THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E430 OF 2021

BETWEEN

STEPHEN M. AMADALO NAMUNYANYI.....PETITIONER

VERSUS

THE HUMAN RESOURCE MANAGEMENT PROFESSIONAL EXAMINATION BOARD.....RESPONDENT

AND

KENYA NATIONAL ASSOCIATION OF PRIVATE COLLEGES.....INTERESTED PARTY

JUDGMENT

1. The petitioner filed a petition dated 18th October 2021 for the alleged contravention of Articles 1(1),10(2)c, 22(1), 23(1), 27(2), 35(1)(b) and 47 of the Constitution. Accordingly the petition seeks the following orders: -

    a) ***A declaration be issued that the respondent contravened Articles 10(2)c,22(1),23(1),27(2),35(1)(b)***

and 47 of the Constitution in exercise of its mandate of determining certification fees for the CHRP program;

b) *An order be and is hereby issued that the CHRP(K) certification fees unilaterally and arbitrary implemented were not subjected to public participation and consequently same is null and void;*

c) *An order be issued that the CHRP(K) Certification fees imposed upon the currently gazetted CHRP(K) finalists by the respondent contravenes the legitimate expectation of the candidates/trainees as the same was not disclosed at the time of their enrolment to the program;*

d) *That consequently the communication published in the Daily Newspaper on Monday 27th September 2021 by the respondent requiring the gazetted finalists to pay Ksh.4500 termed as 'CHRP(K) Certification fees' as a pre-condition for admissibility for a certification ceremony be declared null and void and set aside;*

e) *That this honourable Court be pleased to order the respondent to refund in its entirety the CHRP(K)*

Certification Fees paid by any of the gazette finalist; and

f) That costs of this petition be provided for and any other relief(s) this honourable Court deems just and fit to grant.

Petitioner's case

2. The crux of this petition, as supported by the averments in the petitioner's sworn affidavit of similar date, revolves around the fact that the respondent vide a notice published in the daily newspaper dated 27th September 2021 introduced new fees dubbed *'CHRP(K) certification fees'*. These fees were to be paid by the finalists who had completed their program successfully for the certification ceremony. The petitioner asserts that this was done outside the respondent's mandate in essence violating the finalists rights under ***Articles 1(1),10(2)(c),35(1)(b) and 47 of the Constitution***.

3. The petitioner who is a Certified Human Resource Professional (CHRP-K) and member of the Institute of Human Resource Management of Kenya (IHRM) avers that their profession is regulated by the Human Resource Management Professionals

Act, No.52, 2012. In view of this he states that the respondent is established under ***Section 16*** of the Act. He avers that the mandate of the respondent under ***Section 17*** is to develop and prescribe human resources curricula, manage professional examinations and certify qualified students.

4. With regard to fees, he says that ***Section 17(d) & (e)*** of the Act provides that the respondent is to prescribe the fees and other charges payable with respect to such examinations and to issue certificates to candidates who have satisfied examination requirements. He avers that these fees have been in force and applicable since 1st November 2016 to all HRMPEB students. He adds that this information was circulated by all training institutions and published on their websites for the students and public's information.

5. In light of this he deposes that the respondent does not have the mandate to train and qualify the students, as this is a function of the training institution such as the College of Human Resource Management (CHRM) which is a member of the interested party. Moreover he informs that these training institutions are subject to the regulatory requirements under

the Technical and Vocational Education and Training Act No.29 of 2013.

6. The petitioner depones that the respondent does not deal with the students directly for the purposes of training save for the information relating to their mandate. Ultimately he says that it is the training institutions who deal with the students directly and advise them on the information relating to their program as obtained from the certifying bodies.

7. Appreciating this context the petitioner takes fault with the respondent's introduction of the *CHRP (K) certification fees*, which was done arbitrarily without prior notice to the affected parties essentially violating the principles of ***Article 10 of the Constitution***. Likewise, he contends that the training institutions and affected parties have a legitimate expectation that the required fees will not be unilaterally changed in any manner from the date of registration to conclusion of the program.

8. He deposes that the respondent in a notice dated 7th September 2021 to the stakeholders and students made known that its certification ceremony would be held on 19th October 2021 for all students who would have completed the

CHRP program by June 2021.This was followed up by Gazette Notice No.11091 dated 13th October 2021 that listed the successful candidates. Prior to this, he informs that the respondent vide the daily newspaper dated 27th September 2021 had informed that the gazetted finalist would be required to pay Ksh.4500 called CHRP(K) certification fees as a pre-condition for admissibility for the scheduled certification ceremony.

9. He avers that he was apprehensive that the respondent would carry out the certification ceremony to the exclusion of gazetted students who had not paid the CHRP (K) certification fees. He adds that it has not been possible to resolve this matter amicably. It's his positon that the respondent has contravened the constitution by violating the rights, of the gazetted CHRP(K) finalists.

The Respondent's case

10. The respondent vide a replying affidavit dated 8th November 2021 sworn by Dr. Douglas Ogolla, the respondent's Chief Executive Officer made its response to the notice of motion. In the same way, the respondent made a response dated 21st

November 2021 to the petition which reiterated the contents of its replying affidavit verbatim. He deposes that the notice of motion dated 18th October 2021 was overtaken by events as the certification ceremony scheduled for 19th October 2021 took place and students were issued with the relevant certificates.

11. He deposes that the respondent is empowered under ***Section 17*** of the Act to prescribe fees and other charges payable in relation to administering, conducting, processing and releasing examinations to the students including certification and award of ceremonies. Moreover, he informs ***that Section 17(d)*** enables the respondent to charge and administer examination fees and issue successful students certificates and awards under ***Section 17(g)*** of the Act. Additionally he avers that the respondent enjoys wide discretion under ***Section 17(k)*** to perform all matters incidental to the performance of the functions of the Act.

12. He deposes that ***Section 17(d)*** as read together with **17(k)** of the Act informs that the respondent's decision to issue certificates and awards to successful students is an

administrative function performed as an internal process hence not requiring consultation with the students or public.

In view of the foregoing, he informs that the day to day running of the respondent's affairs is carried out by the Chief Executive officer and other committees that make recommendations to the respondent. As such the respondent's management committee was constituted to look into the upcoming certification ceremony. In a meeting held on 15th September 2021 the committee resolved that the certification ceremony would be held virtually.

13. He avers that awarding and grant of the certification can only be conducted by the respondent at an event organized and managed by itself not the training institutions. He adds that the law does not require the respondent to perform this function in consultation with any other institution. It was thus on this basis that the successful candidates were informed on 27th September 2021 to pay Ksh.4500 to cater for the certification ceremony expenses.

14. Be that as it may, he deposes that the certification ceremony has been a long held tradition sanctioned by the respondent

since its inception. He added that the ceremony was not unique as the same was done in other professions as well. He for example likened the ceremony to that of lawyers when they are admitted to the bar as advocates. Furthermore, he informs that this is the only event that the students celebrate their achievement. He makes known that none of the successful students filed a formal complaint with the respondent on the impugned fees and all participated in the certification ceremony.

15. He depones that the petitioner lacks locus to institute the instant petition as he is neither a student nor finalist in any of the colleges. What's more he states that the petitioner has not demonstrated how the alleged constitutional violations prejudiced the rights of the students. To that end he contends that the respondent stands to be prejudiced if the orders sought are granted.

The Interested party's case

16. The interested party in response filed its replying affidavit dated 1st November 2021 sworn by Ekirah Wambui Ndung'u, its Secretary General who avers that unless the sought orders

are granted the respondent's actions will be disastrous to its students. This is because the respondent made a unilateral decision without the input of its members and the students. She avers that the respondent acted beyond its mandate in effect encroaching on its member institutions. She further depones that the respondent's action is unconstitutional and ought to be stopped by this Court.

The Petitioner's submissions

17. The firm of Omanga Nyabweni & Company Advocates on behalf of the petitioner filed UNDATED written submissions. Counsel identifies the following as the issues for determination:

    i. *Whether the petitioner has locus standi;*

    ii. *Whether the petition raises constitutional questions; and*

    iii. *Whether the acts and omissions of the respondent infringe the constitution and if the manner in which the impugned decision was reached is immune from constitutional dictates.*

18. On the first issue he submits that pursuant to Article 3(1) of the Constitution the petitioner bears the meaning of person as

defined in ***Article 22*** as read together with ***Article 258*** and ***260 of the Constitution***. He argues that the respondent's actions adversely affected the petitioner and other people. In support reliance was placed on the case of **Ms.Priscilla Nyokabi Kanyua v Attorney General & Interim Independent Electoral Commission Nairobi HCCP No.1 of 2010** where it was noted that where a large number of persons are affected there is merit in one person or organization being able to approach the court on behalf of all those persons whose rights are allegedly infringed. Considering this he argues that the petitioner has the requisite locus standi to institute the instant petition.

19. On the second issue Counsel submits that this Court by virtue of ***Article 165(3) (b)*** and ***d (ii) of the Constitution*** has jurisdiction to hear and determine matters on violation of infringement of a right or freedom in the Bill of Rights in view of ***Article 23(1) of the Constitution***. Considering this, Counsel submits that what constitutes a constitutional question was stated to be that which includes a dispute on whether any law or conduct is inconsistent with the Constitution. Moreover, the

interpretation, application and upholding of the Constitution is as held in the case of **M. Fredericks & Others v MEC for Education and Training, Eastern Cape & Other (CCT 27/01) [2001] ZACC 6.**

20. Counsel submits that being that the respondent is a public entity, its increase of the certification fee was in contravention of ***Articles 1(1),10(2)(c),35(1)(b) and 47 of the Constitution*** which in effect infringed upon the rights of the CHRP (K) finalists. This is due to the unilateral decision to impose the CHRP (K) Certification fees on the successful students for the period of June 2018 to June 2021 without prior notice to the affected students.

21. It is his argument that this action contravened the principle of public participation under ***Article 10(2)(c) of the Constitution***. Moreover, that the additional fees that were never disclosed at the onset of the students program, was a poor administrative action and abuse of its administrative powers contrary ***Article 47 of the Constitution***. This thereby frustrated the student's legitimate expectation as to the financial

implication of the program. Counsel as such affirms that the petition does raise constitutional issues.

22. Submitting on the third issue, Counsel states that according to ***Article 47 of the Constitution***, every person has the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Therefore where a decision is likely to adversely affect a person they are entitled to be issued with written reasons for the action. In the same way the decision ought to follow the procedure laid down in ***Section 4(3) and 5(1) of the Fair Administrative Action Act***.

23. Counsel submits that the respondent subjected the CHRP (K) finalists to an unfair administrative action by unfairly changing the impugned fees without giving the petitioner's notice. In support he cited the Court of Appeal case of **Republic v Ololulung'a Land Disputes Tribunal & another Ex parte Nguruman Limited (2017) eKLR** where the Court considered the principle of reasonableness which the petitioner states was defeated by the respondent's actions. Additional reliance was placed on the case of **Republic v Council of Legal**

Education & 2 others Ex parte Mitchelle Njeri Thiongo Nduati (2019) eKLR.

The Respondent's submissions

24. The respondent through the firm of MJ Okumu and Associate Advocates filed written submissions dated 10th December 2021. Counsel identified the issues for determination as follows:

    i. *Whether the petitioner herein has the requisite locus standi to institute the present petition;*

    ii. *Whether the petitioner's petition raises constitutional issues requiring determination by this honourable Court;*

    iii. *Whether the decision taken by the respondent on 15th September 2021 to conduct the certification ceremony and to charge the prescribed fees contravened Articles 10(2)(c),22(1),23(1),27(2),35(1)(b) and 47 of the Constitution;*

    iv. *Whether the decision taken by the respondent to conduct a certification ceremony and to charge*

prescribed fees for the same is one that requires conducting of public participation;

v. *Whether the decision taken by the respondent to conduct a certification ceremony and to charge prescribed fees contravened the legitimate expectation of its candidates/trainees; and*

vi. *Whether in the circumstance the reliefs sought by the petitioner are tenable in law.*

25. Counsel on the first issue submits that the petitioner is an imposter lacking locus standi to institute and sustain this petition. This is since he is not a student nor a finalist in any of the colleges under the aegis of the respondent. Further that he has not demonstrated any constitutional violations that have prejudiced his rights or those of the students. Additionally Counsel submits that the prayers sought concern the individual finalists who did not feel aggrieved by the impugned fees as none lodged a complaint.

26. Counsel argues that although the scope of locus standi has been widened, the same does not mean that the rule of locus standi is no longer relevant in constitutional petitions. Where it

is clear that the petitioner has no business bringing a matter to Court, to permit such would amount to the Court abetting abuse of its processes as held in the case of **Sollo Nzuki v Salaries and Remuneration Commission & 2 others (2019) eKLR**. In view of this Counsel submits that the petitioner does not have a bona fide ground to institute this petition.

27. Moving on to the second issue Counsel submits that the instant petition as drafted does not meet the legal threshold of a constitutional petition as set out in the case of **Anarita Karimi Njeru v Republic(1976-1980)KLR 1272**. He says so because the petitioner has not identified the constitutional provisions deemed to be violated with precision and the manner the provisions have been violated. It is argued thus that a party invoking ***Article 22(1) of the Constitution*** has to show the rights said to be infringed as well as the basis for the grievance as held by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR**. Additional reliance was placed on the case of **Moile Yenko & 7 others v National Land Commission & 5 others (2016) eKLR.**

28. On the third issue, Counsel submits that the respondent is mandated under ***Section 16 of the Human Resource Management Professionals Act No.52 of 2012*** to perform the very functions that are contended in this petition. Accordingly ***Section 17*** of the Act empowers the respondent to prescribe various fees in relation to administering, conducting, processing and releasing examinations to the successful students in the certification and award ceremony. In view of this, he questions how performance of a duty prescribed by the law could be unconstitutional.

29. He therefore submits that in the absence of any challenge on the constitutionality of the said Section of the Act, the function is valid as the Act enjoys the presumption of constitutionality as discussed by the Supreme Court in the case of **Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (2013) eKLR**.

30. Turning over to the fourth issue, Counsel submits that the respondent's decision was an internal operational decision which cannot be subjected to public participation. To buttress this point Counsel cited the case of **William Odiambo Ramogi**

& 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR where it was held that requiring an entity to subject its internal operational decisions to public participation is unreasonable as the same would forestall the operations of such an entity.

31. On the fifth issue he submits that contrary to the petitioner's assertion on legitimate expectation, it is the students' expectation to get certification at the end of the training process. As such it was the respondent's determination to ensure the students get the certification. In fact Counsel submits that had the respondent failed in ensuring the candidates get the awards and certification, the same would have been in breach of the candidates right of legitimate expectation.

32. In support he relied on the case of **Communication Commission of Kenya** case (supra) where it was stated that legitimate expectation arises when a body by representation or by any past practice arouses an expectation that is within its power to fulfil. In light of this Counsel submits that the respondent did fulfil the legitimate expectation of the

candidates as expected. He therefore urges the court to dismiss the petition.

Analysis and Determination

33. Having carefully considered he pleadings, responses rival submissions, cited cases and the law, I find the issues that arise for determination to be as follows:-

i. *Whether the petitioner has the requisite locus standi to sustain the instant petition.*

ii. *Whether the petition has met the constitutional threshold for constitutional petitions.*

iii. *If so, whether the petitioner's rights under Articles 10(2)(c),27(2), 35(1)(b) and 47 of the Constitution were violated.*

iv. *Whether the respondent's decision ought to have been subjected to the principle of public participation.*

v. *Whether the Petitioner is entitled to the reliefs sought.*

Whether the petitioner has the requisite locus standi to sustain the instant petition

34. The locus standi of the petitioner has been challenged by the respondent. It contends that the petitioner is not a student nor a finalist in any of the colleges under its auspices. The petitioner in rebuttal noted that he bears the meaning of person under ***Article 22 of the Constitution***. This is because the respondent's actions affected him and the relevant stakeholders thus the suit is one brought in public interest.

35. The law on locus standi for constitutional petitions is envisaged under ***Article 22*** and ***258 of the Constitution***. The Articles read as follows:

> *(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*
>
> *(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by--*
>
> *(a) a person acting on behalf of another person who cannot act in their own name;*
>
> *(b) a person acting as a member of or in the interest of, a group or class of persons;*

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

36. Speaking to the law on locus standi the Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** held as follows:

> ***"(28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in***

Legal Notice No. 117 of 28th June 2013 – The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013–which, in view of its long title, we take the liberty to baptize, the "Mutunga Rules", to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of the Constitution.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of

poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution."

37. It goes without saying that the scope of locus standi is wide. Conversely this is within the confines of the prescribed categories. In my understanding this means that every person who institutes a constitutional petition has to demonstrate that they are eligible under one of the classes set out above. Unmistakably for that reason the wide scope of locus standi does not grant an automatic right to anyone invoking the provisions of ***Article 22*** and ***258 of the Constitution***.

38. In this regard the Supreme Court in the case of **Communications Commission of Kenya** (Supra) held that:

"[349] ...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well

as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

39. Considering this and in order to determine whether the instant petition is in public interest it is imperative to establish what amounts to a public interest matter and who qualifies as a legitimate party to sustain a public interest claim. I find guidance in the case of **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR** where the Court discussed this notion as follows:

"58. According to Black's Law Dictionary[40] "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community

have pecuniary interest or some interest by which their legal rights or liabilities are affected.

59. While dealing with the question of "bona fides" of a petitioner, especially in the case of a person approaching the Court in the name of Public Interest Litigation, the Indian Supreme Court in the case of Ashok Kumar Pandey vs. State of West Bengal[41] held as hereunder: -

"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to

see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

40. A look at the issue raised by the petitioner informs plainly that the petition is brought in the interest of the duly gazzetted students who were listed as the finalists to receive an award and certification during the respondent's certification ceremony scheduled for 19th October 2021. In view of this the petitioner took issue with the fact that the listed students were required to pay Ksh.4500 dubbed as CHRP (K) certification fees.

41. It is my measured assessment that the *"persons"* in whom the suit was instituted in favour of were the listed students and so the ones affected by the decision. This means that there is no distinct disadvantage that the public would undergo in view of the impugned fees as the same were only applicable to the listed students. Moreover none of the listed students nor the parents or guardians raised issue with the fees.

42. In the same way, although the petitioner says he has brought this petition as one of the affected parties, he has not shown how he was affected by the respondent's decision to increase the impugned fees. He was not a student or one under obligation to pay fees. From the foregoing the matter does not qualify as one touching on interest of the public.

43. Taking this into consideration I am not persuaded that the petitioner is an eligible party to bring the instant suit. I find that citing a matter as brought in public interest while it relates to a select class of persons and no demonstration of personal grievance in the context of the interest, does not suffice to be regarded as such. I find the holding in the case of Brian Asin (supra) relevant in this way:

"60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice.[42] But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. [43]The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. The constitution envisages the judiciary as "a bastion of rights and justice.

61. Public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns.

62. Former Chief Justice of India A.S. Anand cautioned the over use of Public Interest Litigation and emphasized "Care has to be taken to see that Public Interest Litigation essentially remains public interest litigation and is not allowed to degenerate into becoming political interest litigation or private inquisitiveness litigation.[44]"

44. Consequently, I find that the instant petition does not fall within the meaning of a public interest matter and as such the petitioner does not have the requisite locus standi to sustain the instant petition.

(ii) Whether the petition has met the constitutional threshold for constitutional petitions; and

(iii) If so, whether the petitioner's rights under Articles 10(2)(c),27(2), 35(1)(b) and 47 of the Constitution were violated.

45. According to the petitioner, the respondent's act of increasing the certification fee for the CHRP (K) finalists for the period of June 2018 to June 2021 was in contravention of ***Articles 1(1),10(2)(c),35(1)(b)*** and ***47 of the Constitution***. In effect he argues that this act infringed upon the rights of the listed

students due to the lack of prior notice. In light of this he asserts that the issues raised are constitutional in nature within the jurisdiction of this Court.

46. On the other hand the respondent argued that the petitioner failed to identify with precision the constitutional provisions purported to be violated and the manner in which they were violated, in essence failing the constitutional threshold set for constitution petitions.

47. In a constitutional suit, a party that alleges violation of constitutional rights must plead with reasonable precision the manner in which the rights have been violated as observed in the **Anarita Karimi Njeru** (supra). This was further affirmed by the Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**.

48. Likewise, the Court in the case of **Husus Mugiri v Music Copy Right Society of Kenya & another [2018] eKLR** held as follows:

> ***"18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in Anarita Karimi Njeru vs. Republic [1979]***

eKLR. That is, the applicant must specify which specific provisions of the Constitution that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again."

49. My interpretation of the above provision is that for a constitutional petition to be sustainable it must satisfy the set threshold. It follows that the mere citing of constitutional provisions is not enough. A petitioner must clearly indicate the provisions deemed to have been violated and show factually and by adducing evidence how the provisions were violated by the respondent.

50. A perusal of the pleadings discloses that the petitioner's issue is founded on the increment of the CHRP(K) certification fees. It is well appreciated that the respondent as a creature of the ***Human Resource Management Professionals Act, No.52, 2012*** is mandated under ***Section 17*** of the Act to:

(a) prescribe and regulate syllabuses of instruction for human resource management professionals examinations;

(b) prepare and conduct examinations for persons seeking registration under the Act;

(c) make rules with respect to examinations;

(d) prescribe the fees and other charges payable with respect to such examinations;

(e) issue certificates to candidates who have satisfied examination requirements;

(f) make rules with respect to examinations;

(g) issue professional qualifying certificates and other awards to candidates who have satisfied examination requirements;

(h) investigate and determine cases involving indiscipline by students registered with the Examination Board;

(i) promote recognition of its examinations locally and internationally;

(j) remit a proportion of not less than thirty percent of the fees collected under paragraph (d) to the Institute to

support continuing human resource professional development; and

(k) do anything incidental or conducive to the performance of any of the preceding functions.

51. From the foregoing it is clear that the respondent is mandated to prescribe fees and issue certifications and awards. To that end it is sensible to deduce that the respondent acted within its mandate as required by the law. I note that this is a fact that was acknowledged by the petitioner in the suit. What the petitioner took issue with however was the manner in which the increase was made. It is on this premise that he argued that the cited rights were violated.

52. Principally the contention was that the additional fees were not disclosed at the beginning of the program and no notice given prior to the increase. This action as argued constituted an abuse of administrative powers, and violating the cited rights and the students legitimate expectation on the financial implication. An interrogation of the pleadings reveals that other than stating the violations the petitioner does not show

factually or adduce evidence to show how these violations were achieved.

53. Moreover the petitioner does not show how the exercise of a statutory mandate violated the stated rights. It is not demonstrated that the respondent is required to state all the required fees at the onset of the program thus invoking a legitimate expectation that the fees will not be altered until the end. Similarly, it is not evidenced that the respondent is required to notify the students and institutions of any changes made in accordance with its mandate.

54. It is worthy to note that unless proved otherwise, this Court is required to presume that an Act of Parliament is constitutional and actions in line with it are lawful as seen in the Supreme Court case of **Raila Odinga**(supra) and also affirmed in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534** where it was held that:

> ***"Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive***

such a construction as will make it operative and not inoperative"

55. Reasonably, where an action in an Act of Parliament is alleged to be unconstitutional the burden of proving the allegations lie on the one who alleges so. In the absence of actual proof that the respondent acted outside its mandate to warrant invocation of ***Article 165(3)(d)(i) of the Constitution***, this Court cannot interfere with the carrying out of such a mandate.

56. In my humble view the petition before this Court contains generalized claims of violations of the cited provisions not backed up with any provisions of the law. In addition it lacks particularity in the way in which the cited provisions were violated thus failing to meet the required threshold. Furthermore, the petitioner did not adduce evidence to support the allegation that the respondent acted outside its mandate.

57. In light of this I find that the constitutional threshold was not met in the instant petition. Fundamentally what becomes apparent therefore is that the petitioner has failed to

discharge his burden of proof to the effect that the respondent violated the cited constitutional provisions.

(iv) <u>Whether the respondent's decision ought to have been subjected to the principle of public participation</u>

58. Following the petitioner's arguments, I find it imperative to address the issue of public participation as raised by him. He petitioner took issue with the fact that the students and institutions were not involved in the decision taken out. According to him, the respondent being a public body ought to have involved the relevant stakeholders, in making this decision. In opposition, the respondent maintained that the decision taken out was an internal one within the respondent's usual mandate.

59. Public participation is captured under ***Article 118 (1) of the Constitution*** and states that:

Parliament shall-

a) Conduct its business in an open manner and its sittings and those of its committees shall be open to the public, and

b) Facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.

60. The Court of Appeal speaking to the importance of public participation in the case of **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR** stated as followed: -

> ***"The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning."***

61. Public participation is a key element in the legislative functions. This was appreciated in the case of **Republic v County**

Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR where the Court held that:

> ***"50. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What***

amounts to a reasonable opportunity will depend on the circumstances of each case."

62. An evaluation of this Article and authority makes it clear that the obligation to uphold the principle of public participation is bestowed on policy makers while making laws. In principle, where a decision concerns public policy, the public must be involved and be given an opportunity to participate in the making of that the policy or law. The question to be answered as a result in this matter is whether the principle of public participation is also mandatory to various bodies and institutions while making decisions within their mandate.

63. The five Judge bench in the case of **William Odhiambo Ramogi**(supra) in this regard opined as follows:-

"133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the 'internal operational decisions concept'. The second

scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.

134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.....

136. We agree with the Learned Judge. We further find that requiring an entity to subject its internal operational decisions to public participation is unreasonable. It is a tall order which shall definitely forestall the

operations of such entity. That could not have, by any standard, been the constitutional-desired-effect under Articles 10 and 47.

137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of the Constitution, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders."

64. I stand guided by the sentiments expressed above. A reading of the ***Section 17 of the Human Resource Management Professionals Act, No.52, 2012*** discloses that the respondent in

carrying out its mandate is authorized to prescribe fees making it an operational decision hence not requiring submission to the principle of public participation. Be that as it may, it was incumbent on the petitioner to demonstrate that the decision of the impugned fees increase occasioned an unfair financial burden with far reaching consequences on the students, stakeholders and the general public.

65. This was not proved by the petitioner in this case to necessitate the second consideration of public participation in administrative decisions as opined in the ***William Odhiambo Ramogi*** case (supra). The respondent did not violate the principle of public participation.

66. Taking into consideration the preceding analysis, it is clearly manifested that the petitioner has failed to discharge his burden of proof to the required standard for constitutional petitions. In light of this, I come to the conclusion that the respondent did not violate ***Articles 10(2)c, 22(1), 23(1), 27(2), 35(1)(b) and 47 of the Constitution***.

(v) Whether the Petitioner is entitled to the reliefs sought

67. Drawing from the above conclusion that the rights of the petitioner, were not violated I am of the humble view that the petitioner's petition lacks merit and is hereby dismissed with costs.

Orders accordingly.

Delivered virtually, dated and signed this 9th day of June in open court at Milimani Nairobi.

H. I. Ong'udi

Judge of the High Court