



**Mbita v Kisii University (Constitutional Petition 23 of 2019)
[2024] KEHC 15559 (KLR) (2 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION 23 OF 2019**

**RE ABURILI, J
DECEMBER 2, 2024**

BETWEEN

MILDRED ALICE MBITA PETITIONER

AND

KISII UNIVERSITY RESPONDENT

JUDGMENT

1. The petitioner MILDRED ALICE MBITA and others not before court were students of the respondent University undertaking studies in pursuit of a Diploma in Library & Information Studies. They were enrolled at the respondent's Kisumu Campus.
2. It was the petitioners' case that despite paying the requisite fees and successfully completing their studies, the respondent declined to clear them on account of missing marks. In the course of the proceedings, the other petitioners withdrew their claims, leaving the 1st petitioner to pursue the petition to its logical conclusion.
3. The petitioner seeks the following orders: -
 - a. A declaration that the Petitioners rights guaranteed and protected under Article 10, 27, 28, 43 and 47 of *the Constitution* have been violated by the Respondent.
 - b. An order compelling the Respondent to release the Petitioner's results for DLIS 0211 Research Methods and DLIS 0227 – Research Project.
 - c. An order of mandamus to issue compelling the respondent to include the names of the petitioner in the graduation list scheduled for December.
 - d. An order compelling the respondent to release all academic testimonial including diploma certificate and all original transcripts illegally and unlawfully held by it on account of missing



marks alleged not having been done to the Petitioner unconditionally and with immediate effect.

- e. General exemplary and punitive damages at courts apportioned rate towards unwarranted emotional, physical and mental destabilization of the Petitioner and aimed at deterring any such future malicious illegalities by the Respondent and the cadre.
 - f. Costs of the Petition be borne by the Respondent.
4. It is the petitioner's case that she was enrolled to Kisii University Kisumu Campus in the year 2015 and that in July 2018, which time she had completed her course work as well as the research project and attachment, the respondent closed the Kisumu Campus and advised the petitioner to choose the preferred campus to be transferred to.
 5. The petitioner averred that what was left was clearing with the University in order to graduate as she had cleared her school fees.
 6. The petitioner averred that she chose to be transferred to the main campus where the academic registrar declined to clear her to graduate on the premise that the following 5 units did not reflect in her records:
 - a. Research Methods DLIS 0211
 - b. Publishing and Book Trade DLIS 0226
 - c. Emerging Trends in Information Management DLIS 0225
 - d. Information and Communication Society DLIS 0216
 - e. Research Project DLIS 0227
 7. The petitioner averred that she contacted the respective lecturers who confirmed having submitted the marks to the respondent and she informed the Dean of Academics.
 8. The petitioner averred that together with her father, they sought the help of the Ombudsman and subsequently the respondent managed to update marks in 3 units and as such, the only missing marks are for 2 units namely: -
 - a. Research Methods DLIS 0211
 - b. Research Project DLIS 0227
 9. It was the petitioner's case that the lecturer in charge of the Research Project confirmed that he supervised the Petitioner and awarded her marks but that the lecturer in charge of Research Methods was not available due to poor health.
 10. The petitioner averred that nonetheless, she produced an exam card confirming that she indeed sat for the exam the only notable difference being that in the exam card, the code is captured as DEBAD and not DLIS as she sat for the paper with the students taking business as it is a course cutting across all the faculties.
 11. The petitioner testified in support of her case reiterating the averments in her petition. In cross-examination, the petitioner admitted that she had not presented any document in court to show that she sat for the Research Methods DLIS 0211 course but that she had documents to show that she sat for the exams. She further testified in cross-examination that the Research Project that she had attached to her petition was not signed and dated whereas this was a requirement prior to submission before a supervisor.



12. The petitioner further stated that the University informed her to register for the 2 units and re-sit the exams but she did not despite the fact that she had made a request for special exams.
13. In re-examination, she stated that she did not sign the project presented to the University as it was her personal copy, the original copy having been earlier surrendered to the University.
14. PW2 Boniface Simiyu testified that he was previously employed by the respondent and supervised the petitioner's research project. He testified that the petitioner cleared by March 2018 and that he awarded her marks, B of 60% and submitted the copy to the Department of Library and Information Sciences.
15. PW2 corroborated the petitioner's testimony that the student's project was fully signed by both the petitioner and himself and that the one presented in court was the student's copy.
16. In cross-examination, PW2 reiterated that he was not presented with a contract by the respondent and that he last worked for the University in 2018 when he left after submitting the student's marks. He denied withholding the student's research project because he was not paid.
17. In response, the respondent filed a replying affidavit sworn on the 15th November 2019 by its Assistant Legal Officer, Seth Ongúti in opposition to the petition.
18. It was deposed that no evidence had been presented by the petitioner to sustain the claim that the petitioner had satisfied the prerequisite conditions for conferment of the Diploma Certificate in the courses she undertook.
19. The respondent further deposed that, following investigations, it was discovered that the petitioner was only missing marks in two units, Research Methods and Research Project which exams it was discovered she never sat for and subsequently the petitioner and other students who had such issues were advised to register for examination.
20. The respondent further deposed that despite the petitioner requesting to sit a special examination and having been enlisted to sit for the said examinations, the petitioner failed to turn up despite her other colleagues sitting for the said examinations.
21. The respondent deposed that it was thus not to blame for the petitioner's woes as she had been given numerous opportunities to sit for the examination but had refused to do so.
22. Mr. Ong'iti testified in support of the respondent's case adopting his witness statement dated 1.11.2021 as his evidence in chief. It was his testimony that the petitioner's claim ought not to have come to court as the petitioner had not completed the course.
23. He further testified that the respondent received the petitioner's demand letter and responded to it and advised her and other affected students to go and re-sit for the examination. It was his testimony that the petitioner applied for special examination but never appeared to sit for the said examination however two other students applied and sat for the examination and eventually graduated.
24. Mr. Ong'iti further testified denying that PW2 submitted the results on behalf of the petitioner as the University Statutes provides how exams are to be administered, marked and results submitted to the respective departments. He further testified that results must have a mark sheet and examination attendance register. It was his testimony that it was not possible to release the petitioner's results as she never sat for the examination.
25. In cross-examination Mr. Ong'iti testified that the request for special exams was done by the department on behalf of the students who requested to sit for special exams and that there was no request by the



petitioner. He further testified that the respondent did not have the handing report from Kisumu which report would have the students' marks.

26. In re-examination Mr. Ong'iti testified that the course code in the exam cards relied on by the petitioner bore the Code DBAD 0112 which did not belong to the Department of Information Sciences. He reiterated that the petitioner did not sit the 2 units that are subject of this petition.

The Petitioners' Submissions

27. The petitioner submitted that if at all it was within the special knowledge of the respondent that the petitioner did not sit for the project work then the most prudent thing to do was to give the name of the supervisor assigned to the petitioner to testify that the petitioner did not undertake the project work to completion as required by section 112 of the *Evidence Act*.
28. It was submitted that the petitioner discharged the responsibility to prove the case by giving out the name of the supervisor, calling him and producing a copy of the project work as an exhibit in court.
29. The petitioner submitted that as regards the marks for Research Methods the relevant lecturer was indisposed due to poor health but nonetheless, she produced an exam card confirming that she indeed sat for the exam the only notable difference being that in the exam card the code is captured as DEBAD and not DLIS as she sat for the paper with the students taking business as it is a course cutting across all the faculties.
30. It was submitted that despite the respondent's testimony in cross-examination that the petitioner applied for special exams but not that she had missing marks however when put to task to produce the request for special examination by the petitioner, he failed to produce it.
31. The petitioner submitted that her rights under Article 10,27,28 and 47 of *the Constitution* had been violated. It was further submitted that the petitioner had a legitimate expectation to graduate after completing the course work and payment of school fees. Reliance was placed on the case of *Nelvin v Kenyatta University (Petition E381 of 2022)*.
32. On whether an order of mandamus should be granted, it was submitted that the respondent is a public body hence judicial review orders of mandamus apply to it as was held in the case of *Republic v Principal Secretary Ministry of Internal Security & Another Exparte Schon Nooranik & Anor (2018) eKLR*.
33. As to whether the petitioner was entitled to general exemplary and punitive damages it was submitted that the respondent's conduct betrayed the very values and principles of Article 10 and that such an award is just and appropriate in this case.
34. The respondents submitted that they were entitled to costs due to the prolonged nature of the case which costs ought to be settled by the respondent.

The Respondent's Submissions

35. It was submitted that no cited constitutional rights were violated as alleged by the petitioner. On her allegation of violation of her right under Article 27, it was submitted that for the petitioner to succeed under this head she was required to show a nexus between the negative treatment she received vis-à-vis the treatment given to other students in as far as being enlisted as a graduand was concerned.
36. It was thus submitted that the petitioner did not qualify for graduation as she had not sat for two exams and thus this claim had no basis and must fail.



37. The respondent submitted that the petitioner's claim that she was treated in an undignified manner by the respondent's staff and administration contrary to the provisions of Article 28 when she went to inquire on the missing marks remained a mere allegation as no tangible evidence was exhibited showing the same.
38. On the petitioner's allegation of violation of Article 29 it was submitted that the petitioner's woes were of her own making as she simply did not sit for exams despite being accommodated by being offered an opportunity to resit her exams, she rubbished the advice and opted to pursue the instant case.
39. The respondent submitted that the allegation of violation of the petitioner's right to education under Article 43 did not materialize as this right is borne by the state and not learning institutions as was held in the case of Phylis Kemuma Onenga v Dima College Limited [2022] eKLR.
40. It was further submitted that the petitioner had not produced any evidence to show that she sat for DLIS 0211 and Mr. Charles Mboi who she claimed examined her did not attend court to verify the said allegations.
41. The respondent further submitted that the petitioner's claim of violation of Article 47 had no basis as there is no requirement under the said Article that makes it mandatory to communicate to the petitioner in writing that her marks were missing.
42. The respondent submitted that the petitioner does not merit grant of the orders sought as she as not satisfied all the conditions necessary to be awarded a diploma certificate as she never qualified for issuance of the same in the first place and thus the petitioner is calling for the court to micro-manage the respondent's affair which is outside the court's jurisdiction as was held in the case of Penina Wothaya Wachira v Kenya Methodist University 2018] eKLR.
43. As regards the petitioner's prayer seeking general, exemplary and punitive damage, it was submitted that the claim ought to fail as she had not proved any violation of her rights or that the respondent deliberately contributed to her predicament as was held in the case of Alice Njeri Ngichiri v Kenyatta University 2012] eKLR and Godfrey Julius Ndumba Mbogori & Another v Nairobi City Council [2018] eKLR.
44. The respondent thus urged the court to dismiss the petition with costs.

Analysis & Determination

45. Having considered this Petition, response thereto, submissions by Counsel for both parties and various authorities relied upon. I find that the issues for determination are as follows;
 1. whether this court has jurisdiction to grant the reliefs sought in the Petition
 2. whether the petition is merited
 3. Who bears the costs of this Petition?
46. It is well established that jurisdiction of the Court is that authority vested on the court of law to take cognizance of matters brought before it for adjudication. That jurisdiction may be general or specific, limited or unlimited. This jurisdiction may be conferred by *the Constitution*, Statute or both.



47. Supreme Court has in Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & Another (2012) eKLR held that;

“ A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

48. In this case, the Petitioner has invoked jurisdiction of this court to remedy what she considers to be breach of her fundamental rights and freedom under Articles 2, 3, 20, 21, 22,23, 27, 28, 29D, 43 (f) and 47 (1) and (2) of *the Constitution* of Kenya, 2010.

49. It is trite that a petitioner must identify the constitutional entitlement threatened, infringed or violated and to demonstrate with some level of precision on the manner of violation as to enable the respondent to mount a defence.

50. The said position was coined in Miscellaneous Criminal Application 4 of 1979, Anarita Karimi Njeru v Republic [1979] eKLR when the court remarked as follows: -

“ ... 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...”

51. The above precedent has been subsequently cited with approval by various courts of superior jurisdiction. In Kenya Medical Practitioners, Pharmacists and Dentists’ Union v University of Nairobi & another [2021] eKLR, the court wholesomely discussed the precision requirement in the following manner: -

87. The foregoing finding (Anarita Karimi case) received endorsement from the court of Appeal in Nairobi Civil Appeal No 290 of 2012, Mumo Matemu v Trusted Society of Human Rights Alliance when the Learned Judges remarked on the importance of compliance with procedure under article 159 of *the Constitution*, the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* and need for precision in framing issues in constitutional petitions. It was observed thus: -

52. The Supreme Court went on to set out the standard of proof in Constitutional Petitions in the case of Communications Commission of Kenya & 5 Others v Royal Media Services Limited supra where the court stated as follows: -

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



53. Accordingly, it is not enough for the petitioner herein to allege violation/infringement of her constitutional right but there must be a link drawn between them, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement.
54. In addressing this issue, the starting point must be *the Constitution* itself. Article 165(1) establishes this court and its jurisdiction conferred to it under Article 165(3). The Petitioner purports to bring her Petition under Article 165(3)(b) which states and reads as follows:
- “subject to clause (5), the High Court shall have –
- b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;”
55. It is the Petitioner’s allegation that she was a student at the Respondent’s institution having and that having completed the course work and paid the requisite school fees and completed the relevant exams, that she was entitled to graduate from the institution however this did not happen due to alleged missing marks that she contended.
56. The evidence on record is that the petitioner was missing marks are for 2 units, Research Methods DLIS 0211 and Research Project DLIS 0227. PW2, the lecturer in charge of the Research Project confirmed that he supervised the Petitioner and awarded marks and that he subsequently submitted to the respondent.
57. However, regarding Research Methods, the petitioner’s case was that the lecturer in charge of Research Methods was not available due to poor health but she did produce an exam card confirming that she sat for the exam, the only notable difference being that in the exam card, the Code is captured as DEBAD and not DLIS as she sat for the paper with the students taking business as it is a course cutting across all the faculties.
58. The respondent on its part led evidence to the effect that the petitioner had missing Marks and was part of a group that requested to re-sit the said exams but eventually failed to show up for the same. However, in cross-examination, the respondent admitted that they had not produced a hand over report from the Kisumu campus that would detail the marks of the students who transferred from the Kisumu campus to the main campus like the petitioner.
59. Taking all the aforementioned into consideration, it is clear that there was failure on the part of the respondents in how it handled the students moving from the Kisumu Campus to the main campus. The question is whether this failure by the respondents constituted violation of the petitioner’s cited constitutional rights.
60. It is not lost on this court that the respondent offered the petitioner an opportunity to re-sit the said exams which the petitioner failed to take up and as such the petitioner could not be added to the graduation list. The other co petitioners who opted out of this case sat for the examinations.
61. E.Ogolla J had this to say in *Samuel Barasa & 5 others v Technical University of Mombasa & 2 others* [2019] eKLR:
- “It is the finding of this Court and I hold so, that at this point in time this Court is not able to determine or interrogate the academic policy requirements which has caused the Respondent to bar Petitioners No. 1, 2, 5 and 6 from the graduands list for 2019. The Court



cannot compel the university to award degree or certificates to students who in the view of the university have not met the academic cut. “

62. I cannot agree more and add that Universities have standards and that Courts cannot determine or impose its own standards on the Universities. The petitioner was given an opportunity to re sit for the examinations in the two units where her marks could not be traced and as I have stated, the University did not handle the transition from Kisumu Campus to Kisii main Campus properly. The offer for her to re sit the exams or to be reexamined is a mitigation by the University. The petitioner cannot demand that she be cleared and allowed to graduate without her marks being traced even assuming that she sat for the two units and was examined on the same.

63. H.Omondi J (as she then was) in the Republic v Vice Chancellor Kisii University Ex- Parte Muthamia Samuel Mwiti [2019] e KLR had this to say where a student was inadvertently given marks for 1st class honours but later revoked before graduation and the student sued the University:

“I can do no better than to echo the words in MAGIT VS UNIVERSITY OF AGRIC, MARKUDI [2005 – SUPREME COURT) that”

“the courts have no business to flirt into the arena of a University deciding whether a thesis had met the standard of which it has set, has been met. Any attempt, in any court, ... to dabble or encroach into the purely administrative and domestic affairs of a University...may lead to undue interference, nay the weakening inadvertently so to speak, of the powers and authority conferred on the Universities by statutes and that Will not be justifiable....truly academic decisions are to be distinguished from the administration decisions of the academic boards ...administrative decisions are subject to judicial review. Purely academic decisions are treated as beyond the court’s reach though, on facts in several cases, the courts can interfere...”

64. Similarly, in Maharashtra State Board vs. Kurmarsheti & Others (1985) CLR 1083, it was held that:

“So long as a body entrusted with the task of framing the rules and regulations act within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules and regulations.”

65. It is my opinion therefore, that the court should be reluctant to substitute its own views as what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them.

66. In many instances, the courts have held that academic decisions are to be distinguished from the administrative decisions of the academic bodies. This is because administrative actions are subject to judicial review while purely academic decisions are treated as beyond the courts reach though in some cases the court can interfere.

67. In Penina Wothaya Wachira v Kenya Methodist University [2018] eKLR Mativo J (as he then was) held that for the Petitioner to succeed in review in academic matters, these areas are not disturbed by courts unless the decisions under challenge are constitutionally so fragile and unsustainable. If the decision is legal and lawful, the unreasonableness and propriety of the same may not be questionable by the court. In other words, among the Wednesbury principles of illegality, irrationality and impropriety



if the decision can get over the first test, it may withstand the other two tests, unless, it is shockingly unreasonable, perverse and improper.

68. The learned Judge stated as follows:

“It will be wholly wrong for the court to make a pedantic and purely idealistic approach to a problem of this nature, isolated from the actual reality and circumstances of the case. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list, but without losing sight of the ultimate values to be protected, that is the value of ensuring that Degrees offered are not compromised or open to challenge or put the Petitioner to a situation whereby the regulating body may ultimately fail to recognize her Degree. The degree certificate must be worth the paper it is written. It must not be open to assail or challenge on its integrity. An assault on the integrity and credibility of the degree will be an affront to the institution granting it.”

69. I wholly agree with the above holding by the learned Judge. The question as to whether the Respondent’s refusal to include the petitioner in the graduand’s list on the grounds that she had two missing marks violated the Petitioner’s right in any way it is my opinion that this nature of the decision is one that falls into the category or areas not disturbed by the courts unless the decision under challenge is constitutionally fragile and unsustainable, noting that the petitioner was accorded an opportunity to re-sit for the examinations in the disputed units.

70. Section 7(2) of the *Fair Administrative Action Act* provides grounds for review of administrative actions to include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. None of these has been proved by the Petitioner in this case.

71. I agree with the Respondent that the Petitioner has not proved her case in showing that her alleged constitutional rights have been violated or infringed in any way and consequently her claim for general, exemplary and punitive damages also fail.

72. I find that the Petitioner has failed to prove her case against the Respondent and this Petition is accordingly dismissed with no orders as to costs.

73. Decree to issue

74. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 2ND DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

