REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 382 OF 2019

IN THE MATTER OF ARTICLES 2(1), 2(4), 3(1), 10, 19(2), 20(2), 21(1),

22, 23, 25(c), 27(1), 27(2), 28, 43(1)(f), 47, 48, 50(1) & 55 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAIR ADMINSITRATIVE ACT 2015

AND

IN THE MATER OF THE SUSPENSION AND SUBSEQUENT

DISCONTINUATION FROM STUDIES OF WANJALA SETH WANYAMA AT KENYATTA UNIVERSITY

BETWEEEN

WANJALA SETH WANYAMA.....PETITIONER

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

JUDGEMENT

PETITION

1. The Petitioner through a Petition dated 24th September 2019 supported by Petitioners Verifying Affidavit of even date seek the following reliefs:-

a) A Declaration that the discontinuation of the Petitioner from the Respondent University pursuant to an allegation of examination irregularity constitutes a flagrant abuse of the Petitioner's right to fair hearing and fair administrative action.

b) A Declaration that the proceedings carried out by the Respondent's College's Disciplinary Committee were, unfair, unprocedural and unconstitutional thus illegal and null and void.

c) A Declaration declaring the suspension letter dated 20th September 2016 and subsequent expulsion letter dated 9th January 2017 or such letters and or decision or any related thereto by the Respondent or any person acting under its authority is null and void abinitio and without any legal effect whatsoever and an order nullifying or setting the same aside.

d) An Order compelling the Respondent to reinstate the Petitioner back as a student in the school of Economics and the Petitioner be included in the list of the individuals to graduate in the next graduation ceremony.

e) The Respondent be condemned to pay the costs of this Petition.

f) That costs of this Petition be borne by the Respondents.

PETITIONER'S CASE

2. The Petitioner hereof was a student at the Respondent's facility where he was pursuing a degree in Economics and Finance having joined the institution in the year 2011. The Petitioner was supposed to graduate from the institution in the year 2015 but failed to graduate due to missing marks. The Petitioner decided to re-do the courses in which he had missing marks and was due to graduate in July of 2016.

3. The Petitioner aver that he was denied the opportunity to graduate on the premises that he had interfered with online examination. He was served with a letter dated 7th October, 2016 to appear before the disciplinary committee on the 24th of October, 2016; which letter was later amended on the basis it had an error on the grade that had been altered.

4. The Petitioner state that he attended the hearing on the said date and contended that the charge as contained in the said letter was not sufficient for him to mount a defence. He, further, informed the disciplinary body that is innocent of the charge against him and he is not aware of the circumstances under which his online examinations were purportedly tampered with.

THE RESPONDENT'S CASE

5. The Respondent case is that the Petitioner who was a student of the Respondent who having applied to graduate was discovered to have influenced the tampering of online examination data. During the verification of his examination results, it came to the attention of the Respondent that his marks for two units: EES 302 and EAE 301 had been altered from grade E to A. This was not a bona fide mistake but a deliberate attempt by the Petitioner to illegally improve his marks (see FC-1 and FC – 2 a & b in the Respondent's Replying Affidavit).

6. The Respondent through a letter dated 7th October 2016, invited the Petitioner to a hearing before the Students' Disciplinary Committee ("the SDC"). The letter of invitation, which was later amended on 21st October 2016 to clarify a slight error clearly stated the nature of the offence being that of tampering of results, to allow him to adequately prepare his defence.

7. The Respondent contend that on 24th October 2016, the Petitioner appeared before a duly convened SDC and made representations in his defence. The SDC considered the Petitioner's response but did not find it satisfactory considering that the Petitioner had earlier applied to retake the units. It thus recommended that the Petitioner be discontinued from studying in the University for having committed an exam irregularity in contravention of clearly communicated University Regulations. The Vice Chancellor approved the recommendation which was communicated to the Petitioner vide a letter dated 9th January 2017. The letter further informed the Petitioner that he had 14 days to appeal the decision which he did vide a letter dated 14th January 2017. The letter further informed the Petitioner that he had 14 days to appeal the decision which he did vide a letter dated 14th January 2017 but received by the University on 30th January 2017 (*see FC-1 and FC – 2 a & b in the Respondent's Replying Affidavit*).

8. The Respondent aver that the Petitioner's appeal was heard on 18th May 2017 during which he did not present any new evidence. Upon deliberations, the Appeals Committee upheld the decision to discontinue the Petitioner. At all times while appearing before the SDC and the Appeals Committee, the Petitioner did not seek any information to aid in his defence neither did he challenge the sufficiency of the information given as shown by the records of the hearing annexed to the Replying Affidavit *(see FC-5, and FC-10 in the Respondent's Replying Affidavit)*.

9. The Respondent urge that the Petitioner by a Petition dated 24th September 2019, the Petitioner prays for declarations that the disciplinary proceedings constituted an abuse of the right to fair hearing; and that they were unfair, un-procedural and unconstitutional, hence void. The Petitioner in addition seeks an order compelling the Respondent to reinstate him and to be included in the next graduation list.

ANALYSIS AND DETERMINATION

10. I have carefully considered the pleadings herein, the counsel rival submission and for the same the issues arising for consideration can be summed as follows:-

> ***a) Whether the Petitioner was accorded his right to be heard as captured under Article 50 of the Constitution before the Respondent discontinued the Petitioner?***
>
> ***b) Whether the Petitioner is entitled to reliefs sought?***

A. WHETHER THE PETITIONER WAS ACCORDED HIS RIGHT TO BE HEARD AS CAPTURED UNDER ARTICLE 50 OF THE CONSTITUTION BEFORE THE RESPONDENT DISCONTINUED THE PETITIONER?

11. ***Article 43(1)(f) of the Constitution*** states that every person has right to education. The right to education is therefore a fundamental human right guaranteed in the constitution and therefore an indispensable means for realizing other human rights. It follows the right to education cannot be lightly and casually be limited unless there are compelling reasons thereof and even where there are compelling reasons, the limitation should not be such that it conflicts with the substance of the right to education, further such a limitation should be reasonable and proportionate to the offence. Secondly the process leading to the decisions, should be above board and undertaken in strict compliance with the constitutional rights of the affected party.

12. The Petition in support of the above proportionate relies in the ***European Court of Justice*** in the case of ***IRFEN TEMEL & Other – versus- Turkey application No. 3645802/02***. Where the Court rendered thus:-

"The Court reiterates that the right to education does not in principle exclude recourse to disciplinary measures, including suspension or expulsion from an educational institution in order to ensure compliance with its internal rules (see Yanasik v. Turkey, No.14524/89, Commission decision of 6 January 1993. DR 74, p.14, and Sulak v. Turkey, No.24515/94. Commission decision of 17 January 1996, DR 84-A.P.98). However, such regulations must not injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols (see Campell and Cosans v. The United Kingdom, 25 February 1982, 7 41, Series A No.48). In the instant case the applicants were suspended from the university for either one or two terms as a result of the exercise of their freedom of expression.

46. In the particular circumstances of the case and for the reasons stated above, the Court considers that the imposition of such a disciplinary sanction cannot be considered as reasonable or proportionate. Although, it notes that these sanctions were subsequently annulled by the administrative courts on grounds of unlawfulness, regrettably by that time the applicants had already missed one or two terms of their studies and, thus, the outcome of the domestic proceedings failed to redress the applicants' grievances under this head."

13. The crux of the above-mentioned case is submitted by the Petitioner is whether there were compelling reasons to impose the disciplinary sanction that was imposed to the Petitioner and whether the sanction was reasonable and proportionate to the circumstance of the case.

14. The Petitioner contend that the process leading to the disciplinary sanction against the Petitioner was deeply flawed and the decision unreasonable and disproportionate.

15. The Petitioner urge that the Respondent did not accord him the right to be heard as captured by ***Article 50 of the Constitution***. It is urged that the Petitioner was summoned to appear before the Respondent's, Disciplinary Committee through a letter dated 21st October 2016, which letter was the charge sheet against the Petitioner which read verbatim as follows:-

"Following reports of your involvement in examination irregularity, this is to invite you to appear before the Student's Disciplinary Committee (SDC) on Monday, 24th October, 2016 at 8.30a.m. in the Deputy vice-Chancellor (Research Innovation & Outreach)'s Boardroom No. 420 at the Central Administration Complex to answer to a charge of influencing tampering with online examination data following two 2) units which were enhanced as follows:

UNITS FROM TO

EES 302 E A

EAE 301 E A

Please note that should you fail to appear, disciplinary action will be taken against you without further reference to you."

16. It is urged on behalf of the Petitioner arising out of the contents of the letter inviting the Petitioner to the disciplinary proceedings, which was essentially the charge sheet, did not contain sufficient information to enable the petitioner effectively respond: It is urged that it was shallow, short on details and contrived to ensure that the Petitioner cannot put up an effective defence and respond robustly.

17. The Petitioner urge that critical information were missing, for instance the letter did not reveal the manner of influencing the tampering with on-line grades and the nature of the tampering or when the tampering of the grades was done. It is urged that the Respondent ought to have provided the respondent with sufficient particulars as to the circumstances that the Petitioner is suspected to have interfered with the examination and whether the Petitioner hacked the system or colluded with a staff of the university and use his credential to change his grade or whether the Petitioner stole the credentials of a staff of the university and used it to alter his grade. It is further submitted that without the particulars as to how the Petitioner is alleged to have altered his exams, it is urged that he could not have been expected to defend himself as it was not disclosed what the Petitioner was to answer to in the said Letter. In view whereof it is contended the Petitioner was not accorded a fair hearing as provided under ***Article 50(2)(b) the Constitution***, to be informed of the charge, sufficient detail to answer it. It is therefore Petitioner's averment that the Respondent breached his right under ***Article 50(2) (b) of the Constitution***.

18. In support of the aforesaid the Petitioner sought support from the case of ***Winrose Gathigia vs Kenyatta University Nairobi High Court Misc Appl.No.1029 of 2007*** where it was stated that:-

"The letter… did not contain sufficient particulars of the offence that the Petitioner was to face to enable the Petitioner mount her defence."

19. The Petitioner further contend the second transgression to his right to fair hearing under ***Article 50(1) of the Constitution*** is that of the right to be informed in advance of the evidence the prosecution intends to rely on, and to, have reasonable access to that evidence. No modicum of evidence was availed to the Petitioner to proof that the Petitioner was in any way involved in the interference with his online grade or the source of this evidence. It is further urged that there seemed to have been no evidence linking the Petitioner to the alleged offence and that explains why the Respondent failed to avail to the petitioner any form of evidence. For instance it questioned, why was the copy purported official transcript, which has been annexed as annexture FC - 6 in the replying affidavit of the Respondent, not availed to the Petitioner? It is stated that seems the respondent disciplinary committee was hell-bent on hiding crucial evidence from the Petitioner.

20. The Petitioner relied in the case of ***Kanda v Government of Malaya (1962)AC 322 IT*** where the Court when addressing the importance and centrality of availing all evidence to the accused held:

"If the right to be heard is to be a real right which is worth anything. It must carry with it a right in the accused person to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct … them"

21. Similarly in the case of ***Republic versus Kenyatta University Ex-Parte Applicant Gatetua Macharia Kennedy Miscellaneous Application No. 264 of 2013*** it was stated that:-

"My finding is firmed by the fact that the Applicant was not provided with the report that formed the basis of the accusation against him. No witness was called to give evidence against him. In short, no evidence was adduced in support of the charges facing him."

22. The Respondent on the other hand on the allegations labelled against it that the procedure employed by it in discontinuing the Petition violated his right of fair hearing and that the process was a traverse and short of a fair hearing submits that at all times, it observed the rights the Petitioner was entitled to including the rights to natural justice and fair administrative action. The SDC and the Appeals Committee at all times adhered to the stipulated procedures and that there were no irregularities as alleged.

23. The Respondent further submit that the court ought to bear in mind the need and value of the disciplinary processes carried out by the Respondent. As was held in ***Alice Njeri Ngichiri v Kenyatta University (2012) eKLR*** this case entails the balancing of two competing interests.

"The first is the right of a student, who has undergone a course of study at the respondent University, to realize the purpose of that course of study in a timely and efficient manner. The other relates to the interest that the University has in ensuring that those qualifying from its academic training do so with the grades that they deserve, and that there is no cheating or tampering with grades which would undermine the credibility and integrity of degrees awarded by the institution."

24. The Respondent further contend that at all times it adhered to the guidelines and procedures that regulate examinations in the Respondent institution in carrying out the disciplinary proceedings. The Court in ***Alice Njeri Ngichiri v Kenyatta University (2012) eKLR*** citing with approval the holding in ***Winrose Gathigia v. Kenyatta University (2008) eKLR*** approved the principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. It held that:-

"The principles require, among other things, that prescribed statutory procedures binding on the administrative body are followed, and if there are no such procedure prescribed, some form of inquiry must be made to enable the tribunal to fairly determine the question at issue. Further, the person concerned must know the nature of the accusations made against him or her, and an opportunity must be given to correct or contradict any statement pre-judicial to their view. Put simply, a party against whom action will be taken by a body exercising a quasi-judicial function must be given an opportunity to tell his side of the story. Further, the provisions of Article 47 of our Constitution cited above guarantee to everyone administrative action that is fast, efficient, and fair."

25. The Respondent state that it undertook all necessary procedures in its regulations to ensure that the Petitioner was heard and a just conclusion was reached. By informing the Petitioner of the scheduled hearing, allowing him to make his representations, giving the disciplinary outcome expeditiously, informing of the right to appeal and subsequently holding the appeal hearing, It is contended by the Respondent that it discharged its duties under the university regulations. The procedures were done in a timely manner and the rules of natural justice were followed by the committee in arriving at its decision.

26. The Respondent further contend that to allow the Petition it would;

i) Undermine the integrity of the University's academic standards;

ii) Undermine the quality of the degree that the Petitioner would receive; and

iii) Undermine the integrity of the other students' degrees.

27. On fair hearing the Respondent contend that the disciplinary process the Petitioner was subjected to did not contravened his right to fair hearing as provided in ***Article 50(1) of the Constitution of Kenya, 2010***. The Respondent referred to the case of ***Dry Associates Limited v Capital Markets Authority & another Interested Party Crown Berger (K) Ltd (2012) eKLR***, where it was stated that :-

"although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. Article 50(1) applies to a court, impartial tribunal or body established to resolve a dispute while Article 47 applies to administrative action generally."

28. The Respondent on fair hearing under ***Article 50(1) of the Constitution*** submit that the right to fair hearing under ***Article 50(1) of the Constitution*** does not apply to the Respondent in carrying out administrative duties such as the disciplinary process. In the case of ***Judicial Service Commission v Mbalu Mutava & Another (2015) eKLR***, the Court of Appeal held that:-

"It is clear that fair hearing as employed in article 50(1) is a term which exclusively applies to trial or inquiries in judicial proceeding's where a final decision is to be made through the application of law to facts. It was inappropriate therefore for the 1st Respondent's Counsel to invoke Article 50(1) in this appeal…The right to fair hearing under Article 50 does not apply to …

an administrative action within the meaning of Article 47(1)."

29. In the instant matter the Petitioner did not appear before a Judicial body, that the Respondent is not a Judicial body, the right to fair hearing does not hereby apply and cannot be found to have been violated. As to the right to fair administrative action I find that the notification for the disciplinary hearing was adequate in informing the Petitioner of his charge of involvement in an examination irregularity. Further, at the hearing, he did not request for any further information from the University or additional evidence, and the same denied. It follows therefore he had adequate information as regards the charge he was facing.

30. In the Petition, the Petitioner faults the procedure applied by the Respondent. It is trite that Respondent has the mandate to prepare its procedure as was held in the Court of Appeal in ***Kenya Revenue Authority v Menginya Salim Murgani Civil Appeal No. 108 of 2009*** that:

> ***"There is ample authority that decision making bodies other than courts and bodies whose procedure are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide who they will proceed."***

31. From the above I find that it was clearly been demonstrated that the Respondents administrative act against the Petitioner met the constitutional threshold as provided in ***Article 47 of the Constitution***. I further find guidance in respect of the above position from the holding of ***Eliud Nyauma Omwoyo & 2 others v Kenyatta University (2014) eKLR*** where the Court relied on ***Republic v Kenyatta University and 2 others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009*** that:-

> ***"I am persuaded by the above reasoning and I agree that the conduct of disciplinary proceedings are matters that fall within he parameters of the University's governing body and hereby hold that there was no violation of the Petitioners' right under Article 50(1) of the Constitution with regard to having the matter adjudicated upon by any independent and impartial adjudicating authority. I reiterate here that there is indeed no evidence before me that the members of the Committee were biased or had pre-determined minds and the arguments made in that regard were no more than speculative."***

32. Similarly in the case of ***Ouna Christopher Odongo v Kenyatta University (2016) eKLR***, this Court in dismissing the Petition held that:-

> ***"Where a Petitioner appears before a Student Disciplinary committee and to explain himself which he did without raising any question as to either the clarity of the charge against him or the notice given for him to do so. It is very difficult for the court in the circumstances to fault the Respondent on that aspect of the Petition."***

33. The Petitioner raises an issue regarding the right to education alleging that Respondent's decision to discontinue him was disproportionate and that it is a violation of his right to education. I find that while there is no dispute that the right to education is fundamental right, it can be limited in accordance with ***Article 24 of the Constitution of Kenya 2010***. This Court in ***Oluoch Dan Owino vs. Kenyatta University Supra*** held as follows on the right to education vis-à-vis; the duty to comply with the rules and regulations of an educational institution:

> ***"…the right to education does not denote the right to undergo a course of education in a particular institution on one's terms. It is my view that an educational institution has the right ot set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions."*** *(Emphasis supplied)*

34. In the instant Petition it is noted that the Petitioner has not urged or adduced any evidence that the rules he was accused of breaching were unconstitutional or unreasonable. I find it an institution such as the Respondent has a duty to ensure that the grades its students obtain are authentic. The Petitioner was aware of this rule. He has a right to be education but within the rules which he has subscribed but not otherwise.

35. The Petitioner's contention that his rights to fair hearing were violated as he was not furnished with evidence against him on time and that he was not informed of the charge is not supported by evidence. The Petitioner never complained of inadequance of the particulars in the charge sheet nor did he seek particulars of the charge sheet nor sought to be furnished with evidence to be relied upon and was denied. Indeed he never raised any issue before the Respondent as regards the hearing of the matter and was not considered. He never questioned the procedure applied at all. The notification for disciplinary hearing adequately informed the Petitioner of the charge of involvement in an examination irregularity. As it is all clear the charge sheet do contend the evidence to be relied upon, the Petitioner at the hearing if he needed information from the Respondent or additional evidence there was nothing that stopped him from seeking the same. If the petitioner had sought the same and was denied this would be a different matter altogether. In view hereof I find that the decision of the Respondent was arrived at lawfully, and that the same is lawful, and procedurally fair.

36. The courts are not supposed to interfere where adequate notice and substance of any charge are supplied in advance to the affected persons and as such disciplinary proceedings cannot be interfered with. In the case of ***Peris Wambogo Nyaga v Kenyatta University (2014)*** it was held that: -

> ***"Where adequate notice and substance of any charges are given to an affected person, the disciplinary proceedings against such a person cannot be invalidated. The Petitioner was accorded ample time to prepare for the disciplinary hearing."***

37. In the instant Petition, I find the Petitioner was given adequate notice with clearly stated charges and proceeded to appear before the Disciplinary Committee, took part in the proceedings without raising any complaints as regards the charge sheet or evidence to be relied upon. I find that it would be against ***Article 47 of the Constitution***, where the Respondent had fully complied with the ***Constitutional***

Process, and the ***Fair Administrative Act*** to proceed to invalid the proceedings in absence of evidence demonstrating otherwise. I find that the Petitioner was accorded the right to be heard by the Respondent before discontinuing his Education and his right to fair hearing were not violated.

B. WHETHER THE PETITIONER IS ENTITLED TO RELIEFS SOUGHT?

38. The reliefs sought by the Petitioner are well set out in his Petition under ***paragraph 62 (a) (b) (c) (d) and (e) in the Petition***. Upon analysis of the evidence and considering the issues herein above I have come to the conclusion that the Respondent's actions were lawful and in adherence to the Constitution, Statute, and Rules of Natural Justice.

39. In view of the conclusion that I have come to, I find that I have no power to award the reliefs sought. In the text in ***Wade & CF Forsyth in the 'Administrative Law', 10th Edition at page 362***, which text was affirmed by this Court in the decision in ***Captain (Rtd) Charles Masinde v Augustine Juma & 8 others (2016) eKLR*** where it was stated that:

> ***The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision… The court must strife to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."*** *(Emphasis added)*

40. In view of the above I find that the Petitioner has failed to prove his case as required and I decline to award him any of the reliefs sought.

41. ***The upshot is that the Petition is dismissed with costs.***

Dated, Signed and Delivered at Nairobi on this 25th day of February, 2021.

.....

J. A. MAKAU

JUDGE