**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**PETITION NO. 39 OF 2019**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 165(3), 258 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 24, 25, 27, 33, 35, 37, 43, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**GIDEON OMARE.................................................................PETITIONER**

**VERSUS**

**MACHAKOS UNIVERSITY...............................................RESPONDENT**

**JUDGEMENT**

**The Parties**

1. The Petitioner is described in this petition as a male adult Kenyan Citizen of sound mind, while the Respondent is a Public University established under the ***Universities Act*** (No. 42 of 2012) and the Machakos University Service Charter.

**The Petitioner's Case**

2. According to the petitioner, following his expulsion from Machakos University sometimes in December 2018, he petitioned this court vide Machakos High Court Petition Number 11 of 2019, seeking

*inter alia* to be re-admitted back to the Respondent university in 3rd year for normal studies. During the interlocutory stages of the said Constitutional Petition, this Court on the 2nd April 2019, ordered the Respondent herein to permit him to sit for 2ndsemester of 3rd year examinations pending the hearing and determination of the petition with liberty to the Respondent to withhold the results pending further orders of this court.

3. However**,** the Respondent's Deputy Vice-Chancellor, **Prof. Joyce Agalo** in charge of Academic and Student Affairs (DVC, ASA) denied him access to the university premises to prepare for the said examinations as a result of which he complained to the Respondent's Vice-Chancellor vide a letter dated 16th April 2019. He however received a response from the Respondent university vide a letter dated 17th April 2019, informing him that as per the University records he remain expelled regardless of a court order for him to do examinations. The Respondent nevertheless partially permitted him to only sit for the final examination for 2ndsemester of 3rd year but refused to administer CAT examinations on him which CAT examinations are so critical for purposes of computations, tabulations in final results to make a determination whether he passed or not.

4. The Petitioner pleaded that he wrote to the University Administration vide a letter dated 26th April 2019, drawing their attention to this court orders requiring him to do exams in particular to the fact that they had not administered CAT Examinations as envisaged in the order.

5. By a judgement dated 22nd July, 2019 in the said petition, this Court compelled the Respondent to re-admit him to join the University's Bachelor of Education year III hence allowing his petition in full. Despite that the Petitioner's several attempts to avail himself to the University for my Re-admission were to no avail and that to-date the university has neither administered CAT examinations for the 2nd semester of 3rd year nor has it allowed him to sit for the 1st semester of 3rd year as a whole both which examinations are so critical for the purposes of computation and tabulation of final results so as to make a determination whether he qualifies to proceed to the next year of study (4th year).

6. It was the Petitioner's understanding of the orders of this Court that he was not precluded me from doing the Continuous Assessment Tests (CATS) which constitute 30% while final examinations consist 70% of the semester.

7. According to the Petitioner, though the Respondent University applied for stay of execution of the said orders, the Court declined to stay his re-admission back to the university. Following the ruling declining to stay the judgement, the Respondent sat and decided to discontinue his studies as per the letter dated 11th September 2019, a decision which was further supplemented vide a letter dated 30th January, 2020 in furtherance of the one issued on 11th September, 2019.

8. The Petitioner therefore linked his said discontinuation from the university to the orders of this court readmitting him back to the university.

9. According to the Petitioner his discontinuation from the university was based on the grounds that he had failed all his units for his 2nd semester in his 3rd year in contravention of Clause 18. 4 rule 1 of the Rules which provides that a student who fails all units in one semester shall be discontinued.

10. The Petitioner however disclosed that on 30th January, 2020 he received two letters from the Respondent one re-admitting him back to the university to continue with my 3rd year studies while the other one discontinuing his studies at the university on the pretext that he had failed all units taken from 2nd semester of 3rd year.

11. According to the Petitioner, grading of examinations in any given semester constitutes of Continuous Assessment Test which accounts for 30% and the main exam which contribute 70% making it 100% and the said rule is cemented in mandatory terms under Clause 15(2) of Schedule VI of the Machakos University Statutes. In his case, all his units were graded out of 70 instead of 100 as is required under the

Machakos University Statute.

12. It was the Petitioner's case that the decision to discontinue his studies offends the provisions of Clause 15(2) of Schedule VI of the Machakos University statute, Article 47 of the Constitution of Kenya and the ***Fair Administrative Actions Act*** since the CATs were not included nor were the marks for the main exam converted against 100% and the same was not lawful, reasonable and procedurally fair.

13. Aggrieved by the decision of the Respondent to discontinue his studies, he decided to appeal to the University Vice-chancellor in accordance with the Machakos University statute schedule VI. Clause 18.4 Discontinuation Rule 3 and specifically requested for the minutes of the board of examiners that discontinued his studies (which minutes ought to have been accompanied with the letter of discontinuation anyway demonstrating the reasons for the said drastic decision to enable him prepare an effective appeal to the University Vice-Chancellor). As the said minutes were not forthcoming, and the timelines for the appeal was reckoning, he had no option other than appealing notwithstanding the failure to be provided with the said minutes. He prepared my appeal and specifically complained to the Vice-Chancellor that the CAT marks were left out from the very beginning before concluding that he had failed.

14. The Petitioner complained that his future and fate was draconically sealed and the core and essential content of his constitutional right derogated from by the said decision that was arrived at in total disregard of both the precepts of a fair administrative action and the principles of natural justice and by out-right contravention of the Machakos University Statutes, schedule VI. In his view, the decision to discontinue his studies was made in breach of the rules of natural justice and his constitutionally guaranteed right to Education; was in bad faith and failed to meet his legitimate expectations; failed to meet the principles of proportionality which seeks to strike a balance between the adverse effects of which a decision has on the rights and individual liberties and his interest'; was not fair and objective; was made wholly taking into account irrelevant and/or extraneous contradictions and relevant considerations and relevant law and /or university statute.

15. The petition was hinged on Article 10(1) of the Constitution that provides that the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution or enacts, applies or interprets any law or makes or implements public policy decisions; Article 10(2) of the Constitution that provides that the national values and principles of governance include the rule of law, human rights, good governance, integrity, transparency and accountability and contended that the Respondent's act of discontinuing the Petitioner herein does not at all uphold the tenets espoused under Article 10(2) of the Constitution of Kenya and most of all disregarded the rights of the Petitioners in this case; Article 19 of the Constitution that envisages the dignity of individuals and the realization of the potential of all human beings and contended that the acts and /or omissions of the Respondent which include failing to administer the CATS and subsequently discontinuing him runs contrary to the provisions of this Article and Article 21 of the Constitution that makes it a fundamental duty for the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

16. It was the Petitioner's case that to the extent that he was unjustifiably and unreasonably condemned by discontinuation from the respondent university on a pretext that he had failed the incomplete examinations he took without the CATs being administered to him, the following provisions of the constitution were violated:

> a. Article 24 which provides that a right or fundamental freedom in the bill of rights shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable and that the limitation does not derogate from the right or fundamental freedom's core or essential value.
>
> b. Article 43 which decrees that every person has a right to education.
>
> c. Article 47 which requires all administrative actions to be expeditious, lawful, reasonable and procedurally fair and further requires that where aright or a fundamental freed of a person has or is

likely to be adversely affected by administrative action; the person has a right to be given written reasons for the action.

17. He asserted that to the extent that the Respondent failed to grant him full access to the minutes of board of examiners that purported to discontinue my studies, the following provisions of the constitution and the access to information Act have been contravened:

a. Article 35 which decree that every citizen has the right of access to information held by the state organ and information required for the exercise or protection of any right or fundamental freedom.

b. Article 46 which entitle a person to the right of information necessary for them to gain full benefit from goods and services.

c. Section 4(1) & (3) of the ***Access to Information Act*** which entitles every citizen the right of access to information held by any other person where the information is required for the exercise or protection of any right or fundamental freedom and his right shall be provided expeditiously at a reasonable cost.

18. It was further contended that Article 47(1) of the Constitution which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was breached by the Respondent in the following ways:

i. Failing to offer him an opportunity to take his Continuous Assessment Tests (CATs) Examinations for 3$^{rd}$ year 2$^{nd}$ Semester.

ii. Failing to follow the mandatory provisions of Clause 15(2) of Schedule VI of the Machakos University statute

iii. Discontinuing him without following the mandatory provisions of Clause 18.1 (1) of Schedule VI of the Machakos University Statute under which the examinations ought to have attracted an incomplete grade

iv. According to the Petitioner his exam result ought to have been awarded an incomplete grade not a fail as purportedly concluded.

19. The Petitioner lamented that as a result of the foregoing, he has been subjected to extreme cruelty which has affected his emotional wellbeing by being denied the right to education as provided and/or guaranteed under Article 43(1)(f) the Constitution. Further, in discontinuing his studies without following the express guidelines, the Respondent has not only failed to uphold the crucial tenets of human dignity, social justice and respect for human rights, it has fallen short of the principle of good governance and accountability espoused under Article 232 and 259 of the Constitution. He averred that he comes from a very humble background and is at the risk of having his promising life destroyed and risk being rendered destitute and vagrant unless this court intervenes and safeguards his rights from further violation by the Respondent. In his view, the totality of the Respondent’s actions amounts to flagrant violation of his rights as enshrined in the Constitution of Kenya 2010.

20. In support of his petition the petitioner swore an affidavit which he filed in support of his petition and in which he reiterated the foregoing facts. Apart from the same, he averred that he was reliably informed by credible sources from within the university senate, that his examinations were unilaterally re-marked by the university administration without his knowledge and /or complaint. He believed that the sole reasons for re-marking was to ensure that he had failed, and therefore have a ground to discontinue his studies. He also filed a further affidavit in which he refuted the allegations made by the Respondent in the replying affidavit.

21. In his submissions, the Petitioner contended that on or about 11$^{th}$ September, 2019, he received a letter discontinuing his studies at the Respondent’s institution on the basis that he had failed his 3$^{rd}$ year,

second semester examinations. The said letter did not have any reasons why the university board of examiners arrived at the said decision to discontinue his studies and even after he requested for the minutes of the board of examiners, his request was declined on grounds that the requested documents were confidential as can be discerned from the Respondent's letter dated 21st November, 2019. According to him, the most critical reason that informed his request for the minutes of the board of examiners was to enable him understand the reasons why the Respondent reached the said decision and know exactly how to mount a defence at the appellate stage. However, since the said minutes were not forth coming and the timeline for the appeal was reckoning, he had no option other than lodge the appeal.

22. To his dismay, on 30th January 2020, he received two letters from the Respondent, one re-admitting back into the University pursuant to court orders issued on 22nd July, 2019 in Petition Number 11 of 2019 and another letter supplementing the one issued on 11th September 2019, discontinuing his studies at the institution in finality ***"…reference is made to your discontinuation from the university vide a letter dated 11th September 2019"…The decision is therefore <u>upheld</u> and you remain discontinued"*** on the basis that he had failed his 3rd year, second semester examinations without any explanations yet again.

23. Previously, he had been expelled from the Respondent's institution and challenged the decision through Constitutional Petition Number ***11 of 2019*** and this Honourable court quashed the Respondent's decision to expel me and directed the Respondent herein to re-admit him back into year III to continue undertaking his bachelor of Education degree.

24. During the interlocutory stages of the aforementioned case, this Court on 2nd April, 2019 ordered the Respondent herein to allow him to sit for his 3rd year, second semester examinations. According to him, the said examinations did not include CATs marks and the orders of this Court did not preclude him from doing the said CAT examinations because by the time they were being offered he was not allowed to access the university premises or attend lectures/lessons for a simple reason that he was serving his expulsion. Pursuant to the aforementioned orders of this Court, he requested vide a letter dated 26th April, 2019 to be issued with Continuous Assessment Test (CATs) but the Respondent did not allow him to sit for the said exam which accounts for 30% and only allowed me to sit for the main exam which accounts for 70%. His attempts to access the university premises which include the library for purposes of preparing for the examination was denied thus being stripped of the opportunity to adequately prepare for the exams as ordered by court.

25. Having been denied the Continuous Assessment Test (CATs) for the 2nd semester of 3rd year, he only sat for the main exam of 3rd year second semester which accounts for 70% and therefore his results were not compiled and/or tabulated in accordance with the university statutes which provides for tabulation of results based on score of CAT marks and the main exam marks.

26. Being dissatisfied with the Respondents decision to discontinue his studies because, in his view, it was irrational, unfair, unreasonable, malicious, procedurally unfair, made in bad faith and illegal and he applied to be issued with the Respondent's Board of Examiners' proceedings dated 11th September 2020, and/or minutes orally and further since the same did not elicit any response he did a letter dated 12th November, 2019 requesting for the said minutes to adequately prepare for the appeal. However, as the said documents requested were not forthcoming, he ended up lodging an appeal, and the said appeal was summarily dismissed without him being given even the slightest opportunity to defend himself and/or mount a defence against the discontinuation.

27. It was his case that it was the unreasonable, irrational, unfair, unprocedural and illegal conduct of the Respondent informed the filing of the present Petition seeking *inter alia* orders of certiorari to quash the decision to discontinue his studies and an order of mandamus compelling the Respondent to re-admit him and allow him to continue with his studies at the Respondent's institution.

28. In this petition the Petitioner is of the view that the issue that falls for determination is whether his discontinuation from the Respondent University was lawful and should be allowed to stand or be

quashed.

29. According to the Petitioner, by failing to furnish him with the minutes/proceedings leading to the decision to discontinue the Respondent denied him an opportunity to prepare for the appeal adequately and thus denied him the right to a fair trial. Further, the Respondent violated his rights to natural justice which included his right to defend myself against the decision to challenge his discontinuation by not being accorded an opportunity to appear and argue his appeal. In this regard the Petitioner relied on the decision in **Gideon Omare vs. Machakos University [2019] eKLR** and in **Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR** where the Court referred to the case of **The Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, and **Republic vs. County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh [2018] eKLR**.

30. It was submitted that the conduct of the Respondent espoused herein was in violation of the petitioner's right to a fair trial required of administrative bodies as enshrined under Article 47 of the Constitution of Kenya and section 4 of the ***Fair Administrative Action Act***. Further, the denial of the said minutes was a grave violation of Section 4(1) (b) and 4(3) of the ***Access to Information Act***, No. 31 of 2016.

31. According to the petitioner, had he been afforded an opportunity to advance reasons why his studies should not have been discontinued, then he would have informed them that he had not sat for the CAT exam, despite the fact that he had requested for it to be administered and further that he had also been denied a chance to prepare for the main exam by using the school facilities including the library to study and revise since at the time, he had been expelled and not in school. He therefore submitted that the summary dismissal of his appeal without him being heard, amounted to violation of his constitutional right to fair trial.

32. It was submitted that the decision to discontinue his studies on the grounds that the petitioner had failed his 3rd year, second semester examinations was an illegality since it was a clear violation of Clause 15(2) of Schedule VI of the Machakos University Statutes which essentially requires that a student ought to sit both the Continuous Assessment Test which accounts for 30% and the main exam which accounts for 70%. It was submitted that the said section deals with examinations and is couched in mandatory terms and the use of the word **shall** denotes that tabulation of the final marks/grade can only be done upon computation of the CAT marks and the main examination marks. According to the petitioner, the failure by the Respondent to observe the above mentioned provisions of the Machakos University Statutes by failing to administer and/or allow him to sit for CAT exams and thus its decision to discontinue his studies was an violation of the said Section 15(2) of the Machakos University Statutes and thus an illegality.

33. In support of this submission the petitioner relied on the case of **Republic vs. Anti-Counterfeit Agency Exparte Caroline Mangala t/a Hair Works Saloon [2019] eKLR** where the court cited the South African case of **AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and Another**.

34. He contended that the decision to discontinue his education at the University was irrational, unreasonable, unfair, and malicious and made in bad faith since he was denied entry into the university premises which include the library to read, revise and properly prepare for the exam as well as his denial to sit for the CATs despite having requested for it formally through a letter. In this regard the petitioner relied on the case of **Republic vs. Kenyatta University Ex parte Martha Waihuini Ndungu [2019] eKLR** and **Republic vs. Anti-Counterfeit Agency Exparte Caroline Mangala t/a Hair Works Saloon [2019] eKLR**.

35. In summary, it was submitted that the conduct exhibited by the Respondent in first, denying the petitioner entry into the institution for purposes of preparing for exam despite an order of the court, refusal to issue cat exams despite asking for it, summarily dismissing his appeal without even permitting him to make submissions and/or mount a defence, and going ahead on the same day issue him with a

letter of re-admission and at the same time a letter of discontinuation were unfair, illegal, unreasonable, malicious, made in bad faith and a grave violation of his rights as espoused under article 47 and 50 of the Constitution and the rules of natural justice hence the orders sought herein.

36. He therefore prayed for:

> **a) An order of Certiorari quashing the decision of the Respondent discontinuing his studies.**
>
> **b) An order of mandamus directing the Respondent to re-admit him back into the Institution and allowing him to continue with his degree program in 3rd year.**
>
> **c) An order of directing the Respondent to re-admit him back into the institution and allowing him to continue with my degree program in 3rd year.**
>
> **d) An order that the Respondent do pay general damages to the him.**
>
> **e) The Respondent be condemned to pay Costs of this Petition.**
>
> **f) Any other orders and or directions this Honourable Court deems fit to grant.**

**Respondent's Case**

37. In response to the petition, the Respondent relied on a replying affidavit sworn by **Prof Joyce J Agalo**, the Deputy Vice - Chancellor (Academic and Student Affairs) at Machakos University on 10th July, 2020.

38. According to the Respondent, judgement in Petition 11 of 2019 *Gideon Omare vs Machakos University* was delivered on 22nd July, 2019 in which the court ***interalia*** ordered the Respondent herein to re-admit the Petitioner to join the University's Bachelor of Education Year III. Aggrieved by the whole judgement it issued instructions to its Advocates on record herein to appeal against the said judgement and to seek stay of execution of the decree arising thereon from the said judgement and pursuant thereto an appeal was lodged at the Court of Appeal being ***Civil Appeal No. 418 of 2019 Machakos University vs Gideon Omare*** which is yet to be heard and determined. However, the Respondent's application seeking stay of execution was dismissed by the Honourable Court. Similarly aggrieved by the said decision the Respondent gave instructions to their advocates on record herein to appeal against the ruling of the court.

39. According to the Respondent, the Petitioner herein now challenges the decision to discontinue him on grounds of his failure to satisfy the requirements as envisaged under the Machakos University Statutes.

40. The deponent confirmed that she was aware that on 2nd April, 2019, during the pendency of Petition 11 of 2019, this Court issued orders that the Respondent allows the Petitioner herein to sit for his April examinations but withholds his results pending further orders of the court an order which the Respondent complied with by allowing the Petitioner access to the University precincts to sit for his April examinations. While confirming that the office of the Vice-Chancellor received the Petitioner's said letter alleging harassment by security personnel, the deponent averred that and upon consultation with the Director of Security Services of the Respondent herein, the director informed the administration that the Petitioner had not been denied any access to the University but was required to undergo the standard security checks as is the custom for visitors seeking entry to the University precincts.

41. The deponent reiterated that the Petitioner herein voluntarily joined the University, read, understood and committed himself to be bound by the University's Rules and Regulations by signing the letter of acceptance of offer to join the Respondent University. According to her, at the time the Petitioner sat for his April Examinations, he was still expelled from the Respondent University as Petition No.11 of 2019 challenging his expulsion had not been determined by this Court and was therefore a visitor to the

University which fact she communicated to the Petitioner through her letter dated 17th April, 2019.

42. According to the deponent, she is in charge of matters concerning Academics and not security and therefore the allegations that she denied the Petitioner access to the University as alleged is unsupported by evidence, untrue, unfounded and defamatory in light of the public nature of these proceedings. To the contrary, she averred, it is actually the Petitioner who has been hostile towards her person regardless of the fact that she acts in an official capacity in this matter on behalf of the Respondent herein and this has been evident in various social media fora brought to the administration's attention where the Petitioner has mobilized, incited the Respondent's students against her person and the administration even alleging she intends to kill him, matters which she has reported to the Machakos Police Station booked under OB. No. 15/27/02/20.

43. It was her position that the April examinations were marked and graded and released to the other students but the Petitioner's results were withheld pursuant to the orders of this Court for the Respondent to withhold the results. In the said results, the Petitioner herein had failed all the units taken in the second semester in the 2018/2019 Academic year. Subsequently, during the pendency of the Respondent's application for stay, this Court issued orders *interalia* that the Petitioner herein continues with his studies SUBJECT to meeting CONDITIONS and for the Respondent to allow the petitioner to continue with his studies as ordered by this Court, the petitioner had to comply with the University's Rules and Regulations that provides for conditions and registration requirements that students have to adhere to in order to continue with their studies which Regulations explicitly provide that every student shall register for every semester by paying the registration fee and such registration is only considered complete after the student fulfils financial obligations and other registration requirements including passing of examinations for the previous semester.

44. However, the Petitioner had failed to meet the requirement that all his fees must be paid in that he had an outstanding fees balance of Kenyan Shillings Fifteen Thousand Four Hundred and Fifty **(**Kshs. 15, 450/). Further, the University statutes are clear that a student must attend 2/3 of the lectures for a unit in a semester and sit for Continuous Examinations Tests (CATs) that contribute to 30% of the Examinations while Final examinations shall contribute to 70% requirements which the Petitioner had failed to meet. Pursuant to the court orders issued on 21.08.2019 for the Petitioner to continue with his studies subject to meeting conditions, a senate meeting was convened on 11th September, 2019 to discuss *interalia* compliance by the Petitioner with the University Regulations and it was resolved that he be discontinued in his studies for want of compliance with the University Regulations.

45. It was deposed that since Schedule VI. Clause 18.4 Rule 1 of the Machakos University Statute state that a student who fails in all units in any one semester shall be discontinued, based on the foregoing, the Respondent issued the Respondent with a discontinuation letter dated 11th September, 2019. It was also averred pursuant to the judgement of the court dated 22nd July, 2019 and the dismissal of the Respondent's application for stay of execution, the Respondent issued the Petitioner with the said letter dated 30.1.2020 re-admitting him back to the University, but reiterated their position that he remained discontinued for his failure to meet requirements for him to continue with his studies as per the letter dated 30th January, 2020. According to the Respondent, the University Regulations apply uniformly to all students and the Petitioner cannot be accorded special treatment.

46. The Respondent however insisted that it fully complied with the court orders issued on 2nd April, 2019 and the Petitioner sat for his April Examinations in the 2018/2019 Academic Year. As opposed to the Petitioner's allegations that the Respondent University refused to administer CAT examinations, it was contended that the Petitioner was never denied entry to sit for the CATs examinations and neither did he avail himself for the CATS. Further, CATs are continuous in nature administered throughout and during the academic term through various Curriculum based activities and hence not administered together with the main examinations or in one single sitting as the Petitioner alleges. The deponent explained that the marking of examinations is done by the academic staff and not the administration.

47. It was admitted that on 14th November, 2019, the Respondent received the Petitioner's request for 'all

evidence including examination booklets and the said per unit cumulative marks of the said proceedings and minutes of the board of examiners proceedings of your letter dated 11.9.2019' and responded to the said request through their advocates on record vide a letter dated 21.11.2019 received by the Petitioner herein who did not follow up to collect the said minutes for his use.

48. According to the Respondent, the University Statutes provide that a student can only be awarded an incomplete grade where the student is NOT able to sit for his FINAL examinations and not CATs and secondly, the reasons advanced by the student must be found satisfactory by the Senate. Since the Petitioner did sit for his final April examinations, it was contended that he cannot seek refuge under the said provision of Statute. To the Respondent, regulations are in place in educational institutions for a reason and Courts do not run institutions nor do they interfere with structures already in place unless rights or freedoms have been infringed. In this case the Petitioner is among the over 8,000 students who voluntarily and willingly joined the Respondent University, agreed in writing to be bound and adhere to the University Statutes that provide *inter alia* the passing of examinations and fulfilment of other requirements before one can proceed to the next class.

49. The Respondent insisted that the Petitioner was procedurally and lawfully discontinued, 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 therefore the Respondent's position that this petition is without merit and does not meet the test for grant of orders sought and prayed that the same be dismissed with costs to the Respondent.

50. On behalf of the Respondent it was submitted that the Petitioner herein was discontinued for failure to meet the requirements for him to continue with his studies and reliance was placed on **Dennis Kahara Nyaburuginyi vs. Registrar of Academic Affairs, Technical University of Mombasa [2018] eKLR.**

51. According to the Respondent since the Petitioner is among the over 8,000 students who voluntarily and willingly joined the Respondent University, agreed in writing to be bound and adhere to the University Statutes that provide *inter alia* the passing of examinations and fulfilment of other requirements before one can proceed to the next class, it was the duty of the students to abide by those regulations and there is a legitimate expectation that students admitted to the University will obey and adhere to the University Statutes and the University in applying the rules as formulated cannot therefore be said to violate the rights of the Petitioner. The Respondent relied on the case of **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR** and contended that the wisdom from jurisprudence in such matters states that answer booklets cannot be produced before this Court based on the case of **Kenya National Examinations Council vs. Republic ex parte Gathenji and Others [1997] eKLR** as quoted in **Republic vs. Kenya National Examination Council ex parte H N G Suing as a friend and Parent of A H N [2016] eKLR.**

52. It was submitted that the circumstances of this case are that the Petitioner was discontinued in his studies for his failure to meet legal requirements as per the Machakos University Statute pursuant to the directions given by the court that he should continue with his studies subject to meeting conditions and hence the issue of him being given an opportunity to be heard would not arise in the situation. In this regard the Respondent relied on **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009** as quoted in the case of **Republic vs. Kenya National Examination Council ex parte H N G Suing as a friend and Parent of A H N [2016] eKLR** and **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572**

53. It was submitted that on 14th November, 2019, the Respondent received the Petitioner's request for 'all evidence including examination booklets and the said per unit cumulative marks of the said proceedings and minutes of the board of examiners proceedings of your letter dated 11.9.2019'. To this request the Respondent responded through its advocates on record vide a letter dated 21st November, 2019 received by the Petitioner herein who did not follow up to collect the said minutes for his use. The Respondent relied on Section 9 of ***Access to Information Act, No.31 of 2016***

54. It was contended that the Petitioner's application was received by the Respondent, who being an institution was not able to avail the information immediately but was within the timeframe provided by law upon receipt of the Petitioner's letter dated 12.11.2019 to consult and avail the documents to the Petitioner which documents the Petitioner has never collected for his use to date.

55. The Respondent relied on the case of ***Dennis Kahara Nyaburuginyi case*** for the position that legal requirements such as class attendances and contact hours are provisions of law which every student must comply with failure to which he may be disqualified.

56. Based on the foregoing, the Respondent prayed that this Court dismisses the Amended Petition with costs to the Respondent.

**Determinations**

57. The facts of this petition are that the Petitioner herein had earlier on filed Petition 11 of 2019 - **Gideon Omare vs. Machakos University**. After hearing the same, this Court, by its judgement delivered on 22nd July, 2019, ordered the Respondent herein to re-admit the Petitioner to join the University's Bachelor of Education Year III. Before the delivery of that judgement, this Court had on the 2nd April 2019, during the pendency of the petition, ordered the Respondent herein to permit the Petitioner to sit for 2ndsemester of 3rd year examinations with liberty to the Respondent to withhold the results pending further orders of the Court.

58. It is important to determine what according to the Respondent's Statute amounts to examinations. Clause 15(2) of Schedule VI of the Machakos University Statute provides that;

> ***Examinations shall consist of Continuous Assessments (CATs) which shall contribute 30% and University examinations which shall contribute 70%. CAT and other continuous forms of assessment marks may be greater than 30%. Failure to sit for CATs and undertake other continuous assessments shall lead to fail in the unit. Where a course is solely of practical work, it may be examined wholly by continuous assessment and/or practical assessment.***

59. It is therefore clear that a holistic appreciation of the order of 2nd April 2019 was that the Respondent was enjoined to facilitate the Petitioner to undertake both the Continuous Assessments Tests (CATs) and University examinations. According to the Petitioner, despite his several attempts to-date the university has neither administered CAT examinations for the 2nd semester of 3rd year nor has it allowed him to sit for the 1st semester of 3rd year.

60. On its part the Respondent has maintained that the Petitioner was never denied entry to sit for the CATS but the Petitioner did not avail himself for the same.

61. It is important to set out the role of the Courts in matters such as this. It is trite law that the Court ought not to interfere with the decision of the Respondent simply because it holds the view that the said decision was unmerited as long as the same is based on the guidelines put in place by the Respondent unless it be shown that the decision was irrational or unreasonable. Where it is not shown that the decision was unreasonable, I associate myself with the decision of the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others Civil Appeal No. 121 of 2013** that:

> **"the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations."**

62. I also wish to associate myself with the decision in **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011 in which Mumbi Ngugi, J expressed herself as follows while citing with approval the case of Republic –vs- The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 (unreported):**

**"The Council of Legal Education followed to the letter the purpose and objects of the Act including the applicable regulations and this Court has no reason to intervene in a way that interferes with the merit of the decisions clearly falling within the relevant regulations and which have been applied by the Council of Legal Education without any procedural irregularity or for an improper purpose. I decline to do so. The Council of Legal Education has the power and duty to insist on the highest professional standard for those who wish to qualify as advocates. The Regulations are aimed at achieving this. The decision was made on merit and this Court has no reason to intervene. The Regulations and the policy behind the rules were properly made pursuant to the Act and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations...The Council of Legal Education is the best judge of merit pertaining to academic standards and not the courts. Parliament clearly vests the power of formulating policy of training and examining of advocates on the Council of Legal Education and it would be wrong in the view of this court to intervene with the merits of the decision by the Council of Legal Education...a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of *Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223*. In the case before me, there is no evidence to suggest that the 1st respondent, in dealing with the application for admission by the petitioner, acted in any of the ways set out above that would justify interference by this Court with its decision."**

63. The learned Judge continued:

**"I find and hold that it would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above. In judicial review, the courts quash decision made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision which is what this court is being asked to do by issuing a mandamus to compel a re-sit. I reiterate my earlier findings on this point in the case of *R v JUDICIAL SERVICE COMMISSION ex-parte PARENO Misc Civil Application No.1025 of 2003* (now reported) that it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies."**

64. This was a reflection of the position taken in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** in which it was held:

**"so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."**

65. It was therefore appreciated by **Nyarangi JA** in **Daniel Nyongesa and Others vs Egerton**

**University College CA No. 90 of 1989** that:

> **"Courts are very loathe to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run Universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decision has been made without fairly and justly hearing the person concerned or the other side…"**

66. Therefore, if the Petitioner was afforded access to undertake both the CATS and the exams, this court would not be entitled to interfere with the results thereof since this Court cannot transform itself into examiners for the purposes of determining whether or not the result of the marking was in order. However, I must point out that where it is demonstrated that the decision arrived at was clearly unreasonable or irrational, the Court may well interfere.

67. Based on the material placed before me it would be improper for this Court to determine whether or not the process leading to the determination by the Respondent that the Petitioner had failed was proper. That is a matter that was squarely within the province of the appellate tribunal.

68. According to the Petitioner, he did exercise his appellate option. He however faults the appellate process on the basis that despite his application to be issued with the Respondent's Board of Examiners' proceedings dated 11th September 2020, and/or minutes both orally and formally vide his letter dated 12th November, 2019 to enable him adequately prepare for the appeal, the said documents requested were not forthcoming as a result of which he ended up lodging an appeal without the same, an appeal which was summarily dismissed without him being given even the slightest opportunity to defend himself and/or mount a defence against the discontinuation.

69. Here two issues arise. The first is whether the Petitioner was entitled to the said proceedings. Section 4(2) of the ***Fair Administrative Action Act, 2015*** provides as hereunder:

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

70. It is therefore clear that the Petitioner was entitled to be given written reasons for his discontinuation. In the letter dated 11th September, 2019, it was stated that he was discontinued because he had failed in all the units in Second Semester in the 2018/2019 Academic Year and the decision to discontinue him was made pursuant to Schedule VI Clause 18.4 Rule 1 of the University Statute. In my view that was sufficient for the purposes of the aforesaid section. The rationale for reasons for decisions was restated by ***Rose M. B. Antoine,*** in ***'A New Look at Reasons—One Step Forward—Two Steps Backward' (1992) 44 Administrative Law Review 453, 454*** that:

> **"…reasons are essential to the efficient functioning of the machinery of good government. Such efficiency requires that decisions be well thought out and not arbitrary, both of which point to the giving of reasons as a fundamental part of the decision-making process. The giving of reasons affords the decision-making process a measure of impartiality and gives the appearance that decisions are free from impartiality and bias, thus encouraging public confidence in the system of administration. Reasons also tend to give legitimacy to administrative decisions, encouraging acceptance of a decision, even where adverse to the person affected, since reasons appear rational, unbiased, and logical. Reasons are essential to the adequate functioning of the appeal process, as they enable the person affected to know whether it is possible to challenge a decision, and if so, upon what grounds. Reasons also enable a reviewing authority to better understand the basis of the decision, thus allowing that authority to better carry out the appellate function effectively. Reasons form part of the general ideals of due process, that is, that the principles of natural justice and fairness be carried out in any decision making process."**

71. However, Section 6(4) of the ***Fair Administrative Action Act, 2015*** provides that:

***(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.***

***(2) The information referred to in subsection (1), may include-***

***(a) the reasons for which the action was taken; and***

***(b) any relevant documents relating to the matter.***

***(3) The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.***

***(4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.***

***(5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.***

72. It is therefore clear that where a person materially or adversely affected by any administrative action intimates that he intends to challenge an administrative decision, it behoves the administrator to supply him or her with such information as may be necessary to facilitate his or her application for an appeal or review which information may include the reasons for which the action was taken and any relevant documents relating to the matter. Upon receipt of the said request the administrator is enjoined to, within thirty after receiving the request, furnish the applicant, in writing, with the reasons for the administrative action and if the administrator fails to do so the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason. The administrator may however depart from this if it is reasonable and justifiable in the circumstances, as long as he informs the person making the request of such departure. The consequences for failing to give reasons were emphasised in **Priscillah Wanjiku Kihara vs. Kenya National Examination Council (KNEC) [2016] eKLR** in which this court held that where an administrator fails to give reasons, the court can infer that there were no good reasons; also that if the reasons given are not the ones the administrator is lawfully and justifiably entitled to rely upon, the Court is entitled to intervene since the conclusion would be that the administrative action is based on an irrelevant matter.

73. Since the section employs the use of the word ***include,*** I associate myself with the position in **South Bucks District Council & Another vs. Porter [2004] UKHL 33** to the effect that:

> **"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds."**

74. In this case, it is admitted by the Respondent that on 14th November, 2019, it received the Petitioner's request for 'all evidence including examination booklets and the said per unit cumulative marks of the said proceedings and minutes of the board of examiners proceedings of your letter dated 11.9.2019'. It was however its position that it responded to the said request through its advocates on record vide a letter dated 21.11.2019 received by the Petitioner herein who did not follow up to collect the said minutes for

his use. In the said letter dated 21st November, 2019, the Respondent purported to rely on the order of this Court issued on 21st August, 2019 by which the Court permitted the Respondent to withhold the results. What is however intriguing is that during the pendency of the said proceedings, the Respondent purported to discontinue the Petitioner. In my view, the Respondent could not on one hand discontinue the Petitioner while at the same time declining to furnish the Petitioner with the material prescribed in section 6 of the ***Fair Administrative Action Act***. Once the Respondent made a decision which materially or adversely affected the Petitioner such as his discontinuation, the Petitioner was entitled to disclosure under section 6 aforesaid and the Respondent could not fall back on the order issued on 21st August, 2019 to decline to comply with the mandatory requirements of the law, since it was its action that triggered the Petitioner's right under the Act. In other words, the Respondent was blowing hot and cold at the same time. In my view a party ought not to create absurd situations and rely on the same to evade legal consequences.

75. 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."**

76. The second issue taken by the Petitioner is that his appeal was summarily dismissed without him being afforded an opportunity to argue his appeal. While the Respondent insists that the petitioner was procedurally and lawfully discontinued and that due process was followed, it has maintained a deafening silence as regards the Petitioner's complaint that he was never afforced a hearing in his appeal. This is not the first time this Court is dealing with the issue as the same issue was dealt with in details in the earlier petition between the parties herein. In order to drive the point home, I will once again deal with the matter herein.

77. Article 47 of the Constitution of Kenya provides 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.***

78. Procedural fairness is therefore now a constitutional requirement in administrative action and the requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now clear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** Civil Appeal 52 of 2014 in which the Court of Appeal 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."**

79. Once again I have no hesitation in finding for the Petitioner. The Respondent has once again caught the wrong end of the stick. This Court will not tire from its obligation to bring back the Respondent on track when it gets legally derailed and it matters not how many times the derailment occurs. Until such a time that the Respondent gets its act right this Court must bring home to it its constitutional and legal obligation to adhere to the rule of law at all times in its administrative actions. Where it fails to do so it behoves this court to tell it in no uncertain terms that that is how not to conduct its proceedings.

80. In the premises I find this petition merited.

**Order**

81. Accordingly, I grant the following orders:

> **a) A declaration that the final decision of the Respondent discontinuing the Petitioner was tainted with illegality, irrationality and procedural impropriety.**
>
> **b) An order of certiorari bringing into this Court the final decision made by the Respondent discontinuing the Petitioner from the Respondent University.**
>
> **c) An order of mandamus compelling the Respondent to re-hear the Petitioner's appeal in strict compliance with the provisions of Fair Administrative Action Act and to render its decision thereon within 30 days of this decision. In default an order of mandamus shall issue compelling the Respondent to readmit the Petitioner to the University to continue with his degree program in 3$^{rd}$ year.**
>
> **d) The costs of this petition shall be borne by the Respondent.**

82. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 18$^{th}$ day of August, 2020.**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***The Petitioner in person***

***Miss Mbilo for Mrs Wambwa for the Respondent***

***CA Geoffrey***