



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO.224 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLES 22,23,27,29,

31, 47,49,50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE VERDICT OF THE KENYA MEDICAL TRAINING COLLEGE

STUDENTS DISCIPLINARY COMMITTEE AND THE DECISION OF KENYA

MEDICAL TRAINING COLLEGE OF 20TH MARCH 2017

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA MEDICAL TRAINING COLLEGE.....RESPONDENT

EX-PARTE: ALEX MUNENE MBUI

JUDGEMENT

Introduction

1. In his Motion brought on Notice dated 27th June, 2017 the *ex parte* applicant herein, **Alex Munene Mbui**, seeks the following orders:

1. **An order of Certiorari to quash the decision of the respondent contained in the letter dated**

20/3/2017 suspending the ex parte applicant from its institution.

2. An order of Mandamus directing the respondent, its agents, employees, servants board of Governors, committee or any other relevant entity to re-admit the applicant unconditionally to its institution.

3. A declaration that the decision to suspend the applicant was arbitrary, unlawful and grossly unconstitutional.

4. A declaration that the applicant's fundamental rights were contravened and grossly violated by the respondents, its board of governors, agents, employees, servants by forcefully subjecting and/or recommending the applicant to a psychological supervision.

5. A declaration that the applicant's fundamental rights were contravened and grossly violated by the respondent and its employees.

6. A declaration that the applicant is entitled to payment of damages and compensation for the violation and contravention of his fundamental rights.

7. General damages, exemplary and moral damages on an aggravated scale for the degradation of the image of the applicant in the eyes of fellow students and right thinking members of society,

8. Any further orders, writs, directions as this honourable court may consider appropriate.

9. The costs of this application be provided for.

Ex Parte Applicant's Case

2. According to the *ex parte* applicant was, on 20/2/2017 in the company of fellow students at the KANU Hotels, 4th Floor chatting the evening away as is normal among students after a long day's school work. Suddenly, a security officer broke the door to the room in which they were without knocking and accused them that they were illegally in the school compound and that they were in possession of and/or were smoking bhang. To the applicant, being students at the respondent institution, he was he was baffled by this allegation.

3. However to his shock and disbelief, the said security officer demanded that he writes a statement acknowledging and/or admitting the above stated trumped up allegations of being in possession of and smoking bhang which demand the applicant declined. He was however warned that dire consequences would follow if he refused to do so whereupon the security officer wrote the statements himself and demanded that they sign them. According to the applicant, shaken and in total disbelief, out of pure coercion and undue influence, he reluctantly signed the statement admitting that he was in possession of bhang and had been caught by the security officer smoking the same. They were thereafter bundled into a waiting vehicle and informed that they were being taken to the police station and they were taken to Capital Hill Police Station where they spent two (2) nights before being arraigned in court and charged with being in possession of an illegal substance. On 22/2/2017 the day of arraignment they were released on Kshs 20,000/ cash bail.

4. According to the applicant, on 14/3/2017 he appeared before the Disciplinary Committee hoping to be heard but was not given the chance to give account of what transpired. Instead, the committee relied on and adopted the statement he had been coerced into writing despite his attempts to explain myself to the committee.

5. It was the applicant's case that he received another invitation to appear before the Disciplinary Committee on 20/3/2017, on which date he appeared with his guardian but neither him nor his guardian was accorded a hearing before the committee with the Chairperson indicating that the purpose of the

invite on the material day was to be informed of the decision/verdict that the Disciplinary Committee had arrived at. At that point, he was handed a letter signed by the Principal, KMTC Nairobi, suspending him from the respondent institution with immediate effect until Criminal Case No. 546 of 2017 is over.

6. Aggrieved by the said decision, the applicant appealed to the director of the respondent institution on 24/3/2017 but the appeal is yet to be heard, over one month later, though according to him, he has no faith in the whole process going by how the matter was handled from the very beginning.

7. The applicant insisted that he was not caught either in possession of or smoking bhang at the respondent institution's compound as alleged hence the respondent's agent/employee arrived at the obvious erroneous decision that the applicant was in possession of and was smoking bhang, based on the fact that his eyes were allegedly red.

8. I was the applicant's case that though he has a right to be afforded fair and expeditious administrative justice as a matter of constitutional right, he instead faced persecution, arbitrariness and a general sense of casualness, injustice and unprofessionalism from the respondent and/or its agents. By reason of the issues aforesaid, both his education and social life have been greatly affected and the trumped-up criminal charges has caused and continue to cause him emotional and psychological distress as he faced an uncertain future directly and solely caused by the unlawful, arbitrary and oppressive acts of the respondent and/or its agents.

Respondent's Case

9. The application was opposed by the Respondent.

10. According to the Respondent, the *ex parte* Applicant is a student at the Respondent Institution in Nairobi having been admitted in 2015 under Registration Number D/PHISIO/16001/048 to pursue a Diploma in Physiotherapy. Upon admission and orientation the *ex parte* Applicant like all new students was appropriately inducted on the college Rules and Regulations and on the need to obey the laws of the land like all other citizens more specifically Cap IV Hostel Rules/Sec C on substance abuse.

11. It was contended that on or about the 20th February, 2017 upon a tip off from reliable sources on the alleged activities of the Applicant and his colleagues and on proceeding to a room at the KANU Hostels, 4th floor at the Respondents students residential quarters Hostel and on requesting for the door to be opened, the people inside who had locked themselves therein refused to open prompting the security officers to forcefully enter the room and upon search found the occupants smoking cannabis sativa and confiscated 52 roles of bhang including Ethiopian type, smoking aids (improved shisha containers).

12. Upon being caught red handed, the Applicant owned up further confessing that he together with the other students are habitual users of *cannabis sativa* and had been doing so for a long time buying the same at Kshs 15 per roll. Accordingly, all the six occupants of the room at the time were arrested and taken to the security office for further interrogation upon which the Applicant and the other students confessed that they normally procure the *cannabis sativa* at Kenyatta Market. Thereafter the security personnel consulted with the Principal whereafter the Applicant and the other students were handed over to Capital Hill Police for further investigations and appropriate legal action.

13. It was disclosed that the police raided Farelane Building at Kenyatta Market on the night of 20th February, 2017 as informed by the suspects and managed to arrest the 7th suspect one **Musa Kehan Leloon**, also a student at the Respondent's institution in the Department of Nursing who was found with twelve rolls of bhang in his rental house. In total 70 roles of bhang were found with the Applicant together with his colleagues.

14. According to the Respondent, the police after investigations found the Applicant and his colleagues culpable and had them arraigned before Kibera Law Courts on the 22nd February, 2017 where they were charged of being in possession of Narcotic drugs. Upon being released on bail, a notice was dispatched to

the Applicant clearly indicating the date, time and place of the Disciplinary Committee hearing together with the nature of allegations leveled against the Applicant and the fact that he was required to answer to the charges during the hearing scheduled for the 14th March, 2017. At the said Disciplinary Committee meeting on the 14th March, 2017 the Applicant attended and proceedings were taken in which he confessed to being in possession and being found taking cannabis sativa on the 20th February, 2017 and to also having been a habitual user of the same.

15. It was averred that after lengthy deliberations by the Disciplinary Committee, on the said date of 14th March, 2017 the Applicant and the other students were asked to avail their parents on the 20th March, 2017 before the conclusion of the Disciplinary Proceedings.

16. It was the Respondent's case that the applicant was given ample opportunity to present his defence and that he actually did so by confessing to having been found smoking cannabis sativa and being in possession of the rolls that were confiscated by the security guards.

17. The Respondent averred that on the said 20th March, 2017, the Applicant and other students came with their parents who were updated of the history of the matter and the proceedings of 14th March, 2017 though the parents expressed their reservations on why the students including the Applicant were taken to the police station instead of the issue being resolved internally by the Respondent and their considered request for the Applicant and his colleagues not to be expelled but a lenient punishment be meted out. After consideration of all the relevant material facts and after lengthy and thorough deliberations the Disciplinary Committee decided to suspend the Applicant and his colleagues to await the conclusion of the Court case and their right of appeal to the director was reserved and the Applicant was duly notified of the decision and reasons thereof by the Respondents Principal on 20th march, 2017.

18. It was confirmed that the Applicant appealed to the Director of the Respondent on the 24th March, 2017 and the said appeal is pending hearing. Similarly, the criminal case is also pending hearing at Kibera Law Courts and the Applicant can prove his innocence there but not before this Court.

19. The Respondent insisted that the Applicant was duly notified of the charges he was facing and was duly invited and accorded an opportunity to be heard both on the 14th March, 2017 and on the 20th March, 2017 and he was indeed heard at length where he confessed to being found in possession of cannabis sativa and while abusing the same and from the minutes thereof it is clear that he owned up having committed the offence. In any event the issue of his guilty or otherwise awaits determination at the Kibera Law Courts during the hearing of the pending criminal case.

20. It was the Respondent's case that the other students at the Respondent's Institution equally have rights to be protected from dangerous elements and the Applicants alleged rights cannot supersede the rights of other majority students whose safety is being jeopardized by the Applicants activities. To it, the Applicant like any other Kenyan Citizen has a duty to obey the laws of the land and being found to be in breach thereof is subject to due process like any other citizen. The Court was therefore urged to consider public policy and the interests of the wider student community which should override the Applicant's purported rights which cannot be enjoyed while simultaneously threatening the harmony, tranquility and safety of other students.

21. The Respondent further contended that the issues herein are still the subject of the appeal before the Director of the Respondent and the Kibera Law Courts which proceedings are more efficacious and appropriate to the circumstances of this case. According to it, this Court is not the appropriate forum for adjudication of this matter as the Applicant is appealing against the merits of the Disciplinary Committee decision and for which he has also appealed to the Director. In the circumstances, the case as instituted herein is an outright abuse of the due Court process and the Court was urged to dismiss the same with costs.

Determinations

22. I have considered the application, the affidavits, the submissions and authorities cited herein.

23. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

24. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

“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.”

25. 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*.

26. 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.”

27. 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.

28. That the Respondent has powers and jurisdiction to suspend the applicant's licence has not been challenged. 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.

29. Before dealing with the merits of the case, the Respondent contended that during the application for leave to bring Judicial Review proceedings, the Applicant was only granted leave to apply for Judicial review orders for certiorari and Mandamus as prayed for in prayers 1 and 2 of the Applicants Notice of Motion Application dated 27th June, 2017. All the other prayers No. 2 to 9 were not granted and by implication were declined. The short answer to this contention is that leave is only required in respect of the reliefs in the nature of certiorari, prohibition and mandamus. Such other reliefs as damages, compensation and declarations do not require leave.

30. In the instant case, the applicant contends that he was penalised based on trumped up charges which he was coerced into admitting. In my view this Court cannot make a determination as to whether or not

the charges facing the applicant were trumped up charges and whether or not the concession thereto was based on coercion. Such allegations cannot be determined based on affidavit evidence.

31. The applicant has however contended that the impugned decision was arrived at in breach of the rules of natural justice in that before the said decision was made the applicant was never afforded an opportunity of being heard. The applicant contends that when he appeared before the Disciplinary Committee, the Committee simply adopted his said recanted admission without affording him a hearing.

32. I have perused the minutes of the meeting held on 14th March, 2017 and there is no evidence at all that the applicant was heard on the allegations levelled against him. Apart from setting out the allegations against him and the version of the security officer, there is no indication at all that the applicant was called upon to deal with the same.

33. On 20th March, 2017 when the parents appeared, it appears from the minutes that they were simply informed of what took place on 14th March, 2017 and the parents asked for their views. Again there is no evidence at all that the applicant was given an opportunity to respond to the allegations facing him before the verdict was arrived at.

34. Since it is a Constitutional obligation on the part of the Respondents to afford the applicant a fair hearing before a decision adverse to the applicant was made, it was incumbent upon the respondent in light of the denial by the applicant that he was never heard to prove that such an opportunity was in fact afforded. Apart from mere averments, there is no evidence to controvert the applicant's contention that he was never heard. The mere fact that the security officer contended that the applicant and his colleagues had admitted the offence did not deprive the applicant of his right to be heard on the said allegations.

35. Lord Loreburn LC in Board of Education vs. Rice; [1911] AC 179 stated that:

“a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is ‘a duty lying upon everyone who decides anything.’”

36. In Russel vs. Duke of Norfolk [1949] 1 All ER at 118, the Court expressed itself as hereunder:

“There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case.”

37. As was held in Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:

“The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc.”

38. Therefore whatever disciplinary method is adopted, the process must be procedurally fair and the person concerned should have had a reasonable opportunity of presenting his case. In this case there is no

evidence that the applicant was given an opportunity of presenting his case before the verdict was arrived at. That being the case, it does not matter whether the same decision would have been arrived at had he been heard. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456:**

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio.”

39. With respect to the pending appeal, it is clear that the applicant was never heard at all. Since the proceedings before the Disciplinary Committee were themselves a nullity, it is my view that the appellate procedure cannot be invoked to bar the applicant from seeking the remedies under Article 47 of the Constitution as read with section 11 of the ***Fair Administrative Action Act***.

40. In the premises I agree that the applicant’s rights to fair administrative action were violated. I however find no basis in awarding him compensation.

Order

41. In the premises I hereby issue an order of certiorari removing into this Court for the purposes of being quashed the decision of the respondent contained in the letter dated 20/3/2017 suspending the ex parte applicant from its institution which decision is hereby quashed. I also issue an order of Mandamus directing the respondent, its agents, employees, servants Board of Governors, committee or any other relevant entity to re-admit the applicant unconditionally to its institution unless and until the applicant is otherwise lawfully removed from the Respondent’s institution.

42. As the merits of the charges leveled against the applicant has not been determined and considering the relationship between the parties herein, there will be no order as to costs.

43. Orders accordingly.

Dated at Nairobi this 26th day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mukururi for the applicant

Mr Ochieng for Mr Saenyi for the Respondent

CA Ooko