REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELANEOUS CIVIL APPLICATION NO. 111 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF *CERTIORARI* AND *MANDAMUS* BY MARTHA WAIHUINI NDUNGU

AND

IN THE MATTER OF ARTICLES 47 & 50(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF THE DECISION BY THE STUDENT'S DISCIPLINARY COMMITTEE (KENYATTA UNIVERSITY)

BETWEEN

REPUBLIC...APPLICANT

VERSUS

KENYATTA UNIVERSITY..RESPONDENT

MARTHA WAIHUINI NDUNGU..............................*EX PARTE* APPLICANT

JUDGMENT

Introduction.

1. I find it convenient to start by stating that the disciplinary power of a university is derived from the statute establishing it. It is common for the statute to empower the university Council or some other body to make disciplinary rules or Regulations. Thus, the Respondent's Calendar, 2014-2017 provided *inter alia* that the Respondent's examinations shall be conducted under Rules and Regulations set out by the Senate.

2. It is uncontested that a student of the University is subject to the disciplinary provisions prescribed in the Regulations. Additionally, there is no contestation to the truism that at the time of admission, a Student executes a Bond binding himself/herself to observe the rules and Regulations governing the conduct of the Student while at the University.

3. Perhaps I should add that a university is not just a corporate body created by operation of law. It is also a community of people associated in activities related to thought, truth, and understanding. It must be a place where the broadest possible latitude is accorded to innovative ideas and experiments, where independence of thought and expression are not merely tolerated but actively encouraged. Because thought and understanding flourish in a climate of intellectual freedom; because the pursuit of truth is primarily a personal enterprise, a Code of Discipline must be strongly anchored on principles of intellectual freedom, intellectual honesty, academic honesty, personal autonomy and maintenance of high standards of integrity of academic programs. The code should be interpreted, applied and understood with these principles firmly in mind.

The application.

4. On **4th** July 2018, the *ex parte* applicant successfully obtained leave to commence Judicial Review proceedings seeking orders of *Certiorari* and *Mandamus* without exhausting the Respondent's internal mechanism. The court further ordered that the leave so granted do operate as stay of execution of the Decision of the Respondent's Students Disciplinary Committee rendered on **22nd** December 2017. Pursuant to the said leave, the *ex parte* applicant moved this court on **24th** July 2018 seeking the following orders: -

> *a. **That** an order of certiorari to remove into the high court for purposes of quashing the proceedings and decision of the Respondent's Student Disciplinary Committee of **22nd** December 2017 discontinuing the applicant from studying at the Respondent's University.*
>
> *b. **That** order of Mandamus compelling the Respondent to reinstate the applicant back to her studies and further compelling the Respondent to administer all the exams that the applicant has missed out during the period of her suspension and discontinuation from her studies.*
>
> *c. **That** the cost of this application be provided for.*

Grounds relied upon.

5. The *ex parte* applicant states that on **28th** November 2016, while sitting for her ARE: 227: Theory and Method in the Study of Religion, she was alleged to have been involved in an examination irregularity. She states that by a letter dated **15th** December 2016, she was informed that she had been suspended and would be informed in due course when to appear before the Student's Disciplinary Committee. Further, she states that on **13th** June 2017 she received a call from the Respondent inviting her to a Student's Disciplinary Committee hearing on the **15th** June 2017 and also advising her before proceeding to the hearing to pick an official letter at the Senate Office.

6. She contends that due to the short Notice, she did not have adequate time to prepare for her defense and or call a friend who would have testified in her favour. Also, she states that at the hearing the lecturer who allegedly caught her engaging in the examination irregularity was not called to testify, hence, she was denied her right to cross-examine him contrary to section **4(3)(f) &4(4)(c)** of the Fair Administrative Action Act.[1]

7. Additionally, she states that the decision to expel her was unreasonably delayed, in that, it was more than **12** months after she was suspended and more than **6** months since the hearing was conducted. She states that the delay contravened section **63(3)** of the Universities Act[2], which requires that all matters before the University Council be disposed of within a period of **6** months. Additionally, she contends that she was not supplied with copies of the proceedings and the evidence adduced contrary to section **6(3)** of the Fair Administrative Action Act.[3]

Respondent's Replying Affidavit.

8. **Aaron Tanui**, the Respondent's Legal Officer swore the Replying Affidavit dated **24th** September 2018. He averred that on **6th** December 2016, the Chairman of the Philosophy and Religious Studies Department informed the Registrar of Academics vide an internal memo that the *ex parte* applicant was involved in an examination irregularity during the administration of the ARE: 227: Theory and Method in the Study of Religion Examination on **28th** November 2016 at 11:27 am at SOE 5. He deposed that the examination irregularity in question was the use of a mobile phone to answer examination questions.

9. **Mr. Tanui** also deposed that the Registrar (Academics) forwarded the incident report from the Department of Philosophy and Religious Studies to the Head of Senate Affairs vide a memo dated **15th** December 2016 leading to the suspension of the *ex parte* applicant pending appearance before the Student's Disciplinary Committee vide a letter dated **15th** December 2016. He deposed that vide a letter dated **8th** June 2017, the *ex parte* applicant was informed that her appearance before the Student's Disciplinary Committee would be on **15th** June 2017 at 8.30am.

10. He also deposed that the *ex parte* applicant was aware of the nature of the charges facing her. In addition, he deposed hat the Student's Disciplinary Committee considered her case on **15th** June 2017. He deposed that as evidenced by the minutes, she admitted having been caught using her mobile phone in the examination room, and, that, she knew that having a phone in the examination room was an examination irregularity. He also averred that she requested for forgiveness. He deposed that the actions in question contravened the University Examination Regulations as stipulated in the 2014-2017 University Calendar, page **174** which defines an examination irregularity as (f) possession of mobile phones, i-pods, electronic notebook or any other electronic gadget(s) or source inside the examination room. Additionally, he averred that the University Statute XLVI on University Examinations Regulations at page 140, No. 7 of the 2014-2017 of the University Calendar states that: -

> *"Any examination irregularity, involving either a member of staff or a student, shall be dealt with in accordance with the Statutes and the Regulations governing disciplinary matters."Page 175 of the University Calendar states that any student found guilty of an examination irregularity shall be discontinued."*

11. **Mr. Tanui** averred that the Respondent's Calendar is easily accessible on the Respondent's University website and therefore the *ex parte* applicant's assertions that the University regulations were difficult to find have no merit. He deposed that the Registrar (Academics) vide a memo dated **5th** December 2017 forwarded to the Vice-Chancellor approved Student's Disciplinary Committee Recommendations recommending her discontinuation from studying at the University for committing an examination irregularity.

12. He added that after the *ex parte* applicant was found guilty of an examination irregularity, and, that, she was informed that she would be discontinued from studying at the University vide a letter dated **22nd** December 2017. He deposed that the letter also notified her that she had **14** days to appeal to the Chairman of the Senate. He also averred that the *ex parte* applicant through her advocates wrote to the respondent on **16th** and **19th** January 2018 seeking documents to enable her to prepare an appeal prompting a reply from the Respondent stating that the documents in question are confidential and can only be shared pursuant to a court order. Also, he averred that the *ex parte* applicant has been provided with all the documents and, that, these proceedings are pre-mature since the *ex parte* applicant did not exhaust the internal appeal mechanism.

Guiding principles.

13. There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in judicial review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

14. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach.' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

15. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji**[4]***:-

> *"Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant......."*

16. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

17. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies and tribunals to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

18. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[5]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. **Lord Reid** in ***Animistic -vs- Foreign Compensation Commission[6]*** correctly stated:-

> ***"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."***

19. Nevertheless, whatever the purpose of Judicial Review is deemed to be, some propositions have become clear: orthodox principles of administrative law prescribe that courts engaged in review should not reconsider the merits of the action because they are not the recipients of the discretionary power.[7] Judicial review is not an appellate procedure in which a judge reverses the substantive decision of an administrative body because of the sole ground that the merits are in the applicant's favour. Rather, it is a supervisory procedure whereby a

judge rules only upon the lawfulness of the decision, or the manner in which one was reached. The question for review, therefore, is whether the decision was 'lawful or unlawful'; the question for appeal by contrast is whether the decision was 'right or wrong.'

20. Lastly, the grant of the orders or *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which judicial review orders are sought and satisfy itself that there is reasonable basis to justify the orders sought.

Issues for determination.

21. Upon analyzing the opposing positions presented by the parties, I find that the following issues fall for determination: -

a. Whether the ex parte applicant's right to information was violated.

b. Whether the ex parte applicant's right to a Fair Administrative Action was violated.

c. Whether the Respondent violated the ex parte applicant's right to legitimate expectation.

d. Whether there was unreasonable delay in determining the matter.

*e. Whether the Respondent violated the ex parte applicant's rights under article **50** of the Constitution.*

f. Whether the ex parte applicant has established any grounds for the court to grant the Judicial Review orders sought.

a. Whether the ex parte applicant's right to information was violated.

22. **Mr. Ndungu,** the *ex parte* applicant's counsel submitted that the impugned decision contravened the *ex parte* applicant's right to information enshrined in Article **35 (1) (b)** of the Constitution and section **6 (1)** of the Fair Administrative Action Act.[8] He argued that consistent with Article **35** of the Constitution, the information sought was required for the exercise or protection of a right or fundamental freedom, namely, the right to education guaranteed under Article **43(1) (f)** of the Constitution. He argued that the information sought included relevant documents. He argued that even though the Respondent said that the documents were confidential and could only be supplied pursuant to a court order, it supplied them vide its replying Affidavit without a court order. Further, he argued that the Respondent did not provide the Examination Incident Report referred to as annexure **AT2** in the Replying Affidavit of **4th** April 2018.

23. **Mr. Miano**, the Respondent's counsel's rejoinder was that the information has since been supplied; hence, the issue is now moot.

24. Section **6** of the Fair Administrative Action[9]entitled Request for reasons for administrative action provides that *"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."* Sub-section **2** of Section **6** of *Fair Administrative Action Act*[10] provides that the information referred to in subsection **(1),** may include- the reasons for which the action was taken, and any relevant documents relating to the matter.

25. Though the short title to Section **6** is entitled *"Request for reasons for administrative action,"* the subject of the section is really access to information on administrative action. To this end, the section entitles persons affected by any administrative action to be supplied with information necessary to facilitate their application for appeal or review.[11] The information, which must be supplied in writing within three months, may include reasons for the administrative action and any relevant documents relating to the matter.[12] Where an administrator does not give an applicant reasons for an administrative decision, there is a rebuttable presumption that the action was taken without good reason.[13]

26. However, the Act provides that an administrator may be permitted to depart from the requirement to furnish adequate reasons if such departure is reasonable and justifiable in the circumstances.[14]The administrator must inform the person of such departure.[15] The implication of this provision is that the section allows a limitation of the right to information under Article **35** and the right to fair administrative action under Article **47**.

27. It is clear that the *ex parte* was notified of the impugned decision. She wrote through an advocate and the Respondent replied to the letter. The *ex parte* applicant did not contest the reasons offered. She moved to this court citing the failure to be provided with reasons describing it an "an exceptional circumstance" and sought the courts leave to file this case without exhausting the laid down appellate mechanism. The court allowed the application. Under section **6** the act an aggrieved party is entitled to be provided with reasons to facilitate an appeal against the decision, the moment this court permitted the *ex parte* applicant to move to court under the exceptional circumstances provision, the question of the alleged failure or violation was addressed. This court cannot be invited to make a further finding on an issue that was the subject of the ruling made on **4th** July 2018. If the applicant desired a declaration that her rights had been violated under Article **35** of the Constitution, she ought to have presented her arguments as at that point instead of inviting the court to re-visit a grievance arising from a ground that has been dealt with before.

b. Whether the ex parte applicant's right to a Fair Administrative Action was violated.

28. **Mr. Ndungu** submitted that the Respondent's conduct contravened Article **47** of the Constitution which guarantees every person to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and section **4(3)(f)** and **4(4)(c)** of the Fair

Administrative Action Act[16] which provides that an administrator shall accord the person against whom administrative action is taken an opportunity to cross-examine persons who give adverse evidence against him, a provision, which counsel argued furthers the spirit and intent of Article **47(1)** of the Constitution.

29. To buttress his argument, he cited *Republic v Kenyatta University Ex parte Njoroge Humphrey Mbuthi*[17]where two crucial people whose statements were relied upon in the disciplinary proceedings against an applicant never appeared at the hearing among them the person who claimed ownership of a laptop and the person who allegedly saw the applicant pick it up. Drawing a parallel with the said decision, counsel argued that the lecturer who allegedly caught the *ex parte* applicant engaging in an examination irregularity was not called to testify, hence, she was denied the chance to cross-examine him.

30. The Respondent's counsel **Mr. Miano** argued that the irregularity occurred on **28th** November 2016, and, that, the *ex parte* applicant recorded a statement on the incident. He argued that the *ex parte* applicant was suspended in writing, and, later, she appeared before the disciplinary committee on **15th** June 2017, and, that, she was fully aware of the case against her.

31. The *ex parte* applicant's counsel placed heavy reliance on *Republic v Kenyatta University Ex parte Njoroge Humphrey Mbuthi.*[18]It is settled law that a case is only an authority for what it decides. This position was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[19]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leathem,[20]that "Now before discussing the case of Allen vs. Flood[21] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides...." (Emphasis added)*

32. The ratio of any decision must be understood in the background of the facts of the particular case.[22] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[23] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[24]

33. I have in several decisions stated that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[25] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[26] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[27] My plea is to keep the path of justice clear of obstructions which could impede it.

34. In *Republic v Kenyatta University Ex parte Njoroge Humphrey Mbuthi.*[28]cited by the *ex parte* applicant's counsel, the crux of the dispute is captured in the following paragraph from the judgment:-

> *42. However, the law is now clear that where adverse evidence is given about a person, the person is to be afforded an opportunity to cross-examine the said witnesses. In this case two crucial people whose statements were relied upon in the disciplinary proceedings against the applicant never appeared at the hearing. These were the person who claimed ownership of the laptop and the person who allegedly saw the applicant pick up the laptop. In the absence of these witnesses and as the law required that they be availed for cross-examination, there is no way the manner in which the respondent conducted its proceedings can be said to have met the threshold under Article 47 of the Constitution pursuant to which the* ***Fair Administrative Action Act*** *was enacted. It is not contended by the respondent that its disciplinary rules or procedure provided for a different mode of conducting proceedings from that provided under the Act. Even if there existed such a procedure it had to comply with the letter and spirit of Article 47 of the Constitution.*

35. From the above excerpt, it is clear that the witnesses who were not called were the person who allegedly saw the applicant in the case "pick" a lap top and the owner of the laptop. Clearly, the misconduct in question was stealing a laptop. How could the offence of stealing be established without calling such crucial witnesses? These facts can be distinguished from the facts and circumstances of this case. In the instant case, the *ex parte* applicant is alleged to have been caught engaging in an examination irregularity. She recorded a statement admitting it, she was suspended and the letter of suspension stated the reasons for the suspension. She was invited to attend the proceedings in writing and she was afforded a hearing. She pleaded guilty to the charges and apologized.

36. Article **47** (1) of the Constitution provides that *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."* Briefly, this means that every citizen has a right to fair and reasonable administrative action that is allowed by the law; and to be given reasons for administrative action that affects him or her in a negative way.

37. Lawful means that administrators must obey the law and must be authorized by law for the decisions they make. Reasonable means that the decision taken must be justifiable - there must be a good reason for the decision. Fair procedure means that decisions should not be taken that have a negative effect on people without consulting them first. Also, administrators must make decisions impartially. To ensure fairness, the Fair Administrative Action Act[29] sets out procedures that administrators must follow before they make decisions.

38. The Fair Administrative Action Act[30] was enacted to give effect to the right to just administrative action guaranteed under Article **47** Constitution. The Act defines Administrative Action to include the powers, functions and duties exercised by authorities or quasi-judicial

tribunals; or any act, omission or decision of any person, body, or authority that affects the legal rights or interests of any person to whom such action relates.[31]

39. To be an administrative action, the decision taken must adversely affect rights. Adversely means that the decision must impose a burden or have a negative effect. This includes decisions that; require someone to do something, to tolerate something or not to do something; limit or remove someone's rights; or decide someone does not have a right to something. This is called an "adverse determination of a person's rights. It is not in dispute that the impugned decision imposed adverse sanctions against the ex parte applicant; hence, it fits the above definitions. What is in dispute is whether it was arrived at in a manner that is consistent with the dictates of Article **47** of the Constitution.

40. As the Supreme Court of Appeal of South Africa observed,[32] *"All statutes must be interpreted through the prism of the Bill of Rights.* "This statement is true of decisions made by statutory bodies. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution. It is beyond argument that Article **47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[33] These are the elements the *ex parte* applicant is required to establish in a case of this nature. In fact, absence of one would be sufficient to invalidate the decision. Further, there is a right to be given reasons to any person who has been or is likely to be adversely affected by administrative action.[34]

41. Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order or a decision is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[35]Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[36]

42. Section **4** of the Fair Administrative Act[37] echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

43. Subsection **4** further obliges the administrator to accord affected persons an opportunity: - to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him.

44. Section **7(2)** of the Fair Administrative Action Act[38]provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. Thus, for the court to review an administrative decision, an applicant must demonstrate the above grounds. In fact, not all of them must be proved. Even prove of one of the above is sufficient to invalidate the decision.

45. The decision complained of must affect a person's rights. There are two ways that a decision can affect a person's rights: - **(i)** The decision could deprive a person of their existing rights, or **(ii)** It could affect a person's right by determining what those rights are. In other words, decisions that deprive someone of rights, and those that determine what that person's rights will be, are both "administrative action." Rights are understood in law as when one person has a right to claim something against another person and that other person has a duty to do something. Rights can be the rights granted by the Bill of Rights, by contract or by legislation. Rights can even be created by a promise of an administrator.

46. The impugned decision must have a legal effect; the effect must be direct. This is another way of saying that to qualify as administrative action; decisions must have a real impact on a person's rights. Legal effect means that a decision must be a legally binding determination of someone's rights or obligations. In other words, a decision must establish what someone's rights or obligations are, or must change or withdraw them.

47. As stated above, the Constitution says administrative action must be lawful, reasonable and procedurally fair and that reasons must be given for administrative action that adversely affects rights. There are two parts to the idea of procedural fairness: - The first part is that it is unfair for an administrator to make a decision that adversely affects someone without consulting them first. As we know, a judge is not allowed to convict someone of a crime unless they have been given an opportunity to tell their side of the story. Similarly, an administrator should not make a decision affecting someone without first hearing what they have to say. The second part is that the decision-making process must be free from any real or apparent partiality, bias or prejudice. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially and not because of their own private or personal interest in the matter. As is often said, *"justice must both be done and must be seen to be done."* These two elements or at least one of them would be sufficient to invalidate an administrative decision.

48. There are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given, before the decision is taken, Adequate notice of the nature and purpose of the proposed administrative action, A reasonable opportunity to make representations; After the decision is taken, A clear statement of the administrative action; Adequate notice of any right of review or internal appeal; and Adequate notice of the right to request reasons.[39]

49. "Adequate notice" means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action. The person also needs to know enough information about the proposed administrative action to be able to work out how to respond to the proposed action. They need to know the nature of the action (what is being

proposed) and the purpose (why is the action being proposed).

50. A reasonable opportunity to make representations is a key requirement. The length of time a person should be given to make representations will be different in different circumstances. This should include an opportunity to raise objections, provide new information, or answer charges. A "reasonable opportunity to make representations" can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them.

51. An administrator must clearly state what the administrative action is that will be taken. A person affected by the administrative action must understand what is likely to happen. This will assist the person affected to respond to the action. Using plain and straightforward language will help people to understand exactly what is being planned.

52. I now turn to apply the legal tests enumerated above to the facts of this case. Here is a situation whereby the *ex parte* applicant was caught allegedly engaging in an examination irregularity. She recorded a statement on the issue. She admitted the incident. She was given a suspension letter. She was later called and notified to appear before the Student's Disciplinary Committee. She was advised to collect a letter, which she did. She appeared before the Committee for hearing. She admitted the charges. She cannot not turn round and claim that she was not aware of the nature of charges against her. She cannot now claim she was not accorded adequate notice to prepare for her defense.

53. In *Council of Civil Service Unions v. Minister for the Civil Service*[40] Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality*.[41]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it to *"unreasonableness"* in Wednesbury Case.[42] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

54. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[43]where it was held that once a Judicial Review court fails to sniff any *illegality, irrationality* or *procedural impropriety*, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament, then a court will not interfere with the decision. A decision which falls outside that area can therefore be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

55. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[44]I find and hold that the *ex parte* applicant has not established any grounds to demonstrate the impugned decision is tainted with illegality, irrationality or procedural impropriety.

c. Whether the Respondent violated the ex parte applicant's right to legitimate expectation.

56. **Mr. Ndungu** argued that it was the *ex parte* applicant's legitimate expectation that her statement would be provided to her together with the Examination Incident Report as these are some of the documents/evidence that she should have relied upon at the Student's Disciplinary Committee hearing and is therefore part of the documents that the applicant's advocate requested in the letter dated **16th** January 2018, and, in any event, there is nothing to show that the documents are confidential.

57. **Mr. Miano** did not expressly address this issue.

58. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. Firstly, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

59. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[45] They include - **(i)** there must be a representation, which is "clear, unambiguous and devoid of relevant qualification." **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists, it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

60. Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth***[46] at pages 449 to 450, thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate…. **First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation…. **Second**, clear statutory words, of course, override an expectation howsoever founded…. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

61. I have carefully applied the above time tested and established legal principles to the facts of this case. The *ex parte* applicant says that she was not supplied with "Examination Incident Report as these are some of the documents/evidence." Here is a case where the *ex parte* applicant was caught with un-authorized material in the examination room, namely, a mobile phone. She recorded a statement on the incident herself. She admitted the incident. At the hearing, she also admitted and sought to be forgiven. One wonders what other expectation she had at the hearing on the face of all these admissions. To invoke the doctrine of legitimate expectation in the circumstances of this case would be a grave misnomer.

d. Whether there was unreasonable delay in determining the matter.

62. **Mr. Ndungu** argued that there was an unreasonable delay in determining the matter in that the *ex parte* applicant was suspended on **15th** December 2016, and, that, she learnt about the decision to discontinue her studies on **5th** January 2018 when she was issued with a letter dated **22nd** December 2017. He argued that a period of **12** months had lapsed from the time she was suspended and the time the letter communicating her discontinuation was written, and, that, six months lapsed from the time she was heard and the time the discontinuation was communicated.

63. To buttress his argument, he cited section **63(3)** of the Universities Act[47], which provides that a university council shall expeditiously dispose of all matters before it and in any event, within 6 months. Further, he submitted that under section **62** of the act, a university council might delegate to any committee or any of its members the exercise of its functions or duties under the act or any other written law.

64. **Mr. Miano's** rejoinder to the above contention was that the university calendar was disrupted by a strike, and, in any event, the decision cannot be invalidated by the delay.

65. It true Article **47** (1) of the Constitution provides that *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."*

66. An agency's delay in completing a pending action as to which there is no statutory deadline may not be held unlawful unless the delay is unreasonable in light of such considerations as the agency's need to set priorities among lawful objectives, the challenger's interest in prompt action, and any relevant indications of legislative intent. In considering such challenges, courts are deferential to agencies' allocation of their own limited resources.

67. Guidance can be obtained from the D.C. Circuit, in *Telecommunications Research & Action Center v. FCC ("TRAC")*,[48] which established guidelines to consider when determining whether an agency delay warrants *mandamus* compelling the agency to act. The court stated, "In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant *mandamus*." The court then enumerated several factors, to consider when answering this question. These are - (i) the time agencies take to make decisions must be governed by a "rule of reason." (ii) Where Parliament has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason. (iii) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake. (iv) The court should consider the effect of expediting delayed action on agency activities of a higher or competing priority. (v) The court should also take into account the nature and extent of the interests prejudiced by delay, and, (vi) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. Although these factors are widely cited with regard to whether a court should issue *mandamus* to compel agency action. Courts have also been quick to point out that *"mandamus* is a drastic remedy, suitable only in extraordinary situations."[49]

68. I find is apposite to examine the legal principles governing delay. Two enquiries are to be determined: the first is an objective one and is whether the delay was on the facts unreasonable. The second is whether the delay should be condoned. The first enquiry is a factual one and does not involve the exercise of a discretion. It entails a factual finding and a value judgment based upon those facts. The second enquiry involves the exercise of a discretion. Whether it is in the interests of justice to condone a delay depends entirely on the facts and circumstances of each case.

69. On the first test, delay must be accounted for. The Respondents counsel explained that the delay was caused by a strike that disrupted the University calendar. This explanation is reasonable and acceptable. It was not contested. It is the kind of delay that the court in exercise of its discretion can condone. The argument that the delay in determining the *ex parte* applicant's case was unreasonable fails. It does not fit the above tests.

e. Whether the Respondent violated the ex parte applicant's rights under article 50 of the Constitution.

70. **Mr. Ndungu** argued that the Respondent's conduct violated Article **50(1)** of the Constitution. The contestation here is that the *ex parte* applicant was invited for the hearing two days before the hearing, and, that, due to short notice; she did not have adequate time to prepare her

defense or call a friend who witnessed what transpired on the material day. Additionally, he argued that she only became aware of the charges facing her when she read the letter dated **8th** June 2018 which she received on the day of the hearing. Counsel contended that the proceedings were not fair and did not meet the threshold of Article **50** of the Constitution in that she was not informed of the hearing in good time and that she did not have enough time to prepare her defense including calling a friend who would have testified in her favour.

71. **Mr. Miano's** rejoinder was that the *ex parte* applicant was heard, and, that, she admitted using a mobile phone during the examination. Further, he argued that she was punished as per the Regulations. On the alleged violation of Article **50** Rights, he argued that that there was no need for the applicant to call a witness since she admitted to the irregularity twice, first in her statement and at the hearing.

72. Whether or not a person was given a fair hearing of his case depends on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted: - "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[50]

73. What does fairness require in the present case? The standards of fairness are not immutable. They may change with the passage of time, both in the general, and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.[51]Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[52] In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used "fairness" as an explanation of other grounds of review. This is apparent, for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on "wrongful" or "mistaken" assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

74. I find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava**[53]** that succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** is a distinct right from the right to a fair hearing under Article **50 (1) (2)** of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. It also held that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.**[54]** Fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies.*

75. In any event a trial right to a hearing includes the provision of such information which would render the hearing meaningful in that the affected party is given an opportunity to know all the ramifications of the case against him and thereby is provided with the opportunity to meet such a case."[55] The question of fair hearing is not just an issue of dogma. Whether or not a party has been denied of his right to fair hearing is to be judged by the nature and circumstances surrounding a particular case. The crucial determinant is the necessity to afford the party every opportunity to put his case to the court before the court gives its judgment.[56] A complaint founded on denial of fair hearing is an invitation to the court hearing the case to consider whether the court against which a complaint is made has been generally fair based on equality to all parties before it.[57]

76. I now apply the principles discussed above to this case. I note that the *ex parte* applicant states at the outset "it was alleged she was caught with a mobile phone during an examination." She recorded a statement admitting the charge. This is the same person in these proceedings who is claiming in paragraphs **18** and **19** of her affidavit that she only got to know the nature of the offence after she received the letter dated **8th** June 2018. That cannot be true. Annexed to her application is a letter dated **15th** December 2016. It contents are clear. It refers to the same incident of an examination irregularity. This is the letter suspending her. Additionally, annexed to the *ex parte* applicant's application is a letter dated **22nd** December 2017 communicating the impugned decision. Why lie to this court that she learnt about the case from the letter of **8th** June 2018 when as early as **15th** December 2016 she was served with a letter whose contents are clear. I call this lack of candor. A litigant is always under a solemn duty to be always truthful to the court and present the correct facts to the court and leave it to the court to determine the matter, otherwise, willful misrepresentation of facts is an abuse of court process.

77. In *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others*[58]I observed that "It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use.

78. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[59] The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous, vexations and oppressive.[60]

79. In all fairness, the argument that the *ex parte* applicant learnt of the charges when she read the letter dated **8th** June 2018 cannot pass the test of truthfulness. Additionally, at the hearing she admitted the offence and asked to be forgiven. There is nothing to show that the plea was not voluntary. Having pleaded guilty, she cannot now turn back and allege that she was denied the opportunity to call a witness. Such an argument, is, in my view an afterthought. It cannot stand or pass elementary integrity test.

f. Whether the ex parte applicant has established any grounds for the court to grant the Judicial Review orders sought.

80. **Mr. Ndungu** contended that the appropriate remedy would be for the court to compel the Respondent to reinstate the applicant back to her studies and administer exams to her, which she missed.[61]

81. **Mr. Miano** submitted that the *ex parte* applicant has not met the threshold for judicial review orders as set out in *Republic v University of Nairobi & 3 Others ex parte Patrick Best Oyeso*[62]whereby it was held that in order to succeed in an application for Judicial Review, the applicant must show that the impugned decision is tainted with illegality, irrationality and procedural impropriety. He submitted that the applicant has failed to demonstrate the above grounds. He stated that she pleaded guilty to having committed an examination irregularity. He added that she had the opportunity of denying the charge at the time of recording the statement and at the hearing. He emphasized that this court is only concerned with the decision making process.[63]Further, he argued that the application questions the merits of the decision.

82. Lastly, counsel argued that to establish that the Respondent acted illegally, the applicant is required to show that the Respondent failed to correctly understand, interpret and or apply the law that was used in the decision making process or acted in excess of the rules or exercised powers it did not possess.

83. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either (a) the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or (b) a decision or action that has been taken is 'beyond the powers' (in latin, *'ultra vires'*) of the person or body responsible for it.

84. The *ex parte* applicant seeks an order of *Certiorari* quash the decision. A decision can only be quashed if the body acted without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality.[64] Perhaps I should add that the Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been proved or even alleged that the Respondent acted outside its powers or the decision was arrived at after taking into account irrelevant or extraneous matters.

85. It is my view that the nature and circumstances of the decision fall into the category of areas, which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

86. The applicant also seeks an order of *Mandamus*. *Mandamus* is a judicial command requiring the performance of a specified duty, which has **not been** performed. *Mandamus* is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal** **of action already taken in the exercise of either**.[65]

87. *Mandamus*, *Certiorari* and *Prohibition* are discretionary remedies, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised based on evidence and sound legal principles.

88. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable. For example where the applicant has unreasonably delayed in applying for judicial review, or where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

89. The grant of the orders or certiorari, mandamus and prohibition being discretionary, the court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

90. It is common ground that the respondent has a statutory and moral duty to uphold Discipline at the University including upholding the integrity of examinations administered at the University. It would in general be wrong to whittle away the obligation of the Respondent as a public body to uphold Discipline within the University and enforce compliance with law and Regulations to ensure efficient learning and credibility of the examinations. A lenient approach could be an open invitation to the Respondent to act against its legal mandate.

91. Equally important is the fact that the court should as far as possible, avoid any decision or interpretation which would bring about the result of rendering the system of managing Discipline in Universities unworkable. Additionally, a court of law should be conscious not to render a decision that would compromise the credibility or quality of examination standards and results or create a situation that will go against clear provisions of the law and Regulations governing the conduct of university examinations. Such laws and the Regulations aim at the good of the society by maintaining discipline in Universities and credibility of university examinations. In this regard, the impugned decision meets the proportionality test.

92. The following observation by Charles Goredema is relevant: -

> *"The relationship between a university student and the university appears at first sight to be entirely contractual. It may appear that the student's position is analogous to that of a party to a contract which makes certain demands on him and offers him reciprocal benefits. On enrolling the student, the university under takes to provide tutorship, facilities and a learning environment that is conducive to the pursuit of knowledge. The student in turn undertakes to pay the fees which will make it possible for the university to provide these services. He also undertakes to commit himself to the process of learning. The relationship does, however, have a disciplinary dimension to it. In so far as the university commits itself to creating and maintaining an environment that is conducive to learning, it assumes a position of authority in relation to the student. In turn the student undertakes to accept that authoritative status.*
>
> *A relationship of authority is by definition hierarchical. It is a relationship in which the student is in a subordinate position and the*

university is in a superior, super ordinate, position. The relationship is also administrative. An administrative relationship is characterized by the unequal distribution of power between the subordinate and the super ordinate. The attribute by which the latter is easily identifiable is the vesting of power in it, power which it is in a position to enforce. The power is usually derived from statute, and normally the same statute will define the subsidiary position of the subordinate. A common formula is to provide that every registered student shall be subject to the disciplinary authority of the university council. As an administrative relationship, the student/university relationship is regulated by administrative law. Apart from creating and recognizing certain rights, administrative law also serves to prevent the wrongful encroachment upon or violation of those rights."[66]

93. Additionally, examinations are always considered as one of the major means to assess and evaluate candidate's skills and knowledge be it a school test, university examination, or, a professional examination. Hence, the credibility of examinations offered at the university is of paramount importance.

94. Universities can function properly only if its members adhere to clearly established goals and values. Essential to the fundamental purpose of the learning institutions is the commitment to the principles of truth and academic honesty. The provisions of the governing law and the disciplinary process are designed to ensure that the principle of academic honesty is upheld. While all members in learning institutions share this responsibility, such strict regulations are designed so that special responsibility for upholding the principle of academic honesty lies with the students and teachers to avoid academic dishonesty and safe guard integrity of academic programs.

95. I must reiterate that learning institutions can function properly only if their members adhere to clearly established goals and values. Essential to the fundamental purpose of the learning institutions is the commitment to the principles of truth and academic honesty. The applicable law and Regulations governing conduct of examinations are designed to ensure that the principle of academic honesty is upheld. While all members in learning institutions share this responsibility, such strict regulations are designed so that special responsibility for upholding the principle of academic honesty lies with the students and teachers to avoid academic dishonesty and safe guard integrity of academic programs.

96. In *Chepkorir Rehema (Suing through father and next friend) & 130 Others vs Kenya National Examinations Council*[67] I observed that *"academic dishonesty is a corrosive force in the academic life of learning institutions and is an evil that must be fought zealously. It jeopardizes the quality of education and depreciates the genuine achievements of others. It is, without reservation, a responsibility of all members of the learning institutions to actively deter it."*

97. In the above cited case, I stated that- *"where there are allegations that students resorted to "unfair means…at an examination, this court takes the view that any reliable information suggesting the occurrence of such malpractice in the examination is sufficient to authorize the examining body to take action because examining bodies are responsible for their standards and the conduct of examinations and the essence of the examination is that the worth of every person is appraised without any assistance from an outside source."*

98. Public policy and public interest must be construed strictly to uphold the sanctity and integrity of national examinations. Lord Shaw of Dunfermline in *Local Government Board vs Airlidge*,[68] summed up the position when he held that authorities:-

> "… *must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means"*

99. Applying the law to the facts and circumstances of this case, I find and hold that the *ex parte* applicant has not satisfied any of the conditions for the court to grant the orders of *Certiorari* and *Mandamus*. To hold otherwise would in my view be an affront to the basic and elementary principles of law governing the grant of such orders and the exercise of courts discretion. In view of my analysis, determination and findings herein above, the conclusion becomes irresistible that the *ex parte* applicant's application is fit for dismissal. The upshot is that the orders sought are hereby refused and the application dated **24th** July 2018 is hereby dismissed with costs to the Respondent.

Orders accordingly.

Signed, delivered and dated at Nairobi this 25th day of March 2019

John M. Mativo

Judge.

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[1] Ac No. 4 of 2015.

[2] Act No. 42 of 2012.

[3] Act No. 4 OF 2015.

[4] {2014} eKLR.

[5] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[6] **{1969} 1 All ER 20.**

[7] S. De Smith, H. Woolf and J. Jowell, *Principles of Judicial Review* (Sweet and Maxwell, 1999) at 20.

[8] Act No. 4 of 2015.

[9] Ibid

[10] Ibid

[11] Section 6(1).

[12] Section 6(2)

[13] Section 6(4)

[14] Section 6(4)

[15] Ibid

[16] Act No. 4 of 2015.

[17] {2015} eKLR.

[18] {2015} eKLR.

[19] MANU/SC/0047/1967.

[20] {1901} AC 495.

[21] {1898} AC 1.

[22] *Ambica Quarry Works vs. State of Gujarat and Ors*. MANU/SC/0049/1986

[23] Ibid.

[24] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[25] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr*. (Citing Lord Denning).

[26] Ibid.

[27] Ibid.

[28] {2015} eKLR.

[29] Act No.4 of 2015.

[30] Act No.4 of 2015

[31] Ibid, Section 2

[32]Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and [2000]

[33] Article 47(1) of the Constitution of Kenya.

[34] Article 47(2) of the Constitution of Kenya.

[35] *Kioa v West* (1985), Mason J

[36]See *Onyango v. Attorney General, {1986-1989} EA 456,* ***Nyarangi, JA*** asserted at *page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."* At *page 460* the learned judge added: -*"A decision in breach of the rules of natural justice is not cured by holding that the decision would*

otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

[37] Act No. 4 of 2015.

[38] Act No. 4 of 2015.

[39] Section 6 of the Act.

[40] {1985} AC 374.

[41] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[42] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[43] {2015} eKLR.

[44] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29.

[45] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65.

[46] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000.

[47] Act No. 42 of 2012.

[48] 750 F.2d 70 (D.C. Cir. 1984) ("TRAC").

[50] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[51] See *R v. Secretary of State for the Home Department, ex parte Doody [*1994] 1 AC 531 at 560.

[52] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[53] {2015} eKLR.

[54] Ibid.

[55]*Nisec (Pty) Ltd v Western Cape Provincial Tender Board and Others* 1998 3 SA 228 (C) at 234-5 Davis J

[56]Oguntade, JSC *in Pam & Anor. V. Nasiru Mohammed & Anor.* (2008) 16 NWLR (Pt.1112) 1 @ 48 E – G

[57] Ibid, Per Kekere-Ekun, J.S.C.

[58] Succ Cause no 920 of 2009.

[59] *Public Drug Co v Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415.

[60] In the words of **Oputa J.SC** (as he then was) in (1998) 4SCNJ 69 at 87.

[61] Counsel cited *Onjira John Annyul v University of Nairobi* {2019}eKLR.

[62] {2008}2EA 300. Counsel also cited *Republic v Kenya National Examinations Council ex parte Gathenji & Others* **{1997} eKLR**

[63] Citing *Republic v Registrar of Documents & 4 Others ex parte A.M A* {2018}eKLR.

[64] *Pastoli vs Kabale District Local Government Council and Others* {2008} 2EA 300

[65] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[66]Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa, Charles Goredema Lecturer, Department of Public Law, University of the Western Cape, Zimbambwe Law Review, Vol 13, 1996.

[67] Petition No. 175 of 2016.

[68] {1915} AC 120.