



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**PETITION NO. 14 OF 2016**

**IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ALLEGED BREACH/INFRINGEMENT OF FUNDAMENTAL RIGHTS & FREEDOMS**

**AND**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 32, 33, 36, 37, 38, 47, 48, 50, 159, 162, 165, 258, 259, CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**1. DANIEL N. OTIENO**

**2. BASIL J ANGAGA.....PETITIONERS**

**AND**

**TECHNICAL UNIVERSITY OF MOMBASA.....RESPONDENT**

**JUDGMENT**

**The Petition**

1. By an amended Petition dated and filed herein on 29<sup>th</sup> April, 2016, the Petitioners Petition this court stating that they are adult Kenyan Males of sound mind, residing at Mombasa within the Republic of Kenya, and are at all times material hereto, students at the Respondent’s campus situate along Tom Mboya Avenue, Mombasa-Kenya. The Respondent is a Public Institution established under the provisions of the Universities **Act of 2012 (Revised in 2013)** and the **Technical University of Mombasa Charter of 2012**, situated along Tom Mboya Avenue, Mombasa-Kenya, and comprised of, among others, the University Council, being the governing body of the University, the Senate, and the University Management Board. The Petitioners state that upon securing admission to the Technical University of Mombasa in **2014** and **2012**, respectively, and upon payment of the relevant subscription Fees, they automatically secured paid-up membership to the Technical University of Mombasa Students’ Organisation (hereinafter referred to as “**TUMSO**”). The Petitioners state that, as members of **TUMSO**, and being aware of the Respondent’s Transition from the Mombasa Polytechnic University College (hereinafter referred to as “**MPUC**”), pursuant to the provisions of the Technical University of Mombasa

(Charter (2012), the then Students Union of Mombasa Polytechnic University College (hereinafter referred to as “**SUMPUC**”), sought recognition of the morphed Union **TUMSO** through the enactment of the new Constitution. The Petitioners state that pursuant to the foregoing, with due participation of all relevant parties including **TUMSO** members and members of the Respondent’s staff, **TUMSO** procured a Draft Constitution in the year **2014**, which Draft has not been ratified to date. The Petitioners further state that upon consultation with the Respondent’s administration, the latter introduced a raft of changes in the Draft Constitution **2014**, culminating in the procurement of **The Proposed Constitution of Technical University of Mombasa Students Organisation, 2016**, (hereinafter referred to as the Proposed Constitution, **TUMSO, 2016**) which proposed Constitution heralds, among others, a significant amendment to the Constitution of the **TUMSO** Executive Council through introduction of a Running Mate for Presidential Candidates contesting **TUMSO** Elections. The Petitioners aver that despite the foregoing, the Proposed Constitution of **TUMSO, 2016**, is yet to be ratified by the **TUMSO** members through a referendum. The Petitioners state that the foregoing notwithstanding, the Respondent has announced plans to schedule a **TUMSO** Elections Exercise, **2016**, to be held at the Respondent’s aforementioned campus on **5/04/2016**, between **8:00am** and **5:00pm, EAT**, and thereafter tallying of results to be conducted at the same venue, which exercise was conducted as scheduled. The Petitioners aver that such an exercise as envisaged hereinabove would amount to perpetuating an illegality, there being no enacted **TUMSO** Constitution to guide such an exercise, with the previous elections of **2013, 2014, 2015**, held under the auspices of invalid Constitutions, the first held under the **SUMPUC** Constitution, **2010**, and the last two under the Draft Constitution of **TUMSO, 2014**, thereby exposing the holders of office under those regimes to harassment by the Respondent as being in office through an illegality. The Petitioners further observe that neither the Draft Constitution **TUMSO, 2014** nor the Proposed Constitution **TUMSO, 2016** adequately safeguard the interests or wellbeing of **TUMSO** members as the two documents are not, as yet, binding Law upon any individual and/or entity. The Petitioners state that despite emphasizing the foregoing to the Respondent and collecting signatures in support of a Petition to that effect, the Respondent remains keen to “*maintain status quo*” to the Petitioners’ obvious detriment, further resorting to threats and acts of harassment/intimidation as regards the Petitioners’ academic well-being. The Petitioners state that unless this Court intervenes with the urgency that the Petition merits, the Respondent shall perpetuate the acts of impunity aforescribed to the Petitioners’ irreversible detriment. The Petitioners state that by virtue of the foregoing Paragraphs, the Respondent has, from the outset, violated the Petitioners’ Fundamentals Rights and Freedoms guaranteed under the following Articles of the Constitution of Kenya, 2010, viz:-

- a) Article 27-Equality and Freedom from Discrimination;
- b) Article 28-Human Dignity;
- c) Article 32-Freedom of Conscience, Religion, Belief and Opinion;
- d) Article 33-Freedom of Expression;
- e) Article 36-Freedom of Association;
- f) Article 37-Freedom of Assembly, Demonstration, Picketing and Petition;
- g) Article 38-Political Rights;
- h) Article 47-Fair Administrative Action;
- i) Article 48-Access to Justice;
- j) Article 50-Fair Hearing, which rights cannot be viewed in isolation from the rights of the signatories to the Petition subject hereof.

2. The Petitioners aver that their Claim to the rights hereinabove is representative of the entire **TUMSO** membership that is too intimidated to appear herein for fear of repercussions, including, but not limited

to, victimization as regards their academic pursuit. The Petitioners state that the illegality subject hereof cannot be sanctioned or rendered lawful by whatever argument. The Petitioners state that despite notification to that effect, the Respondent has failed, refused and/or neglected to right the wrongs complained of herein, thereby necessitating the filing of this Petition.

3. The Petitioners pray and petitions this court for the following orders:

**a) A declaration that the Respondent's acts and/or omissions with regard to attempting to conducting TUMSO Elections, 2016 under the auspices of an ungratified Draft Constitution, as well as subjecting the Petitioners to threats, harassment, and intimidation in that regard, are all unconstitutional, null and void.**

**b) A mandatory injunction do issue compelling the Respondent, its servants, agents, employees, or otherwise whosoever to take necessary steps within twenty-one (21) days of such Order, to facilitate the enactment of the Proposed Constitution of the Technical University of Mombasa Students Organisation (TUMSO) 2016, prior to conducting any TUMSO Elections, and, in any event, the entire exercise of enactment not to exceed sixty (60) days from the date of such Order.**

**c) A permanent injunction do issue restraining the Respondent, its servants, agents, employees, or otherwise whosoever from threatening, harassing, intimidating or howsoever interfering with the Petitioners academic and general well-being with regard to this Petition.**

**d) Costs of the Petition.**

**e) Any other relief the Honourable Court may deem appropriate, fair and just in the circumstances.**

4. The Petition is supported by affidavit of the 1<sup>st</sup> Petitioner sworn on 4<sup>th</sup> April, 2016, and with authority of the 2<sup>nd</sup> Petitioner allowing the 1<sup>st</sup> Petitioner to plead. Also attached to the Petition is a copy of the proposed Constitution of Technical University of Mombasa Students' Organization (**TUMSO**).

### **The Response**

5. The Petition is opposed. The Respondent filed the following affidavits in opposition to the Petition:

(i) Replying affidavit sworn by Juliet Wanyonyi, the Dean of Students on 16<sup>th</sup> June, 2016 and filed on 17<sup>th</sup> June, 2016.

(ii) Replying affidavit sworn by Itumu Wambua, the outgoing speaker of the TUMSO Parliament sworn on 16<sup>th</sup> June, 2016 and filed on 17<sup>th</sup> June, 2016.

(iii) Further affidavit sworn by Juliet Wanyonyi, the Dean of Students on 10<sup>th</sup> August, 2016 and filed on the same day.

6. The Respondent's case is that it plays no active role in the students' politics, and that its role is only limited to facilitation. The Respondent states that it plays no role in the ratification of the TUMSO Constitution because that role vests solely with the Student Organization (TUMSO), through its legally created organs.

7. The Respondent's case is further that the Draft TUMSO was ratified by the Students Parliament and the subject elections were conducted under the new Constitution following its ratification.

### **Submissions**

8. Parties filed submissions which were highlighted orally in court.

The Petitioners' case is that they are students of the Respondent University and members of the Technical University of Mombasa Students' Organisation (hereinafter "TUMSO"). The Petitioners blame the Respondent for conducting TUMSO elections with Draft Constitution which was not ratified. They allege that by conducting the elections with a Draft Constitution, the Respondent has violated their constitutional rights. The Petitioners further allege that the Respondent has threatened, harassed and intimidated them.

9. From the submissions of parties this court raises the following issues for determination.

- (i) Whether the TUMSO elections were done under a proposed constitution.
  - i. Whether this Petition meets the threshold of a constitutional petition;
  - ii. Whether the University plays a role in the political affairs of the students;
  - iii. Whether this Petition is overtaken by events; and
  - iv. Whether the Petitioners have been harassed and threatened by the Respondent.

### **Determination**

10. The threshold of a constitutional petition was set in the case of **ANARITA KARIMI NJERU VS. ATTORNEY GENERAL [1979] KLR 154** to the effect that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat. The Petitioners herein enumerated certain Articles of the Constitution but did not specify how those Articles have been infringed. In the case of **MUMO MATEMU VS. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013], eKLR** the Court of Appeal declined to uphold the petition filed in the High Court on the ground that it was not pleaded with precisions as required in the constitutional petitions and that it did not provide adequate particulars of the claims relating to the alleged violations. The learned Judges of Appeal (Kihara Kariuki, Ouko and Kiage, JJ.A) held as follows:

**“Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle..”**

11. The Petitioners have made general allegations on breach of constitutional provision but without specifying how those Articles have been breached to enable the Respondent respond appropriately. At the centre of the Petition is that elections have been conducted under an illegal and unratified constitution. I think this is the main issue for determination, whether or not the said constitution was ratified. I do not see how Articles 27, 28, 32, 33, 36, 37, 38, 47, 48 and 50 cited by the Applicants come in. Of course the Petitioners are entitled to the rights under those articles. However, it must be show in what respect or in what way the Respondent has abrogated the Petitioners rights to enjoyment of those rights.

### **Whether the University plays a role in the political affairs of the students**

12. The Respondent submitted that it plays no active role in the political affairs of the students and more specifically the enactment of the new constitution. The political affairs of the students are run and managed by the duly elected officials and organs of TUMSO. This body ensures that students' participation is embraced; they get an opportunity to elect their leaders peacefully without the interference of the University's Administration and their views and interest are taken care of. TUMSO had its own organs charged with the enactment of the constitution. Specifically, there was the **Students Constitution Review Committee** which collected students' views and collated them into the Draft Constitution and the **Students Parliament** which allegedly ratified the Constitution. The Respondent's role was limited to facilitating the process such as through the provision of funds and security but not to play an active role as

doing so would amount to meddling in the students' affairs.

Indeed, the Preamble to the TUMSO Constitution marked “**DNO 1**” in the 1<sup>st</sup> Petitioners' Affidavit in support of the Petition provides, *inter alia*, that:

“We the students of the Technical University of Mombasa... Do hereby ADOPT, ENACT and GIVE to ourselves and the future generations this Constitution as the Constitution of the TECHNICAL UNIVERSITY OF MOMBASA STUDENTS' ORGANISATION (TUMSO)...”

13. That Preamble shows that it is the responsibility of the students (including the Petitioners herein) to ratify the Constitution, and not the Respondent. The Petitioners should have sued TUMSO itself and its officials. The ratification of the constitution was the sole mandate of the students, and the same appears to have already taken place. The Respondent, correctly in my view, distinguished the case of **Republic vs. University of Nairobi & Another Ex-Parte Nabiswa Wakenya Moses [2016] eKLR** which the Petitioners have relied upon from the circumstances of this case. In that case, the Constitution of SONU (Student Organization of Nairobi University) provided in Article 26 thereof that the Respondent (University of Nairobi) **had a role** of swearing in elected officials through the Chief Legal Officer or any other person designated by the Senate. This provision gave the University of Nairobi a role to play in the process and failure to play that role warranted the granting of the orders to compel it to do so. In the instant case however, the Constitution (Preamble) puts the role of the enactment of the Constitution upon the students and not on the Respondent. The Respondent cannot be compelled to do that which it is not mandated to do and which in any event has already been procedurally done by the students themselves as required by the law.

#### **Whether this Petition is overtaken by events**

14. The Petition seeks an order that the Respondent be compelled to facilitate the enactment of TUMSO Constitution prior to conducting TUMSO Elections. It seems to me that the prayer has been over taken by events for two reasons: One, the subject elections have already been conducted. The same were conducted on 5<sup>th</sup> April 2016 and there is in place a new student leadership. Compelling the Respondent to enact the Constitution before the elections would therefore be an order in vain. Two, the TUMSO Draft Constitution is no longer in the draft form. The same was presented to TUMSO Executive for discussion and finally tabled before the Students' Parliament and adopted on 10<sup>th</sup> March 2016. (**See the Minutes of Students' Parliament marked as Annexure “JW1” to the Affidavit of JULIET WANYONYI**). The same has therefore been procedurally ratified and an order directed at the Respondent to ratify it or to facilitate its ratification has since been overtaken by events.

15. This court has taken note that none other than the outgoing Speaker of the Students Parliament, MR. ITUMU WAMBUA has sworn an Affidavit to confirm that the TUMSO Constitution was duly adopted by the Students Parliament which also resolved that the same be used to conduct the elections the subject of this Petition. The 2<sup>nd</sup> Petitioner participated in the proceedings that led to the ratification of the TUMSO Constitution as he was part of the Student organs that were involved in and were mandated to ratify the Constitution.

It is not easy to understand how the Petitioners expected the Respondent to turn around and go against what the students, through their recognised institutions, had passed and resolved. Once the students' body ratified the Constitution and resolved to apply it in their elections, the Respondent could not, and indeed had no powers, to go against the decision of the students but only to comply with the same. The ratification was undertaken, not only through a process that the Petitioners themselves participated in, but also through organs that are put in place by the students themselves and are therefore representative of all the students. The Petitioners cannot now seek to disown the constitution or the said elections.

#### **Whether the Petitioners have been harassed and threatened by the Respondent**

16. The Petitioners have sought an order to restrain the Respondent from threatening, harassing, intimidating or howsoever interfering with their academic and general well-being with regard to this

Petition. However, the entire Petition, the Affidavit and documents in support thereof are bereft of even the slightest of allegation, evidence or particulars of the alleged harassment. The Respondent has denied the allegations of harassment. The allegations are made in a sweeping and general manner, with no single demonstration of how the Respondent has harassed or intimidated the Petitioners.

**Final Orders**

17. From the foregoing I am satisfied that the Petition before the court lacks merit. The same is dismissed. Parties to bear own costs.

**Dated, Signed and Delivered in Mombasa this 20<sup>th</sup> day of July, 2017.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

M/s Kaguri holding brief Mutiso for Petitioners

Mr. Oluga for Respondent

Mr. Kaunda Court Assistant