IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: WAKI, GATEMBU & ODEK, JJ.A)

CIVIL APPEAL NO. 355 OF 2014

BETWEEN

THE KENYA NATIONAL EXAMINATIONS COUNCIL…APPELLANT

AND

THE REPUBLIC ……..……..……..…..1ST RESPONDENT
THE HON. A TTORNEY GENERAL …….. 2ND RESPONDENT
AUDREY ITHIBU MBUGUA …… 3RD RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Judicial Review Division) (W. Korir, J.) dated 7th October 2014

in

H.C.MISC.C.APPL. No. 147 of 2013)
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JUDGMENT OF THE COURT

1. Audrey Ithibu Mbugua (Audrey), the 3rd respondent, previously known as Andrew Mbugua Ithibu was born and raised as a male. She was enrolled at Kiambu High School, an all-boys school, where, in November/December 2001 she sat for the Kenya Certificate of Secondary Education Examination (KCSE), an examination administered by the appellant, the Kenya National Examinations Council. She performed very well in that examination, and scored a mean grade A-. She was accordingly issued with the appellant's Kenya Certificate of Secondary Education No. 1855399 under the name by which she was enrolled, namely, Ithibu Andrew Mbugua. As is the practice

with the appellant, the certificate was inscribed with the mark, *M*, signifying the candidate's gender as male.

2. Since October 2008, Audrey has received medical treatment at Mathare Hospital for gender identity disorder and depression. Dr. Catherine Syengo Mutisya, the Deputy Medical Superintendent at that hospital stated in a letter dated 12th March, 2013 that Audrey, to whom she referred as *"she",* was evaluated on 27th January, 2008 by the medical board (a panel of psychiatrists) at that hospital which confirmed "*that she had gender identity disorder (trans-sexual) and had already began the medical transition*." In the same letter, Dr. Mutisya stated that:

> ***"On examination today she is still distressed by the challenge she is encountering as a result of her condition. She is facing a lot of stigma as a result of having her certificates and identification documents referring to her as male even though she has partly transitioned to female. This distress her (sic) perpetuated her depression and she has had to be on treatment for depression for a longer period."***

3. Audrey first changed her name in 2010 by dropping the use of the name Andrew. By Gazette Notice No. 6193 of 19th May, 2010 that appeared in the Kenya Gazette of 28th May, 2010 notice was published that by a deed poll dated 7th May, 2010, 'Andrew Mbugua Ithibu' abandoned the use of that name and in lieu thereof assumed and adopted the name 'Mbugua Ithibu'.

4. Subsequently, in January 2012, by Gazette Notice No. 9395, Audrey published that by a deed poll dated 19th January 2012, she had renounced and abandoned the use of the name 'Mbugua Ithibu' and assumed and adopted the name 'Audrey Ithibu Mbugua'. Sometime that year, she wrote a

letter to the appellant requesting for a "*change of name in my KCSE Certificate-KCSE 1855399*" in the following terms:

> ***"I humbly request the Kenyan National examination Council to effect my change of name in my Kenya certificate of Secondary education (KCSE) certificate. This follows my legal change of name from Andrew Mbugua Ithibu to Audrey Mbugua Ithibu.***
>
> ***Attached find copies of my KCSE certificate, deed poll and Gazette notice for your perusal. Your assistance will be highly appreciated."***

5. Prior to that letter, Audrey had, as Program Officer, of an organization known as Transgender Education & Advocacy, engaged the appellant in correspondence on the subject of "*request for policy creation to allow changes of KNEC's Academic Certificates*". In a letter dated 1st December 2010 for instance, Audrey, as Program Officer of that organization stated:

> ***"We would like to… highlight a major problem with the KNEC'S certificates. According to KNEC's policy, no amendments can be made in those certificates-names and sex. Owing to the fact that we live in a gendered society, names do reflect one's sex. For those who are undergoing sex change procedures or have undergone these changes, this policy represents an avenue for discrimination in employment.***
>
> ***While we understand that KNEC has to have stringent measures to prevent proliferation of fake academic certificates we do request that KNEC make considerations to accommodate the needs of the transsexual and intersex people and give them an opportunity to improve their economic and social status.***
>
> ***We kindly request for your audience to discuss the issue further…"***

6. The appellant responded by its letter dated 10th December, 2010. The relevant part of that letter is as follows:

> ***"While we are strict in enforcing the policy on name and gender changes, we do emphasize (sic) with the plight of individuals who are undergoing or have undergone sex changes. As such, we wish to inform you that KNEC does consider gender changes in certificates of individuals who have sufficient reasons and evidence to prove that their case is genuine. As for the candidates who are undergoing or have undergone sex changes, (sic) the Council can consider changes of certificates, if the affected individuals present medical reports from qualified medical practitioners as evidence of their change in gender."*** [Emphasis added]

7. In a rejoinder to that letter, Audrey, again as the Program Officer of the said organization, in her letter dated 7th February 2011 acknowledged the "*considerate and pragmatic approach*" by the appellant to the needs of transsexual and intersex people but pointed out that the appellant had "*failed to mention the issue of changes of name*" pointing out that "*most transsexuals or intersex people undergoing sex transitions do get changes of names in their identity documents while in waiting for the sex reassignment surgery*" and enquired whether it is possible to "*allow these changes backed with new identity card, affidavit, a registered deed poll and a copy of the Gazette Notice?*"

8. In a prompt response dated 9th February 2011, the appellant again pointed out the need for it to put in place stringent measures to deter forgery of certificates so as to ensure credibility of its certificates, and that it is strict in enforcing the policy on name change. It again empathized with the plight of individuals who are undergoing or have undergone sex changes. The letter continued:

> ***"We wish to inform you that KNEC will have to develop a policy on the same to make provision for persons who have undergone gender changes so as to make adequate arrangements for certification of individuals who have submitted the prerequisite evidence to proof that their case is genuine. All candidates who are undergoing or have undergone sex changes, the Council can consider change of name on certificates, if the affected candidates present recent medical reports from qualified Medical Practitioners, affidavit, Birth Certificate, Any certification from the Council, a registered deed poll and a copy of a gazette notice. Other individuals who are over 18 years must submit their new and old identity cards as evidence of their change in name in addition to all other evidence required of candidates.***
>
> ***We wish you the very best as we all strive to improve equity in our society. We appreciate your effort and look forward for a meeting where we can develop the relevant benchmarks to initiate the policy for transgender cases."*** [Emphasis added]

9. It is against that background that Audrey had requested the appellant to effect changes in her certificate. However, in an email dated 8th November 2012, Catherine Maina of the appellant, in what appears to be 360 degree shift in position, informed the Audrey that "*kindly note that we do not effect name changes on certificates after release of examination*." In the same email, the said Catherine Maina offered advice to Audrey that instead of seeking to have the certificate amended to reflect her new name, she should "*attach the gazette in cases that require use of your previously acquired certificates*."

10. On 28th February 2013, Audrey made a formal complaint to the appellant regarding the refusal to effect the change of name. which The appellant responded to that complaint by letter dated 22nd March, 2013 asserting that "*The KNEC regulations do not allow addition or deletion of a name after award of*

a certificate to a candidate" and that "*the Council only allows change of name during the registration for subsequent examinations on submission of a Kenya Gazette notice*". It reiterated the advice to the 3rd respondent that she should "*use the gazette notice to support the differences in names on the certificates*."

11. With that, the stage was set for the litigation that ensued. On 14th May 2013 Audrey applied to the High Court for orders of mandamus: to compel the appellant to carry out its statutory mandate by changing the particulars of name on her said certificate; and an order to compel the appellant to remove the gender mark from the certificate.

12. The appellant opposed the application asserting that the certificate was issued in accordance with the registration particulars "*under which he registered for the examination*"; it doubted that the gender transition Audrey claimed to have been undergoing was sanctioned by law; it asserted that there is no requirement in law for the appellant to effect a name change; that it does not effect changes on certificates that have already been issued as doing so may encourage creation of fraudulent certificates; that doing so might also encourage other candidates to make similar requests; that it was incumbent upon Audrey, as is normal practice, to prove to potential employers or institutions that the names appearing in the certificate do indeed refer to her.

13. Following arguments, the High Court was persuaded that Audrey's motion had merit and in its judgment delivered on 7th October 2014 ordered:

> ***"The applicant has satisfied this Court that the orders should issue. An order of mandamus is therefore issued to compel KNEC to recall the applicant's KCSE certificate No. 1855399 issued in the name of Ithibu Andrew Mbugua and replace the said certificate with one in the name of Audrey Mbugua Ithibu. The replacement certificate shall***

be without a gender mark. This should be done within 45 days from the date of this judgment and will be subject to payment of reasonable fee, if necessary, by the applicant."

14. Aggrieved, the appellant has lodged this appeal.

The appeal and submissions by counsel

15. Learned counsel for the appellant Mrs. Kiarie submitted that the Judge fell into error in ordering the appellant to perform a duty that was not in the statute and in ordering it to perform a duty in a specific way; that the scope of an order of mandamus is limited to performance of a public duty where statute imposes clear and unqualified duty to perform an act; that where a statute, which imposes a duty leaves discretion as to the mode of performing the duty, an order of mandamus cannot command the duty in question to be carried out in a specific way. In support, counsel referred to the case of ***Kenya National Examinations Council vs. R, Ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR*** and also to ***Makupa Transit Shade Limited & anor vs. Kenya Ports Authority & anor [2015] eKLR*** and submitted that the Judge could not, by order of mandamus, compel the appellant to recall Audrey's certificate and to replace it with another one without a gender mark within 45 days.

16. Counsel also complained that Audrey was serving her own private interests having pretended, in her initial engagement with the appellant, to have been acting in public interest. It was submitted that judicial review remedies are public in nature and should not be issued to enforce private law rights such as a request for change of name and that the 3rd respondent should have filed a constitutional petition. The case of ***Makupa Transit Shade Limited & anor vs. Kenya Ports Authority & anor*** was again cited.

17. It was submitted that the Judge erred in holding that a right founded in the Bill of Rights can be enforced through judicial review proceedings and for proceeding on the basis that judicial review is among the remedies that a court can grant where a fundamental right or freedom in the Bill of Rights has been denied or violated.

18. The Judge was also faulted for holding that Audrey was no longer male; it was submitted that, based on the evidence, it was clear that the process of transition from male gender had not been completed and Audrey remained a male and the order for removal of the gender mark in the certificate was therefore not well founded. Citing an English decision in ***Bellinger vs. Bellinger [2003] UKHL 21***, it was submitted that it cannot be said that Audrey's gender had been re-assigned and the Judge was ill equipped to make a finding concerning Audrey's disorder and to determine that the prescription lay in the removal of the gender mark in the academic certificate.

19. It was urged further that in granting the orders that it did, and having regard to the complexity of the issues relating to trans-sexualism, the court wrongly waded into legislative territory; that the issues presented are ill suited for determination by the court and require comprehensive legislation. Citing the decision of this Court in ***Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 others [2016] eKLR***, it was submitted that courts have no role to play in policy formulation, a matter best left to the executive and the legislature. The case of ***R. M vs. Attorney General & 4 others [2010] eKLR*** was also cited for the argument that the problem of social stigma faced by transgender persons is beyond legal prescription.

20. Counsel for the appellant concluded his submissions thus:

> ***"…the trial judge was not equipped to make a finding that the 3rd respondent is a female having the body of a woman and to thereafter proceed to issue orders that only superficially addressed an issue that relevant government departments and the legislature should address with a view to coming up with policies, laws and guidelines that will set the criteria for declaring a trans-sexual person as having transitioned into the opposite gender and the consequences flowing therefrom."***

21. With that, the appellant urged this Court to allow the appeal and set aside the judgment of the lower court.

22. Although the Attorney General, the 2nd respondent was served with notice of hearing, there was no representation at the hearing of the appeal. Written submissions had, however, been filed for the Attorney General in support of the appeal in which it was urged that the High Court erred in issuing a mandatory order against the appellant, a statutory body; that under Section 10 (2)(d) of the Kenya National Examinations Council Act, the appellant is empowered to make rules regulating the conduct of issuance of certificates or diplomas and for all purpose's incidental thereto; that the orders issued by the High Court ordering the appellant to issue a new Certificate to the Audrey would cause the appellant to act in excess of its powers as there is no law in force to support the issuance of a new certificate to Audrey with a change of name and without the gender mark. In support, reference was made to the case of ***Kenya National Examinations Council vs. R, Ex parte Geoffrey Gathenji Njoroge & 9 others*** and also to the case of ***John Kabui Mwai & 3 others vs. Kenya National Examination Council & 2 others [2011] eKLR***.

23. In opposition to the appeal, Mr. C. Ojiambo learned counsel for Audrey submitted that in the correspondence exchanged between the parties before action, the appellant assumed two conflicting positions on the question of change of certificates; it initially stated that it does effect changes subject to certain conditions being met but later changed its position to say that it does not effect changes once a certificate is issued.

24. It was submitted that under Rule 9(3) of Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009 (the regulations) the appellant may withdraw a certificate for amendment or for any other reason it considers necessary; that the rules do not prohibit amendment of particulars of name; that the contention by the appellant that the regulations do not allow for additions or deletion of a name after award of a certificate to a candidate is baseless.

25. It was submitted that Rule 9(3) of the regulations does therefore confer on the appellant the power to amend certificates; that rules donating a power may create a duty on the part of the donee to act in the exercise such power. Reference was made to the case of ***Padfield vs. Minister of Agriculture and Food and others [1968]1 ALL. E. R 694*** for the proposition that there may be power coupled with duty. It was urged that even though the power under Rule 9(3) of the regulations is discretionary, such discretion must, on the strength of ***Associate Provincial Picture Houses Ltd vs. Wednesbury Corporation [1988]1 A. C. 858***, be exercised reasonably. An order of mandamus can issue where the donee of the power acts unlawfully by out rightly refusing to consider relevant matters; misdirecting himself in point of law; or taking into account irrelevant or extraneous consideration; or wholly omitting to take into account a relevant consideration.

26. It was submitted that in the present case, the reasons advanced by the appellant for refusing to amend the certificate demonstrate that the appellant failed to understand the object and scope of Rule 9(3) of the regulations as well as its functions and duties thereunder which it misinterpreted and so misdirected itself in law; that inherent in the power to withdraw certificates is the power to deal with certificates which are already issued; that the appellant is accordingly empowered to withdraw a certificate already issued and to make alterations; and that the refusal to exercise that power was an abdication of that power.

27. With regard to the gender mark, it was submitted that the regulations do not require the inclusion of a gender mark in the Certificate; that the appellant can only do that which the statute and the rules permit, and since there is no statutory or regulatory requirement for the gender mark the court was therefore right in ordering its removal.

28. As to the complaint by the appellant that the Judge erred in finding that Audrey's fundamental freedom under the Bill of Rights had been violated, it was submitted that the Judge did not make any such finding and neither had Audrey alleged violation of rights and freedoms by the appellant. That even if the Judge had made such finding, the same would be well founded under Article 21 of the Constitution.

29. Regarding the complaint that the court in making the orders that it did, ignored cultural and social beliefs it was submitted that a consideration of the cultural and social beliefs would have been extraneous to an application for judicial review. That contrary to the argument by the appellant, the court in granting Audrey's prayers did not encroach into the territory of the executive and the legislature; that all the court did was to interpret and

apply the law and did not usurp the functions of other organs of government. It was submitted that the authorities relied upon by the appellant for the proposition that courts should not delve into matters of policy and legislation as they are the preserve of the executive and the legislature were distinguishable.

30. It was argued that the case ***Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 others*** (above) which addresses the matter of usurpation of parliamentary powers by the court is not relevant to this matter which is purely on judicial review of an administrative decision by the court. It was urged that the case of ***Makupa Transit Shade Limited & anor vs. Kenya Ports Authority & anor*** (above) related to a private contract and is irrelevant to a situation involving public duty under a statute while the case of ***Bellinger vs. Bellinger*** related to the right to marry by a trans sexual person and is not relevant to this case. Furthermore, the latter case was overtaken by the enactment of the Gender Recognition Act in UK.

Analysis and determination

31. We have considered the appeal and submissions by counsel. Essentially, the issue for determination in this appeal is whether the Judge erred in granting Audrey an order of mandamus compelling the appellant to issue her with an amended certificate consistent with her newly acquired gender. In effect, do the orders that were granted by the court fall within the scope of mandamus?. Within that are the questions whether the Judge, in effect, granted a public law remedy to enforce a private law right outside the ambit of judicial review proceedings; whether the Judge erred in proceeding on the basis that Audrey was no longer male and in ordering the removal of the gender mark from the certificate; and whether by granting the orders that

he did, the Judge encroached on policy and legislation, the preserved territory for the executive and the legislature.

32. There is no dispute that the appellant is a statutory creature established under Section 3 of the Kenya National Examinations Council, Act No. 29 of 2012 (the Act). Its functions, under Section 10 of that Act, include setting and maintaining examination standards, conduct of public academic national examinations at basic and tertiary levels; awarding certificates or diplomas to candidates in such examinations; confirming authenticity of certificates or diplomas issued by the Council upon request by the government, public institutions, learning institutions, employers and other interested parties; issuing replacement certificates or diplomas to candidates or diplomas to candidates in such examinations upon acceptable proof of loss of the original, doing anything incidental or conducive to the performance of any other preceding functions.

33. Under Section 10(2) of the Act, the appellant is empowered to make rules, among other things, regulating the conduct of issuance of certificates or diplomas and for all purposes incidental thereto. Section 11 provides that the appellant shall have all powers necessary for the proper performance of its functions.

34. Pursuant to Section 10(2) of the Act, the appellant made the regulations, the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules, 2009. Rule 9 of the regulations is pertinent. It provides:

> ***"(1) A certificate awarded to a candidate shall show the name of the candidate, the candidate's index number, the name of the school in the case of a school candidate, and***

all the subjects taken by the candidate in the examination with the respective codes and the grades obtained in all the subjects taken.

(2) ….

(3) The Council may at any time withdraw a certificate for amendment or for any other reason where it considers it necessary.

(Emphasis added)

35. Whereas the appellant is under a statutory duty to award certificates or diplomas to successful candidates, the exercise of its power under Rule 9 of those rules to "*withdraw a certificate for amendment or for any other reason where it considers it necessary*" is discretionary.

36. As this Court stated in the case of ***Kenya National Examinations Council vs. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR:***

> *"**and order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refused to perform the same**."*

37. In the same case, the Court expounded on the scope and efficacy of an order of mandamus. It enunciated that an order of mandamus will compel the performance of a 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. The Court, in that case, adopted passages from the ***Halsbury's Laws of England***, 4th edition, volume 1 paragraph 89 where the editors posit that the purpose of an order of mandamus 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 the mode of redress is less convenient, beneficial and effectual."***

38. The Court also adopted the statement at paragraph 90 of the same volume of the ***Halsbury's Laws of England*** thus:

> ***"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 required 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."*** [Emphasis]

39. That is not to say that the remedy of an order of mandamus is not available where the performance of a statutory duty entails or involves the exercise of discretion on the part of the person or body on whom the discretion is conferred. Discretion, itself, must be exercised reasonably. Lord Greene, M. R of the Court of Appeal in England expounded on the subject years ago, in 1947, in ***Associated Provincial Picture Houses, Ltd. vs. Wednesbury Corporation*** (above) where he stated:

> *"**it is true that discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must***

> ***direct himself properly in law. He must call his attention to the matters which he is bound to consider. He must exclude from his considerations matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority***."

40. Lord Greene then summarize the principle thus:

> "…***the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere***."

41. Undoubtedly, the appellant's duty with respect to award of certificates or diplomas to candidates for national examinations at both basic and tertiary levels is cast in statute specifically under **Section 10 (1) (b)** of the Act. It was in discharge of that duty or function that the appellant awarded Audrey a KCSE certificate whose particulars, Audrey subsequently sought to have amended. The question therefore is whether the appellant was obliged to effect the name change on the Audrey's certificate and to remove the gender mark on it.

42. Rule 9(1) of the regulations spells out what a certificate should contain. Inclusion of a gender mark is not a requirement under that provision. The Judge was therefore right in concluding as he did that the inclusion of a gender mark in the certificate was not a requirement. That is not to say that

the inclusion of the gender mark in any way violated statute or the regulations. Indeed, the appellant may have good reason for including it even though it is not among the mandatory requirements enumerated under Rule 9 (1) regulations.

43. With regard to the power to amend certificates, Rule 9(3) as already noted provides that the appellant "*may at any time withdraw a certificate for amendment or for any other reason where it considers it necessary*". It is therefore open to the appellant either on application or on its own motion to withdraw and amend the certificate where it considers it necessary, subject to good reason. In our view, the appellant was under duty to consider the Audrey's application for amendment of the certificate.

44. The appellant asserts that its powers of amendment are discretionary and that the court had no authority to order amendment, and further that that by issuing an order of *mandamus,* the court usurped the appellant's authority and purported to dictate the manner in which that discretion is exercised. It was urged for the appellant that where a matter is left to the discretionary power of an executive arm of government, courts have no authority to interfere with the exercise of that discretion.

45. Discretion, according to the ***Black's Law Dictionary, 8th Edn*****,** entails "*wise conduct and management; cautious discernment; prudence.* ***2****. Individual judgment; the power of free decision making"* while Administrative discretion is *"a public official's or agency's power to exercise judgment in the discharge of its duties".* There is no doubt, that the powers of the appellant under Rule 9(3) of the regulation to withdraw and amend certificates, *"where it considers it necessary"* is discretionary. The appellant is right that the court cannot, by an order of *mandamus* dictate the specific way in such discretion is to be

exercised (See ***Manyasi vs. Gicheru & 3 others [2009] KLR 687*****).** That is not to say that discretionary power is absolute power and beyond the purview of judicial scrutiny. As already stated, all discretionary power is subject to the doctrine of reasonableness. It must be shown to have been exercised reasonably. See ***Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation*** (above).

46. Furthermore, under **Section 7 (2) (k)** of the **Fair Administrative Action Act**, a court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

47. We have already stated that Audrey first wrote to the appellant a letter dated 1st December, 2010 as the program officer to an organization known as Transgender Education & Advocacy (TEA) seeking to engage the appellant on its policy that *"no amendments can be made in… certificates"* relating to 'name and sex' in light of "*those who are undergoing sex change procedures or have undergone these changes".* Audrey asserted in that letter that the appellant's policy in that regard "*presents an avenue for discrimination in employment"* and sought audience with the appellant to discuss the issue further.

48. As seen above the appellant was empathetic in its response of 10th December, 2010 and upon further enquiry regarding the procedure to be followed by an individual who was desirous of effecting a name and gender

change on a certificate, the appellant in its letter dated 9th February, 2011 explained the procedure for doing so.

49. Relying on the representations by the appellant and armed with a gazette notice, a deed poll, the KCSE certificate sought to be rectified and the medical report, Audrey sought the change of name and gender in her certificate at which point the appellant's reception turned lukewarm and non-responsive. This prompted Audrey to address the appellant through her advocate, at which point the appellant in a letter dated 22nd March, 2013 stated thus:

> ***"…KNEC regulations do not allow addition or deletion of a name after award of a certificate to a candidate.***
>
> ***The Council only allows change of name during the registration for subsequent examinations on submission of a Kenya Gazatte Notice.***
>
> ***Please use the Gazette Notice to support the differences in names on the certificate.'***

50. The appellant thereby declined, without giving any reasons, to exercise its mandate under Rule 9 to act on Audrey's request, notwithstanding that it had previously acknowledged that it has the mandate to amend certificates. It was not that the appellant improperly exercised its discretion but rather it simply refused to act. It was only after Audrey had approached the court for relief that the appellant came up with the claim that Audrey was yet to fully transition to a female. The learned Judge was evidently not impressed and considered the reasons advanced by the appellant as excuses for its refusal to act. In his words:

> ***'KNEC attempted to cast aspersions on the diagnosis of the Applicant's condition and on the treatment he has undergone. This was not a successful strategy as the Applicant adduced evidence to show that he has indeed been diagnosed with G.I.D. In fact KNEC's CEO conceded in his affidavit that the symptoms exhibited by the Applicant were indicative of G.I.D."***

51. The upshot is that although the appellant had represented to the Audrey that it would amend the certificate and was provided with all the requisite documentation to enable it do so, it refused to give any consideration to the matter which it summarily dismissed. In those circumstances, the court was entitled to grant an order of *mandamus* compelling the appellant carry out the duty (See ***J.F Garner, Administrative Law 5th Ed at page 156-7***). Consequently, the issuance of an order of *mandamus* by the trial court was , in our view, not a usurpation of the appellant's powers by the court.

52. As to whether the doctrine of legitimate expectation was applicable, as stated by the Supreme Court in ***Communication Commission of Kenya vs. Royal Media Services Ltd & 5 Others [2014] eKLR*** in order for legitimate expectation to arise,:

> ***"there must be clear and unambiguous promise given by a public authority, the expectation must be clear, the representation must be one which it was competent and lawful for the decision maker to make and there cannot be a legitimate expectation against clear provisions of the law or the Constitution"***

53. In view of the appellant's express statutory powers, coupled with the exchange of correspondence aforesaid, Audrey was well within reason to have a legitimate expectation that the appellant would make the changes sought upon being furnished with the requisite documents by the 3rd

respondent. Consequently, failure by the appellant to do so warranted the issuance of remedial orders of *mandamus*.

54. Counsel for the appellant also complained that Audrey was undeserving of relief on the basis that she held herself out in her initial correspondence with the appellant as representing an organization only to turn around to agitate her own cause. The appellant painted Audrey as an underhanded individual who misled the appellant whilst pretending to be acting on behalf of an organization in public interest. We do not think there is any merit in this complaint. All the correspondence exchanged between Audrey and the appellant before action was clearly authored and signed off by her notwithstanding that it was on the letterheads of the Transgender Education Advocacy organization. We do not discern that there was any attempt by Audrey to disguise herself or to mislead the appellant in any way. The fact that Audrey would, as an individual, benefit from a public law remedy is in our view not a bar to the court granting such relief.

55. All in all, we are not persuaded that the appellant has established a basis for this Court to interfere with the decision of the lower court.

56. Before we pen off, there is the contention that the lower court waded into a policy and legislative arena and that the judge failed to keep his mind alive to the cultural realities of the Kenyan society. There is, of course, need for government, and Parliament in particular to address in a holistic manner the interests of minorities such as transgender persons. Other jurisdictions have taken that approach. There is for instance the Gender Recognition Act in UK that deals with gender reassignment. It cannot be the case that until there is a policy and legislative framework in place, persons like Audrey are without recourse to secure their dignity guaranteed under the Constitution. As the learned Judge noted:

> ***'Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanisation. Each individual has inherent dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution."***

57. In effect, lack of policy or legislative framework cannot be a bar for the court to enforce constitutional rights.

58. On the whole therefore, the appeal lacks merit and is hereby dismissed with costs to the 3rd respondent.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of July, 2019.

P. WAKI

……
JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. OTIENO ODEK

……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR