



**University of Nairobi v Arunga (Civil Appeal 149 of 2018)  
[2023] KECA 843 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 843 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 149 OF 2018  
J MOHAMMED, F TUIYOTT & JM NGUGI, JJA  
JULY 7, 2023**

**BETWEEN**

**UNIVERSITY OF NAIROBI ..... APPELLANT**

**AND**

**IGANGA ALFRED ARUNGA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the High Court at Kisumu  
(D. S. Majanja, J.) dated 31st October, 2017 in H.C. PETITION NO. 1 OF 2017)*

**JUDGMENT**

1. Iganga Alfred Arunga (“the Respondent”) was admitted to the University of Nairobi (Kisumu campus) to study for a Bachelors of Laws (LLB) degree. He was scheduled to graduate in December, 2016. He thought he had completed all the requirements for graduation; and satisfied the board of examiners of the University of Nairobi main campus (“the University” or “Appellant”). As such he was conferred with a Bachelor of Laws degree on 2<sup>nd</sup> December, 2016, during the 56<sup>th</sup> congregation for the conferment of degrees and award of diplomas at the Chancellor’s Court at the University.
2. Subsequently, the respondent made an application to be admitted to the Advocates’ Training Programme at the Kenya School of Law, whereupon he was required to produce the original copies of his testimonials, degree certificate and transcripts. He already had been issued with his provisional transcripts for 1<sup>st</sup> to 4<sup>th</sup> year of study. He was, then, issued with his degree certificate on 16<sup>th</sup> January, 2017. Afterwards, he was informed that he could collect his original transcripts on 23<sup>rd</sup> January, 2017. Meanwhile, the deadline for registration and submitting of testimonials to the Kenya School of Law was on 27<sup>th</sup> January, 2017, whereas the date of reporting was scheduled on 1<sup>st</sup> February, 2017.
3. On 23<sup>rd</sup> January, 2017, the respondent returned to the University to collect his original transcripts as promised. An unpleasant surprise awaited him: while there, his degree certificate was confiscated



- by an official of the University and he was informed that the University had received a “tip” from an anonymous source that he had graduated through deceit and fraud.
4. This turn of events is what led the respondent to file a Petition dated 31<sup>st</sup> January, 2017 at the High Court. In it, the respondent sought the following orders:
    - a. A declaration that the actions of the respondent and/or its agents is illegal and unprocedural and therefore violated the provisions of the Constitution and the rules of natural justice hence null and void.
    - b. A declaration that the actions of the respondent and/or its agents amounts to unfair administrative action and therefore against the letter and spirit of the Constitution hence null and void.
    - c. An order compelling the respondent to release all academic testimonials including degree certificate and all original transcripts illegally and unlawfully held by it to the petitioner unconditionally and with immediate effect.
    - d. General, exemplary and punitive damages at court’s apportioned rate towards unwarranted emotional, physical and mental destabilization of the petitioner and aimed at deterring such future malicious illegalities by the respondent and cadre.
    - e. Cost of this petition be borne by the respondents jointly and severally.
    - f. Interests on (d) above.
  5. In the petition, the respondent alleged that the appellant contravened Article 28 of the *Constitution* as he was treated in an “undignified manner” when his degree certificate was confiscated by an agent of the appellant in the full glare of his peers. He also alleged that the appellant contravened Article 47(2) of the *Constitution* by not giving him written reasons for the administrative action taken. Additionally, he claimed that he was demeaned and denied any form of hearing.
  6. The respondent averred that the actions of the appellant threatened to interfere with the right to education contemplated under Article 43(f) of the *Constitution*. It was his contention that if there were any issues arising against himself, the undisclosed anonymous source and the appellant, the same ought to have been reported in a conventional manner, investigated and then he (respondent) be accorded an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as contemplated under Article 47(1) of the *Constitution*.
  7. The respondent argued that the actions of the appellant through its agents, under the instructions of the Vice-Chancellor, were illegal, insensitive and malicious whose resultant effect could make him lose his admission at the Kenya School of Law.
  8. The respondent further averred that his father confirmed from the appellant that the respondent’s records were clean and there was no reason whatsoever for withholding his documents. In this regard, the appellant’s Legal Officer informed the respondent to collect his documents from the University, but when he reached there, he was informed that there had been no communication from the Vice-Chancellor on the issue.



9. Contemporaneously with the petition, the respondent also filed a Notice of Motion Application dated 31<sup>st</sup> January, 2017, in which he sought the following orders:
1. That the Honourable Court be pleased to certify the present application as urgent to be dispensed with in the first instance for the reasons stated in the certificate.
  2. That the Honourable Court does issue summons to the Vice Chancellor – University of Nairobi, Professor Peter Mbithi, to attend the Honourable Court and show cause why the institution is detaining the petitioner’s degree certificate and original transcripts.
  3. That the Honourable Court does issue conditional order for the immediate release of the original academic transcripts for 1<sup>st</sup> to 4<sup>th</sup> year of study and degree certificate for the award of Bachelors of Laws (LLB) to the petitioner by the respondent pending the hearing and determination of the present petition.
  4. That the cost of this application be provided for.
10. The appellant opposed the respondent’s petition through a replying affidavit of Prof. Henry W. Mutoro, the University’s Deputy Vice-Chancellor in charge of Academic Affairs, dated 14<sup>th</sup> June, 2017. The appellant denied the contents of the respondent’s petition and stated that the respondent was admitted as a Module II undergraduate student in the School of Law, Kisumu campus to pursue a Bachelors of Laws Degree Programme in 2012/2013 academic year. Thereafter, the appellant’s Dean-School of Law presented the respondent’s name for graduation and he graduated on 2<sup>nd</sup> December, 2016 with a Bachelor of Laws, Second Class Lower Division.
11. The appellant’s narrative was that after the respondent’s graduation, an anonymous whistleblower, through an email to the University’s Vice-Chancellor dated 5<sup>th</sup> December, 2016, gave information to the effect that the respondent had forged the appellant’s transcript software, rubber stamp and signature of the University’s Dean-School of Law. The whistleblower alleged that the respondent had generated his “transcripts” in this fraudulent manner.
12. Following this allegation, the appellant claimed that vide a letter dated 7<sup>th</sup> December, 2016, from the Dean-School of Law, it suspended the issuance of the respondent’s certificate and transcripts until the matter was investigated and concluded, pending a disciplinary case. In the affidavit filed on its behalf, the appellant admits that the respondent’s degree certificate was confiscated by the appellant based on these serious allegations. The appellant averred that notwithstanding the provisions of the Universities Act (Cap 210B), the University’s Senate has the powers and duties to decide which persons have attained such standard of proficiency and are otherwise fit to be granted a degree certificate, diploma, certificate or any other award of the University. Consequently, the respondent was requested to surrender the transcripts and degree certificate that had been issued to him pending the outcome of the disciplinary case against him.
13. The appellant complained that the respondent had failed to establish how an administrative action is a constitutional matter or why he opted for a constitutional route before exhausting the normal channels of appeal within the University.
14. The appellant further averred that the respondent’s complaints did not amount to a violation of constitutional rights and neither did he establish any legal and factual basis for the reliefs sought.



- Additionally, the appellant averred that the respondent's application was frivolous and an abuse of the court process on grounds that the court was not the proper avenue for him to ventilate his complaints.
15. The record before the court shows that on 2<sup>nd</sup> February, 2017, Cherere, J. made an order for inter parties hearing of the respondent's Notice of Motion Application dated 31<sup>st</sup> January, 2017. The date scheduled for that hearing was 9<sup>th</sup> February, 2017. On that date, however, Mr. Abande, learned counsel for the respondent, informed the court that the appellant had complied with the orders to release the respondent's original academic transcripts and degree certificate. Consequently, the respondent withdrew the application. The court made the following orders on the court file:
    1. Application dated 31/01/17 has been compromised and its hereby withdrawn.
    2. Mention on 09/03/17 to confirm whether pleadings have been closed.
    3. The respondent to be served.
  16. On 9<sup>th</sup> March, 2017, Majanja, J. made an order for the Notice of Motion dated 31<sup>st</sup> January, 2017 to be heard on 21<sup>st</sup> March, 2017. He also made an order for the same to be served and the respondent to pay Kshs. 1,000/= CAF. On 21<sup>st</sup> March, 2017, Mr. Abande informed the court that the matter was not served and he sought for another date. Subsequently, the court made an order for the application to be heard on 4<sup>th</sup> April, 2017 and the respondent to pay Kshs. 1,000/= CAF. On 4<sup>th</sup> April, 2017, Mr. Abande informed the court that the application was not opposed and he sought prayers that the Vice-Chancellor be summoned to show cause as to why the University was detaining the respondent's degree certificate. On 5<sup>th</sup> April, 2017, the court made a ruling and issued an order, as prayed by the respondent; and summoned the Vice-Chancellor to attend court on 25<sup>th</sup> April, 2017.
  17. On 25<sup>th</sup> April, 2017, the Legal Officer of the University informed the court that the respondent's academic transcripts and degree certificate were released to the respondent on 3<sup>rd</sup> February, 2017. On that day, both parties were represented, with learned counsel, Mr. Abande appearing for the respondent whereas learned counsel, Mr. Omondi appeared for the appellant. Consequently, the court made the following orders:
    1. Respondent to serve its replying affidavit to the petition within 7 days.
    2. Mention on 09/05/17 for further orders and directions.
  18. On 9<sup>th</sup> May, 2017, the court made the following orders:
    1. Replying affidavit to be filed within 7 days.
    2. Mention on 23/05/17.
    3. Defendant to pay Kshs. 1000/= CAF.
  19. On 23<sup>rd</sup> May, 2017, there was no appearance for the appellant and the court made an order that it pays Kshs. 1000/= CAF and Kshs. 5000/= costs of the day. The court also made an order for the hearing of the petition on 18<sup>th</sup> July, 2017. Come 18<sup>th</sup> July, 2017, the hearing was adjourned to 19<sup>th</sup> September, 2017 since the respondent was undertaking exams at the Kenya School of Law.
  20. On 19<sup>th</sup> September, 2017, Mr. Abande opted to rely entirely on the petition and the supporting affidavit. He also made oral submissions and stated that the respondent never received any notifications or reasons for confiscation of his certificate and this was proof that his constitutional right was breached. Mr. Kyawazima, learned counsel for the appellant who held brief for Mr. Kipkorir opted to



rely entirely on the appellant's replying affidavit. Afterwards, judgment was delivered on 31<sup>st</sup> October, 2017.

21. As it will become clear shortly, this litigation history is important because it shows that the respondent got his degree certificate and transcripts back on 3<sup>rd</sup> February, 2017. During the plenary hearing of this appeal before us, Mr. Kipkorir, erstwhile counsel for the appellant, argued that this release date demonstrated that the respondent suffered no constitutional torts or other harms deserving monetary compensation.
22. In its decision, the trial court coined three (3) issues of determination, namely: -
  - a. Whether the court had jurisdiction to adjudicate an administrative matter through a constitutional petition without exhausting the normal channels of appeal within the University.
  - b. Whether the respondent's right was violated.
  - c. What reliefs to issue and who pays the costs of the petition.
23. As regards the first issue, the trial court stated the respondent invoked the jurisdiction of the High Court under Article 165(3)(b) of the Constitution to enforce fundamental rights and freedoms. In this regard, the court opined that Article 22 provides that every person who claims that his fundamental rights and freedoms were threatened or violated has a right to move the High Court for relief. It further stated that the right to apply to the High Court for relief is unconditional, unhindered and without prejudice to any other relief, cause of action or alternative remedy the petitioner may have; and cited the cases of *Samura Engineering Ltd & 10 others v Kenya Revenue Authority*, NRB Petition No. 54 of 2011 [2012] eKLR at para 53 and *Kenafriic Industries Ltd v Commissioner of Domestic Taxes & 4 others*, NRB Petition No. 99 of 2011 [2012] eKLR at para. 37.
24. The trial court thus held that the objection taken by the appellant that the respondent ought to have followed the internal University procedures to resolve his issue or that he could not invoke the provisions of Article 22 of the Constitution were not well founded. Further, on whether the respondent stated with specificity the right alleged to have been violated, the court held that the respondent was clear that his right to fair administrative action under Article 47(1) of the Constitution which provides that: "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair," had been violated. In this regard, the court found that contrary to the appellant's assertion, the right to fair administrative action is a fundamental right under the Constitution which may be enforced by an application under Article 22 of the Constitution.
25. As regards the second issue, the trial court noted that the respondent's case was that he was not notified of the case against him and that his certificate was withdrawn without notice or information. In this regard, the trial court also noted that the University averred that it notified the respondent that the issuance of his academic transcripts and degree certificate had been suspended vide a letter dated 7<sup>th</sup> December, 2016, pending a disciplinary case. However, that said letter was neither attached nor produced in court. The trial court further noted that despite the University advertizing that disciplinary proceedings had been commenced, the respondent was issued with the degree certificate on 16<sup>th</sup> January, 2017. And it was only later when he went to collect his academic transcripts, that the respondent was informed that his academic transcripts and degree certificate had been withheld. Following this occurrence, the respondent's father wrote to the Vice-Chancellor through the Center



Director of the University's Kisumu campus, vide a letter dated 24<sup>th</sup> January, 2017. In that letter, he explained what had transpired and stated as follows:

“We are saddened as a family to note, when the student came to collect his original transcripts, his degree certificate was confiscated without any written reason over the counter and told to go to School of Law Parklands to see the Dean .... My efforts to get comments from the Associate Dean School of Law Kisumu indicated that he is not aware of any such impropriety on the part of the said student in his school and had only referred me to the Vice Chancellor who is the architect of this matter. His officer has no information nor knowledge of such misnomer.”

26. The court noted that upon sending the above letter, the respondent's father also spoke to the University Legal Officer and informed him of the situation. This conversation was confirmed by an email dated 30<sup>th</sup> January, 2017. The Legal Officer wrote back and informed the respondent's father that the respondent could collect his academic papers from the University. Nothing regarding an impending disciplinary case or process was alluded to by the Legal Officer in his response. As such, since the University did not produce the letter dated 7<sup>th</sup> December, 2016, the trial court held that it was entitled to draw an adverse inference that no such letter was sent to the respondent. Additionally, the trial court held that despite receiving the respondent's father's letter, the University did not allude to disciplinary proceedings of any sort or deny the respondent's allegations. Ultimately, the trial court held that the totality of the evidence before it was that although the University knew of the allegations against the respondent, it never informed him and proceeded to take adverse and arbitrary action against him.
27. As a result, the trial court found and held that the respondent's right to fair administrative action under Article 47(1) of the Constitution was violated when he was not informed of the purported disciplinary action against him and when his degree certificate was confiscated and original transcripts withheld without informing him in writing. In this regard, the trial court cited the case of Geothermal Development Company Limited v Attorney General & 3 others, NRB Petition 352 of 2012 [2013] eKLR in which it was held that as a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it.
28. As regards the third issue, having found that there was a violation of the respondent's right, the trial court held that Article 23(3) of the Constitution mandated it to grant appropriate relief including a declaration of rights, an injunction, a conservatory order, an order for compensation and an order of judicial review, in order to vindicate the rights protected under the Bill of Rights. The trial court opined that what amounts to an appropriate relief depends on the nature and circumstances of each particular case and cited the case of Nancy Makokha Baraza v Judicial Service Commission and 9 others, Nairobi Petition No. 23 of 2012 [2012] eKLR and Bidco Oil Refineries Ltd v Attorney General and 3 others, Nairobi Petition No. 177 of 2012 [2012] eKLR. In the circumstances, the trial court made the following orders:
  - a. A declaration be and is hereby granted to the petitioner that his right to fair administrative action under Article 47(1) of the Constitution was violated when the respondent when the respondent arbitrarily and without due process confiscated the petitioner's degree certificate and refused to release his original transcripts.
  - b. I award the petitioner Kshs. 500,000/- as general damages with interest thereon at court rates from the date of this judgment until payment in full.
  - c. I award Kshs. 50,000/- as all-inclusive costs.



29. Aggrieved by the decision of the trial court, the appellant filed a Notice of Appeal dated 3<sup>rd</sup> November, 2017 and a Memorandum of Appeal dated 27<sup>th</sup> November, 2018, in which they raised fifteen grounds of appeal. These are that the learned judge:

1. Erred by disregarding in totality the entire court proceedings of 09/02/17 before Hon. Justice T. W. Cherere, the trial judge who previously had conduct of this matter.
2. Erred in allowing counsel for the petitioner to maliciously push for the hearing of the Notice of Motion Application dated 31/01/17 on 09/03/17 while the purpose of that day's mention was to confirm whether the pleadings had closed, the application dated 31/01/17 having been compromised and withdrawn on 09/02/17.
3. Erred in law and fact in failing to take cognizance of the submissions on record from the respondent's to the court, that admitted to the appellant having complied with court orders of release of the applicant's original academic transcripts and degree certificate.
4. Erred in law and fact in disregarding the testimony of the appellant's verifying affidavit and giving undue consideration to the respondent's evidence as the same were uncontroverted.
5. Erred in law and fact in proceeding to hear to its conclusion, the Notice of Motion Application dated 31/01/17 that sought similar orders as the withdrawn application of 31/01/17.
6. Erred in disregarding the fact that the Notice of Motion Application dated 31/01/17 had been overtaken by events, the subject matter of the petition having been dispensed with in totality.
7. Erred in law and in fact in finding that the appellant was liable for violation of Article 47(1) of the Constitution on fair administrative action.
8. Erred in failing to hold that due process was followed as the respondent was given sufficient notice as to the appellant's investigations into his degree certificates before they were withheld but chose to seek redress in court before the same was addressed as required by the internal procedures of the appellant's institution.
9. Failed to analyze the evidence and or determine the correct issues or at all and he erred by failing to consider the court proceedings, appellant's evidence and/or by considering the respondent's evidence alone.
10. Erred in failing to find in favour of the appellant in view of all the evidence on record and given all the circumstances of the case and his judgment and orders were arrived at in a cursory and perfunctory manner and are unfair, erroneous and indefensible and have occasioned a serious miscarriage of justice.
11. Erred in law and fact in assessing the quantum of general damages and wrongfully awarded the respondent a whopping Kshs. 550,000/= contrary to public law remedies and precedent which is not compensatory in nature.



12. In his judgment stepped into the shoes of the petitioner and argued the petitioner's case and granted the reliefs including damages when no submissions had been made by the petitioner.
  13. Completely erred in granting judgment of aforesaid when the respondent had completely failed to prove violation and/or continued violation of his right to fair administrative action.
  14. Completely erred in law and fact in drawing an adverse inference that in fact the appellant never released the degree certificates to the respondent.
  15. Erred in believing the respondent's allegation that the appellant arbitrarily and without due process confiscated his degree certificate and refused to release his original transcripts.
30. Consequently, the appellant prayed that the appeal be allowed, judgment and decree of the High Court be set aside and dismissed with costs, the appellant be awarded costs of the appeal, and any other order that this court may be pleased to make.
31. During the virtual hearing of the appeal, learned counsel, Mr. Kipkorir appeared for the appellant and learned counsel, Mr. Abande, appeared for the respondent. Both parties filed written submissions and relied entirely on them.
32. The appellant collapsed its grounds of appeal into two issues of determination as follows:
- a. Whether the appellant is liable for the alleged violations.
  - b. Whether the learned judge applied wrong principles in law and abused the exercise of his discretion in award of damages to the respondent.
33. On the first issue, the appellant argued that the High Court failed to consider the court proceedings and in particular, the admission by the respondent's counsel that the appellant complied with the court orders for the release of the respondent's original academic transcripts and degree certificate. It was further argued that the respondent merely laid the provisions of the *Constitution* that were allegedly violated and failed to show the manner of violation or produce evidence to demonstrate the violation and injury (whether physical, emotional or financial). Additionally, it was argued that the respondent failed to prove a nexus between what befell him and the acts, commissions and omissions by the appellant. The appellant urged that on its part, it remedied the respondent's allegation by releasing the respondent's original academic transcripts and degree certificate following the respondent's Notice of Motion Application dated 31<sup>st</sup> January, 2017.
34. On the second issue, the appellant contended that the High Court awarded the respondent an excessive amount in damages, which would set a dangerous precedent as it will open the door for inept students to claim violations for rights for their failure to fulfill the requirements of a degree; and cited the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR in which it was held that the court's discretion for award of damages in constitutional violation cases is limited by what is appropriate and just according to the facts and circumstances of a particular case. Further, in that case, the court cited the case of *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 in which the Supreme Court of Canada established a consideration on when a remedy in a constitutional violation case is just and appropriate to include a remedy that will:
1. Meaningfully vindicate the rights and freedom of the claimants;



2. Employ means that are legitimate within the framework of our constitutional democracy;
  3. Be a judicial remedy which vindicates the right while invoking the function and powers of a court; and
  4. Be fair to the party against whom the order is made.
35. Further, the appellant argued that the respondent was awarded damages he did not specifically plead for or prove in evidence. Counsel was keen to distinguish the General, exemplary and punitive damages at court's apportioned rate towards unwarranted emotional, physical and mental destabilization of the petitioner which the respondent pleaded for; and the generic "general damages" of Kshs. 500,000 which the Court awarded. Counsel argued that there was no meaningful link between the award of damages and the finding of constitutional violations which the Court had made.
36. Opposing the appeal, the respondent deduced the issues of determination into four (4) as follows:
- a. Whether the High Court had the requisite jurisdiction to entertain the constitutional petition.
  - b. Whether the petitioner made out his case with particularity as required and brought himself within the meaning of Article 22 of the *Constitution*.
  - c. Whether the learned judge applied wrong principles in law and abused the exercise of his discretion in award of damages to the respondent.
  - d. Whether the appellant is liable for the alleged violations.
37. On the first issue, the respondent agreed with the opinion of the High Court that Article 22 of the *Constitution* provides that every person who claims that his fundamental rights and freedoms were threatened or violated has a right to move the High Court for relief; and further, the right to apply to the High Court for relief is unconditional, unhindered and without prejudice to any other relief, cause of action or alternative remedy existing in law. The respondent contended that this is an issue that has been dealt with consistently by courts and the appellant gave no reason to convince the High Court to adopt a different approach.
38. On the second issue, the respondent contended that it complied with all the requirements of particularity in a constitutional petition as held in the case of *Anarita Karimi Njeru v Republic* [1978] KLR 154 and affirmed in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. The respondent argued that he was categorical that his rights to fair administrative action under Article 47(1) of the *Constitution* were violated, contrary to the provisions under Article 47(2), which effect was to his detriment. He contended that the High Court was right in holding that the violations alleged were particularized in a precise manner within the meaning of Article 22 of the *Constitution*.
39. On the third issue, the respondent contended that the High Court had powers under Article 23 of the *Constitution* to grant relief that included an order for compensation, in which the court has discretion. He argued that the appellant conceded that it confiscated the degree certificate and withheld original transcripts of the respondent; and later complied with the order of their release as at 9<sup>th</sup> February, 2017. He further argued that the appellant failed to give any proof of disciplinary proceedings against him and neither did it produce before the trial court, the alleged letter dated 7<sup>th</sup> December, 2016, informing the respondent of pending disciplinary action. In this regard, the respondent contended the callousness of the appellant, which according to him meant that given another chance, the appellant would repeat



- the violations; and urged that its actions called for even stiffer penalties than the one that was awarded by the High Court.
40. On the fourth issue, the respondent argued that the appellant conceded that there were violations and it complied with the court order of release of the respondent's original academic transcripts and degree certificate. In this regard, the respondent urged that the evidence he adduced in support of his case was never controverted.
  41. This being a first appeal, we are required to re-evaluate and re-analyze the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact, bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle v Associated Motor Boat Co. Limited* (1968) EA 123) In addition, we must be cognizant of the fact that we should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial Judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane v Olenja* (1986) KLR 661).
  42. Having considered the pleadings in the record of appeal, the judgment of the trial court, the appellant's grounds of appeal and the rival submissions of the parties, three issues present themselves for determination in this appeal:
    - a. First, whether the learned judge ignored the court proceedings of 9<sup>th</sup> February, 2017, before Cherere, J. and whether that had any juridical implications.
    - b. Second, whether the learned judge was correct to make a finding that the respondent's constitutional rights were violated by the appellant.
    - c. Third, whether the learned judge applied the wrong principles in law and abused the exercise of his discretion in awarding damages to the respondent.
  43. Respecting the first issue, as rehashed above, the record shows that on 9<sup>th</sup> February, 2017, the respondent's counsel withdrew the respondent's Notice of Motion Application dated 31<sup>st</sup> January, 2017, on the basis that the appellant had complied with the court orders and released the respondent's original academic transcripts and degree certificate. That being the case, the High Court made an order that the application had been withdrawn and the next mention date scheduled for 9<sup>th</sup> March, 2017, was for purposes of confirming whether pleadings had been closed. Additionally, the appellant was to be served since it had made no appearance by then. However, on 9<sup>th</sup> March, 2017, the court made an order that the respondent's self-same Notice of Motion Application be heard on 21<sup>st</sup> March, 2017, and the appellant be served with the same. Although the respondent's counsel was present in court, he did not bring to the attention of the court that the application had already been compromised. Neither did that counsel inform the court of the same on 21<sup>st</sup> March, 2017 when the matter was next in court for the scheduled hearing of that application. It would appear that counsel had also not served the appellant's counsel by then. This was also true at the next scheduled hearing date which was on 4<sup>th</sup> April, 2017. Indeed, on that day, the respondent's counsel, quite inexplicably, informed the court that the application was not opposed and went ahead and sought summons for the Vice-Chancellor to show cause why the respondent's degree certificate was not issued. The court obliged and issued summons to the Vice-chancellor. Following the court summons of the Vice-Chancellor, on 25<sup>th</sup> April, 2017, the appellant's Legal Officer informed the court that the appellant had already released the respondent's original academic transcripts and degree certificate on 3<sup>rd</sup> February, 2017. On this date, both the appellant's counsel and the respondent's counsel were present in court and neither of them raised the issue of whether the pleadings had been closed and the fact that the Notice of Motion



Application had been withdrawn by the respondent's counsel as had been ordered by the court on 9<sup>th</sup> February, 2017.

44. Given this record, it seems obvious that there was a procedural mishap in the way the respondent's Notice of Motion was handled. While the Motion had been compromised as early as 9<sup>th</sup> February, 2017, new directions were given for its hearing, and even summons issued based on it. The appellant lays the blame of this procedural misadventure on the learned judge and urges that it evinced a pattern which, it claims, persisted throughout the trial, where the learned judge took over the litigation and drove it on behalf of the respondent. Indeed, learned counsel for the appellant sought to use this volley as a segue to attack the learned judge's conceptualization of the damages. His argument was that the learned judge's judicial attitude to the litigation drove him to award damages which had not been prayed for by the respondent; and against findings he had not made. I will return to this shortly.
45. At this juncture, it is enough to point out that appellant's counsel admitted during plenary hearing that this procedural glitch in handling the Notice of Motion was a harmless error: it did not affect the main cause in any essential way. The petition itself was considered on the basis of the pleadings filed and the learned judge made findings unrelated to the compromise made to the Notice of Motion. It only suffices to add that it is a tad unfair to blame the learned judge and draw negative inferences about this judicial attitude towards the litigation based on this procedural mishap when counsel from both sides had, on different occasions, an opportunity to draw to the attention of the learned judge that the Notice of Motion had been compromised.
46. I will now turn to the second issue. Was enough evidence placed before the learned judge to support the findings of constitutional violations? From the pleadings filed and even before us on appeal, the appellant did not deny that it confiscated the respondent's degree certificate on 23<sup>rd</sup> January, 2017 and failed to give him his original transcripts on that day as earlier promised. The appellant did so because it had suspicion, fueled by an anonymous whistleblower, that the respondent had obtained his degree fraudulently. The question that arises is whether the appellant acted in an administratively fair manner when it received the whistleblower's "tip." The appellant does not deny that it was required by the Article 47 of the *Constitution*; the *Fair Administrative Action Act* (FAAA); and its own internal rules and regulations to inform the respondent of the allegations made against him and give him a hearing before making any adverse decision. The case turns on whether the appellant, in fact, took these two actions.
47. The appellant claimed that it wrote to the respondent a letter dated 7<sup>th</sup> December, 2016. The letter was ostensibly written by the Dean-School of Law. It purportedly suspended the issuance of the respondent's certificate and transcripts until the matter was investigated and concluded, pending a disciplinary case. The respondent was categorical that he did not receive this letter; and that he was shocked when his degree certificate was summarily confiscated from him when he turned up to collect his original transcripts on 23<sup>rd</sup> January, 2017. This impugned letter would have served the purpose of informing the respondent about the allegations facing him and the procedures which were afoot to establish the veracity of the allegations – including his right to be heard before any adverse decision was made. It follows that this letter was central to the determination of the case. The appellant's official deponed that it was written and sent to the respondent. The respondent was categorical that it was neither sent nor received.
48. Despite the centrality of the letter to the appellant's case, it did not produce it even after the respondent denied receiving it. This, then, led the learned judge to conclude as follows:

“Since the University did not produce the letter dated 7<sup>th</sup> December 2016, I am entitled to draw an adverse inference that in fact, no such letter was sent to the petitioner. Further



and despite receiving the petitioner's father's letter, the University did not allude to disciplinary proceedings of any sort or deny the petitioner's allegations. The totality of the evidence before the court is that although the University knew of the allegations against the petitioner, it never informed the petitioner and proceeded to take adverse and arbitrary action against him."

49. I must say, with respect, that the learned judge cannot be faulted for reaching this conclusion. Without production of the letter, the appellant could not overcome the very specific allegations by the respondent that his degree certificate was confiscated and his transcripts withheld without due process. It was incumbent upon the appellant to demonstrate that it had, indeed, followed due process in consonance with the FAAA and Article 47 of the *Constitution* when it decided to confiscate the degree and withhold the original transcripts of the respondent even if the actions were only ephemeral. The appellant needed to inform the respondent of the allegations it was investigating and then offer him an opportunity to tell his side of the story. Without demonstration that this happened, it was certainly not an error for the learned judge to conclude that the respondent's constitutional rights had been violated.
50. Thus, I find that there was a violation of rights by the appellant as it failed to inform the respondent of its actions against him as provided for under Article 47(1) and (2) of the *Constitution*.
51. Finally, I will turn to the final issue: damages. Mr. Kipkorir, counsel for the appellant argued that the respondent was awarded damages he did not specifically plead for or prove in evidence. Counsel was keen to distinguish the "General, exemplary and punitive damages at court's apportioned rate towards unwarranted emotional, physical and mental destabilization of the petitioner" which the respondent pleaded for; and the generic "general damages" of Kshs. 500,000 which the Court awarded. Counsel argued that there was no meaningful link between the award of damages and the finding of constitutional violations which the Court had made.
52. Mr. Kipkorir is right about the need to tightly link alleged constitutional violations, the specific constitutional provisions breached and the consequential damage or injury of that breach. This is especially necessary where the petitioner seeks for monetary compensation for the constitutional tort. Damages are awarded as an instance of the consequential injury suffered by a petitioner. It is, therefore, incumbent upon a petitioner alleging the breach of his constitutional rights to tightly demonstrate this tripartite link in order to give the court the basis for assessing damages.
53. The question that arises is whether it was open to the learned judge to grant this relief for general damages when it was not prayed for. I did not understand the appellant's counsel to suggest that a successful petitioner in a constitutional petition cannot be granted general damages for the constitutional tort under Article 23 of the *Constitution*. That Article permits the Court to grant any appropriate relief for constitutional violations. Any relief so granted must, of course, be subject to the common sensical requirement that the other party must have had sufficient notice in order to mount an adequate defence to both the allegations of constitutional violation and the type of relief ultimately granted. Consequently, the tripartite link between the alleged constitutional violations, the specific constitutional provisions breached and the consequential damage or injury of that breach that I postulated above speaks to this necessary limitation on the authority of the Court to fashion an appropriate relief. Differently put, while Article 23(3) of the *Constitution* licences the High Court to innovate on the "appropriate" relief that can be granted for constitutional violations, this requirement of the tripartite link, which is a necessary and logical instantiation of the right to fair hearing, delimits that licence so to speak. I believe that the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, [2014] eKLR is in accord.



54. In the present case, the evidence showed, and the learned judge found that the constitutional violation was that the appellant did not act in an administratively fair manner when it confiscated the respondent's degree and withheld his transcripts without offering him the benefit of due process: informing him of the allegations facing him; informing him of the investigatory and hearing process; and then offering him an opportunity to tell his side of the story. It is instructive that although the respondent had pleaded and prayed for a finding that the failures by the actions of the appellant caused him emotional and mental anguish, the High Court did not make this finding. As such, the monetary relief awarded by the learned judge would have to be general damages for the violation of the respondent's right to fair administrative action.
55. If that be the case and assuming that the respondent had properly, if somewhat clumsily, pleaded general damages for breach of the right to fair administrative action, is the quantum justified by the circumstances? As demonstrated above, the respondent got to learn about the appellant's investigations, rather rudely, for the first time on 23<sup>rd</sup> January, 2017 when he went to pick up his original transcripts. That was the day his degree certificate was confiscated. The respondent acted rather quickly and moved to the High Court by 31<sup>st</sup> January, 2017. Following the Court action, the appellant responded equally expeditiously and released both the degree certificate and the transcripts to the respondent three days later – on 3<sup>rd</sup> February, 2017. Indeed, the appellant argues that had the respondent followed the internal grievance procedures of the university, he would have received his documents without the necessity of this court action.
56. Given these timelines, I do not think that the circumstances here warranted the award of Kshs. 500,000 as general damages for the respondent's violation of the right to fair administrative action. It is not every constitutional violation that warrants a monetary compensation. Given the expedition with which the whole matter was handled, and given that the respondent did not demonstrate that the internal grievance mechanisms of the university were futile or inadequate; and given that there was no factual finding that the respondent suffered emotional distress in the specific circumstances of this case; and further given that no other consequential damages were demonstrated by the respondent, I would think that the declaration made by the learned judge was adequate relief for the respondent.
57. The upshot is that the appeal succeeds only in part: I would find that the declaratory relief granted by the learned judge was warranted and would uphold both the findings of constitutional violation of the respondent's right to fair administrative action and the declaration. However, I would, with much respect, propose to reverse the monetary relief granted to the respondent. Given the mixed results of the appeal, I would order that each party to bear its costs on appeal.

#### **CONCURRING JUDGMENT OF JAMILA MOHAMMED, J.A**

I have had the benefit of reading in draft, the judgment of my brother, Joel Ngugi, J.A. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

#### **JUDGMENT OF TUIYOTT, JA**

I have had the advantage of reading in draft the judgment of Joel Ngugi, JA, with which I am in full agreement and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**JOEL NGUGI**

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**JUDGE OF APPEAL**



**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

