



Odhiambo v Officer in Charge, Kamiti Medium Prison & another (Judicial Review E006 of 2024) [2024] KEHC 14379 (KLR) (Judicial Review) (19 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E006 OF 2024**

J NGAAH, J

NOVEMBER 19, 2024

BETWEEN

ERASTUS NGURA ODHIAMBO APPLICANT

AND

OFFICER IN CHARGE, KAMITI MEDIUM PRISON 1ST RESPONDENT

**DEPUTY OFFICER IN CHARGE, KAMITI MEDIUM PRISON 2ND
RESPONDENT**

Prisons have an obligation to take practical and reasonable measures to facilitate enjoyment of the prisoners right to education

The applicant, Erastus Ngura Odhiambo, was convicted of murder and sentenced to 20 years in prison. While incarcerated, he pursued higher education with support from Kamiti Main Prison. After his transfer to Kamiti Medium Prison in 2023, he was denied access to study materials and subjected to disciplinary action for requesting academic support. He filed for judicial review, arguing that this violated his constitutional rights and statutory protections. The respondents did not oppose the application. The court ruled in his favor, declaring the denial unlawful and ordering the prison authorities to restore his access to study facilities.

Reported by John Ribia

Constitutional Law – socioeconomic rights – right to education – right to education of prisoners – where a prisoner with access with study materials was later denied the same before completion of the studies - whether the decision to deny a prisoner access to the infrastructure, study materials and such tools as were necessary for the prisoner to continue and pursue a post-graduate Masters programme was a violation of the prisoner’s right to education – Constitution of Kenya article 43(1)(f); Persons Deprived of Liberty Act (cap 90A) sections 18, 27(9), 31(1), and the Preamble; Fair Administrative Action Act (cap 7L) sections 4 , 11(1), and 48; International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976 article 13.

Constitutional Law – fundamental rights and freedoms – right to freedom and security of the person - rights of detained persons - where a prisoner with access with study materials was later denied the same before completion



of the studies – claim of legitimate expectation - whether the decision to deny a prisoner access to the infrastructure, study materials and such tools as were necessary for the applicant to continue and pursue a post-graduate Masters programme was a violation of the prisoner’s rights to freedom and security of the person and the rights of detained persons - whether a prisoner’s loss of access of study materials to pursue a post graduate Masters programme due to being transferred from one prison to another violated the prisoner’s legitimate expectation that he would be provided with the materials till completion of the programme - Constitution of Kenya articles 29(f), and 51(1); Persons Deprived of Liberty Act (cap 90A) sections 18, 27(9), 31(1), and the Preamble; Fair Administrative Action Act (cap 7L) sections 4, 11(1), and 48; International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976 article 13.

Law of Evidence – *evidence of intimidation – where a suit was filed by a prisoner against the prison – where the prisoner was transferred - whether the transfer of a prisoner who had filed a suit against the prison while the suit was pending was in itself proof of intimidation of the prisoner by the authorities.*

Words and Phrases – *higher education – definition - All types of study programmes or sets of courses of study at the post-secondary level which are recognized by the competent authorities of a State Party, or of a constituent unit thereof, as belonging to its higher-education system - United Nations Terminology Database (available at <https://unterm.un.org/unterm2/en>).*

Brief facts

The applicant, Erastus Ngura Odhiambo, was convicted of murder and sentenced to 20 years in prison, beginning in 2018 at Kamiti Main Prison. While incarcerated, he pursued higher education, obtaining a Master’s in Business Administration from Mount Kenya University in 2022 and later enrolling in a Master of Science in Project Management. Prison authorities at Kamiti Main Prison facilitated his studies by granting access to study materials, a laptop, and an internet connection.

On February 9, 2023, he was transferred to Kamiti Medium Prison, where he was denied similar academic support. His requests for access to study tools were met with disciplinary action. He alleged that the authorities sought to intimidate him into abandoning his studies.

The applicant filed for judicial review, arguing that the denial of study facilities violated his constitutional rights, the Persons Deprived of Liberty Act, and international conventions. The respondents did not contest the application, leading the court to rule in the applicant’s favor.

Issues

- i. Whether the decision to deny a prisoner access to the infrastructure, study materials and such tools as were necessary for the applicant to continue and pursue a post-graduate Masters programme was a violation of the prisoner’s right to education.
- ii. Whether the decision to deny a prisoner access to the infrastructure, study materials and such tools as were necessary for the applicant to continue and pursue a post-graduate Masters programme was a violation of the prisoner’s rights to freedom and security of the person and the rights of detained persons.
- iii. Whether a prisoner’s loss of access of study materials to pursue a post graduate Masters programme due to being transferred from one prison to another violated the prisoner’s legitimate expectation that he would be provided with the materials till completion of the programme.
- iv. Whether the transfer of a prisoner who had filed a suit against the prison while the suit was pending was in itself proof of intimidation of the prisoner by the authorities.

Held

1. The allegation of intimidation of the applicant came alive in the course of these proceedings when, without any apparent reason, and in absolute disregard of the pendency of the applicant’s suit, the respondents transferred the applicant to Kitui main prison from Kamiti main prison where he could conveniently undertake his post-graduate degree program. It took the order of the court to have the applicant transferred back to Kamiti medium prison. In the absence of any reason for the transfer,



- it could only be assumed that the respondents were out to intimidate him from not only from pursuing his post-graduate degree program but also to stop the applicant from agitating for his right to education.
2. The right to education was a constitutional right to which every person, including the applicant, was entitled. Article 20(5) of the Constitution empowered a court presiding over a dispute on the State's failure in its responsibility to effectuate a socio-economic right, to demand evidence that would exonerate the latter from liability. Socio-economic rights required the State to take legislative, policy and other measures to achieve it. Such measures would include, with specific reference to the category of persons in the applicant's disposition, the enactment of the Persons Deprived of Liberty Act. In its preamble, the Act was stated to be an Act of Parliament to give effect to articles 29(f) and 51 of the Constitution and for connected purposes.
 3. The applicant could not be denied the right to education, or any other right in the Bill of Rights, for that matter, merely because he was imprisoned, since article 51(1) provided that persons who were imprisoned under the law, retained all the rights and fundamental freedoms in the Bill of Rights unless it could be demonstrated the applicant's right to education was incompatible with the fact that he was imprisoned. There was no such suggestion that the applicant's right to education was incompatible with his current disposition. If anything, the applicant had demonstrated that he had, in the past, obtained a degree, in a course which he enrolled while serving his prison sentence.
 4. Section 18 of the Persons Deprived of Liberty Act enjoined institutions such as Kamiti Main Prison, in which persons who, like the applicant were deprived of liberty were placed, to ensure that such persons had access to educational opportunities and reading material. The institutions in which persons deprived of liberty had been placed, had an obligation to take all practical and reasonable measures to facilitate enjoyment of the right to education.
 5. Article 13 of the International Covenant on Economic, Social and Cultural Rights to which Kenya was a party, acknowledged education as necessary for full development of human personality and sense of dignity and also strengthens the respect for human rights and fundamental freedoms. Education was recognized as an enabler for effective participation in a free society and that it promoted understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups. It was a necessary tool in the activities of the United Nations for the maintenance of peace. States parties were required to make higher education accessible to all.
 6. Higher education was all types of study programmes or sets of courses of study at the post-secondary level which were recognized by the competent authorities of a State Party, or of a constituent unit thereof, as belonging to its higher-education system. The post-graduate degree program which the applicant was pursuing was one such post-secondary course of study which was recognized in Kenya as belonging to a higher-education system.
 7. When Kamiti main prison administration approved the applicant's enrolment of educational courses and provided him with such infrastructure and tools as were necessary for him to pursue the courses he registered for, it was not doing anything out of the ordinary; neither was it extending to the applicant unwarranted favour. The prison authority was simply complying with the law to which it was bound and from which it could not resile.
 8. The existence of a legitimate expectation may give standing to seek permission to apply for judicial review; it may also mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so. Legitimate expectation may also mean that, if the authority proposed to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may, however, cease to exist either because its significance has come to a natural end or because of action on the part of the decision-maker.



9. The existence of a legitimate expectation may require a public body to confer a substantive, as opposed to a procedural, benefit. In such cases, the courts would not permit the public body to resile from the representation if to do so would amount to an abuse of power.
10. Legitimate expectation was based on the principles that:
 1. there must be an express, clear and unambiguous promise given by a public authority;
 2. the expectation itself must be reasonable;
 3. the representation must be one which it was competent and lawful for the decision-maker to make; and
 4. there could not be a legitimate expectation against clear provisions of the law or the Constitution.
11. The applicant's expectation that Kamiti Medium Prison would emulate Kamiti Main Prison and continue to provide him with the space, facilities and the necessary tools to pursue his education was not remote. The previous approvals by the prison authorities of the applicant's requests and their facilitation of his education was enough representation to the applicant that having been treated in a certain way, he would be treated the same way for as long as he was pursuing his education in prison.
12. Assuming there was no other legal basis upon which the applicant could claim such treatment, the applicant would still have been expectant to be treated the same way on the strength of the representation or promise made by the prison authorities and from consistent past practice. The past conduct of the prison authorities counted. But over and above the factual basis upon which the legitimate expectation could be inferred, it had been demonstrated that there was a solid legal basis upon which the applicant legitimately expected to be provided with the necessary space and resources for the pursuit of his post-graduate degree course.
13. It had been demonstrated that there was not only an express, clear and unambiguous promise given by the prison authorities but also that over and above that, prior to his transfer to Kamiti Medium Prison, they had consistently approved the applicant's quest of education and facilitated him to the extent that was necessary. The representation by the respondents was not merely one that they were competent to make or can lawfully make, but it was a legal obligation they were enjoined to discharge. Being an expectation that had a constitutional and statutory underpinning.

Application allowed.

Orders

- i. *Declaration made that the respondents' decision to deny the applicant access to the infrastructure, study materials and such tools as were necessary for the applicant to continue and pursue a post-graduate Masters of Science in Project Management program at Mount Kenya University was unconstitutional and, therefore, null and void, to the extent that it was contrary to articles 29(f), 43(1)(f), and 51(1) of the Constitution.*
- ii. *Declaration made that the respondents' decision to deny the applicant access to the infrastructure, study materials and such tools as were necessary for the applicant to continue and pursue a post-graduate Masters of Science in Project Management program at Mount Kenya University was illegal or unlawful to the extent that it was contrary section 18 of the Persons Deprived of Liberty Act and article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights.*
- iii. *A mandatory order or an order in the nature of mandamus was granted compelling the respondents to, forthwith and, in any event, not later than seven days of the date of the instant judgment, allow the applicant access the infrastructure, study materials and such tools as were necessary, including the tools handed over to Kamiti medium prison upon the applicant's transfer to that prison, for the applicant to continue and pursue a post-graduate Masters of Science in Project Management program at Mount Kenya University.*
- iv. *An order of prohibition was issued prohibiting the respondents from barring the applicant, or in any other way interfering with the applicant's access to the infrastructure, study materials and such tools as*



were necessary for the applicant to continue and pursue a post-graduate Masters of Science in Project Management program at Mount Kenya University.

- v. Order of certiorari was granted for purposes of bringing into this Honourable Court and quashing the purported disciplinary proceedings instituted against the applicant by the respondents respectively on June 26, 2023 and December 13, 2023.
- vi. No order as to costs.

Citations

Cases

Kenya

1. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2014] KESC 53 (KLR) (Consolidated) - (Explained)
2. *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) - (Explained)

South Africa

1. *Ministry of Justice & another v Ntuli* CCT15/97, CCT17/95; [1997] ZACC 7; 1997 (6) BCLR 677; 1997 (3) SA 772 - (Followed)
2. *S v Ntuli* (CCT17/95) [1995] ZACC 14; 1996 (1) BCLR 141; 1996 (1) SA 1207 - (Followed)

United Kingdom

1. *O'Reilly v Mackman* [1983] 2 AC 237 - (Followed)
2. *R v Jockey Club, ex p RAM Racecourses* [1993] 2 All ER 225 - (Mentioned)
3. *R v Liverpool Corpn, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299; [1972] 2 All ER 589 - (Followed)
4. *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 - (Mentioned)
5. *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40 - (Mentioned)
6. *R v Secretary of State for the Home Department, ex p Silva* (1994) Times, 1 April, CA - (Mentioned)

Texts

1. Mackay, JPH., (Lord of Clashfern) *et al* (Eds) (2010), *Halsbury's Laws of England* London: LexisNexis Butterworths 5th Edn Vol 61 para 649
2. Wade, HWR., Forsyth, CF., (Eds) (2009), *Administrative Law* Oxford: Oxford University Press 10th Edn p 446 - 448

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53 - (Interpreted)
2. Constitution of Kenya articles 2(6) ; 20 ; 29(f); 43, 43(1)(f); 47(1); 51; Chapter 4- (Interpreted)
3. Criminal Procedure Code (cap 75) sections 309(1)(a); 304(4)(a); 305 ; 309(4)(a)- (Interpreted)
4. Fair Administrative Action Act (cap 7L) sections 4 , 11(1); 48 - (Interpreted)
5. Law Reform Act (cap 26) In general - (Cited)
6. Persons Deprived of Liberty Act (cap 90A) sections 18, 27(9) ; 31(1); Preamble - (Interpreted)

South Africa

Constitution of the Republic of South Africa, 1996 (Act 200 of 1993) - (Interpreted) section 25(3)

Instruments

International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976
article 13

Advocates

None mentioned



JUDGMENT

1. The applicant was convicted of the offence of murder and sentenced to twenty years imprisonment. His prison term commenced in 2018 at Kamiti main prison. While in prison, the applicant enrolled for a Masters of Business Administration (Strategic Management Option) degree program via e-learning with Mount Kenya Kenya University. He commenced the course in May 2019 and graduated in June 2022. Soon after his graduation, the applicant enrolled for a post graduate degree course in Masters of Science in Project Management which course is underway. Apart from undertaking these courses, the applicant has authored articles in various journals and has also trained, and continues to train, his fellow inmates in entrepreneurship skills.
2. All these achievements have been made possible with the help of the prison administration which, among other things, have provided the applicant with an enabling environment to study and also allowed him access such tools for study as a laptop and a wireless fidelity (wi-fi) router.
3. On February 9, 2023, he was transferred from Kamiti main prison to Kamiti medium prison. At the time of the transfer, the applicant was, as noted, undertaking his course of Master of Science in Project Management. However, when the applicant sought from the administration of Kamiti medium prison facilitation similar to that he had been receiving from Kamiti main prison, to enable him continue and complete his course, the officer in charge of Kamiti medium prison commenced disciplinary proceedings against him only because the applicant had sought the facilities he had hitherto been accessible to in the quest for his self-actualisation.
4. It is against the foregoing background that the applicant has moved this honourable court for judicial review reliefs by way of a motion dated January 10, 2024 expressed to be brought under order 53 of the [Civil Procedure rules](#) and the [Law Reform Act](#), cap 26. The applicant has couched his prayers as follows:
 - “ 1. That, this application be certified as urgent and the same be heard in the first instance.
 2. That, this court finds and make orders of judicial review in the nature of *mandamus*, *certiorari* and prohibition to (sic) on the listed actions of the respondents.
 3. That, this court be pleased to find and order that the decision of the respondents to deny access his study materials and enabling environment for the purpose of access to formal education approved by themselves is against section 18 of [Persons Deprived of Liberty Act 2015](#).
 4. That, the court finds and make (sic) order of mandamus directed to the respondents to compel them to allow the applicant his study materials, and an enabling environment so that he could access formal education and more specifically Masters of Science in Project Management at Mount Kenya University as per section 18 of [Persons Deprived of Liberty Act](#).
 5. That, the court finds and an order of certiorari be issued quashing the disciplinary proceedings instituted by the respondents on June 26, 2023 and December 13, 2023 as they contravened article 47(1) of the [Constitution](#) and were not done in good faith and in accordance to the prison rules and regulations.



6. That, the court finds and an order of prohibition be issued to restrict the respondents to transfer the applicant without reasonable cause which has been the tool employed by the prison authority to disorient the applicant.
 7. That, the court finds that an offence was committed by the respondents under the *Persons Deprived of Liberty Act* and accordingly mete a penalty in accordance with section 27(9) and 31(1) of the *Persons Deprived of Liberty Act 2014*.
 8. That the costs of this application be provided for.”
5. The application is based on a statutory statement dated January 10, 2024 and an affidavit verifying the facts relied upon sworn by the applicant on even date.
 6. According to Mr Odhiambo, he has served seven years of the 20-year prison term and, apparently, subject to being granted a remission, he still has another seven years to serve. It is his case that his enrolment for the educational programs is motivated, not just his pursuit for education but also because he considers these programs as a “rehabilitation path”.
 7. Mr Odhiambo has sworn that for the entire period he has been in prison, he has never been subjected to disciplinary proceedings and institution by the respondents of such proceedings against him is in bad faith and only serves to intimidate the applicant into abandoning his quest for the facilities necessary for his continuing with and completing the post-graduate degree program for which he has enrolled.
 8. To demonstrate the respondents’ ill motives, the applicant claims that even after he filed the instant application and, more particularly on December 13, 2023, the respondents initiated yet another disciplinary proceeding against him. The applicant avers that, in both disciplinary proceedings instituted on June 26, 2023 and December 13, 2023, he has never been given the record of the proceedings, the charge sheets and the statements which ordinarily are vital and necessary components of such proceedings.
 9. That notwithstanding, the applicant has exhibited a copy of a charge sheet showing that on June 25, 2023, he is alleged to have committed some offence “contrary to section 66 subsection K of Rev 2017”. The charge sheet shows that he was charged by “CIP” Kimani. As far as I am able to read the handwritten particulars of the charge, the applicant is alleged to have had “in his possession, any (sic) unauthorized article or attempts to obtain such an article or; in that on June 25, 2023 at around 0800hrs in the morning, your were found in possession of 1(one) phone ‘oppo’ charger and one cable after a surprise search was conducted at the mixed block”. The applicant is recorded to have pleaded guilty and, apparently, in mitigation, he stated that he was remorseful and asked for forgiveness.
 10. In support of his application, the applicant has exhibited copies of his letters to the officer in charge of Kamiti Main Prison where, as earlier noted, he was previously imprisoned, showing that his requests for the facilitation of his course had previously been granted. To be precise, on June 11, 2020 the applicant requested to be facilitated in the following terms:

“Subject: Request For Approval To Pursue Masters In Business Administration From Mount Kenya University (MKU) via e-learning

Reference is made to your letter dated 16th September 2019 on request for facilitation to pursue MBA MKU that was to be considered at a later date.

I am an inmate serving a 20 year sentence at Kamiti Main Prison. As part of my continued rehabilitation I have gotten an admission at the MKU (Admission Number



202936/2019) to pursue a Masters in Business Administration through digital learning on a self-sponsorship programme.

I also humbly request your office to approve and facilitate me in pursuing this dream providing a conducive environment for the studies.

I undertake to abide by the underlying regulations in conducting my studies.

With Kind regards.”

11. The letter was stamped with the official stamp of the officer in charge of Kamiti main Prison showing that the applicant’s request was approved. The date of approval is not quite legible but it appears to have a date in June.

12. There is a copy of another letter dated September 16, 2019. Going by its date, this letter preceded the one dated June 11, 2020. In this particular letter, the applicant wrote as follows:

“request For Facilitation To Pursue MBA-Mount Kenya University

The above subject refers.

I am an inmate serving a 20 yr sentence at Kamiti Main Prison. I have enrolled for an MBA at Mount Kenya University under digital/e-learning programme. I am a self sponsored student. For that reason I humbly request to be allowed to acquire the following items for my learning:

Laptop and tablet with reliable regular internet connectivity
fore-learning
Scientific Calculator
Relevant stationery
Storage (Flash Disk or SD card)
Conducive controlled environment for learning
Access for the university staff for the sake of exams and other relevant materials

I also undertake to use the materials and items strictly for the educational purposes requested when granted. Kindly accept my request in the spirit of self-rehabilitation and reforms

With regards,”

13. There are endorsements on the letter by officers of Kamiti main prison showing that the applicant’s request had been received and forwarded for consideration. Another note on the letter shows that the request had been noted and that it was going to be considered at a later date.

14. There is yet another request by the applicant dated 18th November 2020. It was approved by the officer in charge of Kamiti main prison on the same date. The request read thus:

“Request To Acquire Computer Headphones For Video Lessons Playback

Sir, I once again thank you for granting me this rare opportunity to further my education through facilitation of MKU MBA studies. Am progressing well and I did my second semester exams in August this year awaiting results any time from now as I continue with my third semester.

Sir, some of the modules have online classes scheduled at 5pm on weekdays and some on weekends. These hours are out of range for prison activities. I have requested the facilitators of the lessons to record the classes so I can access and download for later playback.

I therefore request you to kindly allow me to acquire headphones, through the welfare office, for video lessons playback during schools hours, which I will only use within the academy.



Kindly accept my request.”

15. The applicant’s request dated September 1, 2020 for a scanner was, similarly, approved. His request to send out of prison a questionnaire for his research was also approved.
16. There is evidence of a note dated February 15, 2023 signed by corporal Peter Muchemi showing that the tools which the applicant had been supplied with while at Kamiti main prison were handed to Kamiti medium prison. These tools are listed as a laptop, a dell mouse, a black headphone, a laptop bag and a mifi router. An officer named as “IP” Chirchir signed the note as having received these items in Kamiti medium prison. The handover was witnessed by “CIP” Thomas Mosiria, a documentation officer at Kamiti medium prison.
17. The respondents did not respond to the applicant’s application. No doubt they were aware of the applicant’s suit because they have consistently facilitated his appearance in court every time the suit has come up in court for one action or another.
18. At the hearing of his application, the applicant urged that by denying him the facilities to continue with his studies, the respondents have infringed on his right to education. The applicant also urged that all he wanted of the respondents is nothing more than a conducive atmosphere to pursue his studies and that without such an environment and without the facilities he has previously been provided with, his right to education will not only be violated but he also stands the risk of losing the sum of Kshs 63,000 which he has paid to Mount Kenya University towards fees for his post graduate program. Having previously been facilitated to undertake and complete a course while serving his prison term, the applicant has urged that it was his legitimate expectation that the respondents will continue to facilitate him and accord him the necessary environment to complete his course that is now underway.
19. The applicant invoked section 4 of the [Fair Administrative Action Act, 2015](#) and also cited a South Africa Supreme Court decision in [Ministry of Justice & Another v Ntuli](#). He also invoked section 18 of the [Persons Deprived of Liberty Act, 2014](#).
20. The applicant neither provided the full citation nor a copy of the South African case but I was able to locate it on the South African Legal Information Institute website where it is cited as [S v Ntuli](#) (CCT17/95) [1995] ZACC 14; 1996 (1) BCLR 141; 1996 (1) SA 1207 (8 December 1995). In that case, the Constitutional Court of South Africa held section 25(3) of the [Constitution](#) (Act 200 of 1993) as listing some particular rights that are deemed to be covered by the general right to a fair trial, bestowing and protecting them individually. One of those rights was in paragraph (h) of that section and it is “... the right ... to have recourse by way of appeal or review to a higher court than the court of first instance.”
21. Section 309(1)(a) of the [Criminal Procedure Act](#) (51 of 1977), provided for appeals by convicted persons and stated that:

“Any person convicted of any offence by any lower court ... may appeal against such conviction and against any resultant sentence or order to the provincial or local division having jurisdiction.”
22. However section 304(4)(a) appeared to limit the right to appeal and stated that:

“When an appeal under this section is noted, the provisions of ... section 305 shall *mutatis mutandis* apply in respect of the conviction, sentence or order appealed against.”



23. Section 305 to which reference was made in section 304(4)(a) read as follows:

“Notwithstanding anything to the contrary in any law contained, no person who has been convicted by a lower court of an offence, and is undergoing imprisonment for that or any other offence, shall be entitled to prosecute in person any proceedings for the review of the proceedings relating to such conviction unless a judge of the provincial or local division having jurisdiction has certified that there are reasonable grounds for review.”

24. The court held section 309(4)(a) of the *Criminal Procedure Act* to be invalid on the score of its inconsistency with the *Constitution* to the extent that it impeded the right to appeal and the guarantee of equality before the law.

25. I understand the applicant’s reliance on this decision to support the position that his case or the submissions in support of the case should not be disqualified merely because he is acting in person.

26. Section 48 of the *Fair Administrative Action Act* which he invoked provides provides, *inter alia*, that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair and that he has the right to be given written reasons for any administrative action that is taken against him. If the administrative action is likely to adversely affect the person’s rights or fundamental freedoms, the administrator is enjoined to give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed action. By denying the applicant access to the facilities that he has hitherto enjoyed, the respondents are alleged to have breached these provisions of the law.

27. Section 18 of the *Persons Deprived of Liberty Act, 2014*, on the other hand, makes provision for the right to education and access to information by persons deprived of liberty. The respondents are alleged to have also contravened this provision of the law by violating the applicant’s right to education and impeding his access to information.

28. In the absence of any response from the respondents and, therefore, in the absence of any evidence to the contrary, I am entitled to proceed on the assumption that the factual basis of the applicant’s application is as stated in the applicant’s affidavit. Indeed, the allegation of intimidation of the applicant came alive in the course of these proceedings when, without any apparent reason, and in absolute disregard of the pendency of the applicant’s suit, the respondents transferred the applicant to Kitui main prison from Kamiti main prison where he could conveniently undertake his post-graduate degree program. It took the order of this honourable court to have the applicant transferred back to Kamiti medium prison. In the absence of any reason for this transfer, it can only be assumed, as the applicant has suggested, that the respondents were out to intimidate him from not only from pursuing his post-graduate degree program but also to stop the applicant from agitating for his right to education in this suit.

29. Speaking of the right to education, it is one of the economic and social rights guaranteed in the Bill of Rights in Chapter 4 of the *Constitution*. To be precise, the right to education, is part of the whole gamut of social and economic rights provided under article 43 of the *Constitution*. This article reads as follows:

43. Economic and social rights

(1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;



- (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants. (Emphasis added).

30. Of particular relevance to the applicant’s application is, of course, article 43(1)(f) that leaves no doubt that the right to education is a constitutional right to which every person, including the applicant, is entitled. The timing and the means by which these rights may be realized is a question that was articulated by the Supreme Court 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). In this case, the appellants had been evicted by the government from their informal settlements on what was generally acknowledged to be public land. One of the questions that arose for determination in this honourable court and which escalated all the way to the Supreme Court was the appellants’ right to accessible and adequate housing under article 43(1)(b) of the *Constitution*, in the wake of their forceful evictions. In affirming the appellant’s right to adequate housing and, in the process, allowing the appeal, the Supreme Court noted as follows:

“ 147. The issue of what constitutes the progressive realization of a socio-economic right has therefore been long settled. The right to accessible and adequate housing, just like any other right under article 43, requires the State to take legislative, policy and other measures to achieve it. Under article 20, the *Constitution* ... empowers the courts and tribunals to apply the provisions of the Bill of Rights effectively by developing the law and adopting the interpretation that most favours the enforcement of the right. Regarding the rights under article 43 of the *Constitution*... article 20(5) provides that: “ In applying any right under article 43, if the state claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles?(sic)

- (a) It is the responsibility of the State to show that the resources are not available
- (b) In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals and
- (c) The court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation



of available resources, solely, on the basis that it would have reached a different conclusion

148. Article 20(5) clearly empowers a court or tribunal, presiding over a dispute, in which the petitioners are claiming that the State, has either neglected, or failed in its responsibility to effectuate a socio-economic right, to demand evidence that would exonerate the latter from liability". (Emphasis added).
31. Of worth noting is that although the court was mainly concerned about the right to accessible and adequate housing, it also addressed the actualisation of the rest of the economic and social rights under article 43 generally, and noted that, "the right to accessible and adequate housing, just like any other right under article 43, requires the State to take legislative, policy and other measures to achieve it" and further implored courts and tribunals to robustly apply article 20 of the *Constitution* which empowers these institutions to develop the law and adopt the interpretation favourable to the enforcement of the Bill of Rights.
32. The policy and the legislative measures to be taken by the state and which, according to the Supreme Court, are necessary for realization or actualisation of the economic and social rights, would include, with specific reference to the category of persons in the applicant's disposition, the enactment of the *Persons Deprived of Liberty Act*, cap 90A. In its preamble, the Act is stated to be "an Act of Parliament to give effect to articles 29(f) and 51 of the *Constitution* and for connected purposes."
33. Article 29(f) of the *Constitution* guarantees the right not to be treated or punished in a cruel, inhuman or degrading manner while article 51 is more specific to the applicant's rights because it addresses the rights of persons who, like the applicant, are detained, held in custody or imprisoned. The article reads as follows:
51. Rights of persons detained, held in custody or imprisoned
- (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
 - (2) A person who is detained or held in custody is entitled to petition for an order of habeas corpus.
 - (3) Parliament shall enact legislation that—
 - (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and
 - (b) takes into account the relevant international human rights instruments.
34. It follows that the applicant cannot be denied the right to education, or any other right in the Bill of Rights, for that matter, merely because he is imprisoned, since article 51(1) is clear that a person who, like the applicant, is imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights unless, of course, it can be demonstrated the applicant's right to education is incompatible with the fact that he is imprisoned. There was no such suggestion that the applicant's right to education is incompatible with his current disposition. If anything, the applicant has demonstrated that he has, in the past, obtained a degree, in a course which he enrolled while serving his prison sentence.



35. Besides the right to education, section 18 of the *Persons Deprived of Liberty Act* enjoins institutions such as Kamiti main prison, in which persons who, like the applicant are deprived of liberty are placed, to ensure that such persons have access to educational opportunities and reading material. Under this provision of the law, the institutions in which persons deprived of liberty have been placed, have an obligation to take all practical and reasonable measures to facilitate enjoyment of the right to education. This section reads as follows:
18. Right to education and access to information
- (1) Persons deprived of liberty shall be entitled—
 - (a) to access educational opportunities and reading material that is beneficial to their rehabilitation and personal development; and
 - (b) to reasonable access to news media.
 - (2) Subject to subsection (1), every Competent Authority under whose charge a person deprived of liberty is placed shall take all practical and reasonable measures possible to facilitate enjoyment of the right to education and access to information.
 - (3) So far as is practically reasonable, the education of children detained in prison shall be integrated with the current system of education.
36. Apart from the *Constitution* and the *Persons Deprived of Liberty Act*, article 13 of the *International Covenant on Economic, Social and Cultural Rights* to which Kenya is a party, acknowledges education as necessary for full development of human personality and sense of dignity and also strengthens the respect for human rights and fundamental freedoms. Education is recognized as an enabler for effective participation in a free society and that it promotes understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups. Accordingly, it is a necessary tool in the activities of the United Nations for the maintenance of peace.
37. States parties are, therefore, required to make higher education accessible to all. Parts of article 13 pertinent to this application read as follows:
1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;



38. For the avoidance of doubt, “higher education” is defined in the United Nations Terminology Database (<https://unterm.un.org/unterm2/en>) as:
- “ All types of study programmes or sets of courses of study at the post-secondary level which are recognized by the competent authorities of a State Party, or of a constituent unit thereof, as belonging to its higher-education system.”
39. No doubt, the post-graduate degree program which the applicant is pursuing is one such post-secondary course of study which is recognized in this country as belonging to a higher-education system. It goes without saying that Kenya being state party to [International Covenant on Economic, Social and Cultural Rights](#), the Covenant is part of our laws by virtue of article 2(6) of the [Constitution](#) according to which any treaty or convention ratified by Kenya forms part of the law of Kenya. For the record, Kenya ratified this Covenant in May 1972.
40. Thus, the [Constitution](#), the statute and the [Treaty on Economic, Social and Cultural Rights](#) point to the conclusion that when Kamiti main prison administration approved the applicant’s enrolment of educational courses and provided him with such infrastructure and tools as were necessary for him to pursue the courses he registered for, it was not doing anything out of the ordinary; neither was it extending to the applicant unwarranted favour. The prison authority was simply complying with the law to which it is bound and from which it cannot resile.
41. Without belabouring the point, the applicant’s application is on the right side of the law and there is no reason why it should not be granted.
42. A different angle from which the application would also be allowed is the judicial review ground of legitimate expectation. This concept of legitimate expectation has been explained in [Halsbury’s Laws of England/Judicial Review \(Volume 61 \(2010\) 5th Edition\)/2](#), at paragraph 649, where it has been explained to mean that a person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment (see *O’Reilly v Mackman* [1983] 2 AC 237 at 275). The expectation, according to this treatise, may arise either from a representation or promise made by the authority (*R v Liverpool Corpn, ex p Liverpool Taxi Fleet Operators’ Association* [1972] 2 QB 299, [1972] 2 All ER 589) including an implied representation (*R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40), or from consistent past practice (*O’Reilly v Mackman* (supra)). In all instances, the expectation arises by reason of the conduct of the decision-maker (see *R v Jockey Club, ex p RAM Racecourses* [1993] 2 All ER 225) and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded (*R v Secretary of State for the Home Department, ex p Silva* (1994) Times, 1 April, CA).
43. The treatise goes further to explain that the existence of a legitimate expectation may have a number of different consequences; it may, for instance, give standing to seek permission to apply for judicial review; it may also mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so. Legitimate expectation may also mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may, however, cease to exist either because its significance has come to a natural end or because of action on the part of the decision-maker.
44. In appropriate circumstances, the existence of a legitimate expectation may require a public body to confer a substantive, as opposed to a procedural, benefit. In such cases, the courts will not permit the



public body to resile from the representation if to do so would amount to an abuse of power. (see *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213).

45. Back home, the Supreme Court applied this concept in the [*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*](#) [2014] eKLR where it noted that:

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

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

46. The court considered Wade and Forsyth in their work, [*Administrative Law*](#), 10th ed (pages 446-448) and came to the conclusion that legitimate expectation is based on the principles that:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or the [*Constitution*](#).”

47. Weighed against the foregoing perspective, the applicant’s expectation that Kamiti medium prison would emulate Kamiti main prison and continue to provide him with the space, facilities and the necessary tools to pursue his education was not remote. The previous approvals by the prison authorities of the applicant’s requests and their facilitation of his education was enough representation to the applicant that having been treated in a certain way, he would be treated the same way for as long as he was pursuing his education in prison.

48. Assuming there was no other legal basis upon which the applicant could claim such treatment, the applicant would still have been expectant to be treated the same way on the strength of the representation or promise made by the prison authorities and from consistent past practice. In short, the past conduct of the prison authorities counts. But over and above the factual basis upon which the legitimate expectation could be inferred, it has been demonstrated there is a solid legal basis upon which the applicant legitimately expected to be provided with the necessary space and resources for the pursuit of his post-graduate degree course.

49. The applicant’s expectation meets the threshold spelt out by the Supreme Court in [*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*](#) (*supra*) since it has been demonstrated that there was not only an express, clear and unambiguous promise given by the prison authorities but also that over and above that, prior to his transfer to Kamiti medium prison, they have consistently approved the applicant’s quest of education and facilitated him to the extent that is necessary.



50. It has also been demonstrated the applicant's expectation is not just reasonable but it is backed by the Constitution, the Persons Deprived of Liberty Act and an international convention which this country has ratified. Again, the representation by the respondents is not merely one that they are competent to make or can lawfully make, but it is a legal obligation they are enjoined to discharge. Being an expectation that has a constitutional and statutory underpinning, the question whether the applicant's expectation is contrary to the provisions of the Constitution need not arise.
51. For the reasons I have given, I allow the applicant's application, and further, by the powers conferred upon this honourable court under section 11(1) of the Fair Administrative Action Act and, for the avoidance of doubt, I hereby specifically order as follows:
1. A declaration is hereby made that the respondents' decision to deny the applicant access to the infrastructure, study materials and such tools as are necessary for the applicant to continue and pursue a post-graduate Masters of Science in Project Management program at Mount Kenya University is unconstitutional and, therefore, null and void, to the extent that it is contrary to articles 29(f), 43(1)(f) and 51(1) of the Constitution;
 2. A declaration is hereby made that the respondents' decision to deny the applicant access to the infrastructure, study materials and such tools as are necessary for the applicant to continue and pursue a post-graduate Masters of Science in Project Management program at Mount Kenya University is illegal or unlawful to the extent that it is contrary section 18 of the Persons Deprived of Liberty Act, cap 90A and article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights.
 3. A mandatory order or an order in the nature of mandamus is hereby granted compelling the respondents to, forthwith and, in any event, not later than seven days of the date of this judgment, allow the applicant access the infrastructure, study materials and such tools as are necessary, including the tools handed over to Kamiti medium prison upon the applicant's transfer to that prison, for the applicant to continue and pursue a post-graduate Masters of Science in Project Management program at Mount Kenya University.
 4. An order of prohibition is hereby issued prohibiting the respondents from barring the applicant, or in any other way interfering with the applicant's access to the infrastructure, study materials and such tools as are necessary for the applicant to continue and pursue a post-graduate Masters of Science in Project Management program at Mount Kenya University.
 5. An order of *certiorari* is hereby granted for purposes of bringing into this honourable court and quashing the purported disciplinary proceedings instituted against the applicant by the respondents respectively on June 26, 2023 and December 13, 2023.
 6. I make no order as to costs.

SIGNED, DATED AND POSTED ON CTS ON 19 NOVEMBER 2024

NGAAH JAIRUS

JUDGE

