IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 72 OF 2013

(CORAM: OKWENGU, GBM KARIUKI & KANTAI, JJA)

KENYATTA UNIVERSITY ……..…….1ST APPELLANT

VICE CHANCELLOR, KENYATTA UNIVERSITY……..2ND APPELLANT

KENYATTA UNIVERSITY SENATE…….……..….3RD APPELLANT

VERSUS

ELENA D. KORIR ……..…….RESPONDENT

(*Being an Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Dulu, J.) delivered on 16th March, 2009 in* **HC Misc. Civil Case No. 1285 of 2007)**

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JUDGMENT OF THE COURT

1. The factual background to this appeal is substantially not in dispute. **Kenyatta University** the 1st appellant (hereinafter referred to a**s *'the University'***), is a University that was established under the **Kenyatta University Act Cap 210C** (hereinafter referred to as '**the Act'**). Although the Act was repealed through the Universities Act (**Act No. 42 of 2012**), that came into effect on 13th December, 2012, the Kenyatta University Act, was the one in force at all material times relating to these proceedings. The Vice-Chancellor of the University (hereinafter referred to as the '***Vice-Chancellor'***), is the 2nd appellant, and the University Senate established under **section 14** of the **Act** (hereinafter referred to as '***the Senate'***), is the 3rd appellant. The respondent in the appeal is **Elena D. Korir**, who was at the material time an Assistant Lecturer at the University. On 5th October 1999, the respondent was registered for a Doctor of Philosophy Degree (**PhD)** in Zoology department of the University. Her PhD thesis was entitled "***Ecological Genetic and Biochemical Aspects of Alcohol Intolerance among Selected Kenyan Populations***". Upon presenting her first progress report to the examiners in the year 2000, an issue arose regarding the data that she was using as it transpired that she was using data that she had collected before she was registered for the degree. The respondent was advised to collect fresh data but she declined maintaining that she was not responsible for the delay in her registration. Consequently, the respondent's supervisors withdrew from supervising her thesis. The respondent appealed to the Vice-Chancellor who granted her permission to continue using the data that she had earlier collected. The respondent continued with her research work and thesis under the supervision of a different supervisor. She subsequently submitted the thesis and on 29th April, 2003, was invited to defend the thesis before

a board of examiners. The board raised some issues with the thesis and recommended that the respondent makes corrections and resubmit the thesis within a year.

2. In October 2005, the respondent resubmitted her PhD thesis that was now entitled "***Genetic and Biochemical Aspects of Alcohol Intolerance in Selected Kenyan Population***". The respondent again resubmitted the thesis in October 2007 having carried out further corrections as recommended by her supervisors. The respondent was thereafter invited to the University's 23rd graduation ceremony that was scheduled to take place on 14th December, 2007 her name having being included in the graduation list for the award of PhD. However, on 5th December 2007, the respondent was served with a letter signed by the Deputy Vice-Chancellor (Academics) informing her that the University had received adverse reports from colleagues in her department questioning her PhD work, as a result of which her name had been deleted from the graduation list and a committee constituted to investigate the matter. Apparently the action was precipitated by a letter from the Board of postgraduate studies in the Biochemistry and Biotechnology Department. Although dated 23rd December 2007 the letter was signed on 26th November 2007 by 5 out of the 6 members. In the letter the Board of Postgraduate Studies expressed concern regarding the respondent's thesis, the data used, and the supervision process, and urged the University to investigate the matter.

3. The respondent moved to the High Court and applied for orders of judicial review against the appellants contending that the decision to delete her name from the graduation list was arbitrary, in breach of the rules of natural justice and an affront to her legitimate expectation as her thesis had been approved in accordance with the laid down regulations. The application was opposed by the appellants through a replying affidavit sworn by Dr. Gabriel Katana the Academics Registrar of the University. In a nutshell Dr. Katana averred that although the appellant was recommended for the award of the PHD, an issue arose regarding the propriety of the respondent's thesis and this necessitated investigations, hence the suspension of the respondent's graduation to facilitate the investigations. Dr Katana explained that in taking the action the Senate was merely in the process of ascertaining the respondent's standard of proficiency and suitability for the award of the PhD in accordance with its statutory mandate.

4. The application was heard by the High Court (**Dulu, J**) who delivered a judgement in favour of the respondent on 16th March, 2009. The ruling culminated in an order of certiorari being issued removing to the court for the purpose of being quashed the decision of the appellants conveyed by letter dated 5th December, 2007 purporting to delete the name of the respondent from the graduation list, and purporting to deny the respondent the conferment of a Doctor of Philosophy Degree (PhD); and a further order of Mandamus directing the appellants to graduate and confer upon the respondent a Doctor of Philosophy Degree for which she had studied and qualified under the Kenyatta University Act of 1985.

5. Being aggrieved by the judgment the appellants lodged an appeal before this Court through a notice dated 20th March 2009. Subsequently a memorandum of appeal dated 29th April 2013 that raised 7 grounds was filed. In short, the appellants complained that in granting the orders of judicial review the learned judge misapprehended and misapplied the law; and erred in compelling the appellants to award a PhD to the respondent, a function of the Senate that the court could not usurp.

6. Upon being served with the appeal the respondent filed a notice of motion application dated 13th October 2014, in which she applied for the appeal to be struck out. The motion that was anchored on some 109 grounds sought to have the appeal struck out ostensibly because it was filed out of time without leave of court; is fatally defective; and is an abuse of the court process. On 15th October 2014, the Court ordered that the appeal be disposed of by way of written submissions and that the respondent's notice of motion filed on 13th October 2014 be treated as grounds of opposition forming part of the respondent's arguments against the appeal. Following further directions of the Court, the parties duly filed written submissions that were highlighted before us.

7. **Messrs Kibe Mungai** and **Emmanuel Wetangula** represented the appellants in this appeal. In the written submissions filed on behalf of the appellants the main issue in the appeal was identified as whether in an application for judicial review, a court can compel a University to award a degree to one of its students. It was submitted that in a judicial review application, the court is concerned with the question whether the procedural law was followed in regard to the impugned decision, and not answering questions of judgment, discretion, policy or fact; it was argued that the question whether the respondent was qualified to be awarded a PhD was a question of judgment, policy and fact because it involved the analysis of whether the respondent had met all the qualifications for the conferment of a PhD; and that this fell within the discretion of the appellant. Reliance was placed on the Nigeria Supreme Court decision in **Magit vs University of Agric., Markudi** [2005 – Supreme Court] where it was held that:

> ***"The courts have no business to flirt into the arena of a University deciding whether a thesis has met the standard of which it has set, has been met. Any attempt by any court, including this court to dabble or encroach into the purely administrative and domestic affairs of a University including that of the 1st respondent, that may lead to undue interference, nay, the weakening inadvertently so to speak, of the powers and authority conferred on the University's by statutes and that conferred on the 1st respondent, will not be justifiable or justified.***

8. It was maintained that under **Statute XV** of Kenyatta University, the Senate was the body charged with overseeing post-graduate studies through its board of post-graduate studies, and this board had decided to suspend the graduation of the respondent pending investigations by an independent committee; that that decision was properly communicated to the respondent by the Deputy Vice-Chancellor (Academics) who is the Secretary to both the Senate and the Board of Post-Graduate Studies. The appellants faulted the learned judge of the High Court in finding that the Board of Post-Graduate Studies and the Deputy Vice-Chancellor were strangers as the two were actually acting as agents of the Senate.

9. It was submitted that the appellants had the statutory role of determining whether its students were fit to be awarded with degrees and a PhD being the highest degree conferred by the University extra scrutiny was necessary. That questions having arisen regarding the respondent's thesis, the appellants were possessed of appropriate expertise and experience to address those questions before the conferment of the respondent's degree hence the suspension of the respondent's graduation. The case of **Republic vs Kenya National Examinations Council *ex parte Geoffrey Njoroge & 9 Others* [1997] eKLR** was cited for the proposition that:

> "***where a statute which imposes a duty gives discretion to the mode of performance of the duty in the arms of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way***".

10. On the issue of legitimate expectation the case of **Nyongesa & 4 Others vs Egerton University [1990] KLR 693** was distinguished, it being submitted that the facts in that case where Egerton University without hearing the students, refused to release the student's results on account of them being involved in some infraction, was different from the respondent's case in that her graduation ceremony was merely suspended pending the findings of the committee set up on the recommendation of the Board of Post-Graduate Studies, and that the respondent still had the opportunity of being heard before the final decision is made.

11. In support of the action taken by the University, it was asserted that a situation had arisen where the respondent was about to be conferred with a PhD based on a questionable thesis and such an action would have impacted on the propriety of all the degrees being issued by the University and there was therefore need for the appellants to take immediate action. In this regard, the following dicta by Lord Denning in **Lewis vs Heffer & Others** [1978] 3All ER 354 was relied upon:

> "***Very often irregularities are disclosed in a government department or in business house***

and a man may be suspended on full pay pending inquiries. Suspicion may rest on him, and so he is suspended until he is cleared of it. No-one so far as I know has ever questioned a suspension on the ground that it could be done unless he is given notice of the charge and an opportunity of defending himself, and so forth". The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumor and suspicions. The others will not trust the man. In order to get back to work, the man is suspended. At that stage, the rules of natural justice do not apply."

12. Also cited in support of the action taken by the appellants was a Scottish case **Petition of Newtongrange Branch of Scottish National Party & Others Judicial Review of a pretended decision of the National Executive Committee of the Scottish National Party dated 10th July, 1999,** wherein it was stated as follows**:**

"In this kind of situation, at an early stage when action of some sort requires to be taken and taken firmly, in order to set the wheels of investigation in motion, in my view, natural justice would not demand the steps concerned. … indeed where an administrative suspension is decided upon pending an investigation into some controversial circumstances, it would be inappropriate to hold a hearing in those circumstances, separate from the contemplated investigation itself".

13. In addition, it was argued that the respondent had already defended her thesis and there was therefore no breach of natural justice. It was reiterated that the High Court did not have the jurisdiction to confer a degree on the respondent and that the Senate acting through its organs had properly decided to suspend the conferment of the degree, and that the suspension being a mere holding action, there was no breach of the rules of natural justice or breach of the respondent's legitimate expectation. The Court was thus urged to allow the appeal and set aside the orders issued by the High Court.

14. The appellants' written submissions were highlighted orally by Mr. Kibe Mungai who reiterated that judicial review deals with the process as opposed to merit and seeks to correct mistakes of law made by persons exercising public authority or a tribunal. Counsel maintained that the respondent's application was dealing with merit as it was based on the notion that the respondent had qualified and that the decision made was not a valid decision. Mr. Mungai explained that the appellant had only suspended the respondent's graduation during the pendency of the investigations that were to be carried out; and that the respondent's apprehension that the process would be un-procedural and unlawful, and had no basis. Further, that the order of certiorari sought by the respondent as framed and granted was not challenging the process of illegality or propriety of the process, but touched on the merit of the making of a negative decision against her by the appellant. Counsel pointed out that the graduation subject of the respondent's application was to take place on 14th December 2007 and by the time the judgment was delivered, that date had passed. That this meant that the Senate would still need to clear the respondent before she could graduate and the Senate had to be satisfied that the legal requirement had been met before the conferment of the degree. Finally counsel for the appellants urged that no order or declaration could be made by the court that the respondent had satisfied the conditions for conferment of the degree as the court could not take over the role of the Senate.

15. The respondent relied on written submissions that she filed in person on the 11th November 2014 and supplementary submissions also filed in person on 2nd February, 2015. In her submissions the respondent identified the issues for determination as follows: whether she was qualified for the award of PhD; whether the appellant's action of deleting her name from the graduation list was lawful; what the duties and powers of the organs of the University as defined in the University Statute are; whether there was discrimination targeting her; whether the court awarded the PhD to her; whether the judge properly applied the principles of legitimate expectations; whether any party in the University has a statutory right to arbitrarily review or change the graduation date set by the Senate; whether the judge misconstrued the statutory duties and powers of the appellants; whether the Senate was involved in the deletion of the respondent's name from the graduation list

and finally what is the efficacy of the order sought to vacate and/or set aside the judgment.

16. The respondent maintained that the action taken of deleting her name from the graduation list was unlawful, arbitrary, malicious, discriminatory and based on extraneous considerations; that the deletion of her name was done without following any particular rules or regulations, or giving her a chance to be heard; and that the committee set up to investigate the matter cannot usurp the functions of the Senate and re-examine an award of PhD. She pointed out that under **section 14** of the **Kenyatta University Act 1985 Cap 210 C**, it was only the Senate that had the statutory mandate to award the PhD and that once the Senate had decided the matter it was final. Therefore no organs had any powers to deny her conferment of PhD that had already been approved by the Senate.

17. Further, the respondent maintained that her fundamental rights under **Articles 10,11,12, 19, 20, 21,27,28,29,35,40,41,46,47** and **50** of the Constitution of Kenya were violated as she was discriminated against, and her right to fair administrative action under **Article 47** of the Constitution and right to natural justice were violated as she was denied a hearing before the action was taken against her. In addition, the respondent argued that the duties and powers of various statutory organs of the University are defined in the **Kenyatta University Act** and that there is only the Senate in the **Kenyatta University Act** and not Senate committees. She argued that the Senate committees are created by the Senate to perform duties which are subordinate and have no authority to question the decision of the Senate; thus the Board of Post-Graduate Studies could not overrule the decision of the Senate to confer the degree on her. As for the Vice-Chancellor and the Deputy Vice-Chancellor, acting on behalf of the Senate, the respondent maintained that there was no evidence that the decision to delete her name from the graduation list of 2007 was a Senate decision. In her view the letter dated 5th December 2007 confirmed that the action was taken in response to a letter from a non-statutory board; i.e. the Board of Post-Graduate Studies, Biochemistry and Biotechnology department; and thus the Deputy Vice-Chancellor usurped the duties and powers of the Senate.

18. The respondent also claimed that the appellants had subjected her to ridicule, and made defamatory statements against her for which she sought relief. The respondent concluded her written submissions by urging the court to dismiss the appeal and uphold the judicial review orders made by the High Court and direct the appellants to issue her with a PhD certificate in accordance with the University Act. Finally, the respondent urged the court to invoke the powers granted to it by the Constitution, and award her damages for defamation, and violation of her rights.

19. In reply to the respondent's submissions, the appellant's counsel maintained that the appeal was filed within time and pointed out that there was a certificate of delay that was availed. Counsel argued that if the respondent's complaint was that she was not given a hearing, then at best the superior court could only order for her to be given a hearing, but could not direct the award of the PhD.

20. The matter before court is an appeal arising from an application for orders of judicial review in the nature of mandamus and certiorari. It is therefore necessary to reconsider the law in this regard. As has been stated time and again, judicial review is not concerned with private rights or the merit of the decision being challenged, but is simply concerned with the propriety of the decision making process (**Reid vs Secretary of State [1999] 2 AC 512**). The grounds upon which a court will review a decision were identified in the House of Lord's decision in **Council of Civil Service Union vs Minister of State for Civil Service [1984] 3All ER 935** that was applied by the High Court in **Republic vs Procurement Administrative Review Board & 3 Others ex parte Olive Telecommunication PVT LTD [2014] eKLR,** as illegality, procedural impropriety, and irrationality.

21. In **Republic vs Kenya National Examination Council ex parte Geoffrey Njoroge & 9 Others [1997] eKLR** this Court addressed the law in regard to the order of mandamus as

follows:-

> ***"What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-***
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> ***'The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.'***
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> ***At paragraph 90 headed "the mandate" it is stated:-***
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> ***'The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.'***
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> ***What do these principles mean? They mean that an order of mandamus will compel the performance of public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed..." An order of mandamus compels the performance of the public duty imposed by statute where the person or body of whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because like an order of prohibition, an order of mandamus cannot quash what has already been done.***

22. In the same case the court had this to say in regard to the order of certiorari:-

> ***"Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."***

23. This being a first appeal, this Court is obliged to reconsider the facts as presented to the Court through the affidavit evidence, reanalyze the evidence, and make its own findings on the same and apply the law. As already stated, the affidavit evidence was substantially not in dispute. The respondent sought redress in regard to the appellant's action of deleting her name from the graduation list and the resultant failure to confer upon her the PhD for which in her view she had qualified. What is disputed is the interpretation of the law in regard to the statutory powers of the University and its organs as relates to the conferment of degrees and whether the action taken by letter dated 5th December, 2007 was a decision of the University relating to the performance of a public duty that the University was legally bound to perform; and which the court could compel the University to perform.

24. In his judgment, the learned judge of the High Court identified that the issues for determination in the matter before him as follows:

> ***"I am of the view that the issues are whether the applicant was qualified for the award***

of PhD. Secondly, whether the respondent acted within their powers to remove the applicant from the Graduation List and in appointing the committee and thirdly whether the orders sought are available."

25. With due respect, the first issue as framed related to the merit of the appellants' decision. In considering whether the appellant was qualified for the award of PhD the court was undertaking the statutory role of the University which in accordance with **section 14(2)(d)** of the **Kenyatta University Act,** the University was empowered:

> "***to decide which persons have attained the subscribed standards of proficiency and otherwise fit to be granted a degree, diploma certificate or other award of the University."***

26. In addition, **Section 23** of the **Kenyatta University Act** (now repealed) empowered the University Council to make a statute to facilitate the performance of its functions under the Act. The respondent annexed to her verifying affidavit that was sworn in support of her application for judicial review, a copy of the **Kenyatta University Act** and the Statutes made by the University Council pursuant to **section 23** of that **Act.** Worthy of note is **Statute XV** that makes provision with regard to the powers and duties of the Senate. Of relevance to this appeal is ***clause 2(j)*** that identifies one of the functions of the Senate as **"to approve the award of degrees, diplomas and certificates, including the award of honorary degrees and other academic distinctions;**" and clause 6 of the same statute that states that:

> **"The Senate may, for good cause, withdraw from any person any degrees or other distinctions or titles conferred on them, and revoke any diplomas or certificates granted to them by the University and withdraw all privileges connected therewith."**

27. The Act read together with the University Statutes gave the Senate the mandate to make a judgment with regard to the suitability of the respondent for the award of the PhD. The exercise of that judgment placed the matter entirely within the Senate's discretion, to either approve or not approve the respondent for the award, taking into account all necessary factors. In addition the Senate had powers through its statute to withdraw a degree that had already been conferred. In the case of the appellant, it was not disputed that she had actually been cleared for the award of the PhD, and that the deferment of her graduation was precipitated by subsequent events that threw aspersions on the propriety of her qualification thereby necessitating an inquiry.

28. As rightly submitted by the appellant, judicial review is only concerned with the process followed, and not an evaluation of the judgment, or the exercise of discretion by the decision maker. In regard to the order for mandamus, the following example given by the Court in **Republic v Kenya National Examination council ex parte Geoffrey Njoroge & 9 Others** (supra) is spot on:

> ***"The duty imposed on the licensing court is:***
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> *'to consider and determine applications and the cancellation of licences'* ***-section***
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> ***4(1) Now, if a party applies for a licence under section 8 and the licensing court simply refuses or neglects to consider and determine the application such a party would be entitled to come and ask the High Court for a mandamus, and if the High Court is satisfied that the licensing court has simply refused or neglected to consider and determine the***
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> ***"application" the High Court would be entitled to issue an order of mandamus, compelling the licensing court to consider and determine the application as it is bound by the law to do so. The High Court would, in those circumstances, be compelling, through the remedy of mandamus, the licensing court to perform its public duty imposed on it by section 4(1) of the Liquor Licensing Act, and the public duty imposed***

by that section is the consideration and determination of the application for a license. The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the license. The power to grant or refuse a license is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a license. In fact the Act provides for appeals to the High Court by persons whose licenses the licensing court has refused to renew or whose licenses have been cancelled." (emphasis added)

29. Similarly in this matter in relation to the respondent, the High Court could only compel the University to perform its duty as prescribed under **section 14(2)(d)** of the **Act**, and **Statute XV** of the University, which was to "*decide*" whether the respondent had attained the subscribed standards of proficiency and was otherwise fit to be awarded the PhD by the University, or whether there was good cause to withdraw the conferment of the degree. The High Court could not compel the University to perform its statutory duty in a particular manner by directing it to confer the PhD on the respondent. All that the court could do if it found that the process leading to the decision not to award the PhD on the respondent was faulty, was to order the University to go through the process again and determine whether the appellant had attained the prescribed standards of proficiency and was fit to be granted the PhD, or not.

30. As observed in **Republic vs Public Procurement Administrative Review Board & 3 Others** (*supra*), procedural impropriety may be a ground for judicial review. Procedural impropriety may arise due to the failure to comply with mandatory procedures such as breach of natural justice, bias, breach of fair administrative action or legitimate expectation. In regard to whether the appellant's acted within their power in deleting the respondent's name from the graduation list, the question is whether the process that culminated in that decision was properly arrived at in accordance with the University's statutory powers, and whether the decision was rational and arrived at fairly in accordance with the rules of natural justice. The issue of concern here is not the investigation per se, but whether the investigations were properly initiated and conducted by the University. In this regard the respondent's complaint was two-fold. First that she was not given a hearing before the decision was made, and secondly, that the decision was not made by the Senate which had the mandate to determine who should be awarded a degree.

31. In this case the respondent's complaint that she was not given a hearing before the decision to delete her name from the graduation list was taken, was not disputed. However, it was submitted that the circumstances were such that a hearing at that stage was not appropriate as there was need for urgent action to be taken. The performance of the University's mandate with regard to the prescribed standard of proficiency is a matter that is of public interest as it impacts on the quality of the degrees awarded by the University which dictates how prospective employers respond to graduates from the University. An issue having arisen concerning the propriety of the degree to be awarded to the respondent by the University, and taking into account the fact that the respondent had already been cleared by the Senate for the award of the PhD; the matter was one not only touching on the respondent's proficiency and suitability, but also the integrity of the University's degree award system. The University was therefore under an obligation to investigate the matter.

32. There is also a question regarding the letter dated the 23rd September 2007 that does not seem to have been acted upon until 26th November, 2007 when it was signed by the five lecturers. These questions made it imperative for the University to get to the bottom of this matter by initiating an appropriate investigation. The time frame between 26th November, 2007 and 5th December, 2007, when the letter was written to the respondent is approximately two weeks. The letter dated 5th December 2007 was written about nine days before the graduation date. Therefore it is evident that there was time constraints and action had to be taken.

33. We concur with the submission that the deletion of the respondent's name from the graduation list was only deferment of the graduation pending the investigations. It also provided an opportunity for all the parties including the respondent to be heard. Therefore the complaint that the respondent was not given a hearing has not been justified, and in this regard we concur with the

holding in **Lewis vs Heffer & Others** (*supra*) that in a situation such as this, where there was need for urgent action and where the action taken was only an interim action the rules of natural justice were not violated.

34. The respondent may have had a legitimate expectation that she would graduate on the 14th December, 2007. However, given the circumstances that arose and the public interest in the matter, the action taken by the Board of Post-Graduate Studies in deferring the respondent's graduation to facilitate investigations into the serious and weighty issues raised in regard to the respondent's PhD was reasonable and logical.

35. Coming to the issue whether the decision to delete the respondent's name from the graduation list was made by the Senate, and whether the action was *ultra vires* to justify the intervention of the court, the learned Judge rendered himself as follows:

> ***"In my view the decision to remove the name of the applicant from the graduation list and appointing a committee to review her study, are ultra vires, and deserve the intervention of this court. This is because of two reasons. Firstly, the Senate does not appear to be the organ that made those decisions and communicated to the applicant. The letter dated 5th December, 2007 signed by Professor Oluoch Obura (Deputy Vice Chancellor Academic) has no indication that it was communicating a decision of the Senate. Secondly the decisions appear to have been haphazard as the Deputy Vice Chancellor does not appear to address the institutions or system of the degree examination approval process from top downwards. No rules or regulations were cited for the action taken. The attempt seems to create a parallel system by the Vice Chancellor not backed by any rules. I find that the respondents did not act within their powers in removing the applicant from the graduation list, and appointing a committee per the letter of 5th December 2007 written by the***
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> ***Deputy Vice Chancellor."***

36. On our part we note that the letter dated 5th December 2014 communicating the decision to delete the respondent's name from the graduation list was from the office of the Deputy Vice Chancellor (Academics). It did not purport to come from the Senate. The letter was not explicit on who had made the decision. However it conveyed information regarding action taken by the Vice Chancellor, that is, the constitution of a committee to investigate the adverse reports concerning the respondent's PhD. Under the University **Statute III** the Vice Chancellor and the Deputy Vice Chancellor are both designated as officers of the University. The duties of the Vice Chancellor are spelt out succinctly in University **Statute IV**. **Clause 5** and **9** of that Statute, which are relevant to this matter provides as follows:

> **"5. The Vice Chancellor shall have general responsibility to the University Council for promoting academic development and excellence and for maintaining the efficiency and good order of the University and shall in consultation with the Chairman of Council and where appropriate with the Senate, on occasions where he considers to be occasions of necessity take such steps as he and the Chairman of the Council may deem expedient for safeguarding the interests of the University, provided that in all cases he shall make a report to the next meeting of the Council or the Senate as the case may be.**
>
> **……**
>
> **9. The Vice Chancellor shall be the Chairman of the Senate and all Senate Committees etc"**

37. University **Statute VII** provides for the duties of the Vice Chancellor (Academic). Of relevance to this matter is **Clause 3** and **4** of that Statute that states as follows:

"3.The Deputy Vice Chancellor (Academic) shall be the head of the Academic Division of the University which has the following responsibilities:

1. **teaching which includes preparation of syllabuses and Regulations, timetables, examinations, certificates and transcripts and graduation.**

2. **Research which includes co-ordination of staff and student research;**

4. **The Deputy Vice Chancellor (Academic) shall provide secretariat to the Senate and the following Committees of Senate:**
    i. **Senate Executive Committee**

ii. **Board of Postgraduate Studies".**

38. The learned Judge failed to take into account, these Statutes that provided clear regulations on the management of the University and the functions of the Senate. It is evident that before the Senate can make any decision regarding the award of degrees, it relies on information and reports from its officers and various Committees such as the Examination's Board, and the Postgraduate Board amongst others. The decision making process of the Senate is not a top to bottom process, but a bottom-up process with the ground work being done by the University officers and Committees.

39. The deletion of the respondent's name from the graduation list was an interim action taken on the basis of the report from the Board of Postgraduate Studies. Those who were involved in the decision to delete the respondent's name from the graduation list and the appointment of an investigation committee, included the Vice Chancellor who according to University **Statute IV** had the mandate to take such interim measures to safeguard the interests of the University pending the final decision that was to be made by the Senate.

40. The contents of the letter reveal that it was not conveying a final decision of the Senate but was informing the respondent of the initiation of a process that was going to lead to a decision being taken by the Senate on the issue of the respondents' proficiency and suitability for the award of the PhD. In light of the complaints that had come to light, the Senate was not barred from revisiting the decision it had already made approving the respondent for the award of the PhD, as University **Statute XV** clause 6 gives the Senate the discretion to withdraw from any person any degree awarded by the University if there is good cause for doing so. Thus the process adopted by the appellants was proper, and there was no illegality or excess of jurisdiction to justify the issuance of the order of certiorari.

41. In her notice of motion the respondent sought to have the appeal struck out as being fatally defective and incompetent on the ground that the record of appeal was lodged out of time. However, the appellants availed a certificate of delay that was duly signed by the Deputy Registrar of the High Court confirming that the period 20th March 2009 to 22nd March 2013 were taken by the court for the preparation and supply of the proceedings. Under the proviso to **rule 82(1)** of the Court Rules, the time certified by the Deputy Registrar of the superior court as necessary for the preparation and delivery of the proceedings is excluded from the computation of the time within which the appeal was to be instituted. As judgment of the superior court was delivered on 16th March 2009, with the certification from the Deputy Registrar, the lodging of the appeal on 10th April 2013 is deemed to have been within time.

42. In her motion, the respondent also raised an issue regarding the violation of her constitutional rights under various Articles of the **Constitution** of Kenya 2010. In this regard, the respondent's cause of action subject of the litigation arose long before the promulgation of the **Constitution** of Kenya 2010. That Constitution cannot act retrospectively to confer a cause of action. Secondly the issue of damages for the violation of the respondent's constitutional rights was not an issue before the learned judge and is not therefore open for us to address in this appeal.

43. We have said enough to show that the respondent's motion must fail whilst this appeal must succeed. Accordingly we make the following orders:

i. **The respondent's motion for striking out the appeal is dismissed;**

ii. **The appeal is allowed; and the orders of certiorari and mandamus made by the High Court are hereby set aside and substituted with an order dismissing the respondent's notice of motion dated 18th December 2007 and filed on 20th December 2007.**

iii. **In the circumstances of this case we do not find it appropriate to award costs, and therefore order each party to meet their own costs.**

Dated and Delivered at Nairobi this 4th day of March, 2016.

H.M. OKWENGU

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JUDGE OF APPEAL

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

S. ole KANTAI

……..…….

JUDGE OF APPEAL

I certify that this is a true

Copy of the original

DEPUTY REGISTRAR