REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 13 OF 2019

IN THE MATTER OF: ARTICLES 3, 19, 20, 22, 23, 35, 47, 50, 159, 162(2), 165(3)(B), 175(a),

184, 185 AND 260 OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL

FREEDOOMS IN ARTICLES 20, 28, 35, 47, 48, 50, 73, 201 AND 232 OF THE CONSTITUTION OF KENYA 2010

-AND-

IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTION OF KENYA 2010

-AND-

IN THE MATTER OF: SECTION 4, 6, 7, 8, 9 AND 11 OF THE

FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

-AND-

IN THE MATTER OF: DISCIPINARY HEARING

BETWEEN

ONDARI ISAAC MAGETO.....PETITIONER

-VERSUS-

MACHAKOS UNIVERSITY.....RESPONDENT

JUDGEMENT

1. This suit was commenced by the Petitioner, a third year student pursuing a Bachelor's Degree in Education at Machakos University, against the Respondent University vide the Petition dated 10th April, 2019.

2. According to the petitioner, prior to the events that gave rise to the cause of action herein, he had never had any disciplinary issue at the University. Between January to April, 2018 he attended School Practice Programme at Kambi Mawe High School together with his colleagues, **Osoro Kinara**, **James Munene Githinji**, **James Maina** and **Barrack Meme** and upon clearing the programme he received a good send off and a recommendation from the School Administration.

3. He was however shocked when at the University he received a letter of suspension on or about 23rd July, 2018. Though he responded denying the allegations against him, his response did not elicit any response from the University and instead by a letter dated 17th October, 2018 he was summoned to appear before the University's Disciplinary Committee. Though he requested for the University Rules on Procedure, he was denied the same. Further he has not notified that he could seek the assistance of counsel or a colleague student of his

choice to appear with him and was not furnished with any document, report, complaint letter or any interdiction or proceedings containing any allegations against him. When he presented himself in obedience to the summons, he relied on his statement as well as the clearance letters from Kambi Mawe High School.

4. According to the Petitioner, he did not know who the complainant was and was not accorded a chance to be present when the said complainant testified and was not afforded an opportunity to cross0examoned him/her and if any complaint, material or proceedings and evidence were ever presented he was unaware of the same as the same were not tendered in his presence in order to enable him deal with the same.

5. After the hearing he received a letter purporting to terminate his studies. Though he appealed the decision, he received a letter dated 30th January, 2019 purporting to disallow his said appeal. The Petitioner reiterated that he was not made aware of any rules and regulations that he had breached and none of his said counterparts were called to testify against him. Neither was he made aware that he could call them to testify on his behalf hence he presented his evidence without calling them as his witnesses and that his evidence remained uncontroverted and unimpeached.

6. It was the Petitioner's case that though the allegations made against had far reaching consequences on his future, he was not given a fair hearing on the same. In view of the foregoing the Petitioner contended that his right to natural justice was violated as he was condemned unheard in violation of Articles 10, 27, 43, 47 and 50(1) of the Constitution and sections 3 and 4 of the ***Fair Administrative Action Act***.

7. The Petitioner therefore sought a declaration that constitutional rights were contravened and infringed, an order for compensation and an order for his unconditional reinstatement to continue with his education.

8. The petition was supported by an affidavit sworn by the Petition on 10th April, 2019 in which the said averments were reiterated.

9. He also filed submissions.

Respondent's Case

10. The petition was however opposed by the Respondent vide a replying affidavit deposed to by **Prof. Joyce Agallo**, the deputy Vice Chancellor, Academic and Student Affairs, on 2nd December, 2019.

11. According to the Respondent, the petition should be struck out for reasons that it is an abuse of court process as it does not raise any constitutional questions and the remedies sought therein are available under the law, determinable without any recourse to the Constitution.

12. While the deponent admitted that the Petitioner was a student at Machakos University pursuing Bachelor's Degree in Education (Science) having been admitted in the School of Education (Department of Educational Curriculum Studies) in September 2015, it was deposed that the Petitioner is not a *bona fide* student of the Respondent University as he has not met the registration requirements or financial obligations thereof as required by the University Statutes, as he was expelled from the University and his records closed.

13. It was deposed that the Petitioner in January-April 2018 semester while on Teaching Practice at Kambi Mawe High School as per the requirements of fulfilling his degree programme, engaged in gross misconduct contrary to the University Regulations and the Teachers code of conduct. According to the deponent, on or about November 2017, the Petitioner among other students scheduled to be on teaching practice January-April 2018 Semester were convened for a meeting by the Teaching Practice coordinator who exhaustively briefed them on the teaching practice regulations during which time the Petitioner was issued by the Teaching Practice Coordinator with Teaching Practice Professional Documents including an extract of the School Teaching Practice Regulations, a format of schemes of work and observation forms among other documents.

14. In January 2018, upon arrival at Kambi Mawe High School, the Petitioner and his colleagues were inducted into the School by the Principal of the School and the Deputy Principal together with the other teachers. However, on 5th July 2018, the Teaching Practice Coordinator received complaint and information from the Principal Kambi Mawe High School that the Petitioner and two of his colleagues were involved in sexual relations with students at the said school during the period of their teaching practice. The deponent exhibited copies of a letter dated 5.7.2018 and some statements of the involved students and minutes dated 22.6.2018 of Kambi Mawe High School.

15. It was deposed that the Teaching Practice Co-ordinator on behalf of the University conducted investigations into the allegations in liaison with the Principal of Kambi Mawe High School which revealed that the Petitioner had carnal knowledge with (sic) the minor students at the institution while on teaching practice, leading to moral decay within the School as evident on the high number of pregnancies of students within the same period. As a result, the Petitioner was invited to appear before the Students Disciplinary Committee vide a letter of invitation dated 17.10.2018 a copy of which was exhibited. Through the said letter the Petitioner was informed of the hearing date before the Students Disciplinary Committee; the particulars of charges he was facing; the provisions of the University Statute he was in breach of; his right to make and send a written defence to the Deputy Vice Chancellor (ASA)before hearing date; and his right and mandatory requirement to bring alongside his parent/guardian at the hearing. On 11th September, 2018, the Petitioner presented his written defence and appeared before the Students Disciplinary Committee, comprising of *inter alia,* the Deputy Vice Chancellor Academic and Student Affairs (ASA) who chairs the committee, on 23rd October, 2018 accompanied by his guardian; **Lucy Mokeira Ondari**.

16. At the said meeting, it was averred that the charges facing the Petitioner were read to him by the Chairperson of the Committee, the Deputy Vice Chancellor Academic and Student Affairs (ASA), and he was accorded a chance to respond to the charges in his defence. Before the said Committee, it was deposed, evidence was proving that the petitioner during teaching practice was involved in major disciplinary conduct in complete defiance of Regulation 5 of The Teaching Practice Regulations that provides that:-

Any behaviour which brings the teaching profession into disrepute and which may range from refusing to participate in co-curricular activities, missing a class, failure to prepare a lesson to more serious offences such as flirting with students, being drunk while on duty, having sexual relations with students will result in disciplinary action.

17. According to the deponent, when she asked the Petitioner if he had any witnesses in support of his case, the Petitioner had none. According to her, in the event of a witness being present, his testimony would be heard and taken by the committee. It was averred that though the Petitioner first denied the charges against him, later on he confessed to the Charges. As it is the practice as the Chairperson of Student Disciplinary Committee (SDC) at the end of the disciplinary proceedings, the deponent stated that she personally asked the petitioner and his parents to convey any comments or sentiments to the committee but no complaints were raised on the disciplinary process undertaken or otherwise.

18. The Students' Disciplinary Committee (SDC) acting under the University Statutes Schedule II(3) deliberated and found the Petitioner guilty of the charges of gross misconduct preferred against him and recommended for his expulsion by the Senate as per the University statutes. Pursuant thereto, on 13th November, 2018, a Report dated of the Student Disciplinary Committee meeting was tabled for deliberation by the Senate on the recommendations made by the Student Disciplinary Committee in regards to the matter of *inter alia* the Petitioner herein. The said Report recommending the Petitioner's expulsion from Machakos University was approved by Senate on 13th December, 2018. Upon the approval of the Senate on 13th December, 2018, the Petitioner was expelled vide a letter dated 14th November, 2018.

19. According to the deponent, the Petitioner was not only given an opportunity to convey his written defence, but also accorded an oral hearing in the presence of his guardian where he was accorded an opportunity to make his oral representations in his defence.

20. It was averred that the University Statutes provide for a right of appeal to the Vice-Chancellor which right the Petitioner did exercise by appealing against the decision of the Students Disciplinary Committee on 28th November, 2018 but the appeal was rejected by the Vice-Chancellor on grounds that there was no fresh evidence besides that presented during the Students Disciplinary Committee as envisaged under the University statutes.

21. It was averred that the Petitioner obtained a Clearance Certificate from Kambi Mawe High School signed by the Principal and Cooperating Teachers who were his direct supervisors to confirm that he had returned all school property borrowed from the school during the teaching practice and that he had completed his teaching practice in the school. However, the clearance certificates were not in relation to the discipline of the Petitioner and hence the Principal of Kambi Mawe High School made a confidential report dated 5th July, 2018 on issues of gross indiscipline on the part of the Petitioner after the same came to his attention and he investigated the same. Contrary to the assertions by the Petitioner, a report of gross misconduct was also made from Kambi Mawe High School in regards to his colleagues **James Githinji Munene** and **Osoro Kinara** which report formed the basis of investigations by the Teaching Practice Coordinator that subsequently led to disciplinary proceedings against them.

22. It was contended that the spirit of the University Rules and Regulations encourages a student faced with an indiscipline issue to respond to the allegations personally and does not in any way curtail the right to fair hearing but rather moulds the morals of student by instilling a sense of personal responsibility and accountability.

23. It was averred that the Petitioner did not request and/or inform the Disciplinary Committee that he would be represented by a legal Counsel or had been accompanied by one and neither did he raise the issue of legal representation during their respective disciplinary proceedings hence the issue of legal representation cannot be properly raised now as a ground challenging the decision of the senate.

24. It was further averred that the Petitioner freely and voluntarily agreed, in writing, to be bound by and to comply with the Rules and Regulations of the University when he joined the institution and the Respondent University has an obligation to not only impact on the academics but also mould the students to be responsible citizens.

25. It was therefore deposed that the Petitioner was procedurally and lawfully expelled, due process was followed in accordance to the Constitution of Kenya, 2010, Rules of Natural Justice and University Statutes and the respondent has therefore not breached any of the rights and fundamental freedoms of the petitioner but only discharged its obligations as a University and a public institution. The Respondent's position was that the petition lacks merit, the reliefs sought therein cannot be granted by this court and same ought to be dismissed with costs to the Respondent.

26. It was submitted on behalf of the Respondent that the petition should be struck out for reasons that it is an abuse of court process as it does not raise any constitutional questions and the remedies sought therein are available under private law, determinable without any recourse to the Constitution. The Respondent relied on **E.K. & 5 Others vs. The Registered Trustees of S.H.S [2015] eKLR** and submitted that in this case evidence was adduced before the Students Disciplinary Committee proving that the petitioner during teaching practice was involved in major disciplinary conduct in complete defiance of Machakos University Regulation 5 of The Teaching Practice Regulations

27. In this regard the Respondent relied on **Maureen K. Imbiakha & Another vs. Teachers' Service Commission & 2 Others [2019] eKLR** that the public interest underlying the conduct of teachers as society role models, specifically in matters of morality and fidelity to the law cannot be overstated. According to the Respondent, the Student Disciplinary proceedings against the Petitioner were not a "trial" as contemplated under Article 50(2) of the Constitution of Kenya and it is trite law that administrative proceedings are not adversarial proceedings where all the trappings of litigation are expected to be on show as was stated in the case of **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No.34 of 2009** which decision was quoted with approval in **Republic vs. Kenyatta University Ex-Parte Solomon J Mummah [2013] eKLR** as well as **Egerton University vs. Patel Maulik Prasun [2017] eKLR, Nyongesa & 4 Others vs. Egerton University College [1990] eKLR, Ouma Christopher Odongo v Kenyatta University [2016] eKLR**, **Arthur Kaindi Nzioka v Kenyatta University Misc. Appl. No.316 of 2007, Olouch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR.** It was submitted that the Petitioner was procedurally and lawfully expelled, due process was followed in accordance to the Constitution of Kenya, 2010, Rules of Natural Justice and University Statutes and the respondent has therefore not

breached any of the rights and fundamental freedoms of the petitioner but only discharged its obligations as a University and a public institution. It was reiterated that the Petitioner was expelled from the Respondent's University after due process and there is no basis for an award of monetary compensation.

28. Accordingly, the petition lacks merit, the reliefs sought therein cannot be granted by this court and same ought to be dismissed with costs to the Respondent, it was submitted.

Determinations

29. I have considered the issues raised in this petition.

30. It was contended by the Petitioner that the manner in which the Respondent conducted the said disciplinary proceedings was unfair and that the rules of natural justice were violated in the process. The Petitioner's complaints are that though he requested for the University Rules on Procedure, he was denied the same; that he has not notified that he could seek the assistance of counsel or a colleague student of his choice to appear with him; that he was not furnished with any document, report, complaint letter or any interdiction or proceedings containing any allegations against him; that he did not know who the complainant was and was not accorded a chance to be present when the said complainant testified and was not afforded an opportunity to cross-examine him/her; that if any complaint, material or proceedings and evidence were ever presented he was unaware of the same as the same were not tendered in his presence in order to enable him address with the same; and that he was not made aware of the fact that he could call witnesses.

31. The Courts have over a period of time distinguished between Court litigation or trials and purely disciplinary proceedings. Before dealing with the authorities, it is important to note that the principles running through these cases have now fortunately been legislated in the ***Fair Administrative Action Act, 2015***. Section 4 thereof provides as follows:

> ***(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 4l of the Constitution, the administrator may act in accordance with that different procedure.***

32. It is therefore clear that an opportunity to be heard must not necessarily be by way of oral hearing as is usually the position when one is charged before a court of law. I agree with **Michael Fordham** in ***Judicial Review Handbook*** 4th Edn. at page 1007 that:

> **"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular**

function and circumstances of the individual case".

33. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

> **"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."**

34. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

> **"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."**

35. In my view, reference to hearing the other side must have been with respect to oral representation since I do not see how a decision affecting a person can be made without affording that person an opportunity to present his case either orally or by in writing in light of the provisions of Article 47 and 50 of the Constitution. However, the law is clear that where a tribunal decides to hear one party then it must hear all the parties. See **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR.**

36. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

> **"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."**

37. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

> **"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."**

38. 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 unless the rules and regulations guiding the particular disciplinary proceedings provide otherwise. In this case the complaint against the Petitioner arose from allegations made against him arising from his alleged conduct while he was on teaching practice at Kambi Mawe High School. The Respondent exhibited minutes of the meeting of the Board of Management of the said school held on 22nd June, 2018 in which the Board resolved to report the incident to the Respondent.

39. The minutes of the Students Disciplinary Committee Meeting held on 23rd October 2018 reveals that though the Petitioner initially denied the allegations made against him, after further interrogation, he admitted the wrongdoing. Whereas the Petitioner has denied that he indeed made such admission, it is not for this Court to fault the records of the Petitioner when there is no basis upon which it can do so.

40. From the forgoing, the Petitioner's challenge to the proceedings before the Students Disciplinary Committee cannot succeed.

41. The Petitioner however appealed the decision to the Senate. Whereas the Petitioner need not have appeared before the Tribunal in person, the law expected that he would be heard on his case before a determination either way was made. The hearing can take the form of oral hearing or the applicant can present his case in writing. Either way is permitted. However, to completely lock out a party who has invoked the appellate jurisdiction of the Senate is unacceptable.

42. In this case, the Respondents have not exhibited the proceedings before the Vice-Chancellor that led to the decision dismissing the Petitioner's appeal, assuming there were any such proceedings. Similarly, the Respondent has contented itself with exhibiting only one page of the Regulations. On his part, the Petitioner contended that he was never supplied with a copy of the same. In those circumstances, it was incumbent upon the Respondent in whose custody the said Regulations are to not only exhibit the same but to also show that the same were complied with. By only exhibiting one page and omitting to exhibit the provisions dealing with the appeal, one can only make adverse inference against the Respondent. This is compounded by the fact that the proceedings before the appellate tribunal have not been exhibited.

43. I have perused the decision dismissing the appeal which states that the appeal was rejected as it contravened Schedule VI Clause 17(2) that states:

> ***Any student who is discontinued due to involvement in an examination irregularity may appeal to the Vice-Chancellor against the discontinuation provided there is fresh evidence that was not availed during the disciplinary proceedings.***

44. In this case it is clear that the Petitioner was not charged with involvement in an examination irregularity. Accordingly, the provision which was relied upon in dismissing his appeal was inapplicable. In the absence of the proceedings leading to the said decision one may well be excused in concluding that the Petitioner's appeal was not considered at all, and if it was considered, the same was done under a wrong provision.

45. In the absence of the proceedings leading to the decision dismissing the appeal, it would seem that this was a matter in which the Petitioner's appeal was summarily dismissed, yet no provisions were cited that permitted that kind of a procedure. I therefore associate myself with the position adopted by **Aburili, J** in **Lucy Wanjiku Gitumbi & Another vs. Dedan Kimathi University of Technology [2016] eKLR** where she expressed herself as hereunder: -

> **"63. Furthermore, it is not denied that after the decision of the Disciplinary Committee, the applicants appealed to the Vice Chancellor who constituted an Appeals Committee to hear the appeals which was filed in writing. However, the applicants were never called upon to make oral representations of their respective appeals… 83. In my humble view, the Appeals Committee proved to be little more than a rubber stamp of the decision of the Students Examinations Disciplinary Committee since it never even called on the students to make representations in support of their written appeals before arriving at the verdict of dismissing the exparte applicants' appeals... 84The conclusions I make here is simply that due process was not accorded to the exparte applicants in the hearing of the accusations against them for committing examinations irregularities… I further find that the Dedan Kimathi University of Technology also proceeded to determine the student's appeal without according them adequate opportunity to mount an affective oral submission…"**

46. I also reiterate the position in **Republic vs. Chuka University Ex-Parte Kennedy Omondi Waringa & 16 Others [2018] eKLR** that: -

> **"70. Nonetheless as the Senate was considering an appeal lodged by the applicants challenging their expulsion/ suspension by Grievance Handling Appeals Committee, it was absolutely necessary that the applicants be called upon to choose whether they wished to be present at the said hearing to present their appeals orally, in person or through legal representation or by way of written submissions. Such opportunity was never accorded to them.171. In my view, the failure to accord the applicants an opportunity to be heard during the Senate hearing deprived them of their constitutional right to be heard and to be accorded a fair hearing and to a fair administrative action since the decisions that were to be taken were no doubt going to adversely affect the applicants' rights to education…174. A party does not lose the right to be heard on appeal simply because they were accorded a hearing at the lowest level of the dispute. Being heard on appeal is an opportunity to challenge the manner in which the inferior body or tribunal handled the matter and therefore the applicants should never have been locked out of the appeal process as the denial ousted the applicants from the fair administrative process and from the judgment seat. Had the applicants been heard on appeal to the Senate, they would have had a chance to raise serious issues such as quorum."**

47. In **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** the Court held:

> **"I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; "1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. *if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides.* It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi–lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."**

48. Unless the legal instrument provides for summary dismissal of an appeal, where the right of an appeal is provided in the instrument, the same ought not to be denied by introducing procedures which do not permit a fair hearing and adjudication of the provided avenue for redress. "Appeal" is defined in ***Black's Law Dictionary***, 10th Edition at page 117 *inter alia* as *"A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal."* ***Ballentines Law Dictionary*** on the other hand defines the same word at page 29 *inter alia* as *"The process by which a court or a higher level administrative body is asked to review the action of an administrative agency."* Clearly, what is required is not just a confirmation of the agency's decision as the Senate purported to have done in this matter but a review of the said Student's Disciplinary Committee's decision.

49. In this case, there is no evidence that the Vice find that the grounds upon which the appeal was made did not fall within the purview of the relevant Regulation.

50. In **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation [1948] 1 KB 223**, **Lord Greene** stated (at page 229*)* that:

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

51. In my view, an introduction of a procedure which does not permit the hearing of a party in his case whether orally or otherwise, may well amount to bad faith and constitute irrationality as one cannot be in a position to know what factors were considered by the authority in arriving at the decision. Such a decision may well be described as having being arbitrarily arrived at. This must necessarily be so because statutes are interpreted by reference to their purpose, and statutory powers must be exercised for the purpose for which they were conferred. Public authorities are required to promote, and not to frustrate, the legislative purpose. In my view the purpose of the procedure for appeal is to afford a person aggrieved by the decision made against him or her an opportunity to challenge the same. To thwart that intention by blocking a person's grievance from being agitated without affording any reason for the same amounts in my view to thwarting statutory or legislative intent and purpose. This position was adopted in **R (Haworth) vs. Northumbria Police Authority [2012] EWHC 1225 (Admin)** at [104] cited at page 534 of ***Judicial Review Handbook*** 6th Edn. by **Michael Fordham** where the Court was dealing with the refusal to consent to police pension reconsideration, however strong the merits a decision which was found to be "not in accordance with statutory purpose".

52. Even if the Respondent's submission that after going through the Petitioner's appeal vis-à-vis the Committee's earlier decision, no merit was found in the appeal, section 4(3)(b) of the ***Fair Administrative Action Act*** provides that 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 an opportunity to be heard and to make representations in that regard. As was held in **Republic vs. Chuka University Ex-Parte Kennedy Omondi Waringa & 16 Others [2018] eKLR:**

"175. The applicants also complained that they were never supplied with the proceedings of the Students Disciplinary Committee (SDC) which was subject of the appeal. The respondent never controverted this assertion. This, in my view, violated Section 4(3) (g) of the Fair Administrative Action Act which mandates that applicants must be given information, materials and evidence to be relied upon in making the decision or taking the administrative action."

53. In my view the right of an appeal can only be meaningfully enjoyed if the party appealing is heard before the decision is made**.** For an authority or tribunal entrusted with taking administrative decisions which affect the rights of a person to close itself in an office and by way of fiat dismiss an appeal without procedurally and properly hearing the same and without indicating how the decision was arrived at whether by tossing a coin or otherwise thus leave the petitioner speculating as to the manner in which the determination was made, can be anything but fair. In my view the power given to administrative or executive authorities ought to be properly exercised and must not to be misused or abused. This is so because as elucidated by **Prof Sir William Wade** in his learned work, ***Administrative Law*****:**

"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of [his property] just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"

54. Clearly no reasons have been advanced as to why the appeal was dismissed since the provisions relied upon was not relevant. Article 47(2) states:

"Every person has the right to be given written reasons for any administrative action that is taken against him."

55. Similarly, section 4(3)(d) of the ***Fair Administrative Action Act*** provides 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 statement of reasons. In this case, the decision was that the appeal was rejected as being in contravention of an irrelevant provision. That statement cannot also constitute the reasons for the decision. Accordingly, the decision made by the Respondent violated Article 47(2) of the Constitution and contravened section 4(3)(d) aforesaid.

56. Having considered the foregoing, I am satisfied that the manner in which the appeal was determined did not meet the standards of fairness.

57. Having considered this petition as well as the response, I have no doubt in my mind that the manner in which the Petitioner's appeal was disposed of was unprocedural and violated his rights to fair administrative action. The manner in which the same were conducted did not comply with the provisions of Article 47 of the Constitution.

58. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6**:

> **"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."**

59. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

60. In the premises I find this petition merited.

Order

61. Accordingly, I grant the following orders:

> **a) A declaration that the manner in which the Petitioner's appeal was disposed of was unprocedural and violated his rights to fair administrative action. The manner in which the same were conducted did not comply with the provisions of Article 47 of the Constitution.**
>
> **b) An order compelling the Respondent to consider, hear and determine the Petitioner's appeal while adhering to the rules of natural justice and render a decision thereon within 45 days of this decision and default the Petitioner to be readmitted to his studies.**
>
> **c) I however decline to grant an order for compensation as I do not have the basis upon which such an award can be assessed.**
>
> **d) As the Petitioner's counsel consistently failed to adhere to this Court's directions to furnish soft copies of the pleadings in word format, there will be no order as to the costs.**

62. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF MAY, 2021.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey