



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 212 OF 2015

ALBERT MANDELA OGENDI.....PETITIONER

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

Introduction

1. In his Petition dated 20th May 2015 the petitioner alleges violation, of his constitutional right to education, contrary to Article 43 of the Constitution, by the respondent. The petition was supported by his affidavit sworn on the same date. He also filed submissions dated 1st September 2015 and supplementary submissions dated 11th November 2015.

2. The petitioner seeks the following orders from the Court:

1. A declaration that the decision by the respondent to expel the petitioner from the University for life is an infringement and/or violation of the petitioner's fundamental rights and freedoms under articles 26(1) and 43(1) of the Constitution of Kenya 2010.

2. An order of Certiorari does issue quashing the respondent's decision contained in its letter of 13th January 2014 expelling the petitioner from the University for life.

3. An order of mandamus does issue compelling the respondent to reinstate and re-admit the petitioner back to school to enable the petitioner complete his schooling.

4. An order for compensation for violation of fundamental rights and freedoms

5. Costs of and incidental to this suit.

3. In his affidavit in support of the petition, the petitioner avers that he was admitted to the respondent to pursue a Bachelor of Arts Degree in 2005. He enrolled for the course and the required units and zealously attended all classes and assignments. He deposes that not at any single time did any question of any impropriety on his part ever arise.

4. He deposes that sometime in 2008, while he was in his third year, while he and other students were sitting for a Continuous Assessment Test (CAT) in Social Change and Development, he was accused of

arranging with a fellow student, one Sylvia Wachera “*to impersonate myself*” during that CAT. Following a disciplinary hearing conducted by the Disciplinary Committee of the respondent’s Senate, a decision to expel him from the University for life was made.

5. The petitioner avers that aggrieved by the decision to expel him, he appealed against the decision in October 2012, but that the respondent, in a letter dated 13th January 2014, rejected his appeal and upheld its earlier decision. He deposes that he requested for minutes of the proceedings by his letter dated 18th February 2015 to enable him pursue his rights under the Constitution. He avers that he has never received a response from the respondent, and believes that the decisions of the respondent to expel him for life from the university is a violation of his constitutional right under Article 43 (1)(f) of the Constitution of Kenya, 2010.

6. He states that he has not, since his expulsion, been able to engage in any meaningful employment or other source of income due to lack of requisite academic papers. He also deposes that he is entitled to protection of his right to a livelihood, and that his right to life includes the right to a livelihood. Consequently, by expelling him, the respondent has denied him the right to life under Article 26(1).

7. In her submissions on behalf of the petitioner, Ms. Ogongo reiterated his averments that he was expelled from the respondent in 2008, which was a violation of his right to education under Article 43. She conceded that the 2010 Constitution was not in force, but that the right to education was provided for under Article 12 of the Universal Declaration of Human Rights (UDHR). Further, it was her submission that Article 26 and 43(1) of the constitution can be applied retrospectively because of section 7 of the repealed Constitution and Article 12 of UDHR.

8. The petitioner’s case was that he had a right to education which cannot be limited and in accordance with Article 19(3), is only subject to the Constitution. Ms. Ogongo submitted that the limitation to this right contained in the respondent’s regulations is not reasonable and justifiable in an open and democratic society and does not meet the threshold provided under Article 29. She submitted further that the respondents regulations are unconstitutional and should be declared null and void.

9. The petitioner further alleged violation of his right to information. It was his submission that he requested for minutes of the proceedings by the Senate Disciplinary Committee and the approval of the (Committee’s) decision by the Vice Chancellor but the respondent refused to supply the information. He relied in support on the decision in **Charles Omenya and 8 Others vs Attorney General (2014)eKLR**.

10. He urged the Court to allow the petition as the decision to expel him for life was drastic and unreasonable in the circumstances and contrary to his rights. He prays that he should be re-instated to the university to complete his education as he was in his final year and has been denied his right to university education thereby denying him a chance to secure his livelihood.

11. The petitioner conceded that he had no issue with the manner in which the respondent conducted the disciplinary proceedings against him, arguing only that he should not have been expelled but should have been re-admitted after a period of time. He takes issue with the provision in the regulations that a student who is caught cheating should be expelled, arguing that the regulations should not provide for expulsion, and that having served 6 years, that should be sufficient (punishment) and the respondent should be able to re-admit him to complete his last year.

The Response

12. The respondent opposes the petition and has filed an affidavit in reply sworn by Ms Lydia Akaranga on 16th July 2015. The respondent also filed submissions dated 23rd September 2015 together with a list of authorities.

13. Ms. Akaranga, the Deputy Registrar Examinations (Operations) of the respondent, makes various depositions to the effect that the lecturer in Social Change and Development had, on 17th June 2008,

found that a Ms Gaita Sylvia Wachera, whom the petitioner admitted was his girlfriend, had been trying to assist the petitioner by doing his CAT for him. The lecturer informed the Deputy Registrar, Examinations, on 17th July 2008 of the examination irregularity committed by the petitioner and Ms Gaita. The conduct of the petitioner and Ms. Gaita was contrary to **General and Academic Conduct** set out in the **Regulations Governing the Organization, Conduct and Discipline of Students**. Following his suspension and disciplinary proceedings against him, a decision was made to expel the petitioner from the University.

14. Ms. Akaranga concedes that the petitioner appealed against the respondent's decision, and the respondent's Senate Examination Disciplinary/Appeals Committee, after giving the petitioner an opportunity to address them on his grounds of appeal, upheld the decision of the Senate to expel the petitioner from the university.

15. With regard to the petitioner's claim that he had not been supplied with the minutes that he had requested for by his letter of February 2015, Ms. Akaranga deposes that the respondent was in the process of tracing and making ready the requested documents in order to supply them to the petitioner when he filed the present petition. She denies that the decision of the respondent to expel the petitioner amounted to a violation of his constitutional rights.

16. In his submissions on behalf of the respondent, Learned Counsel, Mr. Lutta, observed that the petitioner was seeking in his petition a declaration that his expulsion was a violation of his constitutional rights, an order of certiorari to quash the decision to expel him, and order of mandamus for his reinstatement to the respondent, and an order for compensation.

17. Mr Lutta observed that in his submissions before the Court, however, the petitioner had prayed for an order for the annulment of the rules governing the organization, conduct and discipline of students and the **Statutes Governing University Education**, the vital instruments of the respondent, while no such prayer had been sought in the petition. It was Mr. Lutta's submission therefore that had the petitioner wished to annul the statutes and the rules, he should have made a specific prayer in this regard in his petition to enable the respondent address it. Mr. Lutta therefore asked the Court not to consider the prayer for annulment of the regulations.

18. The respondent took the view that the issues that the Court should consider were whether the 2010 Constitution was applicable to the present petition; whether the petitioner had been guilty of inordinate delay in filing his petition; whether he was accorded a fair hearing at the disciplinary proceedings, and whether the decision to expel him was a violation of his constitutional rights.

19. With respect to the issue of delay, it was the respondent's case that the petitioner was expelled in 2008, about 7 years prior to the filing of the petition. He should, in the respondent's view, have approached the Court as soon as possible after he was expelled. His attempt to purport to seek minutes and engage the respondent in correspondence was, in its view, a clear way of attempting to revive a matter that was dead and buried as at 2008.

20. With respect to his prayer for an order of certiorari to quash the decision to expel him, the respondent submitted that the prayer, not having been lodged within 6 months, was hopelessly dead. In its view, even assuming that the petitioner was entitled to seek certiorari, the latest he could have done so was in July 2014 as his last correspondence on the issue was dated 13th January 2014. Further, that if the orders for certiorari could not issue, then neither could the prayer for a mandamus succeed.

21. Counsel for the respondent further observed that the petitioner's Counsel had conceded on behalf of the petitioner that he does not have a problem with the disciplinary process undertaken by the respondent in arriving at the decision to expel the petitioner. He pointed out that the respondent had, in the affidavit of Ms. Akaranga, set out weighty matters on the process and how the decision was arrived at. The petitioner had not filed a further affidavit to challenge the averments by Ms. Akaranga, and her averments remain unchallenged and uncontroverted. It was the respondent's submission therefore that the petitioner had not challenged the allegation against him, cheating in examinations, nor has he challenged the

disciplinary process by all the committees of the respondent.

22. In the respondent's view, the petitioner must of necessity acquit himself of the allegations of cheating and fault the process leading to his expulsion for the petition to serve any purpose. Counsel submitted that to grant the petition would be to give credence to academic dishonesty and would amount to trashing the regulations and statutes relating to governance of institutions.

23. The respondent denied that the petitioner's right to education had been violated, even had the 2010 Constitution been applicable. He had been given a chance to study at the respondent but had squandered it by cheating, and he still had a right to study at any other institution. In its view, the right to education did not imply an absolute right to education whatever he did, and it prayed that the petition be dismissed with costs.

24. In her submissions in reply, Ms. Ogongo for the petitioner submitted with regard to the question of delay that the petitioner was expelled in 2008, but the decision to expel him was communicated on 13th January 2014 and he sought minutes of the proceedings. She also submitted that he had properly invoked the Articles of the Constitution as the Court has jurisdiction to grant orders where the rights were protected under the former constitution.

Determination

26. The issue raised by this petition is fairly straightforward: has there been a violation of the petitioner's constitutional rights under Article 43 and as a consequence thereof, a violation of his right to life under Article 26? Article 43(1)(f) provides that everyone has the right to education, while Article 26 guarantees to everyone the right to life.

26. I start by considering certain concessions made by the petitioner's Counsel in the course of the hearing of this matter, his omission to challenge the averments by Ms. Akaranga on behalf of the respondent, and the consequences thereof. Ms. Ogongo conceded that the petitioner was not challenging the disciplinary process undertaken by the respondent, yet he has filed a petition in which he seeks orders of certiorari and mandamus against the respondent.

27. What is the jurisdiction of a court exercising powers of judicial review over a decision of an inferior tribunal? In **Civil Appeal No. 180 of 2013 - Isaack Osman Sheikh vs IEBC & Others**, the Court expressed itself as follows:

“A judicial review of administrative, judicial and quasi-judicial action and decisions of inferior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction flowing from Article 165(6) of the Constitution is not in the nature of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High Court a power to arrogate to itself the decision-making power reserved elsewhere.”

28. In the House of Lords decision in **Chief Constable vs Evans [1982] 3ALL ER 141**, the Lord Chancellor, Lord Hailsham of St. Marylebone, stated at p 143 as follows with respect to the judicial review remedy:

“This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration, is intended to protect the individual against abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner”. (Emphasis added)

29. Since there is no complaint about the respondent's exercise of its powers in the course of carrying out

its disciplinary process against the petitioner, what exactly is the petitioner's complaint?

30. The material before me indicates that the petitioner was found to have been cheating in examinations. Another student was trying to assist him by presenting a script in his name, essentially sitting the CAT for him. The respondent's decision, in accordance with its regulations, is that the consequences of such action on the part of a student is expulsion. Does this amount to a violation of the right to education? In the case of **Oluoch Dan Owino vs Kenyatta University, High Court Petition No. 54 of 2014**, this Court observed as follows:

[51.] "As I understand it, the right to education does not denote the right to undergo a course of education in a particular institution on one's terms. It is my view that an educational institution has the right to set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions."

31. While the petitioner had not pleaded any illegality or unconstitutionality of the respondent's regulations under which he was disciplined and subsequently expelled, Ms. Ogongo submitted at the hearing that the regulations were unconstitutional and should be declared null and void. However, aside from the fact that the petitioner was introducing an entirely new argument and seeking orders that were not pleaded in his petition, no attempt was made to demonstrate in what manner the respondent's regulations were unconstitutional. I am therefore unable to find a basis for impugning the decision of the respondent to expel the petitioner in accordance with its regulations.

32. It was submitted on behalf of the respondent that the petitioner was guilty of inordinate delay, and that the rights guaranteed under Article 43 could not be applied retrospectively. There is considerable merit in these submissions. I note that the petitioner was expelled in 2008. He did not appeal against the decision until 2012, and then sought the minutes of the proceedings against him in February 2015 before filing the present petition in May 2015. It appears to have taken him four years to make the decision to appeal against the respondent's decision, and a further three years to decide to file this petition.

33. One feels a certain kind of sadness for parties in the position of the petitioner, but also a certain sadness at the moral decay that has placed him where he finds himself today. Implicit in the lack of challenge of the decision of the respondent in terms of the process is the admission that he was indeed cheating in the examination. What he is aggrieved at, as I see it, is not that he was found guilty of cheating in exams, but the severity of the punishment that was meted out to him.

34. The Court in this case must agree with the respondent that to compel it to admit the petitioner back for his studies is not a tenable option. As submitted on their behalf, the petitioner was expelled more than 7 years ago, and doubtless a lot has changed in the institution's syllabus. Secondly, the message would be that it is acceptable to cheat in exams, as one will be re-admitted to continue from where one left off after a suitable period. We do seem to have a serious moral challenge that undermines and adulterates everything that we do, and that in the end bodes ill for our institutions and, by extension, our society. Compelling the respondents to re-admit the petitioner in the circumstances of this case would be to further extend that decay.

35. Given that no impropriety on the decision making process of the respondent has been established, and no violation of the petitioner's rights has been made out, or irregularity or unconstitutionality of the respondent's regulations, I find that this petition has no merit.

36. In dismissing the petition, I would observe that the best option open to the petitioner is to seek admission to start his course afresh, either at the respondent, if they will consider him, or at a different institution, and for him to be resolved to undertake his studies with honesty and probity.

37. Each party shall bear its own costs of the petition.

Dated, and Signed at Nairobi this 16th Day of March 2016.

MUMBI NGUGI

JUDGE

Dated, delivered and signed at Nairobi this 17th day of March 2016

J. L. ONGUTO

JUDGE

Ms. Ogongo instructed by the firm of Omari Muumbi & Kirangu & Co. Advocates for the petitioner.

Mr. Lutta instructed by the firm of Lutta & Co. Advocates for respondent.