



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 604 OF 2017

1. VICTOR ANDOLLAH OBOCK.....1ST PETITIONER

2. PHILIP MARUNDU.....2ND PETITIONER

3. MONICA MUKENE MALUTA.....3RD PETITIONER

4. PHELIX OYOO OKUMU.....4TH PETITIONER

5. GLORIA KHANDASI SAIDI.....5TH PETITIONER

6. MICHAEL GITHINJI.....6TH PETITIONER

(SUING ON THEIR OWN BEHALF AND ON BEHALF OF SIXTY-NINE (69) OTHERS)

7. NYARIKI JOACHIM NEWSON MASIRA

8. JOSEPH MIANO MUTHONI

9. NDUVYA BERITA KATHINI

10. BELIA WANJA MURIUKI

11. PAUL GITAU KAMANDE

12. RAGOT RAPHAEL

13. CEDRIC MUNGUTI KIVUVA

14. MAURICE RABUOCHE OCHIENG

15. OKOTH STEPHEN OKONG'O

16. THORPHEL EUGGINE ATINDA

17. DANIEL KIBET RONO

18. PETER NDIKU WAMBUA

19. K. PHILIP MARUNDU

20. NATHANIEL O. WANYANGA

- 21 OPOT STEPHEN LEWIS OKECH
22. ALLUBE DANIEL SIKUKU
23. W. CLEMENT NYAGILO
24. SAMUEL MEMUSI MAMIA
25. WANJIRU JACKSON NJAGI
26. ANTHONY WANJOHI NGATIA
27. MICAH OCHWANG'I OMWANCHA
28. SAMUEL IRUNGU KIHARA
29. NYANG'AU ONCHOKE SAMSON
30. KAMAU RUTH NYAMWATHI
31. PETER KIBUGI WAIRIA
32. GITHINJI MICHAEL NGUBIRU
33. NJAGI G. ROFAS
34. GIDEON JUSTUS NDUNGA
35. VICTOR OBOCK ANDOLLA
36. GEORGE SAITOTI TUKIKO
37. GLORIA KHANDASI SAIDI
38. KEMBOI FELIX KOGEI
39. VICTOR OTIENO OKUNA
40. CATHERINE WARUGURU MAINA
41. CHEPNGETICH EDITH
42. GEORGE KIPKEMOI LANGAT
43. NYAKONDIKA EDWIN K.
44. ROBINSON IRUA NGECHU
45. BETTY NDUNGE MUTHOK
46. JOSEPH SAA MWAVU
47. BRIAN TUGEE MALING'A
48. LESAN K. SIDNEY
49. ZEDEKIAH ONDIEKI NYAMUMBO
50. PHELIX OYOO OKUMU
51. NGORO MARTIN MAINA
52. JACKLINE AKINYI OWISO

- 53. MANWA OSIEMO NORMAN
- 54. A. KAHURE KAHIHU
- 55. FRANKLINE MGANDI EDWARD
- 56. GOLUCK ODHIAMBO KONUKO
- 57. FELIX MUIA KIMEU
- 58. LANGAT K. BRIAN
- 59. SAMUEL MUANGE MUTUNGI
- 60. EMANUEL ELISHAH NDANYI
- 61. SILAS OUMA MANGENI
- 62. MUGERE A. LORRAINE
- 63. MONICA MUKENE MALUTA
- 64. STANLEY KINYUA IRUNGU
- 65. PANCRAS ODHIAMBO
- 66. AMENYA ONYANGO KELVIN
- 67. LUTOMIA ERIC MASITSA
- 68. JOHN NDICHU NJERI
- 69. TIMOTHY NDUBA KINUTHIA
- 70. DUNCAN KIPNGENO YEGON
- 71. OMAGWA SAMSON OBARE
- 72. P. MIRINGU NGURE
- 73. ERIC KIBATHI CHIURI
- 74. FRANCIS MAKAU MUTEI
- 75. KANG'ASUA JOHN KYALO

-VERSUS-

- THE ATTORNEY GENERAL.....1ST RESPONDENT
- THE TECHNICAL UNIVERSITY OF KENYA.....2ND RESPONDENT
- THE UNIVERSITY OF NAIROBI.....3RD RESPONDENT
- THE COMMISSION FOR UNIVERSITY EDUCATION.....4TH RESPONDENT
- THE ENGINEERS BOARD OF KENYA.....5TH RESPONDENT
- THE MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY.....6TH RESPONDENT

J U D G M E N T

1. Victor Andollah Obock, Philip Marundu, Monica Mukene Maluta, Phelix Oyoo Okumu, Gloria Khandasi Saidi and Michael Githinji have

brought the petition dated 11th December, 2017 on their own behalf and on behalf of 63 other persons. They seek the following reliefs:

- a) A declaration that the Petitioners herein were valid students of the University of Nairobi having been enrolled at Kenya Polytechnic University College which was a constituent college of the University of Nairobi.**
- b) A declaration that the action by the 2nd Respondent to absorb the Petitioners into the Technical University of Kenya knowing very well that it was not approved to offer engineering courses by the Engineers Board of Kenya is unconstitutional [and] contrary to Article 47 (1) of the Constitution.**
- c) An order nullifying degree certificates issued by the 2nd Respondent to the Petitioners and sixty-nine (69) other Petitioners.**
- d) An order compelling and directing the 2nd Respondent to forward with immediate effect the names of the petitioners and sixty-nine (69) others for the inclusion in the 3rd Respondent's list of graduands for the next graduation to be held by the 3rd Respondent.**
- e) That this Honourable Court do grant orders that upon the successful compliance of orders 2 and 3 above the 5th Respondent be compelled to consider the Petitioners' application as graduate engineers valid.**
- f) Compensation for the lost time.**
- g) Any other order this court can deem fit to grant.**
- h) The costs of this Petition be provided for.**

2. The Attorney General; the Technical University of Kenya; the University of Nairobi; the Commission for University Education; the Engineers Board of Kenya; and the Ministry of Education, Science and Technology are the respective 1st to 6th respondents.

3. The petitioners' case is that between 2009 and 2011 they were admitted at the School of Engineering of the University of Nairobi to undertake engineering courses. The petitioners were then sent to undertake their engineering studies leading to Bachelor of Science Electrical and Electronics Engineering degrees at the Kenya Polytechnic University College, which was then a constituent college of the University of Nairobi.

4. The petitioners' case is that in 2013, Kenya Polytechnic University College was accredited and granted a Charter to become a fully-fledged university known as the Technical University of Kenya ('TUK'). The petitioners were consequently absorbed into the TUK and they proceeded with their studies subsequently graduating with various engineering degree certificates. The petitioners claim that the respondents are guilty of material non-disclosure as they never informed them of the consequences of their being moved from the University of Nairobi ('UoN') to the TUK.

5. According to the petitioners, upon graduating from the TUK, they applied to be registered as engineers with the Engineers Board of Kenya ('EBK') but their applications were declined on the basis that the TUK was neither accredited nor recognised by the Board to offer engineering degrees.

6. The petitioners contend that their right to equal protection and equal benefit of the law under Article 27(1) of the Constitution was infringed by the respondents. They further claim that the action of the UoN of admitting them and that of the TUK of absorbing them while knowing very well the TUK was not approved to offer engineering courses by the EBK violated their right to fair administrative action under Article 47(1) of the Constitution.

7. The petitioners additionally assert that the actions of the TUK have denied them an opportunity to access employment as engineers thereby resulting in the contravention of Section 5(2) & (3) of the Employment Act as well as Articles 28 and 55(c) of the Constitution.

8. The petition is supported by affidavits sworn on 11th December, 2017 by Gideon Justus Ndunga, Victor Obock Andollah, Goluck Odhiambo, Manwa Osiemo Norman, Lesan K. Sidney, Throphel Atinda Euggine, Wambua Peter Ndiku and Gloria Khandasi Saidi.

9. The TUK filed grounds of opposition dated 1st August, 2018 confirming that it is mandated to confer degrees to students who have successfully completed their courses. The TUK avers that having been awarded a Charter, it took over all the obligations of its predecessor the Kenya Polytechnic University College which admitted the petitioners. It further asserts that the receipt of the Charter signified that it had satisfied the conditions set by the Commission for University Education ('CUE') to offer engineering courses, specifically Bachelor of Science in Electrical and Electronics Engineering. The TUK avers that the EBK has no powers to regulate the engineering courses offered by it.

10. It is further contended that the petitioners had no legitimate expectation that upon completion of their courses the UoN would award them degrees since they were admitted, registered, taught and examined by the TUK. It is additionally the TUK's averment that the petitioners' rights have not been violated in any way since it awarded them degrees but their registration declined by the EBK.

11. The CUE supports the petition through its response to the petition dated 16th September, 2019. Its position is that the petitioners have a reasonable cause of action against the TUK and the UoN. It is also averred that petitioners' claim that the TUK exposed them to prejudice by failing to seek the requisite recognition of its engineering courses from the EBK is legitimate. As a result, it is affirmed that the actions of the

TUK have denied the petitioners a chance to access employment hence violating their right under Article 55(c) of the Constitution. Further, that the TUK's action has also infringed on the petitioners' right to human dignity under Article 28.

12. The CUE concur that the petitioners had a legitimate expectation that the UoN would award them degrees on graduation as it had customarily done. It is further asserted that the transition of the TUK into a fully-fledged university and the consequent severance of ties with the UoN are scenarios contemplated by the law to be of progressive effect. The CUE assert that the retrospective application of the change to the detriment of the petitioners was uncalled for.

13. The EBK through its grounds of opposition dated 15th February, 2018, contend that the degree certificates issued to the petitioners by the TUK cannot be the basis of the petitioners' application for registration as graduate engineers as the TUK is not accredited to offer engineering courses.

14. The EBK asserts that there is no evidence from the petitioners that any of them made or submitted any application in compliance with the provisions of the Engineering Act. The EBK contend that they cannot be compelled to admit the petitioners as graduate engineers until and unless there is a valid application for registration and it is subjected to scrutiny as required by the Engineers Act.

15. The EBK asserts that the petition does not disclose any reasonable cause of action and the petitioners' claim against it should be dismissed with costs.

16. The first issue that comes to mind is whether the petitioners were students of the TUK or the UoN. The petitioners in their submissions dated 2nd October, 2018 urged that a contractual relationship existed between themselves and the UoN as they received letters of admission from the University. The petitioners contend that since the Kenya Polytechnic University College was a constituent college of the UoN, the UoN was in charge of all operations of the college and the UoN therefore had the responsibility of awarding degrees in respect of studies undertaken at the college. These averments are buttressed by the provisions of the University of Nairobi Act, 210, the Legal Notice No. 159 of 2007 and the decision in the case of **Kelvin Mbwaya & 3 others v Attorney General & 5 others [2017] eKLR**.

17. The petitioners relied on the decision of the Supreme Court in **Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR** and the Universities Act, 2012 and submitted that the act of transferring the responsibility of the UoN to the Kenya Polytechnic University College did not affect the students who had been admitted before the accreditation of the TUK.

18. It is further submitted by the petitioners that their rights and privileges were not affected by the awarding of the Charter to the TUK and the obligation placed upon the UoN through Legal Notice No. 159 of 2007 was not extinguished by the transition process. The petitioners submit that a contractual relationship did exist between them and the UoN with the TUK being the proxy.

19. The petitioners submit that Section 5 of Legal Notice No. 159 of 2007 was still operational in respect to students who had been admitted before 2012. It is the petitioners' case that it was therefore unequivocal that upon completion of their courses the students would be awarded degree certificates by the UoN. The petitioners further rely on Section 3 of Legal Notice No. 159 of 2007.

20. The petitioners assert that they had a legitimate expectation when they undertook the course that they would graduate as recognised engineers. They rely on the decisions in **Council of the Civil Service Union v Minister for the Civil Service 1985 AC 374; O'Reilly v Mackman [1983] 2 AC 237**; and **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**.

21. It is asserted that Legal Notice No. 159 of 2007 was unequivocal that the UoN would award the students with degree certificates at the end of their studies. The petitioners contend that the Legal Notice informed the legitimacy of the expectation of the petitioners therefore informing their continued studies at the TUK.

22. The 1st and 6th respondents in their submissions dated 14th June, 2020 submit that the petitioners were enrolled and admitted to the TUK on the understanding that the degrees would be awarded by the UoN, however, with the accreditation of the TUK the awarding of the degree certificates was left to the TUK.

23. Through submissions dated 18th September, 2019, the TUK states that the petitioners were admitted and issued with admission letters by Kenya Polytechnic University College, a constituent college of the UoN. The Court is therefore urged to find that the petitioners having been duly admitted, registered, taught and awarded with degree certificates at Kenya Polytechnic University College they are regarded as students of the TUK. This argument is buttressed by reference to the decision of the Court of Appeal in **Oindi Zaippeline & 39 others v Karatina University [2015] eKLR**.

24. The UoN through submissions dated 21st August, 2018 invoke the concept of separate legal personality and submits that no cause of action lies against it and the petitioners' attempt to apportion liability to it should fail. The UoN argues that under the principle of separate legal personality, the relationship between it and the TUK would be interpreted as that of a parent company and its subsidiary. In support of the submission reliance is placed on the decisions in **Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & another [2014] eKLR**; and **Adams v Cape Industries PLC [1990] Ch 433; Jesse Waweru Wahome & 54 others v Kenya Engineers Registration Board & 5 others [2012] eKLR**.

25. The UoN urges the Court to find that the petitioners were not its valid students as the TUK took over all the rights, duties, obligations, staff, assets and liabilities of the Kenya Polytechnic University College. The UoN invited the Court to absolve it and find that it cannot and should not be compelled to graduate the petitioners as they are students of the TUK. It is also submitted by the UoN that the petitioners have since graduated and been issued with degree certificates by the TUK and had submitted them to the EBK. It is their argument that the act of suing the UoN and asking the Court to compel it to graduate the petitioners is an afterthought. They rely on the cases of **Martin Wanderi &**

106 others v Engineers Registration Board & 10 others [2018] eKLR; and Mbwaya & 3 others v Attorney General & 5 others [2017] eKLR.

26. The UoN contend that its role was that of a mentor which it fully performed and ensured a transition for the UoN students to the TUK. It is submitted that upon the conversion of the constituent college into a fully-fledged university, the UoN isolated itself and was fully absolved from any commissions or omissions by the TUK pertaining to the petitioners. It is asserted that the petitioners have not demonstrated to the Court how the UoN violated their constitutional rights to education and human dignity. The UoN relied on the decision in the case of **Dry Associates Limited v Capital Market Authority & another [2012] eKLR** and urged the Court not to entertain the petitioners' claim against it.

27. The CUE in its submissions dated 16th September, 2019 contends that the awarding of Charter to the TUK and the consequential transition to a fully-fledged university did not in any way extinguish the relationship that existed between the petitioners and the UoN. The CUE submits that the UoN is estopped from denying the petitioners their degrees on the ground that the accreditation of the TUK extinguished the inherent responsibility owed to the petitioners. The argument is supported by the decisions in the cases of **Kelvin Mbwaya & 3 others v Attorney General & 5 others [2017] eKLR** and **Martin Wanderi & 106 others v Engineering Registration Board & 10 others [2018] eKLR**.

28. In answering the question as to whether the petitioners were the students of the TUK or the UoN, I find myself in agreement with the persuasive decision of Mwita, J in **Kelvin Mbwaya & 3 others v Attorney General & 5 others [2017] eKLR**. The reason why I rely on the stated decision is the fact that the issues and arguments raised by the parties therein are similar, if not the same, with those in this matter. It is also noted that all the respondents in that case are also respondents in this case.

29. In the stated case, the Court tackled the question of whether the petitioners therein were students of the TUK or the UoN by interpreting the relevant legal instruments being the University of Nairobi Act, Legal Notice No. 159 of 2007 and the TUK's Charter. The Court observed that:

“64. I have examined the relevant statutes for the three institutions involved and more so Legal Notice 159 of 2007 and the 2nd respondent's Charter. The transition clause in Charter is clear that only students of the University College pursuing diploma and certificate programmes at the commencement of the Charter, (15th January 2013), would complete their courses and be awarded diplomas and certificates of the 2nd respondent. There is no similar provision regarding students who were pursuing degree courses in the university college. The Legal Notice establishing the university college, on the other hand provided that its students pursuing degree courses would be awarded degrees of the 3rd respondent.

65. Although the petitioners received admission letters from the university college which would ordinarily make them students of the college, Legal Notice No 159 of 2007 was unequivocal that they would be awarded degrees of the 3rd respondent. This can also be implied from the transitional clause in the Charter which left out students who were pursuing degrees at the university college among those who would be awarded academic certificates of the 2nd respondent at commencement of the Charter on 15th January 2013.

66. Furthermore, Legal Notice 159 of 2007 which was a subsidiary legislation to the 3rd respondent Act, defined “university” as the 3rd respondent. The Act itself defined “student” as one registered for purposes of obtaining academic qualification of the 3rd respondent, which was the case with the petitioners.

67. From a factual and practical point of view therefore, and giving the three statutes a holistic examination both textually and contextually, the university college had no legal power to award its own degrees. The Legal Notice was clear on this, and the same fact could also be implied from the Charter. It was the responsibility of the 3rd respondent to confer degrees to the petitioners and the fact that the Charter left out the petitioners among students who would be awarded the 2nd respondent's academic certificates, spoke it all. The only logical conclusion one can draw from the examination of the statutes is that the petitioners were students of the 3rd respondent, and this fact was acknowledged by paragraph 5 of the legal Order. In my respectful view, the clear intention discernible from the statutes is that the petitioners were students of the 3rd respondent for purposes of award of degrees.”

30. The Court went ahead and held as follows:

“69. I therefore find and hold that to the extent that the legal order gave the petitioners the right to be awarded degrees of the 3rd respondent, and the transition clause in the Charter left them out of those who were to get academic certificates of the 2nd respondent, they were deemed to be students of the 3rd respondent and were therefore entitled to her degrees.”

31. I see no reason for departing from the decision as the Court provided an extensive analysis of the relevant laws. I am particularly persuaded by the interpretation provided of Section 32(4) of the TUK's Charter which states that:

“The students of the Kenyan Polytechnic University College pursuing diploma and certificate programmes as at the commencement of the Charter shall complete their courses and shall be awarded diplomas and certificates of the University.”

32. The provision in question does not refer to the students pursuing degree programmes at the University at the time of the commencement of the Charter. It only refers to those who were pursuing diploma and certificate courses as being entitled to be awarded diplomas and certificates by the TUK. In the circumstances, I am guided by Legal Notice No. 159 of 2007 which defines ‘University’ as the UoN and states in Section 5 that **“the degrees awarded by the University College shall be the degrees conferred by the University”**.

33. As explained in **Kelvin Mbwya (supra)**, the TUK was not given the responsibility by its Charter of awarding degree certificates to the students who were pursuing degree courses at the Kenya Polytechnic University College. It follows that as per the Legal Notice No. 159 of 2007, the UoN retained the responsibility of awarding degrees to the petitioners.

34. Additional support is found in the decision of **Oindi Zaippeline & 39 others v Karatina University [2015] eKLR** where the Court of Appeal when confronted with similar facts found in favour of the appellant and held that:

“34. It is our view that revocation of the Legal Notice did not affect the status of the appellant as a student of Moi University. First, Section 23 (3) (c) & (e) of Interpretation and General Provisions Act is explicit that a right, privilege or liability acquired, accrued or incurred is not repealed. In the instant case, the appellant under the doctrine of legitimate expectation and pursuant to the provisions of Paragraph 5 of the Legal Notice No. 163 of 2010 had acquired a right to be conferred a degree of Moi University; the 2nd respondent had also incurred and acquired an obligation to confer the degree. It is our considered view that revocation of the Legal Notice did not affect the acquired rights and accrued obligations of the parties hereto. Second, the appellant became a student of Moi University upon admission in 2009 under the provisions of Moi University Act (Cap 210A) and not vide the provisions of Legal Notice No. 163 of 2010. Revocation of the Legal Notice did not revoke the Moi University Act pursuant to which the appellant became a student of the University; revocation of the Legal Notice had effect on those students who were admitted by Karatina University College when it became a body corporate after Legal Notice No. 163 of 2010 was gazetted; it is these students who became students of Karatina University pursuant to Paragraph 33 of the Charter. Third, the Charter has no express provision converting students of Moi University who were at the Karatina University College to become students of Karatina University. Paragraph 33 of the Charter applies to students of “former Karatina University College” who were pursuing degrees.”

35. I am therefore in agreement with the petitioners that they were students of the UoN and were entitled to be awarded degrees by the university in the absence of any legal provisions transferring the responsibility of awarding degree certificates to the TUK.

36. The question that follows my finding above is whether the petitioners’ rights were infringed by the respondents. The petitioners contend that by the TUK issuing them with degree certificates in engineering while fully knowing that it had not been accredited to offer engineering courses infringed their constitutional rights under Articles 27(1), 28, 47 and 55 (c). Reliance was placed on the decisions in the cases of **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** and **Martin Wanderi & 106 others v Engineering Registration Board & 10 others [2018] eKLR** in support of the submission.

37. The petitioners contend that the TUK was non-existent at the time they were admitted and therefore they were the responsibility of the UoN and as per Section 5 of Legal Notice No. 159 of 2007 the issuance of degree certificates was within the ambit of the UoN. Further, that in as much as such responsibilities were transferred to the TUK upon accreditation, such transfer only affected students that were admitted after 2013.

38. The 1st and 6th respondents submit that in the circumstances of the dispute the Ministry’s responsibility is limited to policymaking, supervision and development of universities in order to ensure they comply with their statutory mandates.

39. The TUK submits that there is no evidence to show that the petitioners were admitted by the UoN which would have guaranteed them the right to graduate as students of the UoN. Further, that the petitioners’ letters of admission were all issued by the predecessor of the TUK thereby creating a contractual relationship between the TUK and the petitioners.

40. The TUK contend that by virtue of Section 23 of the Interpretation and General Provisions Act the promulgation of the Charter as a repealing law cannot retrospectively affect rights that had already accrued or obligations and one of the rights that accrued was the as a learning institution it was mandated to issue the degree certificates to the petitioners upon successful completion of their studies. Reliance is placed on the cases of **South African Veterinary Council v Szymanski 2003 (4) S.A. 42 (SCA)** and **Oindi Zaippeline & 39 others v Karatina University [2015] eKLR**.

41. The TUK submits that the petitioners have failed to demonstrate how its teaching, examining and awarding them with degrees violated their rights. According to the TUK, it is actually the action of the EBK of declining to register the petitioners as engineers that has violated their right to education.

42. In reliance on the position adopted by the High Court in **Martin Wanderi & 19 others v Engineers Registration Board of Kenya & 5 others [2014] eKLR**, the TUK implores this Court to find that it was duly mandated and accredited by the CUE to teach, examine and award degrees in the field of engineering. It is therefore submitted that the act by the EBK of declining to register the petitioners violated their rights of education and livelihood.

43. On its part, the UoN relied on the decisions in the cases of **Anarita Karimi Njeru v Republic [1979] 1KLR 154** and **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR** and argued that there is no proper petition before this Court since the particulars of the alleged violations and the manner in which the rights were allegedly violated have not been pleaded.

44. The CUE concurs with the petitioners that their legitimate expectation was real as it was consistently buttressed by the then prevailing circumstances which included, *inter alia*, the undertaking of syllabuses approved by the UoN’s Senate, the approval of all examinations by the UoN and full enjoyment of the UoN’s academic facilities. The CUE contends that by dint of Legal Notice No. 159 of 2007 there emerged an unequivocal understanding that the UoN would be responsible for awarding the petitioners with respective degrees upon the completion of their studies. This argument is supported by reference to the case of **O’Reilly v Mackman [1983] 2 AC 237**.

45. The CUE aligns itself with the position of the petitioners as regards the infringement of their rights under Articles 27(1), 28, 47 and 55(c) of the Constitution. The decision in the case of **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** is cited in support

of the submission that the petitioners' entitlement to fair administrative action was curtailed when the TUK failed to exercise due care and awarded engineering degree certificates without first procuring the requisite mandate for awarding such degrees. The CUE placed reliance on the decision of the Supreme Court in **Martin Wanderi & 106 others v Engineering Registration Board & 10 others [2018] eKLR** in support of its submission that the petitioners' right to human dignity was infringed by the actions of the TUK.

46. I will once again cite **Kelvin Mbwaya (supra)** on the question of legitimate expectation. The Court determined as follows:

“80. The University College order 2007 was express and unambiguous that the petitioners would be awarded degrees of the 3rd respondent. When the university college attained the Charter, the Charter left the petitioners out among students who would be awarded academic certificates of the 2nd respondent. The fact that the petitioners would get degrees of the 3rd respondent was not only a representation and practice but was also anchored in law (statutes). The petitioners therefore continued with their studies with the knowledge that this would be the case.

81. Applying the principle in the decisions referred to above and taking into account the facts of this case, I am satisfied that the petitioners had a legitimate expectation that on completion of their studies they would be awarded degrees of the 3rd respondent, an expectation that was violated when they were awarded degrees of the 2nd respondent.”

47. I find that the holding in the cited case is equally applicable to this case. When a student undertakes a course study with a learning institution, there is an expectation backed by the laws establishing the institution or governing its operations that the student will, upon successfully completing the study programme, leave the institution with a certificate fit for the purpose of such study. Where there is need for accreditation with a professional body before a course is offered, then there is a legitimate expectation that the learning institution has obtained the necessary clearances before offering the study programme. The TUK cannot blame the EBK for executing its statutory mandate. Indeed, the TUK would be held liable for offering unaccredited courses.

48. In **Oindi Zaippeline & 39 others v Karatina University [2015] eKLR**, the Court of Appeal found that a student has a legitimate expectation that he would be awarded a degree by the university which admitted him/her. The Court held that:

“48. As stated earlier, the appellant had a contractual relationship with Moi University. The nature of this contractual relationship is underpinned by the fact that the appellant was admitted by the 2nd respondent to undertake studies leading to the award and conferment of a degree of Moi University. It is our considered view that by admitting the appellant to undertake studies at Moi University, the 2nd respondent made a promise and representation to the appellant that upon successfully undertaking the course of study, it shall award and confer its degree to the appellant. We find that a clear and unambiguous promise or representation was made by the 2nd respondent to the appellant and the doctrine of legitimate expectation is applicable. It would be an illegitimate expectation on the part of the appellant to expect a degree from any other university except that which admitted him and who's program of study he undertook; it is also an illegitimate expectation for the 2nd respondent to admit students and expect to confer them with degrees of another university.”

49. As matters stand in the case before this Court, the expectation was that upon completing their studies the petitioners would be awarded degrees by the UoN as provided in the University of Nairobi Act and Legal Notice No. 159 of 2007. In the circumstances I find that the TUK and the UoN violated the petitioners' legitimate expectation that the degree certificates to be awarded to them would be from the UoN and not any other university.

50. The petitioners assert that their right to fair administrative action under Article 47 of the Constitution was violated when the TUK awarded them degree certificates yet it was not legally entitled to do so.

51. Section 7(2)(a)(i) of the Fair Administrative Action Act, 2015 allows the court to review administrative action or decision where the person who made the decision was not authorized to do so by the empowering provision.

52. In the matter before me, the TUK submits that the receipt of the Charter signified that it had satisfied the conditions set by the CUE to offer engineering courses and specifically Bachelor of Science in Electrical and Electronics Engineering. It is, however, clear from the Charter that the TUK was not given the responsibility of taking over the award of degrees for already registered students whose degree certificates were awardable by the UoN. Therefore, by purporting to award degrees to the petitioners, the TUK exceeded its jurisdiction and in the process violated the fair administration rights of the petitioners.

53. The petitioners contend that the TUK also violated their right to equal protection and equal benefit of the law under 27(1) of the Constitution. In my opinion, the petitioners have not set before the Court with precision how their rights under the abovementioned provision of the Constitution were violated. The petitioners have not demonstrated how they were treated in a manner that rendered them unequal before the law. They have also not indicated the person or persons whom they were treated unequally to.

54. The petitioners further complain that their rights under Articles 28 and 55 (c) of the Constitution were violated by the actions of the TUK in awarding them degrees that it was not entitled to award. Article 28 provides that the inherent dignity which every person has should be respected and protected. Article 55(c) requires the State to take measures, including affirmative action programmes, to ensure that the youth access employment.

55. The petitioners' case is that the TUK awarded them degrees knowing well that it was not accredited to offer engineering courses. The TUK denies this allegation without producing any evidence to show that its Bachelor of Science in Electrical and Electronics Engineering course was accredited by the EBK. It therefore follows that since the petitioners hold degrees for a course that was not accredited the EBK is not expected to register them as engineers. Since the petitioners cannot be registered as engineers there is no way they can put to use the knowledge and skills obtained through their studies by being gainful employed as engineers. I, therefore, find that there has been a clear

violation of the right to access employment.

56. In **Martin Wanderi & 106 others v Engineering Registration Board & 10 others [2018] eKLR**, the Supreme Court held that:

“[128] Consequently, as the lawfulness of an act under Article 47(1) of the Constitution goes to substantive justice, having found that the Board acted ultra vires its mandate, it outrightly breached Article 47(1) of the Constitution. Notably in Judicial Service Commission v Mbalu Mutava & another, (above), the Court of Appeal also noted that fair administrative justice embodies dignity.

[129] Again, it therefore follows that a breach of Article 47(1) of the Constitution, where proved, amounts to a violation of the right to human dignity. Hence, having found that Article 47(1) of the Constitution was breached, it follows that that breach also resulted in the violation of the petitioners’ right to human dignity.”

[Emphasis Added]

57. The Court went on to state that:

[132] Drawing from comparative jurisprudence, the Constitutional Court of South Africa has placed the right to dignity at the core of a violation of other fundamental rights and freedoms in the case of Dawood v Minister of Home Affairs, [2000] (3) SA 936(CC) where it was stated:

“Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.”

58. Since the petitioners in the matter before me have successfully proved that their right to fair administrative action and their right to access employment have been infringed upon, it follows that their right to human dignity was also violated by the actions of the TUK.

59. In conclusion, I concur with the petitioners that their rights under Articles 28, 47 and 55(c) of the Constitution were violated by the actions of the TUK. The UoN is also not innocent as it abdicated its duty to award the petitioners their degrees after they had successfully completed the study programme.

60. There is a prayer by the petitioners that the EBK should be compelled to register them as engineers. In response to this request, the 1st, 5th and 6th respondents relied on sections 7 and 18 of the Engineers Act, 2011 and the cases of **Engineers Board of Kenya v Jesse Waweru Wahome & 6 others CA 240/2013** and **Republic v the Council of Legal Education Ex-parte James Njuguna & 14 others [2007] eKLR**, and submitted that the EBK is simply carrying out its statutory duty and should not to be chastised for discharging its mandate as required by the law.

61. Once again I concur with the observation in **Kelvin Mbwya (supra)** that:

“83. Although the Court appreciates the petitioners’ concerns in seeking such an order, and given the Court’s findings and the appropriate orders the Court is to make I do not think the order is appropriate in the circumstances. The petitioners must first get their degree certificates and then make applications to the 5th respondent for registration. Ordering the 5th respondent to register them now will, in my view, be premature.”

62. Considering my findings in this judgement, it follows that the petitioners are yet to be awarded legitimate degree certificates from the proper institution being the UoN. Once the error that occurred is rectified, the petitioners will be entitled to make applications to the EBK for registration. Counsel for the Board told the Court that the petitioners would be registered once they presented degrees from an accredited institution. The prayer to compel the Board to register the petitioners at this stage has no proper foundation and is declined.

63. What then are the appropriate reliefs in this case? The UoN relied on the case of **Romauld James v AGT [2010] UKPC** and submitted that the petitioners have not discharged their burden of proof on the claim for compensation as no evidence was produced in support of quantum of damages. The Court was therefore urged not to award any damages.

64. On the issue of award of damages in cases of constitutional violations, I wish to rely on the holding in the case of **Charles Kaindo Kuria & 20 others v Technical University of Kenya [2019] eKLR** that:

“22. The principles applicable to award of damages for constitutional violation under the constitution was explained exhaustively by privy council in the case of Siewchand Ramanooop vs The AG of T&T, PC Appeal No. 13 of 2004, where it was held, that a monetary award for constitutional violation was not confined to an award of compensatory damage as per Lord Nicholas at paragraph 18 & 19;

"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The

comparable common law measure of damage will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law."

23. The position of the privy council was adopted in case of **Dendy vs University of Witwatersrand, Johannesburg & Others – [2006] 1 LRC 291** where the Constitutional Court of South Africa held that;

"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases."

24. Upon applying the above decision and jurisprudence, I have no doubt, that when the court is exercising the constitutional jurisdiction, the court is concerned with upholding or vindicating the constitutional right which has been infringed or breached and where an award of damages is to be made it is at the discretion of the court as it is not compensatory or punitive. It is in other words a secondary remedy to be made only in the most appropriate cases to vindicate the rights violated."

65. The petitioners in the above case were each awarded Kshs 148,764/- as compensation for violation of their rights under Articles 28 and 47 of the Constitution. In the case of **Martin Wanderi & 106 others v Engineering Registration Board & 10 others [2018] eKLR**, the Supreme Court upon finding that the petitioners' rights under Article 47 (1) and 55 (a) & (c) of the Constitution had been violated awarded each one of them general damages of Kshs 200,000/-. Additionally, in the case of **Jesse Waweru Wahome & 2 others v Kenya Engineers Registration Board [2012] eKLR**, the Court awarded each petitioner Kshs. 200,000/- for violation of their rights constitutional rights under Articles 47(1) and 55(a) & (c).

66. In the absence of proposal of the appropriate damages by the petitioners, I will stand guided by the cited precedents on quantum and award each petitioner Kshs. 200,000/- as general damages for violation of their constitutional rights.

67. In conclusion, I find that the petitioners have successfully established a basis for allowing their petition. I have determined that they were students of the UoN and therefore were wrongly awarded degrees by the TUK contrary to the law and their expectations. The petition dated 11th December, 2017 therefore succeeds and orders shall issue as follows:

- a) A declaration is hereby issued that the petitioners were valid students of the University of Nairobi having been enrolled at Kenya Polytechnic University College which was a constituent college of the University of Nairobi.
- b) A declaration is hereby issued that the action by the Technical University of Kenya to absorb the petitioners while knowing very well that it was not approved to offer engineering courses by the Engineering Board of Kenya was unconstitutional and violated the petitioners' rights under Articles 28, 47(1) and 53(c) of the Constitution.
- c) An order is hereby issued nullifying the degree certificates issued to the petitioners by the Technical University of Kenya.
- d) An order is hereby issued compelling and directing the Technical University of Kenya to forthwith forward the names of the petitioners to the University of Nairobi for inclusion in the list of graduands in the first graduation to be held by the University of Nairobi upon the delivery of this judgement.
- e) Each Petitioner is awarded Kshs. 200,000/- as general damages against the Technical University of Kenya and the University of Nairobi jointly and severally.
- f) The costs of this petition shall be met by the Technical University of Kenya and the University of Nairobi.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JULY, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT

DATED, COUNTERSIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF JULY, 2021.

J. A. MAKAU,

JUDGE OF THE HIGH COURT