



REPUBLIC OF KENYA



KENYA LAW
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**Ogega v Kenya School of Law & another (Appeal 2 of 2020)
[2020] KELEAT 50 (KLR) (30 October 2020) (Judgment)**

Diana Kemunto Ogega v Kenya School of Law & another [2020] eKLR

Neutral citation: [2020] KELEAT 50 (KLR)

REPUBLIC OF KENYA

IN THE LEGAL EDUCATION APPEALS TRIBUNAL

APPEAL 2 OF 2020

R.N MBANYA, CHAIR, EO ARWA, R.W KIGAMWA & SM GITONGA, MEMBERS

OCTOBER 30, 2020

BETWEEN

DIANA KEMUNTO OGEGA APPELLANT

AND

KENYA SCHOOL OF LAW 1ST RESPONDENT

COUNCIL FOR LEGAL EDUCATION 2ND RESPONDENT

*(Being an appeal against the decision of Ms. Helene Namisi – Lecturer of
Conveyancing ATP 107 as embodied in the letter dated the 30th April,
2019 by the Director/Chief Executive Officer of the Kenya School of Law)*

JUDGMENT

1. Genesis of the appeal.

1. The appellant Diana Kemunto Ogega lodged an appeal with the Tribunal against the Kenya School of Law as the 1st respondent and the Council For Legal Education as the 2nd respondent on 13th July, 2020. The appellant, a student who was undertaking the Advocates Training Programme (ATP) during the 2018/2019 academic year by the motion originating the appeal, seeks for prayers: -
 - a) The 1st respondent be and is hereby directed to award the appellant 13 marks in the assignment submitted by Firm E26 for the Conveyancing Coursework 2018.
 - b) That consequent upon (a) above, the 1st respondent do forthwith/without delay transmit the appellant's amended/updated overall marks for Conveyancing (ATP 107) to the 2nd respondent.



- c) That consequent upon (b) above, the 2nd respondent upon receipt of the appellant's amended/ updated overall marks for Conveyancing (ATP 107) do forthwith/without delay issue a suitably amended transcript to the appellant.
 - d) In the circumstances such further orders/directions as are just and expedient be made/issued.
 - e) That costs of and incidental to this application be borne by the respondents jointly and severally in any event.
2. The appellant's notice of motion is supported by an affidavit sworn on 13th July, 2020 and a further affidavit sworn on 14th September, 2020. The appellant had initially originated the dispute herein in the High Court at Nairobi *vide* Constitutional Petition No. 417 of 2019 in which Justice J. A. Makau found that the court was bereft of jurisdiction to address the matter in a ruling delivered on the 12th March, 2020 as the appellant was yet to exhaust the dispute resolution mechanism established under section 31 (1) of the [Legal Education Act, 2012](#). The 1st respondent in response to the appeal did file two affidavits. One by Ms. Helene Namisi the Lecturer who was responsible for the teaching of the Conveyancing - ATP 107 during the requisite academic year of 2018 sworn on 25th August, 2020 and the other by Mr. Fredrick Muhia who is the Academic Services Manager and the Secretary of the Committee of Examiners sworn on 28th September, 2020. The appeal came up for directions before the Tribunal with the appellant acting as a pro se litigant, Ms. Pauline Mbuthu and Dr. Henry K. Mutai appearing for the 1st respondent while Dr. Jacob Gakeri appeared for the 2nd respondent. Dr. Gakeri informed the Tribunal that the 2nd respondent would not be filing any documents. The Tribunal then proceeded to give directions as to the disposal of the appeal by way of written submissions. The appellant and the 1st respondent did file written submissions.

2. The appeal by the appellant and submissions.

3. The appellant was a member of firm E26. The firm E26 upon undertaking the group project assignment in-respect of ATP - 107 Conveyancing was awarded 13 marks out of 20 marks. The said marks were to be allocated to each firm member and was to form part of the total score for the ATP 107 – Conveyancing marks. The appellant on the 26th September, 2018 learnt that she had been awarded 11 marks instead of 13 marks awarded to the group.
4. Subsequently, the appellant vide a provisional transcript issued by the 2nd respondent on 4th February, 2019 for the Bar Examinations noted that she had scored 49% out of the possible 100% of the marks in respect of the course ATP 107 – Conveyancing. The same was below the designated pass mark of 50% and which attracted the result of a fail in the course. The course entailed a component of a project assignment which was undertaken as a group of students designated as a firm.
5. The appellant took up the matter on the 11th. April, 2019 with the 1st. respondent through a letter addressed to Ms. Anna C. Konuche - Assistant Director of the Advocates Training Programme. In the letter she gave an account of her participation in the Conveyancing project course work whereby she attended all the firm's meetings and contributed in drafting its eventual report. She indicated that she was present on 20th. July, 2018 when the project work was being submitted. By the penultimate paragraph therein she sought a re-submission of her rightful project mark to the 2nd respondent.
6. On 30th. April, 2019 the 1st. respondent's Director replied to a letter dated the 15th. April, 2019 from the 2nd respondent's Secretary concerning the complaint of the Conveyancing project work. The letter indicated that the appellant with another student had been awarded 2 marks less than that awarded to the firm because the Lecturer teaching the course had explained that they did not attend a class



presentation. It was the appellant's contention that all the firm members could not make a presentation within the 10 minutes allocated to each firm.

7. The appellant on the 10th. May, 2019 while reiterating the complaint wrote to the Director of the 1st. respondent and stated that she was present during the class presentation. She had also signed the class attendance list of the day as proof of the same. She had made a request to the Academic Services Manager of the 1st. respondent for the retrieval of the class list as proof of her attendance on the material day. To the appeal she attached the screen shoot images of the email correspondence on the course between the Lecturer in issue and the group members, Whatsapp communication extracts of the firm, the course work assignment for ATP 107 - Conveyancing, 2018 which had 4 instructions, the class attendance list for the day indicating against her name that it was signed and an extract of page 19 of the Kenya School of Law Student HandBook for the years 2016 - 2018.
8. In her written submissions the appellant submits that the decision by Ms. Helene Namisi the Conveyancing Lecturer for ATP 107 to include additional instructions that an extra 2 marks would be awarded for class group presentation was ultra-vires, arbitrary and discriminatory. The Lecturer lacked authority to prescribe her own/further instructions. While relying on the decision in *Republic v Betting Control and Licensing Board & Another ex-parte Out Door Advertising Association of Kenya*, (2019) eKLR it was her appeal that if the exercise of a discretionary power had been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power has been exercised illegally. The appellant called into aid the provisions of sections 109 of the *Evidence Act*, Cap. 80 for the proposition that the 1st. respondent failed to establish non – attendance on her part during the firm's presentation of the project assignment. To bolster her appeal she cited the decision in *Zachariah Wagunza & Another v Office of the Registrar Academics Kenyatta University & 2 others*, (2013) eKLR in which it was held;

“Where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is outrageous it may amount to gross unreasonableness as to justify the grant of judicial review orders.”

9. She assailed the impugned decision to deny her the 2 marks as amounting to a violation of the rights under articles 27, 47 and 50 of the *Constitution of Kenya*, 2010 which respectively relate to equality and freedom from discrimination, fair administrative action and fair hearing. She finally wound up the submissions by seeking for a declaration that the respondents conduct violated the legitimate expectation of good governance, integrity, transparency and accountability. This was in addition to violations of articles 27, 47 and 50 of the *Constitution of Kenya*, 2010. She also sought for orders of mandamus and that the costs of and incidental to the appeal be borne by the respondents jointly and severally in their individual, personal and official capacities in any event.

3. The response to the appeal and submissions.

10. The position taken by the respondents is articulated by the depositions of Ms. Helene Namisi – Lecturer of the ATP 107 – Conveyancing course for the class E during the 2018/2019 academic year at the 1st. respondent's School and Mr. Fredrick Muhia the Academic Services Manager of the School. It is contended that the 1st. respondent trains persons for purposes of the *Advocates Act*, Cap. 16 and mounts the Advocates Training Programme (ATP). The students are grouped into firms which undertake practical assignments as part of the project course work.



11. In the year 2018, the appellant was a member of firm E26 for purposes of the Conveyancing course work. The 1st. respondent required the firms to undertake course work assignment in Conveyancing and all students were required to participate in the preparation and subsequent presentation of the assignment. In addition to the course work, firm members were expected to attend firm meetings, participate in the research in respect to the assignment given, attend and participate in the group presentation in class as well as respond to any questions raised in order to score the extra 2 marks. The course work and the group presentation made up the total score, which constituted 20% of the overall mark.
12. On 20th. June, 2018 the Lecturer was present in class to receive firm E26's presentation of its assignment. Out of the 10 students in the firm only 8 students got up and participated in the presentation. The appellant was not amongst them. The Lecturer after the presentation by the 8 students called out the names of the 2 missing students in order to confirm that they were not seated in the room but no response was forthcoming. It is the Lecturer's contention that the appellant did not participate in the presentation which was a requirement but presumably signed the class attendance list. She was therefore not awarded the 2 marks. At the conclusion of the presentation the Lecturer received the class attendance list from the students and upon inspection she noted that the appellant had been marked as present but had not gotten up to present with the firm. She made a note of her absence together with another member of the firm and submitted the list to the Academic Affairs Office of the 1st. respondent. She deposes that she does not know who signed the attendance list on behalf of appellant as she never made a presentation alongside her firm members. She was also not aware why the appellant failed, refused or neglected to participate in the presentation. She contends that the appeal is a ploy by the appellant to find a short cut into the bar without meeting the academic requirements. The requisite class list for the day is attached in which the appellant's signature is appended on.
13. The Tribunal in the course of giving directions on the appeal based on its juridical mandate to inquire into the matter under section 31 (1) of the Legal Education Act, 2012 drew the attention of the Parties to the appeal on the need to address the Kenya School of Law Student Hand Book, 2016 – 2018 and the mandate of the Committee of Examiners under the Kenya School of Law (Training Programmes) Regulations, 2015. Accordingly, the Committee of Examiners through its Secretary asserted that it conducts written examinations on behalf of the 2nd. respondent. The written examinations were set invigilated and graded by the 2nd. respondent. The project course work comprised of 20% of the total examination grade. It was set, administered and scored wholly by the 1st. respondent on such topics, as the examiner would determine. In the project course work, the examiner was the Lecturer. It was not unusual for different classes to have different grading criteria as determined by the individual examiners who are the class Lecturers. The conveyance project course work, 2018 for the appellant's class was determined by Ms. Helene Namisi who was the class Lecturer and the discretion allowed to the Lecturer in setting the course work naturally extended to distribution of the marks over the assignment.
14. An insinuation of lack of candour and mischief is taken up by the Committee of Examiners against the appellant for failing to disclose that she had partaken in the re-sit of Conveyancing - ATP 107 in 2019 but she was unsuccessful. The appeal was only an after-thought and a vexation cause advanced by the appellant to the respondents. To buttress the factual rival position advanced for the respondents it was submitted by the 1st. respondent that the project course work assignment given to the firms comprised of the project assignment which attracted a maximum of 18 marks and a presentation for which would attract a maximum of 2 marks making a total of 20 marks of the final examination grade. The appellant did not attend the presentation but had purported to sign the attendance list.



15. It was contended that the decision taken by the Lecturer was justified and anchored on the law based on the authority in *Republic v Public Procurement Administrative Board & 2 others Ex-Parte Rongo University*, (2018) eKLR. In order to achieve the mandate of a public legal education provider, the 1st. respondent had adopted an approach of clinical skills training sessions which combined the delivery of theoretical lessons and the opportunity to practice by simulation as provided for in regulation 18 of the *Kenya School of Law (Training Programmes) Regulations*, 2015. The course work was a broad set of activities which were an essential component of the Advocates training methodology which included project work. The course work was a critical component of the methodology intended to equip students with practical advocacy skills at the end of the programme. The project work including the presentation were examinations and subject to the provisions of the Regulations. This included the requirement for being present and participating in whatever manner the school may have directed. The appellant ought to have taken the exercise seriously enough to be present.
16. The direction of the school was expressed by the Lecturer in exercise of the discretion to set the course work assignment. There was no requirement for the individual members to make a personal presentation and the ten minutes were allocated for the firm to make a joint presentation. The appellant was required to be in the class room and rise up with her firm mates during the presentation.
17. The actions by the 1st. respondent were guided by the *Kenya School of Law (Training Programmes) Regulations*, 2015, the Student Handwork 2016 – 2018 and the practices. The Lecturer did not deviate from the accepted practices nor did she exceed her authority. The respondents relied in the authority of *Maharashtra State Board v Kurmarsbeth and others*, (1985) CLR 1083 which addressed the issue of examinations and judicial restraint in interfering with the decisions made on the same. In the said authority it was stated;

“So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of efficaciousness of such rules or regulations.”
18. The Student Handbook was a reference manual for students in the Advocates Training Programme which gave details of project work and the manner in which it is explained to the students. It specifically stated to the students that the examiner would determine the topics for the project work. The Handbook was explicit that the examiner would be the Lecturer.
19. It was submitted that the appellant had failed to discharge the legal burden of proof. The first person evidence by Ms. Helene Namisi was that the appellant was not present. The appellant had admitted only two students were marked as absent from her firm and that both students somehow signed the class attendance list. The appellant had claimed to being actually present and just failed to respond when her name was called out but the other student was rightfully marked absent. The appellant ought to have attached at least an affidavit from a fellow class mate stating she was present in class.
20. The mathematical formula of calculating the grades was a creature of the appellant’s own imagination as it had never been discussed, approved, adopted or ever applied in the School and if it had been the appellant was put to task to produce the circular, notice and procedure. In discussing the legal and evidential burden of proof, the School relied on the authorities in *Levi Simiyu Makali v Koyi John Walukhe & 2 others*, (2018) eKLR and Supreme Court petition no.1 of 2017 – *Raila Amolo Odinga & Another v I.E.B.C & 2 others*, (2017) eKLR.
21. The respondents while seeking to advance their submissions on the aspect of estoppel, approbation and reprobation submitted that the true purpose of the appeal was that the appellant was seeking to



game the system by finding away into the bar despite not having satisfied the academic requirements. It was noteworthy that she pursued the appeal only when she unsuccessfully re-sat the Conveyance - ATP 107 in 2019. Reliance was placed in the authority amongst others of *Banque De Moscou v Kindersley* (1950) 2 ALL ER 549 in which Sir Evershed stated;

“This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating or, in the more homely English Phrase, blowing hot and cold.”

22. The respondents were apprehensive that if the appeal was allowed it would undermine and render redundant the Advocate Training Programme’s training methodology adopted by the school, the bar examination and by extension it would serve to bring into disrepute the legal profession.
23. On fair administrative action and legitimate expectation it was submitted that the appellant was treated the same way as the other student who never attended the presentation and therefore a claim for discrimination would not arise. For authority the decision in *Peter K. Waweru v Republic*, (2006) eKLR and the *Black’s Law Dictionary*, 11th edition were invoked. On legitimate expectation it was submitted that the law does not protect every expectation but only those which are legitimate. Legitimacy was to assume the parameters of a clear and unambiguous representation, reasonableness, the same must be induced by the maker and the representation must be one which it was competent and lawful for the decision maker. Reliance was placed on a legion of authorities which included the *National Director of Public Prosecutions v Philips & others* (2002) (4) S. A. 60.
24. The 1st. respondent finally dissuaded the Tribunal from judicial intervention in the matter as it would be improper for the Tribunal to substitute its own decision for that of the decision maker which would amount to unwarranted interference. The plea of a dismissal of the appeal with an order for costs was sought.

4. Analysis of the appeal and the law.

25. The decision the subject of the appeal originates from the denial of 2 marks by Ms. Helene Namisi who was the Lecturer for class E in respect of the Advocates Training Programme Conveyancing Course - ATP 107 offered by the respondents during the academic year 2018/2019. The appellant as confirmed by the facts was a member of firm E26 which was awarded 13 marks out of the possible 20 marks for the project work. The appellant and another student who is not the subject of this appeal unlike her fellow group firm members were awarded 11 marks instead of 13 marks. The record of the impugned decision is contained in the letter by the 1st respondent’s Director/Chief Executive Officer dated the 30th April, 2019. The letter is a response to a letter by the 2nd respondent dated the 15th April, 2019. For ease of reference the letter of the 30th April, 2019 is as follows;

“Ref. No. KSL/ATP & PS/VOL. 1 (137)

Date: 30th April, 2019

Dr. Jacob Gakeri

Secretary/CEO

Council of Legal Education

PO. Box 829 – 00502

NAIROBI.



Dear Dr. Gakeri,

Complaint On Conveyancing (ATP 107) Project

Marks – Diana Kemunto Ogega : 20181410.

We acknowledge receipt of your letter dated 15th April, 2019 concerning complaint of Conveyancing Project Work and our response is as follows:

That the student and another were awarded two (2) marks less than that awarded to the group because the lecturer teaching the course explained that the two did not attend class presentation.

We hope that clarifies the matter.

Thank you.

Yours Sincerely,

Dr. Henry K. Mutai

Director/chief Executive Officer

Kenya School Of Law

c.c. Diana Kemunto Ogega - Your letter dated 11th April, 2019.”

26. The respondents taking into account the afore-going attribute the decision to with-hold the 2 marks to want of attendance of the appellant in the participation of the class presentation. The Tribunal agrees with the 1st respondent that the Lecturer had the leeway to exercise a discretion in setting the course work component for the Conveyancing - ATP 107 offered by the respondents. The Tribunal concludes that the Regulations were un – explicit on the mode of assessment for the Advocates Training Programme.
27. Section 28 (2) (a) of the *Kenya School of Law Act*, 2012 obligates that the manner of administration of examinations is to be provided for in the Regulations. The regulations provide;

“ 28. Regulations

- (1) The Board may, with the approval of the Cabinet Secretary, make regulations generally for the administration and management of the School.
- (2) Regulations made under subsection (1) may provide for—
 - (a) the categories of examinations and the manner in which such examinations shall be administered;...”

28. The Tribunal notes that the Regulations of the School do not provide for the assessment mode for the Advocates Training Programme unlike the Para – Legal and the Continuing Education Programmes which are provided for in regulations 16 and 21 of the *Kenya School of Law (Training Programmes) Regulations*, 2015 which provide;

“ 16. Assessment and issuance of certificate in the Paralegal Studies Programme

- (1) The School shall assess each course unit using coursework and a final written examination.



(2) The Board of Directors shall determine the percentage to be allocated for each mode of assessment...

21. Assessment under the Continuing Professional Development Programme

The School shall determine the mode of assessment for each course offered under the Continuing Professional Development Programme.”

29. The Regulations have a lacuna on the mode of assessment for the Advocates Training Programme which should be cured through the formulation of Regulations on the same.

30. The statutory duty to administer Bar Entry Examinations is reposed upon the 2nd respondent by dint of section 8 (1) (f) of the [Legal Education Act](#), 2012. The same provides;

“ 8. Functions of the Council

(1) The functions of the Council shall be to—

- (a) regulate legal education and training in Kenya offered by legal education providers;
- (b) licence legal education providers;
- (c) supervise legal education providers; and
- (d) advise the Government on matters relating to legal education and training.
- (e) recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.
- (f) administer such professional examinations as may be prescribed under section 13 of the Advocates Act.”

31. The 2nd respondent had however, delegated the said function to the 1st respondent. The same is well confirmed by the submission of the Secretary of the 2nd respondent during the pre - trial sessions of this appeal and also the authority in [Nabulime Miriam & others v Council of Legal Education & 5 others](#), [2016] eKLR in which Justice Odunga held;

“That the body with the legal mandate as between Kenya School of Law, and the Council for Legal Education, to set, supervise or mark Advocate Training Programme examinations is the Council though in this instance, that mandate was delegated to the School by the Council.”

32. Under section 8 (1) (f) of the [Legal Education Act](#), 2012 the Conveyancing exam the subject of this appeal was being administered on behalf of the 2nd respondent by the 1st. respondent pursuant to delegated authority. The Lecturer had the authority to split the marks into 18 and 2 marks. Page 19 of the Kenya School of Law Student Handbook, 2016 – 2018 of the 1st respondent provided;

“Project Work



This is undertaken by each Firm at the end of term I in all the nine designated courses on such topics, as the examiner will determine. It is presented as a project work report and is marked out of 20 percent. Firm leaders must ensure participation of all firm members. A list of participants duly signed by each firm member shall be attached.”

33. The said Handbook was expressly clear that the project work was to be marked out of 20 percent. The Lecturer marked the project course work for a total of 20 marks.
34. As regards the participation of the appellant in the group project activities, the records appear to point to the fact that she engaged in the same as required. On record keeping the Tribunal is guided by section 19 (2) of the *Kenya School of Law Act*, 2012 which provides;

“ 19. Course attendance

- (2) The Director shall cause records of attendance to be kept in respect of each course and the record shall be conclusive evidence of attendance by students at the School.”

35. The School produced the firm attendance record signed by the appellant. The record is final. No confirmed complaint of forgery of the record was ever brought against the appellant. The comments of absence allegedly made by the Lecturer are not authenticated by any name or signature. The nominal roll was not produced to enable the Tribunal to make attempts to carry-out a comparison on variations in the signatures if they existed. In the circumstances an allegation that the appellant was absent on the date is devoid of merit. If the student had falsified the class attendance register no evidence was led that disciplinary action was taken. While the Lecturer had the discretion to spilt and award marks however, when the issue of the appellant’s absence during the firm’s presentation arose the said Lecturer could not deprive the student of the 2 marks for forgery of her signature if at all it was true without the matter being addressed by the disciplinary process established in section 35 (5) of the *Kenya School of Law Act*, 2012. The section provides;

“ 35. Code of conduct or guidelines on conduct

- (1) The School shall issue a code of conduct or guidelines on the conduct for students and a student shall abide by such code or guidelines.
- (2) A student shall not engage in any activity which may bring the School into disrepute.
- (3) A Student who resides in accommodation offered by the School shall abide by any additional regulations, guidelines or directives in relation to the hostel or other accommodation facilities in which the student resides.
- (4) A student shall —
- (a) except with good cause, attend all lectures, tutorials, seminars, legal clinics, study group meetings, coursework activities and any other scheduled activities of the School;



- (b) sign, using the signature he or she used to sign in the Nominal Roll, the class attendance register when the student attends class or participates in any other activity of the School;
 - (c) not cause damage to the School's property or disrupt the School's operations; and
 - (d) comply with any other requirements for the purposes of any of the programmes of the School.
- (5) A student who contravenes the provisions of this regulation shall be liable to disciplinary action.”

36. The Director of the 1st respondent was the only one who could take appropriate administrative action against the appellant. The Lecturer had no such powers. Section 37 of the [Kenya School of Law Act, 2012](#) provided;

“Disciplinary proceedings

- (1) Where the Director has reason to believe that a student has committed an act of indiscipline under these Regulations or any other guidelines or codes of conduct, the Director shall —
 - (a) take appropriate administrative action; or
 - (b) refer the matter to the Disciplinary Committee;”

37. The Tribunal also finds that only the disciplinary committee of the 1st respondent could reduce the grade awarded to the appellant in a course unit for a reason touching on indiscipline. The Lecturer had no such powers. The decision to withhold the 2 marks was bereft of any juridical foundation. Section 38 of the [Kenya School of Law Act, 2012](#) provided;

“Decision of the Student Disciplinary Committee and Sanctions

Where the Student Disciplinary Committee determines that a student has committed an act of indiscipline under these Regulations or any other guidelines or codes of conduct of the School, the Committee may —

- (a) suspend the student from the school for a period which shall not exceed two years;
- (b) levy a penalty against the student that shall not exceed twenty thousand shillings;
- (c) cancel the examination results of the student in a course unit;
- (d) reduce the grade awarded to the student in a course unit;”

38. The Lecturer had only a duty to refer the matter of indiscipline to be addressed by the established disciplinary mechanism in place. Also it was not clear to the Tribunal if at all it was true that the appellant had been guilty of misconduct as alleged why she never lost the 11 marks.

39. The appellant has taken a claim of discrimination, want of fair administrative action and fair hearing while relying on articles 27, 47 and 50 of the [Constitution of Kenya, 2010](#). The Tribunal finds that the



appeal could be disposed of within the existing statutory framework and the said provisions were not necessary to be invoked.

40. It would be absurd and lead to a situation of anxiety in the Advocates Training Programme offered by the respondents for each Lecturer within the Conveyancing – ATP 107 course to adopt different course methodologies and modes of assessment. Parliament in its wisdom in enacting section 28 of the *Kenya School of Law Act, 2012* empowering the Board of the School to make Regulations intended that formulation of the Regulations by the School's Board be aimed at averting the said uncertainty. The School may have to revert to the task of reconsidering its Regulations to align them with the findings herein.
41. The respondents have expressed apprehension that if the appeal is allowed it will undermine and render redundant the Advocates Training Programme, the training methodology adopted by the School, the bar examination and by extension serve to bring into disrepute the legal profession. The Tribunal holds a contrary view since observance of the rule of law is a fundamental facet by every person in this country anchored on the national values and tenets of governance. The respondents have not clearly spelt out the provision in the Regulations of the School allowing the Lecturer to withhold the 2 marks from the appellant as a disciplinary measure.
42. The respondents can best be guided towards the juridical path of carrying out law reforms to the Regulations governing the Advocates Training Programme as already adumbrated. Parliament by specifically enacting in section 28 (2) (a) of the *Kenya School of Law Act, 2012* that the Regulations made under subsection (1) may provide for the categories of examinations and the manner in which such examinations shall be administered clearly intended to avoid the mischief that has arisen in this matter. The 1st respondent ought to work towards the review of the Regulations to embody a mode of assessment for the Advocates Training Programme.
43. The Tribunal in interpreting the provision of section 28 (2) of the *Kenya School of Law Act, 2012* is so guided in the said interpretation by the sentiments of Nyamu, J (as he then was) in *Republic v Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati*, (2008) KLR 728 where he rendered himself as follows;

“The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the “purposive approach.” In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision... The defect that appears in a statute cannot be ignored by the Judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give “force and life” to the intention of the Legislature.”

44. The requirement of a presentation was not embodied by mandatory inclusion in the regulatory mechanism of the respondents and had not been well spelt out in advance as a teaching methodology. The 4 instructions in the Conveyancing – ATP 107, 2018 Course assignment never included a presentation in them. For the avoidance of doubt the instructions are reproduced as follows;

“Instructions

1. Please note that this assignment will constitute 20% of your overall grade.
2. The assignment shall be completed in Firms, and each Firm shall hand in one hard copy on or before the 20th July, 2018. All assignments must be handed in



by 4 pm on 20th July 2018. Late submissions shall not be accepted, regardless of the reason.

3. When submitting the assignment, please include the admission numbers of each member of the Firm, and each member shall sign alongside his/her name. Marks will be assigned equally to each member of the Firm whose signature is appended to the Assignment. The signature appended to the Coursework should be the same as that in the School Records.
 4. Formatting – Times New Roman, Font size 12, spacing 1.5. Please justify all margins. Maximum of 15 pages, excluding instructions, cover page and Bibliography, if any.”
45. The said instructions as communicated clearly manifest an unequivocal intention by the respondents that they would be no presentations other than handing in by the Firms. The same vindicates the contents of the School’s Handbook at page 19 that a list of participants shall be attached. Though the Tribunal finds that the Lecturer had discretion to split the marking of the assignment, however, the 1st respondent has not discharged its burden of proving that the appellant failed to attend class on the day of the submission. The attendance list was signed by the appellant. No evidence has been led to prove that her signature is a forgery. The remarks of absence below the list are not confirmed to be by the Lecturer as there is no name or signature accompanying the same.
46. The respondents took up the issue that the appeal was barred by the tenets of estoppel, approbation and reprobation. It was their contention that the appellant had re – sat the Conveyancing – ATP 107 exam and was unsuccessful. The appellant in her further affidavit filed with the Tribunal on the 15th September, 2020 contends that she never failed the said exam and a re – sit was normally taken by students who failed the examination. The Tribunal notes that the appellant based on the transcript she scored 49% in the Conveyancing - ATP 107 course. Had the respondents not withheld her entitlement to the 2 marks, the appellant would have scored 51% which is past the pass mark.
47. Accordingly it is proper for her to be classified as amongst the students who had passed the examination as she was not a failure.
48. The taking of the re - sit by the appellant would not have changed the existing fact that she had already passed the examination. The same was taken in ignorance of the fact that she had passed. The Tribunal makes a finding that the re-sit by appellant was superfluous and she cannot not be guilty of conduct that bars its jurisdiction. The fact that the appellant never disclosed the re – sit would not bar the jurisdiction of the Tribunal as the reality was she was not a failure and the information in view of the finding that the respondents wrongfully withheld the entitlement to the 2 marks would not have been of a decisive character in this appeal. Further, the Tribunal notes that the appellant never derived any benefit from the re-sit. The appellant’s right to move the Tribunal remained *sui -generis*. As stated in 15 *Halsbury’s Laws of England* Par. 340;

“The principle that a person may not approbate and reprobate expresses two propositions, first, that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.”



49. Finally on legitimate expectation, the appellant in ground 16 of her motion mentioned that she had a legitimate expectation of career progression, right to further learning and right to earn a living as a legal practitioner which had been curtailed. However, the appellant did not submit on this matter further. Also no evidence was led in the 2 affidavits of the nature of the intended legitimate expectation. It is the finding of the tribunal that the said matter was not established by the appellant. The appellant ought to have satisfied the legal parameters. The Tribunal is guided by the decision in Republic v Kenya Revenue Authority ex parte Shake Distributors Limited, Nairobi Hc. Misc. Civil Application No. 359 of 2012 in which Odunga J observed;

“...the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law.”

5. Determination.

50. The Tribunal finds merit in the appeal and the same is allowed. The decision denying the appellant 2 marks over alleged failure to participate in the project course work group presentation is hereby set aside as made by Ms. Helene Namisi – Lecturer of Conveyancing - ATP 107 during the 2018/2019 academic year in pursuance of the powers of the Tribunal by section 35 (a) of the Legal Education Act, 2012. It is ordered:-

- a) Pursuant to section 35 (b) of the Legal Education Act, 2012 which empowers the Tribunal to exercise any of the powers which would have been exercised by the 2nd respondent’s Council the appellant is now awarded 13 marks instead of 11 marks in the assignment submitted by Firm E26 for the Conveyancing - ATP 107 Project Coursework, 2018.
- b) The 1st respondent shall forthwith, without delay and in any event within a period of 7 days from the delivery of this judgment transmit the appellant’s amended/updated overall marks for Conveyancing - ATP 107 to the 2nd respondent as awarded in (a) above.
- c) The 2nd respondent shall upon the receipt of the appellant’s amended/updated overall marks for Conveyancing – ATP 107 as awarded herein forthwith and without delay issue a suitably amended transcript to the appellant and in any event within a period not exceeding 7 days thereof.
- d) The appellant having acted as a pro se litigant and despite having been a successful litigant who did not retain an Advocate is not entitled to costs of the appeal. Thus each party shall bear own costs of the appeal. The Tribunal is also guided by section 35 (c) of the Legal Education Act, 2012 as regards the justice of the matter in declining the award of costs as no instruction fees and by extension they were no disbursements in-terms of filing fees.
- e) Any party aggrieved has the liberty to appeal to the High Court under section 38 (1) of the Legal Education Act, 2012 on a point of law.

It is so ordered by the Legal Education Appeals Tribunal.

DATED AT NAIROBI THIS 30TH DAY OF OCTOBER, 2020.

ROSE NJOROGE – MBANYA - (MRS.)- CHAIRPERSON

EUNICE ARWA - (MRS.)- MEMBER

RAPHAEL WAMBUA KIGAMWA (MR.) - MEMBER



STEPHEN GITONGA MUREITHI (MR.)- MEMBER

I Certify this is a true copy of the original judgment of the Tribunal.

GILBERT ONYANGO - REGISTRAR

