REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 411 OF 2015

NKATHA JOY FARIDAH MBAABU.....…...PETITIONER

AND

KENYATTA UNIVERSITY…….....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner was until 2015 a University student. She was then a third year student pursuing an undergraduate degree in Library and Information Science when on 12 May 2015 the Respondent issued her with a letter discontinuing her studentship at the Respondent institution. The Petitioner had allegedly been found guilty of an examination irregularity.

2. The Petitioner claims she was denied the right to fair hearing and also a right to fair administrative action prior to the Respondent's action to discontinue her studentship. The Petitioner also claims that post the decision to discontinue her studentship, the Respondent also denied her a right to appeal the decision. In consequence the Petitioner sought an array of declaratory reliefs as well as an order of certiorari to quash the decision by the Respondent to discontinue the Petitioner's studentship.

3. The Petition was contested.

Factual Background

4. The facts appear relatively straightforward and may be retrieved from the Petition and stated as follows.

5. On 8 August 2014 whilst the Petitioner was sitting for examinations in a unit known as ISC402: Practical Cataloguing together with other students the Petitioner alongside eight other students was accused of breaching the examination rules. In the invigilators opinion the seat-desk on which the Petitioner sat had writings related to the subject examination and various questions. The Petitioner was subsequently suspended from the Respondent institution on 30 September 2014.

6. Subsequently, on 5 February 2015, the Petitioner appeared before the Respondent's Disciplinary Committee.

7. On 22 May 2015 following the Disciplinary Committees' findings, the Petitioner's studentship in the Respondent institution was discontinued. Then on 25 May 2015, the Petitioner lodged an appeal from the findings and decision to discontinue her studentship. The appeal was apparently never heard.

Petitioner's case

8. The Petitioner contends that her constitutional rights were violated. In particular the Petitioner points to Articles 47 and 50(1) of the Constitution and states that her rights to fair administrative action and fair hearing have been infringed. Additionally, the Petitioner also points to Articles 27 and 43(f) of the Constitution and states that she has not been afforded an equal benefit of the law and that her right to education has been trampled upon.

9. The Petitioner contends that in so far as the invigilators sat in the Respondents Disciplinary Committee to determine the Petitioners case there was no impartial tribunal contrary to the provisions of Articles 47 and 50(1) of the Constitution. The Petitioner also contends that the failure to afford the Petitioner a chance to cross-examine the witnesses violated Article 47 of the Constitution. The Petitioner additionally complains that the Disciplinary Committee did not consider all relevant evidence. Finally, it is contended that the decision to discontinue the Petitioner's studentship was not based on reason.

10. Further it is the Petitioner's case that the Respondent's failure to hear and consider the Petitioner's appeal was an act in bad faith and of discrimination contrary to Article 27, as the right of appeal is itself a right guaranteed by the Constitution.

11. The Petitioner asked the court to quash the Respondents decision to discontinue the Petitioner's studentship.

The Respondent's case

12. The Respondent's case is contained largely in the Replying Affidavit of Prof. Fatuma Chege sworn on 16 November 2015.

13. The Respondent contends that the Petitioner was guilty of an examination irregularity contrary to the Respondent's examination regulations by having scribbled legible notes relevant to the examination the Petitioner was undertaking on the morning of 8 August 2014. The Respondent states that the irregularity was witnessed and documented by two invigilators.

14. The Respondent contends further that the Petitioner faced the Respondent's Disciplinary Committee fully aware of the accusations and having been given due notice and further, that the Petitioner's studentship was only discontinued after a fair hearing attended by the Petitioner where the Petitioner was informed of the charges she faced and afforded an opportunity to respond. Both the invigilators and the Petitioner testified at the hearing of the disciplinary committee and that after due consideration of the evidence the committee recommended that the Petitioner be discontinued from her studies.

15. Additionally, the Respondent states that the Petitioner was informed in writing of the decision to discontinue her studentship and also of the Petitioner's right to appeal. That was on 22 May 2015. The Respondent contends that the Petitioner never exercised the right to appeal.

16. Further it is the Respondent's case that the Respondent's Disciplinary Committee was impartial as the Petitioner was not only informed of the charges she was faced with but also availed the evidence that incriminated her and afforded an opportunity to respond to the charges. The Respondent additionally declined that the two invigilators who witnessed and documented the Petitioners alleged irregular actions were members of the Disciplinary Committee that heard and finally recommended the Petitioner's punishment.

Arguments in court

17. The Petitioner's case was presented by Mr. Duncan Okubasu whilst Mr. Angwenyi urged the Respondent's case. Both counsel argued on the basis of the written submissions filed.

Petitioner's submissions

18. Mr. Okubasu faulted the process adopted and applied in disciplining the Petitioner and which led to the Petitioner's studentship being discontinued. In Mr. Okubasu's submissions, the Petitioners right to fair administrative action as well as fair trial had been infringed.

19. Firstly, Mr. Okubasu submitted that the Petitioner was not adequately informed of the charges she faced. Secondly, counsel pointed out that the notice of the scheduled hearing was also inadequate and short as was the very inadequate information in the notice. Thirdly, it was Mr. Okubasu's view that the evidence adduced before the Disciplinary Committee was irrelevant as the 'chair' which had been used by the Petitioner was never availed. Fourthly, counsel faulted the decision for having been based on an alleged admission by the Petitioner.

20. Fifthly, Mr. Okubasu contended that the Disciplinary Committee was impartial as the Petitioner's accusers were also members of the same committee hearing the Petitioner's case and that the Petitioner was never afforded an opportunity to cross-examine the accusers who were the two invigilators.

21. Finally, the counsel submitted that the Petitioner had been denied the right to appeal despite having lodged an appeal in time.

22. Counsel relied on the case of **Joseph Mbalu Mutava *vs.* Attorney General & Another [2014]eKLR** for the proposition that the Petitioner was entitled to the right of cross-examination during the disciplinary hearing. Reference was also made by the Petitioner's counsel to Section 5 of the Fair Administrative Action Act, 2015 in support of the right to cross-examination.

23. Counsel concluded that the Petitioner right under Article 47 of the Constitution had been violated and the decision to discontinue the Petitioner's studentship was not reasonable.

Respondent's submissions

24. According to Mr. Angwenyi for the Respondent, two questions rested for determination. Was the procedure adopted by the Respondent fair? Secondly, was the decision by the Respondent's Disciplinary Committee reasonable?

25. Counsel contended that the Petitioner was aware of the regulation which prohibited unauthorized material being carried to Respondent university's examination halls as well as the consequence of violation of such regulation.

26. Mr. Angwenyi contended that by the Petitioners own admission, the Petitioner was aware of the existence of the unauthorised writings on the desk which led to her suspension and ultimate expulsion. The Petitioner, it was also submitted, was under a duty to inspect her desk and also notify the invigilator of any such writings.

27. Counsel additionally stated that there had been presented sufficient evidence before the Disciplinary Committee to warrant the decision arrived at, in addition to the admission by the Petitioner during the hearing. Counsel referred the court to the case of **Republic *vs.* Kenyatta University *Ex P* Gladys Nyambura Njogu [2011] eKLR** for the proposition that where there is adequate evidence the court ought not interfere with a decision of a tribunal.

28. On the issue of procedural fairness, the Respondent's counsel submitted that the Disciplinary Committee was impartial as no evidence had been placed before the court to illustrate any impartiality. Secondly, and relying on the decisions of the court in **Compac Investments Ltd *vs.* National Land Commission & 3 Others [2016]eKLR, Republic *vs.* Pwani University College Ex Parte Maina**

Mbugua & 2 Others [2010]eKLR and **Judicial Service Commission *vs.* Mbalu Mutava & another [2015]eKLR** counsel submitted that the Petitioner did not have an automatic right to cross-examine witnesses as not all tribunals and by extension Disciplinary Committees proceed in an adversarial manner. Counsel added that the Fair Administrative Action Act commenced after the impugned disciplinary proceedings had been finalized.

29. Mr. Angwenyi denied that the Petitioner had been afforded a short notice prior to the hearing and that in any event, the Petitioner had wilfully subjected herself to the proceedings and could now not complain. For this latter proposition counsel referred the court to the case of **Eliud Nyauma Omwayo & 2 Others *vs.* Kenyatta University [2014]eKLR.**

30. Finally, it was also the Respondents submission that the Petitioner had not tabled any evidence to show that she had exercised her right of appeal.

Discussion and Determination

Issues

31. My reading and understanding of the respective parties pleadings and submissions reveals that three issues emerge for determination in this Petition.

32. Firstly, is whether the Respondent violated the Petitioner's rights under Article 50(1) of the Constitution? Secondly, is whether the Respondent violated the Petitioners rights under Article 47 of the Constitution? With regard to the second issue, two questions ought to be answered. Was the disciplinary process adopted procedurally fair and, if so, was the ultimate decision fair.

33. The third core issue is whether the Petitioner's rights under Article 27 has been violated by the Respondent in so far as the Petitioner attributed her failure to exercise her right of appeal on the Respondent's actions and inactions.

34. Finally, of course, is whether the reliefs sought can be granted.

Some uncontested facts

35. Various facts turned out to be uncontested by both parties. I may shortly state the uncontested facts as follows.

36. The Petitioner was an undergraduate Bachelor of Library and Information Science private sponsored student at the Respondent institution. On 8 August 2014 the Petitioner was scheduled to sit for her last examination paper as a third year student. The exam was scheduled to be undertaken in a room identified as Hall EFO6. The exam venue was however changed to another room identified as Hall EFO7 on the morning of the exam. The Petitioner together with other students duly moved to the new exam room. They (not all of them) carried along their seat-desks. Half an hour into the exam the invigilators noticed that the seat-desks the Petitioner and some other students were using had writings which were relevant to the exam. The invigilators cut short the Petitioner's exam session.

37. Two invigilators were involved and witnessed the incident. They caused the Petitioner and the other students to sign a form. The invigilators then made their report to the Respondent. On 30th September 2014 the Petitioner was suspended from the Respondent institution. The reason for the suspension was that the Petitioner had been involved in an examination irregularity. The Petitioner's fate was to await the decision of the student Disciplinary Committee.

38. It is further common cause that a disciplinary committee meeting was convened on 5th February 2015. The Petitioner attended. The committee heard the evidence, deliberated and returned the verdict that the Petitioner was guilty of examination irregularity.The Petitioner was thereafter duly expelled from the Respondent institution.

39. Finally, it is not in controversy that an appeal preferred by the Petitioner has not been heard, even though the Respondent states that no appeal was preferred by the Petitioner.

Contested facts

40. Controversy emerges, when the Petitioner states that she was not afforded a fair hearing as, inter alia, the student Disciplinary Committee was conflicted. Controversy also stalks the facts when the Respondent states that the Petitioner has never lodged an appeal with the Respondent.

Right to fair hearing: Article 50

41. The starting point must be the recognition by the Petitioner that the Respondent had the authority and indeed ability to discipline and punish the Petitioner for any of her transgressions *qua* student. This fact was not contested by the Petitioner. The disciplinary process is to be conducted by a body constituted by the Respondent.

42. As was held in **Republic –vs- Kenyatta University & 2 Others Ex Parte Jared Juma, HC. Misc Civil Application No. 90 of 2009**:

> ***"Discipline at the Respondent's University is necessarily an internal process conducted using internal personnel. It would be impractical to sub-contract or delegate as it were, this function to an outside agency. Most bodies established under statute also establish disciplinary committees. Kenyatta University is no exception. The composition of the disciplinary committee is set out in the Statute, and it comprises University officers. The University has jurisdiction to conduct its own disciplinary proceedings. This must necessarily be so. The suggestion that disciplinary proceedings are a matter for courts is untenable…the existence of such a disciplinary committee has always been recognized by the courts. The courts also recognize that their relationship with such committees is limited to supervision."***

43. The court must thus be loath to interfere with any decision of such institution unless it is evident that it was undertaken outside of legal provisions and contrary to constitutional provisions. The institution is enjoined to perform such disciplinary tasks through such bodies are legally and properly constituted as dictated by such relevant laws as the Universities Act, No 42 of 2012 and the institution's own statutes.

44. I must additionally also point out that even where the court finds it appropriate to interrogate any disciplinary process by an educational institution a clear balance ought and must always be struck out between the need to ensure that the private rights of a student to education of the one hand and the wider public and societal interest which expects the institution to avail graduates at whatever level, whose credentials both academically, ethically and integrity- wise are unblemished and spotless. It is truly not for a party outside of the educational institution including the court to chaperon and nurture the student. Such nurturing which includes discipline is best left to the institution, including the punishment meted out.

45. Similar sentiments were well articulated by the court in **Alice Njeri Ngiciri –v- Kenyatta University, HCCP No. 261 of 2011** where the court stated that:

> ***"The first is the right of a student, who has undergone a course of study at the Respondent University, to realize the purpose of that course of study in a timely and efficient manner. The other relates to the interest that the University has in ensuring that those qualifying from its academic training do so with the grades that they deserve, and that there is no cheating or tampering with grades which would undermine the credibility and integrity of degrees awarded by the institution.***
>
> ***The first troubling possibility goes to the integrity of students pursuing courses of study at the University and the institutions own staff; that students and staff of the Respondent are willing to reduce the award of grades and qualifying degrees to a transactional exchange in which***

students' grades are altered to reflect better than the students have been awarded by their Tutors. The other troubling possibility is that the Respondent's examination systems are so inefficient and compromised that it cannot safeguard the integrity of the grades it awards. In light of these possibilities, the Court is called upon, in my view, to balance these competing interests while bearing in mind the greater public interest in a system of higher education that can be relied on to help achieve societal goals in education. I shall revert to a consideration of the issue of greater public interest that this matter raises later in this judgment." *(emphasis added)*

46. The question consequently to be addressed is whether the Respondent acted properly and lawfully in the circumstances of the instant case. I must refrain, for the moment, from addressing any issues of merit for reasons which I also give later in this judgment.

47. The Petitioner has claimed that the Disciplinary Committee which recommended her expulsion, or discontinuation in university parlance, was conflicted and had a predetermined mind. Paragraph 39 through 42 of the Petition clearly capture the Petitioners case in these respects when it is stated that the Respondent's Disciplinary Committee as made up also included one Caroline Mutwiri, who participated in the hearing proceedings and determination. Caroline Mutwiri, it is not contested, was one of the invigilators on duty on 8 August 2014 when the Petitioner was allegedly caught with unauthorised writings on her seat-desk. Indeed, Caroline Mutwiri is the one who allegedly noticed and detected the irregularity as far as the Petitioner was concerned.

48. The Petitioner claims that the presence of the said Caroline Mutwiri as one of the panellists or a member of the Respondent's Disciplinary Committee compromised the integrity of the committee and violated the Petitioner's right to fair hearing. The Petitioner adds that the situation was made worse by the said Caroline Mutwiri fielding questions through the other panellists and not being availed to be cross-examined by the Petitioner.

49. Article 50(1) provides that:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".

50. The Article requires tribunals or forums other than courts (which are presumed to be impartial and independent) to be impartial and independent. It also expects courts, tribunals and forums to be fair. The test whether the Constitution's criteria for independence and impartiality has been met is an objective one. It is whether from the objective standpoint of a reasonable, objective and informed person the tribunal or forum will be perceived as enjoying the essential conditions for independence and impartiality. A fully informed person ought to harbour a reasonable apprehension of bias before a verdict of partiality is returned. This is the universal test and it is for applicant alleging lack of independence and impartiality to dislodge the presumption that the tribunal or form is partial by presenting convincing evidence: see **President of the Republic of South Africa –v- South Africa Rugby Football Union [1999] 4 SA 177 (CC).**

51. It is a clear principle of the law that no man shall be a judge in his own cause (*nemo judex in sua causa*). It is along this principle that the Petitioner contended that her accuser was a member of the same Disciplinary Committee that set to hear and determine the Petitioner's disciplinary cause. The Respondent contended that the Petitioners alleged accuser was never a panellist or member of the Disciplinary committee.

52. I have perused the evidence availed.

53. The uncontested minutes of the Students Disciplinary Committee hearing of 5 February 2015 do not reveal the said Caroline Mutwiri or her co-invigilator as members of the said student Disciplinary Committee. No other evidence was placed before me by the Petitioner to show otherwise apart from an

allegation that the minutes were 'doctored'. The minutes however, reveal that both Ms. Caroline Mutwiri and her co-invigilator like the Petitioner testified at the proceedings.

54. I am satisfied that the Petitioner has not established that either Caroline Mutwiri or her co-invigilator Dr. Maina Kamau was a member of the Student Disciplinary Committee that heard and determined the Petitioners case. In the result, the Petitioner has not demonstrated to the required standard that her case was determined by a partial and prejudiced tribunal or forum contrary to the provisions of Article 50(1) of the Constitution.

Article 47: Right to Fair Administrative Action

55. Article 47 of the Constitution provides thus:

> ***47 (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.***
>
> ***(3) Parliament shall enact legislation to give effect to the rights***

56. The above Article has been promoted by the Fair Administrative Action Act No. 4 of 2015 ("**the FAA Act**"). In particular, Section 4 of the FAA Act is explicit on how administrative action is to be undertaken. The guidelines under Section 4 of the FAA Actconsists mainly of the common-law rules and principles of natural justice. Section 4 of the F AA Act may be partially reproduced as follows:

> ***<u>Section 4 FAA Act</u>***
>
> ***(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***
>
> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
>
> > ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action; new regulations, expert evidence;***
> >
> > ***(b) an opportunity to be heard and to make representations in that regard;***
> >
> > ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
> >
> > ***(d) a statement of reasons pursuant to section 6;***
> >
> > ***(e) notice of the right to legal representation, where applicable;***
> >
> > ***(f) notice of the right to cross-examine or where applicable; or***
> >
> > ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

57. It is clear that to depart from the provisions and guidelines laid out by Section 4 of the FAA Act, a

person acting in an administrative or quasi-judicial capacity has to show that another written law prescribes procedure which conforms to the principles set out in Article 47 of the Constitution: see **Section 4(6)** of the FAA Act. Such written law must also conform to the requirements of Article 24 of the Constitution.

58. The Respondent institution no doubt when acting in an administrative or quasi-judicial capacity and set to make decisions affecting the legal rights or interests of any person was bound to observe the rules of natural justice as subsumed under Article 47 of the Constitution. The Respondent has not denied that in convening a disciplinary committee hearing and ultimately recommending the Petitioners expulsion it was exercising an administrative action and performing a quasi-judicial function. It was bound to follow the rules of natural justice and observe the principles set out under Article 47 of the Constitution: see **Lempaa Vincent Suyianka & Others *vs.* Kenyatta University & 2 Others Misc. Appl No. 1118 of 2003,** and **Awuni & Others *vs.* West Africa Examination Council [2005] 1 LRC 594** both cited with approval in **Alice Njeri Njichiri *vs.* Kenyatta University (Supra).**

59. Article 47 of the Constitution effectively absorbed the common law principles which provided the grounds for judicial review but more critically the appellation 'administrative action' was no longer confined to 'conduct' but included any 'decision' by a natural or juristic person or authority exercising or performing administrative or quasi-judicial functions. The conduct of the administrative or quasi judicial process must be procedurally fair and lawful. Likewise the decision too, where it adversely affects rights or interests must be lawful and reasonable; merited for that matter.

60. It has not been contested that the Respondent institution had the lawful authority to make the decision in question. The Respondent institution had the lawful mandate both under the Universities Act and the relevant statutes of the Respondent to constitute a Student Disciplinary Committee to determine the Petitioner's culpability in the matter of any examination irregularity and make the appropriate recommendation. What is however contested is that the process was procedurally fair and the decision itself reasonable.

61. On the issue of procedural fairness, the Petitioner has pointed out no less than six defects in procedure to invite the courts intervention.

62. It was stated that the Petitioner was not adequately informed of the charges she faced and that the notice period was short. The Petitioner also faulted the evidence adduced at the hearing convened by the Respondent as "irrelevant" and untested and that the decision was pegged on an alleged admission by the Petitioner. The Petitioner then also faulted the composition of the Student Disciplinary Committee to show that it was procedurally unfair before wrapping up the attack by stating that the Respondent has denied the Petitioner a right of appeal.

63. I have already dealt with the composition of the Student Disciplinary Tribunal. I do not intend to revisit the issue, suffice to point out that the evidence availed would appear to epically show that the Petitioner's accusers were not members of the Disciplinary Committee but only attended as witnesses and testified or gave their versions to the Committee the same way the Petitioner did.

64. Was there adequate information availed to the Petitioner before the hearing? The answer to this question can only be found in the communication exchanged between the Petitioner and the Respondent institution prior to the hearing. Such communication must also be viewed in light of the essence of the information on the charge.

65. The purpose of the proposed administrative action was to determine the Petitioners culpability if at all, in the examination irregularity. I did not hear the Respondent contest the fact that there is always need to inform any accused person of the charges he is faced with. Indeed, in all its correspondence with the Petitioner the Respondent made attempts to inform the Petitioner of the purpose of convening the disciplinary committee meeting and the reason of the invitation to attend. In my view, the essence of informing any person faced with an administrative action of charges s/he faces is to enable him/her to answer it or prepare his/her defence. The sufficiency of the details will however depend on each particular

case and circumstances.

66. In the instant case, the Petitioner was accused of examination irregularity. Her examination was cut short. That was on 8 August 2014. Seven weeks later on 30 September 2014, the Petitioner was suspended from the Respondent institution. The letter suspending the Petitioner read partly as follows:

> *"Following a report by the Department of Library and Information Science on your involvement in examination irregularity in Unit ISC 402: Practical Cataloguing held on Friday 8th August 2014, I regret to inform you that you are suspended from studying in this University pending your appearance before the students Disciplinary Committee. This is in accordance with University Examination Regulation on penalties stipulated in the university calendar.*
>
> *You will be informed in due course when to appear before the Students' Disciplinary Committee."*

67. The letter made no specific mention of the charges the Petitioner would be facing. In sum, it was a generalized letter talking of examination irregularity and suspension. The suspension of the Petitioner could have meant that the Respondent was still conducting its own internal inquiries to properly place the Petitioner in the hands of the Student Disciplinary Committee. When the Respondent was finally ready to place the Petitioner before the Students Disciplinary Committee, the charge(s) against the Petitioner should have been framed in detail and they indeed they were.

68. The Respondent consequently wrote a letter on 27 January 2015 inviting the Petitioner to disciplinary committee hearing on 5 February 2015. The letter read partly as follows:

> *"This is to inform you that you are required to appear before the Students' Disciplinary Committee (SDC) on Thursday, 5th February 2015 at 8.30 am in the Deputy Vice-Chancellor (Academics) Board Room, Central Administration complex 1st floor room 122 to answer charges of committing an examination irregularity in the unit ISC 402: Practical Cataloguing, an incident that occurred on 8th August 2014 at EF 07, when you were found using a seat which had written detailed notes which were relevant to the examination".*

69. The letter was indeed intended to inform the Petitioner in sufficient detail the charges she was faced with before the Students' Disciplinary Committee. The Petitioner did not however receive the letter. Though posted to the Petitioner's last known address and to the same address the suspension letter of 30 September 2014 was also posted, the letter of 27 January 2015 was returned unclaimed and uncollected. It is however instructive that the letter was registered with the postal service on 30th January 2015, some five days before the hearing date of 5th February 2015.

70. The Respondent contends that the Petitioner was however also notified of the hearing date and the charges she faced through a tele-conversation on 4 February 2015. The Petitioner does not deny the tele-conversation but denies that she was informed of the charges.

71. It was for the Respondent to satisfy the court that it notified the Petitioner of charges she was to face before the student disciplinary committee with such detail as to enable the Petitioner prepare her defence and also prepare for the hearing. I am not satisfied that the Respondent has discharged this burden. The letter of 27 January 2015 was detailed enough but it is not in controversy that the Petitioner did not receive it.

72. Besides, I am also not convinced that the Petitioner deliberately ignored the notification by the Postal service to collect it. No evidence was placed before me to show that the Petitioner was notified. Additionally, the letter was posted on 30 January 2015. That was a Friday. The earliest the postal service could have issued a notification was Monday 2 February 2015 which left only two clear days prior to the hearing date. It is unlikely that the Petitioner could have simply been waiting for this notification.

73. Secondly, the Respondent did not disclose who made the call to the Petitioner and through whose

telephone number.

74. From the record of evidence before me, the Petitioner only became aware of the charges she faced on the morning of the hearing by the Students' Disciplinary Committee and indeed as the proceedings commenced.

75. The Petitioner also contended that the notice prior to the hearing was inadequate. The hearing was slated for 5 February 2015. The Respondents representative apparently called the Petitioner on 4 February 2015. That was too close to call. The fact that the Petitioner attended the hearing on 5 February 2015 does not take away the fact that the period of notice was too short. It certainly failed to meet the essence of notice.

76. Further on procedural fairness, the Petitioner also contended that the Respondent relied on irrelevant evidence, failed to produce the actual evidence and denied the Petitioner the opportunity to cross-examine witness. The proceedings before the Students' Disciplinary Committee of 5 February 2016 were soundly adversarial. There was an accused person in the Petitioner faced with specific charges. The Respondent had levelled the accusations. The Respondent lined up witnesses being the two invigilators. The Petitioner herself gave evidence as did the Respondent's witnesses. The Petitioner was questioned by the members of the Committee. The Respondent could however only avail the best evidence in its possession and leave the now independent Students' Disciplinary Committee to isolate and determine the Petitioner's culpability, if at all.

77. I am unable to see how the Respondents evidence may be faulted for being irrelevant. Instances of examination irregularities are a common feature in the Kenyan society. Like information technology specialists, examination cheats device new methods in the dawn of every day. Some are complex. Others are simple, yet touch on the cheating person's privacy where for example the irregularity takes the form of relevant material being scribbled on parts of the human body. Securing evidence of examination irregularity is thus a delicate process. It takes courage. It also depends on the circumstances of each case.

78. With regard to the issue of cross-examination, the Respondent conceded that the Petitioner never cross-examined the witnesses who testified on behalf of the Respondent. The record of proceedings availed through the minutes reflects this position. The Respondent however contends that the Petitioner did not have a right to cross-examine the witnesses and further that in any event the Petitioner did not specifically seek to cross-examine the witnesses.

79. I would disagree.

80. There is no doubt that one of the precepts of Article 47 is the right to challenge and adduce evidence. An administrative action which is adversarial cannot be deemed procedurally fair if the parties are not in a position to adduce and challenge evidence. This is fulfilled by calling witnesses and through cross-examination. That is what the truth- seeking function of a tribunal or forum like the Students' Disciplinary Committee is dependent upon. Parties appearing before quasi-judicial tribunals or forums ought to be informed of this right more so where a party is proceeding *propia persona*. The right to cross-examine is now a mandatory right under Section 4(3) of the FAA Act. Previously, it was not: see **University of Ceylon –v- Fernando [1960] 1 LRC 223.** It all depended on the circumstances of each case and the peculiarity of each forum. However, the application of Article 47 would demand that one is accorded this right even in the absence of express statutory provisions.

81. The circumstances of this case certainly dictated that the Petitioner be afforded the full benefit of the process. Alone she faced a panel of eight persons set to determine her fate as a student. She was allowed to testify. She was questioned. Yet the panel failed to accord her the entitlement of questioning the Respondent's witnesses. The least the panel could have done is to inform her that she could also question the witnesses rather than adopt a wait and see attitude.

82. Finally, the Petitioner contended that the Respondent failed to grant the Petitioner the opportunity to exercise her undoubted right of appeal.

83. It is not in doubt that the Respondent's statutes and regulations provide a further or additional avenue of redress by way of an appeal. Indeed, the Respondent procedurally informed the Petitioner of this right in its letter of 22 May 2015 which communicated the decision to discontinue the Petitioner's studentship.

84. The Petitioner contends that she lodged an appeal on 25 May 2015. The Respondent states that the letter of appeal was never delivered to the Respondent. On this, I would tend to agree with the Respondent. It was for the Petitioner to show by way of uncontroverted evidence that she exercised this right of appeal. It is not enough simply to exhibit an unacknowledged letter and claim its delivery. The appeal process was crucial to the Petitioner's student life, if it was to succeed. I do not see how possibly the Petitioner could simply drop such an important letter and claim it was received by the Respondent. Even if there was no formal acknowledgment, the Petitioner ought to have identified the person who received the letter or the office where it was dropped as alleged by the Petitioner. I have taken notice too of the fact that in her Petition the Petitioner simply states that she "sent" the letter of appeal to the Respondent but then in her Supplementary Affidavit of sworn on 20th January 2016, the Petitioner claims to have hand delivered the letter and met with a promise to be notified of the status of her appeal. The Petitioner however fails to identify when the delivery was made and who promised to communicate. Such contradictions and failure would lead to the plausible inference that the letter of 25th May 2015 actually never reached the Respondent.

Conclusion and Findings in summary

85. There is no doubt and I find that the Respondent was duty bound to observe the rules of natural justice and afford the Petitioner a procedurally fair process in tandem with the provisions of Article 47 of the Constitution. In this respect the Petitioner was entitled to be notified in sufficient detail of the charges she was to face before the Respondent's Students' Disciplinary Committee. The Petitioner was also entitled to adequate time to offer her defence by preparing for the same and if necessary call witnesses. The Petitioner was also entitled to adduce and challenge any evidence. The Respondent's Students' Disciplinary Committee was itself bound to consider all the relevant evidence and reach a reasonable and lawful decision and where necessary consider any appeal properly laid before the Respondent by the Petitioner.

86. From the evidence availed before me and the parties respective submissions, firstly, I am satisfied that the Student Disciplinary Committee as constituted on 5 February 2015 was properly constituted and composed.

87. Secondly, it is clear that the Petitioner was not informed in sufficient detail of the charges she faced and further that the Petitioner in only being notified on 4 February 2015 to attend the hearing on 5th February 2015 was not given sufficient notice. These two procedural defects, in my view, fundamentally violated the Petitioner's right to fair administrative action to her prejudice. The Petitioner was not able to prepare her defence within the short period of time and neither was the Petitioner able to call any witnesses. Additionally, the Petitioner's inability to cross-examine witnesses was occasioned by the mere lack of knowledge of that unwritten right which the committee failed to offer to the Petitioner or draw the Petitioner's attention to.

88. Thirdly, I find that the Petitioner did not exercise her right of appeal on the basis of the evidence before me.

Disposal

89. I return to where I started.

90. The Petition raised a relatively serious question on what ought to be done where examination integrity in the institutions of higher hearing is at stake. The appropriate forum is ideally the concerned institution itself. The institution ought to be in a position to determine cases of examination irregularity with little intervention externally. The court ideally ought to let such process run its course. However, the institution must also observe basic rules of natural justice. Our Constitution in absorbing the principles of natural

justice under Article 47 intended to ensure that administrative actions are not simply undertaken to satisfy affected persons psychologically that they have been heard. The substance of natural justice ought to be strictly complied with.

91. The Respondent herein sought to substantially comply and afford the Petitioner the requisite procedural fairness, it however fell short when it failed to inform the Petitioner in substantial detail of the charges it faced. It also failed when it only informed the Petitioner of the hearing date, the day before the date itself. It finally failed when it failed or neglected to notify the Petitioner of its right to cross-examine the witnesses.

92. The procedural hiccups, in my view, amounted to fundamental irregularities as they definitely led to a failure of justice in view of the rather mandatory ultimate sentence of discontinuation of the Petitioner's studentship. The violation in my view affected the decision of the Committee.

Reliefs and final orders

93. I have found that there were fundamental irregularities in the circumstances of this case.

94. I have also found and reiterate that the court is ordinarily not the best forum to determine issues of examination irregularities unless there is a compelling necessity. I do not find that there is a compelling necessity for me to substitute the findings of the Student Disciplinary Committee even as I return the verdict that the decision to discontinue the Petitioner's studentship ought to be vacated.

95. In the result, I find partially for the Petitioner. The Respondent's decision to discontinue the Petitioner's studentship will be and is to be quashed and the parties will revert to the position obtaining as of 4 February 2015.That is to say that the Petitioner will remain suspended and the disciplinary proceedings reconvened *de novo*.

96. I make therefore the following final orders:

> **a.** It is declared that the letter inviting the Petitioner to the disciplinary hearing and the disciplinary proceedings conducted against the Petitioner on 5 February 2015 as well as the decision to discontinue the Petitioner's studentship from the Respondent University amount to a contravention of the right to fair administrative action were unconstitutional and are hereby quashed.
>
> **b.** The Respondent is hereby ordered to commence fresh disciplinary proceedings against the Petitioner in accordance with the law and in any event within the next 90 days.

97. I hold no party responsible for costs. Each party shall bear its own costs

98. Decree accordingly.

Dated, signed and delivered at Nairobi this 19th day of August, 2016

J.L.ONGUTO

JUDGE