



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 2 OF 2017

WINNIE KERUBO ONSOMO.....PETITIONER

VERSUS

JOMO KENYATTA UNIVERSITY OF AGRICULTURE

& TECHNOLOGY.....RESPONDENT

JUDGMENT

1. The petitioner, **Winnie Kerubo Onsomu** has brought an action against the Respondent, **Jomo Kenyatta University of Agriculture and Technology**, for cancelling her examinations and expelling her claiming that the decision to expel her was arrived at without regard to the rules of natural justice and an infringement to her right to education.

2. The petitioner's case is contained in her petition dated 11th May 2017 together with her verifying affidavit sworn on even date and her statement dated the 11th May 2017 and a further affidavit filed on the 27th July 2018. The respondent filed a replying affidavit sworn on 8th May 2018 by Dr. Esther Muoria who is the respondent's Registrar in charge of academic affairs. I shall outline the facts before I delve into the legal arguments and the reliefs sought.

3. The Petitioner joined the Respondent in 2013 as a student pursuing Business IT bearing admission No. HD232-C 006-0354/13. While she was a student with the respondent she faced allegations of examination cheating which she claims were false and unfounded and an infringement of her rights. The Petitioner was well conversant with the respondent's examination regulations and did not take into the exam room any written or unwritten material to warrant her expulsion. She contends that the decision to expel her was arbitrary, unjust, unreasonable and unconstitutional and offends values of the constitution particularly the right to Education. She contends further that she was not caught with the written notes on her hand that she was taken out searched and found with no notes on her hands. She did not escape from the exam room to clean her hands. She was allowed back and she proceeded with her exams which were marked but the result was withheld. That she was not caught with any printed documents nor were photos taken as evidence of her cheating during the examination period. That she appeared before the Disciplinary Committee but the decision was flawed she did not breach the University Regulations. Based on the facts the petitioners seeks the following orders:

i. An order of certiorari quashing the decision to expel the Petitioner herein as being arbitrary, unjust, unconstitutional and offends the values and principles of the constitution.

ii. The respondent be and is hereby ordered to re-admit the Petitioner and allow her to do examination.

iii. Costs of this cause be provided for.

4. The Respondent opposed the Petitioner's case. The Respondent's case was that the Petitioner upon admission was furnished with the Respondent's regulations including Common Examination regulations ('Regulations'). Regulation 7(a) (iii) of the regulations provides;

All books papers and instruments not approved for use in the examination, and personal belongings brought to the examination (venue) must be left in such a place of the room as the invigilator shall direct. All papers used during examination must be handed to the invigilator before the candidate leaves the examination room.

5. Regulation 5 (c) provides as follows:

"Invigilators shall have powers to confiscate any unauthorized material or aid brought to the examination room and to expel from the examination room any candidate(s) who create(s) any disturbance(s)."

6. They alleged that on 15th April 2016 the Petitioner was sitting for her organizational Behaviour (HBS 2113/HPS 2302) examination when the respondent's invigilators found the petitioner with written notes on her hands whereupon the Petitioner escaped, cleaned her hands and returned asking to be pardoned by the invigilator. The invigilator prepared a report on the incident and the petitioner was subsequently invited to appear before the Examination Disciplinary Committee to answer to the violation of regulations 7(a) (iii) and 5(c), the penalty applicable under the regulations were:

a) Cancellation of examination results for the candidate involved.

b) Expulsion from the university.

7. The Petitioner filed a written response to the respondent's invitation and was heard on 15th June 2016. The University Examination Disciplinary Committee after hearing and considering the matter found the Petitioner guilty of all charges and made a determination to cancel the petitioner's results and expel her. The Petitioner was informed of the committee's decision via a letter. Being dissatisfied with the findings, the Petitioner appealed to the University Disciplinary Appeals Committee. She was invited to attend a hearing of the appeal via a letter dated 19th August 2016 and the appeal was heard on 31st August 2016 and the decision of University Examination Disciplinary Committee affirmed. The respondent avers that the petitioner has not established with sufficient particularity any breach of the rules of natural justice or the manner in which such breach was occasioned since the petitioner was accorded fair hearing in both Committees. That the petition does not disclose any procedural failures that amount to fundamental irregularities nor has the petitioner provided sufficient fact and or evidence to challenge the merit of the decisions of both Committees. That this court is not the proper forum to determine the issues of examination irregularities.

8. The respondent also contends that the order of certiorari is untenable because an order for certiorari has to be made within 6 months after the making of the decision.

Determination

9. Parties canvassed the matter by way of written submissions and oral submissions. I have considered, their affidavits annexures, their submissions and the law. The following are the main issues for determination from the Petition and the parties' submissions.

1. Whether the petition is time barred by virtue of the 6 month limitation period.

2. Whether the petitioner is entitled to the orders sought.

10. The petitioner has come to court claiming her constitutional rights have been infringed and seeks an order of certiorari to remedy the breach. The first issue for determination is whether this court can grant the order sought in light of the fact that this application was filed after the six months period had lapsed. **Article 22 (1)** of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. **Article 23 (1)** gives the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. **Article 23 (3)** provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including an order of judicial review.

11. From the above, it then follows that courts when presented with a petition in which the petitioner claims that his constitutional rights have been infringed then the six month period under the **Law Reform Act** would not apply as the application emanates from the Constitution and not the **Law Reform Act**. The court when making determinations relating to such petitions can look at the merits of the decision and not merely the decision making process which is the confine of judicial review under the Law Reform Act as was established in in **West Kenya Sugar Company Limited vs. Kenya Sugar Board & another [2014] eKLR**. The Court of Appeal in **West Kenya Sugar Company Limited (supra)** held as follows:

“32. The Constitution has expressly expanded the scope of judicial review in relation to breach of fundamental right or freedom in the Bill of Rights as by Article 23(3)(f) the High Court can grant an order of judicial review as a relief for breach of fundamental right or freedom. The determination of the question of breach of fundamental right or freedom is likely to involve the merits of the decision of a statutory, or public officer or State Officer and not merely the decision making process which is the confine of judicial review under the Law Reform Act and Order 53 CPR. Article 258 of the Constitution is silent as to reliefs the High Court can grant for contravention of other provisions of the Constitution particularly whether the High Court can grant an order for judicial review. The decision whether orders of judicial review are available for general contravention of the Constitution under Article 258 rests with the superior courts and we have to await their decision.

33. If the decision is about the decision making process and the application is made under Law Reform Act and order 53 CPR as in the present case, the jurisdiction of the court is exercised within the narrow limits of judicial review jurisdiction – the decision making process.”

12. I now turn to whether the petitioner is entitled to the orders sought. The petition is brought under **Articles 19, 20, 22, 23, 43(f) and 165** of the Constitution. In her petition the petitioner claims that the decision to expel her was arbitrary, unjust unreasonable, unconstitutional and offends her right to education. The Common Examination Regulations (1st Revision), under Rule 8 of the schedule of punishable examination offences and applicable penalties provide as follows;

“(a) Any complaint that a candidate has committed an examination offence shall be referred to the Examination Disciplinary Committee of Senate (to which the senate has delegated the power to deal with all matters relating to examination irregularities). For the purpose of these regulations, an examination offence shall include any breach of any rules relating to the conduct of

examination and any dishonest practice occurring in the preparation and submission of any work, whether in the course of an examination or not, which counts towards the attainment of a pass in any unit otherwise occurring in connection with an examination.

(b) The Examination Disciplinary Committee of Senate (in the exercise of the appropriate powers delegated by Senate, shall hear and determine any complaint on examination irregularities. The candidate concerned shall be notified in writing by the Registrar (Academic Affairs) of the subject matter of the irregularities and the time and place of hearing. He or she shall be invited to submit his/her written response to the charges and may attend the hearing. Failure to attend the hearing shall not deter the Committee from determining the case against the candidate.”

....

(e) A candidate may appeal to the Vice Chancellor against any decision of Senate or its Disciplinary Committee under paragraph (b) and (c) of these regulations by writing to the Vice Chancellor within fourteen (14) days of being notified of the decision. A candidate so appealing shall be entitled to make submissions in writing and may, with the consent of the Vice Chancellor, appear when the appeal is determined. The Vice Chancellor may dismiss or allow the appeal or vary the penalty. The decision of the Vice Chancellor on any appeal under this regulation shall be final.”

13. Vide a letter dated 31st June 2016 the Registrar (Academic Affairs) invited the petitioner to appear before the University Examination Disciplinary Committee on Wednesday 15th June 2016, at 8:30 a.m., in the Old Boardroom, Main Campus, Juja to answer to charges of violating Examination Regulation 7(a) (iii) and 5 (c). The Petitioner in a letter received by the respondent on 14th June 2016 filed her response in regard to the allegations. The minutes of the students’ Examinations Disciplinary Committee meeting held on 15th and 16th June 2016 reveal that the petitioner denied the charges at the hearing and it was resolved by the Examination Disciplinary Committee that her results be cancelled and she be expelled from the university. This decision was communicated to the petitioner on 28th June 2016 by the Deputy Vice Chancellor. Subsequently on 25th July 2016 the petitioner appealed to the Vice Chancellor against the decision of Examination Disciplinary Committee of Senate and her appeal was heard on 31st August 2016 where the decision of the Disciplinary Committee was upheld.

14. Though the petition is also centred on infringement on the right to Fair Administrative Action under **Article 47 of the Constitution**, the petitioner did not plead violation of **Article 47 of the Constitution** in her petition. **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.

15. In this regard I shall discuss two different views on whether or not the petitioner is required to set out the rights violated with precision. In Noah Joseph Olero v 35 Elected Mca’s of Kisumu County & 3 others [2016] eKLR, the court observed that;

The petitioner does not plead how specific provisions of the Constitution have been violated. In fact, the entire petition does not cite any provision of the Constitution that has been violated. It refers to violation of the Constitution in vague and general terms. Likewise, the Notice of Motion is silent on any provisions of the Constitution. It not the duty of the court or the respondents to trawl through the pleadings and depositions to divine which provisions of the Constitution the petitioner could possibly have meant to invoke. It is for this reason that I find and hold that the petition is fatally deficient. I gave the petitioner an opportunity to amend the petition to clarify his claims before the hearing but he declined the entreaty.

16. On this matter Odunga J was of a different view in the case of Kimani Waweru & 4 others v Central Bank of Kenya & 7 others [2018] eKLR as he observed that;

“Where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former.

17. The principle in Anarita Karimi Njeru v Republic (No.1) [1978] KLR 154 as affirmed by the Court of Appeal in Mumo Matemu v Trusted Society for Human Rights Alliance & 5 Others NRB CA Civil Appeal 290 of 2012 [2013] eKLR was that the Petitioner is obliged to set out his claim in respect of each provision of the Bill of rights violated and elucidate how the provision was violated in respect to him. It would not be proper for this court to make considerations on whether the petitioner’s right to fair administrative action was violated as this was not pleaded. What is clear from the petition is that the right to education under the Bill of Rights has been denied and the petitioner is seeking an order of judicial review to remedy the violation.

18. The petitioner was a student of the respondent and was aware that she was to observe certain rules and regulations failure of which she could be expelled or suspended. She was taken through the University disciplinary process and found in violation of Regulation 7(a) (iii) and 5 (c) of the Common Examination regulations for which the penalties are cancellation of examination results as well as an expulsion from the university. In ALICE NJERI NGICHIRI v KENYATTA UNIVERSITY [2012] eKLR the court held as follows;

“24. The matter before me concerns two important but competing interests, which interests are in turn underlain by two troubling possibilities. The first is the right of a student, who has undergone a course of study at the respondent University, to realize the purpose of that course of study in a timely and efficient manner. The other relates to the interest that the University has in ensuring that those qualifying from its academic training do so with the grades that they deserve, and that there is no

