

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CONSTITUTIONAL PETITION NO E001 OF 2023

BETWEEN

SYLVESTER MAGOE GENTANYE
PETITIONER

VERSUS

THE MINISTRY OF HEALTH 1ST
RESPONDENT
KENYA MEDICAL TRAINING COLLEGE 2ND
RESPONDENT
NEW NYANZA PROVINCIAL GENERAL HOSPITAL 3RD
RESPONDENT

JUDGMENT

The Petition herein seeks that the court makes a declaration that the Respondent's decision to decline to award the Petitioner with a certificate in surgical clinical ophthalmology is unconstitutional, illegal and in violation of the Petitioner's rights; the Petitioner also sought for damages for violation of his rights; He also sought for an order of mandating the Respondent to issue him with the requisite certificate in surgical Clinical Ophthalmology. The Petitioner also sought for costs of the petition.

The petition is premised on the grounds that the Petitioner was an employee of the 1st Respondent working as an Ophthalmic Clinical Officer at the New Nyanza General Hospital Kisumu on permanent and pensionable terms.

That between 1987 to 1989 the 1st Respondent selected him and 4 other colleagues from different hospitals in the country to undertake training to become a cataract surgeon certified by the 2nd Respondent.

That upon completion of the training the Petitioner was posted back to New Nyanza Provincial Hospital where he continued serving as a Surgical Ophthalmic Clinical Officer until his voluntary retirement in 1991.

That upon his retirement he learnt that apart from him all the other colleagues selected for the training had been awarded certification for the course by the 2nd Respondent. That his efforts to engage the 2nd Respondent to issue him with the certificate has not been successful and the 2nd Respondent has also ignored and / or failed to communicate and explain the reason for denial and he has never been given a chance to be heard.

That as a result of the commission/ omission has seriously impeded his socio-economic right to practice as a surgical ophthalmic Clinical Officer and earn a living and thus he has been unable to fend for himself in private since retirement.

The provisions of the Constitution, Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights and Section 4(3) of the Fair Administrative Actions Act that the Petitioner alleges to have been infringed by the Respondents are listed in Part D 16 to 31 of the Petition and the Petitioner challenged the Respondent's action of discriminating against him and refusing to issue him with a certificate in Surgical Clinical Ophthalmology like his colleagues who went through a similar program were issued with certificates.

This petition was supported by the affidavit of the Petitioner sworn on 5th October 2023

The 1st Respondent filed grounds of opposition dated 16th day of June, 2025 to oppose the Petition as follows:

1. THAT the Petition does not outline with precision and specificity how the 1st Respondent has violated the Petitioner's Constitutional rights as was espoused under the locus classicus case of **Anarita Karimi Njeru V Republic (1979) eKLR** reiterated by the Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**.

1. THAT the 1st Respondent does not conduct any training, accreditation and/or certification for any courses offered either by the 2nd Respondent herein or any other institution of higher learning which fall within the exclusive supervision of the Ministry of Education.
2. THAT the Petition does not disclose any reasonable cause of action against the 1st Respondent that accrued either during the pendency of their employment relationship or after it was mutually extinguished.
3. THAT if at all there is any contractual dispute arising out of the Petitioner's employment relationship with the 1st Respondent, then the same is time — barred and cannot be entertained by this Court for want of jurisdiction.
4. THAT the Petitioner is guilty of laches, indolence and inordinate delay which cannot be cured by circumventing the law through a Constitutional Petition.

1. THAT the reliefs sought by the Petitioner against the 1st Respondent are misconceived, untenable and are not supported by factual evidence or the Law.
2. THAT the Petition lacks merit and amounts to a complete abuse of the Court process.

The 1st Respondent prayed that the said Petition be dismissed with costs.

Vide replying affidavit sworn by **DR. KELLY OLUOCH** on 27th January 2025 the 2nd Respondent opposed the petition and averred as follows:

1. THAT I am the Chief Executive Officer of the Kenya Medical Training College (KMTC), the 2nd Respondent herewith and in my capacity aforesaid fully seized with the facts of this case, competent and duly authorized by the Defendant/Applicant to swear this Affidavit.
2. THAT I have read and understood the Petition dated 5th October 2023 together with the Affidavit of Sylvester Magoie Getanyi and where necessary I have had the tenor and purport of the same explained to me by the 2nd Respondents Advocate son record, Messers Mutua Nyongesa Muthoka Advocates and wish to respond to the same as herewith;
3. THAT from the onset, I wish to state that the Petition as filed is not only defective, but misled and an abuse of court process.
4. THAT further, the said Petition does not meet the required threshold of Constitutional petitions as aptly enunciated in the Anarita Karimi Njeru Case.

5. THAT furthermore, the allegations of violations are not adequately particularized, not well founded, vague and do not clearly and adequately show how and by whom they have been perpetrated. The Petition in its entirety seems to be a fishing exercise by the Petitioner.
6. THAT the allegations of violations of the Constitution are vague, imprecise, unfounded, lacking in particulars and do not comply with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and established case law as to the character and contents of Constitutional Petitions thereunder.
7. THAT all in all, the entire content of the Petition and the affidavit thereto is categorically denied as it raises no cause of action actionable against the 2nd Respondent herein as it seeks the award of a certificate in a course not offered or available in the 2nd Respondents institution.
8. THAT in the circumstance, the prayers in the Petition are not capable of being granted as the 2nd Respondent cannot issue what it does not offer and on an unknown course that it has never offered especially in the year claimed by the Petitioner.
9. THAT in reply to the contents on the Supporting Affidavit, I wish to state as hereunder;
10. THAT the 2nd Respondent is a stranger to the contents of paragraph 3 of the Supporting Affidavit as it is not privy to the places in which the Petitioner practiced between the years 1977 to the year 1989.
11. THAT in further response, the 2nd Respondent is stranger to the allegations that the Petitioner together with others were selected

by the Ministry of Health for training in order to attain a higher diploma in Surgical Clinical Ophthalmology (cataract surgery) as the same is not a course offered by the 2nd Respondent and has never been offered by it. Furthermore, the minutes attached therein are clear that neither the 2nd Respondent nor its representatives were present at the said meeting as can be seen from the list of the members present. Further, the authenticity of the said minutes is questionable since the same are unknown to the 2nd Respondent and neither do they exist in its records.

12. THAT further to the above, the alleged minutes are neither signed nor dated thus rendering the same unreliable and lacking authenticity.
13. THAT in further reply, it should be noted that the 2nd Respondent, the Kenya Medical Training College only came into existence vide the Kenya Medical Training College Act of the year 1990, which act commenced on 1st April 1991. As such, the Petitioner could not have been training with the 2nd Respondent between 1987 and 1989 when the 2nd Respondent was not even in existence in its current form.
14. THAT the contents of paragraph 4 are denied in *toto* and the 2nd Respondent is in any event a stranger to the same as it does not and never had any such requirements for the unknown course as is being pleaded by the Petitioner. In fact, the alleged circular is not headed, does not disclose its source, neither is it dated nor signed and as such, its origin is unknown and cannot be relied upon as a basis for the Claim by the Petitioner. The said circular is thus denied as it did not originate from the 2nd Respondent and

the 2nd Respondent is a stranger to the same and to the contents therein.

15. THAT the 2nd Respondent is a stranger to the contents of paragraph 5, 6 and 7 of the supporting affidavit to the Petition. The minutes thereto are also strange to it as it was not a participant in the alleged meetings leading to the said purported minutes which minutes are also not signed and as such, cannot be authenticated.
16. THAT in response to paragraph 8, the certificates attached therein are unintelligible and despite the 2nd Respondent having requested to be served with clear copies through its advocates on record, the said plea has been ignored by the Petitioner/his advocates and as such, the same cannot be authenticated by the 2nd Respondent.
17. THAT in any event, the 2nd Respondent has never offered a course titled "Surgical Clinical Ophthalmology" as is being alleged by the Petitioner.
18. THAT the contents of paragraph 9 are denied in *toto* and the 2nd Respondent categorically states that the same is misplaced as no infringement of any right has been perpetuated by it as the Petitioner herein is seeking certification in a course that has never existed. The same is therefore misdirected ad misguided.
19. THAT from the records available with the 2nd Respondent, the Petitioner herein has graduated twice from the 2nd Respondents predecessor in title.
20. THAT the Petitioner herein graduated in the year 1977 as a Registered Clinical Officer and was issued with a certificate serial no. 95 from the institution.

21. THAT the Petitioner again graduated in the year 1983 as a Clinical Officer (Ophthalmic) and was issued with a certificate serial number 5937.
22. **THAT** I wish to state that the Kenya Medical Training College (KMTC) started to offer a **Higher Diploma in Clinical Medicine & Surgery (Cataract Surgery) in the year 1991**. As such, the petitioner could not have benefited from this program as he alleges that he trained for Cataract Surgery between 1987 and 1989.
23. THAT the 2nd Respondent has no record of the Petitioner herein training for the Higher Diploma in Clinical Medicine & Surgery (Cataract Surgery) from the year 1991 onwards when the said course became available.
24. THAT it should be noted that prior to the year 1991, Cataract surgery training was offered through an arrangement between Hospitals, the Ministry of Health and the Kenya Society for the Blind, and not as a course at the Kenya Medical Training College (KMTC). As such, no certificate can be issued by the institution for a course it never offered nor participated in.
25. THAT on 3rd August 2022, the Petitioner herein applied to be issued with a certificate in Higher Diploma in Ophthalmic/Cataract Surgery from the 2nd Respondent. As the 2nd Respondent has never offered any programme by the name Ophthalmic/Cataract Surgery, the Petitioner was advised that a replacement certificate could only be made for his Higher Diploma in Ophthalmology which he had successfully completed in the year 1983 upon payment of replacement fees.

26. THAT the Petitioner herein paid the requisite replacement fee and he was issued with a replacement certificate which he duly collected from the 2nd Respondent.
27. THAT in the circumstance, it is clear that the Petitioners claim is misguided as he has been previously advised and he collected a replacement for the diploma that he actually trained for and as requested by himself.
28. THAT it is also clear that the Petitioner is guilty of laches as the alleged certificate of the unknown course apparently trained for between the year 1987 and 1989 is being sought for in a Petition filed in the year 2023, **a period of over 38 years** since the cause of action apparently arose.
29. THAT the filing of the suit herein as a constitutional Petition is thus an innovative scheme to go round the statutes of limitation for an issue that apparently arose more than 38 year ago.
30. THAT in any event, the Petition is in clear contravention of Section 3 of the Public Authorities Limitation Act, CAP 39.
31. THAT in the circumstance, I do pray that the Petition herewith be dismissed as the same is a clear case of abuse of court process and seeks for orders that are not available to the Petitioner and more specifically orders that cannot be sought as against the 2nd Respondent as the 2nd Respondent cannot and is not in a position to issue a certificate for a course that it has never offered nor has it ever provided to the Petitioner herein between the year 1987 and 1989 as sought therein.
32. THAT the Petition herein is only fit for dismissal and/or striking out as it not merited and neither is it one befitting of the prayers

sought as it does not meet the threshold of a constitutional petition.

33. THAT I thus pray that the Petition herein be dismissed with costs to the 2nd Respondent.

The Petitioner filed a supplementary/ further affidavit sworn on 27th March 2025 to controvert the 2nd Respondent's averment in the replying affidavit.

The Petition was canvassed by way of written submissions.

The Petitioner's submissions are dated 22nd November 2024 and supplementary submissions dated 24th March 2025 which have been quoted verbatim below for ease of reference as follows:

The Petitioner's case is that he was discriminated against by the Respondents when he was without proper cause denied certification for Surgical Clinical Ophthalmology by the 2nd Respondent. That the Petitioner has produced a circular showing the requisite conditions they had to attain to qualify for the certificate. The Petitioner has further produced various minutes confirming that indeed he had attained the said conditions and was posted back to the 3rd Respondent where he practiced Surgical Clinical Ophthalmology till his resignation in 1991.

34. He submitted that he had been selected alongside four other colleagues, Dr. Mulatia, Mr. Maina, Mr. Binns and Mr. Abdinuur, to go through the rigorous training, however, it came as a shock when he later discovered his colleagues were awarded the certificate which he was never awarded. In support of his claim that he was discriminated the Petitioner produced a copy of the said certificate that was awarded to Dr. Mulatia.

35. Additionally, the Petitioner further submitted that, the Respondents never accorded him fair hearing in denying him the said certificate. Consequently, his socio-economic rights and fair labour practices were violated. The Petitioner submitted that he tried to follow up the case with the Respondents, however, nothing was forthcoming hence this petition. It thus, didn't come as a shock that despite service of this petition on the Respondents as evidence by an affidavit of service dated 10th May, 2024 and filed on the CTS, none of the Respondents has even bothered to respond or defend themselves against the claims herein.

The Petitioner cited the authority in **Ripples International v Attorney General & Another [2022]** where the court held that where constitutional violations are brought before the court, one has to clearly identify the particular sections of the Constitution violated, illustrate how actions by a Respondent have clearly violated those constitutional provisions and clearly state the prayer they seek from the court. The court held;

“It is trite that a petitioner in a constitutional petition is required to not only cite the provisions of the Constitution which have been violated, but the manner in which they have been violated with regard to them. (see Anarita Karimi Njeru (1976-80) 1 KLR 1272). In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the petitioner should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation.”

The Petitioner in further submissions also put reliance on the holding in ***John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR (per Lenaola, Mumbi (as they then were) & Majanja JJ)*** while agreeing with a submission on mootness as follows:

“We also agree with the submissions of Prof Ghai that this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy. In this case the dispute before the court falls squarely within the province of article 258 of the....”I respectfully agree....”

The Petitioner submitted that he has positively discharged this burden by pleading that his right to fair and equal treatment had been violated by being discriminated, right to a fair hearing and right to fair socio-economic rights and labor practices have all been violated by the Respondents. He contended that he had showcased the particular articles in the Constitution of Kenya that buttress these rights, other international conventions protecting the same rights and how the Respondents have violated these rights. Thus, the Petition is not moot and presents an actual infringement of constitutional rights.

The Petitioner also cited that holding in ***Nyabola v Attorney General & Another [2014]*** where the court discussed in depth on the right to fair and equal treatment and freedom from discrimination. That the court discussed the test of discrimination as one hinged on rationality of decision. It explained;

“50. Wilson J., in Andrews v Law Society of British Columbia [1989] 1 SCR 321, defined discrimination as a “distinction which whether intentional or not but based on grounds relating to personal characteristics of individual or group [which] has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.” Article 27 guarantees equality for all persons and prohibits discrimination and the term “discrimination” implies any distinction, exclusion, restriction or preference which is based 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. 51. For the purpose of this case, it refers to any distinction, exclusion, limitation or preference based on the grounds enumerated which has the purpose of nullifying or impairing equality of treatment in education. According to article 1 of the 1960 UNESCO Convention against Discrimination in Education such distinction, exclusion, limitation or preference may be manifested in depriving any person or group of persons of access to education of any type or at any level; of limiting any person or group of persons to education of inferior standard; or of establishing or maintaining separate education systems or institutions for persons or groups of persons.

52. The issue whether children in private schools may be the subject of discrimination was dealt with in the case of John Kabui Mwai & 3 others v Kenya National Examination Council Nairobi Petition No 15 of 2011 [2011] eKLR. In that case the High Court held that from a reading of article 27(4) considered in light of article 259(4)(b) of the Constitution, the framers of the Constitution did not intend to declare the categories of discrimination mentioned in article 27(4) to be closed and that children in private schools could therefore be the subject of discrimination.

53. It is now well established that inequality treatment is not per se prohibited (see Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another, NRB Petition No 102 of 2011; [2011] eKLR and Community Advocacy and Awareness Trust & 8 Others v Attorney General, NRB Petition 243 of 2011 [2012] eKLR). The question as to whether a discrimination is fair or unfair hence illegal is to be weighed against the rationality test. This is to say that the aim of the inequality should be aimed to achieve a certain legitimate governmental objective. This was clearly elucidated in RM v Attorney General [2008] 1 KLR (G & F) 574, the court stated that, “The equal protection do not in our view require things which are different in fact or in law to be treated as though they are the same. Indeed the reasonableness of a classification would depend upon the purpose for which the classification is made. There is nothing wrong in providing differently in situations that are factually different. The law does all that is needed when it does all it can, indicates a

policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and as first as its means allow." The court further stated that, "We further hold that the principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful if they satisfy the following:-

(1) Pursue a legitimate aim such affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim. "Although the court referred to a reasonable basis for differentiation, I think the proper test is one of rationality in the sense that all the court needs to be satisfied is that the object of differentiation bears a rational relationship to a legitimate government purpose compatible with the principles and values of the Constitution. Such a test maintains fidelity to the principle of separation of powers that is one of the pillars of the Constitution (see Political Parties Coalition Forum Coalition & others v Office of the Registrar of Political Parties and others NRB Petition No 436 of 2013; [2014] eKLR).

54. The question for my determination is not merely whether the provisions are discriminatory or amount to unequal treatment, but whether the different treatment of children in public and private schools in the circumstances of this case bears a rational connection with legitimate governmental purpose. The issue of the different treatment of public and private schools was considered in John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others (supra). The question for consideration was whether the formula used to

determine the number of Kenya Certificate of Primary Education candidates to be placed in national schools from public and private primary schools of a particular district discriminated against candidates from private schools. The effect of the formula was to diminish the number of private school students proceeding to national public secondary schools compared to their public-school counterparts. The petitioners contended that the policy discriminated against private school students and that the policy did not afford them the opportunity to realize their full potential. In considering the matter the High Court observed as follows; “Rightly or wrongly, and it is not for the courts to decide, the framers of the Constitution manifestly regarded as inadequate a blanket right to equal treatment, and their intention was to remedy the perceived societal inequalities thus recognizing the necessity of corrective measures, namely those envisaged in article 27(6), which were at the same time given the status of constitutional guarantee. It was out of the realization that unequal people cannot be treated equally. Comparisons between different groups are necessary to discern the differential effect of policy and to assist the court in properly characterizing and identifying the groups that are relevant to the particular article 27 at hand. Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in equality or whether, on the other hand, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.”

55. In order to determine whether the policy is discriminatory, it is necessary to consider whether funding or in kind support for public schools to the exclusion of private schools achieves a legitimate aim consistent with the constitutional values and principles...”

The Petitioner also argued that there was no rational or legitimate aim consistent with the constitutional values and principles to justify why the Respondent denied him certification and none existed. In the contrary the Petitioner said that he discovered all the colleagues who attended the same course had been given certificates.

The Petitioner submitted that the above circumstances amount to differential treatment yet our Constitution enshrines and protects the right to equality and freedom from discrimination. The Petitioner alleged that the Respondents discriminated against the him and cited the authority in **Nelson Andayi Havi v Law Society of Kenya [2018] eKLR where Mativo J** (as then was) describe differential treatment as;

“92. From the above definition, it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.94. The clear message emerging from the authorities, both local and foreign, is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible

phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.⁹⁵ It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.⁹⁶ The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but prohibits unfair discrimination”

The Petitioner further submitted that the Respondents never informed him of any reasons let alone legitimate ones for such differentiation neither did they give him a chance to be heard. Whether the denial was an administrative decision arrived at, the 1st and 2nd Respondents ought to have informed the Petitioner in line with the provisions of Article 47 of the Constitution on fair administrative action which is inalienable.

The Petitioner submitted that the only conclusion that can be drawn from the actions of the Respondents, is that they were arbitrary and irrational and the burden is on them to show this court that they didn't violate the Petitioner's right to equality and didn't discriminate against him.

It was also submitted that the Respondents despite being served with this petition severally have never filed any response. It is thus incumbent upon this court to protect and call out the Respondents for these violations.

With regard to socio-economic rights, the Petitioner submitted that Article 21(1) of the Constitution places both negative and positive obligations on the state and its agents with regard to protection of rights. That these rights were upheld by the Supreme Court in **Mitubell Welfare Society v The Kenya Airports Authority & 2 Others [2013] eKLR** where the court reiterated that the state and its agents, owe the biggest burden of protecting and ensuring implementation of these socio-economic rights. In this instance, the state through its agents the 1st and 2nd Respondents had a positive duty to promote actions that protect the Petitioner's and other citizens' access to socio-economic rights such as being free from hunger, having adequate food of acceptable quality and social security.

The Petitioner submitted that the denial of the certificate directly impeded his capability to fend for himself since his resignation from public service. That owing to these actions by the Respondents, he has been condemned to a life of destitution yet he is a qualified Surgical Clinical Ophthalmologist.

It was the Petitioner's submission that state agents such as the 1st and 2nd Respondents have a duty to protect and uphold constitutionally protected rights and freedoms and where violations are anticipated, the same must be communicated and one given an opportunity for fair administrative action and within the ambit of Article 24 of the Constitution on Limitation of Constitutional rights.

The Petitioner contended that actions by the Respondents were not justified in the circumstances and to date he has never been subjected to any administrative action let alone a fair administrative action and his right to equality and freedom against discrimination, right to fair administrative action and right to fair socio-economic rights were infringed by the Respondents.

The Petitioner prayed that this court allows the Petition and grant the orders sought as per the Petition dated 5th October, 2023.

In response to the Petitioners submissions the 2nd Respondent filed submissions dated 4th May 2025 as follows:

The Petitioner alleges that he trained between the year 1987 and 1989 to perform cataract extraction at the Kisumu New Nyanza Provincial General Hospital, the 3rd Respondent herein under the supervision of a Dr. Madadi for 12 months. He was thereafter reviewed by a Dr. J. Odede of Eldoret District Hospital who then approved him and he was posted as a surgical Ophthalmic Clinical Officer. That he was thereafter posted back to the Kisumu New Nyanza Provincial General Hospital where he practiced as a Surgical Ophthalmic Clinical Officer until his voluntary retirement in the year 1991. That he then subsequently learned that those he had trained with were given certificates for the said course but he was not given any certificate for the training by the 2nd Respondent on account of discrimination. He therefore alleges that his constitutional rights have been violated and seeks the remedies as pleaded in his petition.

In support, the Petitioner has attached some incomplete and unsigned minutes and an alleged circular that is undated, unsigned and not on a letter head to determine its source.

The 2nd Respondent submitted that it never trained the Petitioner herein in the alleged course of Ophthalmic Surgery and neither did it offer the said course until the year 1991. That if the Petitioner trained for the same between the year 1987 and 1989, then the same was not done under it and as such, but with third parties and as such, it cannot issue a certificate for a course that it never had in its curriculum.

That as far as the 2nd Respondent was concerned, it had admitted the Petitioner twice as a student wherein the Petitioner graduated in the year 1977 as a Registered Clinical Officer and was issued with certificate Number 95.

That subsequently, the Petitioner was thereafter trained for a second time and graduated in the year 1983 as a Clinical Officer (Ophthalmic) and was issued with a certificate serial Number 5937.

That the 2nd Respondent never admitted the Petitioner again as a student for any other training and no other records exist of the Petitioner training for the alleged Higher diploma in Surgical Clinical Ophthalmology (Cataract Surgery) and that in any event, the 2nd Respondent never offered the said course.

It was further submitted that it is the 2nd Respondents position that the Petition filed is misplaced and misguided as against it as it seeks for a remedy that cannot be offered by the 2nd Respondent as the 2nd Respondent cannot issue a certificate to any person for a course it has never offered and one that was not in its curriculum as at the time its alleged to have been undertaken by the petitioner.

That the 2nd Respondent only developed and started offering training and certification in a course titled **Higher Diploma in Clinical Medicine & Surgery (Cataract Surgery) in the year 1991** which

the Petitioner never attended at the 2nd Respondent's college from the year 1991 for any further training.

The 2nd Respondent also submitted that it is its position further is that the claim before court is not a constitutional Petition as the same fails to meet the threshold of a constitutional petition as enunciated in the **Annarita Karimi Njeru case**.

The 2nd Respondent identified issue to be determined as:

- a. Whether the Petition meets the threshold of a constitutional petition?
- b. Whether the Petition offends the provisions of the Limitation of Actions Act/Public Authorities Limitations act?
- c. Whether the remedy being sought is capable of being granted?
- d. Who should bear the costs?

A. Whether the Petition meets the threshold of a constitutional petition?

The 2nd Respondent submitted that courts have held over and over that not all disputes amount to or should be elevated to the status of constitutional petitions. Especially in matters where the parties seek to avoid the normal court process due to limitations of actions statutes which bar the filing of suits outside the times limited in the statutes.

The 2nd Respondent cited the case in **Nehemiah Stone Bic Misiani t/a Stonebic High School v Kenya National Examination Council (KNEC) & 3 others [2022] KEHC 2129 (KLR)**, where the court dismissed the Petition as the same did not meet the threshold for a constitutional petition as was held below;

“29. In the instant Petition and before proceeding any further, I find it prudent to consider the question as to whether or not there is a competent constitutional Petition for determination by this Court. The principle of what constitutes a constitutional Petition was sufficiently enunciated in the case of Annarita Karimi Njeru vs. Republic (1970) eKLR in which principles were last restated by the Court of Appeal in the case of Mumo Matemo vs. Trusted Society of Human Rights Allied & 5 others (2013) eKLR.

30. The Principle established in the Annarita Karimi Njeru case (Supra) was that a Constitutional Petition should set out with a degree of precision the Petitioner’s complaint, the provisions infringed, and the manner in which they are alleged to be infringed. The Mumo Matemo case (supra) simply reaffirmed the principle in the Anarita Karimi case when the Court at paragraph 44 of the Judgment stated as follows:-

“(44) We wish to reaffirm the principle holding on this question in Anarita karimi Njeru (supra). In view of this, we find that the Petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the Petition so as to provide sufficient particulars to which the Respondents could

reply. Viewed thus, the Petition feel short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the Superior Court below to lament that the Petition before it was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1st Respondent.”

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1. **It should be noted and appreciated in any suit, it is not for the Court to aid the Petitioner to present his case before the Court. It is the duty of the Petitioner to do so. In view of the aforesaid, it is evidently clear that the instant Petition, falls short of the established threshold of a constitutional Petition as it fails to disclose, with a reasonable degree of precision, the manner in which the 1st, 2nd, 3rd & 4th Respondents has violated any of the Petitioner’s rights.**
2. **To buttress the above reliance is placed in the case of Annarita Karimi Njeru vs Republic (No.1) [1979] KLR 154 in which the High Court set out the considerations which should guide parties as they seek to file a constitutional reference in the high Court. The principle in this decision is that a party**

who alleges that his or her rights under the Constitution have been violated must demonstrate, with a reasonable degree of precision, the Articles of the Constitution that have been violated, and the manner of violation with respect to him.

- 3. Further the same principles were adopted in the case of Mumo Matemu vs. Trustees Society of Human Rights Alliance & 5 others [2013] eKLR (Civil Appeal No. 290 of 2012) where the Court of Appeal underscored the need to have a reasonable degree of precision in drafting of pleadings in constitutional litigation.**
- 4. The mere allegation by Petitioner of violation of human right or fundamental freedoms of the applicant has been violated or is threatened with violation or has been contravened without compliance with principles set out in Annarita Njeru case (Supra) is not in itself sufficient to entitle an applicant to invoke the jurisdiction of this Court, it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court for solely for purpose of avoiding the necessity of applying in the normal way for appropriate Judicial remedy for unlawful action which involves no contravention of any human right or fundamental freedom.”**

The 2nd Respondent submitted that it should be noted that the Petition filed herewith has only listed down various provisions of the constitution of Kenya 2010 without interlinking the mentioned articles

of the constitution to specific violations that are applicable to him in a particularized or precise manner or at all.

The 2nd Respondent Similarly quoted and relied in the case of **Mburu v Inspector General of Police & 2 others (Petition 57 of 2023) [2023] KEELRC 2488 (KLR) (17 October 2023) (Ruling)**, where the court in dismissing a Petition that had been filed without particulars of alleged constitutional violations as is the case herein stated as follows;

“The Court has considered the petition. The petitioner has not by description or reference to Articles of the Constitution particularized the alleged constitutional violations. The allegations are generalized allegations of violation of rights and freedoms not disclosed in the petition at all. In the circumstances, the Court returns that the petition fails to meet the threshold for a proper constitutional petition. The preliminary objection is upheld in that respect.”

The 2nd Respondent urged the court to note that at no point in the entire Petition has the Petitioner particularized the alleged constitutional violations but has only listed down provisions of the constitution without linking specific violations to the particular provisions of the constitution. The same is clearly a vague and feeble attempt to disguise the dispute raised by the Petitioner as a constitutional claim where none exist and where it’s clear that the Petitioner was trying to go around the statutory limitations on filing suits in court.

That further in the **Nehemiah Stone Bic Misiani t/a Stonebic High School** (Supra), the court in seeing through the attempt by the Petitioner to camouflage a civil claim as a constitutional petition stated as follows;

“38. From clear perusal of the Petitioner’s Petition, I find that it is purely civil claim disguised as constitutional Petition. Considering the current Petition the Petitioner is aggrieved by Respondents action and/or omissions, which have resulted to financial loss, defamation, closure of the institution and deregistration. The claim is civil in nature since it raises no constitutional issue and have not met the principles set out in the Annarita Karimi Njeru case (Supra).

1. *On reading the Petition and considering the Petition as a whole, I find the Petitioner’s claim as pleaded is premised on law of tort and is purely civil claim with clear civil remedies. To buttress the foresaid reliance is placed in the case of **Uhuru Muigai Kenyatta v. Nairobi Star Publications Limited (2013) eKLR**, cited by Githua J in **Veronica Sum v National Bank of Kenya Ltd (2016) eKLR**, where Lenaola J (as he then was) applied the holding in the Re application by **Bahadur (1968) LR C (Cost) 297** and held that;*

“Where there is remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (Supra) where the converse may have bene expressed

as the position. My mind is clear however that not every ill in society should attract a constitutional sanction...”

2. *In the Re-application by Bahadur case (supra), the Court in Trinidad and Tobago it was held as follows:-*

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution.”

3. **In view of the aforesaid, I find that the Petition do not meet the required threshold for a Constitutional Petition. Secondly the Petition is purely civil claim disguised as a Constitutional Petition. In view whereof, I find that the doctrine of avoidance relevant. This Court therefore find that there is remedy in civil law, and the Petitioner should pursue that remedy in the civil law since not every ill in society should attract a Constitutional structure. I find that the Constitution cannot always be a general substitute for normal procedures for invoking judicial control of administrative action. The Petitioner has to follow the normal procedures in putting his claim against the Respondents. Time and again Courts have clearly expressed themselves that where infringements of rights can found a claim under**

substantive law, the proper cause is for the Petitioner to bring a claim under the law and not under Petition disguised as a constitutional Petition as is the case in this matter.”

The 2nd Respondent prayed that this court finds that the Petition herein does not meet the threshold of a constitutional petition and proceed to dismiss the same forthwith.

B. Whether the Petition offends the provisions of the Limitation of Actions Act/Public Authorities Limitations act?

The 2nd Respondent submitted that it is clear that the Petitioner has approached court on grounds that he was to be issued a certificate by the 2nd Respondent after completion of training. The 2nd Respondent is a government medical college. The Petitioner is therefore in the position of a student, and the 2nd Respondents an academic institution. A relationship between a student and an academic institution is a contractual relationship based on the application for study by the student, acceptance of the said application, payment of the relevant fees and the subsequent enrollment, training and upon successful completion, certification through issuance of a duly signed certificate by the academic institution.

The 2nd Respondent submitted that if the relationship between it and the Petitioner is that of a student and institution, then the dispute is civil in nature and not constitutional as it is in reality a breach of contract claim. That where a party has suffered loss due to a breach of contract, then the remedy due to the said party is a civil remedy upon

a civil action being filed and heard and not the filing of a constitutional petition alleging infringement of constitutional rights.

It was argued that the Petitioners real intention of filing a constitutional petition in this matter is actually an avoidance tactic since the he knows that he is time barred from pursuing a civil claim based on contract after 38 years!

That under Section 4 of the Limitation of Actions Act, CAP 22 of the Law of Kenya, it is clear that an action founded on contract cannot be brought after 6 years from the time the cause of action arose. In this matter, the Petitioner alleges that he underwent training between 1987 and 1989, the cause of action thus arose in the year 1989, the same cannot be prosecuted now, over 38 years later!

It was further submitted that, since the 2nd Respondent is a Government institution, suits against it are governed by and must abide to the provisions of the Public Authorities Limitation Act, CAP 39 of the laws of Kenya. That Section 3 thereof provides that no proceedings founded on contract shall be brought against the Government after the end of three years from the date on which the cause of action accrued. As such, these proceedings having been brought after 38 years, cannot stand and ought to be dismissed forthwith.

C. On Whether the remedy being sought is capable of being granted?

The 2nd Respondent submitted that from the Replying Affidavit on record, it is clear that no such course has been offered by the 2nd Respondent as none in that name exists. That the only course offered that is remotely close to what the Petitioner seeks in his petition is **Higher Diploma in Clinical Medicine & Surgery (Cataract Surgery)** which was only offered from the year 1991 and the Petitioner never applied for or attended the 2nd Respondent's college as from the year 1991 for training in the said course. The Petitioner clearly states that he was trained between the year 1987 to 1989, this was before the course was offered by the 2nd Respondent and as such, the 2nd Respondent cannot issue a certificate for a course it never offered and for a year that the same was not even part of its curriculum. This certificate cannot be issued as it would amount to the perpetuation of an illegality and will be against the law.

Furthermore the 2nd Respondent argued that it is also clear that all the documents attached and relied upon by the Petitioner including alleged minutes and circulars have no relation whatsoever with the 2nd Respondent as they never originated from the 2nd Respondent and neither did the 2nd Respondent participate in their making. That the minutes are unsigned and incomplete and there is no participation of any officer from the 2nd Respondent in all the minutes attached. The 2nd Respondent is a stranger to the said minutes, circulars and all other documents attached therein. The said documents could only have been properly tested through a proper hearing in a civil suit where evidence can be formally adduced and tested in cross examination.

D. Who should bear the costs

On who should bear the Costs of the petition, the 2nd Respondent submitted that costs follow the event and since this matter was unnecessary insofar as it relates to the 2nd Respondent, then the same ought to be awarded in favor of the 2nd Respondent upon dismissal of the Petition.

In conclusion the 2nd Respondent submitted that it is wrongly joined and sued in this suit as it had no participation in the dealings that the Petitioner had with third parties between the year 1987 and 1989. It is clear from the alleged circular and unsigned minutes that the 2nd Respondent was never a participant in any discussion regarding the petitioner herein and was never a part of any dealings or trainings that were being done by third parties without its involvement. That in the circumstance, the 2nd Respondents urged that the Petition be dismissed with costs as it does not meet the threshold of a constitutional petition as clearly spelt out in the **Annarita Karimi Njeru case**; that the Petition offends the provisions of the Limitation of Action Act and more so the provisions of the Public Authorities Limitations Act; that further the remedies being sought cannot be granted as the Petitioner seeks to force the 2nd Respondent to issue him with a certificate for a course it never offered in the years indicated as the only course close to the one being alleged by the petitioner started being offered in the year 1991 and the Petitioner never enrolled for the same.

In a rejoinder to the 2nd Respondent's submissions the Petitioner filed supplementary submissions dated 24th March 2025 where he submitted that in In Kiragu v Chuka University (Constitutional Petition E001 of

2023) [2024] the honourable court dealt with the first issue, where the Respondent had filed a preliminary objection to dismiss the petitioner's petition on the basis it did not meet the standard in the Annarita Karimi case. The court while dismissing the preliminary objection analysed the law as follows;-

'Rule 4(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the "Mutunga Rules") provides that: "Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules."

The Petitioner argued that Rule 10 of the Mutunga Rules governs that the form that a constitution should take and Rule 10(2) of the same Rules specifically provide as follows:

"(2)The petition shall disclose the following—

(a)the petitioner's name and address;

(b)the facts relied upon;

(c)the constitutional provision violated;

(d)the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e)details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f)the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g)the relief sought by the petitioner."

It was submitted that the Mutunga rules found the bedrock of what suffices as a constitutional petition or otherwise and the petition dated 5th October, 2023 meets each of the requirements. It was thus, the petitioner's humble submission that the petition before the court meets the Annarita Karimi (as discussed in our earlier submissions) threshold as founded under the Mutunga rules.

That with regard to the doctrine of Laches, it was the Petitioners submission that the 2nd Respondent's replying affidavit has revealed that the Petitioner indeed tried to engage the institution on the subject matter of this petition. Consequently, it is an admission that the Petitioner has been seeking to understand and resolve the issue herein with the institution and did not just wake from deep slumber to file this petition. That this court was the forum of last resort after the institution, the 2nd Respondent herein, which had capacity to resolve the issue declined to resolve it. Thus, the delay herein is justified in that the Petitioner tried to engage the 2nd Respondent unsuccessfully before filing this petition.

That additionally, to controvert the allegation of laches, the 2nd Respondent has not pleaded or demonstrated the prejudice they would suffer if this petition is heard and determined. These arguments notwithstanding, questions about constitutional violations are not questions found on tort or contract to attract limitation of actions provisions. The court has upheld this in various cases, for instance in **Dominic Arony Amolo Amolo v Attorney General [2003] eKLR**, Hayanga J, succinctly stated the law thus (page 2 and 4,)"-

"...The point to decide here is whether breach of Fundamental Rights and redress thereof can be brought to Court any time irrespective of the provisions of Limitation

Act. Like for example colonized persons seeking redress years after independence. To put it another way whether in interpretation of constitutionally entrenched provisions of Fundamental Rights, the Court is in any way circumscribed by legislative statutes like Limitation Act. Section 3 of the Kenyan Constitution provides:- “This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and subject to Section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.” ... I, therefore, think and I so hold that Section 3 of the Constitution excludes the operation of Cap 22 with regard to claims under Fundamental Rights and further that the Fundamental Rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated under the Limitation Act Cap 22.”

This argument and the question of when is a good time within which to hold state agencies or actors responsible for violations especially human rights was reiterated and upheld in **Zipporah Seroney & 5 others v Attorney General [2020] eKLR** in which W. Korir J, held thus (paragraph 58)

“[58] ...Indeed this Petition relates to events that occurred during the presidency of Mzee Jomo Kenyatta. The Petition has been brought about forty five years after the deceased was allegedly arrested and detained... In the circumstances of this case, it is not too late to peer into the past and

correct the injustices that may have occurred in our history. I therefore reject the Respondent's assertion that this petition is time barred. (Emphasis added).

The Petitioner concluded his submissions by reiterating that, government agencies are not individuals who can argue that they lost records or witnesses or evidence. The Respondents are government institutions with institutional memory and thus will suffer no prejudice. In any case, it is important that state agencies be held responsible for violations they commit even in the distant past to avoid a repeat in future. In this regard, the 2nd Respondent cannot shy away from taking responsibility of the misdeeds of its predecessor Medical Training College. This equally applies to the 1st and 3rd Respondents as they are all corporate bodies with perpetual succession. The court was urged to make a finding in favor of the Petitioner and allows the petition as prayed.

ANALYSIS AND DETERMINATION

Having considered the pleadings, the affidavits and the rival submissions, the following issues arise for determination:

1. Whether the Petition meets the constitutional threshold under the *Anarita Karimi Njeru* and *Mumo Matemu* tests;
2. Whether the Respondents violated the Petitioner's constitutional rights;
3. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petition meets the Constitutional threshold, the parameters for assessing the sufficiency of a constitutional petition were articulated in *Anarita Karimi Njeru v Republic* (1979) and

reaffirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance* (2013) where it was held that a petitioner must plead with reasonable precision the rights allegedly violated, the manner of violation, and the connection between the Respondent's conduct and the alleged infraction.

The Petitioner has enumerated several constitutional provisions which he contends were violated. However, the Court must examine whether the pleaded facts demonstrate, with the required clarity, that the Respondents undertook an action or omission capable of amounting to a constitutional violation.

From the annexure SMG1 copy of document without letter head shows that the Petitioner was one of the candidates for next year. Being that the next minute of the undated document reads 7/87 it can be assumed that he was among candidates for 1988. It is not clear what his candidature was all about.

Annexure SMG 2 is also a portion of a document which gives conditions of training for each of the Ophthalmic Clinical Officer selected by the Ministry of Health to be trained in a practical course of instruction by an Ophthalmic Surgeon who has been approved as instructor in cataract surgery by the Kenya Ministry of Health.

There are 4 conditions for certification attached to the training and training for competence in certain areas. Annexure 2 like 1 above does not have a letter head or conclusion and the same is not dated or signed.

Annexure SMG 4 is a list of names that is not explained how it is related to the petition.

The next document is minutes of a meeting of Professional Sub-Committee of The National Prevention of Blindness held at KNH 9th Floor Seminar Room on 16th November 1989 held at 10.15 am. The minutes indicate that the Ministry of Health's Training Committee had already recommended that Ophthalmic Clinical Officer Cataract Surgery Training Certification course be set up and the Medical Training Centre had received written instructions to confirm the instructions to start the course. The workshop to decide and finalise the course curriculum was to take place in January 1990 and it was proposed that the course known as Higher Diploma in Ophthalmology (Cataract Surgery Course) was to start in July 1990.

The minutes also make reference to Ophthalmic Clinical Officer Cataract Surgery Students assessment and indicates that the Petitioner had now been re-assessed at Eldoret and Dr. Odede had recommended that he be posted as Cataract Surgeon.

Minutes of 1st March 1990 also refer to the Petitioner's re-assessment and that he was awaiting a posting order.

The 2nd Respondent placed before the court uncontested evidence that as at the date the Petitioner claims he was trained it did not exist in its current statutory form between 1987 and 1989; it did not offer any programme in Surgical Clinical Ophthalmology in the period alleged; the Petitioner's only known qualifications are a 1977 Registered Clinical Officer certificate and a 1983 Diploma in Ophthalmic Clinical Medicine; higher diploma training in cataract

surgery was first offered in 1991; that the Petitioner sought a replacement certificate for his 1983 qualification, which was duly issued.

These facts substantially weaken the foundation upon which the Petition rests. No evidence is placed before the Court demonstrating that the 2nd Respondent undertook, supervised or certified the alleged training programme. The unsigned minutes and uncertified documents relied upon by the Petitioner do not establish the 2nd Respondents' involvement or legal obligation to issue the certificate sought.

As regards the 1st Respondent, the Petition does not identify the decision, policy or action attributable to it that allegedly violated the Petitioner's rights. Mere assertion that the Petitioner was an employee of the Ministry of Health is not sufficient to satisfy the precision test. The authors of the unsigned and undated annexures do not indicate that the Petitioner was to be given certificate upon completion of the alleged course. In two of the minutes the only indication is that he had been re-assessed and Dr. Odede recommended that he could be posted. In the second minute it is reported that he had been re-assessed and was awaiting a posting order. Whether he was posted or not is not disclosed and it is also not disclosed whether his resignation almost immediately after the alleged training affected his certification.

The claim herein arose from events of 1987-1989. The Petition was filed in 2023, representing a delay of nearly 38 years. The Petitioner has given the court piecemeal information and while constitutional claims are not strictly subject to statutory limitation, courts have consistently held that constitutional petitions must not be used to

circumvent statutory limitation or resurrect stale claims where no plausible explanation for delay is offered.

In light of the foregoing, the Court finds that the Petition does not disclose a proper constitutional controversy capable of adjudication under Article 22. The dispute, if any, is administrative in nature, and the pleadings fall short of the constitutional threshold established in *Anarita Karimi Njeru and Mumo Matemu*.

Whether the Petitioner's Constitutional Rights were violated, it was his claim that he was discriminated against as one of the colleagues he trained with during the same period Ronnie Mwangangi Mulatia was given a certificate dated 6th May 1993- Higher Diploma in Cataract Surgery. It is apparent that the certificate referred to was issued long after the 2nd Respondent had mounted the course alluded to and it cannot be said with certainty that the said Ronnie Mwangangi was given a certificate arising from the training the Petitioner allegedly undertook between 1988-89. The Petitioner has not demonstrated—through credible, authenticated evidence—that the Respondents were obligated to issue him with the certificate in question. A claim founded on a course that the 2nd Respondent never offered, and in respect of which it neither trained nor supervised the Petitioner, cannot result in a finding of constitutional violation. The Respondents' evidence that the 2nd Respondent did not offer the course in question, did not exist in its present form during the relevant period, and has no record of the Petitioner's alleged training remains unchallenged.

The Petition is further undermined by an unexplained delay of nearly 38 years, which betrays an attempt to turn a stale administrative

grievance into a constitutional matter and circumvent statutory limitation.

In the result, the Court finds that the Petition does not raise any justiciable constitutional controversy and constitutes an abuse of the court process.

On whether reliefs sought are available, a court cannot grant orders that are factually impossible, such as directing an institution to issue a certificate for a course it has never offered, or granting damages where no constitutional violation is established. The prayers sought are therefore not available.

In the result, the Court finds that the Petition does not raise any justiciable constitutional controversy and has failed to satisfy the threshold under Anarita Karimi Njeru case. The Petition dated 5th October 2023 is hereby dismissed. This being a constitutional matter it is hereby ordered that each party shall bear their own costs of the petition.

DELIVERED, DATED and SIGNED at MIGORI this 26th day of February, 2026.

**A. ONGINJO
JUDGE**