REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 43 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INFRINGEMENT AND OR VIOLATION OF THE PETITIONERS CONSTITUTIONAL RIGHTS CONTRARY TO ARTICLES 25(a), 35, 43(e & f), 47(1), and 50(1) (e), (i) and (k), A OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF VIOLATION OF SECTION 106 (B) (1 to 5) AND SECTION 107(1) OF THE EVIDENCE ACT, CAP 80, LAWS OF KENYA

BETWEEN

STEVEN MUGWANJA NYAMBURA.....................................PETITIONER

AND

KENYATTA UNIVERSITY...1ST RESPONDENT

DEAN, SCHOOL OF BUSINESS,

KENYATTA UNIVERSITY...2ND RESPONDENT

DEAN, SCHOOL OF ECONOMICS,

KENYATTA UNIVERSITY..3RD RESPONDENT

REGISTRAR OF ACADEMICS,

KENYATTA UNIVERSITY..4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner herein STEPHEN MUGWANJA NYAMBURA, is a former student of KENYATTA UNIVERSITY, the 1st respondent herein, having been admitted to the said university in September 2012 to pursue a degree course in Commerce. He completed his course in April 2016 and was promptly placed in the provisional graduation list for the graduation ceremony slated in the month of June 2016. His name was however removed from the final graduation list published five (5) days to the graduation day on the basis of alleged tampering with online examination data thereby precipitating a series of events that culminated in the filing of the instant petition.

PETITION

2. In the petition dated 5th February 2018 and supported by the petitioner's affidavit sworn on the same date, the petitioner states that by a letter dated 20th June, 2016 he was suspended from the 1st respondent university on allegations of involvement in examination irregularity pending appearance before the University's Disciplinary Committee (hereinafter **"the committee"**). He attached a copy of the said suspension letter to his supporting affidavit as annexture **"SMN5"**.

3. He further states that on 7th October 2016, the 1st respondent served him with a letter requiring him to appear before the committee on 28th October 2016 to answer charges of influencing tampering with online examination data in respect to a Unit called EET 101, also known as "Micro Economics Theory 1", whose grade was changed from D to A, a unit which the petitioner had taken in the 2nd semester of his 1st year and in which he had sat for an examination in the month of April 2013, but whose results, he alleged, the 1st respondent did not convey to him despite numerous queries. He claims that in October 2015 he learnt, on checking the university's online examination portal that he had scored a grade E in the said unit but that upon lodging several complaints to various offices including the departmental chairman, he was in mid-2016 pleasantly surprised to learn that his earlier results had been corrected and that he had scored an A for the Unit EET 101 (hereinafter **"the disputed unit"**).

4. The Petitioner avers that he appeared before the committee on 28th October 2016 for the hearing of the case against him but that the 1st respondent did not tender any sufficient evidence to support the charges levelled against him. He faulted the committee for presiding over a flawed process that he claimed, violated the principles of natural justice thereby denying him his right to a fair hearing as envisaged under Article 50(1) (e),(i) and (k) of the Constitution.

5. The Petitioner further avers that the verdict of the committee that found him culpable for the charges filed against him was communicated to him in a letter dated 21st December 2016 which letter indicated that he had been found guilty of tampering with the online examination data in a different unit, being Unit EET 201 instead of the disputed unit. He states that the committee also recommended the discontinuation of his studies at the university and further barred him from accessing the university premises without the express permission from the university management.

6. The petitioner stated that his suspension and subsequent expulsion from the university following disciplinary proceedings that, he claims, were fundamentally flawed was unfair, malicious, and unlawful and infringed on his constitutional right to education, social security and fair administrative action as it ended his four year academic investment thereby shattering his dreams of living a dignified life upon concluding his studies. Based on the above facts, the petitioner sought the following reliefs:

> **1. A declaration that the 1st respondents and its officials have jointly and severally violated the petitioner's right to fair hearing.**
>
> **2. A declaration that the 1st respondents and its officials have jointly and severally violated the petitioner's right to fair administrative action.**
>
> **3. A declaration that the 1st respondents and its officials have jointly and severally violated the petitioner's right to education, social security and right to access to information.**
>
> **4. A declaration that the 1st respondent's letter suspending the petitioner from the 1st respondent's institution dated 20th September 2016, Students Disciplinary Proceedings conducted by the 1st respondent on 28th October 2016 and letter dated 21st December 2016 discontinuing the petitioner from the 1st respondent grossly violated the Rules of fair hearing and natural justice, were illegal, malicious and void ab initio and are hereby set aside and or revoked.**
>
> **5. An order that the Petitioner is entitled to general exemplary damages for highhanded, oppressive and arbitrary violation of the petitioners' fundamental rights and freedoms.**
>
> **6. In the alternative to prayer (four) 4 above an order that the petitioner be allowed to unconditionally sit for the disputed Unit of EET 101 which is also known as " Micro-Economics, Theory 1" and appropriate marks be awarded to him.**
>
> **7. That subsequent to prayer 4 or 7 above , the petitioner be deemed to have passed the disputed Unit of EET 101 which is also known as "Micro-Economics, Theory 1" and be unconditionally cleared for final graduation at the 1st respondent's institution.**
>
> **8. Costs of the Petition.**

<u>RESPONSE</u>

7. Through the replying affidavit of Professor Ephantus Kabiru dated 28th March 2018, the 1st respondent confirms that the petitioner was indeed one of its students and that he was due to graduate in the year 2016 but that upon scrutinizing the examination data in respect to the petitioner, it emerged that there were discrepancies in the marks he attained in the examination pointing towards alteration of results in respect to the disputed unit which showed that the petitioner had higher marks in the online portal as compared to the actual marks held by the departments.

8. Professor Kabiru deposed that the initial entry of marks in the physical records was 22.0 an indication that the petitioner did not sit for the final examination but that the marks were amended through a posting made by one **Seth Wekesa** on 14th April 2016 to read 72.0. He attached a copy of the petitioners grades audit report to his replying affidavit as annexture **"FC-1"**.

9. According to Professor Kabiru, the irregularities detected upon the verification of the results showed that some members of the respondent's staff had colluded with the petitioner to surreptitiously alter the results so as to enable the petitioner to undeservedly graduate. He further deposed that the results of the grades audit report informed the 1st respondent's decision to suspend the petitioner and to stop him from graduating pending conclusive investigations into the matter and thereafter, a hearing before the committee.

10. It was deposed that the suspension letter sent to the petitioner was issued pursuant to the 1st respondent's examinations regulations as stipulated in the university calendar 2014-2017 at page 174 which was attached to the replying affidavit as annexture **"FC-2"**. Professor Kabiru deposed that the petitioner was, through a letter dated 7th October 2016 summoned to appear before the committee on 28th October 2016 to answer charges of influencing tampering with online examination data in course Number EET 101, whose grades were altered from D to A. It was deposed that upon hearing the case and granting the petitioner a chance to be heard, the committee recommended the discontinuation of the petitioner's studies at the respondent's university which decision was also communicated to the 1st respondent's Vice Chancellor and the petitioner through a letter dated 21st December 2016.

11. Professor Kabiru further averred that the petitioner was, in the said latter dated 21st December 2016, informed of his right of appeal against the committee's decision to the Chairman of the University Senate, if he deemed it necessary, an option which the petitioner did not explore as he, instead, chose to file the instant petition.

12. Professor Kabiru denied that any of the petitioner's rights was violated and maintained that the entire disciplinary process that the petitioner was subjected to was fair, just and was conducted in strict compliance with the rules of natural justice as the petitioner was duly informed of the accusations against him after which he was granted a chance to respond to the said accusations at a hearing that was conducted by an impartial committee which concluded its deliberations within a reasonable time.

13. Professor Kabiru further stated that the 1st respondent, as a public institution, acted in the best interest of the public with the sole aim of upholding the credibility and integrity of degrees that it awarded and that at no time was it motivated by any malice against the petitioner.

PETITIONER'S SUBMISSIONS

14. ***Mr.Musungu***, learned counsel for the petitioner, submitted that having been a student at the 1st respondent university for the period between 2012 and 2016, the petitioner was due to graduate in June 2016 but that his hopes to graduate were dashed when the 1st respondent accused him of influencing tampering with the examination online data with regard to the disputed unit that had its marks changed from 22 to 72 thereby changing the grade from D to A which accusations led to his suspension and subsequent expulsion from the said university.

15. Counsel explained that during the petitioner's 1st year studies at the 1st respondent university, he duly sat for an examination in the disputed unit but that his results for the said unit were never conveyed to him thereby prompting him to lodge numerous complaints and queries that did not yield any concrete results till 2016 when the petitioner was, through the assistance of his department's chairman, able to obtain his results for the disputed unit that showed that he obtained grade E but that after filing a complaint, the grade was altered to read A. It was the petitioner's submission that he was thereafter listed on the provisional graduation list for the graduation slated for June 2016 before the commencement of the impugned disciplinary proceedings.

16. Learned counsel submitted that the petitioner presented himself for a hearing before the Committee whose decision to discontinue him from studying at the said university was communicated to him in a letter dated 21st December 2016. The petitioner's case was that he sat for and passed the examination in the disputed unit and that an earlier discrepancy in his marks had been corrected. He took issue with the wording of the discontinuation letter which referred to unit EET 201 as the affected unit instead of the disputed unit EET 101. Counsel explained that the petitioner was not able to appeal against the decision of the committee within the 14 days granted for the appeal because he received the expulsion letter late and that he had an ailing mother to attend to. He stated that the disciplinary proceedings of 28th October 2016 were malicious since no investigations report was tendered before the committee to confirm that the examination results online data had been tampered with.

17. *According to* ***Mr. Musungu*** the petitioner was placed in the provisional graduation list because he had passed all the university examinations. He faulted the committee for making an adverse finding against him on allegations that were not substantiated by irrefutable evidence. In ***Mr. Musungu's*** view, the entire disciplinary process was not procedural as it was not carried out in strict compliance with the rules of natural justice and that his constitutional rights to fair hearing and fair administrative action were violated. He urged this court to revoke the said decision of the committee. He relied on the decision in the case of **Eliud Nyauma Omwoyo & Another vs. Kenyatta University, Constitutional Petition No. 365 of 2012-Nairobi** wherein Lenaola J. (as he then was) while adopting the decision in the case of **Arthur Nzioka vs. Kenyatta University** held:

> ***"….in the circumstances, considering the Respondent's total failure to comply with procedure relating to discipline, this court cannot just sit back, throw its hands up and say that it is powerless to say anything to uphold the applicant's rights."***

On the principles of natural justice, learned counsel cited the case of **De Souza vs. Members of Tanga Town Council, 1961 (EA) 377** wherein it was held inter alia that:

> ***"…if the principles of natural justice are violated in respect to any decision, it is immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice. The decision must be declared to be no decision….."***

18. Counsel also relied on the decision in the case of ***Eliud Nyauma Omwoyo & 2 Others v Kenyatta University (supra)*** for the submissions that **Article 47** of the Constitution requires that administrative action taken should be expeditious, efficient, lawful, reasonable and

procedurally fair.

19. On legitimate expectation, counsel cited the case of **Serah Mweru Muhu vs. Commissioner of Lands** to support his argument that petitioner expected to graduate from the university upon obtaining examination results that showed that he had passed all the units including the disputed unit.

RESPONDENT'S SUBMISSIONS

20. ***Mr. Angwenyi,*** **l**earned counsel for the 1st respondent submitted that the Disciplinary Committee heard the petitioner and recommended his discontinuation from studying in the respondent university and that the said decision was duly communicated to the petitioner. He maintained that the decision was justified and was arrived at through a fair process after which the petitioner was granted an opportunity to appeal which opportunity the petitioner did not seize. While citing the provisions of Section 9 of the Fair Administrative Actions Act, counsel submitted that the petitioner had failed to exhaust all the 1st respondent's internal dispute resolution mechanism and could not therefore be seen to be seeking a review of the administrative action that had been taken against him.

21. In a rejoinder to the petitioner's claim that he was unable to file an appeal against the committee's decision within the requisite 14 days because he received the expulsion letter late and because he had a sick mother to attend to, counsel submitted that expulsion letter clearly stated that the 14 days period to appeal would begin to run from the date that the petitioner received the said letter and that at no time did the petitioner seek an extension of the appeal period on the basis of personal challenges within his family set up.

22. On the petitioner's claim that his suspension was unlawful, counsel submitted that the committee handled and determined the petitioner's case, in strict compliance with the 1st respondent's rules and regulations governing the discipline of its students. He emphasized that under the said rules, the university was required to subject the petitioner to a disciplinary process upon discovering that he had committed an examination malpractice and was mandated to suspend the petitioner the moment an examination irregularity was brought to its attention. For this submission, counsel cited the case of **Kenyatta University & Others vs. Elena Korir [2013] eKLR**. According to counsel, the petitioner was accorded a fair hearing and after the Committee's recommendations were communicated to him, he opted not to lodge any appeal against the said decision thereby foregoing his opportunity to challenge the said decision.

23. On legitimate expectation, counsel submitted that the mere fact that the petitioner's name appeared on the provisional graduation list was not an automatic guarantee that he would eventually graduate since the provisional list was still subject to verification and confirmation. Counsel relied on the decision in the case of **Republic vs. Kenya National Examination Council ex parte Martin Phiri [2014] eKLR.**

24. On the petitioner's claim for damages, counsel urged the court to balance the right of the petitioner to the orders sought against the greater public interest which is to ensure that students graduate with the marks that they deserve as was observed in the case of **Alice Njeri Naichiri vs. Kenyatta University [2012] eKLR**. Counsel added that it took the petitioner 13 months after receiving the impugned decision of the committee to challenge the said decision before this court and in that regard, the costs of the delay should be borne by the petitioner. Counsel concluded that the petitioner did not establish that the 1st respondent violated any of his rights under the Constitution.

DETERMINATION

25. I have considered this petition, the response thereto, the submissions by counsel for the parties and the authorities that they relied on. This petition challenges the respondent's decision to discontinue the petitioner's studies at the university on grounds that he had influenced the tampering with online examination results. It was alleged that the petitioner who had scored D in the disputed unit changed his marks from 22 (grade E) to 72 (grade A) which the petitioner denied.

26. It was not disputed that the 1st respondent's students' Disciplinary Committee conducted disciplinary proceedings against the petitioner, found him guilty and recommended the discontinuation of his studies in their institution and further barred him from entering the university grounds without permission. It was also not disputed that the petitioner, who was duly notified of the committees decision, did not lodge any appeal against it.

27. The petitioner's main ground in this petition was that his right to fair administrative action in terms of Article 47 of the Constitution was violated. He said he was not accorded a fair hearing and that there was no evidence to support the allegations made against him.

28. As was aptly emphasized by Chacha Mwita J. in the case of **Geoffrey Oduor Sijeny v Kenyatta University [2018] eKLR,** the right to fair administrative action is not only an integral part of the Bill of Rights but also an essential feature of our Constitution and the soul of a democratic society without which democracy and the rule of law cannot be maintained. This right is now firmly entrenched in our Constitution as a way of ensuring that administrative actions meet the standards set by the Constitution.

Article 47 of the Constitution provides as follows;

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair***.
>
> ***(2) 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.***

29. As can be noted from the above provision, it is now a constitutional requirement that administrative bodies must employ constitutional standards of legality, reasonableness and procedural fairness in any administrative actions. Under the said standards, the administrative bodies are also required to accord the person to be affected by such actions a hearing before taking the action. Where the actions would have adverse effects on the persons' right(s), they are required to give the persons written reasons for the actions. This is a right that must not be

abrogated or compromised.

30. It is now trite law that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** Civil Appeal 52 of 2014 in which the Court of Appeal held that:

> ***"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."***

31. The importance of fair administrative action as a Constitutional right was also stated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

> ***"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"***

32. Section 4 of the Fair Administrative Action Act, 2015 reiterates and emphasizes the prominence of Article 47 and the process to be followed in conducting administrative actions. A party coming to this Court on the basis that his or her right to fair administrative action was violated, must therefore show that the standards enumerated in Article 47(1) as amplified by section 4 of the Fair Administrative Act were non-existent in that administrative action and or that they were violated, and only then should the Court summon its jurisdiction under Article 165 (3) (b) of the Constitution ***to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.***

33. The question which then arises in the instant petition is whether the committee complied with the constitutional requirements of fair administrative action. From the evidence presented by both parties, it was not disputed that the petitioner was notified of the allegations made against him and thereafter invited to attend the disciplinary proceedings where he made his presentations. The Disciplinary Committee considered the case before it and recommended the discontinuation of the petitioner's studies. Upon making its decision, the committee notified the petitioner of the outcome of his case and granted him an opportunity to appeal. The petitioner did not lodge any appeal as was required by the university statute.

34. My finding, therefore, is that the 1st respondent fulfilled the requirements of fair administrative action as envisaged by the constitution by informing the petitioner, in advance and in writing, of the charges made against him, and by granting him an opportunity to defend himself at a hearing before making its recommendations. It was not disputed by the petitioner that the 1st respondent has a legally recognized appeal process which process the petitioner was informed he could pursue and opted not to follow. No material was placed before this court, by the petitioner, to satisfy me that he was prevented from presenting his appeal by the 1st respondent or that his plea to lodge his appeal out of time was rejected.

35. Having failed to file an appeal, I find that the petitioner cannot jump the gun and present his case before this court before exhausting the dispute resolution mechanism that is provided for by the university rules as to do so would contravene the clear provisions of the Fair Administrative Action Act which at Section 7 provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision in court or before a tribunal as the case may be in accordance with section 8 of the Act. Section 9(2) of the said Act, on the other hand, is clear that the High Court or a subordinate court should not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

36. Having regard to the aforementioned provisions of the Act, it is my finding that where there exists an alternative dispute resolution mechanism allowed by law, and a party chooses not to follow and exhaust that process, it is not open for that party to approach the court prematurely as at that given time the court lacks the jurisdiction to entertain the matter. Indeed courts have on numerous occasions held that where there is an alternative remedy the same should be pursued first before turning to court for redress. The case of **Republic v National Environmental Authority [2011] eKLR**, is one such case where the court held that where there is an alternative remedy and especially where an appeal process is provided for, it is only in exceptional circumstances that an order for Judicial Review would be granted, and only if that alternative remedy is not suitable to determine it.

37. From the stand point of both the statutory and case law therefore, the petitioner could only move the court after he had exhausted the alternative remedy or if he demonstrated that the alternative remedy was not suitable for resolving the problem which is not the position in the instant case. As matters stand in this case, the petitioner has not shown that the alternative dispute resolution mechanism is not suitable for resolving his case or that there are special circumstances that would make the court assume jurisdiction and hear the matter.

38. It is therefore my finding that the procedure adopted by the committee in informing the petitioner of the case against him and according him an opportunity to defend himself met the minimum threshold of a fair trial/hearing within the meaning of Article 50 of the Constitution. No material was placed before me to show that any of the petitioner's rights were violated during the said hearing.

39. The petitioner argued that the Committee's disciplinary process was not procedural while citing the case of **Eliud Nyauma Omwoyo (supra)**. I however find that the circumstances in the cited case are different and distinguishable from the instant case as in the said case, the court found that there was total failure to comply with the procedure relating to discipline while in the instant case, the petitioner was subjected to the 1st respondent's disciplinary process.

40. In this case, the main issue in dispute is whether or not the petitioner violated examination regulations by influencing the tampering with the online data. My humble view is that depending on the answer to that issue, the next issue is whether the petitioner could be said to have qualified to graduate. I find that those are issues that the Appeal Disciplinary Committee could have resolved had the petitioner complied with the appeal procedure allowed by the respondent's statute. I find and hold that this petition is clearly premature given the fact that the appeal process was not exhausted.

41. My above findings could have been sufficient to determine this petition, but I am still minded to consider the other pertinent issue raised by the petitioner regarding the violation of his constitutional rights.

42. Under the claim for right to fair administrative action, the petitioner also alleged that the 1st respondent did not handle his case in an expeditious manner as there was an apparent delay in the hearing and determination of his case which delay traumatized him and his entire family members who were all looking forward to attending and celebrating at his graduation ceremony.

43. From the facts of this case, it was not disputed that the disciplinary process was initiated by the 1st respondent in June 2016 when it issued the suspension letter and was concluded on 21st December 2016 when the impugned verdict was rendered. In effect therefore, the entire disciplinary process, was initiated and concluded within a period of 6 months. The question which then arises is whether the said period of 6 months can be said to have been such a long time that it amounts to a delay that offends the provisions of Article 47 of the Constitution. Courts have held that what amounts to a delay will depend on the facts and circumstances of each case. In the case of **Utalii Transport Company Limited & 3 others V NIC Bank Ltd & Another (2014) eKLR,** when discussing the principles that the court ought to apply in determining whether there has been a delay to warrant the dismissal of a case for want of prosecution, the court observed as follows:

> ***"Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case the explanation given for the delay and so forth. Nevertheless, inordinate delay should not be difficult in ascertaining once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore inexcusable… inordinate delay for purposes of dismissal of a suit for want of prosecution should be one which is beyond acceptable limits"***

In the case of **Jimmy Wafula Simiyu V Fidelity Commercial Bank Ltd (2014) eKLR** Gikonyo J. held as follows:

> ***"…No doubt the court has discretion to excuse delay as long as it has been explained to the satisfaction of the court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to a fair trial to one of the parties or both. Therefore, the fact of delay does not seal the fate of the case..."***

44. Applying the above principles to the instant case, I note that the petitioner did not state that there was a time limit within which the 1st respondent ought to have heard and determined the disciplinary case against him so as to enable this court determine whether the delay, if any, in concluding the process was inordinate or amounted to a violation of the provisions of Article 47 of the Constitution. Indeed, no material was placed before this court to show the kind of workload that the committee had, at the time so as to assist this court to ascertain if it was sluggish in handling the petitioner's case. I am therefore unable to find that there was a delay that caused substantial prejudice to the petitioner's trial before the committee thereby violating his rights to fair administrative action.

RIGHT TO EDUCATION

45. It is trite law that the right to education is not absolute, but is subject to the rules and regulations governing studies/education in a given institution.

46. In the instant case, the 1st respondent's case was that tampering with examination results was against its regulations as stipulated in the university calendar for the year 2014 – 2017 which was produced as annexture "**FC-2"** to the replying affidavit. I have perused the said annexture/exhibit which states as follows on examination irregularity:

> ***"A student who is involved in any examination irregularity shall be suspended immediately by the Registrar (Academic) upon receipt of an incident report pending appearance before the students' Disciplinary Committee."***

47. Having regard to the above regulation, I am satisfied that in suspending the petitioner and calling upon him to answer charges of influencing the tampering with the results, and thereafter reaching the verdict of guilt and discontinuing the petitioner's studies, the 1st respondent acted well within its mandate and rules. It is therefore my finding that the disciplinary process did not amount to an infringement of the petitioner's constitutional right to education. I am guided by the finding in the Indian case of **Maharashtra State Board -VS-Kurmarsheth & Others, (1985)CLR 1083** where it was stated that:-

"So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations.............."

In the above case, the same court emphasized the need:-

"............to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them."

48. Also cited in the case of **Maharashtra State Board (supra)** was the case of **University of Mysore and others v. Gopala Gowda and another A.I.R 1965 S.C. 1932** where the regulations framed by the Academic Council of the University was under challenge and the High Court of Mysore held that the regulation was beyond the competence of Academic Council or the University and those bodies had no power to prevent the two students from prosecuting their studies and from appearing at the subsequent examination. In the Special Leave Petition moved by the university, the Supreme Court disagreed with the view taken by the High Court and held:-

"The Academic Council is invested with the power of controlling and generally regulating teaching courses of studies to be pursued, and maintenance of the standards thereof, and for those purposes the Academic Council is competent to make regulations, amongst others, relating to the courses, schemes of examination and conditions on which students shall be admitted to the examinations, degrees, diplomas, certificates and other academic distinctions. The Academic Council is thereby invested with power to control the entire academic life of the student from the stage of admission to a course or branch of study depending upon possession of the minimum qualifications prescribed".

In the case of **Rachel Adhiambo Ogola & Another v Council of Legal Education & Another [2017] eKLR** Mativo J. held inter alia that:-

"The first Respondent has not only a statutory duty but also a moral duty to uphold the law and to ensure due compliance with the law and Regulations governing the examinations. It would in general be wrong to whittle away the obligation of the Respondent as a public body to uphold the law. A lenient approach could be an open invitation to the Respondent to act against its legal mandate and pose a real danger of compromising both the professional ability and competence of persons released to the public to practice law."

49. Taking into consideration the dictum in the above cited cases, I find that the 1st respondent was justified and had a moral obligation to uphold the law regarding the disciplinary procedures within its institution in order to ensure compliance with the regulations governing examinations.

50. Consequently and for the reasons, findings and observations that I have made in this judgment, the petition dated 5th June 2017 is declined and dismissed with no order as to costs.

Dated, delivered, and signed in open court at Nairobi this 26th day of June, 2018.

W.A. OKWANY

JUDGE

In the presence of

Mr. Musungu for the petitioner

No appearance for the respondent

C.A. Kombo