REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. 342 OF 2018

MARTHA KERUBO MORACHA.....PETITIONER

VERSUS

THE UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

Introduction:

1. One of the students who was admitted to pursue undergraduate studies leading to the degree of Bachelor of Economics and Statistics in the University of Nairobi in the academic year 2009/2010 was *Martha Kerubo Moracha*, the Petitioner herein.

2. As the Petitioner sat for her fourth year examination in *STA: 406, Stochastic Processes* on 21st May, 2013, she was allegedly found with unauthorized materials in the examination room. The Petitioner was suspended and eventually expelled from the University.

3. The Petitioner then filed the Petition subject of this judgment.

The Petition:

4. The Petition is dated 3rd May, 2018. It is supported by the Affidavit of the Petitioner evenly sworn on the same date.

5. The Petitioner contends that she was not accorded a fair hearing and that her rights and fundamental freedoms were variously infringed by the Respondent. In the main, the Petition prays for the following: -

> *(a) A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 26, 47 and 50 of the Constitution of Kenya, 2010 have been contravened and infringed upon by the Respondent;*
>
> *(b) A declaration that Part IV(c)(2)(vi) of the Respondent's Rules Governing the Conduct and Discipline of students be and is hereby declared unconstitutional and any administrative action*

based on the aforesaid rules be and is hereby declared null and void;

(c) An order of Certiorari removing into this Honourable Court to quash the decision of the Respondent contained in the letter dated the 4th of June, 2013 suspecting the petitioner form the Respondent university and the letter dated 23rd July, 204 expelling the petitioner from the Respondent University;

(d) A compulsory order compelling the Respondent to release to the Petitioner the original official transcripts and original official Bachelor of Economics & Statistics degree certificate duly executed.

(e) In the alternative, the Respondent to do and concur in doing all things necessary for conferment and to actually confer upon the Petitioner the Bachelor of Economics and Statistics degree, complete with a certificate and original official transcripts;

(f) A declaration that the petitioner is entitled to the payment of damages and/or compensation to be assessed by the court for the violation and contravention of her fundamental human rights by the Respondent herein as provided for under Articles 26, 47 and 50 of the Constitution of Kenya, 2010;

(g) Costs of this Petition;

(h) Any other relief that this honourable court may deem just to grant.

6. The Petition was heard by way of reliance on affidavit evidence and written submissions. The Petitioner filed her submissions on 3rd November, 2020.

The Response:

7. The Petition is opposed. The Respondent filed a Replying Affidavit through its Deputy Vice-Chancellor in charge of Student Affairs one *Prof. Isaac M. Mbeche*. The affidavit was sworn on 23rd November, 2018.

8. The Respondent contends that the Petitioner was accorded a fair hearing within the constitutional and statutory parameters. It also filed and relied on the written submissions dated 8th December, 2020.

Issues for Determination:

9. I have carefully considered the Petition, the response thereto, the parties' submissions and the decisions referred to.

10. I discern the following issues for determination: -

(i) Whether the University of Nairobi Regulations Governing the Organization, Conduct and Discipline of Students contravene Section 21 of the Statutory Instruments Act;

(ii) Whether the decisions by the Respondent to suspend and expel the Petitioner from the University are in violation of Article 47 of the Constitution for want of fair administrative procedures.

(iii) Whether the Petitioner's right to fair hearing under Article 50 of the Constitution was infringed;

(iv) Whether the Petitioner's right to livelihood under Article 26 of the Constitution was infringed;

(v) What remedies, if any, should be granted.

11. I will deal with the above issues sequentially.

(a) Whether the University of Nairobi Regulations Governing the Organization, Conduct and Discipline of Students contravene Section 21 of the Statutory Instruments Act:

12. It is the Petitioner's contention that the University of Nairobi Regulations Governing the Organization, Conduct and Discipline of Students (hereinafter referred to as '***the Regulations'***) contravene Section 21 of the Statutory Instruments Act, No. 23 of 2013.

13. It is submitted that the Regulations are a statutory instrument. As such, the law gives an operational lifespan to any statutory instrument of 10 years unless lawfully exempted or extended. The Petitioner further contends that since the legality and applicability of the Regulations was not exempted or extended in law, then the Regulations ceased to be operational 10 years from the 27th November, 1997 when they were enacted.

14. The Court of Appeal decision in *Tom Dola & 2 Others vs. Chairman, National Land Commission & 5 Others (2020) eKLR* was referred to on the aspect of retrospectivity of the law.

15. It is posited that since the Regulations were inoperational, they could not have been the basis of the decisions to suspend and expel the Petitioner from the university.

16. The Respondent did not tender any submissions on this aspect.

17. The Regulations were made pursuant to the University of Nairobi Act, Cap. 210 of the Laws of Kenya. The said Act was repealed by the enactment of the Universities Act, No. 42 of 2012. The Universities Act was both assented into law and became operational on 13th December, 2012.

18. Part X of the Universities Act is on repeal and transitional provisions. The application of the Regulations was saved under Section 81(2) of the Universities Act. The only qualification was that the Regulations must not be inconsistent with the Universities Act.

19. The Petitioner has not challenged the Regulations on the basis of being inconsistent with the Universities Act. She, instead, posits that by the time she faced the disciplinary proceedings, the Regulations were inoperative by dint of Section 21 of the Statutory Instruments Act.

20. The Statutory Instruments Act became operational on 25th January, 2015. By then, the Regulations had been in force since 27th November, 1997; a period of 18 years. Were the Regulations therefore caught up by Section 21 of the Statutory Instruments Act?

21. Section 21 of the Statutory Instruments Act provide as follows: -

Automatic revocation of statutory instruments

(1) Subject to subsection (3), a statutory instrument is by virtue of this section revoked on the day which is ten years after the making of the statutory instrument unless—

(a) It is sooner repealed or expires;

(b) A regulation is made exempting it from expiry

(2) The responsible Cabinet Secretary may in consultation with the Committee, make a regulation

under this Act extending the operation of a statutory rule that would otherwise be revoked by virtue of this section for a period as is specified in the regulation not exceeding twelve months.

(3) Only one extension of the operation of a statutory rule can be made under subsection (2).

22. Given that Section 21 of the Statutory Instruments Act came into play long after the Regulations had been enacted, it becomes incumbent to examine whether the doctrine of retrospectivity is a complete bar in this case.

23. The Supreme Court in ***Application 2 of 2011, Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR*** was confronted with the question whether it had jurisdiction under Section 15 and 16 (Appeals to the Supreme Court) of the Supreme Court Act to entertain an appeal from the Court of Appeal on a decision that was delivered on 31st July 2008, two years before the advent of new constitutional order that created the Supreme Court.

24. The Respondents contest on jurisdiction was based on the argument that the powers of the Supreme Court only relate back to the date of its establishment, and upon appointment of Judges to the Supreme Court.

25. The 2nd Respondent *(Kenya Commercial Finance Co. Ltd)* buttressed the foregoing position by relying on Section 22 of the Sixth Schedule to the Constitution (Transitional and Consequential Provisions) in respect of judicial proceedings and pending matters by submitting that the section expressly saved pending proceedings but not the ones which had been finalized. As such, the jurisdiction of the Supreme Court only commenced from the effective date. It did not acquire any jurisdiction relating to appeals which had been determined before the effective date.

26. The 3rd Respondent *(Kenya National Capital Corporation Ltd)* supported the foregoing position by stating that the promulgation of the new Constitution on 27th August 2010 could not confer jurisdiction on the Supreme Court to review cases which had been finalized by the Court of Appeal. Its position was that the people of Kenya could not have intended to confer jurisdiction on the Supreme Court, otherwise they would have expressly conferred such jurisdiction.

27. In seeking to emphasize the presumption against retrospectivity, the Respondents pointed to Section 9(1) of *Interpretation and General Provisions Act* which provides that: -

Subject to the provisions of subsection (3) an Act shall come into operation on the day of which it was published in the Gazette.(3) If it is enacted in the Act, or in any other written law, that the Act or any provisions, thereof shall come or to be deemed to have come into operation on some other day the Act or as the case may be, that provision shall come or be deemed to have come into operation accordingly.

28. The Respondents' bottom line was that there is no provision neither in the Constitution nor in the Supreme Court Act that incorporated retrospectivity into the provision under Section 16 and Part IV of the Supreme Court Act.

29. In determining the question whether the appellate jurisdiction of the Supreme Court stretched back to the time prior to the promulgation of the Constitution, the Learned Judges interrogated the issue of Retrospective/Retroactive Application or operation of legislation and the Constitution.

30. In so doing, they referred to the *Black's Law Dictionary (6th Edition)* which defines retrospective law as follows;

A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or

attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred.

31. The Learned Judges then went ahead and spoke to the doctrine against retrospectivity with respect to *criminal* and *civil* justice system in the following manner: -

(60) Most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in Article 50 (2) (n) of the Constitution. That article provides that:

Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law.

32. With respect to non-criminal legislation, the Learned Judges opined that they are *prima facie* forward looking and are not to be given retrospective application. In making reference to *Halsbury's Laws of England, 4th Edition Vol. 44 at p.570* they observed: -

(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.

33. The Learned Judges however remarked that ***exceptions*** do exist in the rule against retroactive application. They observed as follows in respect of legislation: -

(61) …retroactive law is not unconstitutional unless it:

(i) is in the nature of a bill of attainder;

(ii) impairs the obligation under contracts;

(iii) divests vested rights; or

(iv) is constitutionally forbidden.

34. In giving effect to the foregoing exceptions, the Learned Judges, with particular bias to the Constitution, stated as follows: -

(62) …At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution. (*A position endorsed and reiterated more recently by the same Court in Petition 2 of 2015, Karen Njeri Kandie v Alassane Ba & another [2017] eKLR.)*

35. In citing with approval the South African decision in *Du Plessis & Others versus De Klerk and Another* (1997) 1 LRC637 where the Constitutional Court declined an invitation by the Defendants to invoke certain provisions of the Constitution as a defence to a claim that arose before its commencement,

the Supreme Court agreed with the Respondents' point of view. The South African Court pronounced itself as follows: -

> *…A right of action was a form of incorporeal property and there was no warrant in the Constitution for depriving a person of property which he lawfully held before the Constitution came into force by invoking against him a right which did not exist at the time when the right of property vested in him. The citation of well –known authorities on the need for a generous rather than a legalistic interpretation of the Constitution hardly supported an argument directed to depriving and individual of an existing right.*

36. Taking cue from the foregoing finding, the Learned Judges made the finding that that the Court could not operate retrospectively. It declined reliance of Section 15 of the Supreme Court Act by the Applicants to confer jurisdiction to the Court. It dismissed the application in the following terms: -

> ***(65) In the instant case, we find that a final judgment by the highest court in the land at the time vested certain property rights in, and imposed certain obligations upon the parties to the dispute. We hold that Article 163 (4) (b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution.***

37. I have carefully perused the Statutory Instruments Act. *Section 27* provides as follows: -

> *(1) Sections 27 and 34 of the Interpretation and General Provisions Act (Cap. 2) are hereby repealed*.
>
> *(2) Despite the provisions of subsection (1), any regulations, order or notice issued* ***immediately before the commencement of this Act*** *shall continue in force as if it were made under this Act unless it is expressly revoked by an Act of Parliament under which it is made.* (emphasis added)

38. As said, the Regulations were enacted on 27th November, 1997. By the time the Statutory Instruments Act came into force, the Regulations had been operational for a period of 18 years.

39. The Statutory Instruments Act does not define in terms of time, what the phrase *'immediately before the commencement of this Act'* mean. Be that as it may, Section 27(2) of the Statutory Instruments Act intended that the Act applies to any regulations, orders or notices made immediately before the enactment of the Act.

40. This Court shall then determine if the Regulations were made immediately before the enactment of the Statutory Instruments Act.

41. The *Black's Law Dictionary*, revised 4th Edition West Publishing Company defines the word '*immediately*' at page 884 as: -

Without interval of time, without delay, straightaway, or without any delay or lapse of time.

42. The same Dictionary defines the word '*before'* at page 196 to mean:

Prior to; preceding

43. The **synonyms** for the words 'immediately before' include *just prior, directly before, right away before, shortly before, shortly earlier, before something happens*, among others. Some of the **antonyms** for the words 'immediately before' include *way before, long time before, long earlier, long time earlier, long time preceding, long time prior*, among others.

44. *Immediately before'* can, hence, be deduced to mean: -

a subsequent event occurs but prior to it, without interval or lapse of time or delay there was an initial one.

45. The words 'immediately before', therefore, connote those events which happened just before the issue at hand. In this case, it will be the regulations, orders and notices which were enacted immediately before the coming into force of the Statutory Instruments Act on 25th January, 2013. As said, the Regulations by then had been in place for 18 years.

46. Whereas Section 27(2) of the Statutory Instruments Act has an aspect of retrospectivity, such is capped to '*immediately before'* the commencement of the Act. Whereas this Court will not attempt to fix the possible timelines in the context of the words 'immediately before', given that the parties did not sufficiently render themselves on the matter, it is obvious and logical that an event which took place 18 years ago cannot, by any standards, be deemed as falling within the term 'immediately before' in respect of another event which occurred 18 years later. The period of 18 years is far, too long away, into the past.

47. This Court, therefore, finds that Section 21 as read with Section 27(2) of the Statutory Instruments Act do not apply to the Regulations in this case. The Regulations are valid and in force.

48. The issue is, hence, answered in the negative.

(b) Whether the decisions by the Respondent to suspend and expel the Petitioner from the University are in violation of Article 47 of the Constitution for want of fair administrative procedures:

49. The Petitioner posits that under Section 35(1)(b) of the Universities Act, the Senate is the only body that is in charge of all academic matters of a University. Further, it is submitted that the functions of the Senate are assigned under the Charter, in this case, the University of Nairobi Charter, 2013 (hereinafter referred to as '***the Charter'***). Section 19(3)(s) of the Charter, it is submitted, mandates only the Senate to propose regulations and procedures for the discipline of students and make recommendations thereof to the Council. Section 18(8) of the Charter gives the Council the power to approve regulations governing the conduct and discipline of students of the University. Section 35(a)(ii) of the Universities Act mandates the Council to approve statutes of a university and publish them in the Kenya Gazette.

50. According to the Petitioner, the Regulations having been rendered inoperative by operation of the law, the only applicable law at the time she went through the disciplinary processes was the Constitution of Kenya, the Universities Act and the University of Nairobi Charter.

51. On a without prejudice basis, the Petitioner further submits that even by assuming that the Respondent was guided by the revoked Regulations, the said Regulations do not give the Vice-Chancellor the power to unilaterally suspend a student from the Respondent institution. The suspension must be sanctioned by the Respondent's Council because the Regulations states that the Vice-Chancellor shall act *on behalf of the Council*. Therefore, the function of the Vice-Chancellor in as far as suspension of the Petitioner is concerned is only limited to communicating the decision of the Council.

52. It is, hence, submitted that none of the laws or the Regulations granted the Vice-Chancellor of the Respondent the unilateral authority to suspend any student from the University. The Petitioner, therefore, posits that the decision by the Vice-chancellor to unilaterally suspend the Petitioner from the Respondent institution was illegal and *ultra-vires.*

53. The Petitioner further submits that the Vice-chancellor suspended the Petitioner without any evidence or valid reasons or at all. Despite the decision being the most extreme measure in the circumstances, the suspension was had no reasons, was indefinite, irrational and unreasonable and it contravened the Petitioner's right under Article 47 of the Constitution. The decisions in *Republic v. Betting Control and Licensing Board & another ex-parte Outdoor Advertising Association of Kenya [2019) eKLR* and *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1947) 2 All ER 683* were cited in support of the submission.

54. The Petitioner also took issue with the manner in which the College Disciplinary Committee (hereinafter referred to '***the Disciplinary Committee***') and the Senate Examination Appeals/Disciplinary Committee (hereinafter referred to '***the Senate Committee'***) were constituted. According to the Petitioner, the Disciplinary Committee was improperly constituted in that the Dean of the Faculty, the Chairperson of the Student's Department and one representative from the Students' Hall of Residence nominated by the Students' Hall Chair were absent from the proceedings.

55. The membership of the Senate Committee was unprocedural in that the Principal and the Dean of the Faculty of Arts were represented when the Regulations do not allow for a proxy, the Dean of Students and the Warden or equivalent were absent from the proceedings and that there was an additional Senate Representative, to wit, there were three (3) instead of two (2) Senate representatives. Further, under the Regulations, any punishment on a student administered by the Disciplinary Committee must be sanctioned by the Senate Committee. That was not the case in this matter as the letters dated 10th December, 2013 and 23rd July, 2014 were issued by the Acting Registrar without the approval of the Senate Committee.

56. The need to properly constitute a tribunal and the need to adhere to procedural rules was emphasized at paragraph 132 in *Republic v University of Nairobi ex parte Michael Jacobs Odhiambo & 7 others [20161 eKLR* where the Honourable Court affirmed the position in *Republic v University of Nairobi Ex parte Michael Jacobs Odhiambo & 7 others [20161 eKLR.*

57. Furthermore, it is trite law that where adverse evidence is given against a person by a witness, it is an element of procedural fairness that the person must be given an opportunity to cross-examine that witness. The case of *Republic v Kenyatta University Ex-parte Njoroge Humphrey Mbuthi (2015) eKLR* was cited in support of the assertion.

58. In this case, the Petitioner contend that the said Professor J.A.M Otieno who allegedly found her with unauthorized material during an examination was not called as a witness neither were the alleged materials produced at the hearing.

59. The Petitioner further submits that in carrying out the disciplinary proceedings against her, the Respondent was duty bound to satisfy the test of a lawfulness, reasonability and procedural fairness under Article 47 of the Constitution. The Respondent failed to do so.

60. The Respondent contends that the Petitioner was accorded fair administrative procedures and that the disciplinary committees were constituted as per law. It is deponed that the Petitioner admitted to having unauthorized materials in the examination room and that the Regulations were properly so applied to her case.

61. It is further deponed that the Disciplinary Committee considered the witness report and all available evidence and further to the Petitioner's plea of guilty. She was rightfully found guilty of examination malpractice. The decision of the Disciplinary Committee, which had all the reasons thereto, was upheld by the Senate Committee.

62. The decision in *Dry Associates Limited vs. Capital Market Authority & Another (2012) eKLR* was referred to in support of the Respondent's submission.

63. I will begin this discussion with a recall that I have already found that the Regulations are validly in place and effective in law. As such, the submissions by the Petitioner to the contrary fail and is for rejection.

64. Second, I will deal with the power of the Vice-chancellor of the Respondent to suspend a student on disciplinary grounds. Part IV of the Regulations provide as follows: -

> *1. The following provisions shall apply to all disciplinary actions taken against Students in respect of disciplinary offences specified herein, whether wish offences are committed within or outside the*

University precincts:

A: Disciplinary Authority: For purposes of these regulations the Vice-Chancellor, acting on behalf of Council, is the disciplinary authority of the University and may in that capacity;

(i) Vary or add to the list disciplinary offences specified herein until such action shall cease to have effect unless approved at the next meeting of Council;

(ii) suspend any student suspected of committing any discipline offence under the regulation from the University pending disciplinary action.

(iii) take any other measures necessary for the proper operation of disciplinary procedures set out herein.

65. Regulation 1(A)(ii) of Part IV of the Regulations is clear. It gives the Vice-Chancellor the power to suspend any student on disciplinary grounds pending further action. Whereas the ultimate power to determine the culpability of the Petitioner rests with the Senate Committee, the power donated to the Vice-chancellor on suspension is interim.

66. The constitutionality of Regulation1(A)(ii) of Part IV of the Regulations is not challenged in the Petition before Court. The argument fronted by the Petitioner that the power cannot be unilaterally exercised by the Vice-chancellor, but by the Council of the University, is unfounded. The regulation is clear that the Vice-chancellor has such power. As to how the Vice-chancellor exercises the power is another issue altogether. The Petitioner's argument is, hence, misconceived and is hereby rejected.

67. Another aspect of the suspension raised by the Petitioner is that the suspension was indefinite. It is true the Regulations allow the Vice-chancellor of the Respondent to suspend a student pending further disciplinary proceedings. However, the Regulations are silent on the duration of the suspension.

68. The High Court in ***Adrian Kamotho Njenga vs. Attorney General; Judicial Service Commission & 2 Others (Interested Parties) (2020) eKLR*** discussed what ought to happen when a provision of the Constitution is silent on timeline. The Court stated as follows: -

147. The people of Kenya did not expect the President to delay appointment of judges given that the persons so recommended are intended to serve the citizenry immediately in dispensing justice. The people may not have assigned time lines within which to formalise the appointment of judges because they did not expect the President to delay such appointments once he receives recommendation from the 1st Interested Party. The fact that there is no time limit, however, cannot be used to delay appointments done in accordance with the Constitution and the law.

148. Even if the Respondent was to successfully argue that there is no timeline and, therefore, the President can take as much time as he likes without violating the Constitution, then he needs to be reminded of ***Article 259(8)*** *which provides that:*

"If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises."*(Emphasis)*

149. In our view, the appointment of judges by the President, should be immediate and as soon as the recommendations are forwarded to him by the 1st Interested Party. That is the spirit of ***Article 259(8)*** *of the* ***Constitution,*** *which demands that actions be taken without* ***unreasonable delay,*** *and as* ***often*** *as the occasion arises. The President is only required to put in place plans to appoint the persons recommended as judges. Such plans cannot take much time and, therefore, in our considered view, the reasonable time contemplated by the Constitution, should be within 14 days from the date recommendations are received to the President.*

*150. **Article 259** demands that the Constitution be interpreted in a manner that accords with its values and principles and, therefore, all actions by State organs, State officers and public officers must be done in accordance with the Constitution. **Article 259(3)** commands that every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.*

*151. In that regard, when the Constitution uses the words **'reasonable time'** and **"as often as occasion arises** ", any action delayed beyond 14 days cannot be deemed to be within reasonable time.*

*152. This view was shared by this court in **Law Society of Kenya v Attorney General & 2 others** (supra) where the court stated:*

> ***"[94] In determining what is reasonable time therefore, it is our view that the timelines stipulated in the Constitution ought to act as a guide. Under Article 263 of the Constitution, the Constitution was to be promulgated within fourteen days of its gazettement. Under Article 115(1) the President is required to assent to a Bill within fourteen days after receipt thereof. Under Article 114(1) the President is required, within fourteen days after a vacancy in the office of Deputy President arises, to nominate a person to fill the vacancy. Under Article 158(4) of the Constitution, on receipt and examination of the petition for removal of the Director of Public Prosecutions, the President is required to, within fourteen days, suspend the Director of Public Prosecutions from office and, acting in accordance with the advice of the Public Service Commission, appoint a tribunal. Similarly, under Article 168(5), the President is required, within fourteen days after receiving the petition for removal of a Judge, to suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission, appoint a Tribunal."***

153. The Court went on to state:

> ***"[95] In our view the spirit of the Constitution is that when it comes to matters of national interest, the thread that runs across the constitutional timelines with respect to purely procedural matters where what is required is more or less a seal of approval or formalisation of a decision already substantially made, is that fourteen days period is generally reasonable."***

154. The court then concluded thus:

> ***[96] "Taking the cue from the said provisions it is our view that to subject persons who have been nominated for appointment as Judges for a waiting period of more that(sic) five months as was the case herein, is clearly unreasonable. It subjects the said nominees to unnecessary anxiety. In arriving at this decision, we take into account the strict timelines given to the Commission in undertaking the process of nomination of Judges. Such strict timelines show the seriousness with which the appointment of Judges ought to be treated. Accordingly, all the players in the chain of the appointment process ought to expedite the process of appointment of Judges taking into account the important role played by the Judiciary in the administration of justice in any democratic system of governance."***

154. In the premise, we find and hold that the delay in appointing the persons recommended by the 1st Interested Party, is unreasonable and, therefore, unconstitutional.

*155. In coming to this conclusions, we are guided by the Supreme Court observation in **Communication Commission of Kenya & 5 others v Royal Media Services & 5 others** (supra) that" **the Constitution should be interpreted in a holistic manner, within its context, and in its spirit**. Further in **Speaker of the Senate & Another v. Attorney-General & 4 Others** (supra) the same court was clear that:*

*"**[156]…Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents"***

69. The Court in the foregoing case settled for a period of 14 days as reasonable time within which the President ought to swear Judges into office once recommended by the Judicial Service Commission.

70. In our case, the Petitioner was suspended from the university *vide* the letter dated 4th June, 2013. By then, she was in her last year of studies. She was out of the university upto 22nd July, 2013 when her case was heard before the disciplinary committee. That was a period of around 48 days.

71. There is no doubt the Petitioner had to be accorded adequate time within which to prepare for the hearing. The period ought to have been reasonable. That was the period which ought to have been indicated in the suspension letter. Going forward, the Respondent should indicate the duration of any suspension it issues pursuant to the Regulations and which period must be reasonable. In other words, it was incumbent upon the Vice-Chancellor to indicate the duration of the suspension in the letter dated 4th June, 2013.

72. By taking into account the unique circumstances of this case, the suspension ought not to have exceeded a period of 30 days. Be that as it may, the failure to indicate the period of the suspension in the letter dated 4th June, 2013 did not invalidate the suspension.

73. In the end, the decision to suspend the Petitioner did not infringe the Constitution or the law.

74. I will now deal with whether the decision to expel the Petitioner stand the test of Article 47 of the Constitution and the law. As the matter rests on whether the Constitution and the law was upheld during the disciplinary hearing, the starting point is the Constitution itself. Article 2 *inter alia* declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. Article 3 places an obligation upon every person to respect, uphold and defend the Constitution.

75. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.

76. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

*Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution***.**

77. Speaking on the Constitution, Ringera, J in ***Njoya and Others vs. Attorney General {2004} 1 KLR 232, {2008} 2 KLR (EP) 624 (HCK)*** stated thus: -

…. the Constitution is the supreme law of the land; it's is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.

78. In ***Joseph Kimani Gathungu vs. Attorney General& 5 Others Constitutional Reference No. 12 of 2010*** the Supreme Court of Kenya (Ojwang, JSC) stated as follows: -

A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the

earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions.

79. Given the supremacy of the Constitution, the manner in which the Constitution is interpreted and applied takes the centre-stage. Article 259 of the Constitution deals with the interpretation of the Constitution. It obligates anyone interpreting the Constitution to do so in a manner that *'promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance'.*

80. Article 20(3) obligates any Court applying a provision of the Bill of Rights to develop the law to the extent that it gives effect to a right or fundamental freedom, to adopt the interpretation that most favours the enforcement of a right or fundamental freedom, to promote the values that underlie an open and democratic society based on human dignity, equality, equity, freedom and the spirit, purport and objects of the Bill of Rights.

81. Article 19 provides that the Bill of Rights, which comprises of the human rights and fundamental freedoms, is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The human rights and fundamental freedoms are inherent in that they belong to each individual and are not granted by the State. They are also only subject to the limitations contemplated in the Constitution.

82. The Supreme Court has severally laid down guidance on the interpretation of the 2010 Constitution. In ***In Re the Speaker of the Senate & Another v Attorney General & 4 Others; Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR*** where retired Chief Justice Mutunga in his concurring opinion expressed himself as follows: -

[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. ***Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.*** (emphasis mine).

83. In ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR*** the Supreme Court further stated as follows: -

[*356] We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social,*

cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to Articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.

[357] We begin with the concurring opinion of the CJ and President in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014 left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:

[232] …References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts. [Emphasis supplied]

[233] It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya.

84. In ***In the Matter of the Kenya National Commission on Human Rights; Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR*** the Supreme Court dealt with the holistic interpretation of the Constitution at paragraph 26, thus: -

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. ***It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances***.

85. In the words of the retired Chief Justice of Israel Aharon Barak in *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) 308 observed, that "…*one who interprets a single clause of the constitution interprets the entire constitution…'.*

86.In a majority decision in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court Advisory Opinion Application No. 2 of 2012*** at para 54, the Supreme Court further stated as follows on the interpretation of the Constitution: -

Certain provisions of the Constitution of Kenya have to be perceived in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. ***Where a Constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.***

87. In interpreting the Constitution, a Court must always remain alive to the truism that a Constitution has a structural posture. It has the main framework and pillars forming its *'core and an unalienable soul.'* That is the **basic structure of the Constitution**. Such a structure is so sacred that it cannot even be undermined by a constitutional amendment. This is the doctrine variously referred to as the "***basic structure doctrine"*** or ***the doctrine and theory of unamendability of "eternity clauses"*** or ***the doctrine and theory of "constitutional entrenchment clauses"*** or ***the doctrine and theory of "unamendable constitutional provisions"*** or ***the doctrine and theory of "unconstitutional constitutional" clauses.*** (See: The Supreme Court of India in *Kesavananda Bharati v State of Kerala & Anor* (1973) 4 SCC 225, *Golak Nath vs State of Punjab* and *Sajjan Singh*1965 AIR 845 and *Minerva Mills v. Union of India* AIR 1980 SC 1789; The Constitutional Court of South Africa in *Re Certification of the Constitution of the Republic of South-Africa*1996(4) SALR 744 (CC); *Executive Council of the Western Cape Legislature v. President of the Republic*1995 10 BCLR 1289 (CC) and the High Court in Tanzania in *Christopher Mtikila v. Attorney General of Tanzania* (10 of 2005) [2006] TZHC 5; among others).

88. A Court, also, ought to be guided by the language used in the Constitution. A Court should not unduly strain to impose a meaning that the text is not reasonably capable of bearing. It should also avoid what was described as *'excessive peering at the language to be interpreted'*. (See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others vs. Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24* and *Johannesburg Municipality vs. Gauteng Development Tribunal and Others [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another 1950 (4) SA 653 (A) at 664G-H*).

89. Courts have variously interpreted the Constitution. Expounding on Article 10, the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR*** held that:

> *In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.*
>
> *Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.*

90. Turning to **Article 47** of the Constitution, the provision states in Sub-articles (1), (2) and (3) as follows: -

> *(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

91. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. No. 4 of 2015. 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.

92. 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'.*

93. In ***Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR*** Court of Appeal addressed itself on the above. The Court held that: -

> *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.*

94. The South African 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 while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

> *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…*

95. The right was further discussed in ***Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR***. The Court had the following to say:

> 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 it 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...

96. There is no doubt the decision to expel the Petitioner from the Respondent is an administrative action. I say so because the decision adversely affected the rights of the Petitioner. As such the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

97. Section 4 of the Fair Administrative Actions Act goes further to itemize what the administrator must do when dealing with an administrative action. I will now ascertain if the Respondent adhered to those requirements.

98. One of the contentions by the Petitioner is that she was not accorded an opportunity to cross-examine the witnesses. Section 4(3)(f) of the Fair Administrative Actions Act provides that one who may be affected by an administrative action be accorded an opportunity to cross-examine the witnesses. In this case, the entire proceedings rested with the evidence of Prof. J.A.M. Otieno who was the invigilator during the time the examination in issue was taken. The Petitioner contends that whereas she had some materials in the examination room, they were not relevant to the examination. The Petitioner maintained the position even when she appeared the disciplinary committee. *Exhibit 'ISM1'* of the Replying Affidavit sworn by Prof. Isaac M. Mbeche on behalf of the Respondent are the minutes before the said committee.

99. The minutes show that the Petitioner was charged with four counts. For ease of this discussion, I will reproduce the part of the minutes where the counts and the Petitioner's responses appear, and, as follows: -

COUNT ONE:

Statement of the Offence

Failure to respect and adhere strictly to the administrative and academic procedures established by the University of Nairobi Act for the control, governance and operations of the University contrary to Part III 1(a)(i) of the rules governing the conduct and discipline of Students (RGCDOS)

Particulars of the Offence:

a) That on the 21st day of May, 2013, during a University Examination paper namely STA:406, Stochasitc Processes you were caught with class notes scribbled on University of Nairobi Answer sheet booklet paper, which notes were relevant to the said examination and from which you were copying.

b) That on the same day and time during the said University Examination, while habouring an intention to defraud, you sneaked into the examination Room relevant materials, which you were found with by Prof. J. A. M. Otieno, an invigilator which action was illegal and unauthorized.

Student's Plea: Not guilty to Count One (a) but guilty to Count One (b).

COUNT TWO:

Statement of the Offence

Failure to respect rights and privileges of the members of the University Community at all times contrary to Part III 19a) (ii) of Regulations governing the conduct and discipline of Students (RGCOD).

Students Plea: Not guilty to Count One (a) but guilty to Count One (b)

COUNT THREE:

Statement of the offence

*Failure to refrain form any conduct that might bring the University or any Section or programme thereof to disrepute or public odium contrary to Part III 1 (a) (iii) of the regulations governing the conduct and discipline of students (**RGCDOS**).*

Students Plea: Not guilty to Count One (a) but guilty to Count One (b).

COUNT FOUR:

Statement of the Offence

*Failure to carry yourself in all public for a with such humility and dignity as befits your status as a mature and responsible citizen contrary to Part III 1 (a) (vi) of the regulations governing the conduct and discipline of students (**RGCDOS**)*

Students Plea: Not guilty to Count One (a) but guilty to Count One (b).

100. The Petitioner denied counts (a) of all the four counts. Having so denied part of the charges preferred against her, the disciplinary committee ought to have conducted a hearing of the case. The hearing would have entailed adducing evidence through witnesses and documents. Had the hearing of the case been held, the Petitioner would have had an opportunity to cross-examine the witnesses called by the Respondent. One of the witnesses would have been Prof. J.A.M. Otieno who allegedly found the Petitioner with the materials in issue. Another witness would have been the one to demonstrate how the materials were relevant to the examination. There is no doubt the Respondent would have called several witnesses going by the nature of the charges against the Petitioner.

101. However, despite the Petitioner having denied the charges, the disciplinary committee never directed the Respondent to call any witnesses or at all. The committee went ahead and found the Petitioner culpable. It accordingly recommended for the Petitioner's expulsion from the university.

102. In affirming the foregoing, the Court in *Republic v Kenyatta University Ex-parte Njoroge Humphrey Mbuthi (2015) eKLR* stated as follows: -

However, the law is now clear that where adverse evidence is given about a person, the person is to be afforded an opportunity to cross-examine the said witnesses. In this case two crucial people whose statements were relied upon in the disciplinary proceedings against the applicant never appeared at the hearing. These were the person who claimed ownership of the laptop and the person who allegedly saw the applicant pick up the laptop. In the absence of these witnesses and as the law required that they be availed for cross-examination, there is no way the manner in which the respondent conducted its proceedings can be said to have met the threshold under Article 47 of the Constitution pursuant to which the Fair Administrative Action Act was enacted. It is not contended by the respondent that its disciplinary rules or procedure provided for a different mode of conducting proceedings from that provided under the Act. Even if there existed such a procedure

it had to comply with the letter and spirit of Article 47 of the Constitution.

103. It was, therefore, incumbent upon the Respondent to call witnesses and adduce evidence when the Petitioner denied the charges before the disciplinary committee. That was, however, not the case.

104. The other contentions raised by the Petitioner in this issue shall be dealt with in the next issue. Suffice to say, that by failing to call witnesses at a time when the Petitioner had denied the charges, the Respondent failed to accord the Petitioner a lawful and procedural fair opportunity to defend herself.

105. The result is that save for the indefinite nature of the letter of suspension, the suspension of the Petitioner by the Respondent did not infringe Article 47 of the Constitution or the law. However, the expulsion of the Petitioner from the University infringe on Article 47 of the Constitution as well as the Fair Administrative Actions Act to the extent that the Respondent failed to call any witnesses after the Petitioner had denied the charges and, further, that the Respondent failed to accord the Petitioner an opportunity to cross-examine any of the potential witnesses.

(c) Whether the Petitioner's right to a fair hearing under Article 50 of the Constitution was infringed:

106. The Petitioner contends that the Respondent variously infringed the Petitioner's right under Article 50 of the Constitution. First, the Regulations suffer from bad drafting as they allow and prohibit representation of a student facing disciplinary proceedings at the same time. The Petitioner submits that the law must be certain to enable a party prepare for a trial. The decision in *Council of Governors vs. Attorney General & Another (2017) eKLR* is cited in support.

107. Further, the Petitioner contends that a trial is a technical process and, therefore, one's legal representation is crucial. It is also argued that the right is guaranteed under Article 50 of the Constitution and cannot be limited. The Petitioner cited *Republic vs. Chuka University exparte Kennedy Omondi Waringa & 16 Others (2018) eKLR* to support the submission.

108. As earlier on stated in the preceding issue, the other issues raised by the Petitioner in respect to the composition of the disciplinary and Senate committees, the manner the hearing was conducted among others shall also be dealt with under this issue.

109. On its part, the Respondent maintains that the hearing was fair and duly complied with the Constitution and the law.

110. Article 50(1) and (2) of the Constitution provides as follows: -

> *(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*
>
> *(2) Every accused person has the right to a fair trial, which includes the right—*
>
> *a. to be presumed innocent until the contrary is proved;*
>
> *b. to be informed of the charge, with sufficient detail to answer it;*
>
> *c. to have adequate time and facilities to prepare a defence;*
>
> *d. to a public trial before a court established under this Constitution;*
>
> *e. to have the trial begin and conclude without unreasonable delay;*
>
> *f. to be present when being tried, unless the conduct of the accused person makes it*

impossible for the trial to proceed;

g. to choose, and be represented by, an advocate, and to be informed of this right promptly;

h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

i. to remain silent, and not to testify during the proceedings;

j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

k. to adduce and challenge evidence;

l. to refuse to give self-incriminating evidence;

m. to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

n. not to be convicted for an act or omission that at the time it was committed or omitted was not—

i. an offence in Kenya; or

ii. a crime under international law;

o. not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

q. if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

111. The above provision is part of the **Bill of Rights**.

112. **Article 24** of the Constitution is on limitation of human rights and fundamental freedoms in the Bill of Rights. It enumerates the specific instances where any limitation is permissible. It states as follows: -

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clauses (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.

113. **Article 25** provides for the specific rights and fundamental freedoms which ***cannot*** be limited. It is tailored as follows: -

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) ***the right to a fair trial;*** *and*

(d) the right to an order of habeas corpus.

114. The right to a fair trial is among the rights and fundamental freedoms which cannot be limited in anyway whatsoever. It is therefore one of the rights forming the basic structure of the Constitution. It is, therefore, a right which cannot be waived or acquiesced. (See the Court of Appeal in Eldoret in ***Civil Appeal 51 & 58 (Consolidated) Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR).***

115. Article 50(1) is on the impartiality and independence of a Court or a tribunal. The requirement, therefore, also has the element of how the Courts or tribunals are constituted.

116. In this case, the Petitioner took issue with how the Disciplinary committee and the Senate committee were constituted. As a recap, the Petitioner contends that the Disciplinary Committee was improperly constituted in that the Dean of the Faculty, the Chairperson of the Student's Department and one representative from the Students' Hall of Residence nominated by the Students' Hall Chair were absent from the proceedings.

117. On the membership of the Senate Committee, the Petitioner posits that it was unprocedural in that the Principal and the Dean of the Faculty of Arts were represented when the Regulations do not allow for a proxy, the Dean of Students and the Warden or equivalent were absent from the proceedings and that there was an additional Senate Representative, to wit, there were three (3) instead of two (2) Senate representatives. Further, under the Regulations, any punishment on a student administered by the Disciplinary Committee must be sanctioned by the Senate Committee. That was not the case in this matter as the letters dated 10th December, 2013 and 23rd July, 2014 were issued by the Acting Registrar without the approval of the Senate Committee.

118. The Respondent did not respond to these allegations and submissions.

119. Part IV(C) of the Regulations provide for the composition of the Disciplinary and Senate Committees. The Disciplinary committee is composed as follows: -

The Principal - Chair

The Dean of Faculty/Director of Institute of School

The Chairperson of the Student's Department where appropriate

One representative nominated by the College Student's organization

One representative from the Students' Hall of Resident nominated by the Students' Hall Chair

The College Registrar - Secretary.

120. On the other side, the Senate Committee is composed as follows: -

Deputy Vice-Chancellor (Academic Affairs) - Chair

Principal/Director of S.W.A

Dean of Students

Dean of Faculty

Warden or equivalent

Two (2) Senate Representatives

Three (3) Student Representatives

Academic Registrar - Secretary

121. The disciplinary committee conducted the proceedings on 22nd July, 2013. The Committee was constituted of the following members: -

Prof. Peter K'Obonyo - Acting Principal/Chairman

Mr. L Maurice Awiti - Ag. Director, School of Economics

Dr. Thomas N. Ongoro - Ag. Assistant Director, School of Economics

Mr. J.O. Obosi - College Registrar/Secretary- Secretary

122. There was one *Annmaria Mahaga*, a Senior Administrative Assistant who was in attendance.

123. The committee was hence comprised of, in essence, three members instead of the required six members. The missing members were the Chairperson of the Students in the School of Economics, representative of the College Students' organization and a representative from the Students' Halls of Residence. The upshot is that the entire student body was not represented in the committee. Conversely there were two representatives from the School of Economics instead of one.

124. The Disciplinary Committee recommended to the Respondent's Senate for the expulsion of the Petitioner from the University with effect from 22nd June, 2013.

125. The Senate committee conducted its proceedings on 18th June, 2014. The Committee was constituted of the following members: -

Prof. H. W. Mutoro - Deputy Vice-chancellor (AA) - Chairman

Dr. Olunga - Representing Principal, CHSS

Dr. S. I Akaranga – Representing Dean, Faculty of Arts

Prof. J.W.K.Mariara – Senate Representative

Dr. Ayub Mukhwana – Senate Representative

Prof. N. Ndegwa - Senate Representative

Mr. B. M. Waweru - Academic Registrar (Ag)

126. There were two other persons in attendance. They were *Mrs. L.O. Akaranga* (Deputy Registrar, Examinations (Operations) and *Mr. E. M. Mbuva* (Senior Assistant Registrar, Examinations (Recording).

127. The committee was hence comprised of seven members instead of the required eleven members. Again, the three students' representatives were left out of the proceedings.

128. From the foregoing, the students' representatives did not take part in the disciplinary proceedings against the Petitioner. I have carefully perused the minutes of both meetings and did not see any members who were recorded as absent with or without apologies. There is, as well, no minute explaining the absence of the students' representatives in both meetings.

129. As a result, the only reasonable inference one can make from the exclusion of the students' representatives from both meetings is that the exclusion was intentional. By that, the composition of the committees was contrary to law. That state of affairs, therefore, impeded negatively on the impartiality and independence of the committees.

130. The above is buttressed in many decisions of this Court including ***Republic vs. University of Nairobi ex parte Michael Jacobs Odhiambo & 7 Others (2016) eKLR***.

131. I will now look at the applicability of Article 50(2) in this case. Sub-article (2)(b) and (j) deals with

the sufficiency of the information given to an accused person to enable him or her answer the charge.

132. It is by now well settled that an accused person should be supplied with all the materials the prosecution intends to use at a trial. The Court in ***Domenic Kariuki vs. Republic (2018) eKLR*** discussed the matter at a great length.

133. In this case, the Respondent's letter dated 4th June, 2013 suspending the Petitioner indicated that a detailed copy of the specific charges and particulars and any other related matters will be communicated to the Petitioner. The Petitioner denies being supplied with any such documents before she appeared at the disciplinary committee.

134. The Respondent did not respond to the Petitioner's allegation. The Petitioner's position is, hence, uncontroverted.

135. Sub-article 2(g) is on the right of an accused person to legal representation. The Court or tribunal has a duty to inform an accused person of this right. Failure by a Court or tribunal to discharge the burden renders the trial a nullity. This was discussed in detail in ***Supreme Court Petition No. 5 of 2015 Republic -vs- Karisa Chengo & 2 Others [2017] eKLR*** and also in ***Migori High Court Criminal Appeal No. 44 of 2019 N.M.T. alias Aunty vs. R*** (unreported).

136. Part IV(C)(vi) of the Regulations is clear that legal representation of a student appearing before any disciplinary committee is not allowed. The Regulation, hence, infringes Article 50(2)(g) of the Constitution.

137. Further, by failing to avail the witnesses for cross-examination, the Respondent infringed Article 50(2)(k) of the Constitution.

138. Lastly. there is the issue of the charges preferred and the conviction rendered. This Court has already reproduced those charges above. At the end of the trial, the disciplinary committee resolved as follows: -

> ***Having interviewed the student and considered all the evidence available before the Committee, the student, Ms. Kerubo Martha Moracha – X75/3804/2009 was found guilty of cheating in the examination, STA: 406, Stochastic Processes.***

139. The Petitioner was never charged with any count on cheating in an examination. The conviction was, therefore, in respect of a charge which the Petitioner was never charged with. As such, the Petitioner was not accorded an opportunity to defend herself on the charge of cheating. The conviction cannot stand.

140. Having examined the applicability of Article 50(1) and (2) of the Constitution and in view of the foregoing findings and conclusions, I now return a verdict that the Respondent variously infringed Article 50 of the Constitution in the course of the disciplinary hearings.

141. The issue is answered in the affirmative.

(d) Whether the Petitioner's right to livelihood under <u>Article 26 of the Constitution was infringed</u>:

142. The Petitioner avers that despite appearing before the disciplinary committee, she proceeded to graduate with a Bachelor's degree in Economics and Statistics on 6th December, 2013. She also successfully cleared from the university. When the Petitioner went to the University to collect her degree certificate around 17th December, 2013, she was, instead, served with a letter to the effect that the disciplinary committee had recommended to the Senate for her expulsion from the university.

143. The Petitioner then appealed against the decision to recommend her expulsion. The Senate Committee, however, upheld the decision of the disciplinary committee.

144. As the disciplinary processes went on in the university, the Petitioner secured a one-year sales contract with the Family Bank. The Petitioner annexed a copy of the contract as Exhibit - 14. It is dated 16th October, 2014. The Petitioner contends that the contract was subject to availing a copy of the degree certificate and the academic transcripts. Since the documents were not forthcoming from the university, the Petitioner posits that the contract was terminated.

145. The Petitioner now contend that her right to earn a livelihood was infringed by the Respondent in declining to release the academic documents to her. She relied on *Kitale Shuttle Ltd & 5 Others vs. County Government of T/Nzoia (2015) eKLR* and *Peter K Waweru vs. Republic (2006) eKLR* in urging the Court to find that her right to livelihood is infringed.

146. The Respondent did not specifically respond to this issue. However, it maintained that it had duly complied with the law and asked this Court to dismiss the Petition.

147. I have considered the decisions referred to by the Petitioner in this issue. I echo the position that unless one is lawfully deprived of the right to livelihood, that deprivation offends the right to life and the right to protection of one's human dignity.

148. In this case, I will answer this issue under the limb of remedies.

(e) <u>What remedies, if any, should be granted:</u>

149. The Respondent has extensively and properly so, dealt with the considerations to be taken into account by Courts in determining the remedies to grant to a party. The remedies are discretionary and the onus is always on the party seeking such remedies. The Respondent has made reference to several decisions of this Court and those binding upon this Court. The Petitioner, as well, referred to several decisions on the aspect of remedies.

150. I have carefully considered the decisions. I am indeed grateful to the Respondent for it has laid clear the law.

151. The Petition has to a large extent has succeeded. However, it must be noted that the success is on the procedure in which the decision to expel the Petitioner was made and not on the merits of the decision.

152. In other words, whereas the Respondent may have been justified in making the decision it did, with a view to, among other reasons, uphold the dignity and integrity of the Respondent institution, the processes towards making that decision is impugned.

153. In such instances, a Court must be careful in granting the remedies. The Court of Appeal in ***Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR*** discussed the manner in which Courts must deal with prayers for compensation at length.

154. Although the extract is rather lengthy, it nevertheless expounds a comprehensive comparative analysis on how other jurisdictions have dealt with the issue. The decision has good jurisprudential content. The Learned Judges expressed themselves as follows: -

> *The challenge, in our view is not whether we should interfere with a discretionary award of damages by a trial judge but what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual, by a State. It is important to state from the outset that damages arising out of Constitutional violations also known as Constitutional Tort Actions are within public law remedies and different from the common law damages for tort under private law.*
>
> *It is convenient to consider first, the comparative jurisprudence and general principles applicable to awards and assessment of damages for the violation of the Constitutional rights of an individual*

by a State. We will do so very briefly and broadly because it is not in doubt under common law principles, that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is at issue. However, in this case and as we posited earlier, we would want to consider what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual by a State under public law.

The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of ***Siewchand Ramanoop v The AG of T&T,*** *PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.*

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. (emphasis ours). All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award. (emphasis ours)

In the ***Tamara Merson v Drexel Cartwright*** *and* ***Ag (Bahamas) Privy Council Appeal No. 61 of 2003*** *the Privy Council held that in some cases, a suitable declaration may suffice to vindicate the right which has been breached. The Court quoted the postulation by Lord Scott of Foscote in* ***Merson*** *(supra) in which, after citing a passage from* ***Ramanoop*** *(supra) including the paragraphs set out above, stated thus:*

> "[[18]. These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement

and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary."

Taking que from the above decisions, the Privy Council in ***Alphie Subiah v The Attorney General of Trinidad and Tobago*** *Privy Council Appeal No. 39 of 2007 pronounced itself on the same point stating that: -*

"The Board's decisions in Ramanoop, paras 17-20, and Merson, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in Merson's case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of Ramanoop, and Merson, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in Thompson v Commissioner of Police of the Metropolis [1998] QB 498, 516 D-E) for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whetheran additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasised in Merson, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression."

The position of the Privy Council is in no way altered by the South African Case of ***Dendy v University of Witwatersrand, Johannesburg & Others -*** *[2006] 1 LRC 291 where the Constitutional Court of South Africa held that:*

"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

"…The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

In ***Peters v. Marksman & Another*** *[2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in* ***Fuller v A-G of Jamaica (Civil Appeal 91/1995****, unreported****), where the Court held that:***

It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable… Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the

circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.

The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in ***Doucet-Boudreau v. Nova Scotia (Minister of Education)****, 2003 SCC 62 to include, a remedy that will:*

(1) meaningfully vindicate the rights and freedoms of the claimants;

(2) employ means that are legitimate within the framework of our constitutional democracy;

(3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

(4) be fair to the party against whom the order is made.

*Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "****appropriate and just*** *"according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.*

155. In this case, the Petitioner's rights will certainly be vindicated *vide* appropriate declarations and other orders. Although the Respondent violated the Petitioner's rights aforesaid, as said, the merits of the decisions remain untested. The Petition impugned the manner in which the decision was arrived at. In that case, the issue as to whether the Petitioner's right to livelihood was infringed, and if so the compensation thereto, cannot be answered as it calls for the interrogation of the merits of the decision.

156. In consideration of the circumstances of this matter I am well convinced that the grant of other remedies rather than damages will serve as adequate, just and appropriate.

Disposition:

157. Flowing from these findings and conclusions, the disposition of the Petition dated 3rd May, 2018 is as follows:

(a) The University of Nairobi Regulations Governing the Organization, Conduct and Discipline of Students do not contravene Section 21 of the Statutory Instruments Act.

(b) A declaration hereby issues that Regulation 2(vi) of Part IV(C) of the University of Nairobi Regulations Governing the Organization, Conduct and Discipline of Students infringes Article 50(2)(g) of the Constitution to the extent that it denies legal representation for students facing disciplinary processes. The provision is hereby declared unconstitutional.

(c) A declaration hereby issues that the decision by the Respondent to suspend the Petitioner from the University communicated vide the Respondent's letter dated 4th June, 2013, save for want of a time frame within which the suspension lasts, is lawful.

(d) A declaration hereby issues that the decision to expel the Petitioner from the University is in violation of Articles 47 and 50 of the Constitution for want of fair administrative procedures and a fair trial. The decision is hereby quashed.

(e) The Respondent shall, within 30 days of this judgment, convene its Disciplinary Committee and re-hear the matter and in line with this judgment. In the event the Respondent fails to convene the Disciplinary Committee, the following orders shall thereafter issue: -

(i) A declaration that the decision by the Respondent to suspend the Petitioner from the University communicated vide the Respondent's letter dated 4th June, 2013 is invalid. The decision will then stand quashed;

(ii) An Order that the Respondent shall forthwith release the Petitioner's Bachelor's degree certificate, the academic transcripts and all other necessary documents as requested for by the Petitioner.

(f) As the Petition has partly succeeded and the matter is still current, each party to bear its own costs.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **18th March, 2021.**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Oduor, Counsel for the Petitioner.

Miss Mochana, Counsel for the Respondent.

Elizabeth Wambui – Court Assistant.