Charo v Kenya National Examinations Council & another (Constitutional Petition E178 of 2021) [2021] KEHC 193 (KLR) (Constitutional and Human Rights) (4 November 2021) (Judgment)

Wesley Mdawida Charo v Kenya National Examinations Council & another[2021] eKLR

Neutral citation: [2021] KEHC 193 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E178 OF 2021

AC MRIMA, J

NOVEMBER 4, 2021

BETWEEN

WESLEY MDAWIDA CHARO ..... PETITIONER

AND

KENYA NATIONAL EXAMINATIONS COUNCIL ..... 1ST RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE ..... 2ND RESPONDENT

The Kenya National Examinations Council had the mandate and duty to effect a change in name in a candidate's academic certificate where the candidate had opted to change his name.

Reported by Beryl Ikamari

Constitutional Law *- fundamental rights and freedoms - rights to fair administrative action and access to information - correction and update of records held by a public body - where an applicant had changed his name and requested the Kenya National Examinations Council to effect the change and issue him with academic certificates that bore the new name - where the request was declined on grounds of lack of a policy or legislative framework - whether the Kenya National Examinations Council had violated that applicant's rights to fair administrative action and access to information - Constitution of Kenya, 2010, articles 47 and 35(2); Access to Information Act, No 31 of 2016, section 13; Kenya National Examinations Council Act, No 29 of 2021, section 10(1)(d); Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009, rule 9(3).*

Constitutional Law *- fundamental rights and freedoms - rights to fair administrative action and access to information - unsuccessful efforts to remedy a complaint - where the Commission on Administrative Justice had handled a complaint and made unsuccessful efforts towards its resolution - where the complaint related to a failure to effect changes on academic certificates despite a request being made to the Kenya National Examinations*

Council - whether failure to resolve the complaint meant that the Commission had violated the complainant's rights to fair administrative action and access to information - Constitution of Kenya, 2010, articles 47 and 35(2).

Brief facts

The petitioner changed his name in the course of his university education through a Deed Poll and was unable to graduate as a result. He had been invited to study at the University of Nairobi for a Diploma in Business Management and the basis was the qualifications appearing in his Kenya Certificate of Primary Education (KCPE) and Kenya Certificate of Secondary Education (KCSE.) In both his KCSE and KCPE certificates his names appeared as David Wesley Mnyika Mwanyia.

The petitioner requested the Kenya National Examinations Council (KNEC) to change his name as it appeared on his KCSE certificate but KNEC did not effect the requested change. He contended that his legitimate expectation and the expeditious consideration of his request under article 47(1) of the Constitution were violated when the 1st respondent (KNEC) failed to effect the requested changes to his academic certificate. He said that for that reason he had not graduated and secured employment under his new name.

The petitioner then approached the Commission on Administrative Justice (CAJ) and sought redress against the conduct of KNEC. The petitioner received a response in December 16, 2019 from the KNEC's Legal Officer rebuking him for nagging the KNEC over requests that had already been rejected. The petitioner, in response wrote to the Cabinet Secretary for Education explaining his case and complaining against the Legal Officer. KNEC gave him a response in September 22, 2020 stating that it had written to the Attorney General seeking guidance about the legal issues raised as a result of his appeal to the Cabinet Secretary for Education.

Issues

i. Whether a failure by the Kenya National Examinations Council (KNEC) to issue an applicant that had changed his name with new academic certificates that reflected the change, was a violation of the applicant's rights to fair administrative action and to access to information.

ii. Whether the Commission on Administrative Justice had violated a complainant's rights to fair administrative action and to access to information where it had taken reasonable steps towards resolving the complaint, but an effective solution had not been found.

Held

1. Rule 9(3) of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009 (KCSE Rules) provided that KNEC could at any time withdraw a certificate for amendment or for any other reason where it considered it necessary. Further section 13 of the Access to Information Act provided that at the request of an applicant, a public entity or private body had to within a reasonable time, at its own expense, correct, update and annotate any personal information held by it relating to the applicant, which was out of date, inaccurate or incomplete. Furthermore, the lack of a policy or legislative framework specific to the petitioner's circumstances was not a bar for the court to enforce constitutional rights. An unreasonable administrative action could be reviewed by the court.
2. The right to have a name necessarily implied the right to change that name. Therefore, where a person lawfully changed his name, it was only right for that person to enjoy the benefits that accrued to him as a result of that change. Denial of those benefits amounted to the denial of the right recognized under article 53 of the Constitution. The court was obliged to develop the law to the extent that it did not give effect to a right or fundamental freedom and to adopt the interpretation that most favoured the enforcement of the right or fundamental freedom.
3. There were several decisions, including a decision from the Court of Appeal, that clearly settled the position on the mandate and duty of the Kenya National Examinations Council to recall and re-issue certificates. With a background wherein the 1st respondent (KNEC) had been a party to the cases in which those decisions were made, KNEC was aware of what the courts had repeatedly decreed it to do but it remained adamant to do so.

4. There was no doubt that the refusal by the 1st respondent to effect the name change for lack of a policy framework contravened article 35(2) of the Constitution, section 13 of the Access to Information Act, section 10(1)(d) of the Kenya National Examinations Council Act and rule 9(3) of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009.
5. The decision not to issue new certificates to reflect the name change was an administrative action because it affected the rights and interests of the petitioner. That decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.
6. KNEC was legally empowered to issue new certificates and in discharging its duty to do so, it exercised discretion. Discretionary power was not beyond the purview of judicial scrutiny. It had to be exercised reasonably.
7. The 1st respondent cited lack of a policy framework as the reason for failure to issue the petitioner with certificates in which a change in name was reflected. However, a constitutional right was enforceable even where there was no applicable policy or a legislative framework. Additionally, the reason offered for not effecting the changes was contrary to the Constitution, the law and express court orders and it was therefore unlawful. In fact, the 1st respondent's decision bordered on contempt of court especially in light of the decision in *Wesley Mdawida Charo v University of Nairobi; Commission on Administrative Justice (Interested Party)* [2020] eKLR.
8. There was evidence that the 2nd respondent (CAJ) engaged every possible avenue towards settlement of the dispute. It summoned and held meetings with the KNEC and sought guidance from the Department of Civil Registration Services on how to help the petitioner. While the matter remained unsettled, the petitioner opted to withdraw its complaint before CAJ and file a petition at the High Court. The High Court upheld the petitioner's plea but the petitioner encountered difficulty in enforcing the decision. It was unclear why the petitioner sued the CAJ despite the efforts that the CAJ made towards the resolution of the matter.
9. The CAJ's conduct was beyond reproach and the allegations that it had violated the petitioner's rights were without a legal basis.

Petition partly allowed.

Orders

i. *The claim that the CAJ's conduct violated the petitioner's rights under articles 35(2) and 47(1) of the Constitution failed and was dismissed.*
ii. *The claim that KNEC's refusal to issue the petitioner with Kenya Certificate of Secondary Education (KCSE) and Kenya Certificate of Primary Education (KCPE) certificates in his new names violated the petitioner's constitutional rights under articles 35(2) and 47(1) of the Constitution, section 13 of the Access to Information Act, section 10(1)(d) of the Kenya National Examinations Act and rule 9(3) of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009 succeeded. The court declared the impugned decision constitutionally infirm. The impugned decision was quashed.*
iii. *An order compelling the 1st respondent to amend its records to reflect the petitioner's change of name from David Wesley Mnyika Mwanyia to Wesley Mdawida Charo, to recall the Petitioner's Kenya Certificate of Secondary Education (KCSE) and Kenya Certificate of Primary Education (KCPE) certificates and to issue the Petitioner with new certificates in the name of Wesley Mdawida Charo.*
iv. *General damages of Kshs. 1,500,000 were awarded to the petitioner as against the 1st respondent for violation of the petitioner's rights.*
v. *Exemplary damages of Kshs. 500,000 were awarded to the petitioner as against the 1st respondent.*
vi. *The petitioner had to bear the 2nd respondent's costs of the petition whereas the 1st respondent had to bear the petitioner's costs of the petition.*

Citations

Cases

1. Albanus Mwasia Mutua v Republic [2006] eKLR — Explained
2. Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others — Explained
3. Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others — Explained
4. Eunice Nganga v Higher Education Loans Board & 2 others — Explained
5. Gitobu Imanyara & 2 others v Attorney General — Explained
6. Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others — Explained
7. In re Estate of Ezekiel Luyali Liyai [2020] eKLR — Explained
8. Jennifer Muthoni Njoroge & 10 others v Attorney General [2012] eKLR — Explained
9. John Njue Nyaga v Nicholas Njiru Nyaga & another [2013] eKLR — Explained
10. John Wachiuri t/a Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano — Explained
11. Joseph Mbalu Mutava v Attorney General & another — Explained
12. Judicial Service Commission v Mbalu Mutava Musyimi — Explained
13. Kenya National Examinations Council v Republic & 2 others [2019] eKLR — Explained
14. Legeus Lomosi Mudegu v Kenyatta University — Explained
15. Lucas Omoto Wamari v Attorney General & anopther [2017] eKLR — Explained
16. Lucas Omoto Wamari v Attorney General & another — Explained
17. Manyasi vs. Gicheru & 3 others — Explained
18. Martha Kerubo Moracha v University of Nairobi [2021] eKLR — Explained
19. M W K v another v Attorney General & 3 others [2017] eKLR — Explained
20. Peter Njoroge Muiruri& 9 others v ATTORNEY GENERAL & another [2012] eKLR
21. Rachel Mutheu Ndambuki v Cabinet Secretary, Ministry of Lands and Physical Planning & 2 others — Explained
22. Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti — Explained
23. Republic v Kenya School of Law & another Ex Parte Kithinji Maseka Semo & another [2019] eKLR — Explained
24. Republic vs Kenya National Examination Council & another ex-parte Audrey Mbugua Ithibu — Explained
25. RKM v Attorney General — Explained
26. Wesley Mdawida Charo v University of Nairobi; Commission on Administrative Justice (Interested Party) — Explained
27. President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1 — Explained
28. Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation — Explained

Statutes

1. Access to Information Act — section 13 (1), 14 (1), 21 (a) — Interpreted
2. Births And Deaths Registration Act — section 14 — Interpreted
3. Commission On Administrative Justice Act — section 7 (d), 8 (b)(g), 43 — Interpreted
4. Constitution of Kenya, 2010 — article 35 (2), 46 , 47(1),48,50 (1),55(c),59 (2) (i)(j), 159 (2)(a)(b), 232, 43 (1), 28, 10, 259 (1) — Interpreted
5. Fair Administrative Action — section 4 (1) — Interpreted
6. Kenya National Examination Council (Kenya Certificate of Secondary Education Examinations) Rules 2009 — Rule 9 (3) — Interpreted
7. Kenya National Examinations Council Act — section 10 (1), 11, 37 — Interpreted

8. KNEC (Management of Examinations) Rules — Rule 12(3) — Interpreted
9. South African Constitution — section 33 — Interpreted
10. Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation — Interpreted

Advocates

Miss. Bisem for for the 1st Respondent
Miss. Mricho, Learned Counsel for for the 2nd Respondent
Wesley Mdawida Charo for the Petitioner in person.

JUDGMENT

Introduction:

1 The Petition herein presents the predicament of a person who changes his name in the course of undertaking university education and as a result, is unable to graduate.

2. Wesley Mdawida Charo, the Petitioner herein, sat for his Kenya Certificate of Primary Education (hereinafter referred to as 'KCPE') and Kenya Certificate of Secondary Education (hereinafter referred to as 'KCSE') in 2004 and 2008 respectively.

3. Both his primary and secondary educational certificates bear the name David Wesley Mnyika Mwanyia.

4. Seeking to further his education, the Petitioner applied to The University of Nairobi for a Diploma in Business Management course. On the basis of the qualification and names appearing on his KCSE Certificate, the Petitioner was admitted to the Diploma programme.

5. Having endeavoured to have his former name, David Wesley Mnyika Mwanyia, replaced in his academic certificates to reflect the new name, Wesley Mdawida Charo, in vain the Petitioner instituted the current proceedings.

The Petition:

6 The Petition is dated May 10, 2021. It was filed under Certificate of Urgency and is supported by the three Affidavits of Wesley Mdawida Charo deponed to on May 10, 2021, August 2, 2021 and August 16, 2021 respectively.

7. The petitioner contended that in the course of his university education he changed his name from David Wesley Mnyika Mwanyia to Wesley Mdawida Charo through a Deed Poll dated January 21, 2015. It is his case that his name change was accordingly published vide Kenya Gazette Notice Vol.CXVII-No.58 dated June 5, 2015.

8. The petitioner contended that his new identity was subsequently updated in the Integrated Population Registration System (IPRS) thereby facilitating the same to happen his other accounts such as the immigration department, Kenya Revenue Authority, Independent Electoral and Boundaries Commission, National Transportation and Safety Authority, National Social Security Fund and National Hospital Insurance Fund.

9. Armed with The Deed Poll, National Identity Card, Kenya Gazette Notice, KCSE Certificate and a letter from the Vice Chancellor Nairobi University, the petitioner averred that he requested, by way of a letter dated December 22, 2017, the Kenya National Examination Council (hereinafter referred to as "the 1st respondent' or 'KNEC') to effect the change on his KCSE Certificate.

10. It was his case that his request was guided by rule 9(3) of the Kenya National Examination Council (Kenya Certificate of Secondary Education Examinations) Rules 2009 as well as the decision in *Republic vs Kenya National Examination Council & another ex-parte Audrey Mbugua Ithibu* (2014) eKLR.

11. He contended that in violation of his legitimate expectation and expeditious consideration of his request guaranteed under article 47(1) of the Constitution, the 1st respondent rejected to effect the changes.

12. It is his case that the failure to effect that change has rendered him unable to graduate from the University of Nairobi and secure employment by use of his academic certificates under his new name like everyone else in the society.

13. The petitioner averred that on March 9, 2018, he lodged a complaint against the 1st respondent before the Commission on Administrative Justice (hereinafter referred to as 'the 2nd respondent' or "CAJ") seeking redress on the conduct of the 1st respondent to no avail.

14. He posited that on December 16, 2019, he subsequently wrote another letter to the 1st respondent citing the Court of Appeal and High Court decision in Kenya National Examinations Council v Republic & 2 others [2019] eKLR and RKM v Attorney General & Kenya National Examinations Council [2019] eKLR respectively seeking action on his request.

15. The petitioner contended that in violation of articles 35(2) and 47(1) of the Constitution, the 1st respondent failed to issue fresh certificates with changed names. It is his case that the Legal Officer of the 1st respondent, Befly Bisem responded to his letter of December 16, 2019 rebuking him for nagging the 1st respondent over requests that had already been rejected.

16. Upon facing rejection from the Legal Officer, the petitioner averred that he escalated his complaint by writing a letter dated January 13, 2020 to the Cabinet Secretary for Education explaining his case and lodging his complaint against the Legal Officer of 1st respondent.

17. He averred the said Cabinet Secretary marked the letter to the Principal Secretary for Education. It is his case that in acknowledging communication from the Ministry of Education, 1st respondent formally responded to him for the first time on September 22, 2020, since 2018.

18. The petitioner contended that in the said letter the 1st respondent stated that the said Ministry had forwarded his matter to her for action and that she had in turn written to the Attorney General seeking guidance on the legal issues raised as a result of the appeal to the Cabinet Secretary for Education.

19. The petitioner averred that he never received feedback from the 1st respondent. He thus made a follow up though a letter dated April 8, 2021 which letter was never responded to.

20. It is the petitioner's case that the continued failure and/or refusal by the 1st respondent to perform its statutory duty in accordance with articles 35(2) and 47(1) of the Constitution, is the reason the University of Nairobi is unable to update his records for purposes of graduating.

21. The petitioner further averred that he had already completed his academic training at the University by the time he approached the 1st respondent on December 22, 2017 and since then he has missed a total of six successive graduation ceremonies, namely; the one of September 14, 2018, December 21, 2018, September 6, 2019, December 20, 2019, September 25, 2020 and December 11, 2020.

22. The petitioner contended that he has been unable to secure any job due to the discrepancy in his National Identification Card and academic certificates in violation of article 35(2) and 43(1)(f) of the Constitution as a result of the 1st respondent failure to perform its statutory obligations.

23. The petitioner pointed an accusing finger at the 2nd respondent for failing to issue a determination expeditiously regarding his complaint against the 1st Respondent. He averred that the 2nd respondent's mishandling of his compliant aggravated his predicament.

24. On the foregoing, the petitioner prayed for the following orders: -

a) A declaration that the 1st respondent's actions have infringed on the petitioner's inalienable right to a name, violated his constitutional rights under article 27, 28, 29 (d), 35 (2), 43 (1) (f), 46 (1) (a), 47 (1) and 55 (c) of the Constitution and breached article 21, 24, 46, 47 and 232 of the Constitution, section 4 (1) of the *Fair Administrative Action Act*, 2015 and section 13 (1) of the *Access to Information Act*, 2016.

b) A declaration that the 2nd Respondent has violated the petitioner's constitutional rights under Article 46 (1) (a), 47 (1) and 50 (1) and breached Article 46, 47, 48, 59 (2) (i) and (j), 159 (2) (a) and (b) and 232 of the constitution, Section 58 of the Interpretation and General Provisions Act, Section 4 (1) of the *Fair Administrative Action Act*, 2015 and Section 7 (d), 8 (b) and 8 (g) of the *Commission on Administrative Justice Act*, 2011.

c) An order bringing into this Honourable court for the purposes of being quashed and quashing the decision by the 1st respondent not to effect the changes in her records pursuant to a duly executed Deed Poll as requested by the petitioner vide his letter dated December 22, 2017.

d) An order to compel the 1st respondent to recall the petitioner's KCPE and KCSE Certificates for amendment and to re-issue the petitioner with a new KCPE and KCSE Certificate respectively both bearing the name WESLEY MDAWIDA CHARO arranged in the 1st respondent's traditional name arrangement format subject to the payment of a reasonable fee if necessary.

e) An award of general damages against the 1st and 2nd respondents respectively for the violation of the petitioner's constitutional rights.

f) An award of exemplary/punitive damages against the 1st respondent for her arbitrary and unconstitutional action and her propensity for repeating the same violations.

g) An award of aggravated damages against the 1st and 2nd respondents respectively arising from their unreasonable, unlawful and unconstitutional actions.

h) Any other relief or further orders that this Honourable Court may deem just and expedient to grant.

i) Costs of this petition plus interest at court rates from date of filing suit until full payment.

25. In his submissions dated August 2, 2021 the petitioner asserted that the Petition is premised on the right to a name as guaranteed by the Constitution and affirmed by the decision in *In Re Estate of Ezekiel Luyali Liyai [2020] eKLR* where following was said: -

> If the right to a name exists, then it follows that the right to change that name also exists. It has not been argued that the Applicant changed her name unlawfully. In this regard, I concur with Odunga, J. who in the case of *RKM v Attorney General & Kenya National Examinations Council* [2019] eKLR, stated:
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> > In my view the right to have a name necessarily implies the right to change that name. Therefore, where a person lawfully changes his name, it is only right that the person ought to enjoy the benefits that accrue to him as a result of that change. To deny a person the benefits that accrue to him as a result of the change of his name, in my view, amounts to the denial of the right under Article 53 of the Constitution. This court is constitutionally obliged to develop the law to the extent that it does give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

26. The Petitioner further submitted that the 1st Respondent violated his legitimate expectation under Article 47(1) of the Constitution and the right to access information as provided for under Article 35(2) of the Constitution as well as Section 13(1) of the *Access to Information Act*.

27. The Petitioner faulted the 1st Respondent for defying Rule 9 (3) of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009, sound legal advice from the Office of the Attorney General as well as clear guidance from the honourable Courts in *Republic -vs- Kenya National Examination Council & another ex-parte Audrey Mbugua Ithibu* (2014) eKLR, *RKM -vs- Attorney General & Kenya National Examinations Council* [2019] eKLR and *Kenya National Examinations Council -vs- Republic & 2 others* [2019] eKLR. He contended that he has as a result suffered severe mental anguish, psychological torture, depression, deprivation of peace of mind, sadness and the unreasonable wastage of his time, energy and limited resources.

28. It is his submission that the 1st Respondent's actions have infringed on his inalienable right to a name of his choice, denied him his right to a livelihood, violated his constitutional rights under Articles 27, 28, 29 (d), 35 (2), 43 (1) (f), 46 (1) (a), 47 (1) and 55 (c) and breached Article 21, 24, 46, 47 and 232 of the Constitution, Section 4(1) of the *Fair Administrative Action Act*, 2015 and Section 13(1) of the *Access to Information Act*, 2016

29. As regards the 2nd Respondent, the Petitioner reiterated the fact that it participated in furthering his woes despite the expectation that it would alleviate his predicament in violation of his constitutional rights under Articles 46 (1) (a), 47 (1) and 50 (1) 48, 59 (2) (i) and (j), 159 (2) (a) and (b) and 232 of the Constitution, Section 58 of the Interpretation and General Provisions Act, Section 4(1) of the *Fair Administrative Action Act*, 2015 and Section 7(d), 8(b), 8(g) and 43 of the *Commission on Administrative Justice Act*, 2011. To that end, reliance was sought in the decision in *RKM v Attorney General & Kenya National Examinations Council* [2019] eKLR where it was found: -

> .... it is my view that since the minor Applicant changed his name through a deed poll which is a legally recognized method, it is not the business of state agencies to select names for Kenyan citizens. Therefore, the reason advanced by the Respondents for the 2nd Respondent's failure to effectuate that decision is not a legitimate reason for denying the

> Applicant's request. The Respondents have not cited to me any legal provision that expressly bars the 2nd Respondent from effecting the minor's change of name. There mere fact that the provisions deal with correction of errors does not necessarily limit the enjoyment of the minor's rights guaranteed by the Constitution.

30. In buttressing violation of fair administrative actions under Article 47 of the Constitution the Petitioner relied on the decision in *Republic v Kenya School of Law & Another Ex-Parte Kithinji Maseka Semo & Another [2019] eKLR*. He submitted that the conduct of the 1st Respondent was illegal and it failed the test of lawfulness, reasonableness and fairness.

31. To further demonstrate violation of Article 47 of the Constitution reliance was placed on the decision in *Legeus Lomosi Mudegu v Kenyatta University [2020] eKLR* where it was observed that: -

> Article 47(1) of the Constitution provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The words expeditious and efficient almost mean the same thing. In using the words in the Article, the drafters of the Constitution wanted administrative action to be undertaken without waste of time, money and energy. Administrative action therefore needs to be carried out without undue delay.

32. With respect to the right to equality before the law and non-discrimination, the Petitioner submitted that the Orders of the Court directing amendment in names of a person in KCSE Certificate in *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR* that were upheld by the Court of Appeal in *Kenya National Examinations Council v Republic & 2 others [2019] eKLR* were not applied in his case thereby discriminating against him.

33. In submitting on the violation of the right to livelihood under Article 43(1)(f) of the Constitution the Petitioner argued that the Petitioner is entitled to the fruits of his education and the right of academic progression which include the right to access and secure formal employment by use of his academic certificates and qualifications.

34. To buttress the foregoing, the Petitioner relied on *Martha Kerubo Moracha v University of Nairobi [2021] eKLR* where it was observed: -

> ... I echo the position that unless one is lawfully deprived of the right to livelihood, that deprivation offends the right to life and the right to protection of one's human dignity.

35. The Petitioner further submitted that his right to inherent dignity under Article 28 of the Constitution was violated by the manner in which the 1st Respondents officer reacted to him through telephone conversation.

36. On award of general damages, the Petitioner submitted that this Honourable Court has a duty to ensure that the Respondents herein do not get away with the violation of his constitutional rights. Reliance was placed on the decision in *Albanus Mwasia Mutua vs Republic [2006] eKLR* where it was observed: -

> ... At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place.

37. The Petitioner submitted that an award of Kshs. 10,000,000/= from each Respondent as general damages would be adequate compensation for the violations as well as Kshs. 5,000,000/= as exemplary

damages from each Respondent and Kshs. 5,000,000/= from each Respondent for aggravated damages.

38. The Petitioner referred to *Eunice Nganga -vs- Higher Education Loans Board & 2 others [2020] eKLR* where the Court awarded Kshs. 10 Million, *M W K v Another -vs- Attorney General & 3 others [2017] eKLR* where the Court awarded Kshs. 4 Million, *Rachel Mutheu Ndambuki -vs- Cabinet Secretary, Ministry of Lands and Physical Planning & 2 others [2020] eKLR* where the Court made an award of Kshs. 3.5 Million and *Lucas Omoto Wamari -vs- Attorney General & another [2017] eKLR* where the Court awarded Kshs. 2 Million.

39. Further reliance was placed on the Court of Appeal in *Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR* where the Learned Judges in reference to the decision in *Gitobu Imanyara & 2 others versus Attorney General [2016] eKLR* observed thus: -

> ...the primary purpose of a constitutional remedy is not compensatory or punitive, but it is for purposes of vindicating the rights violated and to prevent or to deter any future infringement. See also *Lucas Omoto Wamari & 2 others [2017] eKLR* for observations inter alia that:
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> > .... mere declaration without any specific award of damages do not vindicate the appellant. Neither do they convey a derogative message regarding the sanctity of the Constitution and the need for protection of fundamental rights and freedoms....

40. In the end, the Petitioner prayed that the Petition be allowed as prayed.

The 1st Respondent's case:

41. The 1st Respondent, the *Kenya National Examinations Council*, is a body corporate with perpetual succession and a common seal established under the *Kenya National Examinations Council Act* No. 29 of 2012. Its core function is to maintain examination standards, conduct national examinations, award certificates, confirm authenticity of certificates, issue replacement certificates or diplomas to candidates or diplomas to candidates in such examinations among others.

42. It opposed the Petition through the Replying Affidavit of Wilson Chelimo, the Deputy Director, Examinations Administration Department in charge of KCSE and KCPE Examinations.

43. He deponed that the 1st Respondent's decision not to replace the Petitioner's Certificate was guided by the fact that it had no provision for altering or changing certificates once issued. He averred that the said change would affect the Councils' archives data and authenticity of certificates under Section 10 of the KNEC Act No 29 of 2012. That, would not be in tandem with the records of the candidates that sat the examinations at a school.

44. He further averred that the Petitioner's request of 22nd December, 2017 was responded to vide their letters dated 18th January, 2018 and 24th March, 2018 and that as per their policy then, the Petitioner was informed of that there was no provision and would not be possible to change of name.

45. He further averred that the primary document guiding the registration of candidates' names was the birth certificate which should have been obtained before the candidate sat for the examination and names can be reviewed upon scrutiny of birth certificate issues before the candidate sat for the examinations where the names requested for appear on the birth certificate.

46. He deposed that the Deed Poll had a prospective effect but could not apply retrospectively to certificates that had been issued many years ago.

47. It was further his case that the 1st Respondent does not originate any information regarding candidates. It only complies with data furnished by various centres/schools and education offices and as such it performed its functions by awarding the Petitioner Certificates as mandated by law.

48. He averred that it was a risk to issue certificates in new names to the Petitioner when his identity could not be verified or substantiated. He asserted that it is only the Registrar of births that could substantiate the identity of the Petitioner.

49. He posited that as a matter of policy it does not effect name changes on certificates nor does it issue duplicate certificates for purposes of avoiding free circulation of idle certificates and forestall fraudulent activities.

50. He averred that allowing candidates to effect changes would make it impossible to authenticate certificates produced to potential employers or other educational institutions or interested parties.

51. He posited that the Council's records date back to 1929 and its system is not configured to allow for issuance of certificates different from those entered upon registration. It was its case that it does not have the funds to change the system.

52. He averred that upon consulting the Attorney General on the issue, the Council was advised to develop a policy on the change of names which is still in progress in liaison with Registrar of Births and Deaths.

53. He posited that the Council acted within the law and did not engage in any activity outside its jurisdiction. He urged the Court to takes into consideration the critical issues raised and the impact that would raise if Petition is allowed without a proper policy and safeguard.

54. In its submissions, the 1st Respondent identified the issues for determination as whether it violated the Petitioners rights under Articles 27, 28, 29(d), 35(2), 43(1)(f), 46(1)(a), 47 and 55 of the Constitution and Section 4(1) of the Fair Administrative Act and Section 13 of the *Access to Information Act*, 2016.

55. The 1st Respondent submitted that its regulations made no provision for change of name on certificates in retrospect. That the only correction it can make is provided for under Rule 20(5) of the KNEC (Management of Examinations) Rules where it may correct information given in the results slip before certificates is issued in instances where it finds that such corrections necessary.

56. It was submitted that under Rule 12(6) of the said Regulations, the names in the birth certificate ought to conform to the names of the replaced certificate.

57. It submitted further that their response to the Petitioner was in accord with the law and consistent with Section 10(d) of the KNEC Act and Rule 20(5) of the KNEC (Management of Examination) Rules of 2015 and Rule 12(6) of KNEC (Confirmation of Examination Results and Issuance) Rules.

58. As regards the award of costs, the 1st Respondent submitted that it had written to the Attorney General and in acting on its guidance, is in the process of developing a policy which will apply to all future applications by members of the public in addressing requests like this.

59. It was his case that none of the Respondents had flouted the law as to warrant the grant of damages either punitive or aggravated damages.

60. The Respondent submitted that it was fair for the Court to give timelines to the 1st Respondent for the development of the policy guidelines. To that end it placed reliance was on the decision in *Centre of Rights for Education and Awareness & 2 Others -vs- Speaker of The National Assembly & 6 Others* where the Court ordered development of the necessary legislation.

61. It was further submitted that the decision in Republic -vs- Kenya National Examinations Council & Another regarding transgender persons was distinguishable from the instant case. In the case the Court relied on Rule 3 of the KNEC (Kenya Certificate of Secondary Examination) Rules 2009, which have been superseded by the Rules of 2015.

62. In accepting jurisdiction under Article 165(d)(ii), the 1st Respondent urged the Court to interpret the Constitution in a manner that promotes its values and principles, advances the rule of law human rights and fundamental freedoms in the Bill of Rights and in a manner that contributes good governance.

63. In the end, it was submitted the 1st Respondent did not act with malice ill intention unconscionably or with lack of good will but instead within the boundaries of the law.

64. The 1st Respondent stated that it would only be constitutional, just and fair that the Court allows the 1st Respondent to develop policy guidelines for the Petitioner and other future requests.

The 2nd Respondent's case:

65. The 2nd Respondent responded to the Petition through the Replying Affidavit of Leonard Ngaluma, the Commission's Secretary.

66. It was his case that the Commission received from the Petitioner a request to review the decision of the 1st Respondent refusing to update his personal information in his Certificate in line with the Deed Poll and National Identity Card.

67. He deponed that the Commission initiated an inquiry into the matter vide its letter dated 9th March, 2018 addressed to the 1st Respondent and that the 1st Respondent responded stating that its query policy does not have a provision for change of name on the Certificates unless there was a material error made at the time of registration.

68. He deponed further that the 1st Respondent requested to be furnished with the Petitioner's Birth certificate.

69. It was his case that the Commission invited the 1st Respondent for a meeting on 24th April, 2018 in a bid to deal with the matter conclusively but when they eventually met, they were unable to agree on the way forward.

70. He deponed further that the Commission was dissatisfied with the outcome of its meeting and wrote to the 1st Respondent stating that it would determine the matter in accordance with Section 14(1) of the *Access to Information Act*, 2016.

71. With respect to the Petitioner's request for change of name on the Birth Certificate, the 2nd Respondent deponed that it noted that the Director, Department of Civil Registration Services informed the Petitioner that name change could only be effected when a child is two years and below and that facts of birth could not be changed via Deep Poll. Upon second request by the Petitioner, the said Director reiterated that Section 14 of *Births and Deaths Registration Act* provides for a two-year period from the date of registration within which the name registered can be altered and since that period had lapsed they were not in a position to change the Petitioner's name.

72. It was deponed that the Commission noted that the change of name in the KCSE certificate could only be dealt with effectively upon effecting change in the Birth Certificate in the first instance. It therefore wrote to the Department of Civil Registration Services requesting for a meeting to resolve the matter.

73. He deponed further that in the meeting, they resolved that the Department of Civil Registration Services would be given time to enable consultation and deliberation on the matter. That information was communicated to the Petitioner in their letter dated 28th November, 2019.

74. He also deponed that the Department of Civil Registration Services informed the Petitioner through the Commission that upon considering the circumstances of the case, it would add the new names to the names already contained the Petitioner's Birth Certificate.

75. He deponed that upon informing the Petitioner of the development, the Petitioner rejected the proposed method of correction of information by the Department of Civil Registration Services. The Commission thereafter advised the Petitioner that the facts of birth as captured in the Birth Certificate could not be substituted as a birth certificate is a historical record.

76. It was his further disposition that upon informing the Petitioner of the foregoing, the Petitioner withdrew his complaint against the 1st Respondent from the Commission.

77. From the foregoing, Mr. Ngaluma deponed that the Commission performed its functions and discharged its mandate of reviewing the decision made on access to information in accordance to Section 21 of *Access to Information Act* 2016.

78. He urged the Court to dismiss the Petition with costs.

79. In their written submissions dated 23rd September, 2021, the 2nd Respondent identified the issues for determination as being whether it violated the Petitioner's right to fair administrative action, whether the Commission had administrative discretion in handling the complaints, whether the Commission was diligent and reasonable in handling the complaint and whether the Petitioner should be awarded damages.

80. While submitting on the first issue it was urged that the Commission strived to efficiently and effectively handle the Petitioner's case by taking the necessary steps and duly notifying the Petitioner accordance to Section 4(1) of the Fair Administrative Actions Act.

81. It was urged that the Petitioner's assertion that the Commission violated Article 47 of the Constitution was baseless. Reliance was placed on *Joseph Mbalu Mutava -vs- Attorney General & Another (2014) eKLR* where it was observed that the requirement of an expeditious hearing in Article 47 of the Constitution must of necessity be read together with the requirement of efficiency of the conduct of administrative action to ensure that no undue prejudice is suffered by any person affected by the said actions. The Court further stated;

    Factors to be taken into account in determining the level of expeditiousness will include the type and complexity of the action being undertaken, and the conduct and diligence of all the parties involved.

82. From the foregoing, the 2nd Respondent submitted that there was no undue delay in handling the Petitioners complaint. It stated that it exercised discretion properly pursuant to Section 21(a) of the *Access to Information Act*.

83. On the award of general and exemplary damages the 2nd Respondent submitted that the proposals for Kshs. 10,000,000/- and Kshs. 5,000,000/= were irrational, unreasonable, unlawful and unconstitutional. It stated that no proof of suffering had been availed to the Court. Reliance was placed in the High Court decision in *MWK -vs- Attorney General & 3 Others* (2017) eKLR.

84. In urging the Court to dismiss the Petition it was stated that the Petitioner had not come to equity with clean hands. To buttress the position, reference was made to the Court of Appeal in *John Njue Nyaga -vs- Nicholas Njiru Nyaga & Another (2013) eKLR*.

85. It was also submitted that the Petitioner was in possession of a Deed Poll and could further his education. As such, his allegation that failure to change his name had deprived him of the right to have an education and employment were untrue.

86. In the end, it was submitted that the Petition was vexatious and abuse of the Court process. The Petitioner prayed that it be dismissed with costs.

Issues for Determination:

87. From the documents filed by the parties, the issues that arise for determination are as follows: -

i. Whether the 1st Respondent's refusal to issue the Petitioner with KCSE & KCPE certificates in his new names violated the Petitioner's constitutional rights under Article 47(1) and 35(2) of the Constitution.

ii. Whether the 2nd Respondents' conduct violated the Petitioner's right under Article 35(2) and Article 47(1) of the Constitution.

iii. Whether the Petitioner is entitled to any reliefs.

88. I will deal with the issues herein below.

Analysis and Determination

i. Whether the 1st Respondent's refusal to issue the Petitioner with KCSE & KCPE certificates in his new names violated the Petitioner's constitutional right under Article 47(1) and 35(2) of the Constitution:

89. Having comprehensively dealt with the parties' cases, I will begin this discussion with a look at the supreme law of the land; the Constitution.

90. Article 2 inter alia declares the Constitution as the supreme law 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.

91. 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.

92. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

> Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

93. Expounding on article 10 of the Constitution, the Court of Appeal in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal No 224 of 2017; [2017] eKLR held that:

> In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.
>
> Consequently, in this appeal, we make a firm determination that article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

94. The petitioner hinged his case on *inter alia* articles 35(2) and 47(1) of the Constitution. Article 35 of the Constitution provides as follows: -

> 35. Access to information
>
> (1) Every citizen has the right of access to—
>
> (a) information held by the State; and
>
> (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
>
> (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
>
> (3) The State shall publish and publicise any important information affecting the nation.

95. Article 47 of the Constitution bestows upon an administrative body several obligations in the following manner: -

> 47. Fair administrative action
>
> (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.

96. The 1st respondent is a creation of the *Kenya National Examinations Council Act*, No. 29 of 2012 (hereinafter referred to as 'the KNEC Act').

97. Its functions are enumerated in section 10(1) of the KNEC Act as under: -

10. Functions of the Council

(1) The functions of the Council shall be to—

(a) set and maintain examination standards, conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels;

(b) award certificates or diplomas to candidates in such examinations; such certificates or diplomas, shall not be withheld from the candidate by any person or institution;

(c) confirm authenticity of certificates or diplomas issued by the Council upon request by the government, public institutions, learning institutions, employers and other interested parties;

(d) issue replacement certificates or diplomas to candidates or diplomas to candidates in such examinations upon acceptable proof of loss of the original;

(e) undertake research on educational assessment;

(f) advise any public institution on the development and use of any system of assessment when requested to do so, and in accordance with such terms and conditions as shall be mutually agreed between the Council and the public institution;

(g) promote the international recognition of qualifications conferred by the Council;

(h) advise the Government on any policy decision that is relevant to, or has implications on, the functions of the Council or the administration of examinations in Kenya;

(i) do anything incidental or conducive to the performance of any of the preceding functions.

98. In order for the 1st respondent to discharge the foregoing functions, section 10(2) of the KNEC Act grants the 1st Respondent the following powers: -

(a) make rules regulating the conduct of examinations and for all purposes incidental thereto;

(b) make rules regulating the confirmation of examination results and for purposes incidental thereto;

(c) make rules regulating the conduct of issuance of replacement certificates or diplomas and for all purposes incidental thereto;

(d) make rules regulating the conduct of issuance of certificates or diplomas and for all purposes incidental thereto;

(e) withhold or cancel the results of candidates involved in examination irregularities or malpractices;

(f) appoint any officer responsible for education or training, including heads of education and training institutions to assist in the administration of examination as may be prescribed by the Council in consultation with the Cabinet Secretary;

(g) equate certificates issued by accredited foreign examining bodies with the qualifications awarded by the Council;

(h) conduct examinations on behalf of foreign states or entities upon request by such states or entities;

(i) conduct academic, technical and other examinations outside Kenya on request;

(j) offer examination services and other advisory services relevant to examinations to private institutions in Kenya upon request by such institution and on such terms as the Council may determine;

(k) invite such body in or outside Kenya, as the Council may consider necessary, to conduct on its behalf, academic, technical and other national examinations within Kenya, or to conduct these examinations jointly with the Council and to award certificates or diplomas to successful candidates in such examinations;

(l) co-operate with such bodies, under paragraph (k), in the performance of its functions;

(m) advise the bodies invited under paragraph (k) upon the adaptation of examinations necessary in Kenya and to assist any such bodies to conduct such examinations;

(n) to align its Regulations on the collection and processing of information which consists of personal data with the Data Protection Act.

99. Section 11 of the KNEC Act makes further provision for the powers of the 1st Respondent. It states as follows: -

The Council shall have all powers necessary for the proper performance of its functions under this Act and in particular, but without prejudice to the generality of the foregoing, it shall have power to—

(a) enter into association with such other bodies or organizations within or outside Kenya as it may consider desirable or appropriate and in furtherance of the purposes for which the Council is established;

(b) offer services to any person, institution or foreign government upon such terms as the Council may from time to time determine; and

(c) undertake any activity necessary for the fulfilment of any of its functions.

100. In order to further enable the 1st respondent fully discharge its duties, section 37 of the KNEC Act makes the provision that allows the Chief Executive Officer to request for information in the following terms: -

> 37. Request for information
>
> (1) The Chief Executive Officer, or an officer deputed in that behalf by the Chief Executive Officer, may, in writing, request any person to furnish the Council with such information or to produce such documents or records as he or she deems necessary and relevant for the performance of the functions of the Council.

101. The 1st Respondent has also developed several subsidiary legislations to aid it in its mandate. One of them is Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009 (hereinafter referred to as 'the KCSE Rules').

102. Rule 9 (3) of the KCSE Rules provides as follows: -

> The Council may at any time withdraw a certificate for amendment or for any other reason where it considers it necessary.

103. In tandem with the provision on withdrawal and amendment of Certificates is section 13 of the *Access to information Act*, No. 31 of 2016. The provision breathed more life to Article 35(2) of the Constitution. It provides as follows: -

At the request of the applicant, a public entity or private body shall within reasonable time, at its own expense, correct, update and annotate any personal information held by it relating to the applicant, which is out of date, inaccurate or incomplete.

104. The issue of change of names and issuance of new certificates by Kenya National Examination Council, the 1st respondent herein, has been severally dealt with by the Courts. In Nairobi High Court Judicial Review Case No 147 of 2013 *Republic vs Kenya National Examinations Council & Another ex parte Audrey Mbugua Ithibu* (2014) eKLR the Court dealt extensively with the subject issue. It then made the follow finding: -

> According to rule 9(3) of the Rules, KNEC may withdraw a certificate for amendment or for any other reason where it considers it necessary. It therefore has the legal backing to comply with the Applicant's request. Where it fails to do so, then this Court can issue an order of *mandamus* to compel it to perform the duty.
>
> Issuance of orders will not affect the rights of any other Kenyan. The applicant has indicated that he is willing to pay a nominal fee for the issuance of a new certificate. The respondents have not demonstrated why the orders the Applicant seek should not be issued. These are orders that will make the applicant feel complete as a human being

105. The above decision of the High Court was appealed against to the Court of Appeal at Nairobi Civil Appeal No 355 of 2014 *Kenya National Examinations Council v Republic & 2 Others* [2019] eKLR. In dismissing the appeal on July 19, 2019, the Court endeavoured a detailed analysis of the duty of Kenya

National Examination Council to effect changes to and issue new certificates and also appropriately countered the argument that the changes were not possible due to lack of a policy framework. The court partly stated as follows: -

> 43. With regard to the power to amend certificates, rule 9(3) as already noted provides that the appellant "may at any time withdraw a certificate for amendment or for any other reason where it considers it necessary". It is therefore open to the appellant either on application or on its own motion to withdraw and amend the certificate where it considers it necessary, subject to good reason. In our view, the appellant was under duty to consider the A's application for amendment of the certificate.
>
> 44. The appellant asserts that its powers of amendment are discretionary and that the court had no authority to order amendment, and further that that by issuing an order of mandamus, the court usurped the appellant's authority and purported to dictate the manner in which that discretion is exercised. It was urged for the appellant that where a matter is left to the discretionary power of an executive arm of government, courts have no authority to interfere with the exercise of that discretion.
>
> 45. Discretion, according to the *Black's Law Dictionary*, 8th Edn, entails "wise conduct and management; cautious discernment; prudence. 2. Individual judgment; the power of free decision making" while Administrative discretion is "a public official's or agency's power to exercise judgment in the discharge of its duties".
>
> There is no doubt, that the powers of the appellant under Rule 9(3) of the regulation to withdraw and amend certificates, "where it considers it necessary" is discretionary. The appellant is right that the court cannot, by an order of mandamus dictate the specific way in such discretion is to be exercised (See *Manyasi vs Gicheru & 3 others* [2009] KLR 687). That is not to say that discretionary power is absolute power and beyond the purview of judicial scrutiny. As already stated, all discretionary power is subject to the doctrine of reasonableness. It must be shown to have been exercised reasonably. See *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation* (above).
>
> 46. Furthermore, under section 7 (2) (k) of the *Fair Administrative Action Act*, a court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.
>
> 57. In effect, lack of policy or legislative framework cannot be a bar for the court to enforce constitutional rights.

106. In *RKM v Attorney General & Kenya National Examinations Council* [2019] eKLR the High Court stated as follows on the same issue: -

> 22. In my view the right to have a name necessarily implies the right to change that name. Therefore, where a person lawfully changes his name, it is only right that the person ought to enjoy the benefits that accrue to him as a result of

that change. To deny a person the benefits that accrue to him as a result of the change of his name, in my view, amounts to the denial of the right under article 53 of the Constitution. This court is constitutionally obliged to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

23. In this case, the respondents have not advanced any hindrance to the reflection of the minor's current names in her certificates save on the ground that the law does not permit the 2nd respondent to do so. Just like Korir, J in Republic vs Kenya National Examination Council & Another ex-parte Audrey Mbugua Ithibu (supra), it is my view that since the minor Applicant changed his name through a deed poll which is a legally recognised method, it is not the business of state agencies to select names for Kenyan citizens. Therefore, the reason advanced by the Respondents for the 2nd respondent's failure to effectuate that decision is not a legitimate reason for denying the applicant's request. The respondents have not cited to me any legal provision that expressly bars the 2nd respondent from effecting the minor's change of name. There mere fact that the provisions deal with correction of errors does not necessarily limit the enjoyment of the minor's rights guaranteed by the Constitution. A declaration that the minor is entitled to a name of her choice and that the 2nd respondent is obligated to effect the changes in the names appearing in the minor's Kenya Certificate of Primary Education Certificate No [....] from MWM to MWM.

107. And, in a case involving the Petitioner herein, the High Court in *Wesley Mdawida Charo v University of Nairobi; Commission on Administrative Justice (Interested Party) [2020] eKLR* stated that: -

> 20. From the above-mentioned Rule 9, the Council is the only approved body that may at any time withdraw a certificate for amendment or for any other reason where it considers it necessary. The petitioner is therefore under duty to liason with (KNEC) to have his KCSE withdrawn and a fresh one if necessary be issued in the names he is proposing. He can therefore armed with changed certificate approach the Respondent with certificate bearing the desired names as this will not only protect the academic integrity, consistency and honesty of academic certificates and degrees issued by the Respondent but it will legally and rightfully transfer the mandate to amend and/or withdraw the certificate to KNEC under rule 9(3) of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009.

108. I believe the foregoing decisions clearly lay down the constitutional and legal position in Kenya on the mandate and duty to recall and re-issue certificates vested upon the 1st respondent by the law. It is of importance to note that the 1st respondent herein was a party in several of the said decisions including the appeal before the Court of Appeal.

109. With such background, the 1st respondent vide its letter dated 22nd September, 2020 sought the advice of the Hon Attorney General on the same issue. In its response dated 12th October, 2020 the Hon Attorney General took the 1st respondent through the constitutional and legal framework on the issue. It also referred to two decisions where the 1st respondent was a party and emphasized what the Courts had repeatedly stated.

110. In categorically rejecting the 1st respondent's contention that it could not effect the change of names by dint of rule 12(3) of *KNEC (Management of Examinations) Rules*, the Hon Attorney General stated as follows: -

> The provision on section 12(3) of KNEC (Management of Examinations) Rules provides that a candidate shall ensure that his name matches the name that appears on the candidate's birth certificate, deed poll or other certificates previously awarded by the Council. This provision applies during the examination and not in the case of a change of name after the certificate has been awarded. Therefore, it cannot serve as a basis for KNEC to fail to replace certificates of individuals who have legally changed their names.

111. It is, therefore, abundantly clear that the 1st Respondent is and has been well aware of the prevailing position on the issue as pronounced by Courts in matters which it also took part. Surprisingly, even the argument of lack of policy framework, which was abundantly relied upon in this matter, was settled by the Court of Appeal in *Kenya National Examinations Council v Republic & 2 Others case* (supra).

112. To me, whereas the 1st Respondent is well aware of what it has repeatedly been decreed to do, it remains adamant to, without any legal justification, not to follow suit.

113. The Petitioner has been requesting the 1st Respondent to effect the name change in vain since 2017. In between that period, the Petitioner has missed at least six graduations at the University of Nairobi courtesy of the 1st Respondent's insistence. Further, the Petitioner has effected changes to his names in all his official documents and status with other Government entities including the immigration department, Kenya Revenue Authority, Independent Electoral and Boundaries Commission, National Transportation and Safety Authority, National Social Security Fund and National Hospital Insurance Fund.

114. As matters stand, the Petitioner has successfully changed his name with all the necessary agencies except the 1st Respondent. As a result, the Petitioner is not able to graduate from the University and worse, he cannot secure any formal engagement since his name in his KCPE and KCSE Certificates is the former name whereas the Petitioner's rest of the official documents bear the new name. That has been the situation since 2017, a period of around 4 years now.

115. It is highly regrettable that the 1st Respondent, which is a public body, would take such a position despite express Court orders, the Constitution and the law which mandates it to effect such changes.

116. Be that as it may, there is no doubt that the refusal by the 1st Respondent to effect the name change for lack of a policy framework contravenes Article 35(2) of the Constitution, Section 13 of the *Access to Information Act*, Section 10(1)(d) of the Kenya National Examinations Act and Rule 9(3) of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009.

117. In will now ascertain if the said decision passes the test in Article 47(1) of the Constitution. I have already reproduced the said provision.

118. In Petition No 342 of 2018, *Martha Kerubo Moracha v University of Nairobi* [2021] eKLR// I had a discussion on article 47 as follows: -

91. 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.

92. 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'.

93. In Civil Appeal 52 of 2014 Judicial Service Commission vs Mbalu Mutava & another [2015] eKLR Court of Appeal addressed itself on the above. 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.

94. 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...

95. 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 it 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...

119. From the foregoing discussion, there is no doubt that the decision not to issue new certificates to reflect the name change is an administrative action. In sum, it is administrative action because it continues to affect 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.

120. There is no doubt that the 1st respondent is legally empowered to issue new certificates. In discharging such a duty, the 1st respondent exercises discretion. As stated by the Court of Appeal in *Kenya National Examinations Council v Republic & 2 others* case (*supra*) '.... That is not to say that discretionary power

is absolute power and beyond the purview of judicial scrutiny. As already stated, all discretionary power is subject to the doctrine of reasonableness. It must be shown to have been exercised reasonably.'

121. In this case, the reason for the 1st respondent not acceding to the petitioner's request is mainly the lack of a policy framework. As pointed out, the issue is already settled against the 1st Respondent by the Court of Appeal in *Kenya National Examinations Council v Republic & 2 others* case (*supra*). For clarity, the appellate Court held that '.... lack of policy or legislative framework cannot be a bar for the Court to enforce constitutional rights.'

122. The reason which the 1st respondent holds in not effecting the changes is hence contrary to the Constitution, the law and express Court orders. To that extent the decision is unlawful. In fact, the otherwise insistence of the 1st respondent against the Courts' decisions on the issue borders on contempt of Court.

123. Therefore, the impugned decision fails the lawfulness test. For this reason alone, the impugned decision is constitutionally infirm.

124. In the end, this Court finds that that the refusal by the 1st Respondent to effect the name change for lack of a policy framework contravenes articles 35(2) and 47(1) of the Constitution, section 13 of the *Access to Information Act*, section 10(1)(d) of the *Kenya National Examinations Act* and rule 9(3) of the *Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009*.

125. The first issue is, hence, answered in the affirmative.

ii. Whether the 2nd respondent's conduct violated the Petitioner's rights under 35(2) and Article 47(1) of the Constitution:

126. The dealings of the 2nd respondent in this matter are well-detailed through the dispositions.

127. In a synopsis, the 2nd respondent's conduct in the petitioner's predicament is a leading example on the principle of constitutionalism. There is evidence on record to show how the 2nd respondent engaged every possible avenue towards settlement of the dispute. It summoned and held meetings with the 1st respondent herein. It even went ahead to seek guidance from the Department of Civil Registration Services on how best to help the Petitioner. Much of the 2nd respondent dealing were well captured in *Wesley Mdawida Charo v. University of Nairobi; Commission on Administrative Justice (Interested Party) case* (*supra*).

128. In the above case, the 2nd respondent herein, which was an interested party therein, made a decision upholding the petitioner's plea. The Petitioner thereafter unsuccessfully sought to enforce that decision in the said proceedings.

129. The 2nd respondent contended that the Petitioner once again engaged it sometimes in 2018 as the issue was not yet sorted out. The 2nd respondent deponed that it undertook various initiatives towards settlement of the matter with the various agencies and kept updating the petitioner. To the utter shock and surprise of the 2nd respondent, the Petitioner then withdrew the complaint it had lodged against the 1st respondent and instead instituted the Petition subject of this judgment where the 2nd respondent was named as a Co-respondent.

130. The petitioner did not deny the enormous efforts by the 2nd respondent in the matter.

131. This court is, hence, at a loss as to why the petitioner sued the 2nd respondent despite the effort it undertook in attending to the complaint laid before it.

132. To say the least, the 2nd respondent's conduct was beyond reproach. As such, the contention that the 2nd respondent violated the petitioner's rights either as alleged or otherwise does not have any legal leg to stand and is for rejection.

133. The second issue now answered in the negative.

iii. Whether the petitioner is entitled to any reliefs:

134. From the above analysis, the Petition has partly succeeded against the 1st respondent and failed as against the 2nd respondent.

135. Apart from seeking declarations and other like orders, the petitioner also sought damages for the violations of his rights.

136. The Court of Appeal dealt with the issue of damages for violations of rights and fundamental freedoms in *Lucas Omoto Wamari v Attorney General & another* [2017] eKLR. This is what the court stated: -

> 38. The trial judge made declarations that the appellant's fundamental rights and freedoms were violated. The question that arises is whether the trial judge awarded any damages in regard to these violations. It was posited that the award of general damages of Kshs. 500,000/= that was made by the trial judge was an all-inclusive figure. Our perusal of the judgment (at paragraph 37 and 38), reveals that the award of Kshs. 500,000/= was in regard to the personal injuries suffered by the appellant from the gun-shot wound, as well as Kshs. 120,000/= for future medical expenses for the same injuries, and Kshs. 53,106/= being special damages incurred as medical expenses again for the same injuries. Except for declining to award exemplary damages, the trial judge did not make any reference to the violations relating to the appellant's fundamental rights and freedoms in his assessment on the issue of damages.
>
> 39. In his prayers in the plaint the appellant not only prayed for declarations but at prayer (vi) & (vii) specifically prayed for general damages for violations of his fundamental rights and freedoms. Mere declarations without any specific award of damages do not vindicate the appellant neither do they convey a deterrent message regarding the sanctity of the Constitution and the need for protection of fundamental rights and freedoms. Therefore, the omission to make a specific award for these violations, was an error that justifies the intervention of this Court. (Emphasis added).

137. The Court of Appeal in Civil Appeal 98 of 2014, *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, also discussed the legal principles guiding the making of awards in instances where violations of rights and fundamental freedoms are proved. The Court remarked that: -

> 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.

138. The application of the rationality and proportionality principle in coming up with awards largely depend on the conduct of the impugned party. In this case that party is the 1st respondent.

139. It is on record that the 1st respondent had previously been decreed by Courts, including the Court of Appeal, not to infringe human rights and fundamental freedoms on the basis of lack of policy framework. Despite such clear orders, the 1st respondent remained adamant and infact vehemently opposed the Petition herein based on the same ground.

140. The 1st respondent, therefore, showed open disregard to the decisions of the High Court and the Court of Appeal. Such conduct is a serious threat to constitutionalism and the rule of law for it contravenes article 10(2)(a) of the Constitution. That is a basis for an award of exemplary damages.

141. This Court has perused various decisions where Courts awarded damages for constitutional violations akin to the position in this matter. They include *Eunice Nganga -vs- Higher Education Loans Board & 2 others* [2020] eKLR where the Court awarded Kshs 10 Million, *M W K v Another -vs- Attorney General & 3 others* [2017] eKLR where the Court awarded Kshs. 4 Million, *Rachel Mutheu Ndambuki -vs- Cabinet Secretary, Ministry of Lands and Physical Planning & 2 others* [2020] eKLR where the Court made an award of Kshs 3.5 Million and *Lucas Omoto Wamari -vs- Attorney General & another* [2017] eKLR where the Court awarded Kshs. 2 Million.

142. Others decisions include *Jennifer Muthoni Njoroge and Others v the Attorney General* [2012] eKLR, in which four of the petitioners were each awarded general damages for amounts ranging between Kshs 1.5 million and Kshs 2 million for violations of rights and in *Benedict Munene Kariuki & 13 others v the Attorney General* High Court Petition No 722 of 2009, where the plaintiffs were each similarly awarded general damages of Kshs 2 million for similar constitutional violations.

143. Having said so, this Court remains alive to the legal position that damages are discretionary.

Disposition:

144. Flowing from these findings and conclusions, the disposition of the Petition dated May 10, 2021 is as follows: -

i. The claim that the 2nd respondent's conduct violated the petitioner's rights under 35(2) and article 47(1) of the Constitution failed and is hereby dismissed.

ii. The claim that the 1st respondent's refusal to issue the petitioner with Kenya Certificate of Secondary Education (KCSE) and Kenya Certificate of Primary Education (KCPE) certificates in his new names violated the petitioner's constitutional rights under articles 35(2) and 47(1) of the Constitution, section 13 of the *Access to Information Act*, section 10(1)(d) of the Kenya National Examinations Act and rule 9(3) of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009 succeeded. The Court declares the impugned decision constitutionally infirm. The impugned decision is hereby quashed.

iii. An order hereby issues compelling the 1st respondent herein to amend its records to reflect the retitioner's change of name from David Wesley Mnyika Mwanyia to Wesley Mdawida

Charo, to recall the petitioner's Kenya Certificate of Secondary Education (KCSE) and Kenya Certificate of Primary Education (KCPE) certificates and to issue the petitioner with new certificates in the name of Wesley Mdawida Charo.

iv. General damages of Kshs 1,500,000/- is hereby awarded to the petitioner as against the 1st respondent for violation of the petitioner's rights.

v. Exemplary damages of Kshs 500,000/= is hereby awarded to the petitioner as against the 1st respondent.

vi. The petitioner shall bear the 2nd respondent's costs of the petition whereas the 1st respondent shall bear the petitioner's costs of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Wesley Mdawida Charo, the Petitioner in person.

Miss. Bisem, Learned Counsel for the 1st Respondent.

Miss. Mricho, Learned Counsel for the 2nd Respondent.

Elizabeth Wanjohi – Court Assistant.