



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 546 OF 2017

GEORGE GICHUHI.....1ST PETITIONER

JOAN NJERI.....2ND PETITIONER

BILHA KIMANI.....3RD PETITIONER

BEATRICE MALONZA.....4TH PETITIONER

MERCY WANJIRU MWANGI.....5TH PETITIONER

LOY LISA MUTHONI.....6TH PETITIONER

VERSUS

CATHOLIC UNIVERSITY OF EASTERN AFRICA.....RESPONDENT

JUDGMENT

1. The Petitioners, *George Gichuhi, Joan Njeri, Bilha Kimani, Beatrice Malonza, Mercy Wanjiru Mwangi* and *Loy Lisa Muthoni* were students of *Catholic University of Eastern Africa*, the respondent, and were at the time of filing this petition waiting to graduate with Bachelor of Law Degrees on 17th November 2017.

2. The petitioners were admitted to the respondent university between 2013 and 2014 to pursue a course in Law pursuant to admission policy guidelines set out in the 2012 University Hand book. The programme was for 4 years consisting of 51 units spread over 8 semesters. The Hand book contained policies, rules, and regulations that bound the petitioners during the course of their study at the respondent university and which the petitioners contend they complied with.

3. The petitioners state that sometime in September 2017, they applied for their transcripts to enable them apply for admission to KSL but on receiving the transcripts, they noticed peculiar entries in those transcripts. According to the petitioners, some units that they had scored F (failed) during the course but had re-taken them had been included in the transcripts and further, that marks scored after re-takes and the lower marks (F) had still been included thus showing lower grades.

4. This, the petitioners contend, made the transcript to show more units than the 56 required depending on the number of units re-taken and all these units were to be taken into account in determining the petitioners' final degree classification, which they argue is contrary to the 2012 university Hand book. They aver that according to the Handbook, the policy on re-takes and upgrades was to the effect that the highest mark would be retained in the academic record and transcripts. They state that their applications to KSL were summarily rejected on grounds that their transcripts were irregular and that their request to the respondent to correct the errors was not addressed.

5. It is the petitioners' case that instead of using the 2012 Policy under which they re-took the examinations, the respondent was using the Policy approved in March 2016 to the petitioners' detriment. They contend that there was no public participation and or their involvement in the changes to or revision of the policy on examination re-takes thus their right to fair administrative action under Article 47(1) of the constitution was violated. They aver that the respondent's decision to include asterisks and average the marks is unfair and was applied retrospectively in breach of clear terms of engagement between them and respondent despite the assurance that the new policy would not apply to them.

6. The petitioners being aggrieved filed a petition dated 1st November 2017 and sought the following reliefs:-

a. A declaration that the Respondent unilateral decision of 11th March 2016 changing the policy on retakes which adversely affects the petitioners without giving them an opportunity to present their views and reservations, contravenes the petitioners' rights to a fair administrative action.

b. A Declaration that the Respondent decision of 12th October 2017 to include asterisks and average the retake/re-sit marks grossly violated the petitioners' rights of legitimate expectation.

c. A declaration that the decisions and subsequent actions of the respondent thus inclusion of asterisks and averaging of retake and upgrade marks which in effect diminishes the final score of the petitioners' grade brazen infringement of the petitioners' consumer rights.

d. A declaration that the petitioners were only subject to the rules, regulations and policies of the CUEA Student Handbook 2012 particularly on retakes and the application of the 2016 revised policies on the was retrospective and unfair.

e. A declaration that the respondent's actions are in breach of its contractual obligation to the petitioners and accordingly the petitioners are entitled to specific performance as set out in the CUEA Student Handbook 2012.

f. An permanent injunction do issue restraining the respondent whether by its employees, servants or agents, or any of them or otherwise howsoever from including asterisks on the final transcripts of the petitioners and averaging retake marks.

g. The Honourable Courts do grant any other or further orders/directions to secure enforcement of the petitioners' fundamental rights as it deems fit.

h. Costs

Response

7. The respondent filed a replying affidavit by **Prof. Kaku Sangary Nokoe**, Deputy Vice Chancellor Academic Affairs and Research, sworn on 15th December 2017 and filed on 18th January 2018 in response to the petition.

8. **Prof. Nokoe** deposed that the petition is a gross abuse of court process; that it is intended to arm-twist the respondent into watering down its high academic grading standards and that the petition and the prayers sought intend to place the court in a position to interfere with academic decision of the respondent pertaining to its standards of education.

9. Further deposition is that the petitioners who were law students at the university graduated on 17th November 2017; that the petitioners had several re-takes in the course of their studies which were subject to the respondent's rules and regulations; that computation of overall grade taking into account all re-takes of passed courses done and use of asterisks to indicate that a course grade had been attained after more than one attempt were introduced in March 2016, after several stakeholders meetings and engagement.

10. According to **Prof Nokoe**, re-takes before 11th March 2016 were guided by the 2012 student Handbook which allowed students to re-take as many units as they could, subject to payment of requisite fees and that the highest marks between the earlier grades and re-take were entered as the final grade. **Prof. Nokoe** deposes that it was later noted that the practice did not give the student's accurate academic performance and grade and was, therefore, replaced in March 2016 with a better averaging system so that upon re-take both the new marks and previous marks would be recorded to give a true picture of the student's progressive performance, a universally accepted practice.

11. **Prof, Nokoe** disputes the petitioners' contention that they were not consulted before the new policy was introduced. He states that the respondent accorded students an opportunity to give their views and that they also were engaged through their representatives before introduction of the policy. He deposes that the policy was to operate prospectively and not retrospectively and would apply only for units re-taken after its introduction in the May – August 2016 trimester.

12. **Prof. Nokoe** further denies the petitioners' contention that they cannot be admitted to KSL due to the nature and format of their transcripts. According to **Prof. Nokoe**, the respondent communicated with KSL and explained the meaning of asterisks and F shown in the grades though F was deleted from the transcripts but it contributed in determining the student's overall grade.

13. He therefore deposes that the impugned policy was adopted after both the university administration and students' representatives' consultations. **Prof Nokoe** states that he personally had a discussion and engagement with the 1st petitioner over the issue which had also been raised in letter dated 8th June 2017 and agreed to the use of asterisks. He denies that there was violation of the petitioners' rights and fundamental freedoms.

Petitioners' submissions

14. **Mr. Manyara**, learned counsel for the petitioners, submitted highlighting their written submissions dated 26th January 2018 and filed in

court on the same day, that the policy adopted on 11th March 2016 was done without consultation. According to learned counsel, the new policy is a departure from the 2012 Handbook where the highest mark was taken but now an average is taken together with introduction of asterisks. Counsel also contends that when the new policy was adopted on 11th March 2016 there was no student representation. He submits therefore that the process of introducing the regulations violated Article 47(1) of the constitution and sections 4 and 5 of the Fair Administrative Action Act.

15. **Mr. Manyara** further contends that although the policy was to take effect in the May – August 2016 trimester, it was applied to examinations done in January 2016 prior to its adoption and refers to annexure “GH1” in the petitioners’ supplementary affidavit sworn on 26th January 2018 and filed in court on the same day. Learned counsel argues that the impugned policy was not intended to apply to the 2013 – 2014 academic year and gave the example of Criminal Law 1 (April 2014) and 202 Evidence 1 done in January – April 2015, re-taken in May/July 2015/2016 to show that the policy was applied retrospectively.

16. According to counsel, when the petitioners were allowed to re-take the units they understood that the 2012 Policy would apply and therefore contends that the policy was applied retrospectively which violated their legitimate expectation. He relies on a number of decisions including ***Oindi Zaipetine & 39 Others v Karatine University & another*** [2015] eKLR on legitimate expectation.

Respondent’s submissions

17. **Mr. Mwangi**, learned counsel for the respondent, submits also highlighting their written submissions dated 6th April 2018 and filed in court on the same day, that the court is being asked to interfere with academic freedom of the respondent; that the respondent is guided by its ethics and traditions which the court should not interfere with and that the court should not micromanage the respondent institution in its internal administrative arrangements. Counsel relies on the case of ***Nyongesa & 4 Others v Egerton University*** [1990] eKLR for this submission.

18. Learned counsel contends that the policy was adopted by the senate on 11th March 2016 and that the primary purpose of grading is to measure students’ achievements of the established learning objectives. **Mr. Mwangi** submits that the respondent previously relied on the students’ 2012 Handbook which was found to encourage discrimination based on the student’s ability to pay and re-sit examinations as many times as one could afford in order to improve grades and that as a result, those who were unable to pay were disadvantaged and remained with the initial grades.

19. Counsel submits that although there was no student representative when the policy was adopted, that did not violate the law. According to learned counsel, students raised issues which were fully addressed. He contends that there is no merit in the petition and urges that it be dismissed.

Determination

20. I have considered this petition, the response and submissions by counsel for the parties. I have also considered the authorities relied on. The issue raised for determination is whether the petitioner’s constitutional rights were violated by the respondent’s decision to introduce the new policy. The gravamen of this petition hinges on the decision by the respondent to change the policy on re-takes of examinations where although a student would re-take examinations several times as long as he/she was to pay, the marks would be averaged and introduction of asterisks, instead of the old policy where the highest marks were taken in determining the student’s grade.

21. The petitioners contend that the changes were introduced without consultation and or their participation hence their right to fair administrative action and hearing were violated contrary to Articles 47(1) and 50(1) of the constitution. The respondent on its part contends that the policy was introduced to remove the element of discrimination where those who are able would re-take examinations several times to better their grades while those unable do not have an equal opportunity.. The respondent further contends that the changes were introduced after consultation with and participation of students and that there was no violation of petitioners’ rights and fundamental freedoms.

22. The petitioners were students at the respondent university and were, at the time of filing this petition, waiting to graduate. The respondent’s mandate as an institution of higher learning is to train students as leaders and professionals in their fields of study. In that case, the respondent university is mandated to develop academic programmes and examination policies it considers best for its students. The policies must not only be fair but also reasonable to all students.

23. The gravamen of this petition as I see it is that because the new policy introduced averaging of marks between re-takes and the initial grades and asterisks on the re-taken units, the petitioners consider the policy unfavourable to them. They argue that the policy was introduced without consultation and participation and view this as a violation of their rights under Articles 47(1) and 50(1) of the constitution.

24. Article 47(1) of the constitution grants every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Sub Article 2 states that where a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action the person to be affected has the right to be given written reasons for the action. On the other hand, Article 50(1) confers on every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

25. Article 47(1) has therefore introduced constitutional mechanisms aimed at ensuring that administrative bodies apply these standards as tools for measuring constitutionality of administrative actions or decisions taken that would have the potential of affecting rights and fundamental freedoms. These constitutional principles have significantly changed the manner of performing and discharging administrative duties and functions our constitutional democracy.

26. In the case of ***Judicial Service Commission v Mbalu Mutava Musyimi***[2015] eKLR the Court of Appeal stated 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”.

27. In *Dry Associates Ltd v Capital Markets Authority and Another*, **Petition No. 328 of 2011 (Unreported)**, the court observed that; *“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law ... but is to be measured against the standards established by the Constitution.*

28. And in the case of *Republic v Kenya Revenue Authority ex parte Lab International Kenya Limited*, [2011]eKLR the Court again observed that, *“The Common law in its evolution has defined the rules of conduct for a public authority taking a public decision, entrusting the overall control-jurisdiction in the hands of the Courts of law; but for Kenya a general competence of the Courts is now no longer confined to the terms of Statute law and subsidiary legislation, but has a fresh underwriting in the Constitution of Kenya, 2010, Article 47 which imposes a duty of fair administrative action and Article 10(2)(c) demands, “good governance, integrity, transparency and accountability.”*

29. In the South African case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1, the Constitutional Court of South Africa stated that;

“... 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...”

30. And as to what amounts to an administrative action, the Court of Appeal opined in *Judicial Service Commission v Mbalu Mutava Musyimi* (supra) that this *“will largely depend on characteristics of the decision, the nature and substance of the decision and the objective it is intended to achieve”*. It observed that *“an administrative action includes an administrative decision which adversely affects or is likely to affect any person made or contemplated to be made by certain public officers, state officers and state organs in the national and county executives pursuant to a power conferred by the Constitution or any written law”*.

31. The principle of fair administrative action in Article 47(1) has introduced the right to both procedural and substantive rights in public administrative decisions both in public and private sectors. An administrative action may be vitiated or tainted at both the procedural or substantive right levels. At the substantive level, the petitioners were to show that the respondent’s actions are unlawful because the respondent did not have power, mandate or authority to take the action it did to formulate the impugned policy which would make the action fail the constitutional test of legality. In this petition that is not the petitioners’ contention. To that extent therefore, there is no doubt as to the legality of the respondent’s action from a substantive level. That the petitioner had power and mandate to formulate the impugned policy is not under challenge hence the respondent acted within its mandate.

32. That then leaves the question of procedural right to fair administrative action as the only issue for determination by this court. Article 47(1) of the constitution demands that an administrative action be expedition, efficient and procedurally fair. In this petition, the petitioners have not alleged that the action complained of was not expeditious. That is, they are not contending that the formulation of the policy took far too long and as a result violated their rights due to the sluggishness. That is not the complaint. The petitioners have also not complained that the action was not efficient as that too would be a ground for faulting the administrative action. Where an administrative action is inefficient a party would have the right to challenge it on that ground and if the court is satisfied that the action was inefficient it can annul it for failure to meet the constitutional standard of efficiency.

33. The only complaint that I perceive in this petition rests on the procedural aspect of the respondent’s action. The petitioners argue that there was no consultation or participation of students before the policy was adopted. The respondent however contends that students were involved and consulted before the policy was adopted on 16th March 2016. The petitioners also contend that the policy was to apply during the May-August 2016 trimester but was applied retrospectively which the respondent has denied.

34. As to whether students were consulted, the petitioners say no and point out to the fact that there was no student representation in the meeting of 16th march 2016 which adopted the policy. That there was no student representative the petitioners have to show that the student representative was required to be present but was absent for reason of not being informed of the said meeting and as a result, the respondent violated a vital provision of the law governing the respondent institution.

35. I have perused the petition as well as the Minutes of 16th March 2016 which adopted the impugned policy. It is true that according to the minutes there was no student representation. That notwithstanding, there is no averment in the petition or deposition in the affidavit that there is a law or regulation that required a students’ representative to be present but which was violated. In that regard, the petitioners’ argument that there was no students’ representative in the meeting of 16th March that adopted the policy is without substance. I say so because the law is clear that the burden of proof is on the party who alleges existence of certain facts to prove such existence.

36. In that respect, section 107(1) of the Evidence Act (Cap 80) provides that; **“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?”** Section 109 of the same Act again provides that **“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence,**

unless it is provided by any law that the proof of that fact shall lie on any particular person.” In this petition, it was the petitioners’ duty to show that the absence of student representative(s) was a deliberate act on the part of the respondent, violated the law and as a result, infringed on their right which they have not succeeded in doing.

37. With regard to the formation of the policy it is my view that the respondent had mandate to formulate the impugned policy as long as it was aimed at strengthening the university’s academic standards and not to punish or humiliate any students. It is not every administrative action by private institutions that courts must intervene lest they be seen as interfering in their internal management affairs and micromanaging their activities thus negating values of university education. Courts will however interfere where there is clear evidence of violation of the constitution, the law or human rights and fundamental freedoms in the Bill of Rights.

38. In the instance, I do not see how the court can fault the respondent for deciding to use asterisks on the students’ transcripts to show that a student re- sat that unit. Neither should the court interfere with the respondent’s decision to average marks for those who re-sat some units having reviewed its policy to allow this action for doing so would clearly amount to interfering with internal mandate of the respondent.

39. I have also perused the petition, the response as well as annexures. The petitioners say that there had been an agreement that asterisk would not be used. This is contained in a letter dated 4th July 2017 from Emmanuel Ole Tome to fellow students suggesting that there had been an engagement with the respondent’s administration over the issue. Although the letter seems to suggest that it had been agreed that asterisk would not be used, the letter is from a student and not the respondent and therefore, is not authoritative and cannot communicate a policy decision. There was need for the respondent herself to communicate change of policy but not a student.

40. Regarding the contention that the policy should not have applied retrospectively there cannot be denial that policy decisions just like laws are prospective and should not apply retrospectively. The policy, the subject of this petition, forms the single most legal instrument that regulates students’ conduct while at the university. It cannot therefore apply to past conduct given the principle of law that laws apply prospectively and not retrospectively.

41. In this respect, the Authors of **Maxwell on the Interpretation of Statutes**, 12th Edition (Sweet & Maxwell 1969) state;

“...no rule of construction is more firmly established than thus - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.”

42. In the case of **Mithilesh Kumari and another v. Prem Behari Khare**, AIR [1989] SC 1 247, the Supreme Court of India stated;

“The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of past transaction, or impair contracts, or impose new duty or attach new disability in respect of past transactions or considerations already passed,...” Every law that impairs or takes away rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive.”

43. And the Supreme Court observed in **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 others**, [2012] eKLR;

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

44. The jurisprudence flowing from the above authorities is that laws operate prospectively and not retrospectively as they may affect rights that could have accrued before the laws or even policy came to be. In that respect, a party who claims that a law or policy has been applied retrospectively has a duty to show that this is the case to enable the court intervene where possible.

45. The petitioners have averred and deposed that the impugned policy was applied retrospectively while the respondent has denied this. Retroactivity is a factual issue which must be proved to the satisfaction of the court. The 1st petitioner has contended that he sat for re-sat examinations in Criminal Law 1 and Evidence before the policy took effect but it has been applied to him. I have perused the affidavit in support of the petition and annexure “GG3.” The transcript only shows the Semesters but not the date the examination was re-taken. The same thing applies to annexure “GG1” in the supplementary affidavit sworn by the same deponent. There was need for the petitioners to adduce empirical evidence to show the actual dates they re-took examinations to enable the court determine whether it was before or after the impugned policy. As the documents stand now, the court is left without concrete evidence on the issue there is no substantial proof of retroactive application of the policy to any of the petitioners.

Legitimate expectation

46. Finally, the petitioners contend that their right to legitimate expectation has been violated. Legitimate expectation implies a situation where a decision maker has made an express promise within its mandate and which may have been relied on by the party. In this regard, legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. (See **President of the Republic of South Africa and others v South Africa Rugby Football Union and Others** 2000(1) SA 1 CC).

47. According to the Supreme Court of Canada, legitimate expectation arises where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. (*See Canada (Attorney General) v Mavi* [2011] SCC 30).

48. And in *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others*, [2014] eKLR the Supreme Court observed that for one to establish a legitimate expectation, there must be an express, clear and unambiguous promise by a public body; the expectation itself must be reasonable; the representation must be one which was competent and lawful for the decision maker to make and that there cannot be a legitimate expectation against a clear provision of the law or the constitution. However, in *South African Veterinary Council & another v Creg Szymanski (Case No. 79/2001)*, the Supreme Court of Appeal of South Africa opined that the law does not protect every expectation but only those that are legitimate

49. Applying the above principles to the present petition, I am unable to discern any express promise made by the respondent that would result into a legitimate expectation in the manner expressed in the above decisions. There was neither a promise nor reliance on such a promise capable of protection by the court.

Conclusion

50. Having given due consideration to this petition, precedent, the constitution and the law, I have come to the conclusion that the petitioners' rights to fair administrative action and fair hearing under Articles 47(1) and 50(1) of the constitution were not violated neither was their legitimate expectation. The petitioners have also not attacked the impugned policy as being unreasonable. Consequently and for those reasons, the petition dated 1st November 2017 is unmeritorious. It is declined and dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 9th day of October 2018

E C MWITA

JUDGE