REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU.

PETITION NO. 18 OF 2018

IN THE MATTER OF REINSTATEMENT OF HAGAR JERONO MELLY (ECS/1004/13).

AND

IN THE MATTER OF AN APPLICATION BY

HAGAR JERONO MELLY....PETITIONER/APPLICANT

VERSUS

UNIVERSITY OF ELDORET.....RESPONDENT

JUDGMENT

1. The Petitioner is a female adult who joined the University of Eldoret (Respondent University) in September 2013 for a Bachelor of Arts (Economics), a 4 year course.

2. The Petitioner completed her 1st year in May 2013, 2nd year in May 2014 3rd year in December 2015 and was to complete 4th year in December 2016. She went for attachment at County Government of Nakuru, Economic Planning Department for 3 months from May to August 2017.

3. The Petitioner was supposed to graduate on 24th November 2017. She could not graduate because she says that the University unfairly expelled her.

4. By her version, what happened was the following. On the 13th of December 2016, she, along with 83 other students sat for an exam for the course, "Economic Policy Analysis." She says that the students were checked on entering the exam room and that when she handed in her script to Sharon Keror there was no complaint. Another student Eliud Mulamba who was accused like her was only given a warning.

5. The Petitioner says she received a letter dated 22nd March 2017 requesting her to appear before the Student's Disciplinary Committee on exam irregularity which was scheduled for 11th April 2017 at 9.00am. She appeared, was heard and told that the verdict would be communicated. There was no further communication to her. Consequently, she proceeded with her other courses.

6. On the 6th of November, 2017, when the Petitioner had gone to find out about her graduation, she was handed over a letter which referred to a Student Disciplinary Committee which purportedly took place on the 4th October 2017. The letter was dated 18/10/2017 and was signed by the Deputy Vice-Chancellor, Academic & Students' Affairs, Prof. Ruth Otunga. The letter informed the Petitioner that the Students' Disciplinary Committee reached the decision to cancel all her examination results and expel her from the University. The offence for which she was found guilty of was being caught with a mobile phone during the Economic Policy Analysis exam.

7. The letter further informed the Petitioner that, in accordance with the University of Eldoret Common Rules and Regulations Governing Undergraduate Examinations, she could appeal the Committee's verdict by writing to the Vice Chancellor within Fourteen (14) days from the date of the letter.

8. The Petitioner immediately filed an appeal. She protested that she had only appeared before the Committee on 11th April, 2017 and had never appeared before the Committee on 4th October, 2017 as purported by the letter dated 18/10/2017 which she had received. She also contested the Committee's findings as well as the punishment recommended. She requested the Senate to overturn the Decision of the Committee.

9. The Petitioner received a letter dated 16/01/2018 signed by the Vice Chancellor, Prof. Teresa Akenga dismissing her appeal. In material part, the letter read:

> In view of your oral submissions during the hearing of the case and evidences presented to the Committee, it has been decided that the verdict of the Students' Disciplinary Committee on Examination Irregularities be upheld. Therefore, the decision to cancel all the results and your expulsion from the University stands.

10. Still dissatisfied by this decision, the Petitioner filed a second Appeal. It is dated 25/07/2018. Her major complaint was that the University Common Rules and Regulations for Undergraduate Examinations on Examination Irregularities, Clause 8.6 provided that an appeal from the Students' Disciplinary Committee on Examination Irregularities should be heard by an Examinations Irregularities Appeals Committee appointed by the Chairperson of Senate yet none was formed in her case and if one was formed, she was not called to appear before it or make any representations before it.

11. The response to the second appeal came vide a letter dated 30/08/2018 signed by the Deputy Vice Chancellor (Administration and Finance), Prof. Wilson Ng'etich. The letter informed the Petitioner that the earlier verdict still stood and the appeal was, therefore, declined.

12. Having reached the end of the tether, the Petitioner filed the Present Petition. It seeks the following prayers:

> a. An order directing the University of Eldoret to reinstate the Petitioner **Hagar Jerono Melly- ECS/1004/13** back to the University forthwith and unconditionally
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> b. A declaration that the Petitioner constitution rights to a credible and a fair hearing were violated and consequently issue an order quashing the decision made by University of Eldoret vide a letter dated 18th October 2017
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> c. An order restoring the Petitioner's results both in 3rd and 4th year and a further order directing the Respondent to include the Petitioner **Hagar Jerono Melly** in the graduation list
>
> d. An order for costs of the Petition
>
> e. Such other orders as this Honourable Court may deem fit to grant

13. In opposition to the Petition, the Respondent University filed a Replying Affidavit deponed on the 18th of January 2019. The Replying Affidavit insists that the Petitioner was involved in examination irregularities which was observed by the Chief Invigilator and the Security Team. It further states that the Disciplinary Committee was properly and legally constituted and carried on its proceedings lawfully. The affidavit further states that the Petitioner is underserving of the equitable reliefs sought.

14. The primary question presented by this Petition is whether the Petitioner was accorded a fair hearing in accordance with Article 47 and 50 of the Constitution; the rules of Natural Justice; and the dictates of the Fair Administrative Action Act

15. Before getting to the substantive issue, I need to peremptorily deal with two technical objections raised by the Respondent University. The first one is that the Court has no jurisdiction because "the issues presented in the Petition are administrative which this Court cannot adjudicate through a Petition such as the present one." It was difficult to understand the true provenance of that line of argument but it seemed to be based on the doctrine of exhaustion. However, on analysis, the doctrine is inapplicable to debar the present suit because the Petition did exhaustion all the remedies under the University instruments before approaching Court.

16. The second objection by the Respondent University is that the Petitioner has not met the threshold for a filing of a constitutional Petitioner. The argument is that the Petitioner has failed to set out the exact constitutional provision she alleges was breached, the particulars infringed upon, and the manner in which this infringement has been occasioned. The Respondent University relied on the famous **Anarita Karimi Njeru v The Republic (1976-1980) 1KLR 1272** *for this argument. That decision was reiterated in* ***Trusted Society of Human Rights Alliance v The AG & 2 Others (Petition No. 229 of 2012)***. *As our Courts have previously said, the objective of the doctrine announced in* **Anarita Karimi Njeru** was to ensure parties state their case with sufficient particularity to give notice to the Respondents about the nature of their case. I can say here without the need for laborious analysis that it was fairly obvious that the issue at hand was whether the Respondent has breached Article 47 and 50 of the Constitution in the way it handled the Petitioner's case. I would also say readily that the Petitioner included sufficient details for the Respondent University to respond to the suit.

17. This takes us to the substantive question presented: has the Petitioner proved her claim on merit? The Petitioner's complaint is that she was not granted fair hearing. She points to seven factors to demonstrate this:

> a. First, she claims that she received no communication about the hearing of her case until she went to clear for her graduation more than six months later.
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> b. Second, the Petitioner says that the letter announcing the decision of the Disciplinary Committee wrongly claimed that she appeared before the Committee on 18/10/2017 which was untrue.
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> c. Third, the Petitioner says that although the University Rules provide for the formation of an Appeals Board to consider her appeal, in fact, none was formed to consider her case.
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> d. Fourth, the Petitioner says that she was not heard during her appeal.

e. Fifth, the Petitioner objects that the letter expelling her was written by a person who was not part of the Committee which made the decision. She complains that a party cannot make a decision when she was not part of the hearing.

f. Sixth, the Petitioner claims that the decision to expel her is unfair because another student facing a similar offence was only suspended for a year – yet she was expelled from the University.

g. Seventh, the Petitioner argues that the decision reached by the Disciplinary Committee and affirmed by the Vice Chancellor was substantively irrational.

18. The Respondent University does not contest that the Petitioner had a right to be heard. It merely argues that the right was given and that her submissions were taken into account. It argues that the DVC-Academics wrote in her capacity as the DVC which is an administrative duty and not as one who sat as part of the deliberations. The University says that the offence by the other student was substantively different than the offence the Petitioner committed: the Petitioner not only had a mobile phone, but she ran away with the phone and exam paper while the other student merely had contraband notes ("Mwakenya") during the exam.

19. The Respondent University argues that there is no requirement for an appeal to be heard viva voce and that it cannot be said that the Petitioner was not given an opportunity to be heard.

20. I will begin by noting that although this has been filed as a constitutional petition rather than Judicial Review simpliciter, the standards of review are the same. The main point is that the Court does not second-guess the decisions of administrative bodies which have acted within their powers. The review poise taken by the Courts is accurately taken in the treatise, ***The Supreme Court Practice, 1997 Vol. 53/1-14/6*** in the following words:

> The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.

21. I think this is a good place to begin an analysis of the present case. The Court of Appeal put it quite felicitously in ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd***:-

> Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

22. Hence, as our Courts have said before, "where a public authority has acted in exercise of its discretion, the Court is only entitled to interfere with the exercise of discretion in the following situations:- (i) where there is an abuse of discretion; (ii) where the decision-maker exercises discretion for an improper purpose; (iii) where the decision-maker is in breach of the duty to act fairly; (iv) where the decision-maker has failed to exercise statutory discretion reasonably; (v) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (vi) where the decision-maker fetters the discretion given; (vii) where the decision-maker fails to exercise discretion; (viii) where the decision-maker is irrational and unreasonable." See ***Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze.***

23. In the present case, the *Ex Parte* Applicant's main complaint is that she was not accorded fair hearing. She readily admits that she received a letter dated 22nd of March 2017 inviting her to appear before the Student Disciplinary Committee on Examination Irregularity on the 11th of April 2017. There after the minutes show that the meeting happened. The minutes show that "*the student should be charged with leaving the examination room without permission and witH the examination script. There was need to summon the lecturer to appear in person at the next disciplinary sitting to provide more information before charging the student with the offence*" the next letter is one dated 18th of October 2017 stating that the Student Disciplinary Committee on Examination irregularities sitting on the 4th of October 2017 found the student guilty of the offence.

24. In the minutes of the meeting held on the 4th of October 2017 all other students who appeared on the said date had a chance to give their statement and were accompanied by someone. There is no record of what the Petitioner said.

25. What emerges from this is that the Disciplinary Committee adjourned its hearing of 11th April, 2017 when the Petitioner attended to 4th October, 2017. However, the Petitioner was not invited to attend during this re-scheduled hearing. Needless to say, this not only violated the University's own Rules but the rules of Natural Justice and Fair Administrative Action.

26. What is more is that when the Petitioner appealed against the initial decision, her right to fair administrative action was violated in two specific ways:

a. First, she was not given an opportunity to make any representations to the decision-making body. Indeed, the letter communicating the decision to the Petitioner does not even identify who and how the decision to affirm the decision of the Disciplinary Committee was arrived at.

b. Second, while the Rules provide for the formation of a Examinations Irregularities Appeals Committee to hear any appeals from the Disciplinary Committee, there is no evidence whatsoever that such a Tribunal was formed. There is, further, no demonstration at

all that such a Tribunal actually met and considered the appeal by the Petitioner. Instead, what we have are two letters – one by the Vice Chancellor and another one by the Deputy Vice Chancellor affirming the decision of the Disciplinary Committee.

27. It is readily obvious from the analysis so far that the decision by the Respondent University to cancel the examination results of the Petitioner and expel her from the University cannot stand. The decision was un-procedural and procedurally oppressive for not according the Petitioner the right to be heard.

28. In the circumstances of this case, the relief that commends itself, then, is as follows:

a. The decision by the Students' Disciplinary Committee on Examination Irregularities recommending the explusion of the Petitioner, Hagar Jerono Melly, from the University of Eldoret is quashed.

b. The decision is remanded back to the Disciplinary Committee for reconsideration of the decision and appropriate punishment if necessary.

c. The Petitioner shall have a right to appeal any decision in accordance with the University's Common Rules and Regulations for Undergraduate Examinations.

29. In view of the circumstances of this case each party shall bear its own costs.

30. Orders accordingly.

Dated and delivered at Nakuru this 19th day of December, 2019.

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JOEL NGUGI

JUDGE