Syuki v Kenya School of Law; Council of Legal Education (Interested Party) (Appeal E001 of 2024) [2024] KELEAT 297 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KELEAT 297 (KLR)

REPUBLIC OF KENYA

IN THE LEGAL EDUCATION APPEALS TRIBUNAL

APPEAL E001 OF 2024

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

FEBRUARY 7, 2024

BETWEEN

MARK JERMAINE SYUKI ..... APPELLANT

AND

KENYA SCHOOL OF LAW ..... RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION ..... INTERESTED PARTY

(Being an appeal against the decision of Dr. H. K. Mutai – Director/Chief Executive Officer of the Kenya School of Law dated the 2nd January 2024 rejecting admission into the Advocates Training Programme during the 2024/2025 academic yea)

JUDGMENT

A. Introduction.

1. Mark Jermaine Syuki instituted this appeal against the Respondent's decision denying him admission to the Advocates Training Programme. He enjoined the Council Of Legal Education as an Interested Party. The tribunal directed that the appeal be disposed of by written submissions. The Respondent filed a reply through Mr. Fredrick Muhia – the Academic Services Manager at the Kenya School of Law. The Interested Party did not file any documents but indicated that they would rely on the submissions filed by the Respondent.

2. The appeal was originally brought by a Memorandum of Appeal dated 8th January 2024 and amended with leave of court granted on 12th January 2024. The Amended Memorandum of Appeal is dated 14th January 2024. It seeks the following:

    a. The appeal be allowed and the decision of the Respondent communicated on 2nd & 5th January 2024 be set aside in its entirety and be substituted with a finding that the Appellant is eligible

for admission to the Advocates Training Programme based on section 1 (a) of the Second Schedule to the *Kenya School of Law Act* No. 26 of 2012.

b. The 1st Respondent be compelled to forthwith admit the Appellant to the Advocates Training Programme for the 2024/2025 academic year.

c. The 2nd Respondent be compelled to regulate, supervise and enforce the 1st Respondent be compelled to regulate, supervise and enforce the 1st Respondent's compliance with the Admission requirements to the 1st Respondent as set out in section 16 and the Second Schedule to the *Kenya School of Law Act* No. 2012.

d. The costs of this Appeal be awarded to the Appellant against the 1st Respondent and such costs be assessed on the scale applicable to the appeals at the High Court.

B. The appeal.

3. The Appellant sat for the Kenya Certificate of Secondary Education in the year 1990 and attained a mean grade of C + (plus) with a grade of a C + (plus) in English and a B - (minus) in Kiswahili languages. On 24th July 2019, she was admitted to Daystar University to undertake a Bachelor of Laws degree which he completed in the year 2023. He has not been given a degree certificate but he has a "Completion Letter" dated 30th October 2023 annexed to the Appellant's Supporting Affidavit and marked as "Exhibit MJ9".

4. He then applied to be admitted to the Advocates Training Programme offered by the Respondent for the 2024/25 academic year. The said application was unsuccessful because he failed to meet the minimum entry grade of a B (plain) in either Kiswahili or English languages in the Kenya Certificate of Secondary Education Examinations. The decision was communicated as follows;

> "Reference is made to your application for admission into the Advocates Training Programme (ATP) at the Kenya School of Law.
>
> It is regretted that your application was not successful for admission due to the following reason (s):
>
> You are an applicant admitted to the university after 8th December 2014 hence is required to meet the eligibility under category A which requires attainment of B Plain in English and Kiswahili. Your grades do not meet the threshold required for entry to the Kenya School of Law".
>
> Thank you.
>
> Yours sincerely,
>
> Dr. Henry K. Mutai
>
> Director/chief Executive Officer."

5. He impugns the decision dated 7th December 2023 on the basis that his full academic credentials were not accorded consideration and that the Bachelor of Laws degree was not considered in line with the existing law on admission to the School. He complains of discrimination as the decision maker confined itself to a sole consideration of her secondary school qualifications in breach of the law.

6. He also states that he has been made aware that vide a clarification issued in a letter dated 5th January 2024 and received 10th January 2024, that his application was rejected because of a decision by the Court of Appeal reported as *Kenya School of Law V Richard Otene Akomo & 41 Others* (Civil Appeal

E472 of 2021) [2022] KECA 1132 (KLR). His appeal to the Respondent had been expressed in a letter dated 2nd December 2023. The salient features of his appeal as outlined under various titles are:

i. Whether he was qualified to be admitted to the para-legal programme.

ii. Whether the Applicant was qualified to be admitted to the LLB programme.

iii. Whether the Applicant is qualified to be admitted to the Advocates Training Programme.

C. The response to the appeals.

7. In response to the appeal, the Respondent, though its Principal Officer Mr. Fredrick Muhia's affidavit sworn on 16th January 2024, contended that the Tribunal was bereft of jurisdiction to entertain the same as they related to matters of admission to the Advocates Training Programme which were regulated by the *Kenya School of Law Act*, no. 26 of 2012 while the Tribunal was established under the *Legal Education Act*, No. 27 of 2012.

8. The Respondent also contended that it is required by its establishing Act, the *Kenya School of Law Act*, to consider applications for admissions to the ATP and once satisfied that the Applicant is qualified, admit the Applicant to the school.

9. He stated that the Respondent found the Appellant to be ineligible for admission in terms of the criteria set out in Section 16 as read together with the Second Schedule of the *Kenya School of Law Act* 2012.

10. The also quoted Justice Odunga in Kevin K. Mwiti & Others V Kenya School of Law & 2 Others [2015] eKLR as follows:

> " A declaration that the Petitioners who were already in the LLB Class prior to the enactment of the *Kenya School of Law Act* to be treated in a manner contemplated by the guidelines issued by the School prior to the enactment of the Amendment Act. For the avoidance of doubt, those who had not been admitted in the LLB Class prior to the enactment of the *Kenya School of Law Act* are to comply with the provisions of the said Act".

11. The Respondent also contended that the Court of Appeal had upheld its interpretation on the law of admission to the Advocates Training Programme.

12. Further, he stated that the *Kenya School of Law Act* commenced on 15th January 2013 while the Petitioner stated that the Appellant was admitted to the university in July 2019. He follows this point with the averment that the Appellant obtained admission to the university to commence in July 2019 and consequently cannot rely on the now voided Quality Assurance Regulations.

13. He states that allowing people to join ATP at the school on the basis that they had a diploma in law before joining the LLB Degree programme would be to circumvent clear provisions of the statute.

14. He also stated that the question of admission criteria had been settled by the Court of Appeal. At paragraph 17 of the said affidavit, the deponent erroneously states that the Appellant's diploma is not related in law. We note from the exhibits attached to the Supporting Affidavit sworn by Fredrick Muhia and marked as Exhibit MJS 7 is a Diploma in Law from the Kenya School of Law.

D. The submissions by the parties.

15. The Appellant filed submissions dated 29th January 2024. He submitted that they were qualified for admission to the Advocates Training Programme offered by the Respondent by dint of section 1 (a) of

the Second Schedule to the *Kenya School of Law Act*, 2012. That he had obtained a Bachelor of Laws degree from a recognized university in Kenya.

16. He relied on various decisions from the superior courts and from this tribunal. He identified five issues discussed under the respective titles as follows:

    a. The jurisdiction of the Tribunal.

    b. Misconstruction of Section 16 of the *Kenya School of Law Act*, 2012

    c. Retrospective application of "Akomo".

    d. Respondent's failure to guide the 1st Respondent.

17. The Respondent filed submissions dated 1st February 2024. It highlighted the following issues under various titles:

    a. What is the applicable law in this matter?

    b. Is the double standard in admission qualification discriminatory or justifiable?

    c. Whether the Respondent's decision to refuse admission into the Respondent's Advocates Training Programme was a breach of legitimate expectation.

    d. Is academic progression applicable?

E. Analysis and determination.

18. The admission criteria to the two legal education programmes namely the Bachelor of Laws degree and the Advocates Training Programme is the main question that cuts across the pleadings, submissions and issues identified for determination. The Appellant have taken up the said matters. The legislature has enacted the *Legal Education Act*, 2012 which by section 8 (3) (a) therein confers upon the Interested Party the powers to amongst others regulate the admission criteria to legal education programmes. It provides;

> " In carrying out its functions under subsection (2), the Council shall—
>
> a. make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes;..."

19. The said position has been given judicial authority by the Court of Appeal in Nairobi Civil Appeal no. E472 of 2021 - Kenya School of Law v Otene Richard Akomo & 41 Others in which Justices Asike - Makhandia, J. Mohammed and Kantai JJ.A held;

> " The Council has a duty to regulate how the universities admit students to pursue various cadres of legal education; that is at the certificate, diploma and degree levels. That duty must be discharged at the point of entry of the student at the institution offering such courses. A legal education provider, must, at the direction and supervision of the Council, be able to determine whether a student is qualified to pursue studies in law at the time the student applies to join the institution, be it a college or a university."

20. The Interested Party and the Tribunal are established under the same statute. Therefore, the Tribunal has the requisite jurisdiction to inquire into the appeals before it by dint of section 31 (1) of the Act. This position has been settled by several decisions of this Tribunal and the superior courts. This

appeal falls within the four corners of the legal and factual framework envisaged by Section 31 and the Tribunal will consider and determine the appeal.

21. As regards the appeals, the Appellant's primary contention was that he was entitled to admission to the Advocates Training Programme predicated on the fact that he held Bachelor of Laws degrees from a recognized university in Kenya. Therefore, he states that he was only to be subjected to the scrutiny in section 1 (a) as opposed to 1 (b) of the Second Schedule to the *Kenya School of Law Act*, 2012. For ease of reference the Tribunal reproduces the same as follows;

> "(a) Admission Requirements into the Advocates Training Programme.
>
> (1) A person shall be admitted to the School if—
>
> (a) having passed the relevant examination of any recognized university in Kenya, or of any university, university college or other institution prescribed by the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, university college or institution; or
>
> (b) having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution—
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> (i) attained a minimum entry requirement for admission to a university in Kenya; and
>
> (ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and
>
> (iii) has sat and passed the pre-Bar examination set by the school."

22. The Tribunal had consistently adopted the literal cannon on statutory interpretation of the said law by finding that the existence of the conjunction 'or' between the two sections connotes an elective and a disjunctive interpretation has been to be adopted. Hence, the applicants to the Advocates Training Programme were only to be subjected to a singular as opposed to a conjunct criteria in consideration of their applications to the programme. The said position has however since changed based on the pronouncement of the Court of Appeal in Nairobi Civil Appeal no. E472 of 2021 - Kenya School of

Law v Otene Richard Akomo & 41 Others in which Justices Asike - Makhandia, J. Mohammed and Kantai JJ.A observed;

> " It was submitted that section 1 (a) of the Second Schedule to the Act, is clear that upon being eligible for an award of a Bachelor of Laws degree from a Kenyan University an applicant would be eligible for admission to the ATP. Further, sections 1 (a) and 1 (b) of the Second Schedule to the KSL Act, distinguishes applicants who hold a Bachelor of Laws degree from Kenyan University and those from a foreign University. We are of the view that with the use of semi-colon between 1 (a) and (b) of the Act then the conditions follow which to us means that you are eligible, firstly, based on your LL.B degree either from a Kenyan University or as in (b) from a foreign university but in all situations, the conditions are same and are enlisted therein which are mandatory to all irrespective of whether you have a degree from within or without Kenya."

23. On a cursory examination and based on a conjunctive interpretation, the Respondent's decision declining admission to the Advocates Training Programme would be upheld as the 1st Appellant fails to meet the minimum English or Kiswahili languages grades at the Kenya Certificate of Secondary Education examinations embodied above. The Appellant attained grades C + (plus) and C+ (Plus) in English B – (Minus) in Kiswahili languages respectively which was below the stipulated minimum. In short, the Appellant does not qualify under this criteria.

24. However, the Tribunal will proceed to consider the appeals on account of the extent to which the Appellants may derive benefit from the Legal Education (Accreditation and Quality Assurance) Regulations, 2016. The Interested Party had formulated criteria for admission to the Bachelor of Laws degree and the Advocates Training Programme based on its mandate under section 8 (3) (a) of the *Legal Education Act*, 2012. For the Bachelor of Laws degree the same was provided for vide regulation 5 of the 3rd Schedule to the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 which provided;

> " 5. Undergraduate Degree Programme
>
> (1) The minimum admission requirements for an undergraduate degree programme in law shall be —
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> (a) a mean grade of C+ (Plus) in the Kenya Certificate of Secondary Education examination or its equivalent with a minimum grade of B Plain in English or Kiswahili;
>
> (b) at least three Principal Passes in the Kenya Advanced Certificate of Education examination;
>
> (c) a degree from a recognised university; or
>
> (d) a Credit Pass in a diploma in law examination from an accredited institution."

25. The said regulations were found to offend the provisions of the law and *the constitution* by the superior court in the first instance and affirmed by the Court of Appeal. In the Constitutional Petition lodged in the High Court at Nakuru being Petition no. 20 of 2016 - Javan Kiche Otieno & Another v Council of Legal Education & Another. The petitioners challenged the formulation of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 on account of failure to obtain

Parliamentary approval as required by the *Statutory Instruments Act*, 2013. The Hon. Justice Maureen Odero in a judgment delivered on the 30th January 2018 rendered herself as follows;

> "The first issue here is the legality of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016. The petitioners contend that the said regulations were made in contravention of Article 10 of *the Constitution*. They further contend that the 1st Respondent was not properly constituted in accordance with section 4 (5) of the *Legal Education Act* at the time of making the said Regulations and that the 1st Respondent does not have the powers to accredit foreign institutions. However, the true position is that the Regulations have not yet become subsidiary legislation because they have not yet been adopted by Parliament as required by section 14 of the *Statutory Instruments Act*. Thus this provision renders the said regulations void and unenforceable."

26. With the said pronouncement, which was a declaration of invalidity of the law, the said Regulations which contained the formulated criteria for admission ceased to have had any legal consequence from their inception. This included the admission criteria to the various legal education programmes contained therein. However, on appeal to the Court of Appeal, the retrospective application of the said declaration was clarified as not applying to crystalized actions. The Court in Javan Kiche Otieno & Another v Council of Legal Education, (2021) eKLR Justices D. K. Musinga (P), R. N. Nambuye and A. K. Murgor; JJ.A in paragraphs 34, 35 and 47 of the judgment while upholding the decision of the superior court as made on the 30th January, 2018 pronounced itself additionally as follows;

> "34. The record does not disclose that following gazetting of the impugned regulations, that they were thereafter, laid before Parliament and adopted....
>
> 35. Since there is nothing that shows that they were at any time passed into law in accordance with the procedures set out in the above cited provision, and which shortcomings the Appellants have conceded, it becomes evident that the impugned regulations were not adopted and as a consequence, did not acquire the force of law...
>
> 47. consequently, it is explicit that a court having declared a piece of legislation or a section of an Act to be unconstitutional, that act or law becomes a nullity from the date of inception or enactment and not from the date of judgment. But it will not be applicable to actions already crystallized whilst the expunged law was in force."

27. In this appeal, identifying the crystalized action would entail a consideration of the point at which the Appellant secured admission to the Bachelor of Laws degree programmes, vis a vis the time the initial decision on the invalidity of the Regulations was entered by the superior court on the 30th day of January 2018. As regards the Appellant he secured admission to the said degree on the 24th of July 2019.

28. This was after the date of the finding of invalidity of the Regulations by the superior court. Accordingly, it is the finding of the Tribunal that the declaration would affect his eligibility for the Advocates Training Programme.

29. Accordingly, he is not entitled to a finding that he had a crystalized action that would not be affected by the declaration of invalidity by the High Court.

30. As regards the claim of discrimination, the Tribunal's findings cannot go beyond the decision by the court of appeal on the issue of discrimination.

31. It is important to reproduce the text of the decision:

> "In interpreting Statutes, it is also a requirement that the court looks at both the text and context in order to ascertain the true legislative intent. In Reserve Bank of India v Peerless General Finance and Investment Co Ltd, 1987 SCR (2) 1 the Supreme Court of India stated thus:
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> > "Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."
>
> On the same principle, Ngcobo, J of the Constitutional Court of South Africa stated in Bato Staff Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and others [2004] ZACC 15; 2004(4) SA 490(CC): 2004(7) BCLR 687(CC) that:
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> > "The technique of paying attention to context in statutory construction is now required by *the Constitution* section 39(2). As pointed above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights."
>
> It is our view that there is also the need to give a Statute a holistic reading and interpretation in order to ascertain the true legislative intent. This was stated by this court in the case of The Engineers Board of Kenya v Jesse Waweru Wahome & Others Civil Appeal No 240 of 2013 thus:
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> > "One of the canons of statutory interpretation is a holistic approach... no provision of any legislation should be treated as 'stand -alone' An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."
>
> It would not make any sense to interpret the section as meaning that two students who score the same mean grade at KCSE and one decides to study at a university outside Kenya and another at a university in Kenya would be treated differently in considering their entry requirements to the ATP, just because one was in the local university thus does not need to prove whether he attained the required score in KCSE or not but subject to the foreign earned degree to KCSE confirmation. This ideally would be negative discrimination and against the principles of natural justice and goes beyond the spirit of the CLE Act informing the qualifications."

The respondents' main contention is that since they had obtained degrees from local Universities, they were not required to prove their entry grades at KCSE. A closer look at the provisions clearly shows that there are two parts which all are dependent on the qualifications after clause 1(b) of the Act.

We have adverted to several authorities that the High Court has grappled with in the interpretation of the said section. We have no difficulty in interpreting the same as the context is very clear and the wording is that there are conditions which affect both qualifications and this is the KCSE grades which are captured at the end of the paragraph.

Even in the provision for those who are categorized under paragraph 2 to the extent that they will be eligible for admission after they have passed the pre-bar examination, it follows that the intent of the legislator was that you have to meet the requirements of the law on admission and equally then after application and consideration, sit for the pre-bar exam. Before the amendment, it was a condition precedent to all applicants but after the amendment, it became optional and depending on the conditions set by the appellant. In the end, with respect, we find that the trial court's interpretation that the respondents were eligible for admission on the mere fact that they had completed LLB studies without having regard to their KCSE grades to be erroneous. The key entry point to any career course in the Kenyan education system is the KCSE examination results and thus it cannot be that just because one graduated from any Kenyan University, the grades obtained at KCSE do not matter or that the certificate itself is of no value at all. It would be discriminative of those who do not study from within the Country who then according to the respondents are the only persons who are required to have their KCSE results considered. We are satisfied that such stance and finding is unrealistic, unreasonable and was not the intention of the Legislature when drafting the said section." [Emphasis Ours].

32. In the end, we find that the appeal fails for reasons outlined above but, specifically, that the Respondent's decision cannot be faulted because the Appellant does no qualify and cannot benefit from the Regulations in view of the cut off date caused by the declaration of their invalidity.

F. Disposition.

33. It is decreed:-

    a. That the appeal is dismissed.

    b. That each party bears its costs of the appeal.

    c. That 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 7TH DAY OF FEBRUARY 2024.

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.

REGISTRAR