



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 35 OF 2014

DENNIS NYAMBANE ORANGOAPPLICANT

VERSUS

EGERTON UNIVERSITY RESPONDENT

JUDGEMENT

Before this court is the Notice of Motion dated 22nd October 2014 by which the applicant **DENNIS NYAMBANE ORANGO** seeks the following orders

a) “THAT an order of CERTORARI be issued to move into this Honourable Court for the purposes of being quashed and to actually quash the orders and/or decision made by PROF. NDIRITU F G on a letter dated 11th October, 2013 where and when Prof Ndiritu issued orders to expel (sic) DENNIS NYAMBANE ORANGO from Egerton University.

b) THAT cost of this matter be borne by the Respondent”

The application was supported by the Statement of Facts dated 2nd October 2014 as well as the Verifying Affidavit of the Applicant sworn on 2nd October, 2014. The Respondent **EGERTON UNIVERSITY** opposed the application by way of Replying Affidavit sworn by **Professor S. F. O Owido** dated 29th January, 2015.

FACTS

The Applicant was at all material times a student enrolled in the Faculty of Agriculture at Egerton University where he was undertaking a Bachelor of Science degree in Animal Production. Following an incident in which the applicant was found in possession of 2½ rolls of *Cannabis Sativa* (bhang) within the University premises disciplinary action was commenced against him. This disciplinary action culminated in the expulsion of the applicant from the University which expulsion was communicated to him vide a letter dated 11th October, 2013. This expulsion letter was signed by Prof. Ndiritu F.G Ag Registrar Academic Affairs.

The letter made reference to disciplinary proceedings which were conducted on 5th June, 2013. The applicant however maintains that he did not participate in those disciplinary proceedings nor was he informed of any allegations against him that were the subject of those disciplinary proceedings. The applicant’s case is that his right to a fair hearing was infringed by the Respondent due to its failure to inform of the allegations against him in advance and its failure to accord him an opportunity to defend

himself.

Following notification of his expulsion the applicant did appeal to the University Senate which dismissed his appeal and upheld the decision to expel him vide their letter dated 20th August 2014.

The applicant now comes before this court seeking orders of certiorari to quash the respondent's decision to expel him as contained in their letter dated 11th October, 2013.

The Respondent's case is that the appellant was in fact summoned to appear before the Students Disciplinary Committee. By way of a letter dated 15th May 2013 the appellant was invited to appear before said committee on 10th June, 2013 to answer to charges of Contravening Rules 7-2, 7-3 and 7-4 of the University Rules and Regulations. The applicant however refused and/or declined to appeal before the committee. He offered no reason and/or explanation for his failure to appear. The matter was deliberated in his absence and a recommendation was made that he be expelled from the University. This recommendation was eventually adopted by the University Senate in its special meeting held on 10th October, 2013. The decision was finally communicated to the applicant vide the letter date 11th October, 2013.

The Respondent conceded to having received the applicants appeal against his expulsion. This appeal was deliberated upon by the Grievances Handling and Appeals Committee on 30th April 2014 and was dismissed. The decision to dismiss his appeal was adopted by the University Council and was communicated to the applicant by a letter dated 20th August 2014.

The respondent insisted that due process was followed in the deliberations and decision to expel the applicant. The Respondent submitted that this application was a mere afterthought.

The application was disposed by way of written submissions. I have carefully perused said written submissions as well as the authorities cited therein.

ANALYSIS

There is only one issue for determination in this case and that is whether the applicant was accorded a fair hearing by the Respondent before the decision to expel him was reached. Article 47(1) of the Constitution of Kenya, 2010 provides that-

“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”

Procedural fairness presumes an adherence to the Rules of Natural Justice. The right to be heard is one of the principles of natural justice. This requires that any person who stands to be adversely affected by a decision must be allowed an opportunity to be heard before that decision is made. The person must be informed of the allegations against him and must be accorded the opportunity to present his case. This was stated in the case of **Grace Kazungu & Another Vs NSSF Cause No. 703 of 2010 [U/R]**

“The fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second, they will be provided with the specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly, they will be given an opportunity to make submissions to the case”

Similarly, in **Republic of Kenya Vs Registrar of Trade Unions [1988] eKLR** the court held:

“Natural justice is concerned with the exercise of power, i.e with acts or orders which produce legal results and in some way alter someone's legal position to his disadvantage – see page 504 of the 5th Edition of H.W.R Wade on Administrative Law Supra. A party to a controversy must therefore be given a fair hearing and the Authority exercising that power must act in good faith

and where two sides are involved it must see that matter which came into existence quasi-lis has started, if that Authority receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it – see the case of B. Johnson & Co. (Builders) Ltd., Vs Minister of Health [1947] 2 ALL E.R 395 at pages 404 and 405. Indeed as was said by Reid, L. J. in the case of Ridge Vs Baldwin, supra page 80.

“The body with the power to decide cannot lawfully proceed to make decision until it has afforded to the person affected a proper opportunity to state his case”.

It is not in dispute that the applicant was not heard before the decision to expel him was reached. He did not attend the Students Disciplinary Committee hearing on 10th June, 2013 nor did he appear before the Grievances Handling Appeals Committee during the hearing of his appeal on 30th April 2014. The Respondent submits that the applicant on his own volition elected not to appear before the Students Disciplinary Committee.

The Respondent concedes that the applicant was not invited to the hearing of his appeal before the Grievances Handling and Appeals Committee but insists that it was not necessary to invite the applicant to appear for the hearing of his appeal.

The issue for determination therefore is whether the applicant having been properly notified elected not to appear before the Students Disciplinary Committee. If this is found to have been the case then the Respondent cannot in any way be faulted.

From the evidence it is clear that a summons was written to the applicant inviting him for the disciplinary hearing scheduled to take place on 10th June, 2013. In that summons the applicant was informed of the charges against him as well as the specific Rules and Regulations he was accused of having breached. He was also informed of the consequences of non attendance.

This letter was addressed to the applicant ‘**Mr Dennis Nyambane Orango**’ but it was not addressed through any Post Office Box number. Instead it was addressed to the applicant “**C/o Ag. Chief Security Officer**”. The court is not told the name of this Ag. Chief Security Officer nor has any person holding that post with the University sworn an affidavit to confirm having delivered the letter to the applicant whether in person or in any other manner whatsoever. I note that in contrast the other letters sent to the applicant (and which the applicant confirms having received) *eg* the expulsion letter dated 11/10/2013 and the letter dismissing his appeal dated 23rd October, 2014 were all addressed to the applicant using his post office address being “**P. O. Box 78 – 40502 Nyansiongo Town**”. Why was this all important letter inviting him to appear before the disciplinary committee not sent through the same address? This is the address which the university had for the applicant and

I note that his letter of offer and all other official communication from the respondent to the applicant was sent through that post office address.

In the light of this variation in the mode of communicating with the applicant, it was imperative that the person who was given the responsibility of delivering this letter to the applicant, in this case the Ag. Chief Security Officer confirms to the court that he did actually deliver the same. As stated earlier no such confirmation has been presented to the court. The applicant has not signed this summons to confirm his receipt of the same. In the circumstances the applicant’s claim that he never received this letter notifying him of the allegations against him and inviting him to appear before the Students Disciplinary Committee

cannot be dismissed. To merely prove that it wrote to the applicant inviting him to attend the disciplinary proceedings is not enough. Given the serious nature of the charges leveled against him and the equally serious ramifications if found culpable the Respondent had a duty to show that it made all necessary and reasonable efforts to have that summons delivered to the applicant.

The onus is upon the respondent to show that the summons was delivered to the applicant before it proceeded to deliberate and recommend his expulsion. If such delivery was made nothing would have been easier than to have the Ag. Chief Security Officer, who was after all employee of the University swear an affidavit confirming the date, time and place when he delivered the letter to the applicant. To the extent that this was not done real doubt remains as to whether the applicant did indeed receive the summons. This doubt must be resolved in favour of the applicant.

The Respondent in its submissions has made much of the fact having been charged before a Court in Nakuru the applicant pleaded guilty to possession of the 2½ rolls of Bhang and was placed on probation. This is neither here nor there when considering whether the applicant was accorded his right to fair administrative action. The right to a fair hearing is not pegged on the strength of the case and it is irrelevant that the same decision would have been reached even if the party had been heard. In the case of **ONYANGO OLOO Vs ATTORNEY GENERAL [1986 – 1989] E. A 456** the Court held as follows:

“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”.

Based on the foregoing I find that it has not been proved that the applicant was accorded his right to a fair hearing. Any decision reached by the Respondent in absence of proof that the applicant was informed in advance of the charges against him and allowing him an opportunity to defend himself, amounts to a breach of the applicants right to be heard. Such decision is therefore void *ab initio* and must be quashed. As such the Notice of Motion dated 22nd October, 20th has merit and is hereby allowed.

I therefore allow this application and make orders as follows:-

- a) An order of certiorari is hereby issued bringing into this court the decision of the Students Disciplinary Committee to expel the applicant made on 10th June, 2013, thereafter adopted by the Senate on 10th October, 2013, subsequently upheld by the Grievances Handling and Appeals Committee on 22nd October, 2013 and adopted by the University Council on 20th August, 2014, for purposes of being quashed, and the same is hereby quashed;
- b) Each party to meet its own costs for this application

Dated in Nakuru this 30th day of September 2016

Maureen Odera

Judge