



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CONSTITUTIONAL PETITION NO 9 OF 2020**

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 25,27,28 ,35, 43 (1) (f), 46, 47,55 & 159 OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTIONS 4 AND 6 OF THE FAIR ADMINISTRATIVE  
ACTION ACT, 2015**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTIONS 3 AND 26 (1) (b) OF THE TECHNICAL AND  
VOCATIONAL TRAINING ACT,2013**

**BETWEEN**

**JUMA CHRISTINE OBURA.....PETITIONER**

**VERSUS**

**NAKURU TEACHERS TRAINING COLLEGE.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL EXAMINATION COUNCIL.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. In her Petition dated 14<sup>th</sup> December 2020, the Petitioner sought the following orders:-

**a. An order of Mandamus do issue and directed at the Respondents and compelling them to issue the**

**Petitioner with her certificate for the P1 Teachers Course.**

**b. A declaration that the Respondents are in breach of Articles 10, 19, 20, 21, 22, 23, 25, 27, 28, 35, 43 (1) (f), 46, 47, 55 & 159 of the Constitution in the manner they have handled and treated the Petitioner and that for such violations their actions have been detrimental to the Petitioner's mental health and financial well-being.**

**c. Damages for violation and infringement of the Petitioner's rights under the Constitution.**

**d. Costs of the Petition be borne by the Respondents**

**e. Any other relief as this Court may deem fit**

2. The Petitioner's Written submissions and their bundle of authorities dated 7<sup>th</sup> July 2021 were filed on 22<sup>nd</sup> July 2021 while those of the 1<sup>st</sup> Respondent were dated 13<sup>th</sup> August 2021. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file any Written Submissions save for their Replying Affidavit. Notably, on 24<sup>th</sup> September 2021 the Petitioner indicated to court that they had no dispute with the 3<sup>rd</sup> Respondent and were only proceeding against the 1<sup>st</sup> Respondent but urged the Court to consider the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's response.

3. The Judgment herein is therefore based on the said Written Submissions and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's Replying Affidavit.

**THE PETITIONER'S CASE**

4. The Petitioner's Petition was supported by the Affidavit sworn on 14<sup>th</sup> December 2020 by the Petitioner herself.

5. It was her case that sometime in the year 2010 she undertook a P1 Course which was due for two (2) years and subsequently sat for her examination whose results were never availed and no reasonable explanation was provided by the 1<sup>st</sup> Respondent.

6. She averred further that being desirous of pursuing the same course, at the instance of the 1<sup>st</sup> Respondent, she again undertook the same course in the year 2015. She contended that she again registered for and sat for her final examination in the year 2017 and passed the same.

7. It was her contention that subsequently she cleared with the 1<sup>st</sup> Respondent's requisite department and was issued with a leaving certificate. She stated further that she collected her provisional certificate and/or result slip from the 1<sup>st</sup> Respondent as she awaited the issuance of the Certificate by the 2<sup>nd</sup> Respondent.

8. She asserted that indeed the Certificates were released by the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent collected the said Certificates in which the Petitioner's Certificate was among them.

9. She pointed out that despite the 1<sup>st</sup> Respondent having and or taking custody of the Petitioner's Certificate, it withheld the same without any reasonable explanation to the Petitioner for a period of three (3) years.

10. Despite issuing a demand letter dated 23<sup>rd</sup> November 2020, to the 1<sup>st</sup> Respondent and copied to the 2<sup>nd</sup> Respondent seeking to have her Certificate released to her, no response was received from the Respondents. It was her case that, it was only months after filing the Petition and the 2<sup>nd</sup> Respondent absolving itself from the custody of the said Certificate that the 1<sup>st</sup> Respondent indicated that it was in possession of the same stating that it had been found and/or delivered by an anonymous person.

11. She submitted that it was now an established principle of law that anyone who wished the court to grant a relief for violation of a right or fundamental freedom must plead in a precise manner the constitutional provisions alleged to have been violated, the manner of the violation and the jurisdictional basis for it. In this regard, she relied on the case of **Anarita Karimi Njeru vs Republic (No 1) [1979] KLR 154** where the court held that where a person is seeking redress from the High Court on a matter which involves reference to the Constitution, it is important that he should set out with a reasonable degree of precision, his complaint, the provisions said to be infringed and the manner of the said infringement.

12. The Petitioner illustrated how her rights under Articles 43, 27, 47, 28, 35 and 46 of the Constitution of Kenya 2010

had been infringed and urged the court to grant the orders sought and allow the Petition.

### **THE 1<sup>st</sup> RESPONDENT'S CASE**

13. Zebedi Muga Omodi, the Principal of the 1<sup>st</sup> Respondent, swore a Replying Affidavit on 13<sup>th</sup> April 2021 and filed on 15<sup>th</sup> April 2021.

14. It was the 1<sup>st</sup> Respondent's case that the Petitioner was enrolled as a student in its college in September 2015 to undertake a two (2) year P1 Teachers Course and after sitting for her examination, in 2018, it issued her with a leaving certificate and her result slip which it contended that she could have used pending release of a Certificate by the 2<sup>nd</sup> Respondent.

15. It further stated that about July 2018 it received Certificates for candidates who had done their examinations in the year 2017 and realised that the Petitioner's Certificate was missing when she went to collect the same.

16. It was its contention that owing to the high number of certificates, it was difficult to confirm each and every certificate that was listed in the delivery dispatch note was in the batch. I further, it contended that it could also be possible that the Petitioner might have been issued with the Certificate alongside graduation gown and failed to acknowledge receipt of the same.

17. It was categorical that it informed the Petitioner of the missing Certificate and urged her to be patient as it tried tracing the same. It added that subsequently, when the same could not be found it informed the Petitioner that the 2<sup>nd</sup> Respondent normally issued replacement certificate in the case of a lost or missing original.

18. It asserted that on 10<sup>th</sup> March 2021, a person who refused to identify himself delivered the said Certificate at its Nakuru Office in an unmarked envelope, and she declined to collect it on the ground that there was already a case in court.

19. It blamed the Petitioner for her own misfortune for failing to take measures to mitigate possible loss that she may have suffered due to lack of a certificate as the 2<sup>nd</sup> Respondent would have issued her with a replacement certificate.

20. It stated that the Petition was defective and ought to be dismissed as it alleged infringement of rights in general terms but did not describe the manner in which the rights had been infringed.

21. It further averred that the Petitioner had not demonstrated the gainful opportunities that she had been unable to access as a result of the missing certificate. It added that the Petitioner would have been registered with Teachers Service Commission (TSC) despite the missing certificate since the 2<sup>nd</sup> Respondent issued replacement certificates.

22. It was categorical that it had not violated the rights of the Petitioner and urged this court to dismiss the present Petition.

### **THE 2<sup>nd</sup> AND 3<sup>rd</sup> RESPONDENT'S CASE**

23. Befly Jemurgor Bisem, swore a Replying Affidavit on 12<sup>th</sup> February 2021 and filed on 23<sup>rd</sup> February 2021 on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein.

24. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents averred that the Petitioner sat for the 2017 Primary Teachers Education (PTE) examination and attained an overall result of Credit. They added that the Petitioner was awarded a PTE Certificate Serial Number 0202286 which was printed on 18<sup>th</sup> June 2018 along with the other Certificates for Nakuru Teachers Training College.

25. They were emphatic that the said Certificates were collected on 4<sup>th</sup> July 2020 by the Principal of the 1<sup>st</sup> Respondent.

26. They were categorical that the Petition is therefore unmerited against it since they had performed their obligations.

### **LEGAL ANALYSIS**

27. The Petitioner was not clear if she had abandoned the rest of the Articles alleged to be infringed upon her Petition, however, this Court limited itself to her Submissions.

28. The court carefully considered the Petitioner's Petition, and the affidavit evidence and the respective parties' Written Submissions and the following as the issues that had been placed before it for determination:-

**a. Whether or not the Petitioner's constitutional rights had been infringed upon;**

**b. If so, what reliefs was she entitled to; and**

**c. Who was to bear the costs of this Petition**

29. The court therefore deemed it prudent to address the aforesaid issues under the following distinct heads.

## **I. CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS**

### **A. RIGHT TO EDUCATION**

30. The Petitioner argued that the right to education under Article 43 of the Constitution of Kenya 2010 was not only limited to one being allowed to pursue academic activities but also to have the said pursuit of academics come to a logical conclusion. She contended that it was reasonable that upon accomplishing her training, the certificate would be the conclusive item for realisation of her right to education and the same having been withheld by the 1<sup>st</sup> Respondent for no justifiable reason, amounted to infringement of her right to education.

31. On its part, the 1<sup>st</sup> Respondent argued that despite filing a response to the Petitioner's allegations, the Petitioner did not seek to file a further affidavit in response to the matters raised thus its averments in the Replying Affidavit were uncontroverted. It added that in the Petitioner's Affidavit, there was no shred of evidence of the alleged violations and that in her submissions the Petitioner appeared to focus on only six (6) Articles which meant that she had abandoned the other Articles earlier mentioned in her Petition.

32. The 1<sup>st</sup> Respondent further argued that the Petitioner did not annex evidence to prove that she was a student at the 1<sup>st</sup> Respondent's institution in the year 2010-2015. It added that the Petitioner had been issued with a School leaving Certificate and results slip from the examination council showed that she had successfully completed her training and thus her rights to education were not infringed as alleged.

33. The right to education is one of the pillars to the economic and social rights under Article 43 of the Constitution of Kenya 2010. The Petitioner had completed her P1 Course. This Court was of the considered view that the delay in the issue of Certificate was not a breach of the right to education. The 1<sup>st</sup> Respondent adequately explained that there was a possibility of certificates being misplaced due to the sheer number of certificates it received from the Respondent.

34. This Court had due regard to the case of **Beatrice Wangechi Mwaniki v Kenya Methodist University [2015] eKLR** where the court held:-

**“The delay in the issue of a Degree Certificate is not a breach of the right to education.”**

35. There was therefore no merit in the Petitioner's averment that her fundamental rights were infringed upon. The delay inconvenienced her but caused her no loss. This court observed that the misplacing of the certificate was as a result of human error. As to human is the err, it would be punitive to punish or penalise another for a mistake that was foreseeable in the normal cause of events.

### **B. FREEDOM FROM NON-DISCRIMINATION**

36. The Petitioner had further argued that the 1<sup>st</sup> Respondent having not provided the list of any other students who had their certificates also missing, it meant that she was exclusively subjected to discrimination and her rights under Article 27 (5) of the Constitution were therefore infringed. In this regard she relied on the case of **Andrews vs Law Society of British Columbia [1989] 1 SCR 321** which defined discrimination as a distinction which whether intentional or not but based on grounds relating to personal characteristics of individual or group which has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of Society.

37. The Petitioner students whose Certificates were missing and therefore her right to non-discrimination claimed that there were no other was infringed. She contended that the Respondents had not informed the court why it was only her Certificate that was missing and that the actions of the 1<sup>st</sup> Respondent were therefore tantamount to discrimination

38. On its part, the 1<sup>st</sup> Respondent argued that the Petitioner had not proven that there were other students who had missing certificates and were given different treatment from her and that the case of Andrews vs Law Society of British Columbia (Supra) was not applicable in the circumstances of this case.

39. Article 27 of the Constitution of Kenya embodies the principle of equality and non-discrimination and states as follows:

**“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law...**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”**

**(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**

40. In the case of John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR, the Court stated referring to Article 27 of the Constitution;

**“..it must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law.”**

44. Needless to say, equality includes the full and equal enjoyment of all rights and fundamental freedoms. The import of Article 27 is that human rights and fundamental freedoms are guaranteed to all persons by virtue of being human and must be enjoyed without limitation. It was therefore the considered view of this court that there was not enough proof that the action taken against her was discriminatory or that she was subjected to different treatment from other students.

### **C. RIGHT TO FAIR ADMINISTRATIVE ACTION**

42. The Petitioner invoked Article 47 of the Constitution and argued that it is trite law that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In this respect, she relied on the case of Judicial Service Commission vs Mutava & Another [2015] eKLR where the court held that 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 and that 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.

43. She was categorical that the Respondents never provided her with reasons in writing of the missing certificate and thus her rights under Article 47 were violated.

44. On the other hand, the 1<sup>st</sup> Respondent argued that since the Petitioner asserted that she had been in constant communication with it all along and she was aware that her certificate was being traced meant that the 1<sup>st</sup> Respondent did not violate her right to fair administrative rights.

45. The Petitioner's contention was that the 1<sup>st</sup> Respondent violated her right to fair administrative action as provided for under Article 47 of the Constitution of Kenya 2010 which provides;

**“(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.”**

46. Fair administrative action, as per Article 47 of the Constitution of Kenya 2010, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the right to a fair administrative action.

47. Article 47 of the Constitution codifies every person's right to fair administrative, action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.

48. What this court was required to consider in this Petition was, whether the 1<sup>st</sup> Respondent in arriving at a decision to withhold the Petitioner's Certificate, acted in a manner, that constituted a breach of Article 47.

49. It was not in dispute that the Petitioner undertook all the examinations required by the 1<sup>st</sup> Respondent and successfully completed her programmed course. The 1<sup>st</sup> Respondent did not deny collecting the Certificates from the 2<sup>nd</sup> Respondent. Thus, the 1<sup>st</sup> Respondent delayed in issuing the Petitioner with her Certificate. It was immaterial that it had issued provisional documents to the Petitioner.

50. Having said so, the fact that there was a delay in issuing the Certificate did not mean that there was an unfair administrative action. The understanding of this court is that administrative action is action that result in a decision that could be challenged in court for not adhering to the principle rules of natural justice. It is a process that entails a complaint that is to be heard by an independent, impartial and neutral tribunal. The person against whom the complaint has been made must have adequate notice of when the complaint will be heard and the details of what the complaint entails. There must be no ambush. The complainant must also be given an opportunity to be represented and/or to fully present his case.

51. That was not the position in this matter. There was a lost Certificate but no complaint against the Petitioner. She was not taken through any administrative action that would fall under the provisions of Article 47 of the Constitution of Kenya. The fact that the 2<sup>nd</sup> Respondent printed the Certificates on 18<sup>th</sup> June 2018 and others dispatched on 4<sup>th</sup> July 2020 as was acknowledged by the 1<sup>st</sup> Respondent indicated that the 1<sup>st</sup> Respondent took action to replace the Petitioner's lost certificates. Whereas there appeared to be a dereliction of duty by the 1<sup>st</sup> Respondent as it appeared extremely disorganised in the release of the Certificates to the Petitioners, that cannot by any means fall within the ambit of Article 47 of the Constitution of Kenya.

#### **D. RIGHT TO HUMAN DIGNITY**

52. She invoked Article 28 of the Constitution and cited a South African case of **S vs Makwanyane [18]** where the court pointed out that without dignity human life is substantially diminished. She submitted further that she was subjected to unequal treatment and was emphatic that the right to equality fosters the right to dignity. She pointed out that the demeanor of the Respondents in handling her grievances were not in any way an indication to having respect to her dignity thus infringing her right to dignity.

53. Notably, Article 28 of the Constitution declares that "every person has inherent dignity and the right to have that dignity respected and protected."

54. The right to human dignity was discussed in both **Republic vs. Kenya National Examinations Council & Another, Ex parte Audrey Mbugua Ithibu [2014] eKLR**, and **A.N.N. vs. Attorney-General [2013] eKLR**, where in the latter authority the court said of Article 28, at paragraph 20 –

**"...while it does not define the term dignity or human dignity, the Constitution of Kenya underscores the place of human dignity in the enjoyment of all other human rights. This is in keeping with the international treaties and jurisdictions which place human dignity at the center of, and as the basis for recognition and protection of all human rights."**

55. However, under our Constitution, Article 28, "dignity" is itself a right or obligation with specific content, and not only as a basis for human rights in general, or a catalogue of specific rights such as freedom from torture, slavery or inhuman treatment which are guaranteed in Article 29 of the Constitution of Kenya.

56. For the foregoing reasons, this court was of the considered view that in the context of the Petitioner, it cannot be said that her right to dignity as an independent right, or a derivative right from other rights, can be said to have been infringed by the failure of the 1<sup>st</sup> Respondent to issue her Certificate. The Respondent cannot therefore legally be said to have suffered indignity at the hands of the 1<sup>st</sup> Respondent.

## **E. RIGHT TO ACCESS TO INFORMATION**

57. The Petitioner invoked Article 35 and Section 4 of the Access to Information Act 2016 and argued that her right to have access to information under the said Article was violated. She argued that on several occasions she made attempts to have information regarding her missing and or withheld certificate and through her advocate even wrote to the Respondents seeking information but no response was made instead she was met with abuse or dismissal by the 1<sup>st</sup> Respondent. She was emphatic that the said information was critical to her as it would inform her pursuit to employment and or further studies.

58. On its part, the 1<sup>st</sup> Respondent argued that the fact that the Petitioner was in constant communication with the institution showed that the 1<sup>st</sup> Respondent had not violated her right to access of information.

59. The importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. The Constitution therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access.

60. In that regard, Article 35 of the Constitution provides that;

**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....**

61. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.

62. For purposes of actualizing Article 35, parliament enacted Access to Information Act 2016. Section 4 of the Act which is material, to this petition provides for the procedure to access information. The section provides;

**1) “Subject to this Act and any other written law, every citizen has the right of access to information held by—**

**a) the State; and**

**b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.**

**2) Subject to this Act, every citizen’s right to access information is not affected by—**

**a) any reason the person gives for seeking access; or**

**b) the public entity’s belief as to what are the person’s reasons for seeking access.**

**3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.**

**4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.**

**5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information. [emphasis court]**

63. It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information.

64. This is a right granted by the Constitution and is protected by the same Constitution. In the case of **Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others [2013] eKLR** the Court stated of what the state should bear in mind when considering the request to access information.;

**“State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a)... they cannot escape the constitutional requirement that they provide access to such information as they hold to citizens.”**

65. In the case of **Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016] eKLR**, the Court reaffirmed the position that the Constitution does not limit the right to access information when it stated;

**“...public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information”.**

66. The 1<sup>st</sup> Respondent in its submissions contended, that the Petitioner having been in constant communication with it meant that it did not infringe its right to access of information.

67. The court carefully looked at the annexures that were attached to the Petitioner’s Petition and noted that save for a Demand letter dated 23<sup>rd</sup> November 2020 from her advocates M/s Ogejo, Omboto & Kijala Advocates, she did not attach any other documentation to demonstrate that she had written to the 1<sup>st</sup> Respondent enquiring about the Certificate. This court could only conclude that her requests were verbal.

68. Section 107 of the Evidence Act Cap 80 (Laws of Kenya) provides that:-

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

69. Section 108 of the Evidence Act further stipulates that:-

**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

70. In the absence of any proof that the Petitioner wrote to the 1<sup>st</sup> Respondent seeking information and the 1<sup>st</sup> Respondent failed to respond to the same, this court was not satisfied that the Petitioner’s right to access information from the 1<sup>st</sup> Respondent was violated and her submission in this regard fell by the way side.

## **F. CONSUMER PROTECTION RIGHTS**

71. The Petitioner further submitted that her rights under Article 46 of the Constitution of Kenya were also violated. She argued that it was clear that her relationship with the Respondents gave rise to consumer rights. In that respect, she relied on the case of **SPG (Suing as parents and guardians of students minors schooling at Sabis International School-Runda) vs Directors, Sabis International School-Runda and 3 Others [2020] eKLR** where the court considered the extent to which education has been considered a consumer right.

72. She invoked the Consumer Protection Act No 46 of 2012 which defines a consumer, a consumer agreement and a consumer transaction. She argued that education is a service provider and parties seek the same for various reasons one of them being economic. She added that the withholding of her certificate by the Respondents was contrary to her expectations and disabled her pursuit of her economic ambitions.

73. On the other hand, the 1<sup>st</sup> Respondent argued that the Petitioner had not demonstrated how her rights under Article 46 were violated. It relied on the same authority cited by the Petitioner above, **Sabis International School-Runda vs Directors, Sabis International School-Runda and 3 Others** (supra) and argued that therein the court stated that the core function of a school was imparting education by providing facilities to educate and train pupils. It asserted that the Petitioner had not pleaded that she was dissatisfied with the quality of the educational facilities provided by the 1<sup>st</sup> Respondent. It added that the Petitioner did not complain of inferior quality of training and therefore failed to prove

violation of her consumer rights.

74. Notably, there was no dispute that the Petitioner undertook her studies at the 1<sup>st</sup> Respondent's College in the year 2015-2017. The fact that the 1<sup>st</sup> Respondent provided the Petitioner services brought the dispute herein within the Consumer Protection Act where the court could intervene in the event there was any infringement.

75. This Court had due regard to the case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & Others [2011] eKLR**, where the court stated as follows:-

**“The equitable rule is that if the borrower is in a situation in which he is not a free agent and is not capable of protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so.”**

76. Whereas the facts of the case herein are distinguishable from the facts in the case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others** (Supra), the principle behind it is the court will intervene to protect a party who has little or no bargaining power and is being taken advantage of irrespective of the circumstances that put him in that position. If this was not so, consumer protection would not have been entrenched in the Constitution and Statute.

77. The Petition herein was to a large extent premised on Article 46 of the Constitution of Kenya which provides as follows:-

“46. (1) Consumers have the right—

**(a) to goods and services of reasonable quality;**

**(b) to the information necessary for them to gain full benefit from goods and services;**

**(c) to the protection of their health, safety, and economic interests; and**

**(d) to compensation for loss or injury arising from defects in goods or services.**

**(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.**

**(3) This Article applies to goods and services offered by public entities or private persons.”**

78. The preamble of the Consumer Protection Act, which is the Act of Parliament contemplated under Article 46(2) of the Constitution, provides that the enactment is an “Act of Parliament to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto.”

79. Section 3(1) provides that the Act must be interpreted in a manner that gives effect to the purposes set out in subsection (4“) which is to promote and advance the social and economic welfare of consumers in Kenya by:-

**a. establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;**

**b. reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;**

**c. promoting fair and ethical business practices;**

**d. protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct;**

**e. improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;**

**f. promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;**

**g. providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and**

**h. providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.”**

80. The question this court was being called to determine was whether or not the Petitioner’s consumer rights under Article 46 of the Constitution had been infringed upon. Having noted that the 1<sup>st</sup> Respondent had proffered a plausible explanation why the Petitioner’s Certificate was not issued to her timeously, this court was not convinced that the 1<sup>st</sup> Respondent infringed the Petitioner’s consumer rights.

## **II. RELIEFS**

81. The Petitioner argued that pursuant to Article 22 and 23 of the Constitution of Kenya this court was empowered to grant the reliefs she had sought.

82. She submitted that the *substratum* of the Petition was to have the Respondents compelled to issue her with her P1 Teachers Certificate and the 2<sup>nd</sup> Respondent had so far produced evidence that the same was released to the 1<sup>st</sup> Respondent who alleged that it came to have its custody when it was dropped by an anonymous person and after approximately three (3) years upon collection by its principal.

83. She was emphatic that the 1<sup>st</sup> Respondent continued to be in custody of the said Certificate and urged this court to issue and order the 1<sup>st</sup> Respondent to release it to her forthwith. She urged this court to declare that the Respondents violated her fundamental rights under Article 27, 28, 35, 43, 46 and 47 of the Constitution.

84. She was emphatic that as a result of the violation she had suffered ridicule, economic disadvantages, deterioration of her mental and physical health and she has not been able to obtain a Teachers Service Commission (TSC) number which was very vital for her employment and progress. She was emphatic that she had suffered in a manner that calls for compensation. She urged the court to allow her Petition.

85. On the other hand, the 1<sup>st</sup> Respondent argued that the Petitioner had not demonstrated any violation of rights and therefore was not entitled to the prayers sought. In this respect, it relied on the case of **Anarita Karimi Njeru vs Republic [1979] eKLR** where the court held that the Petitioner should set out precisely that of which he complains and the manner in which they are alleged to be infringed.

86. It further placed reliance on the case of **Charles Muturi Macharia vs Standard Group & 4 Others [2017] eKLR** where the court stated that the practice developed in constitutional matters is to award damages for violation of constitutional rights, but it cannot be overemphasized that this is after there is evidence of the damage.

87. The 1<sup>st</sup> Respondent was categorical that in the instant case there was no evidence of damage or loss that was suffered by the Petitioner as a result of the alleged breaches for which she could be compensated. It added that if at all the Petitioner suffered any loss, she ought to have mitigated any loss suffered. In this regard, it relied on the case of **African Highland Produce Limited vs Jonh Kisorio [2001] eKLR** without laying out the holding it was relying upon therein.

88. The 1<sup>st</sup> Respondent contended that regulation 8 of the confirmation of results and issuance of replacement certificates rules, 2015 (created under the Kenya National Examination Council, Act No 29 of 2012) had provisions allowing the 2<sup>nd</sup> Respondent to issue replacement certificates in the event that an original was lost. It was emphatic that the Petitioner had not demonstrated that she took steps in obtaining the same.

89. Article 23(3) of the Constitution of Kenya empowers this court to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms, one of them being ...an order for compensation

90. What amounts to "appropriate relief" was discussed by the South African Constitutional Court in **Minister of Health & Others vs. Treatment Action Campaign & Others (2002) 5 LRC 216** at page 249 as follows:-

**"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a**

**particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."**

91. Having found that none of the Petitioner's fundamental rights had been infringed upon, this court was not persuaded that the Petitioner was entitled to any reliefs under Article 23(3) of the Constitution of Kenya. She suffered inconveniences but which did not amount to a violation of the Constitution of Kenya which in turn would attract damages. Indeed, damages should only be awarded where there is loss and/or damage as a result of breach. In addition, the Petitioner failed to demonstrate what action that she took to mitigate her loss or the opportunities she lost when she was not in possession of the Certificate.

92. The 1<sup>st</sup> Respondent had requested her to collect the Certificate but she had declined and asked this court to grant an order for mandamus directing the 1<sup>st</sup> Respondent to issue her with her certificate.

93. So as to bring this matter to a logical conclusion and to avoid the tug of war between the 1<sup>st</sup> Respondent and the Petitioner herein, this court found that it was in the best interests to grant the order for mandamus. However, the other prayers were not merited.

### **DISPOSITION**

94. Accordingly, the Petition be and is hereby allowed as against the 1<sup>st</sup> Respondent, in favour of the Petitioner in terms of prayer No (1) only. As the Petition was technically not successful as the 1<sup>st</sup> Respondent had never declined to give the Petitioner her Certificate once it came, each party will bear its own costs of the Appeal herein. The court will not award any costs against the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents against whom this Petition fails as they are Government Institutions and it would be punitive to award costs against a citizen.

95. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

**J. KAMAU**

**JUDGE**