



**Nekesa v Air Travel & Related Services Ltd (Constitutional Petition E352 of 2020)
[2023] KEHC 2683 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E352 OF 2020**

AC MRIMA, J

MARCH 31, 2023

BETWEEN

MARILYN NEKESA PETITIONER

AND

AIR TRAVEL & RELATED SERVICES LTD RESPONDENT

JUDGMENT

1. Until October 19, 2020, Marilyn Nekesa, the Petitioner herein, was a student at Air Travel and Related Services Limited, a college registered as a limited liability Company under the *Companies Act* (hereinafter simply referred to as ‘the institution’ or ‘the Respondent’).
2. The incident resulting in the Petitioner’s expulsion from the institution is that, sometime in January 2020, the Petitioner was attached to Mombasa County Government for industrial attachment.
3. During the Petitioner’s attachment, an alleged incident of rape was reported to the institution by its Liaison’s Officer.
4. To that end, the institution, in its quest for a detailed explanation of the circumstances of the incident directed one Mr Kevin Maina to explain what had happened.
5. On her part, the Petitioner received a letter dated February 3, 2020 from the institution requesting for an explanation of the incident, an explanation she contended she already had provided through her letter dated January 31, 2020 to the effect that the incident was untrue and unfounded.
6. Upon returning to the institution, the Principal insisted that both Kevin and the Petitioner should pay Kshs 360,000/- failure to which they would not be re-admitted to the institution.



7. On October 19, 2020, the Respondent, through short message service, (SMS)/ email informed parents that students would report back to the institution on November 2, 2020.
8. In the communique, the Petitioner was left out. The Petitioner contended that all effort to resolve the matter was hampered by the Respondent's failure to give her audience.
9. The foregoing series of events yielded the instant dispute.
10. The Respondent opposed the Petition.

The Petition:

11. Through the Amended Petition dated January 28, 2021, supported by the Petitioner's Affidavit and supplementary affidavit deposed to on January 28, 2021 and October 27, 2021 respectively, the Petitioner expressed various constitutional infractions occasioned to her by the Respondent's actions.
12. The Petitioner pleaded that the failure by the Respondent to give her audience as appreciated alongside the failure to subject her to disciplinary hearing was a violation of her right to life and education.
13. The Petitioner averred that she had been denied education due to no fault of her own and the Respondent had failed to follow laid out procedures required of it under fair administrative action.
14. In the supplementary affidavit, the Petitioner deposed that the Respondent was in the habit of coercing and forcing students to unlawfully and illegally confess to incidents by use of threats and inhibitions.
15. In reference to the report of Dr Jane Kimata's findings, it was deposed that the Petitioner was going through normal stages of a junior youth characterized by emotional temperaments, peer pressure and influence.
16. It was her case further that she was not involved in any theft and the apology letter she wrote was as a result of threats from the Institution.
17. It was her position that the school rules and regulation cannot be said to supersede the tenets of the Constitution and cannot be read unilaterally by one party to trounce the rights of another.
18. It was her deposition that expulsion must be in line with the right to fair hearing and fair administrative action which were not availed to her.
19. On the foregoing facts, the Petitioner asserted that her constitutional entitlement under Article 22, 23, 40, 47 and 50 had been violated. She prayed for the following reliefs;
 1. A declaration the decision to expel or suspend the Petitioner herein is unconstitutional.
 2. A declaration that Respondent be ordered to file under oath all evidence relied upon in the disciplinary hearing and the written reasons leading to the suspension/expulsion of the Petitioner within 7 days of service of the Order.
 3. General Damages
 4. Costs of and incidental to this Petition, and
 5. Any other order that this Honourable Court deems fit and just to grant in the circumstances.



The Submissions:

20. In further support of its case, the Petitioner filed written submissions dated *39th October, 2021.*
21. In buttressing the fact that the Petitioner was not accorded fair hearing, it was submitted that the Respondent did not attach any minutes or evidence of disciplinary hearing.
22. The Petitioner submitted further that she was being victimized for the incidence of rape yet she was the one who was raped.
23. On the need for Institutions to follow due process before expelling students, the Petitioner drew support from the decision in *Petition No 18 of 2015, EK & 5 Others -vs- The Registered Trustees of SHS (2015) eKLR* where it was observed inter alia that;

'It was therefore pertinent for the Respondent to inform the Petitioners of the overall evidence against them and how it had been weighed against their defences. Failure to do so demonstrated that the process was neither lawful nor procedurally fair as required by Article 47 of the *Constitution*.'
24. On the claim of rape, the explanation issued by the Respondent did not fall under section 7.2 and 10.5 of the Respondent's rules and Regulations as to warrant expulsion, it was submitted that 'rape' was not provided for in the school rules and regulations.
25. The Petitioner reiterated that she was the one who was the victim and wrote a letter indicating that she blacked out and was not aware of the incidence.
26. It was her case that the Institution relied on information by its Liaison Officer who was also a student and neither carried out investigations nor reported the incident at nearest police station.
27. The Petitioner submitted that under section 10.5 of the rules and regulations, which provide that 'while on attachment, absenteeism or misconduct reported on a student during industrial attachment will lead to automatic expulsion, the term misconduct has not been defined and that nothing was provided to prove that the Petitioner was involved.
28. On the foregoing and based on the fact that the Petitioner had overpaid her school fees, starting another course, and bear embarrassment, it was submitted that damages of Kshs 1,000,000/- would be adequate compensation.
29. The foregoing position was drawn from the decision in *David Kipruto Cheruiyot -vs- Kenya Fluorspar Co Ltd* where it was observed as follows:

'With regard to the 5th Respondent The evidence put forward was that she had already transferred to another school as at the time the Petition was filed. Therefore, ordering her readmission to the school will only disrupt her as she has already settled in another school. The appropriate remedy is one for compensation'
30. In the conclusion the Petitioner urged the Court to allow the Petition with costs on the basis on violation of her right to fair administrative action otherwise guaranteed under article 47(1) of the *Constitution*.

The Respondent's Case

31. The Respondent opposed the Petition through the Response to the Petition dated October 18, 2021.



32. From the outset, the Respondent denied the allegations in the Petition.
33. It was its case that the Petitioner is no longer a student in the Institution but indicated that that she had been admitted in April 2019 to pursue a two-year course in International Food Production.
34. In respect to expulsion of the Petitioner, the Respondent stated that it was not aware of any unlawful and / or arbitrary decision it reached that would have been construed to have led to its refusal and / or any failure to readmit the Petitioner to its institution.
35. The Respondent further denied being aware of the incident of alleged rape referred to by the Petitioner as the cause of any decision the it reached pertaining the Petitioner' stay in the Institution.
36. It asserted further that like any other educational institution, it is guided by rules and regulations for order and the Petitioner was a serial contravener of the said rules and regulations.
37. To lend credence to the foregoing, the Respondent claimed that in the year 2019 the Petitioner was involved in a theft scandal at the Joy Hotel in Voi during a student trip where the CCTV footage showed that she retrieving drinks from the refrigerator. Refence was made to her apology letter where she apologized and promised not to repeat such conduct.
38. The Respondent stated further that on August 24, 2019, the Petitioner was found with Khat a prohibited narcotic substance which according to section 7.2(b) of the school rules and regulations would have led to automatic disqualification but due to the Petitioner's apology letter dated August 24, 2019 she was pardoned.
39. In further illustration of the Petitioner's conduct, the Respondent stated that on September 16, 2019, the Petitioner broke the rules as she found in men hostels past the stipulated time contrary to section 5.2 of the school rules and regulations. To that end, the petitioner admitted breach through her letter dated September 16, 2019.
40. It was its case that on September 16, 2019, the Respondent wrote a letter to summoning the Petitioner's guardian as a result of her perennial deviant behaviour.
41. Subsequently, it is the Respondent's case that the Petitioner was issued with her first warning letter and was directed not to repeat her mistakes.
42. It was therefore its case that the Respondent had been very patient and accommodative in dealing with the Petitioner and had even gone a step further to assist her get professional counselling by attending psychotherapy sessions at Jewels Counselling Centre.
43. In respect to the rape incident, which the Petitioner was adversely mentioned, the Respondent stated the Petitioner sought to defend her conduct by feigning that she had passed out and could not recall what had transpired.
44. It is on that basis that the Respondent found her explanation unsatisfactory and vide its letter dated February 3, 2020 sought detailed explanation.
45. The Respondent claimed that subsequent upon the foregoing, the Petitioner was yet again referred to counselling.
46. It was its case that the Petitioner's numerous incidents of misconduct that warranted her automatic expulsion.
47. It asserted that the Petitioner was procedurally expelled and there is no proof of the claim that it ever demanded Kshs 360,000/- for her to be readmitted.



48. It claimed that if there were any monies demanded it was school fees owed to the institution payable before resumption of studies.
49. It was further its case that its quest to an amicable settlement were ignored by the Petitioner.
50. In asserting propriety of the decision to expel, the Respondent denied procedural unfairness claiming that its decision could only be reviewed having regard to the totality of the circumstances and the Institution's rules and regulations.
51. The Respondent claimed there was no cogent evidence on how it violated the Petitioner's right to life and education and that further the Petitioner had failed to plead her case with particularity.
52. It was its case that the Petitioner was not entitled to the reliefs sought. It prayed that the Petitioner be dismissed with costs.

The Submissions:

53. The Respondent filed written submissions dated November 15, 2021 where it largely reiterated the contents of its Responses to the Petition.
54. It was its case that the Petitioner had not come out clearly on how her right to life and education had been infringed upon. To that end, reference was made to the decision in *Anarita Karimi Njeri -vs R (1979) eKLR* and the one in *Mumo Matemu -vs- Trusted Society of Human Rights & 5 Others (2013) eKLR*.
55. It submitted that the Petitioner's conduct as evidenced by the numerous letters exchanged between the institution and herself including summoning her parents for disciplinary hearing and counselling sessions was testament that it followed due process in arriving at the decision.
56. It also was its case that the decision to expel her was procedurally and substantively fair having complied with all the preconditions of expulsion and applicable laws and giving valid reasons thereof.
57. In the end it claimed that the Petitioner was underserving of the damages sought and orders prayed.

Analysis:

58. On a careful reading of the Petition, the response, written submissions and the decisions referred to by the parties, this Court finds that there is only one issue for determination in this matter. The issue is whether the Respondent complied with the provisions of Article 47 of the *Constitution* in expelling the Petitioner from the institution. The expulsion will hereinafter be referred to as 'the impugned decision' in this matter.
59. Article 47(1), (2) and (3) of the *Constitution* states that: -
 1. 'Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.'
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—



- a. Provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
- b. Promote efficient administration.

60. The legislation that was contemplated under Article 47(3) is the *Fair Administrative Actions Act* Section 4 thereof provides that: -

1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for any administrative action that is taken against him.
3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - a. Prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. An opportunity to be heard and to make representations in that regard;
 - c. Notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. A statement of reasons pursuant to section 6;
 - e. Notice of the right to legal representation, where applicable;
 - f. Notice of the right to cross-examine or where applicable; or
 - g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.
4. The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - a. Attend proceedings, in person or in the company of an expert of his choice;
 - b. Be heard;
 - c. Cross-examine persons who give adverse evidence against him; and
 - d. Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the



Constitution, the administrator may act in accordance with that different procedure.

61. Section 2 of the Fair Administrative Actions Act defines an ‘administrative action’ and an ‘administrator’ as follows: -

‘administrative action’ includes –

- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

62. The Fair Administrative Actions Act also defines a decision to include failure to decide.

63. The Court of Appeal in Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR addressed itself to Article 47 of the Constitution as follows: -

‘Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.’

64. In South Africa, the Constitutional Court in President of the Republic of South Africa and Others vs South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The Court referred to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution. The Court expressed itself as under: -

‘Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades.’



65. The High Court in *Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR* added its voice on the issue, and, as follows: -

25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

- a. 'Illegality - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be 'illegal'. Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.'
- b. Fairness - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.
- c. Irrationality and proportionality - The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*: -

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere but to prove a case of that kind would require something overwhelming.

66. Going by the above discussion, there is no doubt that the impugned decision is an administrative action. I say so because it affected the legal rights and interests of the Petitioner. Therefore, the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

67. The genesis of the impugned decision were the events that took place at the time when the Petitioner was in an industrial attachment in the County Government of Mombasa. That was sometimes in January 2020. The issues were the allegations that the Petitioner was raped.

68. As deposed, on receipt of the information vide its Liaison Officer, the Respondent, as expected, instituted investigations. It wrote to the Petitioner for an explanation over the issue. The Petitioner's response was vide her letter dated January 31, 2020 where she indicated that she blacked out and as such she was not aware of what had happened.

69. The Respondent served the Petitioner with a letter dated February 3, 2020 where it sought for further explanation on the circumstances that led to the blacking out. The Petitioner did not deny receiving the instant letter. However, the Petitioner responded by relying on the information in her letter dated January 31, 2020.



70. The Respondent then proceeded to deal with the matter based on the information it had.
71. From the reading of Article 47 of the Constitution and the Fair Administrative Actions Act, the Respondent, as the administrator, was not under a mandatory obligation to set up a disciplinary tribunal as proposed by the Petitioner. In fact, such a Tribunal is not provided for under the Respondent's Rules and Regulations. What was, therefore, expected of the Respondent as the bare minimum was to ensure that the Petitioner was accorded a reasonable opportunity to present her case and that her response was considered in arriving at the impugned decision.
72. Having considered the matter, the Respondent was required to formally communicate the impugned decision to the Petitioner, which it failed to do. By favouring the Petitioner with the impugned decision, the Petitioner would be able to interrogate it and ascertain if it was in line with the Constitution and the law.
73. Having found that the Petitioner's rights under Article 47 of the Constitution and Section 4(2) of the Fair Administrative Actions Act were infringed to the extent that the Respondent failed to communicate its decision to expel the Petitioner and the written reasons thereof, then the Petition is merited.
74. Consequently, the following final orders do hereby issue: -
- a. A declaration, be and is hereby issued, that the Respondent in failing to communicate its decision and reasons in expelling the Petitioner was contrary to the Constitution and the Fair Administrative Actions Act hence unconstitutional, unlawful, un-procedurally fair, null and void.
 - b. An Order of *Certiorari*, be and is hereby issued, calling, removing, delivering up to this Honourable Court and quashing or revoking the Respondent's decision in failing to communicate its decision and reasons in expelling the Petitioner.
 - c. An Order of *Mandamus*, be and is hereby issued, compelling the Respondent to render its decision and give reasons in expelling the Petitioner. That will be within the next 21 days of this decision.
 - d. In the event the Respondent fails to comply with order (c) above, the Petitioner will be deemed a lawful Respondent's student with all entitlements and opportunities towards completing her studies.
 - e. Given the possibility of subsequent dealing between the parties and the manner in which the Respondent previously dealt with the Petitioner, each party shall bear its own costs of the instant Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss Manyangi for Mr. Githui, Learned Counsel for the Petitioner.

N/A, for the Respondent.

Regina/Chemutai – Court Assistants.

