Muthuri v Kenyatta University (Petition E264 of 2021) [2023] KEHC 22251 (KLR) (Constitutional and Human Rights) (15 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22251 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E264 OF 2021

M THANDE, J

SEPTEMBER 15, 2023

BETWEEN

SHEM MURIITHI MUTHURI ..... PETITIONER

AND

KENYATTA UNIVERSITY ..... RESPONDENT

JUDGMENT

1. The Petitioner has moved to this Court by a Petition dated 8.7.21 seeking the following reliefs:

    a. A declaration that the Petitioner possesses the fundamental right and an inalienable right to pursue and complete his education/degree pursuant to Articles 33, 53 and 46 of the *Constitution* and that the same right has been violated;

    b. A declaration that failure by the Respondent to enter the Petitioner's mark is a violation of fundamental rights contravening Article 35 and 55 of the *Constitution* or import information; (sic).

    c. A declaration that the Petitioner's mark in unit 307 is valid and should be awarded to him to him to enable him graduate on the graduation date;

    d. A declaration that the Petitioner's right to fair administrative action under Article 47 of the *Constitution* was violated by the Respondent;

    e. An order that the Respondent accord the Petitioner protection from biased and ill treatment or discrimination of any kind from any quarters as a result of challenging the ill-informed actions of the officers of the Respondent.

    f. Damages;

g. The Respondents to bear the costs of this Petition;

h. Any other and/or further relief that this Honourable Court may deem fit.

2. The facts of the case as can be gleaned from the record are that the Petitioner joined the Respondent institution in 2014 to pursue a program on Gas and Petroleum Engineering, and has been a student there since. In 2015-2016, the Petitioner failed 2 units. In 2017-2018, the Petitioner paid the requisite fees and was issued with an examination card and did a re-sit for Unit EPL 307 with the full knowledge of the department. Upon inquiry from Mrs. Dorothy Maina, the exam coordinator, he was informed that he had passed. He was the allowed to proceed to years 4 and 5, paid fees, attended classes, sat and passed exams. In 2018, he discovered that his marks for the re-sit had never been posted on his portal. His inquiries did not yield any fruit and in December 2020, the exam coordinator advised that he should have been discontinued from the programme in 2018. On 6.1.21, he was asked to write a letter explaining his predicament and on 29.1.21, he was asked to write another letter to the Vice-Chanellor asking to be allowed to re-sit the exam which he had already done and passed. Given the time that had elapsed, he decided to re-sit the exam and was cleared to do so on 20.5.21. However shortly after the exam began he was removed from the exam room and was given flimsy reasons as to why he could not sit the exam. In spite of his father having several meetings with the school, no way forward was reached. The Petitioner's advocates wrote a demand letter on 7.6.21 which was not responded to. The Petitioner contends that the Respondent's actions were discriminative against him and has subjected him to torture.

3. The Petition is opposed vide a replying affidavit sworn on 11.11.21 by Dr. Bernard Kivunge, the Respondent's Ag. Registrar (Academic). It was averred that the Petitioner was on 15.9.14, registered as student to pursue a Bsc. Degree in Petroleum Engineering in the Respondent's School of Engineering and Technology. By a letter dated 4.10.17, the Petitioner requested to take a semester off which was granted by the Respondent vide a letter dated 9.10.17. Thereafter he proceeded well with his studies but failed 2 units including Unit EPL 307, the subject of this Petition, which he failed thrice. Vide a letter dated 29.1.21, he requested to re sit the unit for the 4th time and by a letter dated 17.2.21, approval for re-sit was granted. The Petitioner however failed to do a retake and unilaterally paid for a supplementary exam and to sit the same. This is what led to his being denied entry in the exam room as he was not regularly registered as a candidate for the supplementary exam, which is available for consistent students, of which he was not. It was explained that supplementary exams are taken by students with content, which entails class attendance, coverage of course outline, continuous assessment tests with assignments and group work and examination. The Petitioner did not do the retake the exam as directed and therefore cannot graduate. Further that the Respondent was magnanimous in allowing the Petitioner to attempt a fourth retake of the exam, which is way above the usual two allowed.

4. The Respondent asserted that all exam results are communicated officially and denied that the Petitioner had passed all his units or that a staff member had informed him that he had passed, as alleged. The Respondent is of the view that the solution to the dispute lies with the Petitioner redoing his retake as earlier directed. He cannot graduate when he has failed a critical unit. Further that the Respondent has a duty, in the public interest, to ensure that only deserving students are allowed to graduate. Additionally, the Respondent pleaded the doctrine of avoidance as issues raised herein can be resolved without recourse to the *Constitution* and that there is no demonstration of violation of the cited provisions. The Petition therefore ought to be dismissed with costs to the Respondents.

5. In a rejoinder vide a further affidavit sworn on 20.1.21, the Petitioner averred that he failed Unit EPL 208 at the first attempt. After doing a supplementary exam, he passed and the result was posted as a

retake. He asserted that in its replying affidavit, the Respondent tried to make a distinction between a retake and a supplementary exam and stated that for one to do a retake, one must repeat the whole year. This information, the Petitioner says, is not in the Student Handbook, which limits retakes to 2 and makes no provision supplementary exams. The Petitioner denied doing 3 retakes of Unit EPL 307 as alleged by the Respondent and that if that were so, there are no results for the said retakes. He contends that the Respondent is being dishonest in claiming that the Petitioner acted unilaterally to register himself for the supplementary exam. The Respondent received the Petitioner's application and received payment but did not at any time inform him that he was not meant to sit that exam, until the actual date when he was in the exam room. He further stated that he has been condemned, threatened and ridiculed through text messages by Dr. Oyoo.

6. Parties filed their written submissions which I have duly considered.

7. Among the documents exhibited by the Petitioner in support of his case is a document titled "application for supplementary exams". The documents is hardly legible and the Court makes nothing of it. The Respondent exhibited a handwritten letter dated 29.1.21 from the Petitioner to the Vice Chancellor, requesting approval to attempt the unit in question for a 4th time. The subject of the letter is instructive. The letter reads as follows:

> Attempting Epl 307 For The Fourth Time
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> I am humbly requesting for approval to attempt the unit EPL 307 for the fourth time. This will be my final attempt and I promise to do my best to pass the unit. Please assist me whenever possible. Your response will be highly appreciated.
>
> God bless you and thanks in advance.

8. By a letter dated 17.2.21, the Registrar (Academic) informed the Petitioner that his request had been approved. The letter reads in part as follows:

> This is to inform you that your request to retake EPL 307 for the fourth time was Approved. Please note that failure of your fourth attempt shall lead to discontinuation.

9. From the record, it is evident that the Petitioner failed the unit in question 3 times and sought approval to do the exam a fourth time. The request had to be escalated to the Vice Chancellor as the policy only allows 2 attempts. The Vice Chancellor acceded to the request and allowed him to do the same for the 4th time, on terms that were he to fail the same, he would be discontinued.

10. It is the Petitioner's case that he was asked to write a letter to the Vice-Chancellor asking to be allowed to re-sit the exam which he had already done and passed. Given the time that had elapsed, he decided to re-sit the exam and was cleared to do so on 20.5.21. However, shortly after the exam began he was removed from the exam room and was given flimsy reasons as to why he could not sit the exam. In spite of his father having several meetings with the institution, no way forward was reached. The Petitioner's advocates wrote a demand letter on 7.6.21 which was not responded to. The Petitioner contends that the Respondent's actions were discriminative against him and has subjected him to torture.

11. The Petitioner sought approval to attempt the unit EPL 307 for the fourth time. The Respondent informed him that his request to retake EPL 307 for the fourth time was approved. The Respondent seeks to draw a distinction between a supplementary exam and a retake. According to the Respondent a retake is done when the student has no content, which means class attendance, coverage of course outline, CATs with assignment and group work and examination. Without this combination, a student would get an E thus requiring him to pay for registration for the unit, attend class for the semester, do CATs and exams. It is the Respondent's case that the Petitioner registered for a supplementary exam

and that is why he was ejected from the exam room. Further that without a retake as directed by the Respondent, he could not graduate.

12. Although the Petitioner stated that he had done and passed his exam, he has not produced any evidence to support this claim. All he needed to do was exhibit a transcript showing that he had indeed passed the same or at the very least, an affidavit from the exam coordinator who had informed him that he had passed. Indeed, had he passed the exam in 2017-2018, he would not have written to the Vice Chancellor on 29.1.21 asking for approval to attempt the unit for a 4th time. Without any evidence to support this claim that he had passed the exam in question, the same is found to be without merit.

13. I now turn to the issue of the retake. The Petitioner in his letter to the Vice Chancellor sought approval "to attempt the Unit EPL 307". An ordinary meaning of the words show that it was the unit that he sought to attempt. There is no mention of the exam. Further, the annexure in his further affidavit relates to the 2019/2020 supplementary examinations pass-fail list and it shows that he passed unit EPL 208. I do not see the correlation between this and the matter in issue.

14. The exhibited internal memo from the Ag. Registrar Academic to the DVC Academic dated 11.2.21 states that the Petitioner "seeks to retake unit EPL 307 when next on offer". The Registrar recommended that the student's request for registration and retake of unit EPL 307 be approved. Again, there is no mention of examination but the unit. I have carefully looked at the Petitioner's Exhibit "SM2". It is a supplementary examinations request form. It is not clear why the Petitioner opted to request for a supplementary exam while all along he sought and got approval for retaking the unit in question.

15. The Petitioner submitted that the Respondent's conduct against him was clothed in mala fides and that its officers continually sent messages fashioned to threaten and intimidate him. He contended that the Respondent's policy is that a student cannot proceed to the next academic year without successfully completing the previous year. He thus argued that the reason the Respondent allowed him to proceed to his final year having failed a unit in 2nd year was because he had done his resit and passed, as confirmed by Dorothy Maina. The Petitioner further submitted that the Respondent breached its duty of trust to him and made it worse by delaying his pursuit to fair administrative action by tying him down with bureaucratic red tape at every turn. He contended that the Respondent made him write letters to which they had no intention of responding and that the several meetings in their offices were pointless. He further claimed that the Respondent has been, during the pendency of the Petition, putting pressure on him to drop the suit and register to retake the unit or risk discontinuation from the school.

16. The Petitioner submitted that the Respondent contemptuously disregarded all efforts aimed at settling the matter amicably. Further that the Respondent disregarded the directions of the Court on filing its documents which could have gone a long way in helping the Court adjudicate the matter with ease. He submitted that he has suffered great injury on account of the Respondent's indolence and outright bad faith toward him. The Court should therefore grant the prayers sought in the Petition and compel the Respondent to release all the results of the Petitioner and refrain from further mistreatment, intimidation and harassment through calls and text messages.

17. For the Respondent, it was submitted that the Petitioner has not demonstrated that the dispute herein raises issues that require constitutional interpretation, but is an ordinary civil dispute. The Respondent urged that the Court applies the doctrine of avoidance and decline to entertain the dispute. Additionally, that academic decisions are not subject to judicial review. Further that the Petitioner has not shown with specificity what provisions of the *Constitution* have been breached.

18. The matters that the Petitioner complains of relate to the decision by the Respondent not to allow him to sit exams in respect of a unit that he has not redone as per the requirements. He thus seeks inter alia

that the Court finds that his mark in the unit in question is valid and should be awarded to him to him to enable him graduate on the graduation date.

19. It is well settled that academic decisions are to be distinguished from administrative decisions which are subject to judicial review. In the case of *Daniel Ingida Aluvaala & another v Council of Legal Education & another* [2017] eKLR, Mativo, J. (as he then was) stated:

> 23. I am also alive to the fact that truly academic decisions are to be distinguished from the administrative decisions of the academic bodies. This is because administrative decisions are subject to judicial review. Purely academic decisions are treated as beyond the courts reach though, on facts, in several cases the courts can interfere. Therefore, as demonstrated by the authorities cited below, the guiding principle and the proposition of law in so far as judicial review of academic decisions is concerned stands as at to-day undisturbed is that the court should be slow to interfere and should only seldom interfere in academic decisions of academic bodies. The reluctance for interference of the court is evident from the following decisions.
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> The learned Judge went on to state:
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> 26. In *University of Mysore and others v Gopala Gowda and another*[9] the regulations framed by the Academic Council of the University prescribed that in the case of a candidate for the B. V. Sc. course failing four times in the first year examination the university can refuse to grant permission to continue the course. When the regulation was under challenge, the High Court of Mysore held that the regulation was beyond the competence of Academic Council or the University and those bodies had no power to prevent the two students from prosecuting their studies and from appearing at the subsequent examination. In the Special Leave Petition moved by the university, the Supreme Court disagreed with the view taken by the High Court and held:-
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> > "The Academic Council is invested with the power of controlling and generally regulating teaching courses of studies to be pursued, and maintenance of the standards thereof, and for those purposes the Academic Council is competent to make regulations, amongst others, relating to the courses, schemes of examination and conditions on which students shall be admitted to the examinations, degrees, diplomas, certificates and other academic distinctions. The Academic Council is thereby invested with power to control the entire academic life of the student from the stage of admission to a course or branch of study depending upon possession of the minimum qualifications prescribed".
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> 27. It was further found that failure by a student to qualify for promotion or degree in four examinations is certainly a reasonable test of such inaptitude or supervening disability. If after securing admission to an institution imparting training for professional course, a student is to be held entitled to continue indefinitely to attend the institution without adequate application and to continue to offer himself for successive examinations, a lowering of academic standards would inevitably result.
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> 28. Power to maintain standards in the course of studies confers authority not merely to prescribe minimum qualification for admission, courses of study, and minimum attendance at an institution which may qualify the student for admission to the examination, but also authority to refuse to grant a degree, diploma, certificate or other academic distinction to students who fail to satisfy the examiners' assessment at the final examination.

20. As a university, the Respondent has the mandate to offer programs of study and to prescribe minimum qualification for admission. The Respondent also has the power to prescribe class attendance, coverage of course outline, continuous assessment tests with assignments and group work which qualify a student for admission to the examination in a given program. It is also for the Respondent to determine who may or may not graduate based on academic assessment against the set parameters. It further falls within the mandate of the Respondent to maintain standards in the programs offered at its institution. The Respondent must therefore be given the requisite space to discharge its mandate to assess and satisfy itself that a student, such as the Petitioner, has met the standards required to graduate. This Court has no capacity and cannot arrogate to itself the role of determining whether the Petitioner or indeed any other student has met the requirements to graduate. This is a purely academic decision. Given that the Petitioner did not do the retake of the unit in question as directed by the Respondent, it is not for this Court to direct the Respondent to accept that the Petitioner has passed the unit which he himself has acknowledged to have failed and to order that he be admitted to graduate. To grant the orders sought by the Petitioner would inevitably result in the lowering of academic standards at the Respondent's institution, which the Court should not countenance.

21. The Respondent has urged the Court to apply the doctrine of constitutional avoidance in this matter and decline jurisdiction. It is well settled that a court will decline to decide a constitutional question when a matter may properly be decided on another basis. This is the doctrine of constitutional avoidance.

22. In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, the Supreme Court had this to say on the doctrine of avoidance:

> The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
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> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue,that is the course which should be followed."

23. And in the case of *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo, J. (as he then was) considered the doctrine of constitutional avoidance and stated:

> Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.[14] As a principle, constitutional avoidance has been linked to the doctrine of justiciability.[15] In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.[16] The doctrine of avoidance was fortified in Sports and Recreation Commission v Sagittarius Wrestling Club and Anor[17] in which Ebrahim JA said the following:
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> > "Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.."

24. The circumstances herein are that the Petitioner was required to meet the requirements of a retake as set by the Respondent in order to do and pass the unit in order to graduate. The issues raised by the Petitioner herein could have been resolved had he done what was required of him instead of coming to Court. I therefore find no basis for the intervention of the Court in this matter.

25. I have looked at paragraph 42 of the decision in the case of *Denis Wahome Muriithi v Kenyatta University* [2021] eKLR relied on by the Petitioner in which Makau, J. stated;

> 42. Section 7(2) of the *Fair Administrative Action Act*, 2015 provides grounds upon which a court or tribunal may review an administrative action. The grounds include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse of discretion, unreasonableness, violation of legitimate expectation or abuse of power. It is apparent from a reading of the stated provision that the court is being called upon to review the decision-making process in order to determine whether the Article 47 constitutional right to fair administrative action was complied with. In the instant case, the Court is required to ensure that the disciplinary process by the University complied with the requirements of procedural fairness.

The Petitioner further relied on paragraph 50 where the learned Judge said:

> 50. The University has been accused of not complying with the principles of natural justice. It was therefore incumbent upon it to adduce evidence rebutting the allegation. The University has not provided a record of the proceedings so that the Court can verify that the charge was read to the Petitioner and evidence adduced in support of the allegation of tampering with online examination results. Instead, the University provided minutes dated 22nd May, 2017 in which the Petitioner's case was discussed and a decision that he be discontinued arrived at. This in my view is akin to providing a judgement to an appellate court without proceedings and it makes it difficult to determine whether the claim by the Petitioner that no evidence was adduced against him is correct or not.

26. The cited case is distinctly clearly different from the matter herein. The petitioner therein had in fact been duly classified by the Engineering and Technology Department as having fulfilled all the requirements for the award of a degree and was accordingly scheduled to graduate in December 2016 as confirmed by the provisional graduation list but was later removed from the list and suspended from the university. The learned judge found as follows:

> 52. A perusal of the evidence placed before this Court by the parties confirms that the Petitioner was taken through a disciplinary procedure that did not comply with the minimum standards of fair administrative action. Matters were made worse by the manner in which his appeal was conducted. There is no evidence that the Petitioner's appeal was considered. All the Petitioner was told through the letter dated 25th January, 2018 was that "the Committee considered your appeal and I regret to inform you that it was unsuccessful."

27. The Petitioner herein has of his own admission failed the unit in question 3 times and sought to redo the unit. There is no evidence that he was taken through a process that did not comply with the minimum standards of fair administrative action. As such, the authority is not helpful to the Petitioner's case.

28. Having found as above, it follows that the claim of by the Petitioner of violation of his constitutional rights is without merit. The unavoidable finding of this Court therefore, is that the Petition lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED IN NAIROBI THIS 15TH DAY OF SEPTEMBER 2023

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... **for the Respondent

..... Court Assistant