



**Mboya v Kenyatta University (Petition E376 of 2022) [2024] KEHC 11853 (KLR)
(Constitutional and Human Rights) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11853 (KLR)

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

PETITION E376 OF 2022

LN MUGAMBI, J

OCTOBER 4, 2024

BETWEEN

OWUOR E MBOYA PETITIONER

AND

KENYATTA UNIVERSITY RESPONDENT

JUDGMENT

Introduction

1. The Petition dated July 20, 2022 alleges that the Respondent has violated the Petitioner's constitutional rights and legitimate expectation due to Respondent's act and/or omission of failing to post his examination results in two units (MDT 223-Guitar Skills and MDT-200 Theory of Aural skills) in Kenyatta University Academic Portal yet he sat and successfully completed all the courses as at 1/10/22. As a result, the Petitioner is aggrieved that his name was not included in that year's graduation list and has been the case as he has not been able to graduate and receive his Degree Certificate losing numerous opportunities in the process.
2. The Petition is supported by the Petitioner's affidavit in support of even date and supplementary affidavits dated 8th February 2023 and 15th May 2023 respectively that were filed in support of the Petition.
3. Consequently, the Petitioner seeks the following reliefs against the Respondent:
 - i. A declaration that the Respondent has breached the Petitioner's rights to equality and freedom from discrimination, right to fair administrative action, right to non-discrimination, right to freedom from psychological torture and right to dignity.



- ii. An order of prohibition to stop Kenyatta University's 51st Graduation until the Petitioner's missing marks are uploaded on the Petitioner's academic portal and the Petitioner's name is included in the graduation list of 22nd July 2022.
- iii. A Mandatory injunction compelling the Respondent to include the name of the Petitioner in the graduation list of 22nd July 2022.
- iv. Damages for harm, loss and injury suffered by the Petitioner.
- v. Costs of the suit.
- vi. Any other order that this Court deems fit to grant and just in the circumstances.

Petitioner's Case

4. The Petitioner stated that he was an undergraduate student at the Respondent where he pursued a Bachelor of Music degree. He completed his studies on 1st October 2021 and was scheduled to graduate in the Respondent's 50th graduation ceremony.
5. He avers that he submitted his application for graduation on 4th November 2021 and the same was acknowledged by the Respondent. To his shock, when the graduation list was issued, his name was not included. He avers that the academic portal indicated that two of his unit, Guitar Skills MDT 223 and Theory of aural skill MDT 200, had unposted marks. As a result, he missed the set graduation ceremony.
6. The Petitioner avers that he paid his university fees as and when required, sat for his exams and handed in all his assignments and project work as expected. He depones that he even offered to retake the two units but when he informed the exam coordinator of the incident, he was told that he did not have to retake the examinations as he had completed the two units. In paragraph 8 of the supporting affidavit, he deposed:

“ 8. I aver that I was duly informed by the exams coordinator that I need not re-sit the units since I had completed them. I was directed to just pay fee, register the units and send the email of fee payment thereafter my marks would be posted. (I annex and mark OEM -4 a copy of the email)”
7. He swore that after sending this email as instructed, he never received any response.
8. He states that when the graduation list for students graduating in December 2021 came out, his name was still not included. He states that this was caused by the Respondent's inaction even after he had complied with the instructions given.
9. He lamented that he missed a scholarship offer set to commence in September 2022, to pursue his Masters studies at Sheffield University, UK due to the missing marks in his academic transcript.
10. He depones that through a communication dated 27th May 2022, he inquired from other students whether any of them had experienced the issue of missing marks. A number of students similarly decried missing graduation as a result of missing marks.
11. Aggrieved, the Petitioner approached the Commission for Administrative Justice (CAJ) to intervene. CAJ advised that he writes to the Respondent addressing his complaint and seeking the information. He avers that the Respondent did not respond to his communication nor upload the missing marks.



12. The Petitioner further informs that he is a member of the Respondent's Student Association Constitution Oversight Committee. He alleges that as a result of his divergent views with the Respondent's representatives in the said Committee, he believes the Respondent is frustrating him by failing to release his missing marks. This is despite having duly and successfully completed his course work, examinations and paying his fees.
13. The Petitioner assails the Respondent's continual inaction as a violation of his rights and fundamental freedoms under Article 27, 28, 29(d) and 47 of *the Constitution* and breach of legitimate expectation. He stated that despite being a resident in Kisumu, he has been Nairobi following up on this issue and this has caused him great financial strain.
14. The Petitioner deposed that whereas the student's portal reflect that he obtained grade B in Guitar Skills MDT 223 and Theory of aural skill MDT 200, the Respondent's end the unit marks show grade E which is confounding as it is all displayed in the Respondent's system. He maintains that up to date, the Respondent has refused to address the issue or provide him with a way forward.

Respondent's Case

15. In response to the Petition, the Respondent filed grounds of opposition dated 19th May 2023 on the basis that:
 - i. The Petition is overtaken by events and is an abuse of Court process as the orders of prohibition and mandatory injunction respectively sought in reliefs (b) and (c) of the Petition are incapable of being granted by this Court.
 - ii. There has been no violation of the Petitioner's right to equality and freedom from discrimination under Article 27 of *the Constitution* as alleged. The acts or omissions which could give rise to the alleged violation of this right have not been pleaded with precision in the Petition as required by the threshold set in *Anarita Karimi Njeru v The Republic* [1976-1980] KLR 1272.
 - iii. There has been no violation of the Petitioner's right to human dignity under Article 28 of *the Constitution* as alleged. The acts or omissions which could give rise to the alleged violation of this right have not been pleaded with precision in the Petition as required by the threshold set in *Anarita Karimi Njeru* (supra).
 - iv. There has been no violation of the Petitioner's right to freedom and security from being subjected to torture in any manner, whether physical or psychological under Article 29(d) of *the Constitution* as alleged. The acts or omissions which could give rise to the alleged violation of this right have not been pleaded with precision in the Petition as required by the threshold set in *Anarita Karimi Njeru* (supra).
 - v. There has been no violation of the Petitioner's right to fair administrative action under Article 47(1) of *the Constitution*, read together with Sections 4(3) and 4(4) of the *Fair Administrative Action Act* No. 4 of 2015. The acts or omissions which could give rise to the alleged violation of this right have not been pleaded with precision in the Petition as required by the threshold set in *Anarita Karimi Njeru* (supra). Consequently, no legitimate expectation could arise as alleged by the Petitioner with reference to his graduation from the Respondent's University.
 - vi. No harm, loss and/ or injury has been demonstrated to arise in the Petition and as such, no damages can be awarded by this Court.



- vii. The Petition is incompetent, misconceived, an abuse of the court process, lacks merit and ought to be dismissed with costs to the Respondent.

Parties' Submissions

Petitioner's Submissions

16. Njaga and Company Advocates on behalf of the Petitioner filed submissions dated 15th May 2023.
17. Counsel submitted that the whole premise of the Petitioner's case is the Respondent's negligence and refusal to remedy its omission to post the two unit's missing marks. As a result of this it is alleged that the Respondent blatantly violated the Petitioner's rights under Article 43, 47 and 50 of *the Constitution*.
18. Moreover, the Respondent's actions are accused of being discriminatory against the Petitioner. This is because his peers who were in his class have since graduated and made economic and social progress. This is while his progress has been stifled as a result of the Respondent's actions.
19. It is argued that the Petitioner's right to education was contravened when the Respondent refused to issue the two units missing marks. The Petitioner submitted that this has caused him to miss his graduation, master's degree scholarship chance and unable to secure opportunities. He noted that this right is recognized by various international instruments that are applicable in Kenya such as Article 13 of the International Covenant on Economic, Social and Cultural Rights.
20. Reliance was placed on *Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others* [2015] eKLR where it was held that:

“Education is both a human right in itself and an indispensable means of realizing other human rights and as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”
21. Like dependence was placed in the Committee on Economic, Social and Cultural Rights General Comment No. 13: The Right to Education (Art. 13) which underscores the joint responsibility of state and state actors to protect the right to education. Further the case of *University Academic Staff Union (UASU) v Attorney General and Chief of Staff & another* [2018] eKLR.
22. It was further argued that the Petitioner's right to a fair administrative action had been violated. It was stressed that the Petitioner's attempts to engage the Respondent and even seek the information in line with Article 35(1) (b) of *the Constitution*, came to nothing.
23. The Petitioner cited the case of *Judicial Service Commission v Mbalu Mutava Musyimi* [2015] eKLR where it was held that:

“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 from which administrative law under the common law was developed”.

24. Counsel as well stressed that the Respondent had violated the Petitioner’s legitimate expectation. Reliance was placed in *Nyongesa & 4 others v Egerton University College* [1990] eKLR where it was held that:

“In my respectful view, a student who has studied to the completion of a university course and who claims to be entitled to the award of a degree, diploma, certificate or other award should not suffer the penalty of deprivation of such award without notice of a hearing. That must be so since such a penalty would clearly take away his “prize” and future source of academic standing and livelihood and all that appertains to it. Prior notice of the proposal to impose such a penalty and of proceedings therefore must in my view be given to persons liable to be directly affected so that they are able to:

- a. make representations on their own behalf if they wish;
- b. appear at the hearing if one is to be held; and
- c. effectively prepare their own case and answer the allegations which they have to meet.”

25. The Petitioner submitted that he was entitled to the reliefs sought relying on *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014]eKLR where it was held that:

“... a close examination of these provisions (article 23(3) and 165(3)(d) of *the Constitution*) shows that *the Constitution* requires the court to go even further than the US Supreme Court did in the *Marbury* , and that article 23(3) grants the High Court powers to grant appropriate relief “ including” meaning that this is not an exhaustive list. “The court went further to observe as follows: [Para 412] “It is emerging already, in this court’s path of jurisprudential development, that we have endeavored to enhance and, as far as possible, stabilize the objective normative yardsticks that assure certainty and predictability in the application of *the Constitution* and the law to the merits of particular cases.”

26. Comparable reliance was placed in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018)* [2021] KESC 34 (KLR) (11 January 2021) (Judgment).

Respondent’s Submissions

27. The Respondent neither filed a replying affidavit in response to the Petition nor submissions despite prolonged indulgence accorded to facilitate the same. On 4/7/2024; when the matter was coming for highlighting of submissions, the Court firmly refused an attempt by the Respondent’s Counsel to abort the trial. It instead ordered the matter to proceed but still gave him the leeway to put in written submissions within three days after the Petitioner decided to forgo oral highlighting. Again, Counsel for the Respondent did not comply with this direction.

Analysis and Determination

28. Arising from the pleadings and the submission, my view is that the following are the issues that arise for determination in this Petition:



- i. Whether the petitioner's rights and fundamental freedoms in *the Constitution* were violated by the respondent;
- ii. Whether the petitioner's right to legitimate expectation was violated by the Respondent; and
- iii. Whether the petitioner is entitled to the relief sought.

Whether the rights and fundamental freedoms of the Petitioner were violated.

29. A Constitution Petition has to satisfy the threshold was set out in *Anarita Karimi Njeru v Republic* [1979] KLR 154 which the court laid down 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.”

30. To establish and demonstrate one's case, the Court in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR observed as follows:

“52. Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate that his or her ability to exercise a fundamental right has been infringed. If the court finds that the law, measure, conduct or omission in question infringes the exercise of the fundamental right or a right guaranteed in the Bill of Rights, the analysis may move to its second stage. In this second stage, the party looking to uphold the restriction or conduct will be required to demonstrate that the infringement or conduct is justifiable in a modern democratic State and satisfies the Article 24 analysis test.”

31. The Court went on to observe that:

“62. Section 107 (1) of the *Evidence Act* provides that "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." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

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*:



“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”

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. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

32. Turning to the specific infringements pleaded by the Petitioner, the Petitioner alleged that his rights under Article 27 of *the Constitution* were violated by the action or omission of the Respondent of failing to include him in the graduation list while his peers were included and allowed to graduate. The relevant sub-articles read as follows:

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6)
- (7)

33. The Constitutional Court of South Africa discussing this right in *Prinsloo vs Van der Linde and Another* (CCT4/96) [1997] ZACC 5 opined as follows:

“

“32. In Dworkin’s words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment. We find support for the approach we advocate in the following passage from the judgment of this Court in *The President of the Republic of South Africa and Another v Hugo*:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply



inegalitarian past will not be easy, but that is the goal of the Constitution and should not be forgotten or overlooked.”

34. In the same way, the Supreme Court in Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) expounded and guided as follows way:

(48) Black’s Law Dictionary, 10th Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination....

(50) In equal measure, we adopt the definition of discrimination in the High Court case of Peter K Waweru v Republic [2006] eKLR as follows:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”

35. In the instant Petition, I do not think the Petitioner has established discrimination given the facts relied on. There is no evidence that there were students in exact similar circumstances as the Petitioner (with complaints of missing marks) that were given preferential treatment and allowed to graduate while the Petitioner was unjustly discriminated and left out owing to any of the prohibited grounds in the Constitution for any other unjustifiable cause. The petitioner did not tender any evidence of discrimination hence this ground of his petition must fail.

36. In respect of the violation of right to education, it is a protected right under Article 43 (1) (f) of the Constitution which states thus:

Every person has the right--

(f) to education.

37. The provision of Article 43 (1) (f) above underscores the right of every person to education and by virtue of Article 21, the Bill of Rights applies to all law and binds all State Organs and all persons. This being a protected right in the Constitution, it means that no person or organ of the State can stifle or stop one from availing to himself or herself the benefit of having education in an arbitral or unfair manner.

38. In fact, so important is the right to education that under Article 43(1) (f) of the Constitution the State is placed under an obligation to facilitate the achievement of the same as emphasized by the Court



in Joseph Njuguna & 28 others v George Gitau T/A Emmaus School & another [2016]eKLR which held thus:

“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...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...”

39. Likewise, in *MMM v Permanent Secretary, Ministry of Education & 2 others* [2013] eKLR the Court observed:

“... Article 21 (2) of *the Constitution* also provides that;

“(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.”

15. Article 21 as illustrated above draws us to look at the following in view of the Government’s efforts in achieving the progressive realization of these socio-economic rights: legislative steps, policy and other measures and the setting of standards. While socio-economic rights are therefore clearly justiciable, States are required to apply as much practicability as possible in the realization of these rights and within the available resources and allocation thereof.”

40. The authorities cited above stress the weight that *the Constitution* attaches on the right to education under Article 43 (1) (f) by requiring the State to take steps to ensure that as much as possible everybody has reasonable access to education. No person or authority should thus arbitrarily curtail one’s quest to education. As was held in *Githunguri Residents Association vs Cabinet Secretary Ministry of Education & 6 others* [2015] eKLR education is not only a human right but also an indispensable empowerment tool that triggers the realization of other human rights including alleviation of poverty and is also an enabler for the vulnerable and marginalized persons to participate fully in their communities.

41. The question in the instant Petition is whether there was unlawful limitation of the Petitioner’s right to education by the Respondent. A student who goes through university studies for the entire duration of the course, does his course work, projects and exams, paid his fees should not be denied the chance to celebrate the achievement, whose crowning glory is his graduation ceremony. If for any reason there is an impediment arising out of some challenges, this reason must timeously conveyed with clarity to the affected student. In the instant case, the Petitioner faced a challenge of missing marks which he accuses Respondent of not posting and despite raising the matter with the Respondent, the Respondent remained and still remains indifferent to his plight without any form of intervention whatsoever. This Court is duty bound to intervene and ensure the ends of justice for the affected student are met as this has put his right to education at risk.

42. Article 47(1) guarantees every person the right to a fair administrative action by providing thus:

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



43. Additionally, the *Fair Administrative Action Act*, 2015 in Section 4 provides in sub-section 3 & 4 that:

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

- i. prior and adequate notice of the nature and reasons for the proposed administrative action;
- ii. an opportunity to be heard and to make representations in that regard;
- iii. notice of a right to a review or internal appeal against an administrative decision, where applicable;
- iv. a statement of reasons pursuant to section 6;
- v. notice of the right to legal representation, where applicable;
- vi. notice of the right to cross-examine or where applicable; or
- vii. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

- a. attend proceedings, in person or in the company of an expert of his choice;
- b. be heard;
- c. cross-examine persons who give adverse evidence against him; and
- d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

44. Section 7 (2) of the *Fair Administrative Action Act*, 2015 further provides for grounds of review by the Court which include: bias, procedural impropriety, ulterior motive, failure to consider relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

45. The prominence of fair administrative action as a constitutional right was appreciated by the South African Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1 as follows:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. 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...”

46. In the present case, the Respondent has adamantly refused to respond to the concerns raised by the Petitioner by refusing to solve his grievances on the missing marks. This intransigence behaviour also played out before this Court. No responses were filed to this Petition despite being indulged for lengthy period of time.

47. It is my considered view that the Respondent arbitrarily violated fair administrative rights of the Petitioner under Article 47 by unreasonably refusing to address his grievances that has impeded his graduation and curtailed the Petitioner’s right to education under Article 43 (1) (f) of *the Constitution*. In the words of Masime J (as he then was) in *Nyongesa v Egerton University College* [1990] eKLR:

“...A student who has studied to the completion of a university course and who claims to the entitlement of a degree, diploma, certificate or other award should not suffer the penalty of deprivation of such award without notice of a hearing. This must be so since such a penalty would clearly take away his prize and future source of academic standing and livelihood and all that appertains to it...”

48. The Respondent did not adduce any evidence to demonstrate any attempt or steps taken to resolve the matter despite the Petitioner’s insistence that it was its omission to post his examination results that has resulted into the current state of affairs. To date, this matter remains unresolved and as such the petitioner has never graduated. The right to human dignity in Article 28 of *the Constitution* entitles every human being to be with respect and understanding as the basis for the enjoyment of other rights and fundamental freedoms. It is my finding that the Respondent has not treated the Petitioner with dignity and understanding. The Respondent has and continues to subject him to psychological and emotional strain by perpetually keeping him in limbo about his graduation. Article 29(d) of *the Constitution* among others protects him from psychological torture. The indifference displayed by the Respondent exposes the Petitioner to grave psychological harm. This Court cannot allow the Respondent to act so unresponsively and irresponsibly and kill the educational dreams and the future of this young man in his prime years.

49. The Court is empowered under Article 23 (3) of *the Constitution* to grant ‘appropriate’ relief, meaning that the Court is not limited by the reliefs provided for under Article 23 (3) or those that are pleaded by a Party and may, where necessary grant orders that meet the ends of justice in a given case. This is what was echoed in the South African Constitution Court when it interpreted the phrase ‘appropriate relief’ in *Minister of Health & Others v Treatment Action Campaign & Others*, [2002] 5 LRC 216 as follows:

“...appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...the courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if need be to achieve this goal.”

50. In the instant case, declaration alone may not vindicate the Petitioner for the violations by the Respondent. I am considering additional reliefs and will apply the principles by the Court of Appeal in



Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment) where the Court explained the guiding factors in awarding such reliefs 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 Ramanooop 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.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

16. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.”

51. In the instant Petition, the orders that commend themselves to the Court in order to meet the ends of justice in this matter are as follows:

- a) A declaration is hereby issued that the respondent violated the petitioners rights to fair administrative action under article 47 of *the Constitution* by unreasonably being unresponsive and failing to act expeditiously on the petitioner’s grievance of missing marks thereby curtailing his right to education under article 43 (1) (f) by derailing the petitioner’s academic journey to date.
- b) A declaration is hereby issued that the manner the respondent has treated the petitioner violates his rights and fundamental freedoms under article 28 and 29 (1) (d) of *the Constitution*.
- c) This Court hereby issues an order compelling the Respondent to avail the Petitioner’s missing marks in the two units (Guitar Skills MDT 223 & Theory of aural Skills MDT 200) within the next 30 days. If for any reason the results for the two units cannot be retrieved or are available but do not qualify the Petitioner to graduate from the University, the Respondent should file a



report with the Court within 30 days detailing a clear pathway for the Petitioner to undertake in line with the Respondent's examination policies so as to be eligible for graduation.

- c) A sum of Kshs. 1,400,000/- payable by the respondent to the petitioner is awarded as compensation for the violation of his constitutional rights under articles 47, 28 and 29 (1) (d) and for the delayed realization of his academic goals leading to various lost opportunities including a proved chance to further his studies.
- e. Costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF OCTOBER, 2024.

.....

L N MUGAMBI

JUDGE

