



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**(Coram: A. C. Mrima, J.)**

**PETITION NO. E354 OF 2020**

**BELINDA KANANA MURIUKI..... PETITIONER**

**VERSUS**

**UNIVERSITY OF NAIROBI..... RESPONDENT**

**JUDGMENT**

**Introduction:**

1. The Petitioner herein, *Belinda Kanana Muriuki*, is employed by the University of Nairobi Enterprises and Services Limited (hereinafter referred to as '*the UNES*') as the Head of Hospitality. The Petitioner is also undertaking Doctor of Philosophy Studies in Business Administration at the Respondent's School of Business under Registration No. D80/50306/2016.
2. The Petition revolves around the withdrawal of the conditional Fee Waiver which the Respondent granted the Petitioner sometimes in 2016 so as to enable the Petitioner undertake her Doctorate studies aforesaid.

**The Petition:**

3. The Petition is dated 30<sup>th</sup> October, 2020. It is supported by three Affidavits of the Petitioner. They are a Supporting Affidavit, a Supplementary Affidavit and a Second Further Supplementary Affidavit. The Petitioner also filed written submissions and a List of Authorities.
4. The Petitioner's case is precise. She contends that as an employee of UNES, which is a subsidiary company of the Respondent, she successfully applied for 100% waiver of fees to enable her pursue the Doctor of Philosophy studies in Business Administration at the Respondent's School of Business. The waiver was communicated to her by the Respondent *vide* a letter dated 16<sup>th</sup> March, 2016. The waiver was conditional on *inter alia* the Petitioner serving the Respondent for a minimum of three years on completion of the studies.
5. The Petitioner formally agreed to the conditions attached to the waiver. She was then duly registered as a student and was given a registration number and a student portal was opened for her. The Petitioner began her studies.
6. Sometimes in February 2020 the Petitioner was laid off redundant by her employer, UNES. She, however, successfully challenged the redundancy and was reinstated. In May, 2020 the Petitioner received a copy of a letter dated 14<sup>th</sup> May, 2020 by the Managing Director of UNES addressed to the Respondent informing the Respondent that UNES had no obligation to reimburse the Fee Waiver granted to the Petitioner. The letter dated 14<sup>th</sup> May 2020 attached a copy of a letter dated 30<sup>th</sup> April, 2020 by the Respondent to UNES requiring UNES to reimburse the Respondent 60% of the fee waiver the Respondent granted the Petitioner.
7. Surprised by the turn of events, the Petitioner, who had not received any prior communication from the Respondent of the intention to withdraw the Fee Waiver only managed to establish through her student portal that her fee waiver granted in 2016 had been reversed with a description '*as per letter dated 14.05.2020.*' That was on 27<sup>th</sup> May, 2020. The Petitioner then wrote a letter to the Respondent dated 27<sup>th</sup> May, 2020 requesting for an explanation on the reversal of the waiver.
8. According to the Petitioner, on 4<sup>th</sup> September, 2020 she received a letter from the Respondent on the reasons for the reversal of the waiver.

The Petitioner, however, contends that the letter was backdated to 25<sup>th</sup> June, 2020. The Respondent advised the Petitioner to seek the waiver from her employer, UNES. The Respondent, as well, demanded the settlement of all the fees which had accrued during the currency of the Fee Waiver. The outstanding fees now stand at around Kshs. 810,000/=.

9. The Petitioner challenges the withdrawal of the Fee Waiver on two main grounds. The first ground is that she was not granted an opportunity to be heard before the waiver was withdrawn. The second ground is that the Petitioner had a legitimate expectation that she will pursue her studies based on the waiver and that the waiver would only be withdrawn on the conditions attached thereto.

10. The Petitioner's position was buttressed by the written submissions. Relying on Article 47 of the Constitution as amplified by Sections 4, 5, and 6 of the Fair Administrative Actions Act, the Petitioner contends that the Respondent was under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. She further submits that procedural fairness requires that persons who are likely to be affected by a decision be afforded an opportunity of being heard before the decision made.

11. The decision in **Republic vs. City Council of Nairobi ex parte North Lake Limited** High Court Miscellaneous Application No. 84 of 2011 (JR) where the Court held that '*...it is settled law that a benefit cannot be withdrawn until the reason for withdrawal has been given and the person concerned has been given an opportunity to comment on the reason...*' was referred to in support of the above legal argument.

12. Other decisions referred to are *Jane Kiongo & 15 others v Laikipia University & 6 others* [2019] eKLR, *Royal British Bank v. Turguand* [1856] 6 E & B 327, *Mohoney v. East Holyford Mining Co* [1875] L.R. 7 HL 869 and *Sita Steel Rolling Mills Ltd V Jubilee Insurance Co. Limited* [2007] eKLR.

13. On the aspect of legitimate expectation, the Petitioner relied on the Supreme Court in **Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others** where the Court stated that '*...Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation...*'

14. The Petitioner also submits that the Respondent is barred by the doctrine of estoppel from renegading from the Fee Waiver.

15. In the end, the Petitioner prays for the following orders: -

a) A DECLARATION that the Petitioner's right to Fair Administrative Action is guaranteed by Article 47 of the Constitution and the Respondent has contravened the Petitioner's rights under the Constitution.

b) A DECLARATION that in arriving at its decision expressed in the letters dated 25<sup>th</sup> June 2020 and 24<sup>th</sup> September 2020 the Respondent violated the principles of the fair administrative action as enshrined in Section 4 of the Fair Administrative Actions Act and Article 47 of the Constitution.

c) A DECLARATION that the decision of the Respondent ha infringed on the Petitioner's right to Fair Administrative Action under Section 4 of the Fair Administrative Action Act.

d) AN ORDER of certiorari removing into this Court for purpose of quashing forthwith the decision contained in the Respondent's letters dated 25<sup>th</sup> June 2020 and 24<sup>th</sup> September 2020 withdrawing the Fee Waiver and demanding a sum of Kshs. 263,000/- which accrued when the Fee Waiver was in existence.

e) AN ORDER compelling the Respondent to reinstate the fee waiver to the Petitioner until completion of her Ph.D studies in business Administration at the School of Business, college of Humanities and Social Studies at the University of Nairobi.

f) AN ORDER compelling the Respondent to pay general damages, exemplary and aggravated damages to the Petitioners for the gross violation of the Petitioner's fundamental rights under Article 47 of the Constitution and Section 4 of the Fair Administrative Action.

g) INTEREST on (e) above at Court rates from the time of filing suit until payment in full.

h) THE costs of this Petition be awarded to the Petitioners

i) THE Honourable Court do issue such other Orders and further directions as it may deem fit to meet ends of justice.

#### **The Response:**

16. The Petition is opposed.

17. The Respondent filed a Replying Affidavit and a Further Affidavit. Both Affidavits were sworn by *Prof. Enos H. N. Njeru*. It also filed written submissions.

18. The response is centred on three grounds. The first ground is that UNES is not a subsidiary of the Respondent and as such the Petitioner is not an employee of the Respondent. The second ground is that the Petitioner is not entitled to the impugned waiver and that the Respondent cannot legally grant such a waiver in law. In other words, the Fee Waiver is illegal and was obtained through fraud and illegality.

The third ground is that despite the fact that the Fee Waiver was obtained fraudulently and illegally, still the Petitioner was accorded an opportunity to present her case prior to the withdrawal of the waiver.

19. The Respondent expounded the above grounds in the Affidavits and the written submissions.

20. It is the Respondent's position that UNES is not its subsidiary since the two are complete separate legal entities. It contends that whereas UNES is registered under the Companies Act, Cap. 17 of 2015, the Respondent is registered under the Universities Act. The Respondent relied on the Court of Appeal in **Victor Mabachi & Anor vs. Nurtun Bates Limited** (2013) EKLK and the English case in **Salomon vs. Salomon & Co Ltd** [1896] UKHL 1, [1897] AC 22 in advancing the argument that the entities are separate legal persons.

21. On the aspect of whether the Petitioner's rights to fair administrative action under the Constitution and the law were violated, the Respondent submits that it is, in the first instance, imperative for the Court to review the manner in which the Fee Waiver was issued.

22. In taking the position that the Fee Waiver was fraudulently and illegally obtained, the Respondent referred to the Collective Bargaining Agreement between the Respondent and the Kenya Universities Staff Union which agreement is not applicable to the Petitioner for the reason that the Petitioner is not a staff of the Respondent. The Respondent also referred to its Human Resource Policy on applicable fee waivers to its staff.

23. The Respondent, however, confirmed the existence of a collaboration between UNES and itself on partial waiver of fees. The Respondent posits that for the Petitioner to be eligible under the said arrangement, she had to apply for the waiver through its employer, UNES. The Respondent further posits that according to UNES the Petitioner never made such an application.

24. It is further posited that despite being challenged to disclose how the Petitioner obtained the waiver, she never availed the application she made to the Respondent so as to accord the Respondent an opportunity to confirm the genuinity or otherwise thereof. It is the Respondent's contention that the waiver is a fraud given that there exists no law on which the Respondent would accord such a waiver. As such, the Respondent contends that no rights capable of protection by the Constitution and the law allegedly accrued to the Petitioner.

25. The Respondent also argued that a Fee Waiver can only be granted based on a private contract between the parties. In this case, it is argued that there was no consideration between the parties since the Petitioner is not an employee of the Respondent and that the Petitioner could not take it for granted that she will be employed by the Respondent upon completion of her studies.

26. The position in **National Bank of Kenya vs. Wilson Ndolo Ayah** (2002) EKLK that "... It is good policy that Courts enforce the law and avoid perpetrating acts of illegality. It can only do so if acts done in pursuance of an illegality are deemed as invalid" was referred to in urging this Court to find as such.

27. Apart from the fraud and illegality aforesaid, the Respondent further contends that the Petitioner was, nevertheless, accorded an opportunity to be heard prior to the withdrawal of the waiver. It posits that the letter dated 30<sup>th</sup> April, 2020, which the Petitioner denies receipt of, was hand delivered to her on 7<sup>th</sup> May, 2020. The letter had the basis for the withdrawal of the Fee Waiver.

28. The Respondent made reference to **Kenya Human Rights Commission v Non-Governmental Organizations Co-Ordination Board** [2016] eKLR and **Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya** [2019] eKLR on the submission that due process was followed prior to the withdrawal.

29. Responding to the issue of legitimate expectation, the Respondent posits that such an expectation cannot arise since it was illegal. The Respondent relied on **National Director of Public Prosecutions v Phillips and Others** [2002] (4) SA 60 (W) para 28, which decision was referred to in **Jane Kiongo & 15 others v Laikipia University & 6 others** [2019] eKLR where at paragraph 42 the Court stated as follows: -

*The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:*

*(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification';*

*(ii) The expectation must be reasonable:*

*(iii) The representation must have been induced by the decision-maker;*

*(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.*

30. The Respondent also referred to **Republic v Principal Secretary Ministry of Mining ex-parte Airbus Helicopters Southern Africa (PTY) Ltd** [2017] eKLR. It urged this Court to dismiss the plea of legitimate expectation.

31. The Respondent prayed that the Petition be found unmerited and be dismissed with punitive costs.

#### **Issues for Determination:**

32. I have carefully considered the Petition, the response thereto, the parties' submissions and the decisions referred to. I find the following issues are for determination: -

(i) Whether the Petitioner was accorded a fair hearing within the meaning of the Constitution and the law;

(ii) Whether the doctrine of legitimate expectation is applicable in this matter;

(iii) What remedies, if any, ought to issue?

**Analysis and Determination:**

33. Before I deal with the above issues, it is imperative to state that there are two interlocutory applications in this matter. Both applications are pending. The first application is the Notice of Motion dated 30<sup>th</sup> October, 2020. It was taken out by the Petitioner. In that application, the Petitioner seeks some interlocutory reliefs pending the determination of the Petition. On 18<sup>th</sup> November, 2020, this Court granted prayer 3 of the application. The prayer 3 sought a conservatory order staying the Respondent's demand of a sum of Kshs. 263,000/= which amount was part of the waiver, but had been updated in the Petitioner's Fee statement and the Respondent demanded settlement. The conservatory order was to last to the determination of the Petition.

34. The other application is a Notice of Motion dated 7<sup>th</sup> December, 2020. It was filed by the Respondent. The application seeks to set aside the order of the Court granting the conservatory order which was issued on 18<sup>th</sup> November, 2020.

35. Given the nature of the applications, there is no doubt that both shall stand determined in the final decision herein. Therefore, the determination of the Petition herein shall effectively dispose of the two applications.

36. I will now deal with the issues.

**(i) Whether the Petitioner was accorded a fair hearing within the meaning of the Constitution and the law:**

37. I have already captured the parties' cases, their submissions and decisions referred to on this issue.

38. The heart of the Petitioner's contention is the manner in which the decision to withdraw the waiver was arrived at by the Respondent. As stated above, the Petitioner contends that she was not accorded any due process prior to making the decision.

39. Upon the promulgation of the Constitution, the requirement of fair hearing became part of the Bill of Rights. **Article 50(1)** of the Constitution states as under: -

*Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

40. **Article 25** of the Constitution provides that the right to a fair trial is one of those rights which cannot be limited.

41. Since this matter rests on whether the Constitution and the law was upheld during the process towards the withdrawal of the waiver, the starting point is the Constitution itself. **Article 2** *inter alia* declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. **Article 3** places an obligation upon every person to respect, uphold and defend the Constitution.

42. **Article 10** provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.

43. Speaking on the Constitution, *Ringera, J* in *Njoya and Others vs. Attorney General {2004} 1 KLR 232, {2008} 2 KLR (EP) 624 (HCK)* stated thus: -

*... the Constitution is the supreme law of the land; it's a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.*

44. In *Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010* the Supreme Court of Kenya (Ojwang, JSC) stated as follows: -

*A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions.*

5. Given the supremacy of the Constitution, the manner in which the Constitution is interpreted and applied takes the centre-stage. **Article 259** of the Constitution deals with the interpretation of the Constitution. It obligates anyone interpreting the Constitution to do so in a manner that 'promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance'.

45. **Article 20(3)** obligates any Court applying a provision of the Bill of Rights to develop the law to the extent that it gives effect to a right or fundamental freedom, to adopt the interpretation that most favours the enforcement of a right or fundamental freedom, to promote the values that underlie an open and democratic society based on human dignity, equality, equity, freedom and the spirit, purport and objects of the Bill of Rights.

46. **Article 19** provides that the Bill of Rights, which comprises of the human rights and fundamental freedoms, is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The human rights and fundamental freedoms are inherent in that they belong to each individual and are not granted by the State. They are also only subject to the limitations contemplated in the Constitution.

47. The Supreme Court has severally laid down guidance on the interpretation of the 2010 Constitution. In ***In Re the Speaker of the Senate & Another v Attorney General & 4 Others; Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR*** where retired Chief Justice Mutunga in his concurring opinion expressed himself as follows: -

*[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.* (emphasis mine).

48. In ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR*** the Supreme Court further stated as follows: -

*[356] We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to Articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.*

*[357] We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014 left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:*

*[232] ...References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts. [ Emphasis supplied]*

*[233] It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya.*

49. In ***In the Matter of the Kenya National Commission on Human Rights; Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR*** the Supreme Court dealt with the holistic interpretation of the Constitution at paragraph 26, thus: -

*But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.*

50. In the words of the retired Chief Justice of Israel Aharon Barak in *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) 308 observed, that "...one who interprets a single clause of the constitution interprets the entire constitution...".

51. In a majority decision in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court Advisory Opinion Application No. 2 of 2012*** at para 54, the Supreme Court further stated as follows on the interpretation of the Constitution: -

*Certain provisions of the Constitution of Kenya have to be perceived in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya*

Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. **Where a Constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.**

52. Having so said, the Constitution further speaks to the manner in which public decisions ought to be made. **Article 47** states as follows: -

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration

53. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. No. 4 of 2015. Section 4 thereof provides that: -

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
  - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
  - (a) attend proceedings, in person or in the company of an expert of his choice;
  - (b) be heard;
  - (c) cross-examine persons who give adverse evidence against him; and
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

54. Section 2 of the Fair Administrative Actions Act defines an ‘administrative action’ and an ‘administrator’ as follows: -

‘administrative action’ includes -

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

55. In **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** Court of Appeal addressed itself on Article 47 of the Constitution. The Court held that: -

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

56. The South African Constitutional Court in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1** ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

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

57. The right was further discussed in **Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR**. The Court had the following to say:

*25. In John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano [39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.*

These are: -

*a. **Illegality** - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.*

*b. **Fairness** - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*

*c. **Irrationality and proportionality** - The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation**: -*

*If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...*

58. Emerging from the above, there is no doubt the Respondent’s decision to withdraw the Fee Waiver was an administrative action. In sum, it was an administrative action because it affected the legal rights and interests of the Petitioner. As such, the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

59. The contention now centres on whether the Respondent’s letter dated 30<sup>th</sup> April, 2020 addressed to the Petitioner was delivered to the Petitioner. I will, henceforth, refer to the Respondent’s letter dated 30<sup>th</sup> April, 2020 addressed to the Petitioner as ‘**the impugned letter**’.

60. Each party takes a contrary position on the service of the impugned letter. Whereas the Petitioner denies receipt of the impugned letter, the Respondent contends that the impugned letter was personally delivered to the Petitioner.

61. Due to the centrality of the impugned letter, I hereunder wholly reproduce the same: -

Ms. Belinda Muriuki

C/o University of Nairobi Enterprises Services

**CHIROMO**

Dear Ms. Muriuki

**FEE WAIVER**

Reference is made to the fee waiver letter to you dated March 16, 2016 to pursue a PhD Programme in Business at the University of Nairobi.

The University Management has reviewed the matter of fee waiver as granted and noted the following: -

- i. That you work in the Hospitality Industry at UNES and you claim to teach the program in the UoN after your studies is misconstrued because you have to be interviewed and offered the job. Moreso, your field of work is not relevant to the PhD course.
- ii. That it is University practice for its staff to be bonded after completion of the programs undertaken. Your bonding is irregular since you are not a staff member at UoN and cannot, therefore, be supported by the University policies.
- iii. That you received 100% fee waiver based on UoN rates and practice, while the UNES HR manual provides for 60% waiver level.

It is therefore been decided as follows: -

- i. That the offer of fee waiver be retracted as it was based on an irregularity.
- ii. That your bonding to work for the University after completion of studies be and is hereby revoked.
- iii. That the amounts expended by UoN on your training be recouped thus: UNES 60% as per UNES policy, yourself the remainder (40%),

By copy of this letter, the finance Officer is required to compute the actual amounts which will be brought to your attention.

Yours Sincerely,

**PETER MUTURI**

**AG. REGISTRAR ADMINISTRATION**

62. In contending further that the impugned letter was duly received by the Petitioner, the Respondent through the Further Affidavit of Prof. Enos H.N. Njeru disposed that the Petitioner listed the Respondent's letter dated 24<sup>th</sup> September, 2020 which referred to the impugned letter but failed to adduce the impugned letter as part of the Petitioner's documents in her List of Documents. As a result, the Respondent served the Petitioner with a Notice to Produce dated 15<sup>th</sup> January, 2021.

63. Responding to the foregoing, the Petitioner through her Second Further Supplementary Affidavit deponed as follows: -

4. THAT in response to paragraph 3 of the Further Affidavit I state that I am a stranger to the letter dated 30th April 2020 allegedly addressed and hand delivered to me. No such letter was ever hand-delivered to me and this explains why the Respondent has no record of hand delivery.

5. THAT further to Paragraph 4 above the Court will note that I have been very consistent that I received the first letter over my Fee Waiver on 14th May 2020 from MD UNES (my employer) responding to Respondent's Acting Registrar's letter dated 30th April 2020 addressed to MD UNES.

6. THAT in reply Paragraph 4, 5 and 6 of the Further Affidavit I state as follows: -

a) The letter dated 30th April 2020 referred in my Petition is produced at Page 30 of the Petition.

b) That I saw the letter dated 30th April 2020 referred in my Petition and produced at Page 30 of the Petition on or about 14th May 2020 when MD UNES responded to Acting Registrar's letter and copied me.

c) That prior to 14th May 2020 I had not received any communication from the Respondent and the letter produced in the Respondent's Further Affidavit is new creation meant to mislead the Court.

d) That I invite the Court to note that the signature in the letter produced in Respondent's Further Affidavit allegedly written by the Ag. Registrar is different from the letter dated 30th April, 2020 addressed to the MD, UNES and produced at Page 30 of the Petition which is a clear indication that the letter has been manufactured by the Respondent as an afterthought in order to misled the Court.

e) That the Court will note from Paragraph 16, 21, 22b of the Respondent's Affidavit in which the Respondent states it was not possible for the Respondent to invite a stranger (myself) for representation. This explains that the letter attached to the Respondent's Further Affidavit is a new creation and afterthought.

f) That I am aware that my Advocates responded to the Notice to Produce and correctly informed the Respondent that I did not receive the letter dated 30<sup>th</sup> April 2020 addressed to me.

64. I have keenly perused all the relevant documents and dispositions and also followed the parties' arguments. The following observations come to the fore: -

(i) The Respondent did not avail any evidence in support of the contention that it effected personal service of the impugned letter on the Petitioner.

(ii) The Petitioner explained that the letter dated 30<sup>th</sup> April, 2020 which was referred to in the Further Affidavit of Prof. Enos H.N. Njeru was not the impugned letter, but a copy of a different letter the Respondent wrote to UNES on the waiver.

(iii) Although the Respondent's letter to UNES dated 30<sup>th</sup> April, 2020 was on the waiver granted to the Petitioner by the Respondent and which letter dealt with the alleged irregularity in awarding the waiver, the letter was not, at least, copied to the Petitioner.

(iv) The record reveals a trend by the Petitioner in dealing with official correspondences. It is not in doubt that in the correspondences on record, the Petitioner either acknowledges or challenges the contents of correspondences to her. It is, therefore, disturbing why the Petitioner would have failed to act on the impugned letter which letter had such a serious impact on her academic progression.

(v) The Petitioner wrote to the Respondent's Vice Chancellor on 7<sup>th</sup> September, 2020 and clearly narrated the events from the grant of the waiver to its withdrawal. In that letter the Petitioner reiterated the efforts she had made so as to get the reasons behind the withdrawal of the waiver in vain. Having failed to get any satisfactory response, and as a last resort, the Petitioner wrote to the Vice Chancellor.

(vi) The Petitioner's letter to the Vice Chancellor dated 7<sup>th</sup> September 2020 was subsequently responded to by the Respondent *vide* its letter dated 24<sup>th</sup> September, 2020 wherein the Respondent contended that the impugned letter had been personally served on the Petitioner.

(vii) Upon the Petitioner's registration by the Respondent as a Doctor of Philosophy student, she was *inter alia* availed with a registration number and a student portal. According to the Petitioner, the portal is the main medium of communication between the Respondent and herself. It is, hence, baffling why the Petitioner found the rest of the correspondences in the portal except the impugned letter.

(viii) The Petitioner readily sought legal advice on learning of the withdrawal of the waiver *vide* the Respondent's letter dated 24<sup>th</sup> September, 2020.

65. In consideration of the foregoing and by placing the positions taken by the parties' herein on the service of the impugned letter side by side, I find it highly doubtful that the impugned letter was personally served or at all upon the Petitioner. The copy of the impugned letter which was introduced through the Further Affidavit of Prof. Enos H.N. Njeru can only be an afterthought.

66. This Court, therefore, finds and hold that the Petitioner was not served with the impugned letter either as alleged or otherwise.

67. Having so found, I will, nevertheless, look at the contents of the impugned letter. According to the impugned letter, the Respondent's Committee reviewed the manner in which the waiver was granted. The Committee made three observations which are in paragraph 2 of the impugned letter. The Committee thereafter made the decision to withdraw the Fee Waver.

68. Even if the impugned letter was served upon the Petitioner, still the procedure adopted by the Respondent's Committee in dealing with the matter is legally wanting. I say so because when the Committee reviewed the matter and made the three observations, it was obligated to formally notify the Petitioner of such observations and to accord the Petitioner an opportunity to respond to the observations. The Committee would have thereafter rendered its findings upon consideration of the Petitioner's response.

69. The Respondent, however, failed to observe the foregoing. Once the Committee made the observations it then unilaterally made the findings.

70. Having found that the Petitioner was not served with the impugned letter and having further found that even if the Petitioner was duly served with the impugned letter, still the procedure adopted by the Respondent in arriving at the decision to withdraw the fee waiver it

granted to the Petitioner in 2016 is wanting, this Court finds that the impugned decision did not conform to the requirements of Article 47 of the Constitution and the Fair Administrative Actions Act. At a minimum, to meet the constitutional and statutory threshold, the Respondent had to: -

- (i) Ensure that it notified the Petitioner of the irregularities in the award of the waiver and its intention to withdraw the waiver;
- (ii) Accord the Petitioner an opportunity to respond to the irregularities and the Respondent's intention;
- (iii) Inform the Petitioner of the mode and the procedure to be used during the proceedings;
- (iv) Inform the Petitioner of her right to attend the proceedings, in person or in the company of an expert of her choice, in the event the proceedings were physically or virtually held;
- (v) Inform the Petitioner of her right to be heard and to make representations;
- (vi) Inform the Petitioner of the right to cross-examine the witnesses, if any will be called;
- (vii) Inform the Petitioner of her right to legal representation;
- (viii) Inform the Petitioner of her right to where necessary to request for an adjournment of the proceedings;
- (ix) Include in the notice the Petitioner's right to a review or internal appeal against an administrative decision;
- (x) Notify the Petitioner of its decision and the reasons thereof.

71. As I come to the end of this issue, I must make it clear that this issue only centres on the procedure undertaken by the Respondent in arriving at the impugned decision. For clarity, the discussion does not venture into the merits or otherwise of the Respondent's decision to withdraw the Fee Waiver. That is at the heart of judicial review proceedings which I will briefly look at below.

72. Judicial review has over time been a subject of litigation. The Court of Appeal in Civil Appeal No 185 of 2001 **Municipal Council of Mombasa –vs- Republic & Umoja Construction Ltd** stated the parameters of judicial review as follows: -

*Judicial Review is concerned with the decision-making process not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision makers took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decisions. (emphasis added).*

73. The above position was restated in **Republic –vs- Kenya Revenue Authority exparte Yaya Towers Ltd (2008) eKLR** with the holding that the remedy of judicial review is concerned with reviewing not the merits of the decisions of which the application of judicial review is made but the decision-making process itself.

74. *The Halsbury's Laws of England 4<sup>th</sup> Edition Vol. (1)(1) at paragraph 60* bolsters the position and cautions that the purpose of judicial review proceedings is to ensure that an individual is given a fair treatment by the authority in which he has been subjected to and that it is no part of that purpose to substitute the opinion of the Judiciary or of the individual Judges for that of the authority constituted by law to decide the matter in question and unless the restriction on the power of the Court is observed, the Court, will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

75. Having said so, the grounds on which the Court exercises its judicial review jurisdiction have also been a subject of consideration by Courts. In the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300**, the Court citing with approval the cases of **Council of Civil Unions v. Minister for the Civil Service (1985) AC 2** and **An application by Bukoba Gymkhana Club (1963) EA 478** held as follows: -

*In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example , illegality, where a Chief Administrator Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the power to do so are vested by law in the District Service Commission....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision - is usually in defiance of logic and acceptable moral standards..... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural favour towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision. (emphasis added).*

76. The Respondent's impugned decision, therefore, infringed Articles 47 and 50(1) of the Constitution as well as the Fair Administrative Actions Act on account of procedural impropriety. The impugned decision is, hence, in contravention of the Constitution.

**(ii) Whether the doctrine of legitimate expectation is applicable in this matter:**

77. The preceding issue has rendered that the Petitioner was not accorded a fair trial. This Court is likely to, in upholding the Constitution and the law and in the interest of justice, accord the parties another opportunity to deal with the matter.

78. In the course of the proceedings, facts will be tendered and the law referred to. Since the doctrine of legitimate expectation depends on factual and legal presentations, it is only proper that the matter be, first, heard.

79. This Court will, hence, not make a finding on whether the doctrine of legitimate expectation applies in the matter at this point in time.

**(iii) What remedies, if any, ought to issue?**

80. The Petition has succeeded on the basis of the infringement of the right to a fair trial and right to fair administrative procedures. However, the real dispute between the parties is yet to be determined.

81. One of the remedies sought by the Petitioner is compensation by way of general damages. On this prayer, I will, refer to the guidance by the Court of Appeal in ***Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR***.

82. The Court of Appeal made a comprehensive comparative analysis on how other jurisdictions have dealt with the issue. In the end, the Learned Judges expressed themselves as follows: -

*Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.*

83. In this case the Petitioner's rights are certainly vindicated *vide* an appropriate declaration and other orders. Further, although the Respondent violated the rights aforesaid, the matter is still pending further deliberations wherein the Petitioner will be accordingly accorded a fair hearing.

84. In consideration of the circumstances of this matter, I am well convinced that the grant of other remedies rather than damages will serve as adequate, just and appropriate remedies. The prayer for general damages is, hence, declined.

**Disposition:**

85. Flowing from these findings and conclusions, the disposition of the Petition dated 30<sup>th</sup> October, 2020 is as follows:

**(a) A declaration, be and is hereby issued, that the Respondent's failure to accord the Petitioner an opportunity to respond to the allegation that the Fee Waiver granted to her as contained in the Respondent's letter dated 16<sup>th</sup> March, 2016 was irregular and the Respondent's decision to unilaterally withdraw the Fee Waiver granted to the Petitioner are contrary to the Constitution and the Fair Administrative Actions Act. The said actions are, hence, unconstitutional, unlawful, procedurally unfair and null and void.**

**(b) An Order of *Certiorari*, be and is hereby issued, calling, removing, delivering up to this Honourable Court and quashing or revoking the Respondent's decisions contained in the letters dated 25<sup>th</sup> June, 2020 and 24<sup>th</sup> September, 2020 withdrawing the Fee Waiver and demanding a sum of Kshs. 263,000/= which amount accrued during the currency of the Fee Waiver.**

**(c) Given the nature of the allegation on the Fee Waiver, the Respondent is at liberty to re-hear the matter against the Petitioner in compliance with the Constitution and the law.**

**(d) Costs to the Petitioner.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 1<sup>st</sup> day of July 2021**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Njuguna**, Counsel for the Petitioner.

**Mr. Mereka, SC**, Counsel for the Respondent.

**Elizabeth Wambui** – Court Assistant