

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E207 OF 2025**

**BETWEEN**  
**LEONARD OMONDI ALUKO & 117 OTHERS.....**  
**.....PETITIONERS**

**VERSUS**

**UNIVERSITY OF NAIROBI.....1<sup>ST</sup>**  
**RESPONDENT**

**VICE CHANCELLOR, UNIVERSITY OF**  
**NAIROBI.....2<sup>ND</sup> RESPONDENT**

**DEAN FACULTY OF LAW, UNIVERSITY OF**  
**NAIROBI.....3<sup>RD</sup> RESPONDENT**

**REGISTRAR ACADEMIC AFFAIRS, UNIVERSITY OF**  
**NAIROBI.....4<sup>TH</sup>**  
**RESPONDENT**

**THE SENATE, UNIVERSITY OF**  
**NAIROBI.....5<sup>TH</sup> RESPONDENT**

**PROF. WINIFRED KAMAU.....6<sup>TH</sup>**  
**RESPONDENT**

**PROF. AYUB NJOROGE GITAU.....7<sup>TH</sup>**  
**RESPONDENT**

**HUMPHEREY O.D. WEBUYE.....8<sup>TH</sup>**  
**RESPONDENT**

**J U D G M E N T**

**Introduction**

1. The Petition dated 14<sup>th</sup> April 2025 was amended on 22<sup>nd</sup> August 2025 and is supported by the Petitioners' affidavit in support of similar date. Additionally, the Petition is supported by further affidavits dated 16<sup>th</sup> June 2025 and 8<sup>th</sup> October 2025.
2. The Petitioners are First Year (1.2), Second Year (2.2) and Third Year (3.2) **Module II Evening- Undergraduate Law Students from Nairobi, Mombasa and Kisumu Campuses** enrolled at the 1<sup>st</sup> Respondent. They assert that they enrolled with the 1<sup>st</sup> Respondent's institution because it had an online Distance Learning Program which indicated that examinations would be offered remotely.
3. The Petitioners claim that in an unprecedented turn of events, the Respondents vide a Memo dated 28<sup>th</sup> March 2025 notified the Petitioners that they were required, from then going forward, to undertake their examinations physically. The Petitioners argue that the Respondents' actions are in blatant violation of their rights under Articles 27, 43(1)(f), 47 and 50 of the Constitution as well as their legitimate expectation.
4. The Petitioners seek the following relief against the Respondents:
  - i. A declaratory Order be issued that the Respondents' actions of abrupt and unilateral alteration of the Petitioners'***

**online learning contract (coursework and administration of examination) to physical, constitutes a violation of the Petitioners' constitutional rights under Articles 27, 43(1) (f), 46, 47, and 50 of the Constitution, and their statutory rights under the Fair Administrative Action Act, 2015 and the Consumer Protection Act, Cap 501.**

- ii. A declaratory Order be issued that the Respondents' actions violated the Petitioners' legitimate expectation arising from the representations made at the time of enrolment from year 2022 and the consistent practice of administering the Module II Evening Programme online for both coursework and examinations should continue until completion of Petitioners studies leading to graduation and award of Bachelor of Laws Degree.**
- iii. A Declaratory Order be issued that any action of the Respondents jointly and/or severally that is inconsistent with the online distance learning contract advertised to the Petitioners from year 2022 onwards and all other contrary actions to alter the mode of administration of examinations from online mode to any other are unconstitutional be voided to that extent.**
- iv. A Declaratory Order be issued that the Respondents' conduct vide memo dated 28<sup>th</sup> March, 2025 and all other subsequent memos negating the online distance learning mode as per the 15<sup>th</sup> May, 2025 memo amounts to misrepresentation, unfair practice, and unconscionable conduct within the meaning of Sections 12, 13, 55, and 56 of the Consumer Protection Act, Cap 501.**

- v. ***A Declaratory Order be issued compelling the Respondents' and specifically the 3<sup>rd</sup> and 6<sup>th</sup> Respondents to administer second semester online examinations to the Petitioners, before the end of December 2025, which they were unable to sit in May 2025 and August 2025.***
- vi. ***A Declaratory Order be issued that the Respondents are liable to compensate, by money refunds and /or damages, of the Petitioners who may be forced to drop out of the University because of the impugned decision.***
- vii. ***A judicial review order of certiorari removing into this Court and to quash the decision of the 3<sup>rd</sup> Respondent together with the Memo issued pursuant to the said decision and all other subsequent memos issued after 13<sup>th</sup> May, 2025.***
- viii. ***A Judicial review order of mandamus compelling the Respondents to maintain their advertisements for online distance learning to the public until performance of the contract through completion of studies and graduation and therefore stop the Subterfuge.***
- ix. ***An Order of mandamus be issued compelling the Respondents to continue administering the Petitioners' coursework and examinations exclusively online under the Module II Evening Programme until completion of their studies, graduation and award of Bachelor of Laws Degree.***
- x. ***An Order of Prohibition be issued directed against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents whether by themselves and or***

**their servants, agents or any person acting on their instructions from interfering and or unjustly altering the Petitioners' online distance learning contract arrangement under the Module II Evening Programme until completion of their studies, graduation and award of Bachelor of Laws Degree.**

- xi. An Order of Prohibition be issued directed against the Respondents and or their agents from retracting, deleting and therefore preserve the online webpage and online examination e-learning and Mtihani portal related to the advertisement of online distance learning from anywhere in the world during and after determination of this Petition.***
- xii. An Order of Certiorari be hereby issued to quash and set aside the decision of the 3<sup>rd</sup> and 6<sup>th</sup> Respondent to alter mode of examination from online to physical for Module II evening programme thus affecting the Petitioners right to education, legitimate expectation and performance of the online contract under online distance learning.***
- xiii. An Order of Permanent Injunction be issued restraining the Respondents, jointly and severally, from altering or interfering with the Petitioners' online distance learning arrangement under the Module II Evening Programme until completion of their studies, graduation and award of Bachelor of Laws Degree.***
- xiv. An Order of Permanent Injunction be issued against the Respondents jointly and/or severally, their servants to stop interfering with the Petitioners right to the long-***

**established legitimate expectation to have their examinations administered online from the date of determination of this Petition and until completion of their studies leading to graduation and award of a Bachelor of Laws Degree.**

**xv. General damages be issued against the Respondents for breach of the Petitioners' Constitutional and Statutory rights, including but not limited to compensation for:**

- a. Financial loss incurred in reliance on the Respondents' representations of online distance learning for both coursework and administration of examination as module II evening students;**
- b. Inconvenience, disruption, and emotional hardship caused by the ultra vires alteration of the mode of administration of examinations that has led to the Petitioners missing out on their Second Semester examinations to date;**
- c. Subterfuge to recruit the Petitioners under online distance learning, module II program and lock them in, then later change the program to introduce a physical component to avoid students from opting out.**
- d. Psychological distress, anxiety, and uncertainty suffered by the Petitioners because of the Respondents' unlawful conduct; and**
- e. Psychological distress, anxiety, and uncertainty suffered by the Petitioners**

***because of the Respondents' unlawful conduct.***

- xvi. Costs of this Petition, together with interest thereon be awarded to the Petitioners.***
- xvii. Any other or further orders and reliefs that this Court may deem fit, just, and expedient in the circumstances.***
- xviii. Issue a declaration that the Respondents have threatened the Petitioners' right to education and right to employment as the Memo purports to have them out of workstations for over 2 Weeks to sit for physical examinations at the respective campuses.***

#### **Petitioners' Case**

5. The Petitioners depone that prior to enrolling at the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent, in an official advertisement on their website, invited interested persons to enroll for the Module II Evening Programme, an online course allowing students to study and undertake examinations remotely. The Petitioners claim that this commitment is etched in Clause 1.6 Common Examination Regulations, 2021.
6. The Petitioners assert that on this premise, they proceeded to enroll for the Law Course, **between the years 2022 - 2024** with the expectation that the learning, coursework and examinations would be conducted online until completion of their studies.

7. The Petitioners state that the Respondents have administered the coursework, assessment and examinations online via the Mtihani Portal, for the last 3 years. According to them, this mode of learning has so far been successful and allowed them to study remotely from anywhere in the world. The Petitioners assert that remote learning is not novel and that the Respondents adopted this mode of learning since 1967.
8. The Petitioners aver that the 3<sup>rd</sup> and 6<sup>th</sup> Respondent on 28<sup>th</sup> March 2025 issued a Memo notifying their intention to revise the mode of conducting examinations at Faculty of Law for the undergraduate students'. As a result, the administration was directed to conduct the subsequent examinations physically at the Nairobi, Mombasa and Kisumu campuses. This was to take effect from the 2<sup>nd</sup> Semester of the 2024/2025 academic year, being May, 2025.
9. The Petitioners allege that they only became aware of the issued Memo after the decision had been made and posted on their WhatsApp group on 1<sup>st</sup> April 2025. In reaction, the Petitioners through their representative, issued a formal demand letter dated 4<sup>th</sup> April, 2025 to the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents, seeking a retraction of the impugned decision and for continuation of online examinations. This is owing to the existing learning contract and their legitimate expectation. Moreover, due to the need for balancing given

the nature of their work and travel constraints considering that some work and reside outside the country.

10. It is stated that following this, the 3<sup>rd</sup> and 6<sup>th</sup> Respondent convened a meeting on 14<sup>th</sup> April 2025 with the representatives of the Regular, Module II Day, and Module II Evening classes. The representatives raised issues regarding the abrupt shift. The Petitioners contend that the Respondents justified their decision by stating that they had received reports of students relying on Artificial Intelligence (AI) in their scripts, and thus needed to curb the practice through administration of examinations physically.
11. They assert however that while the Respondents claim this, their allegation does not relate to any of the Petitioners as evidenced from the Minutes of its Disciplinary Committee. Nonetheless, the Petitioners argue that the Respondents have in place administrative mechanisms to handle examination malpractice that emanate from physical and online examinations including the alleged use of AI.
12. The Petitioners depone that, a second meeting was convened on 10<sup>th</sup> April 2025 by the 3<sup>rd</sup> and 6<sup>th</sup> Respondents with the class representatives. The representatives in opposition to the impugned Memo voiced their objection to the same on the basis that:

- a) *That administration of physical examinations to the Petitioners is impractical to them due to work,*

*geographical location, family and time constraints. For instance, the 9<sup>th</sup> Petitioner resides and works in United States of America while the 51<sup>st</sup> Petitioner works and resides in Australia. As such, it was noted that a primary reason leading to Petitioners enrolling for Module II Evening Studies was based on the Online advertisement by the Respondents in their Webpages for an Online Distance Learning Module that would allow the Petitioners to study from anywhere in the World while balancing work and family life, otherwise risk dropping out of school.*

- b) The Petitioners did not choose either Module I day or Regular mode of study due to their inability to attend regular daytime classes. The administration of physical examinations, potentially lasts two weeks, and would require the Petitioners who are accustomed to online mode of study to significantly be present physically, have time off work, consequently obtaining exam leave days of up to 20 hours a day, which is challenging for many.*
- c) The Petitioner's representatives informed the 6<sup>th</sup> Respondent that the change of examinations mode to physical is a breach of online distance learning contract as advertised in the Respondents webpages and their legitimate expectation. That the Petitioners enrolled in the program specifically because it offered online classes and exclusively, online examinations. Accordingly, a contract was formed and established on this understanding, and a practice adopted since year 2022.*
- d) The Petitioners deemed the impugned decision and the directive as unreasonable in comparison to postgraduate students for the memo's distinction between undergraduate and postgraduate students, with postgraduate*

*programs continuing with online administration of examinations uninterrupted. The Petitioners termed such actions as discriminatory, unfair and unreasonable.*

- e) The Petitioners raised logistical challenges due to their geographical location with some of the Petitioners working across the Country stationed in different Counties and some working and residing outside the Country. Thus the abrupt impugned decision is not only likely to cause financial harm but is also impractical and would lead the Petitioners dropping out of school effectively affecting their right to education.*
- f) The Petitioners questioned the rationale presented by the Respondents to justify the impugned decision to which the Respondents did not issue an explicit response but highlighted the alleged use of AI in examination scripts as was reported by their staff two years ago.*
- g) The Petitioners insisted that the Mtihani Portal, which is used to submit coursework and examinations lacks a copy and paste function therefore, there is a mechanism in place to curb examination cheating. Furthermore, there is a proctoring technology within the Respondents websites and online portals, which is an advanced technology that exists to detect Artificial Intelligence-generated content effectively and throughout the years; open-book online examinations naturally, involve referencing materials.*
- h) The Petitioners' representatives also voiced their concerns with regards to the lack of due process and adherence to procedure in arriving at the impugned decision. It was their contention that the Petitioner's representatives were not invited or*

*consultated under Public Participation rules prior to the issuance of the impugned decision. They stated that as fee-paying stakeholders, the Petitioners ought to have been involved as the decision is not only significant but one that threatens their right to education and legitimate expectation to complete their studies online and have examinations administered as such until completion of their studies, graduation and award of Bachelor of Laws Degree.*

- i) The Petitioners through their representatives informed the 6<sup>th</sup> Respondent that the impugned decision has far-reaching consequences including potential drop-out from Module II Evening program by the Petitioners due to the insurmountable challenges the decision poses to their work and personal lives contrary to the exclusive online contract entered into for online study and administration of examinations until completion of their studies, graduation and award of Bachelor of Laws Degree.*
- j) The Petitioners termed the decision by the Respondents and the announcement by the 6<sup>th</sup> Respondent as unfair and unreasonable for they learnt of the abrupt change of decision on April 1st, 2025, which was suspicious, as Petitioners initially thought it was a prank for the day is famously known as April fool's day. The memo was not communicated on any official school email but only on students WhatsApp groups.*

13. The Petitioners assert that to their dismay after tabling these concerns at the meeting, the 6<sup>th</sup> Respondent dismissed them and maintained that the impugned decision was final. He further advised that the students who were unable to sit for the physical examinations for various reasons to apply for

special examinations. This is despite the purpose of such examinations and key grievance herein, for the following reasons:

- a) *Special Examinations: On Application by the Students, the University Senate approves for **noble/satisfactory cause**, such as sickness, bereavement for the Student who missed to take ordinary examinations to take Special examinations.*
- b) *Supplementary Examination: On Application by the Students, Senate approves for to offer students with a beneficial opportunity to enhance their grades without having to redo an entire course or repeat an academic year. The Student must have therefore sat for the ordinary examinations at first instance.*
- c) *Deferment of studies relate to students postponing enrolment at the university for a semester or a given academic year. The reasons for deferment are various and mostly include reasons such as competing family priorities, health reasons, or other unexpected situations beyond the control of the student.*

14. The Petitioners aver that the 6<sup>th</sup> Respondent then proceeded to affirm the impugned decision by a further Memo dated 10<sup>th</sup> April 2025.

15. The Petitioners postulate that the Respondents' actions have violated their right to education and legitimate expectation as it has disrupted the Module II Evening Programme. The Petitioners as well argue that the Respondents decision is discriminatory as the Master of Laws and PhD students

enrolled in the distance-learning programme have continued to undertake their classes, coursework and examinations online, including the May 2025 examinations, to the exclusion of the Module II Evening students. The Petitioners also argue that the allegations of the use of AI is unfounded as the Respondents have the proctoring technology on their website which is applicable to the Mtihani Portal, thus mitigates the effects of AI.

16. The Petitioners further argue that the Respondents action is ultra vires as seeks to compel them to abandon their contractual mode of online learning and examinations as duly advertised. The Petitioners are equally aggrieved by the Respondents actions as are procedurally unreasonable, unfair and designed to cause an injustice within the meaning of Article 47 of the Constitution. They argue that being stakeholders in the Faculty of Law they ought to have been consulted prior to making the impugned decision. As such, the decision is said to be malicious, lacking in empathy and dignity to students.
17. The Petitioners contend that the Respondents actions are not only in violation of the rule of law but also in violation of their own statutory regulations and examinations guidelines under Sections 16 and 39(2) of the Universities Act and Sections 19(3) (c) of the University of Nairobi Charter. They assert that the Memo in line with these provisions affirm that

the 5<sup>th</sup> Respondent is the body mandated with governance of examinations and thus has the responsibility to direct mode of administration of examinations. As such, the Memos emanating from the 3<sup>rd</sup> and 6<sup>th</sup> Respondent are argued to be in breach of these provisions. Nonetheless, they argue that the decision to revert back to physical examinations cannot use the rule retrospectively otherwise such retrospective application is argued to amount to an arbitrary administrative action.

18. The Petitioners are aggrieved that they have suffered irreparable harm as they were not able to sit for the second Semester examinations administered in May 2025 and further August 2025. Considering this, they argue that they have been left stranded, confused and unable to decipher their next steps. Moreover, that the continued suspension of online administration of examinations is highly prejudicial to them.

### **Respondents' Case**

19. In answering the allegations in the Petition, the Respondents filed Replying Affidavits sworn by the Dean of the Faculty of Law, Prof. Winifred Wambui Kamau and the Academic Registrar, Humphrey O.D. Webuye on 16<sup>th</sup> May 2025. The Respondents equally through Prof. Winifred Wambui Kamau

and the Academic Registrar, Humphrey O.D. Webuye, filed further affidavits dated 30<sup>th</sup> September 2025 and 6<sup>th</sup> October 2025 respectively in view of the amended Petition.

20. The dean faculty of law stated that the 1<sup>st</sup> Respondent's Common Regulations for Examinations, August 2021 provide for face to face, online and blended modes of examinations. She asserted that the Bachelor of Laws programme is not an online or distance learning programme, but rather provides for a variety of modes of delivery, including face to face, online and blended modes.
21. She depones that the genesis of this matter was when the academic staff members of the Faculty of Law started raising complaints regarding the quality and integrity of online examinations. This was due to the numerous examination malpractices. Particularly, she states that there had been rampant cheating, plagiarism and use of AI in answering examination questions. She notes that due to this and in line with Clause 1.7 of the Guidelines for Online Examinations (Revised) 2021, various students were subjected to the disciplinary process. That in fact, in 2024 there were 81 examination disciplinary cases.
22. She asserts that in light of this, the Faculty's Examination Committee was tasked to assess the sustainability of the online mode of conducting examinations and thereafter make recommendations on the appropriate mode of

administering examinations. It is stated that the results of the review and survey indicated support by the academic staff for a return to physical examinations and particularly for the Undergraduate Programme. Considering this, the Committee in its Report dated 26<sup>th</sup> March 2025, resolved that all undergraduate examinations be conducted physically in the Campus with effect from the 2<sup>nd</sup> Semester of 2024 - 2025. She asserts that this decision was solely based on the need to safeguard the integrity and quality of examinations in the Faculty as well as the quality of the graduates.

23. She avers that the University of Nairobi Statutes empowers the Board of each Faculty (Faculty Academic Committee) to regulate the conduct of examinations in courses assigned to the Faculty, and to consider and make recommendations on any question relating to the Faculty. As such, in reviewing whether the online mode of examinations was sustainable the Committee drew its mandate from Clause 1.7, Schedule II of the Common Regulations for Undergraduate Examinations, August 2021 which provides for the Guidelines for Online Examinations (Revised) 2021.
24. She depones that the Committee's Report was communicated on 1<sup>st</sup> April 2025 to all students and staff through the Memo dated 28<sup>th</sup> March 2025. The Memo was further dispatched to the students via the WhatsApp groups administered by class representatives. She argues

that the 47-day notice prior to the commencement of the Second Semester Examinations on 19<sup>th</sup> May, 2025 was sufficient in the circumstances to enable the students adjust to the physical mode of examinations.

25. She depones that the Faculty gave the students an opportunity to be heard prior to implementation of the decision. This is through the consultative meeting with the class representatives on 4<sup>th</sup> April 2025 and 8<sup>th</sup> April 2025. Particularly in the second meeting, it was stated that students who reside outside the Country or campuses and are unable to do the examinations in May 2025, would be accommodated through the provision for special exams in August 2025.
26. Following these meetings, a final Memo dated 10<sup>th</sup> April 2025 was issued to all the students. She avers that a number of Module II students even applied for special examinations which was approved. She opposes the allegation of discrimination to Undergraduate students stating that in arriving at its decision, the Faculty Academic Committee took into consideration the demographics of postgraduate students, especially the Master of Arts in Women, Children and Nature Rights (WCNREG), which is a regional programme, where majority of students are based outside Kenya.

27. In fact, she informs that the impugned Memo clearly indicated that online exams for postgraduate students would continue for the time being as preparations are made to accommodate foreign based students to be physically on campus. She adds that compared to the Undergraduate examinations there had not been any cases of examinations malpractice in the postgraduate examinations and also that the programme differs fundamentally from the Undergraduate programme.
28. She stresses that each student upon being admitted in the University signs an acceptance form in which they accept the terms of admission and execute a bond in which they undertake to adhere to all the University Rules and Regulations. Moreover, all students are required to report physically to register for the programme and physically undertake 8-week Clinical Attachment programme in Law Courts across the country. Similarly, she informs that the Faculty has never used e-Class for assessment.
29. Considering these factors, she contends that the 1<sup>st</sup> Respondent has never made representations that the mode of learning or examinations would always be online as asserted by the Petitioners and neither is the same stipulated in their terms of engagement. As such, she argues that there is no breach of contract as alleged.

30. In the second affidavit, it is deponed that other than the 11<sup>th</sup> Petitioner who was admitted in 2005, the other Petitioners were admitted on diverse dates between 25<sup>th</sup> September 2021 and 20<sup>th</sup> June 2024. He equally affirms that the Petitioners' admission to the University was undertaken subject to adherence to its Rules and Regulations, payment of fees, an undertaking to abide by the Terms and Conditions and execution of the students' bond which all the Petitioners.
31. He adds that the Petitioners having accepted this Terms, were bound by the provisions of the Common Regulations for Undergraduate Examinations, August 2021. He stresses that the online mode of administering examinations was adopted as a stop-gap measure following the onset of COVID 19 pandemic to ensure continuity of academic programmes.
32. Reiterating the stated facts herein above and regards the Petitioners contention that the Respondents failed to inform that the mode of assessment would be reviewed from online to physical, he asserts that the examination regulations provide that the University shall administer assessments in **'various modes and platforms face-to-face, online and blended'**. Secondly that, pursuant to Article 19 (3) (c) of the University of Nairobi Charter, the 5<sup>th</sup> Respondent is bestowed with the mandate to make regulations governing methods of assessing and examining the academic performance of

students. This was done through the Common Regulations for undergraduate examinations, August 2021.

33. He avers that under Schedule II, Clause 1.7 of University of Nairobi Common Regulations for Undergraduate Examination, the 5<sup>th</sup> Respondent delegated the power to review the online mode of conducting examinations to the Faculty Academic Committee. He states that during the making of these Regulations by the 5<sup>th</sup> Respondent, there was student representation. Equally, it is stated that Committee carried out a survey among students to gauge their level of access to campus and discovered that majority of students were based in Kenya and most able to access the campuses.
34. In sum, he argues that the University Rules and Regulations are clear that the mode of assessment is face to face, online and blended and thus opposes the assertion that the 1<sup>st</sup> Respondent represented that it would always offer examinations online.
35. In view of the amended Petition, he contends that there is no legal basis for the joinder of the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents being employees of the 1<sup>st</sup> Respondent in their individual capacities and equally already sued as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. For this reason, he urges that the Court strikes out their names from the Petition.

## **Petitioners' Submissions**

36. The Petitioners filed three sets of submissions, one in person by the 1<sup>st</sup> Petitioner and others filed by their Counsel, Muiruri CM and Partners Advocates. The submissions are dated 9<sup>th</sup> and 24<sup>th</sup> October 2025 respectively.
37. The issues identified for determination are: *whether the impugned decision was made ultra vires the powers conferred upon the Respondents by law, whether the impugned decision is unlawful for want of meaningful stakeholder consultation and participation, whether the Respondents failed to give adequate and reasonable notice before implementing the decision, whether the impugned decision violated the Petitioners' legitimate expectation arising from prior representations and established practice, whether the decision breached the Petitioners' consumer protection rights under statute and contract, whether the impugned decision was tainted by misrepresentation or deceit in its conception and implementation, whether the decision unlawfully created barriers to the Petitioners' constitutional right to education under Article 43(1)(f) of the Constitution and whether the cumulative effect of these violations renders the impugned decision unconstitutional and therefore liable to be quashed in its entirety.*

38. In the first issue, it was submitted that the Faculty Academic Committee made its decision following the academic staff complaints. It was contended that the Committee lacks the requisite delegated authority to review the mode of examination since the same is bestowed on the 5<sup>th</sup> Respondent by virtue of Article 19(3) (c) of the University of Nairobi Charter. He submitted that a reading of Schedule II of the Common Regulations for Undergraduate Examinations, August 2021 makes it apparent that the 3<sup>rd</sup> Respondent's role is limited to monitoring online examinations and the role of the Faculty Academic Committee limited to regular evaluations.
39. Counsel on this issue, submitted that the 5<sup>th</sup> Respondent delegates specific functions limited to regular monitoring of the implementation of the examination's guidelines. Consequently, the 3<sup>rd</sup> and 6<sup>th</sup> Respondent, together with the Board and the Faculty Examination Committee, guided by Clause 1.7 Schedule II of 1<sup>st</sup> Respondents' Common Regulations on Examination, 2021, has delegated authority to monitor the implementation of the examination's guideline within their departments and faculties, and make recommendations which are to be evaluated and approved by the 5<sup>th</sup> Respondent.
40. Accordingly, he argued that the Committee's decision was made ultra vires in violation of Article 47 of the Constitution

since the power to review the Regulations is reserved for the 5<sup>th</sup> Respondent as provided under Clause 4 of the Common Regulations for Undergraduate Examinations, August 2021. As such, the Committee has no policy-making powers.

41. Counsel argued thus that the 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents in open, illegal and irregular violation of the delegated mandate, endorsed the Faculty of Law Academic Committee to exceed its delegated authority by purporting to alter the assessment mode of an ongoing academic programme without 5<sup>th</sup> Respondent ratification. Equally, it was argued that no evidence whatsoever had been adduced by the 3<sup>rd</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondents that the 5<sup>th</sup> Respondent, deliberated on, approved, or resolved to change the examination mode for the Module II programme.
42. On this basis, Counsel argued that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' action amounts to an ultra vires exercise of power. As such, absence of the 5<sup>th</sup> Respondent's resolution renders the impugned Memo void for want of authority.
43. Reliance was placed in **Republic v University of Nairobi Ex parte Michael Jacobs Odhiambo 7 others 2016KEHC2093(KLR)** where it was held that:

*"It is therefore my view that there is no evidence that the decision of the Disciplinary Committee was approved by the Senate Disciplinary Committee in order for it to have taken effect and the purported penalty meted against the 1st Applicant was imposed*

*by a body that had no authority to do so hence the action was ultra vires null and void ab initio. This position is supported by section 7(2)(b) of the Fair Administrative Action Act, 2015 which empowers this Court to review an administrative action or decision, if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with."*

44. Additional dependence was placed in **Republic v University of Nairobi ex parte Michael Jacobs Odhiambo & 7 others [2016] KEHC 2093 (KLR)** and **Kamau & another on behalf of 80 UoN Law School Students v University of Nairobi & others (2020) eKLR**.
45. Equally, in the second issue, he argued that the abrupt impugned decision was made without the meaningful participation of stakeholders in this case, being the students in breach of Article 10 and 232 of the Constitution. Correspondingly, in breach of Article 47 of the Constitution as read with Sections 4(1), 4(2), and 4(3) of the Fair Administrative Action Act, 2015, which entitles every person to a lawful, reasonable, and procedurally fair administrative action.
46. In this matter, Counsel asserted that, the Respondents had unilaterally changed the examination mode from online to physical without consulting the Petitioners in violation of their legitimate expectation. Tying to this in the third issue,

Counsel submitted that the Respondents failed to give adequate and reasonable notice to the Petitioners before implementing the decision.

47. Reliance was placed in **Nyongesa & 4 Others Vs Egerton University College (1990)eKLR** where it was held that:

*“Having thus stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run Universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.”*

48. Equal reliance was placed in **Doctors for Life International v Speaker of the National Assembly & Others (CCT 12/05) [2006] ZACC 11, British American Tobacco Ltd v Cabinet Secretary for Health [2019] eKLR,** and **Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR.**

49. Consequently, Counsel argued that the deliberate exclusion of both the 5<sup>th</sup> Respondent and the Petitioners and their representatives from the process stripped the impugned decision of legitimacy and transparency. Counsel noted that this Court in **Kamau & Another v University of Nairobi &**

**Others (2020) eKLR**, affirmed that participation is deemed adequate only where the Senate has convened, deliberated, and included stakeholder representation of the Petitioners. Thus, the absence of such deliberations conclusively demonstrates that the impugned decision was made without public participation, without procedural fairness, and in violation of the Constitution and so should be quashed.

50. In the next issue, it was further argued that the 1<sup>st</sup> Respondent had expressly falsely represented through the advertisements, website content, and administrative communication that all learning and examinations would be conducted online only to turn and revise the mode to physical examinations. He claimed that these representations were false and knowingly made to attract enrolment. Considering this, he argued that the Petitioners were entitled to rescission of the contract, restitution of sums paid, and damages for consequential loss.

51. On legitimate expectation, reliance was placed in **Republic v Kenyatta University Ex parte Martha Waihuini Ndungu 2019KEHC11128(KLR)** where it was held that for a claim of legitimate expectation to succeed one must prove:

*“a. There must be a representation, which is “clear, unambiguous and devoid of relevant qualification.”*

- b. *That the expectation must be reasonable in the sense that a reasonable person would act upon it,*
- c. *That the expectation must have been induced by the decision-maker and*
- d. *That it must have been lawful for the decision maker to make such representation.”*

52. Further reliance was placed on **Keroche Industries Ltd v Kenya Revenue Authority [2007] 2 KLR (E.P.) 240** and **Constitutional Petition E213 of 2020; Kamau & another (Suing on their own behalf and on behalf of 80 University of Nairobi Law School Students) v The University of Nairobi & 2 others; Attorney General & another (Interested Parties)**.

53. It was further contended that, that the 1<sup>st</sup> Respondent in advertising and delivering the Module II Evening Programme online, led the Petitioners to rely on this established mode for their studies and examinations. As such, the unforeseen shift to physical exams, without consultation, frustrated the Petitioners’ legitimate expectation, causing loss of opportunity and prejudice to their advancement.

54. The Respondents’ decision is as well asserted to be in violation of Section 12 and 13 of the Consumer Protection Act, which prohibits false, misleading, or deceptive representations and unfair practices as in this case. He argued that the 1<sup>st</sup> Respondent’s conduct was in breach of

Section 55 and 56 of the Consumer Protection Act which requires that services be supplied in accordance with the manner and quality represented at the time of contract. According to him, the Respondents by failing to provide online examinations as promised, and subjecting the Petitioners to disadvantageous conditions, breached these statutory duties, causing them financial and academic harm.

55. Furthermore, it was argued that the Respondents' actions were in violation of the Petitioners right to education under Article 43(1)(f) of the Constitution as their sudden change constitutes a barrier to students preventing them from accessing the examination on fair terms as well as an economic barrier in terms of being travel, accommodation, time off work, a geographic barrier and health barrier for students with disabilities and chronic health issues. Counsel relied in **R v Kenya School of Law ex parte Juliet Wanjiru Njoroge [2021] eKLR**, where it was held that administrative rigidity that impedes access to education is unconstitutional.
56. On discrimination, Counsel submitted that the Respondents' impugned decision was discriminatory and arbitrary, targeting only undergraduate Module II Evening students, while other faculties and cohorts continued with online examinations online in violation of Article 27(4) of the Constitution. Counsel submitted that while the 3<sup>rd</sup> and 6<sup>th</sup>

Respondent cited examination malpractice as the justification, no evidence was adduced to affirm this allegation and moreso in relation to the Petitioners.

57. Counsel noted that the Court in **Reverend Ndoria Stephen v Minister for Education [2015] KEHC 3437**, held that discriminatory academic policies breach Article 43 for they contribute to unequal treatment of similarly situated groups constitutes discrimination. Accordingly, Counsel submitted that the Respondents' discriminatory action is a violation of their right to education under Article 43 of the Constitution, and more so the long-established legitimate expectation practice wherein the Respondents has provided online study and online administration of examinations to the Petitioners since year 2022.

58. In sum, it was asserted that the Respondents decision is unconstitutional in view of Articles 10, 19, 20, 22, 27, 43(1) (f), 46, 47 and 50 of Constitution. In light of this, Counsel submitted that the Petitioners are entitled to the reliefs sought.

### **Respondents' Submissions**

59. On 23<sup>rd</sup> October 2025, the Respondents' Counsel, CS. Fredrick Collins Omondi filed submissions for the Respondents'.

60. On the onset Counsel submitted that Universities worldwide enjoy institutional autonomy, a right that is enshrined in Article 33(1) (c) of the Constitution and Section 29 of the Universities Act, 2012. Counsel noted that under the University Act and Section 19(3) of the University of Nairobi Charter, 2013 the 5<sup>th</sup> Respondent is mandated to make policies and formulate regulations governing all matters relating to academic programmes, including methods of assessing and examining the academic performance of students. This he noted was done under the Common Regulations on Examinations, 2021, which provides for various modes of assessment, namely physical, online and blended and gives leeway to the various Faculties to adopt the preferred mode of assessment.
61. On this premise, Counsel argued that the Faculty did not act ultra vires, as the policy direction had already been given by the 5<sup>th</sup> Respondent and also that the student population was represented at the time the 5<sup>th</sup> Respondent made its decision to adopt the Common Regulations on Examinations, 2021 as determined in **Kamau & Another-Vs- University of Nairobi & Others [2020) KEHC 9221 (KLR)**.
62. On the first issue, joinder of the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents, Counsel submitted that Article 3(2) of the University of Nairobi Charter provides that the 1<sup>st</sup> Respondent is a body corporate capable of suing and being sued in its name. As

such, Counsel stressed that suing these Respondents in their individual capacities is unwarranted. Counsel pointed out that the Petitioners were also at fault for duplicity. This is because the 6<sup>th</sup> Respondent is already sued as the 3<sup>rd</sup> Respondent while the 7<sup>th</sup> Respondent is the acting 2<sup>nd</sup> Respondent and 8<sup>th</sup> Respondent sued as the 4<sup>th</sup> Respondent. Counsel urged the Court to strike out their names from the Petition.

63. On the second issue, Counsel submitted that the Petitioners consented to be bound by the Rules and Regulations of the 1<sup>st</sup> Respondent upon their admission. Counsel noted that this is evidenced in their admission letters which informed the terms of engagement and need to execute the students' bonds. Counsel stressed that none of the Petitioners during their admission had indicated that they would only accept the terms if the programme was exclusively conducted online. Counsel stressed that the Petitioners were subject to the University's Common Regulations for Undergraduate Examinations, August 2021 thus cannot feign ignorance.
64. Turning to the third issue, Counsel stated that there was no Rule or Regulation existing with the 1<sup>st</sup> Respondent at their enrollment that the Bachelor of Laws Programme would be administered online and neither does any contract exist to that effect as evidenced from the Respondents averments. Equally, Counsel added that no contract or Agreement was

adduced by the Petitioners to support this claim. As such, Counsel argued that the Petitioners assertion was untrue.

65. Counsel informed that contrary to the Petitioners belief, online learning and distance learning are distinct as the distance-learning programme is asynchronous in that students learn at their own pace with limited or no live sessions and that communication is primarily on email.
66. On legitimate expectation, Counsel submitted that the 1<sup>st</sup> Respondent's Rules and Regulations expressly provide that examinations shall be administered through various modes and platforms being face to face, online and blended. Counsel stressed that while the 1<sup>st</sup> Respondent offered online examinations, the Faculty of Law did not vary the examination Regulations to indicate that examinations would only be administered online. In addition, Counsel emphasized that the mode of examination administration is at the sole discretion of the Faculty of Law thus does not require consultation of the students prior.
67. In light of this, Counsel urged that at no point did the 1<sup>st</sup> Respondent represent that it would conduct examinations online only and that the same is made clear by a reading of Clause 1.6.1 of the University's Common Regulations for Examinations, August 2021. Reliance was placed in Communications **Commission of Kenya and 5 others vs**

**Royal Media Services Limited and 5 others (Petition No.14 of 2014)** where the principles of legitimate expectation were set out as:

*“a. There must be an express, clear and unambiguous promise given by a public authority.*

*b. the expectation itself must be reasonable.*

*c. The representation must be one which was competent and lawful for the decision-maker to make and*

*d. There cannot be a legitimate expectation against clear provisions of the law or the Constitution.”*

68. On the legality of the Memo dated 28<sup>th</sup> March 2025, Counsel submitted that Article 19(3) (c) of the University of Nairobi Charter as read with Clause 1.7 of the Common Regulations for Undergraduate Examinations, August 2021 grants the 5<sup>th</sup> Respondent power to review the modes adopted for conducting examinations and which can be delegated. Once established, each Faculties is required to determine the particular mode and platform for assessment.

69. Counsel submitted that in this matter, once the Senate developed the Regulations, the Faculty of Law proceeded to adopt the online mode of examinations as one of the modes of assessment. In like manner, when the Faculty Academic Committee decision was made, the same was made with reference to these Regulations. Considering this, Counsel submitted that the Committee in making the impugned

decision did not require a resolution from the 5<sup>th</sup> Respondent with regard to conducting of physical examinations as the Regulations already made provision for this.

70. On the allegation of failure to consult the students, Counsel submitted that the process culminating to the making of the Common Regulations for Undergraduate Examinations, August 2021 involved the student's participation through their representatives. Counsel argued thus that the students were given an opportunity to be heard prior implementation of this decision which in the end also led to the decision on the various modes and platform of examination assessment. In addition, to this Counsel relying in the Respondents' affidavit noted that following issuance of the impugned Memo, the 1<sup>st</sup> Respondent held a consultative meeting with the students on various dates explaining the reason why they were shifting to the physical mode of examination administration.
71. Turning to the allegations of discrimination, Counsel relying in the case of **Mohammed Abduba Dida v Debate Media Limited & another (2018) eKLR** stated that the Court guided that mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. Counsel submitted that the different treatment in mode of examinations for different categories of students is not discriminatory as in coming up with the decision it was established that in the

Postgraduate programme, a higher number of students are outside the country and there was no case of examination malpractice reported in the programme. In addition, the teaching and assessment program in the post graduate programme differs from the undergraduate program. Additionally, Counsel highlighted that the online examinations for the postgraduate programme are not indefinite, as the same will be converted to physical examinations in the future.

### **Analysis and Determination**

72. Upon careful perusal of the pleadings and submissions of all the parties, this Court considers the following to be main issues for determination in this Petition:

- i. Whether the decision by 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents to change the mode of examination for Module II- Evening law students from online to physical examination was ultra vires the delegated authority under the applicable regulatory framework.***
- ii. Whether the Respondents violated the principle of public participation.***
- iii. Whether the Respondents failed to give adequate reasonable notice prior to implementing the impugned decision.***
- iv. Whether the Petitioners' rights under Articles 27, 43(1) (f), 46 and 50 of the Constitution were violated.***

- v. ***Whether the Petitioners right to a legitimate expectation was violated.***
- vi. ***Whether the Petitioners are entitled to the reliefs sought.***

***Whether the decision by 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents to change the mode of examination for module II evening law students from online examination to physical was ultra vires their delegated authority under the applicable regulatory framework.***

73. It was contended by the Petitioners that the decision by the Faculty Academic Committee to alter the mode of administering examination to the undergraduate law students- under module II evening law students programme was ultra vires Article 19 (3) of the University of Nairobi Charter since the power to alter the examination mode solely rests on the Senate, (5<sup>th</sup> Respondent). The Petitioners argued that the 3<sup>rd</sup> Respondent's role is only confined to monitoring the online examination while the role of the Faculty Academic Committee is restricted to conducting regular evaluations as provided for in Schedule II of the **University's Undergraduate Common Examination Regulations**. As such, the Petitioners argued that the Faculty Board or its Academic Committee under clause 1.7 of Schedule II can only make recommendations for approval by the 5<sup>th</sup> Respondent but had no power to review or change

the examination policy as that is an exclusive preserve of the 5<sup>th</sup> Respondent under clause 4 of the Regulations. It was thus the Petitioners position the decision made by 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondent, was without the approval or resolution of the 5<sup>th</sup> Respondent, hence ultra vires, and having breached a mandatory procedural aspect, a contravention of Article 47 of the Constitution.

74. In response, the Respondent's Counsel acknowledged that in fact, **Article 19(3) (c) of the University of Nairobi Charter**, read with **Clause 1.6 of the Common Regulations for Undergraduate Examinations, August 2021**; empowers the 5<sup>th</sup> Respondent to review the general modes of conducting examinations (face-to face, online and blended), but, delegates to individual faculties or Departments to choose the particular mode or platform to use in assessing students as long as it is within the authorized modes. The Respondents thus contended that Faculty of Law adopted the online mode of examinations during the Covid 19 crisis to ensure learning was not interrupted. Further, when the Faculty Academic Committee discovered the credibility and the integrity of the undergraduate on-line examination was at stake following numerous reports of cheating and plagiarism that the Academic Staff had documented and reported, it decided to

switch to the physical mode which is also one of the recognized modes under the Regulations.

75. It was the Respondents contention that the Faculty Board and its Academic Committee did not require a fresh or specific resolution from the 5<sup>th</sup> Respondent in order to switch to physical examinations as the Regulations that existed had option, which the 3<sup>rd</sup> Respondent could discretionary choose from.

76. To resolve this issue, it is necessary that I first examine the relevant provisions so as to ascertain their implication.

77. **The Common Examination Regulations of the University of Nairobi** (*Annexure HW 3 in the Respondents Replying Affidavit*)-

**Regulation 1.6** reads:

**MODES OF ASSESSMENT**

*1.6.1 The University shall administer assessments in various modes and platforms- face to face, online and blended.*

*1.6.2 Online assessments may be synchronous or asynchronous; and shall be administered using appropriate platforms such as e-class or SOMAS, as approved by the Senate.*

*1.6.3 Face-to-Face exams shall be administered in physical location within the University premises, or any other venue approved by Senate.*

1.6.4 *Different Examination Papers of the same units may be examined by a combination of online and face-to-face.*

Under these Regulations, there are Schedules, which contain guidelines and procedures.

## **SCHEDULE II- GUIDELINES FOR ONLINE EXAMINATIONS (REVISED), 2021**

**Regulation 1.6:** *These guidelines shall become operational upon approval by the Senate and will be implemented by the DVC (AA), Deans, Chairpersons of Departments and Academic Registrar.*

**Regulation 1.7:** *The implementation of the guidelines shall be monitored continually by the DVC (AA), Deans, Chairpersons of the Department, and Academic Registrar, and evaluated regularly by the Department and Faculty Academic Committee.*

78. **Regulation 19 (1) of the University of Nairobi Charter** creates the Senate (5<sup>th</sup> Respondent) and Regulation 19 (3) sets out Senate responsibilities, among them, 19 (3) (c) provides that that the Senate shall have the power to ***‘to make regulations governing methods of assessing and examining the academic performance of students.’***
79. The regulations referenced in Regulation 19 (3) (c) of the University of Nairobi Charter have been operationalized through ***‘the development of Common Examination***

**Regulations of the University of Nairobi, of which, Schedule II- Guidelines for Online examinations (Revised), 2021 are contained.**

80. The University Senate discharged its role by formulating these regulations, including Guidelines for Online Examinations, which on the face of it, shows received Senate Approval on 8<sup>th</sup> May, 2020.
  
81. These Regulations and the Guidelines thereunder constitute the framework under which students' assessment is managed by assigning implementation responsibilities to DVC (AA), Deans, Chairpersons of the Departments and Academic Registrars (Schedule II- Clause 1.6- Guidelines for Online Examinations-Revised-2021). The guidelines empower the DVC (AA), Deans, Chairpersons of Departments, and Academic Registrar, Department and Faculty Academic Committees with authority to continuously monitor and regularly evaluate their implementation (Clause 1.7 -Schedule II- Guidelines for Online Examinations - Revised-2021).
  
82. The Senate role is formulation of the overall policy framework while the Departments and Faculties of the University discharge the delegated responsibility including selecting the modes of examination assessment to use on the students and conducting continuous monitoring and

regular evaluation of such examinations. It is thus the finding of this Court that the decision as to whether to assess using physical, online or blended examination is purely a discretionary decision of the Faculty or Department, while the Senate provides the general policy on assessment examinations. As long as the mode of assessment within the scope of the policy, the contention that it was contravened by a delegated authority that choose one one of the approve modes does not arise.

83. Moreover, the Faculty did not act outside the scope of its authority when it undertook an inquiry, through its Faculty Academic Committee, to investigate and determine the range of the online examination malpractices since the regulations permitted it to perform continuous monitoring and evaluation of the online examinations under Clause 1.7 - Schedule II- Guidelines for Online Examinations - Revised-2021.
  
84. In the circumstances, this Court finds that the decision to switch to physical from online examination did not derogate from the general policy framework set out by the Regulations and the guidelines thereof, in particular, Regulation 1.6 of Common Examination Regulations of the University of Nairobi as read with Schedule II- Guidelines for Online Examinations (2021), Revised. In addition, the faculty

did not exceed its mandate in authorizing an inquiry into the matter as it was charged with the responsibility to continuously monitor and regularly evaluate the online examination programme.

85. In my view, the decision taken by the Respondents was thus intra-vires. Unless the Petitioners can prove that by switching to physical from online examination, the Respondents misused their powers, either because they failed to take into account relevant factors or took into account irrelevant ones or exercised their power in a manner that was totally unreasonable as to prick the conscience of a reasonable person then the decision must stand. In **Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others [2014] KEHC 8130 (KLR)** the Court held as follows:

***“... It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of discretion in the following situations:***

- (1) where there is an abuse of discretion;***
- (2) where the decision-maker exercises discretion for an improper purpose;***
- (3) where the decision-maker is in breach of the duty to act fairly;***

- (4) where the decision-maker has failed to exercise statutory discretion reasonably;**
- (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;**
- (6) where the decision-maker fetters the discretion given;**
- (7) where the decision-maker fails to exercise discretion;**
- (8) where the decision-maker is irrational and unreasonable. See Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.... A power which is abused should be treated as a power which has not been lawfully exercised..."**

86. The Court will later on examine the discretionary aspects, which is an integral feature in the remainder of the issues to determine whether in arriving at the decision change the mode of assessment for Module II Evening law students from online examination to physical was done arbitrarily.

***Whether the Respondents violated the principle of public participation.***

87. Public participation is a constitutional imperative under Article 10 (2) (a) of the Constitution. The Constitution demands that the national values and principles of governance, which include public participation, to be binding

on all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or **makes or implements public policy decisions.**

88. That requirement is to ensure that the people are meaningfully involved whenever key decision-processes affecting them are made so that they can make their contributions for consideration by those having the power to make those decisions. The Supreme Court underscored and gave guidelines on public participation in **British American Tobacco case Kenya, Plc v Cabinet Secretary for the Ministry of Health & 5 others (2019) eKLR** as follows:

***Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:***

***“Guiding Principles for public participation***

- (i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.***
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.***
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not***

**conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.**

- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.**
- (iv) Public participation is not an abstract notion; it must be purposive and meaningful.**
- (v) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis.**
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.**
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis.**
- (ix) Components of meaningful public participation include the following:**
  - (a) clarity of the subject matter for the public to understand;**

- (b) structures and processes (medium of engagement) of participation that are clear and simple;**
- (c) opportunity for balanced influence from the public in general;**
- (d) commitment to the process;**
- (e) inclusive and effective representation;**
- (f) integrity and transparency of the process;**
- (g) capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.”**

89. It must however be underscored that being involved or consulted is not the same as saying that the stakeholders' views must prevail. In arriving at the decision, the decision maker ought to show that consideration was given to the feedback but is not bound by the views and could depart from them if for instance they are not concomitant with the overriding public interest.

90. As was held by the Supreme Court in **Cabinet Secretary for National Treasury and Planning & 4 others v Okoiti & 52 others (2024) KESC 63 (KLR)**;

***“... when Parliament receives thousands of views during public participation, it may consider clustering them into themes to address the concerns raised by the people. Therefore, there***

**is no justification for imposing an additional burden on Parliament to respond directly to each individual involved in the public participation process.**

**159. We therefore hold that there is no sufficient basis to invalidate a public participation exercise on the grounds that Parliament did not provide reasons to every individual participant on how their proposals, suggestions, and input was treated...”**

91. According to the Petitioners, the Respondents made an abrupt decision to change the mode of examination from online to physical without giving them an opportunity to participate when that decision was being considered, yet as students and stakeholders, the decision was going to materially affect the academic programme. The Petitioners thus contended that the Respondents action violated Article 10, 232 and 47 of the Constitution read together with Sections 4(1), 4(2), and 4(3) of the Fair Administrative Action Act, 2015 with the cumulative effect being denial of a lawful, reasonable, and procedurally fair administrative action in the absence of reasonable notice being given prior to the implementation of the impugned decision.

92. Responding to the Petitioners allegation that the Respondents did not consult the students while making the impugned decision, the Respondents countered that the

student were involved in the process, first, in the development of the Guidelines for Online Examination in August 2020 through their representatives. Further, in regard to the issuance of the impugned Memo on 28/3/2025 that communicated the switching from online to physical exams for the 2<sup>nd</sup> Semester Exams scheduled to take place on 19/5/2025, when the students protested the issuance of the said memo, the Respondents convened meetings with their representatives on 4/4/2025 and on 8/4/2025 where among others, they resolved that students residing out of the country and outside the campus will be allowed to put a request to sit for special examinations in August, 2025 hence the views of the students were heard and addressed before issuance of the final memo on 10/4/2025. That as result, some of the Petitioners made these requests for special examinations and they were approved.

93. Although the Petitioners contend, they were not consulted when initial notice of 28/3/2025 was issued, the Respondents demonstrated, a fact not disputed by the Petitioners, that on 4/4/2025 and 8/4/2025; they met with the student representatives where the concerns concerning the decision to change from online to physical examinations were raised. The Respondents have also explained how some of those concerns were to be addressed in the context of physical examinations, they were to apply to sit special examination which was to be conducted in August, 2025. Some,

according to the Respondents applied and got the necessary approval.

94. In my view, this demonstrates that sufficient consultation was carried out and the Respondents were willing to make adjustments to accommodate those who were incapable of making enough preparations to be able physically sit for the second semester examination from 19<sup>th</sup> May, 2025.

***Whether the Respondents failed to give adequate reasonable notice prior to implementing the impugned decision.***

95. **Article 47 of the Constitution** on the **right to a fair administrative action** provides as follows:

- (a) *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (b) *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.*

96. The **Fair Administrative Action Act, 2015 in Section 4**, in particular, Section 4(1), (2) (3 ) & (4) states:

*Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—*

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;*
  - (b) an opportunity to be heard and to make representations in that regard;*
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*
  - (d) a statement of reasons pursuant to Section 6;*
  - (e) notice of the right to legal representation, where applicable;*
  - (f) notice of the right to cross-examine or where applicable; or*
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—*
- a) attend proceedings, in person or in the company of an expert of his choice;*
  - b) be heard;*
  - c) cross-examine persons who give adverse evidence against him; and*

d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

97. Section 7 (2) of the Fair Administrative Action Act further provides for grounds of review by the Court which include *bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.*

98. **In Mutimba Creser Masayi Joseph vs Masinde Muliro University of Science and Technology [2020] KEHC 7950 (KLR)**

**quoting case of Kenyan Human Rights Commission & another v. Non-Governmental Organization Co-ordination Board & another (2018) eKLR, the Court stated:**

***“40. ... Administrative actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. Accordingly, a party, a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.***

**41. This court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”**

99. In respect to adequacy of the notice, the first notice sent out on 28<sup>th</sup> March, 2025 in regard to the examination that was scheduled to take place on 19<sup>th</sup> May, 2025, about seven weeks duration to the examination day. When the students complained, the respondents held two meetings with their representatives, the first on 4/4/2025 and the second one on 8/4/2025 then issued the final memo and issued on 10/4/2025, (a notice five weeks to the date of commencement of the Examination).
100. The question becomes, is a 5 weeks' notice of examination abrupt and therefore unreasonable? The students grievances included the complaints to the effect that there were those among them studying out of the country or campus hence were staring at incurring unplanned for expenses, others were required to seek permission from work for the entire duration of the examination. The Respondent, after engagement with the students proposed to accommodate those who were unable to sit the examination from 19<sup>th</sup> May

2025 by undertaking to consider them for special examinations in August, 2025.

101. Those who were able to prepare within 5 weeks to the date of the examination had the opportunity to sit for the examination, those that faced unique challenges were given a chance to have an extended period of four months to make preparations to sit for the examination. The staggered approach ensured the needs of the different students were sensibly addressed. In the circumstances, I disagree that the notice given was abrupt. On the contrary, I find the manner the Respondent dealt with the matter fairly indulgent and reasonable.
102. In choosing to shift from online to physical examinations for module II Evening Law Students, was that decision properly justified and thus a proper exercise of discretion by the Respondents or was an arbitrary one?
103. The Petitioners argued that while the Respondents claimed that the decision was based on allegations of malpractices, it is not evidenced in the Minutes of the Respondents Disciplinary Committee that any of the Petitioners was involved. That in any case, the Respondents has put in place administrative mechanisms to handle examination

malpractices that emanate from online examinations including the alleged use of AI.

104. In my considered view, the Respondents' action was triggered by a legitimate overarching goal to protect the credibility and integrity of the university examination and safeguarding the University's academic reputation following credible generalized reports of widespread malpractices that were being reported in undergraduate online examination. It was proportionate institutional measure not directed at any specific individuals but generally to arrest a worrying trend that could irreparably dent the Institution's academic image. The Respondents thus invoked **SCHEDULE II- GUIDELINES FOR ONLINE EXAMINATIONS (REVISED)**, 2021 regulation **1.7**: *which empowered the Department and the Faculties to continually monitor the implementation of the examination guidelines and regularly evaluate them to deal with the rampant complaints by the staff members of the Faculty regarding various examination malpractices including cheating, plagiarism and use of artificial intelligence in answering questions- ( of which, compelling evidence has been exhibited in the formal complaints of academic staff to the Dean Faculty of Law as shown in **annexure WK 1**).*

105. The Court finds the decision reasonable and proportionate response since the University could not continue with the

dishonest online examination programme given the evidence that was already at its disposal.

***Whether the Petitioners' rights under Articles 27, 43(1) (f), 46 and 50 of the Constitution were violated.***

106. This right to freedom from discrimination is enshrined under Article 27 of the Constitution as follows:

- (1) *Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
- (3) *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
- (4) *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*
- (5) *A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

107. The Supreme Court in **Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment)** guided as follows:

***[51] From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”***

108. In the Indian case, **State of Kerala and another vs N. M. Thomas and Others Civil Appeal No.1160 of 1974**; the Court opined thus:

***“... The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not be nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and***

***that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category..."***

109. The Petitioners contended that the Respondents decision was discriminatory since Master of Laws and PhD students enrolled in the distance-learning programme were unaffected and continued to undertake their classes, coursework and examinations online, including the May 2025 examinations, to the exclusion of the Module II Evening students.

110. In reply, the Respondent took the position that having different treatment in mode of examinations for different categories of students is not discriminatory. The Respondents maintained that the teaching and assessment of postgraduate programme differs from the undergraduate program.

111. This fact needs no further emphasis. Post-graduate programmes are fundamentally different, and thus, distinct

from undergraduate studies by structure, purpose and attract different modes of instruction, including assessment. This means reasonable distinctions exist between and different rules apply including on assessment hence as long as distinction can be justified by the unique needs of each programme, there is no discrimination.

112. In regard to the **breach of the right to education**, this is included under economic and social rights under Article 43(1) (f). The specific provision provides as follows:

*Every person has the right—*

*(f) to education.*

113. Analyzing this right, the Court in **Joseph Njuguna & 28 others vs George Gitau T/A Emmaus School & another (2016)eKLR** observed as follows:

***“39. It is key to observe that this right is placed on the State such that, where the State does not have resources to implement a right under Article 43, the State has to either show that it does not have the resources or it will give priority to ensuring the widest possible enjoyment of the right to prevailing circumstances, including the vulnerability of particular groups or individuals. The provision under the Bill of Rights applies to all law and binds all State organs and all persons. To ensure this right, the Basic Education Act (supra) enjoins the Cabinet***

**Secretary to implement the right to basic education as enshrined under Article 53.**

**40. As stated above, public and private institutions are categorized as basic education institutions. However, what is the role of private institutions with regard to education? Are they enjoined to ensure the realization of the right to education and by extension, the right to free and compulsory basic education?**

**41. Mumbi Ngugi J., while addressing the right to education and the place of private schools in the case of J.K (Suing on Behalf of CK) v Board of Directors of R School & another [2014] e KLR, observed that:**

**“It is indeed correct that Article 43 guarantees to everyone the right to education. The constitutional responsibility is placed on the state to achieve the progressive realization of the rights set out in Article However, there is no obligation placed on a private entity such as the respondent school to provide such right;”**

**42. I do agree with the above proposition as the correct legal position.**

**43. I further wish to state that, the services offered by a private entity are akin to a contract, where each of the parties has an obligation. The private school in fulfilling its obligation has to ensure that it provides proper and a conducive learning environment. The parents or guardians have to ensure that they pay the requisite fee so that the child is offered the services rendered in the private school. A private school cannot be equated to a public school,**

***where free tuition is offered and charges can only be imposed with the approval of the Cabinet Secretary.”***

114. Further, in **MMM vs Permanent Secretary, Ministry of Education & 2 others (2013) eKLR** the Court explained:

***“14. The application of the rights provided for in Article 43 of the Constitution is also articulated in Article 20(5) of the Constitution which provides that;***

***“In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—***

- a) it is the responsibility of the State to show that the resources are not available;***
- b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and***
- c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”***

***Article 21 (2) of the Constitution also provides that;***

***“(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.”***

**15. Article 21 as illustrated above draws us to look at the following in view of the Government's efforts in achieving the progressive realization of these socio-economic rights: legislative steps, policy and other measures and the setting of standards. While socio-economic rights are therefore clearly justiciable, States are required to apply as much practicability as possible in the realization of these rights and within the available resources and allocation thereof."**

115. Article 43 (1) (f) of the Constitution broadly addresses the obligation of the State to ensure access education by all. Have the actions of the Respondent created obstacles to the enjoyment of this right? The Respondents have not discontinued the studies of the Petitioners so as to be said that they have deprived them this right. All they have done is to shift to physical examination so as to curb rampant cheating and fraud that the University established was prevalent in online examination by discontinuing the online examinations, otherwise, the Petitioners remain fully enrolled to their educational programmes. That the petitioners occasioned some inconveniences, may have occurred but mere inconveniences that call for extra sacrifice does not translate to denial of the right to education under Article 43 (1) (f) of the Constitution.

***Whether the Petitioners right to a legitimate expectation was violated.***

116. The Supreme Court elaborated on the principle of legitimate expectation in **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] KESC 53 (KLR)** as follows:

***“[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.*”**

***[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.***

***[266] Wade and Forsyth in their work, Administrative Law, 10<sup>th</sup> ed (pages 446-448), discuss the relevant legal principles on legitimacy of an expectation. For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority, that is said to be bound to fulfil the expectation...”***

117. The Court summarized the principles of legitimate expectation as follows:

***“[269] The emerging principles may be succinctly set out as follows:*”**

- a. there must be an express, clear and unambiguous promise given by a public authority;**
- b. the expectation itself must be reasonable;**
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and**
- d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”**

117. In addition, the Court in **Republic v Kenya Revenue Authority Ex-parte KSC International Limited (In Receivership) [2016] KEHC 7369 (KLR)** explained:

**“My view on this issue is informed by the need to achieve certainty in economic sphere. As was appreciated by Nyamu, J in *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others HCMA No. 743 of 2006 [2007] KLR 240 at 295:***

**“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation...certainty of law is an important pillar in the concept of the rule of law.”**

118. The Petitioners contended that prior to enrolling for the Module II evening programme, the 1<sup>st</sup> Respondent had advertised the course in its website as an online course allowing students to study and undertake examinations remotely. The Petitioners claim that this commitment is supported by Clause 1.6 Common Examination Regulations, 2021.
119. The Petitioners state that they had legitimate expectation that the entire course work, including assessment would be undertaken online as this has been the case for the last three years before the Respondents made the sudden decision on 28<sup>th</sup> March, 2025 indicating that the examinations would be conducted physically.
120. The 1<sup>st</sup> Respondent vehemently denied that in its advertisement, Faculty of Law had committed to administer only online exams stating commitment could not be made without amendments to the University Common Examination Regulations where Clause 1.6.1 makes it clear that the University would conduct face to face, online or blended assessments.
121. Further, that the 1<sup>st</sup> Respondent never made any representation that the mode of learning or examinations would always be online as asserted by the Petitioners. They

denied that this was stipulated in their terms of engagement hence there was no breach of contract.

122. The doctrine of legitimate expectation is invoked for fairness and predictability in decisions made by public authorities. However, it is not absolute, in that where there exist reasonable and justifiable reasons, a departure from the same can be justified, for instance, in matter where an overriding public interest outweighs an individual or personal considerations.

123. In the instant case, it is a fact that the Petitioners stated that for the last three years they have been sitting online exams administered by the Respondent. The University Common Examination Regulations, however, provides three options (face to face, online and blended). The administration of one mode, which is at the discretion of the Department of Faculty, does not automatically bar the faculty from opting for any other recognized mode. Further, despite the Petitioners maintaining that their course was purely online including assessments, no specific binding contract that contains this particular clause was exhibited.

124. Finally, this decision was proportionate, justified and non-arbitrary as it was demonstrated that it is legitimately intended to preserve the integrity of the university examination and qualifications following credible widespread

cases of online examination malpractices that characterized the undergraduate online examination that were persistently being documented and reported by the Academic Staff of the Faculty as demonstrated in the annexures filed in before this Court.

125. The upshot is that this Petition lacks merit and hereby dismissed in its entirety.

126. Each Party shall bear its own costs.

***Dated, signed and delivered virtually at Nairobi this 5<sup>th</sup> day of February, 2026.***

.....  
**L N MUGAMBI**  
**JUDGE**