st Respondent’s Senate and Council in accordance with the provisions of the 1st Respondent’s Charter. Under sections 19 and 20 of the *Universities Act* of 2012, a University Charter is the instrument that establishes and gives legal status and authority to a University to inter alia undertake its academic programmes.”

47. Counsel stated that in this matter the 2nd respondent had duly ensured that all students were informed of the course requirements however the petitioner failed to adhere to the set guidelines. Despite this it was noted that the 2nd respondent made provision for make-up CATS. It was contended that the 2nd respondent did not violate this right as she afforded the petitioner reasonable opportunities to participate in assessments for the impugned unit however the petitioner failed to do so.

48. On the second issue, Counsel submitted that the petitioner’s right to a fair administrative action had also not been violated as alleged. This is because the 2nd respondent adhered to all the procedures set by the university and granted the petitioner an ample chance to complete the required assessments. Reliance was placed in *Republic v University of Nairobi ex parte Lazarus Wakoli Kunani & Another* [2013] eKLR where it was noted that:

“Whereas students are entitled to their right to education this Court gave a word of caution in *Oluoch Dan Owino vs. Kenyatta University*, High Court Petition No. 54 of 2014 that: “... the right to education does not denote the right to undergo a course of education in a particular institution on one’s terms. It is my view that an educational institution has the right to set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions.”



49. Additional reliance was placed in *Dry Associates Limited v Capital Markets Authority & Another*, [2012] eKLR.
50. Moving to the third issue, Counsel relying on the 2nd respondent's evidence submitted that the petitioner's class attendance was minimal and she failed to undertake the issued CAT. The 2nd respondent's attempts to engage the petitioner are said to have been unsuccessful. Additionally, in making her decision, the 2nd respondent was guided by the 1st respondent's guidelines as appreciated in *Dry Associates Limited* (supra). It was noted that the petitioner's late submission of her CAT made it impossible for her to enter the CAT marks without the approval of the 1st respondent.
51. Taking this into consideration, Counsel submitted that the petitioner had failed to demonstrate the alleged malice on the 2nd respondent's part. Counsel stressed that the 2nd respondent had only acted within the scope of her duties and did not infringe upon the petitioner's academic freedom.
52. Counsel further argued that any claim against the 2nd respondent, conducted in the performance of her duty ought to be referred to the 1st respondent as the 1st respondent is vicariously liable for the actions of its employees as held in *Kenya Pipeline Company Ltd v Glencore Energy (UK) Ltd* [2015] eKLR.
53. In view of the foregoing, Counsel submitted that the petitioner was not entitled to the reliefs sought including the damages, as no evidence of constitutional violations and unlawful conduct on the 2nd respondent's part had been supplied. Equally, Counsel submitted that the claim for damages was misconceived as the alleged miscarriage is speculative.
54. Counsel also submitted that the petitioner's claim of legitimate expectation was misplaced as it cannot arise where the party seeking relief has failed to meet the necessary legal requirements. Therefore, it was contended that the 1st respondent was not under any obligation to release the marks of a student who had failed to sit for the CATS and assessments.
55. Reliance was placed in *Republic v. Kenya Revenue Authority* [2022] eKLR where it was held that:

“A reading of the enabling statute leaves me with no doubt that it imposes a general duty upon the Respondent to decline a request to amend returns where the legal requirements have not been met. Such circumstances include but are not limited to where a tax payer is under investigations for fraud or tax evasion or has failed to supply required information as in this case. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or has violated the law or committed a criminal offence or where the applicant is under investigations for tax fraud or evasion or has failed to avail required material or where a remedy would impede the authority's ability to perform its functions, or where the judge considers that an alternative remedy could have been pursued.

Stressing the discretionary nature of judicial review remedies, the court in *Republic v Judicial Service Commission ex parte Pareno*⁷¹ held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since



the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles.”

56. Like dependence was placed in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

57. Counsel in closing submitted that the Court ought to refrain from interfering with the 1st respondent’s academic mandate unless there is a clear demonstration of illegality, breach of rights or procedural unfairness. Reliance was placed in *Republic v. Vice Chancellor Jomo Kenyatta University of Agriculture and Technology Ex Parte Cecilia Mwathi & Another* [2008] eKLR where it was held that:

“The court states that “Parliament has clearly vested the mandate of governance, control and administration to the University Council and it would be inappropriate in the view of this Court to intervene on the merits of the decision made by the University Council or anybody acting under its delegated powers.”

Analysis and Determination.

58. It is my considered view that the issues that arise for determination in this matter are:

- i. Whether the Petition meets the threshold of a Constitutional Petition, if so, whether respondents’ violated the petitioner’s rights under Articles 28, 33(1) (c), 43(1)(f), 45(1) and 47 of *the Constitution*.
- ii. Whether the respondent’s violated the petitioner’s right to a legitimate expectation.
- iii. Whether the petitioner is entitled to the relief sought.

Whether the instant Petition meets the threshold of a Constitutional Petition, if so, whether respondents’ violated the petitioner’s rights under Articles 28, 33(1) (c), 43(1)(f), 45(1) and 47 of *the Constitution*.

59. The Advocate for the 1st Respondent stressed that the Petition is unsatisfactory as the petitioner had simply stated the provisions of *the Constitution* without indicating how those rights were violated hence the Petition does not meet the threshold of a constitutional petition.

60. Specificity and precision in identifying the provisions of *the Constitution* alleged to have been violated and further indicating or showing how the violations were effected are the key features of an appropriately pleaded constitutional petition. This test was affirmed by the Supreme Court in *Communications Commission of Kenya & 5 others*(supra) as follows:

“(349) Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”



61. Similarly, the Court in *Munene vs Director of Public Prosecutions & 3 others* [2023] KEHC 25900 (KLR) observed as follows:

“27. The jurisdiction of the High Court in dealing with Constitutional Petitions is properly invoked once a Petition that complies with the constitutional and legal requirements is lodged. The Court must, therefore, decline any invitation by a Petitioner to deal with an alleged Petition which falls short of the laid down parameters on Constitutional Petitions.”

62. Correspondingly in *Japheth Ododa Origa v Vice Chancellor University of Nairobi, Academic Registrar, University of Nairobi & B.M Waweru* [2018] KEHC 4861 (KLR) the Court discussed as follows:

“15. Precision in pleading is vital in Constitutional petitions because it enables the opposite party to fully understand the case they face and be in a position to adequately respond to it. It also enables the Court to decipher the issues brought before it for adjudication. It helps in avoiding surprises and ambiguities in the litigation but more importantly it shows the link between the aggrieved party, the constitutional provisions at play and the possible infringement. This was well stated by the Supreme Court in the case of *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR...”

63. The question thus becomes, has the instant Petition met the threshold. The Petitioner has identified a number of Constitutional provisions she accuses the 1st and 2nd Respondent of violating key among them; Articles 28, 33, 43(1)(f), 45, 47 and 48.

64. In paragraphs 4 to 21, the Petitioner has given a narration of facts which is also supported by the affidavit to the Petition on the manner the alleged violations were executed.

65. In my view, the Petition satisfies the threshold of pleading a Constitutional Petition.

66. Having answered this question in the affirmative, the next issue is whether the Petition has proved the aforesaid violations by discharging the burden of proof. The *Evidence Act*, Cap 80 provides:

107. Burden of proof

a. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

b. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



67. In *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* [2021] KEHC 13098 (KLR) the Court explained the difference between the legal and evidential burden of proof as follows:

“

“22. I also refer to *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

68. In like manner, the Court in *Edward Akong’o Oyugi & 2 others v Attorney General* [2019] KEHC 10211 (KLR) held that:

“

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

69. The petitioner’s chief grievance is that despite meeting the qualification for graduation, the 1st and 2nd Respondents, in violation of fair administrative action have denied her the opportunity to graduate by unreasonably and persistently refusing to submit her CAT marks for unit UCU 104 or allowing her to withdraw the unit which is an elective unit as she has exceeded the 49 Units required for her degree.



70. The respondents in response to the missing CAT marks alleged that the petitioner has never sat for the continuous assessment test in unit UCU 104 except the email CAT she sat for the on 24th June 2022 which was however unprocedural as it was administered on the Petitioner by the 2nd Respondent without prior approval being sought and granted by the 1st Respondent as required. This is deponed in paragraph 20 of Prof. Benard M. Kivunge affidavit sworn on 20th July, 2023 on behalf of the 1st Respondent.
71. The 1st respondents despite acknowledging that the petitioner had indeed surpassed the minimum threshold required to qualify for graduation, nevertheless insisted that the petitioner must complete the elective unit UCU 104 to be allowed to graduate citing Clause 4.8.2 of the 1st Respondent's Handbook (2022-2026) on Degree Classification.
72. Further, on withdrawal of the course, the 1st Respondent denies receiving the Petitioner's letter of 8th December, 2022 on the issue or a session that chastised the petitioner when she presented the letter as alleged. He also stated that the withdrawal of the unit could not be in December, 2022 which was the 1st Semester of the academic year 20222023 considering that Clause 4.5.10 of the 1st Respondent Student Handbook (2022-2026) provides that a student who wishes to withdraw registered unit will do so within the registration period of the semester by submitting the completed course reregistration adjustment form to a Dean of School for unit.
73. From the correspondence annexed by the petitioner, though denied by the Respondent, it demonstrates Petitioner has made numerous efforts to follow up on this matter with the respondents on the issue missing marks for the CAT in UCU 104 which she re-registered in the academic year 20202021 during the first semester.
74. Although the Petitioner insists, she sat physically for the make-up CAT on 19th February 2021, by providing a the Uber receipt for that day, that in itself can only proof travel to the University but not the fact, that she sat for the said CAT.
75. However, 1st respondents' annexure marked 'BK- 4' which is the Class attendance form confirms that the petitioner was in class on 16th and 19th February 2021, the day when the make - up CAT was administered.
76. The 2nd respondent, confronted with this fact by the petitioner insisted that there was no evidence that she sat for the CAT.
77. There being evidence (BK 4) that on 19th February, 2021; the Petitioner was in the classroom, the day the makeup-CAT was administered, then the evidential burden shifted to the Respondents to disprove the fact despite that being present, she did not sit for the said CAT.
78. The 2nd Respondent did not produce the list of CAT scripts received from students to ascertain that petitioner did not undertake the CAT. The 2nd respondent in a letter dated 29th November 2022 addressed to the Head of Data Verification disputed that the Petitioner had sat for the CAT but even then, the 2nd respondent did not adduce any proof, such as the list of the students who had sat for the CAT and not the petitioners despite the petitioner's physical presence in classroom in that very day.
79. Given the Petitioner's physical presence in the classroom and the insistence that she in fact sat for the CAT, this court finds, very difficult to disregard this evidence without any credible rebuttal being offered to the contrary especially by the 2nd Respondent who was responsible for administering the CAT especially as she has no evidence confirming who sat the CAT and who did not sit for the CAT.



80. Article 47 of *the Constitution* provides that every person has a right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The importance of this right was captured in *Mutimba Creser Masayi Joseph vs Masinde Muliro University of Science and Technology* [2020] KEHC 7950 (KLR) as follows:

“

“31. The Court of Appeal, in *Judicial Service Commission vs. Mbalu Mutava & another* [2015] eKLR, stated as follows, with regard to Article 47:

“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....

34. The court in *Kenyan Human Rights Commission & another v. Non-Governmental Organization Co-ordination Board & another* (2018) eKLR, stated:

“40. ... Administrative actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. Accordingly a party, a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation...”

81. In carrying out their duties, the respondents were bound by Article 47 of *the Constitution*. It cannot be reasonable to have a student sit for a test and for reasons that only the 2nd Respondent knows, fail to release her results for the CAT and completely refuse to acknowledge the wrong and instead heap the blame squarely on the student for years on end without providing any solution. The 2nd Respondent in her submissions submitted that she bears no responsibility because she was acting in official capacity. Where there proof of malice, then personal liability would also attach as is apparent in this case where there is clear abuse of power.

82. On the part of the 1st Respondent, instead of carrying out an objective and impartial investigation by examining the relevant material with a view to resolving this matter, it instead chose to take sides and became unnecessarily hard on the student instead of providing her an appropriate forum to ventilate and resolve her grievance.

83. I find that in the circumstances of this case, the 1st and 2nd Respondent violated the Petitioner’s right to fair administrative action under 47 given the kind of treatment she has been subjected to.

84. In relation to Article 28 and 33(1) (c) of *the Constitution*, there was no evidence to substantiate the violation.

85. On violation of her rights under Article 45(1) of *the Constitution*, the Petitioner stated that the respondents’ actions caused her emotional distress that led to the unfortunate loss of her unborn child. To support this claim, she attached a medical report dated 11th November 2022 from the Kisumu



County Referral Hospital by Dr. Oriko. The medical report does not however directly link state the miscarriage to the issue at hand. I find Article 45(1) of Constitution not proved.

86. In respect of violation of Article 43 (1) (f) of *the Constitution*, The Court in Joseph Njuguna & 28 others vs George Gitau TA Emmaus School & another [2016] KEHC 6612 (KLR) observed as follows:

“

“39. It is key to observe that this right is placed on the State such that, where the State does not have resources to implement a right under Article 43, the State has to either show that it does not have the resources or it will give priority to ensuring the widest possible enjoyment of the right to prevailing circumstances, including the vulnerability of particular groups or individuals. The provision under the Bill of Rights applies to all law and binds all State organs and all persons...Mumbi Ngugi J., while addressing the right to education and the place of private schools in the case of J.K (Suing on Behalf of CK) v Board of Directors of R School & another [2014] e KLR, observed that: “It is indeed correct that Article 43 guarantees to everyone the right to education. The constitutional responsibility is placed on the state to achieve the progressive realization of the rights set out in Article However, there is no obligation placed on a private entity such as the respondent school to provide such right.”

87. In the light of the above precedent, it is my considered view that it is not possible for respondents’ actions complained of to amount to violation of the petitioner’s right under this Article. The right is borne by the State and not the institutions of learning such as the 1st respondent. Accordingly, I do not find that the respondents violated the petitioner’s right under Article 43(1)(f) of *the Constitution*.

Whether the respondent’s violated the petitioner’s right to a legitimate expectation

88. The Court of Appeal in Kenya Revenue Authority v Universal Corporation Ltd [2020] KECA 395 (KLR) guided as follows:

“a legitimate expectation arises where there is demonstration that: a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he she it would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the public authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fell within the class of person(s) who were entitled to rely upon the representation(s) made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriment; there was no overriding interest arising from the decision maker’s action and representation; the representation was fair in the circumstances of the particular case and that the same arose from actual or ostensible authority of the affected public authority to make the same; the promise related either to a past or future benefit; its main purpose is to challenge the decision maker to demonstrate regularity, predictability and certainty in their dealings with persons likely to be affected by their action in the discharge of their public mandate.”



89. In addition, the Court in *Republic v Kenya Revenue Authority Ex-parte KSC International Limited (In Receivership)* [2016] KEHC 7369 (KLR) speaking to this expectation observed as follows:

“My view on this issue is informed by the need to achieve certainty in economic sphere. As was appreciated by Nyamu, J in *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others* HCMA No. 743 of 2006 [2007] KLR 240 at 295:

“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Certainty of law is a major requirement to business and investment...certainty of law is an important pillar in the concept of the rule of law.”

The same principle was re-asserted in *Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others* [2005] 1 KLR 280 where it was held that:

“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

90. The petitioner argued that regardless of unit UCU 104, she had completed 51 units in the course which exceeds the minimum threshold of 49 units to qualify for graduation.
91. The respondents insisted that since the petitioner had elected to chose this Unit, she was bound to complete it so that she can graduate.
92. Clause 4.4.11 of the 1st respondent’s Student Handbook (2017 – 2021) states thus:

Withdrawal of a Unit

A student who wishes to withdraw from a Unit will do so in the first three weeks of the semester by completing withdrawal forms which are issued by the Registrar’s (Academic) office. Failure to withdraw officially will lead to grade E at the end of the semester. The grade ‘E’ will be awarded zero (0) score and will be included in calculating the final semester cumulative average score.



93. This directive is similarly reiterated under Clause 4.5.10 in the 1st respondent's Student Handbook (2022- 2026).

94. What is the implication of this Clause? It literally means that if a student fails to withdraw an elective Unit on time, the consequence is an award of grade "E" which is equivalent to a zero score.

Why then would the respondent insist that the petitioner must complete the 'elective unit' yet its own regulation require that it will result in grade E or zero score? The Respondent was bound to act in accordance with the regulations and issue the zero score in that unit, the equivalent of 'grade E' and use the mark in 'in calculating the final semester cumulative average score.'

95. The Court in *Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another* [2017] KEHC 4303 (KLR) observed as follows:

" 43. Statutory bodies derive their authority or jurisdiction from a legal instrument establishing them, and may only do what the law authorizes them to do. This is known as the principle of legality, which requires that administrative authorities not only refrain from breaking the law, but that all their content comply with *the Constitution* and particularly the Bill of Rights. Their decisions must conform to *the Constitution*; legislation; and the common law."

96. Taking into account that the petitioner had already completed 51 units that would enable her to graduate according to the 1st Respondent's regulations as admitted in paragraph 36 of the 1st Respondent affidavit, I find it irrational that the 1st Respondent could still use this course UCU 104 to deny her a chance to graduate when she had done even in excess of what the 1st Respondent has prescribed in its own regulations.

97. Evidently, this is a clear violation of the petitioner's legitimate expectation by the 1st Respondent.

98. This Petition thus succeeds in two aspects, the breach of the Petitioner's right to fair administrative action under Article 47 which incorporates the aspect of legitimate expectation as well.

99. The next issue is on the reliefs the Court should award.

Whether the petitioner is entitled to the reliefs sought.

100. In determining the nature of the reliefs to award, I am guided by the following decisions

101. The Supreme Court decision of *Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others* (SC) Petition No.13 (E015) of 2022) stated as follows:

"

"(91) By the provisions of Articles 22 and 23 of *the Constitution*, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under Article 23 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
 - (f) an order of judicial review.”
- (92) This Court in the case of *Gitobu Imanyara & 2 Others v. Attorney General*, SC Petition No. 15 of 2017, described Article 23 as “the launching pad of any analysis on remedies for Constitutional violations”... the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.
- (95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim’s constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

...

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

102. Further, the Court of Appeal in *Peter Ndegwa Kiai ta Pema Wines & Spirits v Attorney General & 2 others* [2021] KECA 328 (KLR) further noted as follows:

“

- “15. The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of *Siewchand Ramanoop vs The AG of T&T*, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:



“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...”

103. Having regard to the foregoing, the orders that commend themselves in this Petition are as follows:
- a. A declaration is hereby issued that the actions of the 1st and 2nd respondents and/or their agents are unfair, irrational, illegal and unconstitutional for contravening Article 47 of *the Constitution* and the Petitioner’s legitimate expectation.
 - b. An order of mandamus compelling the respondents herein to include the Petitioner in the earliest graduation list of the 1st respondent.
 - c. An award of Kshs. 850,000- for the violation of the petitioner’s rights to fair administrative action under Article 47 of *the Constitution*.
 - d. Costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MAY, 2025.

L N MUGAMBI

JUDGE

