



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.607 OF 2014**

**IN THE MATTER OF ARTICLES 2, 22 AND 23 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 47 AND 50 AND OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTION 41 AND 63 OF THE UNIVERSITIES ACT NO.42 OF 2012**

**AND**

**IN THE MATTER OF SECTION 6(1) (V) (W) (X), (2), (3) AND 9(1) OF THE CHARTER FOR THE TECHNICAL UNIVERSITY OF KENYA**

**BETWEEN**

**CHARLES KAINDO KURIA & 20 OTHERS.....PETITIONERS**

**AND**

**TECHNICAL UNIVERSITY OF KENYA.....RESPONDENT**

**JUDGMENT**

1. The Petitioner filed this petition on 10<sup>th</sup> December 2014 seeking several prayers as set out in the petition simultaneously with a Notice of Motion of even date. The Notice of Motion was dispensed with by way of a consent, that was recorded by both parties dated 16<sup>th</sup> December 2014, where prayers 15(a) (b) and (c) were disposed of, leaving other prayers in the petition for determination being as follows:-

- a) THAT, declaration orders do issue that the rights and freedoms of the petitioners under articles 27, 28, 47 and 50 of the Constitution have been violated.
- b) THAT, an order for compensation do issue and that an inquiry as to the quantum thereof be gone into.
- c) THAT, the Honourable Court grants such further or other orders it deems just, expedient and fair.
- d) THAT, costs be provided to the Petitioners.

2. The Respondent did not file any response to the petition, however it is urged the Respondent is opposed to the petition and proposes to rely on the Replying affidavit sworn by Ruth Kirwa on 15<sup>th</sup> December 2014 and the annexures attached thereto to the petition dated 5<sup>th</sup> June 2018. (I think the Respondent meant the petition dated 10<sup>th</sup> December 2014 as there is no petition dated 5<sup>th</sup> June 2018). The Petitioner on the other hand rely on the petition and the documents accompanying the petition, supporting affidavit of David Mutunga Mwanja sworn on 10<sup>th</sup> December 2014.

**Brief facts of Petitioner's Case**

3. The petitioners herein were students in the Respondent's University pursuing Diploma in Engineering being a three year diploma course which begun in January 2011 ending in December 2014. The petitioners were scheduled to graduate on 16<sup>th</sup> December 2014 but due to the Respondent's commission and/or omission the petitioners ended up graduating on 15<sup>th</sup> December 2016.

#### **Brief facts of the Respondent's Case**

4. The Respondent's case is that the petitioners were part of seventy two (72) students admitted by the Respondent who were pursuing their diploma course in engineering from January 2011. The petitioners took a unit called mathematics which was mandatory and core course subject. It is not in dispute that the students set for their final examination and were set to graduate in December 2014 upon all of them satisfying the conditions set by the University senate before graduating. The Respondent aver that it is unfortunate that the graduation of the petitioners delayed by one year on the basis that the lecturer in charge of teaching the unit "mathematics" picked the answer scripts for the petitioners but failed to return them after marking. That predicament left the Respondent in a condition of confusion since it could not verify whether the petitioners duly passed their examination in order to be allowed to graduate.

5. The Respondent after pursuit of the lecturer concerned, was compelled to institute a criminal case against the said lecturer, one Bramwel Ndeda, in a criminal case No. 5559 of 2014 alongside offering the petitioners another set of examination. The decision to, that effect was arrived at by the University senate, which is constituted of two students from the students Association who sit in every deliberation of the senate amongst other stakeholders.

#### **Analysis and Determination**

6. I have carefully considered the petitioners petition dated 10<sup>th</sup> December 2014, the Respondents' Replying affidavit sworn on 15<sup>th</sup> December 2014, which the Respondent in its submission, claim is the response to the petition, though under paragraph 2 of the aforesaid replying affidavit, it is clear it is a response to the application dated 10<sup>th</sup> December 2014 and not response to the petition. It appears in this petition the Respondent did not file a response. That notwithstanding after considering the pleadings and submissions by counsel, the issues arising for consideration in this petition, with regard to remaining undermined prayers (d) – (f) can be summed up as follows:-

**a) Whether the Respondent violated the petitioners' right to dignity?**

**b) Whether the Respondent violated the Petitioners right to fair administrative action?**

**c) Whether the Petitioners are entitled to damages and costs?**

**A) Whether the Respondent violated the petitioners' right to dignity?**

7. **Under Article 28 of the Constitution**, the constitution protects the right to human dignity. Article 28 on Human rights provides:-

**"Every person has inherent dignity and the right to have that dignity respected and protected."**

8. The petitioners contend that they began their three (3) year diploma course in January 2011 as per annexure ("DMM") of the petitioners bundle of documents on page 10 and 12. That they undertook all examinations required by the Respondent and successfully completed the said programmed course in December 2013 [see annexure ("DMM-2")] on page 23 and 24 of the petitioners list of bundles being confirmation from the Respondent that petitioners had completed their course. The petitioners having completed their diploma academic programmed course with the Respondent qualified for graduation on 16<sup>th</sup> December 2014 (see annexure "DMM-4") on page 40 of the petitioners bundle; however the Respondent unreasonably refused/declined and/or delayed to include the petitioners' names in the graduation list for the graduation ceremony slated for 18<sup>th</sup> December 2014 (see annexure "DMM-5" on page 41 to 52 confirming that graduation was not applicable to the petitioners and "DMM-6" on page 53 to 56 of petitioners bundle of document is a confirmation of convocation of other students in December 2014.

9. The Respondent avers and confirms in paragraph 7 and 8 of their Replying of affidavit, that the petitioners in the year 2012 set for mathematics examination and papers were collected for marking but, one Mr. B. Ndeda, the lecturer in question, failed to return the papers or submit the marking for the students. That by then the Respondent had one (1) year before the petitioners sat for the 3<sup>rd</sup> and final year examinations in May 2013 and the Respondent had 1 year and 6 months before the graduation date on 18<sup>th</sup> December 2014. The Respondent therefore had plenty of time to take the necessary and decisive action to resolve the matter pertaining to petitioners unavailed papers and marks or asking the petitioners to re-sit the paper in question.

10. The Respondent urges that a petitioner who cites a violation of the constitution must by cogent evidence, relate alleged breaches with real, concrete and direct loss and damage or injury arising out of the violation referring to the case of **Anarita Karimi Njeru vs Republic (Nrb).1976-80 KLR.**

It is the Respondent's contention, that the Petitioners right to dignity under Article 28 of the constitution was intact and in no way was it ever violated by the acts of the Respondent herein and that no evidence of loss, damage or injury was led to demonstrate any loss of dignity arising from the Respondent's alleged action.

11. In the case of **Douglas Muturi Nyairo vs University of Nairobi (2018) eKLR** the court held:-

**"The Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, being the foundational values of the Constitution and forming the bedrock upon which the Constitution is**

based. Article 28 of the Constitution provides that every person has inherent dignity and the right to have the dignity respected and protected...

It is therefore evident from the foregoing provisions of the constitution that their purpose is to ensure that persons to whom they apply attain a dignified and reasonable livelihood. Education forms part and parcel of the basis minimums that guarantee not only the dignity of man but also his inalienable right to life. This court is alive to the fact that the reason why most people pursue education is so that they can attain a higher standard of living through the acquisition of better paying jobs, upon graduating, and this must have been the force that drove the petitioner to seek admission in the respondent's university for a post graduate degree course. The petitioner did not however demonstrate, through tangible evidence, that he missed employment opportunities or that his standard of living and dignity was compromised/lowered following the respondent's refusal to release his academic documents to him and on this score, I find that the claim that his right to life was violated was not proved."

12. The petitioners in their petition under paragraph 14.3 content that their inherent dignity and right to have their dignity respected and protected have been violated since they are considered failures by their parents, college mates, community, friends and the society for not graduating at the required time. In the instant petition the Respondent did not file a response to the petition and it would be wrong for the Respondent to purport to rely on a Replying affidavit to an application in response to the petition. The petitioners classmates after seeing the petitioners names missing in the list of grandaunts for December 2014 and their parents having noted the petitioners were not graduating, on due date, they considered them as failures in the society as general for graduating after 5 years for a course that would have taken 3 years. The petitioners classmates, friends and parents would see them as slow and not bright and equate them with failure. I find the petitioners allegations having not been controverted, that they have demonstrated, their inherent dignity and right to have their dignity respected and protected was abrasively violated. I find that this is a lifelong stigma which the petitioners have to live with since the damage already done cannot be undone. This kind of pain and suffering can only be compensated by an award of damages.

#### **B) Whether the Respondent violated the Petitioners right to fair administrative action?**

13. The petitioners contention is, that the Respondent violated the Petitioners' 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."**

14. When the constitutional right is infringed, the court is required to determine whether such infringement is justified in terms of Article 24 of the Constitution, which provides that rights in the Bill of Rights may be limited only in terms of law and only to the extent that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including;

**"(a) the nature of the right or fundamental freedom;**

**(b) The importance of the purpose of the limitation;**

**(c) The nature and extent of the limitation;**

**(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

15. 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.

16. 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.

17. **Section 6 of the Technical University of Kenya Chapter** states;

**"Section 6 – Functions and Objectives of the University.**

**Functions of the university shall be to:**

**(v) Provide programmes, products and services in ways that reflect the principles of equity and social justice.**

**(w) Conduct examinations for, and grant such academic awards as may be provided for in the statutes, and to syndicate examinations for awards at other institutions as may be approved by senate and**

**(x) Facilitate the development and provision of appropriate and accessible academic and other programmes."**

Further **section 63 (3) of the Universities Act No. 42 of 2012** provides that;

**"A university council shall expeditiously dispose of all matters before it and in any event, within 6(six) months."**

**18.** What this court is required to consider in this petition is, whether the Respondent in arriving at a decision to offer the petitioners another chance to sit the unit of mathematics, the Respondent acted in a manner, that constituted a breach of Article 47. In the instant petition, it is not in dispute that the petitioners undertook all the examinations required by the Respondent and successfully completed their programmed course in December 2013 (**annexture "DMM-2"**). The petitioners qualified for graduation on 18<sup>th</sup> December 2014 (**see DMM-4**). The Respondent unreasonably refused/declined and/or delayed to include the petitioners' names in the graduation list for graduation ceremony slated for 18<sup>th</sup> December 2014 (**see "DMM-5"**). The Respondent content the petitioners sat for the mathematics examination paper which was collected for marking but one Mr. Ndeda, the lecturer failed to return the papers or submit the marks for each respective petitioner. The Respondent had sat for mathematic paper in May 2012 in their 2<sup>nd</sup> year of study. The Respondent herein had 1 year before petitioners sat for their 3<sup>rd</sup> and final year examination, in 2013 and also had 1 year and 6 months before the graduation date on 18<sup>th</sup> December 2014. I find that the plaintiff had all the time needed to rectify the situation or take decisive action to dispose and resolve the matter by informing and asking the petitioners to re-sit the paper in view of the situation but the Respondent failed to take expeditious, efficient, lawful, reasonable and procedurally fair action, notwithstanding, that the petitioners right or fundamental freedom had been or was likely to be adversely affected by its administrative action. No reason for petitioners failure to graduate with other candidates was given to them notwithstanding the petitioner's right to be given written reason for the Respondent's action. The Respondent's failure to take any action for a period of 1 year and 6 months, I find, that is inefficient, unreasonable and procedurally unfair in light of Article 47 of the Constitution and section 63(3) of the Universities Act. The criminal charges preferred against the Respondent's lecturer in December 2014 were just after the petitioners' counsel letter was received by the Respondent on 13<sup>th</sup> November 2014 (**DMM-7**) which point to the fact, that the Respondent had no intention of taking any action to ensure the petitioners indeed graduated. This with all due respect, can be described in no other way, than that it is the highest form of deliration of duty by the Respondent which ought not to go unpunished.

**19.** The petitioners herein, had to re-sit the examination after the court's intervention between 5<sup>th</sup> and 6<sup>th</sup> January 2015 as per the court orders of 16<sup>th</sup> December 2014. This forced the petitioners to re-schedule and re-sit a paper they were taught 1 year and 7 months earlier on. It must have been a telling experience for the petitioners. The petitioners nevertheless graduated on 13<sup>th</sup> December 2016, 1 year after the official graduation date. The course intended to have taken 3 years, took 5 years to complete leading to the petitioners loosing lifetime opportunities, as they could not secure the job opportunities as their peers, who undertook other course within the same period. The petitioners could not be absorbed or employed without the academic certificate issued by the Respondent hence they had to wait for over 1 year. The petitioners were punished by the Respondent's commission or omission and through no fault of their own. This is an example of bad experience in life and how sometime life can be unfair and unjust to some people through a fault of others.

**20.** I have no doubt in finding, that the Respondent infringed Article 47 of the Constitution of Kenya 2010 as the Respondent failed to resolve the petitioners issue in time and within 6 months as required by law, for the petitioners to graduate on time; thus 18<sup>th</sup> December 2014. The Respondent should know and was aware by their failure to act expeditiously, the petitioners right and fundamental freedom were likely to be adversely affected by their administrative action but failed to give written reasons for their action as required by Article 47 of the Constitution of Kenya 2010. I note, that the Respondent have not demonstrated to the court, that it gave written reasons to the petitioners informing them the reasons why they were not graduating on 18<sup>th</sup> December 2014. The Respondent's actions are clear violation of Article 47 of the Constitution of Kenya 2010. The petitioners had legitimate expectation, that they would graduate in the year 2014 and contribute to the nation building but this was frustrated by the Respondent's action. I find that the Respondent's action was unjust, unfair, inefficient, unlawful, unreasonable and procedurally unfair and amounts to infringement of Article 47(1) and (2) of the Constitution of Kenya 2010 and also section 63(3) of the Universities Act No.42 of 2012 and Technical University of Kenya charter.

**C) Whether the Petitioners are entitled to damages and costs?**

**21.** The Petitioners content, that having proved that their rights were violated under Article 47 and 28 of the Constitution of Kenya 2010, the High Court has discretion to award relief, including damages under Article 23(2) of the Constitution 2010. The Respondent on the other hand contends that the petitioners are not entitled to an award of damages in view of the fact, that they have not established the grounds or injury that would entitle them to damages sought.

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

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

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

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

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

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

25. The petitioners in this petition, have demonstrated to the satisfaction of the court, that they were innocent victims of arbitrary and callous action, perpetrated upon them by the Respondent. The petitioners did not in anything contribute to the delay in their graduation since the duty of administering and marking the examinations fell squarely upon the Respondent and the petitioners are not to blame. The petitioners during the period of awaiting to know their fate, leading and re-siting the examination underwent a lot mental torture, pain, loss and suffering and are in view entitled to damages due to omission on part of the Respondent. The petitioners who should have taken their course for 3 years, took 5 years and graduated 1 year from the time they were supposed to graduate. The petitioners ought to have graduated in 2014. It has been submitted for petitioners Legal Notice No. 197 of Regulation of Wages (*General Amendment Order 2013*) under the Labour Institution Act No. 12 of 2017 read together with section 63(1) and (2) of the said Act, would be applicable. That under Artisan grade I, a sum of Kshs. 1062.60 is payable per day, and if 25 working days is used to calculate it translates to Kshs.26, 585 per month. The petitioners urge that it would have taken some time for some of the petitioners to apply and be employed, and that a period of 7 months would be reasonable in computing damages and sought an award of Kshs.185,955 for each petitioner as adequate compensation.

26. In the case of **Jeseo Waweru Wahome and 42 Others vs Kenya Engineers and Registration Board, Petition Number 149 and 207 of 2011**, Justice Majanja held that:

**"The Petitioners have prayed for declarations, damages and incidental relief, I have already found the ERB is liable for violating the Petitioner's rights. A declaration to that effect will articulate the fact of infringement but this alone will not soothe the Petitioners whose rights have been violated. I will now consider the nature of relief that I should frame to give full effect to the Petitioners rights."**

27. In the instant petition, I have found the Respondent liable for violating the petitioners' right. The declaration to that effect no doubt articulate a fact of violation of the petitioners right but that will not be enough for petitioners, whose rights have been infringed. I find that the petitioners having been shut out of employment for over 1 year due to the Respondent's commission, and or omission and as such the court should consider the nature of relief that should give full effect to petitioners right. I have considered all facts in this case and find that it would have taken about 7 months for petitioners to be employed. I would find 7 months reasonable as sought by the Petitioners in computing damages and 20 working days as jobs are not available always but apply Kshs.1062.60 per day giving Kshs.21252 per month. For 7 months each petitioner would have earned Kshs.148764. I find an award of Kshs.148764 for each petitioner as adequate.

28. The upshot is that the petitioners, have proved their case on a balance of probability and I allow the petition and make the following orders:-

**a) Declaratory orders be and are HEREBY issued that the rights and freedoms of the petitioners under Articles 28 and 47 of the Constitution have been violated.**

**b) An order be and is HEREBY issued granting each of the petitioners herein an award of Kshs.148,764/- as compensation for violation of their bill of rights under Articles 28 and 47 of the Constitution.**

**c) Costs of the petition to the petitioners to be paid by the Respondent.**

**Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of May, 2019.**

**J .A. MAKAU**

**JUDGE**