



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CONSTITUTIONAL PETITION NO. 12 OF 2017

PEGGY MAKUNGU MALOVA.....PETITIONER

VERSES

KISII UNIVERSITY.....RESPONDENT

JUDGEMENT

In her amended petition dated 14th August, 2018 the Petitioner prays for an order that this court **quashes Kisii University disciplinary proceedings of 25th January 2018, the decision of Kisii University 24th Senate held on 1st February, 2018 in respect to the expulsion of the Petitioner and the letter dated 9th February, 2018 expelling the Petitioner from Kisii University.**

The Petitioner did support her petition with the affidavit dated 14th August, 2018 in which she has stated that she was admitted at the Respondent university in the year 2011 for a degree in Business Management and Administration. She completed her undergraduate studies in July, 2014 and was due to graduate in the year 2014.

That despite this her name did not appear in the graduation list of the year 2015 and 2016 despite her friends graduating. This then necessitated her to file this petition for the Respondent infringe on her Constitutional Rights as enshrined under Article 43(1) (f) thereof.

The filing of this Petition caused the Respondent to file a reply in which it emerged that the Petitioner had been expelled from the University. She said that the expulsion was secret and therefore illegal to say the least. She said that she was not invited to the meeting that discussed her expulsion as the letter that invited her was received by someone else and not her as she was on leave and further training. She said that the invitation letter was received by one **Dr. Macharia** whom she did not know.

She therefore stated that the expulsion was malicious as she was not given an opportunity to be heard.

The respondent vide the replying affidavit of **Seth Onguti** its legal officer sworn on 25th October, 2018 stated that indeed the Petitioner was admitted in the said institution and was expected to graduate by the year 2016 after satisfying the relevant requirements of the University.

That while the process was on they received a letter from the County Government of Tran's Nzoia requesting them to validate a degree certificate which the Petitioner had presented to them. They wrote to the said County Government that the Petitioner was their continuing student and that she was due to graduate.

Upon scrutiny of the said certificate they found that the same was a forgery as it did not emanate from them and in any case the Petitioner was yet to graduate. This then prompted the Institution to commence disciplinary proceedings and referred the matter to the Criminal Investigation Department.

The Respondent has attached several sets of annexures to the affidavit including the impugned minutes of the disciplinary proceedings which culminated into the expulsion of the Petitioner.

The parties after the close of the pleadings were directed to file submissions which the court has had the advantage of perusing them as well as the attendant authorities.

ANAYSIS AND DETRMINATION

There is no dispute that the Petitioner was enrolled as a student at the Respondent University and was due to graduate after satisfying the examiners. The same did not materialise for the reason that the Respondent received a letter from the Petitioners employer in respect to the degree certificate in the name of the Petitioner in which they needed them to verify.

The consequence was a disciplinary process against the petitioner which culminated in her expulsion from the institution. The degree certificate shows that she was awarded the same on 4th December, 2014. The letter dated 13th June, 2016 explaining the Petitioner's status shows that she was to graduate at end of 2016.

The Respondents vide the letter dated 13th June 2016 wrote to the County Government denouncing the said certificate.

A letter dated 16th January, 2018 then invited the Petitioner to attend disciplinary proceedings and it appears that the same was received by one Dr. Macharia on 19th January, 2018 on behalf of the Petitioner. The minutes of the disciplinary proceedings of 25th January, 2018 shows that the Petitioner was absent and the expulsion was recommended.

The Senate minutes dated 1st February, 2018 approved the expulsion of the petitioner and was notified vide the letter dated 9th February, 2018 to appeal to the vice chancellor.

The Petitioner did not challenge the expulsion and choose to proceed by way of this Petition. The Respondent on its part has submitted that it followed all the Procedures as per its Statutes and it informed the Applicant all through what was taking place but she choose to ignore.

The thrust of the Petitioners application is that she was not a party to the proceedings and that her rights to be heard were infringed.

But was this really the case? I have examined the annexures to the application in support as well as in opposition and I note that the Petitioner has not challenge by way of an affidavit that she was not aware of the meetings and the subsequent decisions. She did not deny the fact that she did not know the said Dr. Macharia who received the invitation letter of the disciplinary committee.

Further she has not denied that the sms of 18th January, 2018 sent to her phone number 254 715588269 was not actually hers. More importantly she has not denied that the fake suspicious degree certificate presented to her employer was not hers.

A critical look at the sms messages attached to the replying affidavit of Mr. Onguti which the Petitioner has not refuted shows that she was all through aware of what was taking place. Even if she was not aware, at least from the affidavits by the Respondent she has not counteracted. In my considered view therefore the Petitioner was seized of the disciplinary proceedings and she must have received all the relevant communications.

Even if in doubt, the circumstances obtaining at that moment namely the desire to ensure that she graduates should have propelled her to take pragmatic efforts. I note that even the telephone number given to the DCI by the respondent is the same and belongs to the Petitioner a fact which she hasn't denied.

Having stated so, it would not be necessary to inquire for now the merits or demerits of the reasons why she did not graduate as that is the preserve of the Respondent who has been mandated by statutes to set the standards. The duty of the court is to inquire whether the rules of natural justice and fair administration were followed by the Respondent. In my considered opinion the same was followed contrary to the Petitioner's averments.

She did not as stated above respond to the averments of the Respondent specifically that she was invited to attend the disciplinary committee. In my view the same was deliberate. She did not bother to appeal to the vice chancellor as advised. Further and which is more grave, she did not deny that the fake certificate given to her employer was indeed hers or not.

24 As was stated in *Republic versus Vice chancellor Jomo Kenyatta University of Agriculture and Technology (2008) eKLR*, the remedy in judicial review is not the merits but the process of the decision making. In the case at hand the Petitioner has herself to blame for failing to respond to the summons. Even if she was away she ought at worst to have sent a representative as at that time she had already filed this petition.

25. Ultimately it was her duty to respond to Mr. Seth Ongutis replying affidavit which indicted her on several fronts including fraud.

26. For the foregoing reasons the Petition is hereby dismissed with costs to the Respondent.

Dated, signed and delivered in open court at Kitale this 28th day of May, 2019.

H. K. CHEMITEI

JUDGE

28/05/19

In the presence of:

Bisonga for Mukabane for Respodnent

Ingosi for Nyamu for the Petitioner

Court Assistant – Kirong

Judgment read in open court.