



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL REFERENCE NO. 183 OF 2019**

**IN THE MATTER OF: AN APPLICATION UNDER ARTICLES 20, 29(D), 35(2), 47, & 55(A) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA.**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

**PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**1. SAMUEL BARASA**

**2. GEORGE RAY GIANI**

**3. JUSTUS KIPRUTO KORIR**

**4. KERRY KARMBO SHUNGU**

**5. KERIN KASYOKA KALOVWE**

**6. EUNIC NDANU KATAMBU.....PETITIONERS**

**VERSUS**

**1. TECHNICAL UNIVERSITY OF MOMBASA**

**2. VICE CHANCELLOR TECHNICAL UNIVERSITY OF MOMBASA**

**3. OFFICE OF ATTORNEY GENERAL.....RESPONDENTS**

**RULING**

**Petitioners' Case**

1. The 1<sup>st</sup> Petitioner herein, describes himself as a student of the Respondent University. He claims to have enrolled for a course in Journalism and Mass communication in the year 2015 which he completed in April 2019. Copies of his transcripts are exhibited as “**SB1A**” & “**SB1B**.”

2. The 2<sup>nd</sup> Petitioner herein, describes himself as a student of the Respondent University. He claims to have enrolled for a course in Mechanical Engineering in September 2012 which he completed in August 2019. Copies of his transcripts are exhibited as “**GRG1A**” & “**GRG11B**”.

3. The 3<sup>rd</sup> Petitioner herein, describes himself as a student of the Respondent University. He claims to have enrolled for a course in Bachelor of Science in Mechanical Engineering in September 2014 which he completed in 2019. Copies of his transcripts are exhibited as “**JKK1**.”

4. The 4<sup>th</sup> Petitioner herein, describes herself as a student of the Respondent University. She claims to have enrolled for a diploma in Public Relations in the year 2017 which she completed in August 2019. Copies of her transcripts are exhibited as “KKS A.”

5. The 5<sup>th</sup> Petitioner herein, describes herself as a student of the Respondent University. She claims to have enrolled for a diploma in Public Relations in the year 2015 which she completed in April 2019. Copies of her transcripts are exhibited as “KKK1A”.

6. The 6<sup>th</sup> Petitioner herein, describes herself as a student of the Respondent University. She claims to have enrolled for a diploma in Public Relations in September 2017 which he completed in August 2019. Her transcripts are exhibited as “ENK1A”.

7. The Petitioners’ case was that upon successful completion of their various studies, they had a legitimate expectation of graduating which was violated when their names were unjustly omitted from the graduation list.

8. The Petitioners state that it was only through their Counsel on record, that the 1<sup>st</sup> Respondent vide letter date 30<sup>th</sup> October 2019 communicated its reasons for the omission of their names from its graduands list.

***a) The reasons advance in relation to the 1<sup>st</sup> Petitioner was because he never made any follow ups of his position which to him is outrageous as he has done several follow ups and had no outstanding fee arrears.***

***b) The reason advanced for the omission of the 2<sup>nd</sup> Petitioner’s name in the graduands list is failure to submit his attachment records which allegations he denies in toto. Copies of the said attachment records and certificate were attached to his Affidavit in support of the Petition and marked “GRG2”***

***c) The reason advance by the 1<sup>st</sup> Respondent for the omission of the 3<sup>rd</sup> Petitioner’s name in its graduation list is an arrears of Kshs. 2000/=which was to be paid on or before the 11<sup>th</sup> October 2019. The 3<sup>rd</sup> Petitioner denies the said allegations in toto and states that he made his payment on the 11<sup>th</sup> October 2019 but the payment was not reflected in real time until the 14<sup>th</sup> October 2019 because of issues beyond his control at National Bank of Kenya. A copy of the said bundle was attached to his Affidavit in support of the Petition and marked “JKK2”***

***d) The reason advanced by the 1<sup>st</sup> Respondent for the omission of the 4<sup>th</sup> Petitioner’s name in its graduation list is a fee balance of Kshs. 33,000/=which allegation is disputed by the 4<sup>th</sup> Petitioner who claims that she paid her known balance on the 8<sup>th</sup> August 2019 as required by the 2<sup>nd</sup> Respondent. A copy of the said fee statement was attached to her Affidavit in support of the Petition and marked “KKS2”***

***e) The reason advanced by the 1<sup>st</sup> Respondent for the omission of the 5<sup>th</sup> Petitioner’s name in its graduation list is that her student marks have never been presented to its Senate Board of Examination hence not classified. The 5<sup>th</sup> Petitioner disputes the said allegation and avers that she was classified as a credit student and automatically qualifies for graduation. A copy of the said classification list was attached to her Affidavit in support of the Petition and marked “KKK2”***

***f) The reason advanced by the 1<sup>st</sup> Respondent for the omission of the 6<sup>th</sup> Petitioner’s name in its graduation list is that her student marks have never been presented to its Senate Board of Examination hence not classified. The 5<sup>th</sup> Petitioner disputes the said allegation and avers that she was classified as a credit student and automatically qualifies for graduation. A copy of the said classification list was attached to her Affidavit in support of the Petition and marked “ENK2”***

9. The Petitioners further aver that previously, the 1<sup>st</sup> Respondent would release a list of students who had not been classified in order to give the said students an opportunity for corrections before releasing the results of the supplementary and special exams in order to give students time to comply with the notices. However, this was not the case this time round as they were not accorded the Right to a Fair Administrative Action as they were not informed in advance of the decision to omit(not classify) their names from the graduation list 2019, when it is clear that the said decision stands to irreparably damage their lives if not remedied.

10. The Petitioners seek the following reliefs against the 1<sup>st</sup> Respondent:

**a) The 1<sup>st</sup> Respondent and its administration be compelled by a mandatory order to include the names if the petitioners in the 2019 graduation list.**

**b) A declaration that the action of the 1<sup>st</sup> Respondent to unlawfully omitting the names of the petitioners from graduation list is in contravention of Articles 28,29(d),35(2),47 and 55(a) of the Constitution.**

**c) An order of monetary compensation to the petitioners for the constitutional violation of their rights.**

**d) Costs of this Petition be provided for.**

#### **1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Case.**

11. Vide Replying Affidavit sworn on 8<sup>th</sup> November 2019 by **Dr. Gichuhi Paul Njihia** who is the 1<sup>st</sup> Respondent’s Registrar Academic Affairs, the 1<sup>st</sup> Respondent admitted that indeed the Petitioner are its students.

12. He also deposed that the reason the Petitioners are not featuring in the graduation list are as follows;

- i. *failure to satisfy the technical University of Mombasa Academic Policy requirement; and*
- ii. *Failure to satisfy the technical university of Mombasa financial management policy requirements.*
- iii. *Failure to meet the set deadlines/timelines set by the university and duly communicated to the students' fraternity in aid of the preparation for the 2019 graduation.*

13. He further deposed that the aforementioned reasons were well circulated at the University's Notice boards, Technical University of Mombasa website, Students Management Systems Portal, Social Media and through the Student Union Leadership via several memorandums and notices.

**a) The 1<sup>st</sup> memorandum is dated the 7<sup>th</sup> September 2019 and it reminded the students to check if their names were therein.**

**b) A second memorandum dated 30<sup>th</sup> September 2019 was issued which had been updated and reminded prospective graduating student to check if their name appeared on the final graduands list updated and available on their website and**

**c) The last memo was released on the 5<sup>th</sup> October 2019 which required all student to settle all outstanding issues before the 10<sup>th</sup> October 2019 to give ample time to the senate in its special sitting on the 13<sup>th</sup> October 2019 and for final ratification by the full council meeting held on the 14<sup>th</sup> October 2019. Copies of the said memos were attached to his Affidavit in and marked "GPN1" "GPN2" & "GPN3"**

14. He further reiterated the reasons for the omission of the Petitioners from the graduands list as furnished to the Petitioners' Counsel on record vide letter dated 30<sup>th</sup> October 2019 and added that the 2<sup>nd</sup> Petitioner did not pay a pending fee balance of Kshs. 550/= incurred as library fine, he never put in writing reasons why he never collected his attachment log book and an insurance for attachment as per the University Attachment Policy and that his self-made log book confirms that he was never seen by the attachment supervisor during the self-imposed attachment as said booklet is not marked and signed by the supervisor.

15. He added that timelines for compliance were communicated thrice via memorandums and notices which were circulated but the 4<sup>th</sup> Petitioner never sought or made any effort within the timelines to seek assistance to have her account cleared by the finance Office in time for graduation. Further, he averred that the annexures by the 5<sup>th</sup> & 6<sup>th</sup> Petitioner's in support of the Petition were not valid as the lists had not been signed by the 1<sup>st</sup> Respondent's Chairman of Department and Dean of School for presentation to the University's Senate.

16. He submitted that the University complied with Article 47 of the Constitution by providing Notices which gave ample time for compliance and guided the students on who to consult with regard to their pending issues. Hence, they should not be punished for reasons of the failure by a few students to comply with the laid down deadlines. Further, he averred that the failure to be on the final list of graduands will not affect the Petitioners as they can clear their pending issues and be recommended by the University's Senate in its 2021 Graduation list.

### **3<sup>rd</sup> Respondent's Case**

17. Through Grounds of Opposition dated 8<sup>th</sup> November 2019, the 3<sup>rd</sup> Respondent opposes the Petition. The I note that the 3<sup>rd</sup> Respondents grounds are sufficiently captured in the 1<sup>st</sup> & 2<sup>nd</sup> Replying Affidavit dated 8<sup>th</sup> November 2019. Consequently, this Court need not regurgitate the same.

### **Petitioners' Response to the 1<sup>st</sup> & 2<sup>nd</sup> Respondent Reply**

17. In response to the 1<sup>st</sup> Respondent reply vide a Supplementary Affidavit sworn on the 11<sup>th</sup> November 2019, the 1<sup>st</sup> Petitioner avers that he noticed his name was missing on the graduands list on the 17<sup>th</sup> September 2019. He made follow ups and was referred to Madam Lydia, (the 1<sup>st</sup> Respondents Examinations Coordinator) who in turn sorted out his issue and cleared him for graduation.

18. The 2<sup>nd</sup> Petitioner on his part averred that the alleged outstanding balance of kshs. 550/= library fine was an irregular invoice that he had cleared way back on the 26<sup>th</sup> July 2016 when he was invoiced as confirmed by the 1<sup>st</sup> Respondent librarian and his fee statement. He further states that his name was not among the names on the graduation list released on the 17<sup>th</sup> September 2019 because his results were released with the August series examination vide memo dated 30<sup>th</sup> September 2019 but he was classified and his name was on the graduands list at the faculty of engineering which he belongs to.

17. On the issue of attachment, the 2<sup>nd</sup> Petitioner avers that the 1<sup>st</sup> Respondent had run out of attachment log books and the fact the he did not sign against his name on annexure 1c on the Defendant Replying Affidavit does not mean that he was not qualified to graduate.

### **Submissions and Determination**

18. Parties made brief oral submissions in court which I have carefully considered together with the petition. In my view, the following issues arise for determination:

(i) Whether this court in these circumstances can order the listing of the Petitioners to the graduation list for the year 2019.

(ii) Whether the Petitioners' constitutional rights have been violated.

(iii) Whether damages are payable.

19. It is to be noted firstly that, due to the limited time required for a Judgment or Ruling in this matter, it is not possible to write a long Ruling or Judgment.

20. On the first issue raised herein it is the position taken by this Court that it is not the province of courts to dictate to learning institutions who to confer with graduation awards. The learning institutions must have free latitude to determine who among their client students deserve their honoured academic awards. The role of the court would only be necessary where there is credible evidence that such learning institutions are employing underhand or biased tactics to undermine the rights of their client students.

21. In this arrangement, the students and the university each have roles to play. These roles are played within laws and regulations governing learning, examinations and graduation. As an individual, a student must remain keen and vigilant throughout this period so that one individual's mistake does not hamper the performance of the entire university which is responsible for all the other students.

22. The prayers sought in this petition if granted have the propensity to disturb the university's learning, examination and graduation equilibrium, and its plan at this point in time, and so, this court has in mind that unless it is absolutely necessary it is not its duty to meddle in the graduation prerogative arrangements of the Respondents.

23. Having stated that, this Court is still obligated to consider the petition on its merit.

24. The reasons given by the Respondents for failure to list the 6 Petitioners into the graduation list of 2019 can be put into two categories. Category one is that the Petitioners have not complied with academic policy requirement; and category two, failure to comply with financial management requirements.

25. Both of these issues require elaborate presentation of *viva voce* evidence which was not possible herein due to limited time. It is for this reason that instead of making a Judgment in this matter I will issue interim orders pending the Judgment herein which will be arrived at after hearing parties on *viva voce* evidence.

26. It is the finding of this Court and I hold so, that at this point in time this Court is not able to determine or interrogate the academic policy requirements which has caused the Respondent to bar Petitioners No. 1, 2, 5 and 6 from the graduands list for 2019. The Court cannot compel the university to award degree or certificates to students who in the view of the university have not met the academic cut. This matter will be considered in the full *viva voce* hearing of the petition where if the university is found to be in the wrong there would be redress by way of damages.

27. On the other hand, this Court finds, and holds it to be so, that it can issue orders in situations where the university has barred Petitioners on grounds of financial management policy requirements.

28. In this regard Petitioners No. 3 and No. 4 have been barred from graduation on the grounds that they owe the university Kshs. 2,000/= and 33,000/= respectively. Those allegations have been denied by these Petitioners. On his part the 3<sup>rd</sup> Petitioner avers that he made payment of fees on 11<sup>th</sup> October, 2019, the last day for payment. However, the payment was not reflected on his account until 14.10.19 due to factors beyond his control. I have carefully considered this issue. I am satisfied that the 3<sup>rd</sup> Petitioner does not owe the university any money. I am also satisfied that he paid the required fees within the time required by the university. There is no reason why he should be denied the right to graduate.

29. As for the 4<sup>th</sup> Petitioner it is alleged that she owes the university Kshs. 33,000/= in fees, which she disputes, stating that she paid her known balance on 8.8.19 which was Kshs. 10,000/=. There is evidence of this payment.

30. This Court cannot purport to go into issues of account between the parties. However, it is my finding, and I hold, that a disputed fees account, especially where the university appears not to have kept proper account, cannot be a bar to graduation. The fee account can be settled after graduation, given that the 4<sup>th</sup> petitioner totally denies the account.

31. In the upshot, this Court make the following orders:

(i) The 3<sup>rd</sup> and 4<sup>th</sup> Petitioners herein are hereby cleared to graduate during the 2<sup>nd</sup> Respondent's graduation ceremony to be held on 20.11.19.

(ii) Failure to comply with this order the Respondent shall pay the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners Kshs. 500,000/= each being compensation for time wasted. In addition, the Respondents shall not in any way frustrate their right to graduate in the following year.

(iii) Petitioners No. 1, 2, 5 and 6 have not satisfied this Court that they should graduate without clearing the academic issues raised in the response. In that regard they will have to prove their petition in a *viva voce* evidence and claim damages if successful.

(iv) Costs of this application shall be paid to the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners by the Respondents.

(v) The petition to be set down for hearing in the next term.

**Dated, Delivered and Signed at Mombasa this 14<sup>th</sup> day of November, 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Kirui holding brief Wandera for Petitioners

Mr. Omondi holding brief Nguyo for Respondent

Mr. Kaunda Court Assistant