REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 113 OF 2017

IN THE MATTER OF: AN APPLICATION BY KENNEDY OMONDI WARINGA, CORNELLY LAWRENCE NYANGO, SAMUEL OMONDI ARIANDA, VICTOR OTIENO OCHOLA, MOPHAT OCHIENG OKINYI, RICHARD M. MAIRA, KEVIN ONYANGO ADUR, JUSTINE BOSIRE SAMSON, ANTONY DALMAS OUMA, GERLAD OMONDI OMINGO, MATHEW OKELO ABONGO, VICTOR OMONDI OTIENO, KENNEDY OCHIENG, ROBERT OUKO, NELSON MANDERA OJWANG, DALTON OCHIENG OKETCH, LINUS OMATA KINORO AND DERRICKS OCHIENG OGALO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI AND MANDAMUS.

AND

IN THE MATTER OF: THE DECISION OF 14TH APRIL, 2016 AND 16TH DECEMBER, 2016 AS COMMUNICATED IN LETTERS DATED OF THE SENATE COUNCIL RESPECTIVELY OF CHUKA UNIVERSITY COMMUNICATED D IN THE LETTERS DATED 15/4/2016 AND 22/12/2016 RESPECTIVELY.

AND

IN THE MATTER OF : SECTION 31 OF THE CIVIL PROCEDURE ACT, ORDER 54 RULES 3(1), 4(1) AND 7(2) OF THE CIVIL PROCEDURE RULES, FAIR ADMINISTRATIVE ACTION ACT, 2015, ARTICLE 27,36,43,47 AND 48 OF THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW AND INHERENT JURISDICTION OF THE COURT

REPUBLIC.....APPLICANT

VERSUS

CHUKA UNIVERSITY.....RESPONDENT

EX-PARTE

KENNEDY OMONDI WARINGA, CORNELLY LAWRENCE ONYANGO, SAMUEL OMONDI ARIANDA, VICTOR OTIENO OCHOLA, MOPHAT OCHIENG OKINYI, RICHARD M. MAIRA, KEVIN ONYANGO ADUR, JUSTINE BOSIRE SAMSON, ANTONY ABONGO, VICTOR OTIENO, KENNEDY OCHIENG, ROBERT OUKO, NELSON MANDERA OJWANG, DALTON OCHIENG OKETCH, LINUS OMATA KINORO AND DERRICKS OCHIENG OGALO

JUDGMENT

1. The exparte applicants in these judicial review proceedings are KENNEDY OMONDI WARINGA, CORNELLY LAWRENCE ONYANGO, SAMUEL OMONDI ARIANDA, VICTOR OTIENO OCHOLA, MOPHAT OCHIENG OKINYI, RICHARD M. MAIRA, KEVIN ONYANGO ADUR, JUSTINE BOSIRE SAMSON, ANTONY ABONGO, VICTOR OTIENO, KENNEDY OCHIENG, ROBERT OUKO, NELSON MANDERA OJWANG, DALTON OCHIENG OKETCH, LINUS OMATA KINORO AND DERRICKS OCHIENG OGALO.

2. They are expelled students from the Respondent Chuka University, a public University. By their notice of motion dated 13th March 2017, they seek from this court the following Judicial Review Orders:

a. <u>Certiorari</u> to move into this court and quash the decision of the respondent taken on 14th April 2016 and 16th December 2016 as communicated in letters dated 15th April 2016 and 22nd December 2016 addressed to the applicants:

b. <u>Mandamus</u> to compel the respondent to readmit the applicants to continue with their education and sit examinations;

c. Costs;

d. Such further or other relief as the court may deem fit, just and expedient to grant.

3. The motion is predicated on the statutory statement and verifying affidavit sworn by Cornelly Lawrence Onyango the 2nd exparte applicant on behalf of all the exparte applicants.

4. The exparte applicants' case is that the 1st applicant Kennedy Omondi Waringa was a candidate vying for chairmanship for Chuka University Students Association(CUSA) in the elections conduced on 29th January 2016, which elections the said applicant lost. He claimed that the elections were marred with irregularities. He therefore disputed the said election results and his agents declined to sign the form that confirms the results declared.

5. The applicants claim that the Chuka University(the University) caused their arrest and they were all arraigned before Chuka Senior Principal Magistrate's Court Criminal case No. 140 and 155 of 2016, accused of taking part in unlawful assembly contrary to Section 78(3) of the Penal Code. The criminal charges were however withdrawn by the prosecution on 13th April 2016.

6. That prior to the withdrawal of the criminal charges, on 14th and 15th April 2016, the respondent University invited the applicants to appear before the Disciplinary Committee from 21-24th March 2016 and by letter of 15th April 2016, the respondent University wrote to the applicants expelling the latter from the University, which was two days after the criminal charges were withdrawn.

7. The applicants claim that they appeared before the Disciplinary Committee which was not fully constituted as required under the Rules and Regulations for Students Conduct and Discipline in the student's Handbook 2014. They allege that the said Committee included a non member Senate representative and that the 1st applicant's opponent in the elections Mr Harrison Wanjohi Maina who was the Chairman of the Student Association (CUSA) was a member of the Disciplinary Committee.

8. It was therefore alleged that being the accuser, Mr Harrison Wanjohi Maina could not be a judge and Jury in his own cause which he did thereby violating the rules of natural justice and contrary to the Rules and Regulations which stipulate that ***witnesses required in the case do not act as members of the committee***. The applicants further allege that they were never given a fair hearing and that neither were they allowed to cross examine witnesses.

9. Further, the applicants claim that they were accused of counts which were different from those contained in their expulsion letters.

10. It is also alleged that although the 3rd applicant Arianda Samuel Omondi appeared before the Disciplinary Committee, the expulsion letter indicated that he failed to appear. Further, that Antony Dalmas Ouma the 9th applicant did not receive any letter inviting him for a meeting with the Disciplinary Committee but was nonetheless expelled from the University.

11. It is further alleged that Justin Samson Bosire who vied and won the position of Treasurer of CUSA was prevailed upon to resign which he did but was expelled from the University. It was claimed that the applicants missed all examinations for the academic year 2016/2017. Further, that following the above scenario where the 18 applicants were expelled from the University, they filed JR 205/2016 and on 12th July 2016 Odunga J delivered a judgment directing the applicants to pursue the available remedy and only approach this court after the said alternative remedies are exhausted and that the learned judge declined to delve into the merits of the applicants' case. It is claimed that the applicants complied with the aforesaid judgment and lodged an appeal to the University Council and that on various dates from 11th-14th October 2016 they appeared for hearing of their appeals before the University Council.

12. The applicants claimed that three members of the University Council were also members of the Disciplinary Committee and that by a verdict rendered on 22nd February 2016, only 8 of the student applicants to JR 205/2016 were readmitted back into the University whereas the rest were expelled and only two –Linus Omata Kinoro and Derricks Ochieng Ogalo were suspended for 3 years to resume studies in 2019.

13. The applicants claim that paragraph 9:11 of the Student's Handbook 2014 was violated in that instead of the Chairman of the Council communicating the results of the appeal, it was Professor Francis G. Nderitu Registrar, Academic Affairs who did the communication.

14. It was further claimed that the disciplinary proceedings were not expeditious, efficient, lawful and reasonable and neither were they procedurally fair as required under Article 47 of the Constitution. That there was delay in attending to the appeal which delay has denied the applicants their right to continue with education.

15. The applicants claim that the Senate did not accord them a hearing before expelling/suspending them. They challenge the Rules 9:5 and 9:6 of the Rules and Regulations for Student Conduct and Discipline in the Student's Handbook 2014 requiring the Disciplinary Committee not to adhere to the rules of evidence or procedures and denial of legal representation by an advocate.

16. The applicants further alleged that they were being victimized by the University because they come from one ethnic group or Region. They urge the court to grant them the orders sought.

17. On the part of the respondent, a replying affidavit was filed on 24th April 2017 sworn by Professor Erastus Njoka on 21st April 2017 contending that following the elections of students' representation to the CUSA, the applicants and other students went on rampage leading to serious destruction of University property and temporary closure on 10th February 2016.

18. That the property destroyed included motor vehicles, buildings and looting of items from neighboring shops at the nearby Ndagani market.

19. The respondent contends that the applicants and others were arrested and arraigned in court vide Chuka SPM Criminal case 140 and 158/2016 while the University acting in accordance with the statutes also commenced disciplinary proceedings and found some students culpable for violence and damage to property contrary to the University Statute and Regulations.

20. Further, that the student's challenged the outcome of disciplinary proceedings vide Nairobi JR Miscellaneous 205/2016 but that the matter was on 12th July 2016 struck out with no orders to costs while the applicants were advised to go and pursue the alternative remedy of appeal to the University Council which they did pursuant to Clause 9:11(a) of the Student's Handbook (2014).

21. The respondent contends that 43 students including those who had initially not challenged the disciplinary proceedings also filed an appeal in line with the court's decision.

22. That the University invited the applicants vide letters dated 3rd October 2016 to appear before the Grievances Handling and Appeals Committee (GHAC) on the various dates specified in the said invitation letters. That the letters were dispatched to the respective students' last known postal addresses as per their admission records with the University, via EMS Speed Post.

23. That the Grievances Handling and Appeals Committee is a committee of the University Council established under the First Schedule of the Chuka University Statutes 2014. That the students appeared for the hearing of their respective appeals between 11-13th October 2016 and on 16th December 2016 the Grievances Handling and Appeals Committee Report on Student's Appeal cases was presented, deliberated, approved and adopted by the University Council at a meeting held on 16th December 2016 wherein the recommendations of the Grievances Handling and Appeals Committee were adopted acquitting one student, 14 warned, 4 suspended and 18 remained expelled and letters dated 22nd December 2016 written by the University informing the affected students of the Council's decision on their appeals, dispatched by way of EMS speed post, the same mode used to notify them to attend the Grievances Handling and Appeals Committee. It was therefore contended that the University's Appeals process was properly handled and in strict compliance with the law and the relevant Rules, regulations and guidelines governing the University.

24. It is therefore contended that the issue of irregularity in elections does not have any relevance here as it was addressed by the University. It was contended that contrary to the applicants' assertions, the Students' Disciplinary Committee was properly constituted as per the University's Rules and Regulations and that in any case the applicants raised no issue with the composition of the Committee in their appeals.

25. That the Disciplinary Proceedings dealt with the conduct and culpability of the students on the riots and destruction of University property and not on the legitimacy of the students' elections.

26. The respondent denied that the students' leader Harrison Wanjohi Maina was conflicted and that in any case he was allowed by Rules 9:11 of the Students Information Handbook (2014) and moreso when the proceedings were not related to elections but riots leading to destruction of property.

27. It was contended that the full senate upon receiving a report of the Disciplinary Committee may adopt or reject the report but that in this case it adopted the Students Disciplinary Committee report at its sitting on 14th April 2016. It was further contended that there is no requirement for a hearing by the Senate since the latter delegated functions to the Student's Disciplinary Committee. That it would be absurd to require appearance for the hearing before Students Disciplinary Committee and the Senate which latter is deliberates on the Student's Disciplinary Committee report.

28. That the charges in the invitation letters and those in the expulsion letters were substantially the same and that even where there were differences in the charges like for Victor Otieno Ochoka, no prejudice was occasioned to him as he had notice of the allegations leveled against him.

29. That Ananda Samuel Omondi appeared before the Student's Disciplinary Committee and that the error was communicated vide letter of 12th May 2016. That Antony Dalmas Ouma was invited but he failed to appear before the Students Disciplinary Committee.

30. That the constitution of Grievances Handling and Appeals Committee and Students Disciplinary Committee were different hence it was misleading to claim that the University Council was not properly constituted.

31. The respondent conceded that the decision of the council was communicated by the Registrar Academic Affairs and not the Chairman of the Council but insisted that such delegation of duty was purely for purposes of passing of information to the students and therefore could not affect the decision of the Council. That it is a mere procedural convenience since the Registrar is the custodian of the Contact Information of the Students.

32. It was also contended that the University considered all the procedures and stakeholders involved and expeditiously and efficiently concluded the disciplinary proceedings.

33. It was therefore contended that the respondent University is mandated to discipline errant students in accordance with the Second Schedule of the University's Statute 2014 and Rules and Regulations contained in the Student Information Handbook 2014.

34. The respondent maintained that it conducted disciplinary proceedings against the applicants students in accordance with the statutory dictates, acted in good faith and in accordance with the decision of Odunga J in JR Miscellaneous 205/2016 where some of the affected students were successful and that it must be appreciated that it was not a guarantee that every student who appeared in the appeal proceedings succeeds rather, that individual appellants were heard and decisions made on their merits.

35. The respondents denied that there was any ethnic bias in the disciplinary process. It was the respondent's further contention that to readmit the applicants into the university would be to condone culture of impunity and lawlessness hence the notice of motion should be dismissed with costs to the respondent university.

SUBMISSIONS

36. The parties' respective advocates filed written submissions to canvass the notice of motion. The applicant's counsel Mr Appollo Mboya filed his clients' submissions on 15th June 2017 dated 15th June 2017 and reiterating his client's case and framed 4 issues for determination.

37. ***The first issue canvassed was whether the respondent contravened any statute; whether it acted illegally and unconstitutionally in arriving at the decision to expel and or suspend the applicants***. In answering the above set of issues, counsel for the applicants submitted that the respondent's decisions contravened Sections 4(1) of the Fair Administrative Action Act, 2015 by failing to subject the applicants to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. That the respondent, violated the applicants' rights and breached Section 4(2) of the Fair Administrative Action Act requiring the applicant to give reasons for any administrative action that is taken against them; and that no prior and adequate notice of nature and reasons for the proposed administrative action were given contrary to Section 4(3) of the Fair Administrative Action Act.

38. It was submitted that the decision to expel the applicants was reached without according the applicants a hearing; that the decision as communicated to the applicants violated paragraph 9.5 of the Rules and Regulation; that paragraphs 9.5:9.6 of the regulations are unconstitutional as they deny the applicants legal representation; and that paragraph 9.1 of the Rules of the Disciplinary Committee was violated.

39. On the role of the court in exercising Judicial Review powers, reliance was placed on **CA 180/2013 Isaac Osman Sheikh v IEBC & Others** where it held that Judicial Review Court is concerned with process and is not a merit review of the decision of those other bodies. It was submitted that the respondents acted in violation of Article 47 of the Constitution and Section 4(4) of the Fair Administrative Action Act on the need to accord the person against whom administrative action is taken an opportunity to be heard in person or be represented by an advocate; cross examine witnesses; and to adjourn proceedings where necessary to ensure a fair hearing on legal representation before the committee. The case of **Republic vs Pwani University College exparte Maina Mbugua James & 2 Others Miscellaneous Civil 28/2009** was relied on where the court held inter alia that if a person requests for legal representation then he should be entitled to such legal representation.

40. Counsel for the applicant acknowledged that courts would not interfere with decisions of administrative bodies unless it is manifest that the decision has been made without fairly and justly hearing the person concerned or the other side as was held in **Daniel Nyongesa and Others vs Egerton University College CA 90/1989.**

41. ***The second issue canvassed by the exparte applicants' counsel is whether the decision of the respondent was irrational, unreasonable, made in bad faith and improper motive.*** Reliance was placed on the definition of the said terms as espoused in **Council of Civil Service Unions vs Minister for Civil Service [1984] 3 ALL ER 935 by Lord Diplock, and JR 271/2014 Republic vs Secretary County Public Service Board and Another exparte Hulbai Gedi Adbille [2015] e KLR.** It was submitted that the conduct of the respondent to allow the 1st applicant's opponent Harrison Wanjohi Maina to sit in the Disciplinary Committee was irrational and that there was bad motive to expel all students who were perceived to be supporters of the 1st applicant's candidature for Chairman of Chuka University Students' Association.

42. ***On the third issue of whether the decision was arrived at to expel the applicants with procedural impropriety, unfairness and arbitraries,*** it was submitted that the respondent unfairly showed videos to the applicants without giving them an opportunity to cross examine the makers/producers of the said video clips allegedly showing the applicants in the act of committing offences.

43. The applicants' counsel reiterated in the submissions what his clients had deposed on what they considered to be procedural impropriety, unfairness and arbitraries and relied on **Republic vs CHE Exparte Peter Shitanda [2013] e KLR.**

44. On the fourth issue of whether the applicants' legitimate expectations were violated, it was submitted that the applicants legitimately expected to be accorded fair administrative action and to complete their university education as was held in **Miscellaneous 37/2010 Republic vs City Council of Nairobi exparte Kenya Taxi Cabs Association [2010] e KLR.** The applicants urged the court to grant them the prayers sought.

45. In the respondent's submissions filed on 12th July 2017 and dated 10th July 2017, the firm of Waweru Gatonye submitted reiterating the depositions of Professor Erastus Njoka sworn on 21st April 2017 and maintained that there was lawful basis for the University to undertake disciplinary proceedings against the applicants and make the decision that it did, in accordance with the law and the university statutes, and that it was guided by the decision of Honorable Justice Odunga in JR 205/2016. Four issues were framed for determination namely:

1) ***Whether the disciplinary proceedings and the appeals were generally, procedurally conducted in accordance with the applicable law.*** It was submitted that the respondent did follow all the legal procedures under the Fair Administrative Action Act and Article 47 of the Constitution.

46. That the University had good reasons to take action against the applicants who were suspected of being involved in violent activities and wanton destruction of property leading to temporary closure of the University in contravention of the University Statutes and Regulations and the law generally.

47. Further, that the applicants received notification of the specific allegations against them and how the allegations could be a breach of the rules as shown by the annexed letters of invitation.

48. It was further submitted that the applicants were accorded an opportunity to appear for hearing and were heard on specific dates and venue specified and that they presented their defences which were considered as per the annexed copy of the Student's Disciplinary Committee recommending specific action to the Senate against each student and that the Senate considered recommendations of the Students Disciplinary Committee and took appropriate action.

49. It was submitted that Harrison Wanjohi Maina having been declared as the winner in elections for chair of Chuka University Students Association was legally entitled to sit on the Students Disciplinary Committee since the Student's Disciplinary Committee was not an Electoral Appeals process.

50. It was submitted on behalf of the respondent that the decision of the Students Disciplinary Committee are based on majority votes hence one person's decision could not have swayed the decision of 9 members as stipulated in Rule 9:7 of Student's Disciplinary Committee

51. On the allegations that the students were not invited to appear before the University Senate for hearing on 14th April 2016, it was submitted that the Students Disciplinary Committee is a committee of the Senate mandated to deal with matters referred to it by the Vice Chancellor or any designated authority and to make recommendations to the Senate.

52. It was therefore submitted in contention that it is upon the Senate receiving recommendations of the Students Disciplinary Committee that it meets to deliberate on the same and make a decision either adopting or rejecting the Students Disciplinary Committee recommendations.

53. In the respondent's view, it would be irrational for the applicants to appear before the Students Disciplinary Committee for hearing and expect to again appear before the full Senate for hearing.

54. ***On the second issue of whether the University acted unfairly and arbitrarily to the 3rd applicant Arianda Samuel Omondi; the 8th applicant Justin Samson Bosire and the 9th applicant Anthony Dalmas Ouma,*** it was submitted that the University accorded them all the opportunity to be heard in accordance with the Rules and the Law.

55. ***On whether the right to legal representation was available to the applicants,*** it was submitted that the applicants never requested to be accompanied by and or represented by advocates before the Disciplinary Committee. Reliance was placed on **Oluoch Dan Owino & 3 Others v Kenyatta University [2014] e KLR** where it was held inter alia, that one must request for an advocate before violation of the right to legal representation can be alleged. In this case it was submitted that the issue of legal representation was never raised before the Students Disciplinary Committee hence it cannot be raised now as a ground for challenging the decisions of the Committee. It was submitted that the decision in **Republic vs Pwani University College exparte Maina Mbugua James and 2 others** (supra) advances the same position.

56. Relying on **Judicial Service Commission vs Mbalu Mutava & another [2015] e KLR** it was submitted that the Court of Appeal acknowledged that the right to fair administrative action though a fundamental right can - is contextual and flexible in its application and can be limited as stipulated in Article 24(1) of the Constitution hence the University handled the disciplinary process reasonably.

57. It was also submitted that it was unfounded for the applicants to allege that they were targetted because they came from a particular ethnic community as there were other students who went through the same disciplinary process .

58. ***On whether there was procedural impropriety in communicating the Senate decision to the applicants***, it was submitted that the fact that the Academic Registrar is the one who communicated the decision of the Senate to the applicants does not invalidate the decision of the Senate to discipline the applicants the way it did. Further, that in any case the applicants have not suffered any prejudice by virtue of that communication. Reliance was placed on **Republic vs Kenya National Examination Council Exparte Thomas Mackenzie [2016] e KLR** where it was held that the Chairman signing the letter communicating the decision of the Council in the absence of the Chief Executive Officer who is the Secretary to the Council did not invalidate the decision to suspend the applicant from the university.

59. On the allegation that the University Council was not properly constituted, it was submitted that the Council and the Students Disciplinary Committee are distinct committees with different members as per the Grievances Handling and Appeals Committee, minutes of the Council and report of Students Disciplinary Committee.

60. ***On allegation of breach of legitimate expectation to complete their education,*** it was submitted that the applicants were found culpable after due process was followed hence breach of legitimate expectation cannot arise. Reliance was placed on ***Republic vs City Council of Nairobi Exparte Kenya Taxi Cabs Association [2010]*** citing ***Supreme Court of India decision in J.B. Bansal vs State of Rayastan & Another CA 5982 of 2001*** on the situations where legitimate expectation will successfully be applied.

61. It was submitted that any purported representation that the applicants would not be subjected to a disciplinary process would go against the mandate of the respondent University and would be illegal as was held in **Republic vs Disciplinary Committee of the Law Society of Kenya exparte Paul Musili Wambua & Another [2013] e KLR.**

62. It was therefore submitted that the University has a statutory mandate to discipline errand students through the Student's Disciplinary Committee of the Senate hence any purported promise or representation that a student will not be subjected to a disciplinary action or attendant consequences as the applicants would want to argue is misconceived and baseless. The respondent's counsel urged the court to adopt the decision in **Judicial Service Commission vs Mbalu Mutava & Another** (supra) by the Court of Appeal citing Lord Denning in **Selvarajan v Race Relations Board[1976] 1 ALL LR 12** where it was held, inter alia, that the investigating body is however, the master of its own procedure.

63. ***On whether the orders sought should be granted in the circumstances of this case***, it was submitted that the applicants are not entitled to the orders sought. The respondent urged the court to dismiss the exparte applicants' case with costs.

DETERMINATION

64. I have carefully considered the foregoing. In my humble view, the main issue for determination in this matter is whether the applicants are entitled to the Judicial Review orders of certiorari and mandamus. There are other anciliary questions that the court will have to determine in answering the above key question.

65. What is not disputed in these proceedings is that there were elections for Chuka University Students Association (CUSA) and the 1st applicant and others were vying for various positions. The 1st applicant was vying for the position of student leader (Chairman). He lost the elections to Harrison Wanjohi Maina and he claims that his loss was due to malpractices and irregularities by his opponent.

66. From the facts of this case, it appears that the violent riots that allegedly took place at the Chuka University which is a public University, leading to destruction of property and temporary closure of the University were orchestrated by the election results where some students allied to the 1st applicant who lost elections felt that the elections were not conducted in a free, fair and credible manner. Those whose front runner candidate lost elections were aggrieved and in the process clashed with their opponents and a rampage took place leading to temporary closure of the university, to avert more destruction to property and escalation of violence.

67. Those students who were suspected to have been involved in the riots and damage to University property were subjected to disciplinary proceedings and expelled but before the Senate had pronounced itself on the matter. They then filed JR 205/2016 judgment, and Odunga J struck out the matter on account that the students had not exhausted the available internal appeal process or review mechanisms.

68. The students were all allowed to lodge their appeals as stipulated in the University statutes which they did and upon the Senate pronouncing itself on the matter, they have now challenged that decision of the Senate. Some of the students were however exculpated from blame following the disciplinary proceedings conducted against them.

69. The Student's Information Handbook, 2014 contains matters of students conduct and discipline. Clause 7 is on disciplinary and criminal offences which are all listed at clauses 7.1-7.24 on page 52 & 53. It follows that the procedures and bodies that are responsible for student's discipline are all set out in the said Students Information Handbook, 2014. Clause 9 establishes the composition and procedures of the Students Disciplinary Committee of the Council comprising:

i. Deputy Vice Chancellor, (Academic, Research and Student Affairs) as the Chairperson.

ii. Dean of Students.

iii. Dean of the Faculty concerned.

iv. Chair of the Department concerned.

v. Two Senate Representatives.

vi. Chairman of the Student Association and any other student leader.

vii. Registrar of Academic Affairs) as Secretary.

70. Those are 9 members of the Students Disciplinary Committee. Clauses 9.2-9.11 stipulate the procedures to be followed by the Students Disciplinary Committee. Under Clause 9:5, the Committee ***shall ensure that both sides of the case are heard and witnesses required in the case do not act as members of the committee.***

71. Under clause 9:6 the student being disciplined shall appear in person and that ***" For avoidance of doubt, the committee shall not entertain the audience of advocates or to the legal agents on behalf of the students***.

72. The powers of Students Disciplinary Committee include dismissing the case against the student, warn or caution him either verbally or in writing; require recompense for loss or damage; suspend the student for a specified period; exclude the student from Halls of residence for a specified period as the Committee may deem it; exclude the student from attendance of lectures or other courses or from

taking examinations; expel the student or impose any other penalty as the Committee may in its sole discretion deem appropriate.

73. Under Clause 9.9, the decision of the Committee shall be communicated to the student by the Registrar(Academic Affairs within fourteen days from date of conclusion of proceedings and under clause 9:10 the Committee shall communicate its decision to the Council for ratification within 14 days.

74. Under Clause 9:11 the student shall have the right to appeal to the Chairman of the Council against the decision of the Senate.

75. One critical question raised by the applicants is that the Students Disciplinary Committee was not properly constituted as it comprised non members who are Senate representatives namely Dr Lemmy M. Muriuki, Dr Paul Kamweru and Dr Geoffrey K. Gathungu.

76. Further, that the Students Disciplinary Committee comprised the Chairman of Chuka University Student Association Mr Harrison Maina Wanjohi who was the 1st applicant's competitor in the elections which gave rise to the indiscipline proceedings facing the applicants.

77. First is that it would appear the Committee substituted one other student leader who was to appear with the Chuka University Students Association Chairman, for the extra Senate representative. There are three questions here to be answered.

i. Whether the denial of legal representation to the applicants was prejudicial to their case;

ii. Whether the inclusion of the one extra Senate representative and exclusion of any other student leader was prejudicial to the applicants; and

iii. Whether the inclusion of the Chuka University Students Association Chairman to the Student Disciplinary Committee when he was the 1st applicant's competitor in the elections which gave rise to the disciplinary proceedings vitiated the Student Disciplinary Committee proceedings and therefore contrary to the Student Disciplinary Committee Rules and Regulations, 2014.

78. On the question of legal representation, the applicants further assert that in so far as the Disciplinary Rules expressly oust the legal representation or any legal agent to be present during the disciplinary proceedings, they violate the law. On the other hand, the respondents contends that in any event, the applicant never requested for legal representation at the disciplinary proceedings and that therefore they were raising it at this late stage.

79. I must however mention that the issue as to whether or not a person undergoing disciplinary proceedings was entitled to legal representation is not negotiable. It matters not that the applicants never requested for legal representation especially, considering that the Rules expressly bar such legal representation.

80. The proceedings leading to the expulsion of the applicants from the university were administrative and quasi-judicial proceedings carried out by the respondent which is an administrative body through its committees established by the University Statutes. Expulsion of a student from the University for whatever reason no doubt affects their constitutional rights to education as stipulated in Article 43 (1)(f) of the Constitution. It is therefore a serious matter.

81. Prior to the said disciplinary proceedings being initiated, it is not in dispute that the applicants had been charged before Chuka SPM's Court with offences relating to the same disciplinary proceedings, an indication that the allegations against the applicants were grave.

82. Article 50(1) of the Constitution stipulates that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The disciplinary proceedings leading to the expulsion or suspensions of the applicants were in my view, akin to criminal proceedings for reasons that the consequences were equally grave. The right to education is a constitutional right and therefore any proceedings that would lead to expulsion of a student from a university must be conducted in a fair and just manner that accords the students all opportunities to be heard and to be represented by an advocate of their choice. This is the spirit and letter of Article 50 (2) of the Constitution which stipulates that every accused person has the right to a fair trial which includes: (g***) to choose, and be represented by, an advocate, and to be informed of this right promptly; 50(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.***

83. Albeit the above provisions refer to proceedings affecting accused persons, they are, in my view relevant to disciplinary proceedings such as the ones affecting the applicants herein, owing the serious charges that the applicants faced such that if they were to be convicted before a court they would face custodial sentences.

84. Article 47 of the Constitution which is more relevant to these proceeding guarantees every person the right to administrative action that is expeditions, efficient, lawful, reasonable and procedurally fair. Under sub article 2 thereof, if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Parliament is then empowered under sub article 3 to enact legislation to give effect to the rights contemplated in the Sub Article (2) to provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal.

85. In 2015 Parliament in adherence to Article 47 of the Constitution enacted the Fair Administrative Action Act, No. 4 of 2014. An administrative action under the Act includes: The powers, functions and duties exercised by authorities or quasi-judicial tribunals or Any act or omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

86. 'Decision' is defined to mean any administrative or quasi- judicial decision made, proposed to be made, or required to be made as the case may be.

87. As stated earlier, the charges that the applicants faced were akin to criminal offences although the criminal charges were terminated paving way for disciplinary proceedings by the respondent University.

88. Section 3 of the Fair Administrative Action Act provides that ***where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***

(***e) Notice of the right of legal representation, where applicable.***

4) The administrator shall accord the person against whom administrative action is taken an opportunity to -

Attend proceedings, in person or in the company of the expert of his choice.

Be heard.

Cross examine persons who give adverse evidence against him.

5) Nothing in this Section shall have the effect of limiting the right of any person to appear or to be represented by a legal represented in judicial or quasi –judicial proceedings.

89. It follows that the right to legal representation cannot be limited and is not limited by statute as it complements the right to a fair hearing. And it is the duty of the administrative or quasi- judicial body or tribunal to notify the person accused or against whom administrative proceedings are being conducted, of that right to legal representation, and not to wait and see whether the person shall request for such legal representation.

90. This court notes that the cases referred to by the respondent including the ***Dan Owino case(supra*)** with regard to the right to legal representation were decided before the enactment of the Fair Administrative Action Act, 2015.

91. In the instant case, it is clear that the respondent's Rules and Regulations applicable to student disciplinary matters bar and legal representations or agent in disciplinary proceedings. Therefore, the argument by the respondent that it was encumbent upon the applicants to request for legal representation before the committee does not hold any water. This is so because it is the Rules and Regulations themselves that limit the right to legal representation by a student facing the disciplinary committee.

92. It is trite law that Rules and Regulations of an administrative body exercising either administrative or quasi judicial authority cannot be permitted to limit fundamental rights guaranteed by the Constitution, as they are not substantive legislation contemplated in Article 24 of the Constitution

93. Albeit the respondent further argued that the right thereof could be limited, the limitation can only be done by a statute and then, only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (a) the nature of the right or fundamental freedom(b) the importance of the purpose of the limitation ;(c) The nature and extent of the limitation among others. (see Article 24 (1) of the Constitution).

94. Under Article 24 (2) (b) of the Constitution, provisions in legislation limiting a right or fundamental freedom shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedoms to be limited and the nature and extent of the limitation and (d) Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content. 3) The state or a person seeking to justify a particular limitation shall demonstrate to court, tribunal or other authority that the requirements of this Article have been satisfied.

95. In this case the provisions of Section 4 of the Fair Administrative Action Act, 2015 clearly does not limit the right to legal representation in judicial or quasi judicial proceedings. It follows that Rules or regulations promulgated by the respondent cannot purport to limit that right which is clearly stipulated in the Act and in the Constitution.

96. For the above reasons, I find and hold that the respondent violated the applicant's right to legal representation in the disciplinary proceedings by failing to give him notice of such right to legal representation which was necessary. The respondent also denied the applicants the notice of the right to cross examine the applicants' accusers if there were any.

97. Where it is clear that there was violation of a right guaranteed by the Constitution, which right is not limited by statute, it is immaterial that the applicants have not shown any prejudice accessioned to them by such limitation. This court exists to protect and promote the rights and fundamental freedoms of all persons guaranteed by the Constitution. The Bill of Rights binds all including the respondents herein hence they cannot claim to have power to limit rights which are clearly guaranteed by the Constitution and where the Fair Administrative Action Act 2015 has refused to limit such right.

98. There is also the question of failure to give notice to the applicants of the right to cross examine their accusers. The right to cross examine one's accuser is not only found in Section 4(3) (f) of the Fair Administrative Action Act but also in Article 50(2) (k) of the Constitution couched as the right to adduce and challenge evidence.

99. The respondents are accused of failure to accord the applicants an opportunity to cross examine their accusers or witnesses during the Students Disciplinary Committee proceedings. The respondents deny that allegation and maintain that due process was followed. They have cited several cases decided prior to the enactment of the Fair Administrative Action Act 2015. They have also annexed the proceedings before the Grievances Handling and Appeals Council Committee (GHAC) held on 11th November 2016 at Chuka University Embu Campus Boardroom chaired by Mr Amos Chiguba and Ms Mary M. Masinda representative of Permanent Secretary Education, Science & Technology.

100. The proceedings before Grievances Handling and Appeals Council Committee were for purposes of rehearsing the Students Discipline Committee proceedings as per the agenda item No. 8 that of (8) consider Students Appeals against various disciplinary measures and make recommendations to the council.

101. The court notes that notices were issued to the students to appear before Students Disciplinary Committee on 23rd March 2016 at 9.00a.m. at the respective schools and charges were read out to them and their respective responses recorded including mitigations and observations by the Disciplinary Committee. However, what is apparently missing are the accusers or witnesses who testified against the applicants.it is not even stated as to who was reading out the charges to the students for them to plead to the charges.

102. The question that therefore begs answers is, who are these persons who(1) accused the applicants of wrongdoing and (ii) testified as witnesses against the applicants, and who would then be cross examined by the applicants who appeared in person?

103. Whereas I agree that the rules of evidence are not necessarily applicable in disciplinary proceedings, but cross examination as a right to challenge evidence adduced against the applicants must be demonstrated to have been accorded to the applicants.

104. The proceedings simply show the Faculty, Student's details, charges against the respective student, responses by the student, mitigation of the student and the observations by the disciplinary committee and signatures by committee members, which scenario is replicated by the Grievances Handling and Appeals Committee which merely rehearsed what was before the Students Disciplinary Committee without referring to the evidence that was tendered against the respective applicants.

105. What appears therefore in the proceedings are situations where the students were being taken through a trial where they were expected to prove their innocence as opposed to their being treated as innocent until proven guilty.

106. The findings of the Students Disciplinary Committee were therefore only based on what the students are said to have stated because, for example, it is not on record as to who was taking the video clips which identified some of the applicants' involvement in the acts complained of.

107. In my humble view, it is not enough that there were some charges framed against the applicants by the University. It must be shown that those charges were read out to them by a person and evidence tendered to prove those charges, and the students given an opportunity to be represented by an advocate and to cross examine their accusers.

108. Since the culpability of the applicants was based on adverse evidence against them, that evidence tending to proof the charges levelled against them must be evident on record. No such evidence was adduced in this case.

109. Accordingly, I have no hesitation in finding and holding that the disciplinary proceedings against the applicants were not procedurally fair. Procedural fairness is one of the pillars/hall marks of the right to fair administrative action, which is a constitutionally guaranteed right. It goes without saying that the respondent cannot be allowed to make Rules and Regulations which violate the constitutional provisions as implemented by the Fair Administrative Action Act, 2015. Such violation would be amenable to interference by this court by way of Judicial Review.

110. Section 7(2) of the Fair Administrative Action Act, 2015 stipulates that (2) A court or tribunal under Sub Section (1) may review an administrative action or decision if :The person who made the decision:-

a) ii) acted in excess of jurisdiction or power conferred under any written law;

c) The action or decision was procedurally unfair.

d) The action or decision was materially influenced by an error of law.

e) The administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant.

111. In this case, as the right to cross examine the accusers of the applicants was not afforded to the applicants which is a right guaranteed by the Constitution to challenge evidence; and as the right to legal representation was out rightly denied by express stipulations in the Rules and Regulations, this court has no alternative but to find and hold that the administrative decision and actions of the respondents were taken with the ulterior motive or purpose calculated to prejudice the legal rights of the applicants and therefore amenable to Judicial Review.

112. In addition, there exists, Post 2010 Constitution, that all rules and procedures applicable in adjudicative processes or proceedings must be fair and therefore all persons subjected to adjudicative processes have an inalienable legitimate expectation that the processes applied will be fair and just.

113. Of course this court would not accept as legitimate expectation that indisciplined university students would not be subjected to disciplinary processes. The processes must however be procedurally fair and accord with the constitutional and statutory enactments especially where the results of the processes would adversely affect the rights and fundamental freedoms of the persons against whom administrative actions and decisions are taken.

114. The Constitution, by allowing an accused person to be represented by an intermediary to communicate with the court no doubt places the right to fair hearing at the apex of most rights where a person's other rights would be likely to be adversely affected and as I have stated earlier, the right to education is one such right guaranteed by the Constitution which was likely to be affected by the procedural improprieties committed by the respondent in the process of disciplining the applicants students.

115. The respondent University is reminded by this court that albeit the applicants did not request for legal representations, the Rules and Regulations exclude such legal representation which exclusion I find and hold are ultra vires the Fair Administrative Action Act and Article 50 of the Constitution.

116. In addition, denial of the right to legal representation is a pure point of law which can be raised at any point in time whether on appeal or during the proceedings before the Students Disciplinary Committee. Nonetheless, disciplinary proceedings are a process and Judicial Review is not an appeal. It focuses on the process and the process commenced with the notification of the charges, appearances before Students Disciplinary Committee, Grievances Handling Appeals Committee and Senate hence any legal issue which was not canvassed at the lower level could still be raised before this court, which deals with processes not merit of the decision reached .

117. The other critical question that must be answered relating to the allegation of procedural impropriety is whether inclusion of the extra senate representative was prejudicial to the applicants.

118. As earlier stated, the Rules and Regulations for the conduct of disciplinary proceedings provide for the composition of the Students Disciplinary Committee comprising 9 members among them, two Senate representatives and one other student leader.

119. However, in this case, the Students Disciplinary Committee comprised nine members, excluding one other student leader and included an extra Senate representative.

120. A tribunal or administrative body that makes its own rules must be prepared to adhere to those rules regulating execution of its business and where it fails to do so, then the court will not hesitate to intervene to declare the actions or failure to adhere to those Rules ultra vires.

121. It is those rules and regulations that are confer lawful authority on the respondent University to discipline students who err. A tribunal or body whether it be judicial or quasi- judicial must not vary the scope of its powers and duties as a result of its own errors or conduct of others (**See Republic vs Kenya Revenue Authority exparte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530. C**ourts would not be rubber stamps of decisions of administrative bodies that fail to adhere to their own rules and procedures regulating their own business, failure to which the court will intervene.

122. Failure to adhere to the rules and regulations is evidence of bad faith. In **Re Hardial Sighn & Others [1979] KLR** it was held inter alia that Administrative bodies must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them**.**

123. The Rules and Regulations governing students discipline at the Respondent University are clear that the membership to the Students Disciplinary Committee is 9 with 2 Senate representatives. There is no reason or explanation given why the respondent introduced in the Students Disciplinary Committee an extra Senate representative who was not authorized by the Rules to participate in the deliberations of the disciplinary proceedings involving the applicants.

124. To worsen the situation, the Students Disciplinary Committee excluded one other student leader who was to form the quorum together with the Chuka University Student Association Chairman. No explanation was given for exclusion of the other student leader, in disciplinary proceedings involving students' affairs.

125. This is not to say that there could be a situation where one of designated persons forming the committee may be indisposed or away. If that happens, then it is expected that proceedings would either be adjourned to ensure that all the mandatory persons or office holders are present. The applicants had a legitimate expectation that they would appear before a committee that is fully and properly constituted. Section 7(2) of the Fair Administrative Action Act stipulates at Sub Section (2) that the court may review an administrative action or decision if the administrative action or decision violates the legitimate expectations of the persons to whom it relates. See **Republic vs University of Nairobi exparte Michael Jacobs Odhiambo & Others [2016] e KLR in which case Odunga J** determined the question of a properly constituted tribunal and the consequences of failure to adhere to the procedural rules and relied on several cases including **Gathigia vs Kenyatta University Nairobi HCMA No. 1029/2007 [2008] KLR 587** where the court held, in relation to a duty of a tribunal to ensure that it is properly constituted :

> ***"I would at this stage adopt the observations made in the DE SOUZA case (supra) where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P. 386 – the court said;***
>
> ***"1. if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed;***

2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue;

3. In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…….;

4. The person accused must know the nature of the accusation made;

5. A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward;

6. The tribunal should see to it that matter which has come into existence for the purpose of the quasi – lis is made available to both sides and once the quasi – lis has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."

126. A similar situation arose in **Republic vs Kirinyaga University College & 2 Others exparte Isaya Kamau Kagwima [2015] e KLR** where the court held inter alia:

"I do find that the composition of the membership at the meeting lacked 3 crucial members to wit the Dean of Students and two student representatives. In view of lack of quorum, I am persuaded by the submissions by the applicant that the body that made the decision to suspend the applicant was irregular and any decision emanating there from is a nullity."

127. The respondents did not ensure proper constitution of the disciplinary committees as stipulated in the Rules. In **KCB vs National Commission on Human Rights [2008] KLR 362 the** court stated, inter alia:

"…..it is the duty of the respondent to ensure that the requirements of the panel's composition are met i.e regulations 27. They cannot constitute the panel contrary to provisions s of the law. In this case we find that Mr Godana had no power sit alone on the panel presiding over the dispute between the applicant and the 1st interested party, as it offends clear provisions of the law. The respondent purported to rely on regulation 36 which provides that an irregularity resulting from a failure to comply with any provision of this part or any directions of the hearing panel before it has reached its decision shall not of itself render any proceedings void. We find that regulation 36 cannot remedy that omission because the composition of the panel having been specifically provided for is a fundamental provision which should ideally have been in the Act. Those proceedings presided over by Godana contrary to statute call for intervention of this court by way of Judicial Review." See also **Equator Inn v Tomasyan [1971] EA 405** where it was held that tribunals must be properly constituted was and in **Gathigia vs Kenyatta University [2008] KLR 587** where the court held:

" I would at this stage adopt the observations made in the Hypolleto Cassiani de Souza vs Chairman Members of Tanga Town Council [1961] EA 77 where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi judicial capacity: page 386- the court said :

If a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed;

If no procedure is laid down there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue;

In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means.

It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as to trial ……..."

128. Musinga J (as he then was) in **High Court Miscellaneous 257/2010 Republic vs The Communications Appeal Tribunal & Others [2011] e KLR** stated inter alia:

" A proper construction of the law is that a board, committee or tribunal should be established with numbers and qualifications as required by the relevant law for it to perform its statutory duties….But where the Minister is by law required to appoint five members of a tribunal following a given criteria and he appoints only three…..to the extent that the tribunal is lacking two members, it is not properly constituted. The tribunal was not properly constituted when it heard and determined the appeal. The purported proceedings were null and void and of no legal consequence (See page 37 of 46 Republic vs UON exparte Michael Jacobs).

129. In this case, I find and hold that exclusion of another student leader and inclusion of an extra Senate representative was in breach of the Fair Administrative Action Act and is amenable to interference by this court as such exclusion of and inclusion of an unauthorized person violates the applicant's legitimate expectation to appear before a fully properly constituted Students Disciplinary Committee.as was stated by Odunga J in the **Republic Versus University of Nairobi Exparte Michael Jacobs** case, an improperly constituted Tribunal has no power to preside over an administrative action.

130. There was then the question of whether the inclusion of the Chairman Chuka University Students Association Mr Harrison Maina

who was the 1st applicant's competitor in the elections leading to the impugned disciplinary proceedings was contrary to the Students Disciplinary Committee Rules and Regulations, 2014.

131. The Students Disciplinary Committee Rules contained in the Students Information Handbook 2014 makes it clear as asserted by the applicant, that ***any person who would be called as a witness would not sit on the committee.*** The proceedings of the committee do not disclose who the witnesses or even the person reading the charges to the applicants was.

132. The proceedings further did not given an opportunity to the 1st applicant to indicate whether he had any objections or reservations to his opponent being in the Students Disciplinary Committee despite what the Rules say.

133. The Rules in my view must have contemplated a situation where if one of the members of the Students Disciplinary Committee becomes conflicted as in being a complainant or witness in the matter, then that person cannot be expected to preside over the disciplinary proceedings against whom he/she would be testifying.

134. However, there is nothing on record to show that the Chuka University Students Association chair testified or that he was one of the complainants in the matter. That notwithstanding, as the events surrounding his election are what led to the riots and hence the disciplinary proceedings against the applicants, in my humble view Mr Harrison Maina would be expected to give evidence to shed light on what transpired before, during and after the elections.

135. Elections generally, are emotive and they can be deadly. They can cost a limb and a life. They generate enmity and it is therefore not unusual to find that there was bad blood between the elected leader and the loser, with the loser thereof claiming that there were irregularities and malpractices which denied him the victory. Albeit the disciplinary proceedings were not an appeal arising from the elections in which Harrison Maina was elected while Mr Waringa lost it out, it should have dawned on the Students' Disciplinary Committee that Mr Maina was a potential witness and whether he testified against the 1st applicant or not, his being on the Committee would create perception of bias in the eyes of the opponent, Mr Waringa and his supporters thereby rendering the administrative process action or decision unfair or made in abuse of power.

136. Accordingly, I have no hesitation in finding and holding that the exclusion of the other student leader and the inclusion of the chair of Chuka University Students Association who was the applicant's key opponent in the elections that led to the disciplinary proceedings and who was a potential witness in the said disciplinary proceedings rendered the Students Disciplinary Committee proceedings biased and abuse of power. The said Students Disciplinary Committee proceedings were vitiated. They must be quashed for being improperly constituted.

137. The applicants have further complained that the 3 members of the University Council were also members of the Students Disciplinary Committee and that therefore the decision of the respondent to expel the applicants was biased and made in error.

138. The composition of the Students Disciplinary Committee is as stipulated above.

139. The Grievance Handling Appeals Committee, it comprises:

i. The Council member- Chair

ii. Council member

iii. Permanent Secretary Ministry of Education, Science and Technology

iv. Vice Chancellor – Secretary

140. On the part of the University Council, it comprises:

i. DVC Academic – Chair

ii. Registrar (Academic Affairs) – Secretary

iii. Dean faculty in which student is registered

iv. Head of chairperson of the Department in which he student is registered.

v. Dean of students

vi. Two Senate representative

vii. Two student's representative from students Association.

In attendance is

viii. Complaint or representative of the complainant.

141. The terms of Reference for the Students Disciplinary Committee are to deal with any matters referred to it by the Chancellor, or any designated authority and make recommendation to the Senate. The procedure to the adopted by Students Disciplinary Committee the discipline of students is as provided for in the Students' Handbook 2014.

142. In the instant case, the Grievance Handling Appeals Committee held on 11th October 2016 comprised Mr Amos Chiguba whose designation is chairman but there is no indication to this court as to whether he was a Council member; and Ms Mary M. Masinde – representing Principal Secretary Ministry of Education, Science and Technology. Thus, two members out of the 4 attended and conducted the Grievances Handling Appeals Committee- the chair and the representative of the Principal Secretary of the parent Ministry.

143. There was no Vice Chancellor hence no Secretary and it is therefore not even apparent as to who was taking those long minutes, with the agenda being adopted by Ms Mary Masinde and seconded by the chair himself.

144. Accordingly, I find and hold that failure to fully constitute the Grievances Handling Appeals Committee vitiated the whole proceedings and therefore their decision submitted to the Council for adoption was no decision or at all. It was a nullity and of no effect.

145. In the same vein, on 12th October 2016 there was continuation of the 4th Grievances Handling Appeals Committee and instead of 4 members as per the Rules and Regulations, there were 3 members, Mr Amos Chiguba and Ms Mary Masinde the same people who attended the GHAC meeting on 11th October 2016 but this time round Mr John S, Mbaya member was present. It is however not clear whether the chair and Mr Mbaya are Council members as the quorum does not say so and no apologies from Vice Chancellor who is the Secretary was recorded. There is also no indication as to who was taking the minutes of the GHAC as they reviewed the Student Disciplinary Committee proceedings the whole day. At the end of it all, a closing prayer was offered by one Mr John Karimi Thuranira, who was never disclosed in the quorum and in what capacity he appeared just to offer a closing prayer for GHAC.

146. Similarly, on 13th October 2016 three instead of four persons attended the Grievance Handling Appeals Committee meeting and reviewed Student Disciplinary Committee proceedings and gave verdicts for each student's appeal . At page 36 of the said GHAC proceedings, Professor Dorcas K. Isutsa who was never an attendee according to the quorum as recorded, offered a closing prayer. Her capacity in the proceedings is not disclosed. However she was a member of the Student Disciplinary Committee meeting held on 12th April 2016.

147. In all the Grievances Handling Appeals Committee meetings the Vice Chancellor who was the Secretary never attended and there is no indication as to who was taking minutes which were confirmed as true record of proceedings signed by the chairman on 13th December 2016.

148. The respective Grievances Handling Appeals Committee verdicts were then presented to the Chuka University Council meeting held on 16th December 2016 at the 30th Council Meeting.

149. However, before commenting on the Council meeting, the court notes that the 29th Senate meeting held on 14th April 2016 at 2.00 pm also consisted of some members of the Students Disciplinary Committee like Professor Dorcas K. Isutsa (Deputy Vice Chancellor Academic, Research & Student's Affairs as Secretary and John K. Thuranira Acting Finance Officer.

150. The Grievances Handling Appeals Committee verdicts affecting each of the applicants were then submitted to the Council and the Council after deliberating on the same on 16th December 2016 made final decisions which determined the fate of the applicants, subject of these Judicial Review proceedings.

151. What is striking is that the some members who sat on the Council like Mr John Mbaya and Amos Chiguba were also members of the Grievance Handling Appeals Committee which then means that they were sitting on their own appeal at the Council.

152. Having presided over appeals arising from Student Disciplinary Committee, the two Mr John Mbaya and Mr Amos Chiguba could not and should not have sat in the Council to deliberate on the applicants' appeals where the Council unanimously adopted the report of the Grievances Handling Appeals Committee on Students' Appeal cases. Similarly Professor Dorcas K. Isutsa having sat on the Students' Disciplinary Committee could not sit in the Grievance Handling Appeals Committee which was a higher level above the Students' Disciplinary Committee.

153. Accordingly, I have no difficulty in finding and holding that the respondent's proceedings before the Students' Disciplinary Committee, the Grievance Handling Appeals Committee, and Council were riddled with procedural impropriety and therefore amenable to being interfered with by this court.

154. Another aspect of the impugned proceedings that is questionable is that on 22nd December 2016 all the students who had appealed their cases were send letters communicating the decision of the University Council. The letters were written and signed by Professor Francis G. Ndiritu the Registrar Academic Affairs.

155. The applicants claimed that the letter was signed by the Registrar Academic Affairs instead of the chairman and that therefore the Registrar Professor Francis G. Ndiritu usurped powers of the Council Chairman by purporting to write the letters dated 22nd December 2016 expelling/suspending the applicants from the University.

156. The respondent contended that no prejudice was caused by the Registrar simply communicating, the decision of the Council to the students. Reliance was placed on **Republic vs Kenya National Examination Council exparte Thomas Mackenzie [2016] e KLR** where the court held that as the decision to suspend the applicant in that case was made by the Board, the Chairman only conveyed the

message of the Board to all those suspended on the day including the Chief Executive Officer and the applicant. That therefore the communication by the Chairman to suspend officials including the applicant was not in violation of Clause 12:31:6 of the respondent's manual in place by fact only of being signed by the Chairperson to the Council in the absence of the Chief Executive Officer who was the Secretary to the Council.

157. It was therefore submitted in contention that in this case, the signing of the letters of expulsion and or suspension by the Registrar instead of the Chairman of the Council did not invalidate the Council's decision as the Registrar is the custodian of the students affairs.

158. It must however be appreciated that the above case involved suspension from employment of the Chief Executive Officer and another hence there was no Chief Executive Officer in place to sign the letter on behalf of the Council and therefore the Chairman of the Council signed the letter communicating the decision of the Council which the learned judge found not to invalidate the decision. I agree. However, in this case we are not told that the Registrar signed the letters of expulsion and or suspension of the applicants students on behalf of the Chairman of the Council.

159. There is absolutely no explanation given why the Registrar and or the Chairman of the Council as stipulated in the Rules, why the latter could not sign the letters of expulsion/suspension of the applicants vide letters dated 22nd December 2016. In addition the Registrar never signed the said letters on behalf of the Council as seen from the respective letters. It my view, the act of the Registrar, who was not authorized to sig the letters on behalf of the Chairman of the Council, was usurpation of power and which renders the communication a nullity. He acted without jurisdiction and therefore illegally and in error of law.

160. In **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** also defines illegality as follows;

> ***"...Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality..."***

161. On what constitutes an error of law, the learned authors of **Halsbury's Laws of England** at paragraph 77 page 170 of the **4th Edition** discuss the issue and state as follows:

> ***"There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power."***

162. There is no provision in the Rules and Regulations permitting that the Chairman could delegate the power of signing the impugned letters to any other person. As was held by **Lord Somervel** in **Vine vs. National Doc Labour Board [1956] 3 All ER 939**, at page 951:

> ***"The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duly and the character of the person. Judicial authority normally cannot, of course, be delegated…There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorize someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether "judicial" or not, cannot be delegated."***

163. In the **Pastoli vs. Kabale District Local Government Council and Others [supra]** it was held:

> **"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, irrationality and procedural *impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."*** [Emphasis added.]

164. Similarly in **Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271,** the Court expressed itself as follows:

> ***"What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer's evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director's powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred."***

165. The above position is restated in section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.

166. Accordingly, in the absence of any explanation as to why the chairman never signed the letters and in the absence of evidence that the Registrar signed them on behalf of the Chairman or the Council or that he had powers to do so and with the seal of the Council, this court finds that it is evident that the respondent herein, from the onset was not prepared to adhere to the Rules and Regulations governing its business in student disciplinary matters and neither was it alive to the mandatory provisions of the Fair Administrative Action Act, 2015.

167. There is also the question of whether the Senate should have accorded the applicants a hearing before adopting the Grievances Handling Appeals Committee report and forwarding it to the Council for adoption and communication of the decision to the applicants.

168. The respondent contended that there was no requirement for a hearing before the Senate. The applicants maintain that they should have been heard by the Senate before a decision affecting their rights to education was reached.

169. This court has already established above that some of the members of the Students Disciplinary Committee like Professor Dorcas K. Isutsa (Deputy Vice Chancellor Academic, Research & Students Affairs and John K. Thuranira(Acting Finance Officer) were part of the Senate Committee meeting held on 14th April 2016 which then renders the appeal decision by the Senate a nullity as no person should be allowed to sit on appeal of their own decision for which they have become functus officio.

170. Nonetheless as the Senate was considering an appeal lodged by the applicants challenging their expulsion/ suspension by Grievance Handling Appeals Committee, it was absolutely necessary that the applicants be called upon to choose whether they wished to be present at the said hearing to present their appeals orally, in person or through legal representation or by way of written submissions. Such opportunity was never accorded to them.

171. In my view, the failure to accord the applicants an opportunity to be heard during the Senate hearing deprived them of their constitutional right to be heard and to be accorded a fair hearing and to a fair administrative action since the decisions that were to be taken were no doubt going to adversely affect the applicants' rights to education.

172. As earlier stated, Article 50(1) of the Constitution guarantees every person the right to have any despite that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

173. The applicable law in the applicants' case is the Fair Administrative Action Act, 2015 and the Constitution. The respondent being a statutory body exercising administrative powers in disciplining students who appear errand is bound by the Constitution which is the supreme law of the land. The Bill of rights in the Constitution binds all including the respondent and in carrying out its mandate under the enabling statute and statutes of the University, the respondent must at all times apply those constitutional and legal principles espoused in Articles 10,47 and 50 of the Constitution and the Fair Administrative Action Act, 2015. This court has observed that most of the decisions which both sides of the dispute have relied on touching on procedural fairness by tribunals or bodies exercising administrative or quasi-judicial powers are decisions which were made prior to the enactment and coming into force of the Fair Administrative Action Act, 2015. It follows that those decisions were good law as at then but have since been overtaken by the operationalization of Article 47 of the Constitution, by the enactment of the Fair Administrative Action Act, 2015.

174. A party does not lose the right to be heard on appeal simply because they were accorded a hearing at the lowest level of the dispute. Being heard on appeal is an opportunity to challenge the manner in which the inferior body or tribunal handled the matter and therefore the applicants should never have been locked out of the appeal process as the denial ousted the applicants from the fair administrative process and from the judgment seat. Had the applicants been heard on appeal to the Senate, they would have had a chance to raise serious issues such as quorum.

175. The applicants also complained that they were never supplied with the proceedings of the Students Disciplinary Committee (SDC) which was subject of the appeal. The respondent never controverted this assertion. This, in my view, violated Section 4(3) (g) of the Fair Administrative Action Act which mandates that applicants must be given information, materials and evidence to be relied upon in making the decision or taking the administrative action.

176. Besides, this court further notes that the applicants were only served with charges requiring them to appear before the Students Disciplinary Committee they were never served with witness statements which the respondent wished to rely on to enable the applicants

adequately prepare for the hearing including, availing their own witnesses and or cross examining persons who gave evidence against them. This was contrary to Section 4(4) of the Fair Administrative Action Act, 2015.

177. The applicants further lamented that the number of counts enumerated in the disciplinary letters is not same as those in the expulsion letters. However, the applicants did not elaborate on this. They never provided the details of what was in their expulsion letters as charges that did not match what was stated in the disciplinary letters. They left it to the court to determine whether the charges in the expulsion letters were similar to those charges contained in the letters calling them for disciplinary action. He who alleges must proof. It is not for the court to go fishing for evidence to support the applicant's case. The applicant must bring out clearly those issues which he wishes the court to pronounce itself on. I would therefore reject the assertion which has not been satisfactorily proved by a further allegation that the disciplinary proceedings were not expeditions , efficient lawful and reasonable and procedurally fair. I have already made my findings on the aspect of lawfulness, reasonableness and procedural fairness.

178. On expedition I find that owing to the large number of students who had to undergo the disciplinary process, the respondent did its best in ensuring that the process, though procedurally unfair and often times unlawful, was conducted expeditiously. I decline to make an adverse finding against the respondent considering that the applicants had initially bypassed the own internal appeals review mechanism and approached the court prematurely vide JR 205/2016 causing more delay.

179. It was further alleged that Antony Dalmas Ouma was not invited to attend the Students Disciplinary Committee proceedings. The respondent maintained that the student in question was invited but that he failed to appear before the Students Disciplinary Committee. The burden of proof lay with the respondent to show that indeed this applicant received notification letter and in sufficient time to enable him attend the disciplinary proceedings. the applicant annexed to their own affidavit a letter dated 1th March 2016 marked as CLO 2 inviting him to attend the disciplinary proceedings annexture EN4 is an invitation to appear before GHAC. Accordingly, I find and hold that the allegations that he was not invited for the disciplinary proceedings is not founded. I reject the claims.

180. I must conclude this discussion on the manner in which the exparte applicants were subjected to students disciplinary proceedings by the university. As I do so, I must set the record straight that these proceedings are not an appeal. They are Judicial Review proceedings concerned with the process by which the administrative body (respondent) arrived at the decision. It is not about the correctness of the decision and so I have not delved into any merits of whether or not the decisions reached by the university against the applicants were correct or merited.

181. However, where a decision reached was in violation of the respondent's own internal review mechanisms/rules and Regulations and in breach of the law, such a decision cannot stand. It must be brought before the court and quashed. Accordingly, the decisions of the respondent suspending/expelling the applicants from the university are hereby brought into this court in exercise of jurisdiction vested in this court by Article 165(6) and (7) of the Constitution and are hereby quashed.

182. Having quashed the decisions of the respondents, the next question is whether mandamus is available to the exparte applicants.

183. The applicants have urged this court to grant them mandamus to compel the University to readmit them to continue with their education and sit for examinations.

184. This court appreciates, as was laid out in the **Oluoch Dan Owino vs Kenyatta University HC Petition No. 54/2014** that the right to education does not denote the right to undergo a course of education in a particular institution on one's own terms. Educational institutions have the right to set certain rules and regulations and those who wish to study in those institutions must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations and in doing so, commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions.

185. In this case, the court has found that some of the respondents' rules and regulations governing student's discipline are in violation of Article 47 and 50 of the Constitution and the Fair Administrative Action Act.

186. Such Rules include denial of the right to be present and be heard in person or by an expert or an intermediary or an advocate during the disciplinary proceedings at the appeal level and at the initial Students Disciplinary Committee level. The right to legal representation cannot be limited as is stipulated in the Fair Administrative Action Act.

187. Equally, the right to be heard on appeal before a final decision is reached cannot be limited. The respondent's procedures limit rights which are guaranteed by the Constitution and therefore it is high time the respondents embarked on a journey of reviewing and or amending them to accord with the constitutional and legal dictates, and they must do so before applying those rules in disciplining any other errand student of the Respondent University. But before that is done, and hopefully after this judgment is served upon the respondent for compliance, the respondents must be reminded that where an action under challenge has the potential of restricting human rights and fundamental freedoms guaranteed under the Bill of Rights, any procedural Rule enacted with a view to ensuring the due process is adhered to before any adverse action is taken ought to be considered seriously since under Article 19 of the Constitution, the Bill of Rights is the legal framework for social, economic and cultural policies and the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. The rights and fundamental freedoms guaranteed by our 2010 Constitution are not granted by the state or individuals (see **Management Committee of Makondo Primary School & Another vs Uganda National Examinations Board HC Civil Application No.18/2010** where it was held that.

> "*It* ***is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creative of human kind. It was ordained by the divine hand of God hence the rules enjoy supervisory over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice is null and void and of the effect. The rule as captured in the Latin phrase " audi alterun partem" literally translates into " hear the parties in turn", and has been***

appropriately phrased as " do not condemn anyone unheard". This means a person against whom there is a complaint must be given a just and fair hearing."

188. Nyamu J in **Kenya Bus Services Ltd & 2 Others vs Attorney General [2005] 1KLR 787** stated:

> ***"The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions s etc whereas rights are to the spiritual, god given, and ……..and to the non- believers changeless and the …… wonder of the world. The exparte order could not have been spared in any event for the reason that it would have hindered the smooth flow of the streams of justice for all by blocking the 221 persons while the rivers of constitutional justice or any justice at all should flow pure for all to drink from it."***

189. It must be understood, quite clearly that the respondents had powers to discipline the applicants students once proven that the students had misbehaved and breached the University Rules and Regulations which bind them, and mete out appropriate penalties stipulated in the Rules. However, that power to discipline and punish must be exercised in good faith and in adherence to the Rules and Regulations governing discipline of students, and the established law. The

190. In meeting out sentence, the respondent is expected to exercise discretion reasonably and not arbitrarily and or capriciously. The respondents in my view cannot be the complainant, prosecutor and sole judge and final arbiter in meeting out punishment to the offending students. If that were to remain the position, the rule of law would be lost and whittle away the constitutional safeguards provided under Article 47 of the Constitution. It is for that reason that courts are empowered to investigate allegations of abuse of power and improper exercise of discretion.

191. **Ibrahim, J** (as he then was) in **Eldoret High Court MiscAppli No: 1 of 2009, R vs. The Kenya National Examination Council, [2009] eKLR,** stated at page 11 and I concur that:

> ***"I agree that the cancellation of the entire examination results due to an irregularity in respect of one question in one part of a subject has led to very dire and serious ramifications for the candidates:-***
>
> *i.* ***The Candidates have been completely locked out of future professional careers they would have wished to pursue upon completion of their 8.4.4 education as they shall not get any Certificate and cannot therefore get a chance to further their studies.***
>
> *ii.* ***The cancellation renders their entire studies from kindergarten up to Form Four a waste both in terms of resources expended and considering that the job market requires a basic minimum of KCSE Certificate before one can be employed in any meaningful field.***
>
> *iii.* ***The Candidates character, reputation and esteem in the eyes of their parents, the local community and society at large has been adversely and negatively impaired and dented.***
>
> *iv.* ***The Candidates and the school have been stigmatized and will certainly be ostracized. They will forever*** **carry the tags of cheats** ***and academic thieves.***
>
> *v.* ***Any ambition to continue with their education and careers has been nipped in the bud in shame and disgrace. They remain with no moral or dignity in all aspects.***
>
> *vi.* ***The school being Church associated will be shunned and even the sponsors may withdraw support or call for expulsion of the Head Teacher, Teachers and Management.***
>
> *vii.* ***The Candidates may be negatively affected in their churches and religious associations.***
>
> ***The Respondent has submitted that it looks at the Applicants as Candidates and not young girls. That may be so, however, this Court looks at the Candidates as young girls many of them possibly minors. They are our children and are flesh and blood. They are our Kenyan youth and the future leaders in this Country. They have feelings, dignity, emotions and hearts that can be broken.***
>
> ***They have livelihoods, careers and the future which are on the verge of destruction. How can we look in their eyes and say that they have no right to be heard in respect of the charges of collusion and misconduct in examinations of cheating and dishonesty in examinations. Collusion borders on fraud and even criminality in the mores of the society.***
>
> ***Should a Judicial Review Court allow the said to be countenanced or to happen again in future" The "Wednesday Principle" states that:-***
>
> ***"Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonable could have reached that decision."***
>
> ***I agree as stated in the CHARLES KANYINGI CASE (P.7) that:-***

> ***"An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have no rights, liberties or interest of the person concerned and the purpose which the authority is seeking to pursue.:***
>
> ***The Counsel may well have made its decision in pursuance of its mandate to conduct examinations in the public interest. Be that as it may it would amount to a total miscarriage of justice, gross violation of the cardinal principles of Natural Justice and a mockery of the Rule of law in a country that prides itself to be Democratic Society with a Constitution that protects the individual rights and freedoms of its citizenry and others to allow the sacrifice of the Applicants' fundamental rights at the altar or institutional convenience, expediency or unproven public interest as in this case."***

192. This view now has statutory foundation in section 7(2)(l) of the ***Fair Administrative Act*** which provides that a court may review a decision of an administrative body if the decision is not proportionate to the interests or rights affected. In this case, the Rules and Regulations provide for different types of punishments with some being more serious than others. Whereas sentencing is at the discretion of the Respondent, the exercise of the discretion must be based of rational grounds and ought not to be arbitrary.

193. It is therefore my humble view that arbitrary punishments cannot pass the test of proportionality which is now recognized as one of the key considerations in judicial review proceedings. **Warsame, J** (as he then was) held in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** that ***where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See Padfield Vs. Minister of Agriculture and Fisheries [1968] HL.***

194. Further in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court stated:

> ***"The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law…In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons…Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void…The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law…"***

195. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** the Court held:

> ***"An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."***

196. In meting out punishment to the students, the Respondent University was expected to exercise its discretion reasonably and not arbitrarily and capriciously or in bad faith. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, those in authority should give reasons and if they give none the court may infer that they had no good reasons. Similarly where the reason given is not one of the reasons upon which they are legally entitled to act, the Court is entitled to intervene since their action would then be based on irrelevant matter. That administrative bodies are now enjoined to consider relevant matters and avoid relying on irrelevant ones is now trite. Under Section 7(2)(f), of the Fair Administrative Action Act, 2015, a court or tribunal may review an administrative action or decision, if the administrator failed to take into account relevant considerations.

197. Odunga J in **Republic Versus University of Nairobi Exparte Michael Jacobs**[supra] has this to say and I agree:

> "It is therefore my view that where there are various sentences provided by the law without the law specifying which penalty applies to what offence, where the administrative body opts for the heaviest penalty it ought to give reasons for the same if it is to escape the accusation of arbitrariness. Such considerations may as indicated in the Rules and Regulations include the conduct of the student (past and present). However the reasons for imposing such sentencing ought to be disclosed. See ***Paul Kuria Kiore vs Kenyatta University Petition 396/2014."***

198. The charges that faced the students are serious and cannot be understated. However, circumstances under which those offences were allegedly committed must be taken into account. Students were involved in the process of electing their student leaders at the university. It is not disputed that in Kenya, student leadership has been politicized. It is a hot bed of politics. It is here that students emerge as leaders who then venture into the country's democratic electoral arena.

199. Electoral violence cannot be tolerated off course but in my view, it is upon the respondent University and the law enforcement agencies to ensure that there is law and order maintained before, during and after such elections to prevent violence and damage or loss of lives and property.

200. The students on the other hand must be made to know that their actions and choices have consequences. Such consequences include

their expulsion from the university and therefore being completely locked out of future professional careers that they would have wished to pursue upon completion of their courses at the university in that they will not get any qualification certificates. All their years in school and college will have gone to waste. All the resources expended by their guardians and parents or sponsors will have gone to waste. Those who look upon the students as their role models will be disappointed.

201. The students' character, reputation and esteem in the estimation of their parents, community, and society at large is adversely affected and impaired. They will perpetually carry the tag of being destructive and failures in life for being expelled from university thereby their ambitions for future careers are ripped in the bud of shame and disgrace as they remain with no moral or dignity in all aspects .

202. The applicants are Kenyan Youths who from their pleadings feel discriminated against for coming from a certain part of this county. There may or may be no truth in that aspect or allegation. But they are our future leaders. However, their hopes and aspirations appear doomed by the punishments meted out to each of them by the University in disciplinary proceedings which this court has found, were not undertaken in accordance with the University's own rules and regulations and the established law.

203. The livelihoods of the applicants appear on the verge of destruction. The applicants persistently appeared in court during the hearing of this case. They appeared trodden. They were eager to know the outcome of these proceedings and any delay almost broke their hearts. I could tell that they yearned to return to class to acquire the knowledge that will propel them to greater heights.

204. Their alleged actions border on criminality because they were charged in court but the charges were withdrawn. No reasons were advanced for such withdrawal.

205. Therefore, this court must find an appropriate balance to be maintained between the adverse effects which an administrative body's decision may have to the rights, liberties or interests of the person concerned and the purpose which the body seeks to pursue.

206. In view of the violations of the principles of natural justice, and therefore the mockery of the rule of law, this court must protect the individual rights of the applicant students. This court has power to keep the administrative excesses on check and supervise public and administrative bodies through the control and restrain abuse of powers. It must however condemn all forms of violence and admonish students who have the propensity or tendency to take the law into their own hands and violently engage in wanton destruction of property and innocent people who are in contact with them in their riotous state.

207. This court has powers to interfere with the decisions taken by the respondent where such decisions were in violation of the Rule of Law.

208. The administrative body/respondent had the discretion to mete out any of the sentences stipulated under the Rules. It was not bound to expel the students and where there is suspension, longer period of suspension without stating why the students deserved particular punishments may be construed to mean arbitrariness. The applicants have already lost out over 2½ years of their studies. Repeating disciplinary processes will not be fair and just.

209. For all the above reasons, I find that the motion for certiorari and mandamus is merited. As I have already pronounced myself on certiorari, I now proceed and issue a judicial review order of mandamus compelling the respondent Chuka University to take all the necessary steps and measures to facilitate the applicants students to be readmitted into the university to access and continue with their studies in accordance with the University's academic calendar unless and until otherwise their studies at the Chuka University are otherwise lawfully terminated or suspended.

210. As the merits of the charges leveled against the applicants remain unresolved, each party shall bear their own costs of these Judicial Review proceedings .

Dated, signed and delivered in open court at Nairobi this 19th day of February 2018.

R.E.ABURILI

JUDGE

In the presence of:

Mr Appollo Mboya Advocate for the Applicants

Miss Areri advocate for the Respondents

CA: Kombo