



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 85 OF 2019

KENNEDY NJOROGE.....PETITIONER

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

1. The Petitioner, Kennedy Njoroge, was pursuing a master's degree in business administration at the University of Nairobi (the Respondent) when he was allegedly found copying materials from his phone when sitting for DIS Information Systems examination on 16th December, 2017. The Petitioner was taken through the Respondent's disciplinary process, found guilty and expelled. His appeal to the Respondent's appellate organ was unsuccessful.

2. Through his petition dated 5th March, 2019, the Petitioner now seeks orders as follows:-

“a. That this Honourable Court be pleased to order the Respondent to unconditionally readmit the Petitioner to continue pursuing his studies in Master of Business Administration (MBA) programme.

b. An order for compensation to the Petitioner for the violation of his rights.

c. Costs of this petition.

d. Any other or further relief as this Honourable Court may deem fit and just to grant.”

3. The petition is opposed by the Respondent. Each side has given a different version of the facts of the case. The Petitioner's story is found in the petition, his supporting affidavit sworn on the date of the petition and a further affidavit sworn on 15th July, 2019.

4. The Petitioner's averment is that on the morning of 16th December, 2017 while sitting for DIS Information Systems examination, he unwittingly removed his phone from his pocket to confirm the time. It was then that the invigilator by the name Dr. Kariuki appeared shortly thereafter and took away his examination paper, the answer booklet and the student identification card and left.

5. It is the Petitioner's evidence that he tried to explain to the invigilator that he was not cheating and all he wanted was to confirm the time. He even offered his phone to the invigilator for verification but he declined to take it. He was later suspended from the University and told he would be informed on when he would appear before the disciplinary committee.

6. The Petitioner deposed that on 3rd May, 2018 he was summoned to appear before the disciplinary committee on 9th May, 2018 to answer to charges of engaging in examination malpractices contrary to the regulations governing the organization, conduct and discipline of students. The particulars alleged that he was found with his cell phone in the examination room and that the phone contained material relevant to the examination.

7. It is the Petitioner's case that the disciplinary committee did not accord him a fair hearing and had predetermined the outcome of the matter. The Petitioner averred that on 12th June, 2018 he was informed that the College Disciplinary Committee had found him guilty of copying from an unknown material in his phone and recommended that he be expelled from the University.

8. It is the Petitioner's case that the decision to expel him without evidence in support of the alleged wrong was without justification and the punishment of expulsion was excessively disproportionate to the alleged wrong.

9. The Petitioner further deposed that he appealed the decision to the Senate Appeals Tribunal through a letter dated 21st June, 2018 and on 19th October, 2018 he appeared before the Senate Appeals Tribunal. His case is that the Tribunal did not accord him a fair hearing and had a predetermined outcome on the matter.

10. The Petitioner deposed that he was informed through a letter dated 5th December, 2018 that the Senate Appeals Committee had considered his appeal and recommended to the Senate that his appeal was without merit as there was no new evidence and therefore the earlier decision to expel him from the University for examination irregularity stood upheld.

11. At paragraph 15 of the supporting affidavit, the Petitioner gives the reasons for his claim that he was not accorded a fair hearing by averring that:-

“15. That I contend that the hearing was not fair for the following reasons:

a. The committee that heard and determined the matter was not independent and some of its members that sat in the said committee had already pronounced themselves on my guilt prior to the impugned hearing.

b. I was never accorded the right:-

i. to be informed of the allegations against me with sufficient details to prepare my defence;

ii. to be presumed innocent until proven otherwise;

iii. to have adequate time and facilities to prepare a defence;

iv. to be informed in advance of the evidence the board intended to rely on;

v. to have reasonable access to that evidence to adduce and challenge evidence;

c. The board accused me of copying from a relevant material in my phone yet did not produce any evidence to support any claim and even declined to admit my phone as evidence in support of my case.

d. The hearing was so badly conducted that it did not meet the standards of a fair hearing. The board conducted a simulation of a Kangaroo court.”

12. In his further affidavit, the Petitioner denied the Respondent’s averment that he was found copying from some material. He also averred that he never declined to hand over the phone to the invigilator and that he did not leave the examination room before coming back to offer his phone to the invigilator.

13. On the Respondent’s assertion that he was given the charge sheet through a letter dated 21st February, 2018, the Petitioner deposed that the letter and the charge sheet were never given to him until he appeared before the disciplinary committee on 9th May, 2018. Further, that he was indeed casually invited to the disciplinary committee through a phone call.

14. The Petitioner also averred that he sought to appear before the disciplinary committee in the company of his advocate but his request was turned down. He was instead informed that his lawyers will only be required when a case is filed in court and not during the university disciplinary proceedings.

15. The Petitioner also averred that he sought to be given the answer booklet that had been confiscated but he was reprimanded for wasting the committee’s time after he had been caught cheating in the examination.

16. It is the Petitioner’s averment that after the charges were read to him and he pleaded not guilty the committee members proceeded to ask him questions. Most of his answers were, however, criticised and rubbished for not being true, meaning that the committee members had already determined what the truth was. Further, that the fact that the committee had a predetermined position was confirmed by comments such as *“Daktari is incapable of lying.”*

17. The Petitioner further averred that the invigilator testified after he had testified in order to *“seal the loopholes that had arisen during hearing of my case.”* Further that he was *“never given the opportunity to cross-examine him on the veracity of his statement even after I requested to do so.”*

18. It is the Petitioner’s averment that the committee having not found anything to sustain the charge of copying from a phone changed the charge to one of being found with a phone in an examination room. In his view, the charge and the final verdict were completely different and metamorphosed to reach an already predetermined verdict of guilt in the course of the hearing due to the lack of evidence to support the charge initially levelled against him.

19. It is the Petitioner’s averment that his attempt to explain to the Senate Appeals Committee that the phone he had at the time of the examination was not a smart phone and that the examination could not be copied as it was a practical and not a theoretical examination fell on deaf ears. He deposed that the Tribunal members instead dismissed his appeal accusing him of wasting their time because he had no fresh evidence to support his appeal.

20. The Respondent's opposition to the petition is found in the replying affidavits of the Deputy Vice-Chancellor in Charge of Academic Affairs, Professor Julius Ogeng'o sworn on 15th April, 2019 and 22nd July, 2019 and the further affidavit of Dr. James T. Kariuki sworn on 25th September, 2019.
21. In his first affidavit, Professor Ogeng'o averred that during the time of admission the Petitioner was issued with the Student Information Handbook and he also signed the rules and regulations governing the conduct and discipline of students.
22. Prof. Ogeng'o averred that on 16th December, 2017 at around 10.25am while sitting for DIS Information Systems examination, the examination invigilator, Dr James T. Kariuki, found the Petitioner copying some materials from his phone. The invigilator immediately requested the Petitioner to hand over his phone but the Petitioner declined. The invigilator, however, confiscated the Petitioner's student identity card and examination card. The Petitioner left the examination room and came back a few minutes later, wanting to hand over the phone to the invigilator who informed him that he was no longer interested in the phone.
23. Professor Ogeng'o averred that the invigilator forwarded the issue to the Chair of the Department of Management Science through a letter dated 18th December, 2017. The Petitioner was suspended through a letter dated 18th February, 2018 pending disciplinary action.
24. It is Professor Ogeng'o's averment that the Petitioner was then charged through the charge sheet dated 5th April, 2018 with engaging in examination malpractices contrary to the regulations governing the organization, conduct and discipline of students by copying material from his phone. Through a letter dated 3rd May, 2018, the Petitioner was invited to appear before the College Disciplinary Committee on 9th May, 2018 which he did. After the hearing, he was found guilty and a recommendation made to the Senate that he should be expelled. It is Prof. Ogeng'o's deposition that the Senate upheld the recommendation and consequently expelled the Petitioner through a letter dated 21st June, 2018.
25. According to Prof. Ogeng'o, the Petitioner appealed the decision to expel him to the Senate Examination Appeals/Disciplinary Committee through a letter dated 21st June, 2018 and he was invited to appear before the committee on 19th October, 2018 vide the letter dated 15th October, 2018. After hearing the appeal, the committee found no merit in the appeal and the decision was conveyed to the Petitioner via the letter dated 5th December, 2018.
26. Prof. Ogeng'o averred that the Petitioner was aware that cheating in examinations is a serious matter as the information had been conveyed to all the students. He further deposed that the disciplinary process leading to the expulsion of the Petitioner was free and fair and was guided by the rules and regulations governing the conduct and discipline of students.
27. The second supporting affidavit sworn by Professor Ogeng'o is a replica of his first supporting affidavit and I need not reproduce it in this judgment.
28. In the Respondent's further affidavit, Dr James T. Kariuki who was the chief examination invigilator of the examination in issue narrates the events of 16th December, 2017. He averred that at around 10.25a.m he found the Petitioner in possession of a mobile phone and he was making reference to it while writing the examination.
29. Dr. Kariuki deposed that it is a serious irregularity to have a mobile phone in an examination room whether it is on or switched off and the consequence is expulsion. He averred that the Petitioner did not honour his request to hand over the phone which prompted him to confiscate his student identity card and examination card. It is his evidence that the Petitioner then went out of the exam room then came back to where he was to give out the phone as earlier requested but he declined to receive the phone and directed him to resume his seat.
30. According to Dr. Kariuki, when the time slated for the examination lapsed, the Petitioner went for his documents and he made copies and handed the documents back to him. On 18th December, 2017 he escalated the matter to the Chairperson of the Department of Management Science. Dr Kariuki deposed that he testified on 9th May, 2018 before the disciplinary committee and the Petitioner was afforded an opportunity to ask him questions.
31. The Petitioner filed submissions dated 19th November, 2019. On its part the Respondent filed submissions dated 25th September, 2019 and a list of authorities dated 20th November, 2019.
32. What is required of this court in these proceedings is to determine whether the disciplinary procedure to which the Petitioner was subjected to met the constitutional requirements and in particular whether it complied with the rights to fair administrative action and fair hearing.
33. I intentionally reproduced the averments of the Petitioner and the Respondent at length because I believe it is necessary to interrogate the affidavit evidence in order to determine whether the Petitioner was treated fairly.
34. Although I need not delve into the merits of the decision, it is important to review it in order to determine whether the same was a reasonable and rational decision. The Respondent provided the proceedings before the College Disciplinary Committee and the Senate Examination Appeals/Disciplinary Committee.
35. I have perused the petition and the affidavit sworn by the Petitioner in support of the petition. I have already reproduced paragraph 15 of the supporting affidavit in which the Petitioner lists the reasons why he believes he was not afforded a fair hearing.
36. The first reason given as to why the Petitioner believes that the members of the committees that heard his case and appeal were not

independent is that some of the members had already pronounced themselves on his guilt prior to the hearing. He, however, does not name the members or give particulars of how any member of any of the committees had pronounced themselves prior to the hearing. His petition cannot surely succeed on this ground.

37. The second ground upon which the Petitioner hinges his petition has five strands. The first element is that he was not informed of the allegations against him with sufficient details to prepare his defence. This claim is without merit. In the letter dated 21st February, 2018 suspending the Petitioner, the Petitioner was informed that he was caught copying some materials from his mobile phone in contravention of the Rules and Regulations Governing the Organization, Conduct and Discipline of Students. The letter also informed him that he would be invited to appear before the appropriate committee at a date to be communicated.

38. Although the letter was not a charge sheet, it clearly explained to the Petitioner why he was being suspended and alerted him of an upcoming hearing. Another document is the charge sheet dated 5th April, 2018. The offence and the particulars of the offence were clearly stated in the charge sheet.

39. There is also the letter dated 3rd May, 2018 inviting the Petitioner for the hearing. Finally, the proceedings of 9th May, 2018 capture the fact that the charge and the particulars of the offence were read out to the Petitioner prior to the hearing. It is also noted from the proceedings that he did not ask for time to prepare his defence.

40. In light of the documentation on record, it is clear that the Petitioner had sufficient details of the charge which enabled him to prepare his defence.

41. The second element of the second ground is that his right to be presumed innocent until proven otherwise was violated. The Petitioner does not explain how this was so. The evidence on record shows that he was taken through a full trial process prior to the decision to expel him. I therefore find that he has failed to establish this particular allegation.

42. The third element of the second ground is that the Petitioner was not given adequate time and facilities to prepare a defence. The answer has already been given to this issue. It is clear that the Petitioner had sufficient notice to prepare his defence.

43. The fourth element of the second ground is that the Petitioner was not informed of the evidence that was to be relied on. This allegation is not correct. The Petitioner knew from the outset the case against him. There is no evidence that the invigilator who was his chief accuser had recorded any statement that could have been supplied to him.

44. The fifth and final element of the second ground is that the Petitioner was denied reasonable access to the evidence. He also appears to suggest that he was denied the opportunity to adduce and to challenge the evidence in the trial. Apart from what I have already stated, I add that the Petitioner did not adduce any evidence in support of this particular allegation.

45. The third ground upon which the Petitioner faults the disciplinary process is that no evidence was adduced to support the claim that he was copying some material from his phone and that he was denied an opportunity to produce his mobile phone as evidence. A perusal of the proceedings clearly shows that he never asked to produce his phone as evidence during the hearing. In any case, the evidence of the invigilator was sufficient to confirm that he was found copying answers from his phone.

46. There is the claim by the Petitioner that the invigilator declined to take his mobile phone after he offered to give it to him. The invigilator, however, explained that he had initially asked the Petitioner to give him the phone but the Petitioner declined. It was only after the Petitioner had left the examination room that he later came back and offered him the phone but he declined to take it. The committee that heard the matter believed the invigilator.

47. I have looked at the evidence and find that the decision was reasonable. When the invigilator wrote to the Chairperson of the Department of Management Science on 18th December, 2017, which was a day after the incident took place on 16th December, 2017, he clearly indicated that. *"I went to the student and requested for the phone. However, the student refused to hand over the phone."* His memory was fresh at that time and he never changed his testimony throughout the process. His testimony was therefore believable. The Committee that heard the case and the Tribunal that heard the appeal cannot therefore be faulted for believing the invigilator.

48. The last and final ground upon which the Petitioner based his case was that the hearing was so badly conducted that it did not meet the standards of a fair hearing. Again this statement was not backed by any evidence.

49. In his further affidavit, the Petitioner made other allegations as already stated in this judgment. In my view, the allegations were made as an afterthought. For instance he averred that he asked for his lawyer to be present but the request was declined. This is an important request which should have been captured in the proceedings but it is not there. There is no allegation that the proceedings were doctored. The allegation is also an afterthought because denial to access to legal services is such a serious default that the Petitioner could not have forgotten it when he filed his petition. There is no mention about denial of legal services both in the petition and the supporting affidavit. The issue only pops up in the further affidavit.

50. The Petitioner also claimed that he was denied an opportunity to cross-examine the invigilator. The record clearly shows that the invigilator was cross-examined.

51. Another averment by the Petitioner is that he was convicted for entering an examination room with a mobile phone, which was a different offence from the charge he was facing of copying material from a phone. This averment is incorrect as the Committee resolved that *"having interviewed the student, the witness and considered all the available evidence, Mr Kennedy Njoroge – D 61/5453/2017 was found guilty of the charges."* He was therefore found guilty as charged and not for any other offence.

52. The calling of the witnesses was indeed upside down as stated by the Petitioner. The Petitioner was called to testify before the invigilator was called as a witness. Ordinarily, the accuser should have testified before the Petitioner was called upon to rebut the case. I do not, however, find any prejudice suffered by the Petitioner as a result of the order in which the testimony of the witnesses was received. What is important is that the Petitioner was given an opportunity to state his case and test the veracity of the evidence of the other side through cross-examination. This was not a criminal trial and the procedures for criminal trials were not strictly applicable.

53. Looking at the proceedings in totality, I find nothing to make me hold that the constitutional protections were not complied with in the disciplinary process. That means that the petition is without merit. The same is dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

W. Korir,

Judge of the High Court