



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 55 OF 2014

IN THE MATTER OF: ARTICLES 2, 10, 19, 20 & 22 OF THE CONSTITUTION OF KENYA,
2010

AND

IN THE MATTER OF: CONTRAVENTION OR THREATENED CONTRAVENTION OF RIGHTS
OR FUNDAMENTAL FREEDOMS UNDERARTICLES 25, 28, 29 (d), 40 (5), 43 (1) (f), 46 (1), 47 (1)
& (2) AND 50 (1) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

BEATRICE WANGECHI MWANIKI.....PETITIONER

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

JUDGMENT

1. In a Petition dated and filed on 15th September, 2014, Beatrice Wangechi Mwaniki (the Petitioner), sued Kenya Methodist University (the Respondent) for allegedly violating her Constitutional rights guaranteed under Articles 25, 28, 29 (d) 40 (5), 43 (1) (f), 46 (1), 47 (1) and (2) and 50 (1) of the Constitution of Kenya, 2010, and therefore sought a declaration –

(a) that the actions and omissions of the Respondent enumerated in the Petition are a violation and/or a threatened violation of the Petitioners fundamental rights and freedoms under Articles 28, 29, 40 (5), 46, 47 and 50 of the Constitution of Kenya

(b) an order of mandamus do issue compelling the Respondent to forthwith release to the Petitioner her Degree Certificate and Original Transcripts as well as all other testimonials as usually awarded by the Respondent herein to its graduands;

(c) general damages for breach of the Petitioner's fundamental rights

(d) Costs of the Petition be awarded to the Petitioner;

2. The Petition was supported by the Affidavits of the Petitioner sworn on 15th September, 2015 and the annexures thereto, the grounds on the face of the Petitioner, the submissions of Mr. Ongele counsel for the Petitioner, and the authorities attached to the counsel's submissions aforesaid dated 16th June 2015 and the Petitioner's further Application sworn on 17th June, 2015 and filed on 18th June, 2015 .

THE PETITIONERS' CASE

3. The Petitioner's case is perhaps best summarized, in the Petitioner's Further Affidavit of 17th June, 2015, and filed on 18th June, 2015. The Petitioner had successfully completed her four year course for the award of Bachelor of Arts Degree First Class Honours, in Counseling. She had visited the Respondent's web-site, and found her name among the graduands. She had hired a gown from the University, she had taken part in the Rehearsals, and was ready to stand out to hear her name ring out for the award of a First Class Honour Degree. She was disappointed.

4. The Petitioner discovered in the course of the rehearsals that her name did not appear in the printed list of the graduands. She was frantic. She sought audience with the Registrar of Academic Affairs of the Respondent's main campus in Meru Town who referred her to the Head of the Counselling Department, who informed her that her name was on the graduation list but could not explain why she did not have a seat reserved for her, the Head of Counselling Department referred her to the Dean, but that the Dean did not give her sufficient audience. The Head of Department assured her that even though she may not participate in the graduation ceremony on the 19th July, 2014, he would **“ensure that I get my Original Certificate and Transcripts after the graduation ceremony.”**

5. Not to be discouraged the Petitioner called the Head of the Counselling Department at the Mombasa Campus of the Respondent. He too was unsuccessful, and was informed that she would not get her Degree Certificate and Transcripts until the next graduation ceremony at an indefinite date in the year 2015.

6. The Petitioner considered that if the Respondent had indicated to her that it was still in the process of preparing **“my Original Degree Certificates and Transcripts, and would not have gone through the agony of retaining the services of an Advocate to prepare the demand letter and ultimately to file the present Petition.”**

7. Reliance was placed upon the case of **Isabel Waithira Njoroge vs. Permanent Secretary, Ministry of State for Internal Administration and Internal security and 4 others [2014] eKLR**, where the Court found that the Respondent had a duty to act expeditiously in accordance with Article 47 (1) of the Constituency –

“47 (1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

8. On the right to dignity, reliance was placed upon the decision of **Korir J in Republic vs. Kenya National Examinations Council & Another, exparte Audrey Mbugua Ithibu [2014] eKLR**.

“Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanization. Each individual has inherent dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution.”

9. In **A.N.N Vs. ATTORNEY-GENERAL [2013]eKLR**, Mumbi J says-

“It is thus apparent that human dignity is the foundation for recognition and protection of human rights, which, as provided in Article 19 (b) 6, “belong to each individual and are not granted by the state” regardless of one's status or position or mental or physical condition. Consequently doing

certain things or acts in relation to a human being, which have the effect of humiliating him or her or subjecting him or her to ridicule is in my view, a violation of the right to dignity protected under Article 28.”

10. For all those reasons Counsel for the Petitioner urged the Court to find that the Petitioner’s rights, guaranteed under the respective articles cited in the Petition were violated or threatened with violation, and that the court should so find, and declare.

THE RESPONDENTS CASE

11. The Petition was however opposed by the Replying Affidavit of James Isaiah Muthee, the Respondent’s Registrar in charge of Academic Affairs sworn 6th November, 2014 and filed on 7th November, 2014.

12. Apart from acknowledging that the Petitioner was a student undertaking a Bachelor of Arts in Counselling Degree Program (paragraph 3), the Respondent also acknowledged that the Petitioner undertook all the courses (paragraph 4), the Petitioner successfully sat and passed all examinations administered by the Respondent, and was at all times certified to proceed to the next year of study (paragraph 5), that the Respondent and its agents on or around 8th July, 2014, certified that the Petitioner had successfully completed the course and was awaiting graduation and conferment of the degree in Bachelor of Arts in Counselling with a First Class Honours, (paragraph 6), and that the Respondent put in motion, the final steps towards the graduation ceremony scheduled to take place on 19th July, 2014 (paragraph 7), and the demand letters of 12th August, 2014 for the release of the Petitioner’s Degree Certificate and original Transcript, or an explanation, the Respondent denies all other claims by the Petitioner.

13. The Respondent blames the Petitioner’s failure to graduate on 19th July, 2014 to the Petitioner’s failure to attend the **MANDATORY REHEARSAL** on 18th July, 2014, which was the **“an appropriate opportunity to make good the missing name of the Petitioner in the list of graduands.”**

14. The Respondent also pleads that it circulated a list of all graduands in its web site www.kemu.ac.ke for about 10 days prior to the graduation ceremony to accord prospective graduands an opportunity to counter-check and confirm that they were indeed listed and if not they approach the university to enable it rectify any anomaly.

15. The Respondent also attributes the failure of the Petitioner to appear in the graduation list, **partially** to inadvertent omission by the officer of the University preparing the graduation list (which is a human error), considering that an officer typing a graduation list of over 2000 students may inadvertently misspell or fail to include some detail.

16. The Respondent also pleads that the failure of the Petitioner to appear in the graduation list was largely occasioned by herself for her failure to confirm from the graduands list in addition to her non-compliance with University regulation as to Mandatory Rehearsal.

17. The Respondent avers that despite the Petitioner’s failure to attend the Mandatory Rehearsal, and the Respondent’s own officers inadvertent omission to include the Petitioner’s name in the graduation list, this did not –

“rob the Petitioner the right to her academic documents prepared and delivered as part of all other graduands of 2014. The decision to award or not to award academic documents is statutory, and is vested in the University Senate by dint of sections 3, 5 (1) (b) of the Universities Act, 2012, and Article 14 (5) (e) (f) (h) of the Respondents Articles (Legal Notice No.130 of 2006).”

18. The Respondent pleads further that at no time did the Senate of the Respondent sit to make a

decision not to graduate the Petitioner or to deny the Petitioner her earned academic award, and any claim otherwise is misplaced. The Respondent was committed at all times to issue the Petitioner with her academic documents, and did so on 24th September 2014 by which time the Petitioner was already in court with this Petition.

19. The Respondent denies any claim of inordinate delay to avail the Petitioner with her academic documents as the preparation of such documents, for all graduands takes between two to six months. The Respondent denies in any manner prejudicing or inconveniencing the Petitioner, particularly as the Petitioner was in possession of the provisional transcripts and a letter of completion of studies from the Respondent which would suffice in any of her intended endeavours while waiting for the preparation and delivery of the final academic documents which resonates with initial documents issued.

20. The Respondents concluded that the Petition has no merit and should be dismissed with costs to the Respondent.

DETERMINATION

21. The Petition herein is premised upon the provisions of Articles 25, 28, 29 (d), 40 (5), 43 (1) (f) 46 (1) (2) and 50 (1) of the Constitution of Kenya, 2010. Both Counsel for the Petitioner filed written submissions in support of their respective cases. As already stated the Petitioner's counsel's Final Submissions dated 16th June, 2015 were filed on 15th June, 2015. The first Petitioner's submissions are compromised in the Certificate of Urgency in support of the Notice of Motion filed with the Petition on 15th September, 2014 which sought an order of mandamus to compel the Respondent to release the degree certificate and all original transcripts for the 1st – 4th year of the study pending the determination of the Petition.

22. The Notice of Motion was marked as settled on 23 – 09 – 2014 as the preparation and issue of the Degree Certificate and Transcripts was complete. The issue remaining for determination in this Petition is therefore whether (1) the Respondent's failure to graduate the Petitioner on 19th July, 2014 was a violation of any of the Petitioner's rights, and (ii) whether the Petitioner is entitled to any damages. I will consider these issues generally in the rest of this Judgment.

23. Modern jurisprudence in Kenya agrees with the original formulation in **EL MANN VS. REPUBLIC [1967] E.A.** that whoever seeks redress from the High Court for alleged violation of the Constitution, must set out with a reasonable degree of precision of that of which he complains of, the provisions said to have been infringed and the manner in which it has been infringed, and where a party is unable to plead with some precision how a right or fundamental freedom has been violated, a court ought not to speculate and make findings on conjuncture.....”

(Bernard Murage vs. Firesave Africa Ltd. and 3 others [2015] eKLR.

24. The Petitioner's claim is specifically premised upon Articles 29 (d), (not to be subjected to torture in any manner whether physical or psychological); Article 28, (the right to dignity), the right to education under Article 43 (1), to consumer protection (Article 46 (1) and the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 2. I will consider each of these claims in turn.

OF THE RIGHT TO CONSUMER PROTECTION

25. To argue that the Respondent is mandated by Article 46 (1) (b) of the Constitution to offer the Petitioner the information necessary for her to gain the full benefit from the education services is not only to pervert the true meaning and purport of the right to consumer protection, but also to miss by a thousand miles, what consumer protection in relation to goods and services means.

26. The Replying Affidavit of the Registrar in charge Academic Affairs of the Respondent and which

avermment the Petitioner never controverted in her Further Affidavit, in response to the said Registrar's Replying Affidavit, states that the Petitioner was already in possession of provisional transcripts which she could use to seek gainful employment or admission to further academic pursuits pending the issue of the Degree Certificate and finally authenticated Transcripts. I say no more on that ground and it fails.

OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION THAT IS EXPEDITIOUS EFFICIENT, LAWFUL, REASONABLE AND PROCEDURALLY FAIR

27. Article 47 (2) of the Constitution provides –

“...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...”

28. In the academic text, S A. De. Smith on **Judicial Review of Administrative Action** (3rd Edition 1973) published by Stevens and Sons Limited, and cited with approval in **JOSEPH MBARU MUTAVA vs. ATTORNEY-GENERAL & ANOTHER [2014] eKLR** explains at paragraph 87 what the term “administrative” means. The authors say -

“...the term administrative refers to broad area of government activity in which the repositories of power may exercise every class of statutory function, and that an administrative act cannot be exactly defined that includes the adoption of a policy, the making and issue of a specific direction and the application of a general use to a particular rule in accordance with the requirements of the policy, expediency or administrative practice.”

29. As to what constitutes fair administrative action, the South African Constitutional Court, while construing section 33 (which is in **pari pasu** with our Article 47 (2)), in the case of the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS Vs. SOUTH AFRICA RUGBY UNION & OTHERS (CCT 16/982000 (1) SAI** said –

“...the principle function of section 33 is to regulate conduct of public administration, and in particular, to ensure that where action taken by the administration affects or threatens individuals, the proceedings followed comply with the Constitutional standards of administrative justice. These standards will of course be informed by the common law principles developed over decades.”

and

“...in determining whether an action is expeditious the context and circumstances in which such action is being undertaken is therefore relevant both in evaluating whether in the circumstances the action was timeous and also in light of any adverse effects on the person affected by the decision. Factors to be taken into account in determining the level of expeditiousness will include the type of and complexity of the action being undertaken and the conduct and diligence of all parties involved.”

30. Having successfully completed her four years study for the award of the Degree of Bachelor of Arts in Counselling, the Petitioner had a legitimate expectation, and was entitled to graduate. That is a right she had painfully earned over the years of assiduous and consistent and hard study to even earn an award of a First Class Honours Degree – which only the very best academically deserve. The question however is whether she was denied through an unfair administrative action of the Respondent. Let us examine the facts.

31. The Petitioner was well aware of the graduation date. She had visited the Respondent's web- site. Her name was in the graduation list. She hired a graduation gown, she informed her family and friends who travelled with her from Mombasa to Meru Campus for graduation. One vital step she missed, and I think also deliberately omitted to mention in her pleadings that she failed to attend the **MANDATORY**

REHEARSAL for the graduation.

32. As explained by the Registrar in-Charge; Academic Affairs of the University, the Rehearsal exercise is not merely a donning exercise for the flipping of capes, and other academic regalia, but is also an opportunity to attend to details such as inadvertent omission of names in a graduation list despite the appearance in the web-site.

33. In addition, for the Petition to establish a breach of Article 47 (2) of the Constitution in relation to the Respondent, the Petitioner needed to show a resolution of the senate of the Respondent University denying her graduation. A Senate of a University is established pursuant to section 35 (1) (b) of the Universities Act 2012, which also provides for the functions of the same Senate.

“35. (1) In addition to the provisions of its Chapter, a University shall establish the following organs of governance or their equivalent –

(a) ...

(b) the Senate which shall be in charge of all academic matters of the University and shall undertake the functions assigned to it in the Chapter of the university.”

34. And Article 14 (5) (2) (f) and (d) of Kemu University Chapter provides as follows-

“ (a) – (d)

(e) receive and approve examination results,

(f) institute, implement and supervise all matters related to academic affairs of the university.

(g)

(h) determined persons qualified to award degrees, diplomas, certificates and other awards”

35. There is no averment or suggestion in the entire proceedings supporting the Petitioner and the Petition itself that the Senate of the Respondent University failed to exercise its functions in relation to the Petitioner. On the contrary, the fact that the Petitioner’s name was included, and appeared in the University web site containing the list of graduands confirms that the Senate of the University did receive and did approve examination results, and did determine the Petitioner as among persons qualified to be awarded degrees, diplomas, certificates and other awards at the graduation ceremony of 19th July 2014.

36. It goes without saying that the Senate had put in place all matters and procedures related to academic affair of the University. There is consequently no basis for the plea of violation of the right to fair administrative action.

OF THE RIGHT TO EDUCATION CONTRARY TO ARTICLE 43 (1) (f) OF THE CONSTITUTION

36. The right to education is one of the pillars to the economic and social rights under Article 43 of the Constitution of Kenya 2010. The Petitioner had completed her tertiary education. She earned the distinction of being found by the Senate of the Respondent University, the qualification to be awarded a First Class Honours Degree in her field of study. She was waiting to be conferred with that Degree. She missed that conferment on the date of the graduation ceremony. There were reasons, the Registrar in-Charge of Academic Affairs has explained fundamentally, the Petitioner herself contributed to her misfortune, she has since received her Degree Certificate and Transcripts, the latter of which she had provisional copies. The preparation of Certificates, takes two to six months, No student receives a certificate on the day results are announced and the bottom-line for most is whether one passed or not,

one is obviously elated if one passed with distinction, like the Petitioner. The delay in the issue of a Degree Certificate is not a breach of the right to education. In the words of Counsel to the Respondents –

“.....the Respondent would not have issued documents which it had not procedurally prepared. As a matter of fact, the Respondent completed preparation of the Petitioner’s documents which the Petitioner received on 24th September, 2014 without any inordinate or unreasonable delay. This was hardly two months from the date of the graduation.”

37. The Petition must fail on this ground as well.

OF THE RIGHT TO PROTECTION OF INTELLECTUAL PROPERTY CONTRARY TO ARTICLE 40 (5) OF THE CONSTITUTION

38. Article 40 (5) of the Constitution of Kenya 2010 says-

“40 (1) – (4)

(5) the State shall support, promote and protect the intellectual property; rights of the people of Kenya.”

39. Counsel for the Petitioner wisely avoided making any submissions on this leg of the Petition, perhaps it dawned on learned Counsel that this was a strange claim or ground. The obligation to support, promote and protect intellectual property rights of the people is a function vested in the State, specifically not any other body. Intellectual property is **the sum total of a group of rights, patents, registered designs, copyright, trade marks, know-how – i.e. any industrial information and techniques likely to assist in the manufacture or processing of goods or materials ...,” an expression of individual skill and experience...”**

40. **Firstly** a Degree Certificate does not fall under any of that group known as intellectual property. **Secondly** there is no doubt that the duty to promote and protect intellectual property is vested in the State. The state is not party to this petition. This ground also fails.

OF FREEDOM AND SECURITY OF THE PERSON

41. Article 29 (d) says –

“29. Every person has the right to freedom and

security of the person which includes the

right not to be –

(a) – (c)

(d) subjected to torture in any manner,

whether physical or psychological.”

42. And one of the rights and fundamental freedoms which shall not be limited is freedom from torture and cruel, inhuman or degrading treatment or punishment (Article 25).

43. There is no doubt that to miss a graduation ceremony and watch your friends and their families celebrate upon the calling out of the names of her fellow graduands is traumatic, but is not torture, whether physical or psychological. Black’s Law Dictionary 9th Edition defines torture as –

“The infliction of intense pain to the body or mind to punish, extract a confession or information,

or to obtain sadistic pleasure.”

44. On the other hand, in **Torture and English Law**, 3, (1982), defines torture as –

“By torture, I mean the infliction of physically founded suffering or the threat immediately to inflict it, where such infliction or threat is intended to elicit, or such infliction is incidental to means adopted to elicit, matter of intelligence or forensic proof and the motive is one of military, civil, or ecclesiastical interest.”

45. However, in **A.K.M.M. VS. E.M.K.K. & 2 OTHERS [2014] ECLR**, the court discussed the provisions of Article 29(d) and while acknowledging the above definition continued at paragraph 14 and said –

“...it (torture) is a deliberate and inhuman treatment causing very serious and cruel suffering. Inhuman treatment is physical and mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”

46. Article 28 of the Constitution declares that **“every person has inherent dignity and the right to have that dignity respected and protected.”**

47. The right to human dignity was discussed in both **REPUBLIC VS. KENYA NATIONAL EXAMINATIONS COUNCIL & ANOTHER, ex parte Audrey Mbugua Ithibu [2014] eCLR**, and **A.N.N. VS. ATTORNEY-GENERAL [2013] eCLR**, where in the latter authority the court said of Article 28, at paragraph 20 –

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

48. Christopher McCrudden writing in the *European Journal of International Law*, Volume 19 page 680, paragraph 4, writes that –

“...dignity is seen as providing the basis of human rights in general, in the sense of providing a key argument as to why humans should have rights, and what the limits of these rights may be. In this sense, dignity is the basis for human rights to exist, and there are thinner and thicker variations of this approach. In the thinnest approach, dignity is viewed as simply another way of expressing the ideas of a catalogue of human rights. Dignity neither adds to, nor detracts from, rather it is coterminous with, human rights and therefore adds little to the debate on what rights there are or how they should be interpreted. Others adopt a somewhat thicker way of dignity, seeing it not as a synonym for human rights but rather as expressing a value unique to itself, on which human rights are built.

...In this thicker view or use the role that dignity plays is primarily to help in identification of a catalogue of specific rights. This catalogue is not closed, however and the general principle may continue to generate more rights over time as its implications are better understood or changes occur which give rise to new situations that require application of the general principle for the first time. More generally however, dignity becomes an interpretive principle to assist the further explanation of the catalogue of rights generated by the principle. Some (or all) of the rights then come to be seen as best interpreted through the lens of dignity.”

49. However, under our Constitution, (Article 28), **“dignity”** is itself a right or obligation with specific content, and not only as a basis for human rights in general, or a catalogue of specific rights (such as

freedom from torture, slavery or inhuman treatment) – (Article 29). Thus in the South African case – **DAWOOD VS. MINISTER OF HOME AFFAIRS**, the South African Constitutional Court said –

“Human dignity... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of human dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity the right to equality or the right not to be subjected to slavery servitude or forced labour.”

50. On the question of the right to bodily integrity, arising out of the Westgate Mall Terrorist Attack, and even before, Kenyans have surrendered their right to bodily integrity, and are searched and frisked by youthful guards, who have no regard to such rights! In the context of the Petitioner, it cannot be said that her right to dignity as an independent (thicker) right, or a derivative right from other (thinner) rights, can be said to have been infringed by her failure to graduate on 19th July, 2014. The reasons have already been explained in the foregoing paragraphs of this Judgment. Even if looked at the thinner concept of human dignity [as argued by Professor Christopher McCrudden. Professor of Human Rights Law, Oxford University, Fellow, Lincoln College Oxford, and Overseas Affiliated Professor, University of Michigan Law School,] the Respondent cannot legally be said to have suffered indignity at the hands of the Respondent’s officers.

OF THE RIGHT TO FAIR HEARING

51. Article 50(1) guarantees 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. Both the Petitioner and the Respondent did not dispute this forum.

52. On the question of general damages, the Petition has fallen woefully short of the Constitutional threshold for the violation of any of the alleged rights of the Petitioner, and has consequently failed to demonstrate why and how general damages should be paid.

53. In my humble view the Petition herein has no legal basis or merit, and has in my humble view been brought for an unreasonable purpose and harassment against the Respondent. The claim for damages fails.

54. Costs usually follow the event. I would spare the Petitioner an order for costs. The precipitate action was more to do with the perception of infringement from the eyes of the legal advisers, and less from the Petitioner who depones at paragraph 9 of her Further Affidavit –

“...had the Respondent indicated to me that it was still in the process of preparing my Original Degree Certificate and Transcripts, I would not have gone through the agony of retaining the services of an Advocate to prepare the demand letter and ultimately to file the present Petition.”

55. Common sense and experience throughout public and private universities show that Degree Certificates are issued after and rarely on the graduation day.

56. For all those reasons, the Petition here is dismissed with an order that each party shall bear its own costs.

Dated, Signed and Delivered in Mombasa this 3rd day of December, 2015

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mrs. Mwangi holding brief Jane Kagwe for Petitioner

No Appearance for Respondent

Court Assistant Silas Kaunda