



**Ougo v Regional Institute of Business Management & 4 others (Petition E242 of 2023)
[2024] KEHC 5787 (KLR) (Constitutional and Human Rights) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E242 OF 2023**

LN MUGAMBI, J

MAY 16, 2024

**REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. E242 OF 2023**

BETWEEN

DAVID AYIEKO OUGO PETITIONER

AND

**THE REGIONAL INSTITUTE OF BUSINESS MANAGEMENT 1ST
RESPONDENT**

MASENO UNIVERSITY 2ND RESPONDENT

**PRINCIPAL SECRETARY, STATE DEPARTMENT FOR HIGHER EDUCATION
AND RESEARCH 3RD RESPONDENT**

COMMISSION FOR UNIVERSITY EDUCATION 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 10th July 2023 is supported by the Petitioner’s affidavit in support of similar date and a further affidavit dated 19th September 2023. The Petition was initially filed by 10 Petitioners who were also students at the 1st Respondent. However, vide a Notice dated 19th September 2023, nine of the Petitioners, (all except the 5th Petitioner) elected to withdraw from the Petition. The Court allowed the withdrawal on 7th November, 2023.



2. The main complaint by the Petitioner is that the 1st and 2nd Respondents have refused to allow him to graduate with a Bachelor Degree in Business Administration with Information Technology despite completing all the courses of study and examinations. The Petitioner seeks the following reliefs against the Respondents:
- a. A declaration that the 1st and 2nd Respondents' action of excluding the Petitioners from the graduation ceremony of 16th December 2022 without any notice and/or written explanation amounts to discrimination and a violation of the Petitioners' constitutional right to education and fair administrative action.
 - b. A declaration that the 1st and 2nd Respondents' failure to issue the Petitioners with their respective academic transcripts, letters of completion of their courses and the failure to confer the Petitioners with their respective degrees amounts to discrimination and a violation of the Petitioners' constitutional right to education.
 - c. A declaration that the 1st and 2nd Respondents' actions of denying the Petitioners an opportunity to timeously complete their education and further their careers amount to a violation of the Petitioners' constitutional right to access employment.
 - d. A restraining order against the 1st Respondent through its director, Roseline Oketch and the 2nd Respondent, their servants, agents, and any person(s) acting on their instructions, from victimizing the Petitioners on account of taking legal action against Maseno University Programmes (Nairobi Branch) also known as the Regional Institute of Business Management ("RIBM").
 - e. An order of mandamus directing the 1st and 2nd Respondents to include the Petitioners in the next graduation as scheduled but not later than 31st December 2023, subject to the Petitioners' compliance with the graduation requirements.
 - f. An order of mandamus directing the 1st and 2nd Respondents to:
 - i. Issue all concerned Petitioners and other affected students with their official admission numbers.
 - ii. Provide all the Petitioners who have completed their coursework and sat for their final exams with their final transcripts and letters of completion of their courses to enable them to seek internship positions in furtherance of their careers.
 - iii. Formally communicate to the Petitioners the way forward with respect to payment of tuition fees and where the same ought to be paid.
 - iv. Provide all the Petitioners with a report of their missing tuition fees and how the issue is to be addressed.
 - v. Formally communicate to the Petitioners a date for their graduation.
 - vi. Provide a detailed report of the Maseno University (Nairobi Branch) and/or RIBM's financial position, particulars, and the extent of the misappropriation of tuition fees and the remedial measures that have been taken by the 1st and 2nd Respondents.
 - g. General damages for the 1st and 2nd Respondents' oppressive conduct and violation of the Petitioners' rights.
 - h. Such other and/or further relief as this Court may deem fit to grant.



- i. An order that the costs of and occasioned by this Petition be borne by the 1st and 2nd Respondents.

Petitioner's Case

3. The Petitioner depones that he enrolled at the 1st Respondent to pursue his undergraduate in Business Administration with Information Technology. He avers that the 1st Respondent was working in collaboration with the 2nd Respondent to offer Maseno University Programmes. On this premise, he chose to pursue his course at the 1st Respondent's which he described as the 2nd Respondent's Nairobi branch campus. He in the end successfully completed his coursework and examinations. It was his expectation that upon completion he would graduate. The petitioner is however aggrieved that this never happened.
4. He stated that he was set to graduate at the 2nd Respondent's Main campus on 16th December 2022 but his name was not included in the graduation list. The 1st and 2nd Respondents did not give any reasons for the exclusion of his name from the list and have not addressed the issue. He asserts that he was discriminated against since he was not accorded equal treatment as the other students who graduated yet he had satisfied the requirements for the graduation.
5. The Petitioner also contends that the 1st and 2nd Respondent have failed to issue him with transcripts and the completion letter to enable him secure internship and employment opportunities. Furthermore, that despite paying full tuition fees, the same is not captured in the 1st Respondents financial records. He alleged that he is suffering as a result of the 1st Respondent's management squabbles.
6. He averred that his attempt to obtain information in this matter has been futile as the Respondents have failed to make responses to his enquiries. He alleges that the Respondents have instead resorted to threatening him to stop him pursuing the matter. He cited the 1st Respondent's Director, Roseline Oketch for threatening him upon receipt of the demand letter dated 1st February 2023. Similarly, attempts by his advocate to reach out to the 1st Respondent's director were met with verbal insults.
7. The Petitioner additionally avers that his appeal to the Cabinet Secretary, Ministry of Education to intervene, bore no fruits. Likewise, a further attempt by the 1st Respondent's former principal, Dr. Joshua Olet to the 2nd Respondent also failed. Considering this, the Petitioner contends that he exhausted all the available dispute mechanisms before filing this suit.
8. Consequently, the Petitioner is apprehensive that the 1st and 2nd Respondents' unlawful acts will continue if this Court does not intervene. He notes that this is evident from his exclusion from the December 2023 graduation list also. He for this reason brings this claim against the Respondents for violation of his constitutional rights.

1st Respondent's Case

9. It is noted that this party did not participate in the proceedings. As such, the 1st Respondent's reply and submissions are not in the Court file or Court's online portal (CTS).

2nd Respondent's Case

10. In response, the 2nd Respondent through its Registrar in-charge of Academic and Students' Affairs, Rose O. Chiaji, filed a replying affidavit sworn on 25th July 2023. The 2nd Respondent described the



Petition as misguided and misleading and full of half – truths being vended by the Petitioner against the 2nd Respondent.

11. The 2nd Respondent stated that according to its Admission Policy, a person is considered a student once he/she makes an application in the prescribed manner, meets the minimum requirement for admission into the programme and pays the admission fee. Once the applications are approved by the Senate, the 2nd Respondent then proceeds to issue an admission letter which bears the student's unique registration number and the campus to undertake the Course.
12. She depones that in 2005 there was collaboration entered between the 1st and 2nd Respondent through a Memorandum of Understanding (MOU) with consequential renewals until 30th September 2020 when it ended. The Agreement related to offering of Masters, Degree, Diploma and Certificate programmes in Business Administration with Information Technology. The MOU was to the effect that the 1st Respondent would offer tuition, teaching facilities and receive fee payments. On the other hand, the 2nd Respondent would admit the students, issue identity cards, assess the examinations and award the degrees and Certificates. For this reason, she contends that the 2nd Respondent is a stranger to the 1st Respondent's alleged management disputes.
13. She confirms that the Petitioner was admitted by the 2nd Respondent under Reg.BE/08015/2017.
14. Contrary to the Petitioner's allegation, the 2nd Respondent pointed out that the Petitioner did not complete all the prescribed courses, as he did not sit for a mandatory unit in the 1st year, being PHT – 112 – (HIV and AIDS) hence was ineligible for the graduation and conferment of the degree. That this information is provided in each students' Portal (MIS) which contains all the details of their results and provisional transcripts. The 2nd Respondent stated that the Petitioner has access to this system and can access his result slips.
15. Further still, that the Petitioner has failed to apply for graduation using the prescribed format as provided in the University's Rules and Regulations.
16. The 2nd Respondent was emphatic that it acted and continues to act within the confines of the law and the University Policies. It was the 2nd Respondent's case that it is the Petitioner who has not satisfied the requirements for award of the Degree and that this Petition is thus a ploy to circumvent and interfere with the 2nd Respondent's mandate.
17. The 2nd Respondent faulted the Petition stating that it has not met the threshold for a constitutional Petition.

3rd, 4th and 5th Respondents' Case

18. The above Respondents' replies and submissions are not in the Court file or the Court's online portal (CTS). Indeed, when the matter came up for the oral highlights on 24th January, 2024; Ms. Mwatsao who appeared for the 3rd, 4th and 5th Respondent confirmed their non-participation by stating thus:

“... We will not respond to the Petition because the issues raised is a contract between 1st and 2nd Respondent who are properly represented. We seek to be excused from the proceedings...”

Petitioner's Submissions

19. In the submissions dated 30th November 2023, OK Law Advocates LLP, highlighted on the following issues which it had framed: whether the Petitioner has met the requirements for graduation; whether



the Respondents violated the Petitioner's right to fair administrative action and whether the Petitioner is entitled to general damages for violation of his rights.

20. On the first issue, the Petitioner countered the 2nd Respondent's averment relating to unit PHT 112 – HIV and AIDS by insisting that it was not a compulsory course as per its Maseno University Common Rules and Regulations for Undergraduate Examinations. The Petitioner submitted that according to the Regulations, a student can only take 7 or 8 units at a time. As such, the Petitioner argued that were he to sit for that unit as alleged by the 2nd Respondent, he would have studied 10 units as he had taken 9 units already in the 1st year of Study. This would have been contrary to the Rules would have required Senate's approval which was not provided by the 2nd Respondent and is also not evidenced in its affidavit.
21. Correspondingly, Counsel submitted that the impugned unit was only offered by the 2nd Respondent on its online platform that was not available when the Petitioner was admitted in 2018. That the Common Rules and Regulations did not recognize any the term known as 'compulsory unit' that the 2nd Respondent making reference to and that what was there was only core unit, required unit, pre-requisite unit, elective unit, prescribed units and common unit. In any event, the 2nd Respondent had annexed the particulars of courses done by the Petitioner in the 1st year of study 2017/18 but had not disclosed particulars of the courses 1-5, hence it was Petitioner's submission that the 'compulsory unit' could fall within those whose particulars have not been disclosed.
22. The Petitioner argued that he had submitted his graduation application form to the 2nd Respondent and considering that the course in question was not compulsory, he had satisfied the requirements for the graduation.
23. It was also argued by the Petitioner his right to a fair administrative action had been violated by the 1st and 2nd Respondents. This is because the 2nd Respondent after terminating its MOU with the 1st Respondent failed to set up transitional provisions to ensure that the students admitted under the Agreement were not affected.
24. It is noted that as a result of the 1st and 2nd Respondent's impasse following the termination, the Petitioner has had to suffer the consequences. This is since he has not been able to graduate and not been issued with any reasons for the same. Reliance was placed in *Charles Kaindo Kuria & 20 Others vs Technical University of Kenya (2019) eKLR* where it was held that:

“Fair administrative action, as per Article 47 of *the Constitution* of Kenya 2010, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the right to a fair administrative action. Article 47 of *the Constitution* codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.”
25. Having answered the substantive issues in the affirmative, Counsel submitted that the Petitioner was entitled to general damages. This is in view of his suffering, attributed to the wrangles between the 1st and 2nd Respondent in the end led to violation of his constitutional rights. It is said that this has kept the Petitioner in a perpetual wait for his graduation. Counsel further urged the Court to take note of the 1st Respondent's conduct where instead of resolving the issue, chose to threaten the Petitioner and snubbed the instant proceedings.



26. In support reliance was placed in *Simon Okwaro Habu vs Egerton University (2019) eKLR* where it was held that:

“In respect to damages, there is no doubt that the petitioner has been inconvenienced by delayed graduation; there is no doubt that he may have lost employment opportunities and that the delay has subjected him to mental torture and hardship. The issue of missing marks was not his making. He had to follow up lecturers for the marks and even after being cleared, he took time to negotiate with the respondent and was later forced to institute this suit. For what the petitioner has been subjected to due to fault of the respondent, he deserves general damages as prayed in the plaint. It is not easy to quantify the loss occasioned due to delayed graduation, as it is difficult to point out and quantify lost opportunities as a result of delay. This is because one is never guaranteed a job upon graduation.”

27. Similar reliance was placed in *Delilah Kerubo Otiso vs. Ramesh Chander Ndingra (2018) eKLR*. In the circumstances, Counsel submitted that an award of Ksh.1,000,000/- would be appropriate.

2nd Respondent’s Submissions

28. On 21st December 2023, Counsel Joy Akoth Akinyi filed submissions for the 2nd Respondent. The 2nd Respondent submitted on three issues it had identified, namely: whether the Petition has met the constitutional threshold, whether the Petitioner satisfied the 2nd Respondent Regulatory requirements to be conferred with a degree in Business Administration with Information Technology and whether the Petitioner is entitled to the reliefs sought.

29. Relying on the threshold set in *Anarita Karimi Njeru vs Republic (1979) KLR 154*, Counsel submitted that the Petitioner had failed to demonstrate how the 2nd Respondent violated his rights whilst carrying out its mandate. Furthermore, that the Petitioner had not shown the illegality that had been committed by the 2nd Respondent. Counsel equally argued that the Petition lacked specificity and a cause of action against the 2nd Respondent as highlighted in *Mumo Matemu vs Trusted Society of Human Rights (2014) eKLR*.

30. On the second issue, the 2nd Respondent submitted that it was apparent that the Petitioner had not completed the impugned unit, PHT 112 (HIV and AIDS). It submitted that the unit was compulsory it fell in the category of common unit which by definition is an elective unit which must be taken collectively by all students within School/Institute. As such, this unit must be completed by all students regardless of the course undertaken.

31. The 2nd Respondent argued that the Petitioner’s rebuttal was groundless and full of half-truths. For instance, while the Petitioner claimed he could not access the student’s online portal, no evidence was adduced of his attempt to have the 2nd Respondent resolve that particular issue. Further, the Petitioner did not adduce evidence of having completed the said unit. Likewise, that the Petitioner could not feign ignorance of the requirement to complete the unit as a condition for graduation as the Petitioner of her own assertion went on to attend the classes from January to April 2023.

32. Equally Counsel noted that the University Charter examines the Course distribution prior to offering the same. In this case, the impugned unit had already been approved by the University Senate. In the same manner it was noted that the Petitioner had cunningly attached a graduation application form in his further affidavit for a past cohort when the 2nd Respondent cited the issue in its affidavit. In essence the graduation application form was filed on 31st July 2023 whereas the notice for graduation has been closed on 10th May 2023.



33. To buttress this argument reliance was placed in *Ian Guru Muiruri vs St. Paul's University* (2019) eKLR where it was held that:

26. In the case before me, the Petitioner has not met the conditions for the award of a degree certificate since he has not passed all the required units. I hope the Petitioner is not asking this court to award him a degree because courts have no powers to award degree certificates. Courts only enforce rights where a clear breach of such rights has been established. In this case the Petitioner has not established any violation of rights. He knew from the time he entered the university the number of core units he was to cover. He cannot therefore turn around and claim that he did not know why he was removed from the graduation list. In the circumstances of this case, the failure to inform the Petitioner why he was not graduating did not amount to violation of rights. He knew or ought to have known that he had not passed the examinations for one of the core units.”

34. The 2nd Respondent as well argued that as per the Petitioner's adduced documentation, the requisite school fees had not been paid in full as alleged. This is a condition to being allowed to graduate. Further that the Petitioner had tampered with the school fees receipts. The 2nd Respondent contended that the serial number on the receipts and the bank slips had evidently been tinkered with by among others amending the dates on the receipts, some like receipt of 20/6/18 had serial number older than a receipt issued on 25/9/2018 and the petitioner purporting to have paid fees on 22nd March, 2018 two months prior to his admission. Accordingly, the 2nd Respondent argued that the Petitioner was before the Court with unclean hands. Reliance was placed in *Mohamed Shally Sese (Shah Sese) vs Fulson Company Ltd* and another (2019) eKLR where the Court of Appeal held that:

“It is apparent that the applicant has not been candid with this court. The orders the applicant seeks are discretionary in nature and equitable. Equity calls to those seeking its aid to come before it with clean hands and also do equity. In *John Njue Nyaga v Nicholas Njiru Nyaga & Another* (2013) eKLR, the Court of Appeal sitting at Nyeri observed as follows:

“It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings.” The applicant has not done so and is underserving of the orders he seeks.”

35. Counsel also submitted that the doctrine of legitimate expectation cannot operate against clear provisions of law as held in *Republic vs Council of Legal Education & 2 others Ex Parte Mitchell Njeri Thiongo Nduati* (2019) eKLR.

36. Owing to this, Counsel argued that the Petitioner was not entitled to the reliefs sought. This is because he had failed to satisfy the 2nd Respondent's requirements for graduation thus the claim of discrimination cannot hold water. Besides, the Petitioner had failed to adduce evidence to buttress his claims. Reliance was placed in *Rebecca Ebere vs Deputy Vice Chancellor Academic Affairs University of Nairobi* and another (2019) eKLR where it was held that:

“Correctly submitted by the respondents, the Senate of the 2nd Respondent is empowered by the law to award degrees from the institution. The respondents have submitted evidence to the court showing that the petitioner was not allowed to graduate because she did not publish her papers in referred journals. She cannot allege discrimination as she was not the only PHD candidate whose papers were rejected for not being published in refereed journals. Legitimate expectation cannot come to her aid in the circumstances of this case.”



37. Similar reliance was placed in Rachel Adhiambo Ogola and another vs Council of Legal Education and another (2017) eKLR and Rebecca Ebere vs Deputy Vice – Chancellor Academic Affairs University of Nairobi and another (2019) eKLR.

Analysis and Determination

38. Arising from the Petition, the Response thereto and the Parties submissions, I find the following to be the issues for determination:
- i. Whether the Petition has met the constitutional threshold.
 - ii. Whether the Respondents' violated the Petitioner's right?
 - iii. Whether the Petitioner is entitled to the reliefs sought.

39. A Constitutional violation must plead constitutional right that the petitioner alleges has been violated by specifying the Articles of *the Constitution* violated and the manner in which the violation occurred as was held in Anarita Karimi Njeru (supra) and affirmed by the Court of Appeal in Mumo Matemu (supra) where the Court restated the principle as follows:

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

40. The Supreme Court in Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others (2014) eKLR re-affirmed the position by stating thus:

(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...”

41. It does not end there. At the trial, the Petitioner must marshal evidence to prove the allegations so specified. This the requirement placed on any person who asserts the existence of a fact which is denied by the adverse party per the requirement of Section 107 (1) of the *Evidence Act* which provides thus:

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?

42. The Supreme Court discussing the burden of proof in Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others (2020) eKLR thus held:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”



43. Evans Otieno Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR and Edward Akong'o Oyugi & 2 others vs Attorney General (2019) eKLR where the Court emphasized that it was the obligation was on the Petitioner to prove assertions of fact made in the petition).
44. In regard to the Petition before the Court, the Petition is based on violation of Article 47 of *the Constitution* and the Petitioner has pleaded that he legitimately expected that the he would graduate on 16th December, 2022 but due to the 1st and 2nd Respondent's actions, this did not happen. He stated that his expectation was based on the fact that he had completed all the requirements for the study. He further enumerated instances depicting the manner this right was violated by the Respondents. For instance, he states that he was kept him in an indeterminate state without giving him any information regarding the graduation only to learn that his name had been excluded without notice and without being given any reasons. That despite being informed at beginning of his course that collaboration existed between the 1st and 2nd Respondent at the time he joined the 1st respondent, when that collaboration ended (and was still going on with his studies at 1st Respondent's institute) no communication on transitional arrangements was given to ensure that the students who had been in the 1st Respondent Institution were smoothly transitioned by the 2nd Respondent. That is when his tribulations began.
45. Given the manner the Petition is pleaded, I am satisfied that the Petition pin-points the nature of violation and manner in which the violation happened hence the Petition passes the threshold of specificity and precision. It clearly puts the Respondents on notice on what the alleged violations entail. The claim by the 2nd Respondent that the Petition does not meet the threshold of a Constitution Petition thus fails.

Whether the Petitioner's right to a fair administrative action was infringed

46. The right to fair administrative action guards against abuse of power by those to whom authority has been given so as to guarantee fairness on the persons affected by their decisions. Article 47 of *the Constitution* recognizes and protects the right to a fair administrative action by providing thus:
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.
47. The South African case of President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1 underscored the specific importance having this right in *the Constitution* by holding thus:

“... The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”



48. In *Mutimba Creser Masayi Joseph vs Masinde Muliro University of Science and Technology* (2020) eKLR the Court citing a number of authorities stated:

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires form which administrative law under the common law was developed.”

... “31. Article 47 of *the Constitution* as implemented by *Fair Administrative Action Act* No. 4 of 2015 is clear that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair (Section 4(1)). Under Section 4(2) thereof every person has the right to be given written reasons for any administrative action that is taken against him. 3) where an administrative action is likely to adversely affect the right or fundamental freedoms of any person, the administrator shall give the person affected by the decision.....

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 acting against him is no longer discretionary

49. One major component of fair administrative action rights is what has come to be known as ‘the principle of legitimate expectation’. It was judicially considered by the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others* (2014) eKLR and explained as follows:

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.”

50. The Court of Appeal in *Kenya Revenue Authority vs. Universal Corporation Ltd* (2020) eKLR discussed what should guide the Court in applying the doctrine of legitimate expectation. The Court elaborated 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.”

51. The Petitioner's position was that having completed his coursework for the award of degree in Business Administration with (IT); he ought to have graduated on 16th December, 2022. He denied that there was a compulsory course he had not undertaken namely PHT 112-HIV & AIDS.
52. However, the 2nd Respondent was emphatic that this was a common course which every student had to take as part of the qualifications for the award of the degree.
53. The court must be extremely cautious when dealing with an academic matter. It is the legal duty of the 2nd Respondent to certify students who have fulfilled the academic qualifications for purposes of graduation. The petitioner did not provide proof that he sat and passed the unit in question to qualify for the award of the degree. That is an academic requirement that is governed by the regulations governing training by the 2nd Respondent. It is its responsibility to determine whether the students have fulfilled those requirements. This Court declines the invitation to interfere with the mandate of the 2nd Respondent by declaring an unqualified student qualified. It is not within the competence of this court to do so. That expectation cannot be legitimate.
54. This however is not the end. The conduct of the 1st and 2nd Respondent in dealing with the Petitioner was brought into sharp focus in this petition. The 2nd Respondent had delegated the duty to teach to the 1st Respondent. There was no evidence offered by the 1st Respondent or even the 2nd Respondent to the effect that this unit PHT-112 (HIV AIDS and STI Course) which the 2nd Respondent insists is a mandatory unit was ever offered for teaching to the students (who included the Petitioner) as a common course or by any other name at the 1st Respondent Institution in the year when it was supposed to be taken. The petitioner deposed that it was not offered in 2018 and was only made available online in 2023. That was not rebutted by Respondent in evidence. To later turn around and blame the students for what was never offered to them yet is mandatory for further qualifying for the award of the degree is not only irrational but is also unfair.
55. Further when the Petitioner was following up the issue of his graduation together with other students, the 2nd Respondent removed their names from the graduation list. No reasons were given but in this Petition, the 2nd Respondent attempts to give reasons behind that decision. The 2nd respondent says that the Petitioner had not done the Unit PHT 112, he had not cleared the fees and the receipts in support of payment are full of discrepancies and so on. The question that one would want to pose is why were these reasons not given at the time the Petitioner was looking for answers. Perhaps had the Respondents acted promptly, this litigation would after all not have been necessary.
56. It is my finding that the conduct of both the 1st and 2nd Respondent towards the Petitioner violated his right to fair administrative action in that regard. It was not expeditious, efficient, reasonable and procedurally fair. In fact, the 2nd Respondent contravened Section 4(2) of the Fair Administrative Review Act as read with Article 47(2) of Constitution for failing to give the Petitioner written reasons for the adverse administrative action it took against him. I find that the 1st and 2nd Respondents action



against the Petitioner was frustrating and utterly unjustifiable. The Petitioner's right under Article 47 were violated by the 1st and 2nd Respondent. I find no fault in the 3rd, 4th and 5th Respondents.

57. The consequence is that the Petition succeeds to that extent. The reliefs that commend themselves to the Court are as follows:

1. A declaration that the 1st and 2nd Respondents action of excluding the Petitioner from the graduation ceremony of 16th December, 2022 without any notice or written explanation was a violation of his right to fair administrative action.
2. The Petitioner is entitled to general damages from the 1st and 2nd Respondent for the repressive conduct that subjected the Petitioner to intense stress, anxiety and hardship. The Court assess the same at Kshs. 500,000/-. It is separable so that each Respondent pays Kshs. 250,000/.
3. Costs of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY, 2024.

.....

L N MUGAMBI

JUDGE

