REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYAAT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE 283 OF 2017

REPUBLIC……...…… APPLICANT

VERSUS

MOUNT KENYA UNIVERSITY……...……..……..1ST RESPONDENT

MOUNT KENYA UNIVERSITY

DISCIPLINARY COMMITTEE……...…...2ND RESPONDENT

JUDGEMENT

Applicant's Case

1. The applicant herein, **Ouma Flora Awino**, a fourth year university student at Mount Kenya University (hereinafter referred to as "the University") avers that on the 28th day of May 2017, she was sitting her Diplomatic and Consular law examination when within three minutes into the examination she reached for my handkerchief to clean my nose which tagged along a piece of paper which contained a co.

2. According to her, upon realization thereof she subconsciously put the paper in her mouth chewed it and swallowed it. She was then asked by the invigilator to produce what she had put into her mouth but being unable to produce the same, the said invigilator asked the applicant to follow her and the former gave the applicant a form to fill on the occurrences.

3. The applicant disclosed that she was summoned for a disciplinary meeting on the 4th May, 2017, where a conviction was reached with the punishment of one semester suspension and a repeat of fourth year first semester upon readmission in September, 2017. According to the applicant, she was not given a chance to defend herself or even bring in witnesses in support of her case which is not only a violation of her right to fair hearing but also a violation of the Constitution, rules of natural justice and the Mount Kenya University Student's Handbook.

4. In support of her case the applicant referred to rule 5.1.2 of the students handbook, which states that:

> ***'where a candidate destroys evidence by swallowing, tearing, or throwing it away or in any other way howsoever, then the evidence of at least TWO (2) invigilators will be deemed to be sufficient evidence of an examination malpractice'***

5. It was contended by the applicant that this rules was not adhered to by the Respondent as no witness

was called in support of the allegation.

6. Aggrieved by the said decision the applicant on 5th May, 2017 appealed to the Appeals Committee on the ground that at the first instance hearing no witnesses were called to support the Respondent's claim as required by the foregoing rule. About a week later she was notified of a hearing through a phone call on 16th May, 2017 where again she was denied chance to call witnesses in support of her case after which she was asked to wait for a verdict in a week's time which was not delivered reason being a verdict could not be reached and she was notified to go for a second appeal.

7. During the second appeal, it was averred that the committee called in the witness to testify. To the applicant in calling in this witness at that stage, the Committee introduced fresh evidence which did not meet the criteria for admission of fresh evidence under both common law and rules of natural justice. Although the applicant objected to this procedure, it was contended that the said objection was disallowed on the ground that the committee was guided by its own discretion.

8. According to the applicant, she was denied a chance to present her witnesses and her request on the same was ignored by the committee. In this respect the applicant relied on rule 22.3 of the Students' Handbook which provides that:

> ***'the secretary of the disciplinary committee shall notify the student and the complainant of the date and the time of the meeting and inform them of their right to be present and to call a witness or witnesses'***

9. In this case the applicant averred that the committee upheld the decision made on the first hearing. In the applicant's view, the criterion that was used by the committee to arrive at its verdict was unfair and in violation of the Constitution and her right to fair hearing.

10. The applicant asserted that unless the decision is quashed by this Court her legitimate expectation of completing the course by August 2017 would have been unfairly thwarted.

Respondents' Case

11. In opposition to the application, the Respondents averred that the University is an institution of higher learning which, like all other such institutions, places maximum premium on integrity and quality of the conduct and processing of examinations and results. To the Respondents, the University, in the pursuit of ensuring that its students do not engage in examination malpractices that compromises the quality of its certificates and dent its image, has put in place very clear and unequivocal rules and regulations on the conduct of examinations as appears in the Students Handbook that contains very elaborate rules and regulations that regulate the conduct of examinations.

12. It was however the Respondents' case that the rules allegedly quoted by the *ex-parte* Applicant do not exist in the Student Handbook of the University and that they are her own creations. It was clarified that there is no Rule 22.3 in the Student Handbook as the said Handbook is numbered in paragraphs and Paragraph 22 of the Student Handbook run from sub-paragraphs (a) to (s) and is not numerically numbered and also deals with General Conduct of all students and has nothing to do with examinations. Similarly, Paragraph 5.1.2 of the Student Handbook does not deal with what the *ex-parte* Applicant purports to be contained in Rule 5.1.2 and that that Paragraph 5.1.2. of the Student Handbook reads as follows: -

> ***"The School Disciplinary Committee shall then forward a Report of its hearing and recommendations thereof to the Dean within FOURTEEN (14) days of the hearing."***

13. From the foregoing and as appears from the attached Student Handbook it was contended that it is patently clear that the *ex-parte* Applicant has come to Court with extremely unclean hands by misleading the Court through reference to non-existent documents and seeking sympathy and not justice and most importantly failing to make full and candid disclosure.

14. To the Respondent, the failure by the *ex-parte* Applicant to be candid with the Court and failing to make full disclosure only exposes her to the one and inescapable liability of having her application dismissed with costs.

15. It was averred that the University, as part of its responsibility to ensure that its students are fully familiar and conversant with the rules and regulations governing the conduct of students during examinations, always brings to the attention of all students joining it the Student Handbook and this is always provided to them in hard copy on joining the University. The University also goes a step further to ensure that all its students sitting examinations are reminded of the rules and regulations governing the conduct of examinations and this is always done verbally by the invigilators and in written form by way of instructions on the cover of the examination answer booklets.

16. The Respondents averred that prior to the commencement of the examination in issue, **Joyce Nderitu**, the examinations invigilator on the material day, asked and reminded all students of the examination regulations and specifically to put away any unauthorized materials from the examination room and that naturally she expected the *ex-parte* Applicant to do the same.

17. It was averred that the University outlaws and makes it a serious examination irregularity with clear punishment for any student to enter the examination room with, *inter alia*, any written material or piece of paper or notes or unauthorized materials.

18. In this case it was averred that on 26th April 2017 the *ex-parte* Applicant during an examination was found in possession of unauthorized material contrary to examination regulations as captured in the Student Handbook and upon being confronted by the invigilator, **Joyce Nderitu**, she hurriedly swallowed the incriminating and unauthorized material with the sole purpose of concealing the evidence that ordinarily could be used against her. It was revealed that as a result, the *ex-parte* Applicant almost choked on the piece of paper (popularly known as *mwakenya*) as she was struggling to swallow it, an incident which was witnessed by another invigilator, **Naomi Nduta Kimani** who also had an opportunity to see, hear what the *ex-parte* Applicant said on being caught and actually talked to the *ex-parte* Applicant.

19. According to the Respondents the *ex-parte* Applicant, in conformity with the University procedures was accompanied to the Examinations Office to record a statement of the incident and actually recorded a statement in the presence of the invigilator, **Joyce Nderitu** and the Assistant Registrar-Examinations, **Alex Gachoka** who together with **Naomi Nduta Kimani**, the other invigilator also recorded their statements of what they know of the incident involving the *ex-parte* Applicant.

20. According to the Respondent, the *ex-parte* Applicant did admit in writing and verbally at the very beginning on being caught to being in possession of the unauthorized material and also to swallowing the unauthorized material and has never denied or retracted that statement of admission. Further, the *ex-parte* Applicant did admit that the unauthorized material was indeed notes that she had prepared in the library just before the start of the examinations in issue. It was contended by the Respondent that it is a serious examination irregularity for any student to get into the examination room with any unauthorized material and most importantly material that is relevant to the examination and this is a matter known to the *ex-parte* Applicant, being a senior student at the University.

21The Respondents denied that they violated the *ex-parte* Applicant's right to be heard and that to the contrary the Respondents bent over backwards to hear the *ex-parte* Applicant even in the face of the express admissions of impropriety or irregularity by the *ex-parte* Applicant.

22. It was therefore averred that the witnesses to the examination irregularity were three i.e. **Joyce Nderitu**, **Naomi Kimani** and **Alex Gachoka**.

23. It was averred that the Respondents in observance of procedural fairness did invite the *ex-parte* Applicant to attend the disciplinary committee meeting on 4th May 2017 quite in spite of the self-evident fact that the *ex-parte* Applicant had admitted both orally and in writing to the examination irregularity. During that appearance it was averred that the *ex-parte* Applicant proceeded to admit being in possession

of the unauthorized material and the fact that *ex-parte* Applicant chewed and swallowed the notes. During that session, one of the potential witnesses, **Alex Gachoka** before whom the *ex-parte* Applicant wrote her statement on the Exam Irregularities Form was present but the *ex-parte* Applicant conveniently chose not to ask him any questions or to demand the presence or attendance of the other witnesses.

24. It was the Respondents' case that it is very clear from the Student Handbook that in the event of a student destroying the evidence of an examination irregularity by swallowing it, the evidence of two invigilators is sufficient evidence of the examination irregularity. In their view, the **"evidence of two invigilators is sufficient evidence of the examination irregularity"** simply means that once the two invigilators make a report of the incident, the burden of proof shifts to the student to prove that she did not commit an examination irregularity. The *ex-parte* Applicant failed to discharge that burden in the face of the admission. The same phrase, according to the Respondents means documentary evidence in the form of written statements by the two invigilators and not oral evidence at a disciplinary committee hearing.

25. The Respondents revealed that as evident from the statement and the affidavits on record, the *ex-parte* Applicant has admitted to the examination irregularity on four separate occasions as follows: -

a. On 26th April 2017 when she was caught by **Joyce Mumbi Nderitu** and she admitted to chewing and swallowing the *mwakenya* and almost choked on it.

b. On 26th April 2017 when she talked to **Naomi Kimani**, the other invigilator and admitted to having chewed and swallowed the *mwakenya* and asked for forgiveness as she was being led away by **Joyce Nderitu** to record her statement at the Examinations Office.

c. On 26th April 2017 when filling in the incident report in the presence of **Joyce Mumbi Nderitu** and **Alex Gachoka**.

d. On 4th May 2017 before the disciplinary committee when she admitted to being in possession of the unauthorized material and swallowing it "subconsciously" when caught by **Joyce Nderitu**.

e. On 23rd May 2017 when she appeared before the Appeals Committee and again admitted to being in possession of the unauthorized material but restated the alleged defence of swallowing it "subconsciously".

f. In her Verifying Affidavit sworn on 31st May 2017 where she admitted under oath and voluntarily to being in possession of the unauthorized material, chewed and swallowed it when caught.

g. In her alleged Supporting Affidavit sworn on 6th June 2017 where she once again admitted under oath to being in possession of the unauthorized material, chewing and swallowing it on being caught.

26. According to the Respondents, as the *ex-parte* Applicant was caught with notes in the examination room which she destroyed by swallowing and the same was witnessed by two invigilators, **Joyce Mumbi Nderitu** and **Alex Gachoka**, this meets the evidentiary threshold in the instant case.

27. According to the Respondents, the school disciplinary committee conducted its proceedings, as appears from the minutes, in a manner respectful of the rights of the *ex-parte* Applicant and afforded her all the opportunity to address it on the documentary evidence presented to her.

28. To them, the ex-parte Applicant never made any request or demand to cross-examine any of the three potential witnesses, one of whom was present in the room and therefore the allegation that she was not heard before the school disciplinary committee is not only hollow but a miserable afterthought. The *ex-parte* Applicant was dissatisfied with the verdict of the disciplinary committee and preferred an appeal to

the Vice-Chancellor by way of letter dated 5th May 2017 at which the *ex-parte* Applicant specifically demanded that she wanted **Joyce Nderitu**, one of the potential witnesses, to be present for cross-examination and the Appeals Committee acceded to her request and rescheduled the hearing to 23rd May 2017 when **Joyce Nderitu** would be present.

29. It was averred that on 23rd May 2017 the Appeal Committee reconvened and considered the appeal by the *ex-parte* Applicant in the presence of **Joyce Nderitu** and upheld the decision of the School Disciplinary Committee of 4th May 2017. It was averred that as appears from the minutes of the Appeals Committee at no time did the *ex-parte* Applicant indicate to the Appeals Committee that she had witnesses or independent evidence save for her oral testimony that she chewed and swallowed "subconsciously".

30. To the Respondents, by the mere fact that the Appeals Committee adjourned its sittings from 16th May 2017 to 23rd May 2017 with the singular intention of having the *ex-parte* Applicant cross-examine **Joyce Nderitu** is a clear demonstration that the Appeals Committee could have allowed any witnesses or additional evidence the *ex-parte* Applicant had.

31. According to them, as appears from the minutes of both the School Disciplinary Committee meeting and the Appeals Committee meeting there is no evidence that the *ex-parte* Applicant had any additional evidence that she sought to produce save for her own oral defence that she chewed and swallowed the unauthorized material "subconsciously." Further, it is also instructive that the *ex-parte* Applicant has not even attempted to demonstrate to this Honourable Court what this additional evidence was that she was denied to produce in the face of her admission of guilt and lame defence of chewing and swallowing "subconsciously."

32. The Respondents averred that they were never biased by being both prosecutor and hearing committee since the Student Handbook is very clear on the composition of the Disciplinary Committee and the Appeals Committee and in any case it is well settled law that inferior tribunals are masters of their own procedures.

33. It was contended that the integrity of examinations and academic certificates are matters of huge public interest that requires that appropriate punishment is meted out to those found guilty and the punishment meted out to the *ex-parte* Applicant is what is provided in the Student Handbook and cannot be said to be severe. To the Respondents, there is a huge public interest in having all examinations in Kenya be products of genuine and honest hard work and not products of examination cheating under the guise of "chewing and swallowing subconsciously" and consequently it is in the public interest that perpetrators of examination irregularities are punished and not allowed to catwalk under the guise of subconscious chewing and swallowing of *mwakenya*. They asserted that the public interest in deterring and punishing for examination irregularities in our Universities like the 1st Respondent far outweigh the private interest of the *ex-parte* Applicant to go scot free for the admitted acts of examination irregularities.

34. The Respondents maintained that this application by the *ex-parte* Applicant is an abuse of the Court process and in any event, cannot be used as an avenue to sanitize the admissions of examination irregularity. In any event the application is fatally defective and incurably incompetent for lack of evidence in support. It is long on allegations but short on honest disclosure.

Determinations

35. I have considered the material placed before the Court in this application.

36. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

37. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

38. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

39. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

40. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

41. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the

individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285**.

42. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See **Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155**.

43. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and 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."**

44. That the Respondent has powers and jurisdiction to discipline students is not in dispute. Their power to mete out the punishments they meted to the *ex parte* applicants cannot therefore be contested. The question to be determined is whether in arriving at its decision the due process of the law was adhered to. Article 47(1) and (2) of the Constitution provide:

> ***(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.***

45. It is therefore clear that, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be a ground for quashing a decision if there was material on record which would have warranted a finding to the contrary.

46. In this case two diametrically opposed versions of what took place in the examination hall and thereafter have been given by the applicant and the Respondents respectively. In order to determine which version is correct, it is necessary for one to peruse the proceedings that took place before the Disciplinary Committee which proceedings, it has not been contended were doctored. In this case the only minutes which are on record are those exhibited by the Respondents. In the absence of any credible objection to their authenticity, this Court has no option but to rely on the same as being a true reflection of what took place before the said Committee.

47. When one looks at the said minutes, the only rational conclusion one arrives at is that the proceedings before the Committee was conducted in accordance with the University's Students Handbook as exhibited in these proceedings.

48. The applicant admits even in these proceedings that she had in her possession certain notes made prior to and outside the examination room which according to her, she "subconsciously" swallowed. With due respect the applicant's explanation as to what she did is highly incredible. It is out of the ordinary that one would not only place a paper in one's mouth, chew the same and proceed to swallow it "subconsciously" as the ex parte applicant would like this Court to believe. Such an incredible explanation cannot be expected to be believed by this Court. I associate myself with the lamentations of **Madan, J** (as he then was) in **N vs. N [1991] KLR 685** when he expressed himself in the following terms:

> **"I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."**

49. With respect to the denial of the opportunity to call witnesses there is no evidence that the applicant requested to be allowed to call one. Apart from that in these proceedings, apart from the applicant no other person has sworn an affidavit to support the applicant's case and the applicant has not attempted to explain why this is so. Having considered the versions as presented by the parties, it is my view and I hereby hold that the issues raised before me do not prove the allegations that the process was unfair so as to justify interference by a judicial review Court.

50. From the proceedings on record, there is nothing to support the applicant's allegations and hence there is no basis upon which this Court can find that the disciplinary process adopted by the Respondents failed to meet the threshold of a fair administrative action.

51. I am particularly concerned that the ex parte applicant purported to quote sections of the Students Handbook without exhibiting a copy thereof yet the portions reproduced were discredited by the Respondents who on their part reproduced a copy thereof. In fact according to the Respondent the alleged portions of the regulations relied upon by the applicant are non-existent and they were meant to mislead the Court. If those allegations are true then it does not reflect very well about the applicant's bona fides in these proceedings. As is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief*."**

52. In the absence of a copy of the said Handbook being exhibited which support the applicant's case, there is no basis upon which this Court can find in favour of the applicant.

53. In the premises I find no merit in this application.

Order

54. In the result the order which commends itself to me and which I hereby grant is that the instant be and is hereby dismissed. In the circumstances of this case I make o order as to costs taking into account the relationship between the parties to these proceedings.

55. It is so ordered.

Dated at Nairobi this 1st day of August, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ouma the applicant in person

Mr Mwango for Mr Adera for the Respondent

CA Mwangi