



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 12 OF 2010

REPUBLIC.....APPLICANT

VERSUS

MOI UNIVERSITY.....RESPONDENT

***EX PARTE* ANDREW KITUNI MURAMBI**

JUDGMENT

1. The *ex-parte* applicant was a student at Moi University between 2001 and 2005. He was enrolled for a course leading to an award of Bachelors of Law. He never graduated. He claimed there was a delay in grading his final year dissertation. It was not marked until February 2006. Despite assurances by the dean, his name was not included in the graduating class of 2006. But the worst was yet to come. At first he was informed he had fees arrears of Kshs 50,000. In 2007, he was informed that the results for one of his third year papers were cancelled; and, that he had been expelled from the university.
2. The *ex-parte* applicant was aggrieved by that decision. On 13th October 2008 he was granted leave to apply for *certiorari* to remove into the High Court and to quash the decisions of the respondent contained in a letter dated 3rd April 2008. Leave was also granted to seek an order of *mandamus* to compel the respondent to release all his academic transcripts, degree certificate and a letter authorizing him to join the Kenya School of Law. The original substantive motion was filed on 14th October 2008. Leave was subsequently granted to amend the motion. The *amended notice of motion* was filed on 5th November 2009.
3. The gravamen of the motion is that the *ex parte* applicant was condemned unheard; that the proceedings of the *ad hoc* committee of the senate of 21st November 2007 were hurried; that its members were biased; that he was never served with a copy of the charges or afforded a fair opportunity to defend himself; that the dean of the school of law was absent; and, that there was no evidence from the invigilator for the *Environmental Law Course*. He avers that the actions of the respondent were unlawful, irregular and unreasonable; and, that they ruined his career as a lawyer. Those matters are buttressed by a deposition sworn on 13th October 2008 and the earlier *statement of facts* dated 30th September 2008.
4. The motion is contested. There is filed a replying affidavit sworn on 8th May 2009 by Jacqueline Manani, a legal officer of the respondent. The allegations by the *ex-parte* applicant are denied *in toto*. In particular, it is averred that under the Moi University Act, the council of the university has power to make statutes and regulations for conduct of examinations; and, that the senate has power to regulate content of academic programmes. In addition, it is empowered to determine graduands qualified for award of degrees, and to advise the council. In that regard, the senate passed the *Common Rules and Regulations for Undergraduate Examinations (Revised May 2002)*. They are annexed to the deposition. The respondent contends that the *ex parte* applicant breached

- those regulations. In particular, he copied or attempted to copy from unauthorized materials or sources in the *Environmental Law Paper No. FLB 311*. He is also accused of destroying or refusing to hand over evidence of the irregularity.
5. It is contended by the respondent that the senate *ad hoc* committee investigated the matter, made a report and recommended the expulsion of the *ex parte* applicant. He was granted an opportunity to appeal. Following successful review, he was allowed to tender his defence. He did so on 21st November 2007. It is averred that the *ex parte* applicant admitted the charges. On 2nd April 2008, the senate affirmed the decision of the *ad hoc* committee to cancel the results of the paper and to expel him. The minutes of the meeting are annexed. The University states that it was false to claim the expulsion was over fees arrears; or, that the *ex parte* applicant was unaware of the charges facing him. In a synopsis, the case for the respondent is that its actions were regular and lawful.
 6. The *ex parte* applicant has filed detailed written submissions dated 2nd July 2014. There are also supplementary submissions dated 3rd December 2014. A list of authorities is annexed. The respondent's submissions are dated 11th August 2014. A list of decided cases is also annexed. I have considered the pleadings, depositions, the annexed documents, precedents and the rival submissions.
 7. These proceedings are by way of *judicial review*. As a general proposition judicial review proceedings are not concerned with the *merits* but with the decision making process. In order to succeed in an application for judicial review, the applicant has to show that the impugned decision is tainted with *illegality, irrationality or procedural impropriety*. Those terms were explained well by Odunga J recently in *Republic v Inspector General of Police Ex-parte Patrick Nderitu* Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR-

“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. 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.”

8. There are a plethora of precedents on that subject. See generally *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300, (A persuasive but non-binding Ugandan decision), *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2, *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 and *The Commissioner of Lands v Kunste Hotel Limited*, Nairobi, Court of Appeal, Civil Appeal 234 of 1995 [1997] eKLR.
9. I am satisfied that the disciplinary proceedings against the *ex-parte* applicant constituted an administrative action. The term *administrative action* is wider than the final decision. See *Orion East Africa Ltd v The PS Ministry of Agriculture & another*, Nairobi High Court 100 of 2012 [2012] eKLR. Accordingly, the *ad hoc* committee and the senate were enjoined by the Constitution and the Moi University Act to employ fair, efficient, lawful and expeditious procedures.
10. This cause of action arose before the present Constitution. Article 47 of the current Constitution provides for fair administrative action. Under section 77 of the repealed Constitution, similar principles existed. Article 47 is now more *elaborate* and provides as follows-

“(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)

11. The key question is whether the *ex-parte* applicant got a fair hearing. Prior notice of the charges is an important prerequisite to a fair hearing. The right is well explained in *Halsbury's Laws of England*, 5th Edition, 2010, Vol. 61 at para. 639 -

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

12. The *ex-parte* applicant's case is that there was *failure* of natural justice. An administrative tribunal should apply the rules of natural justice. In *Onyango Oloo v Attorney General* [1986-1989] EA 456, the Court of Appeal had this to say :

“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...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...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...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”

13. See also *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal No. 108 of 2009, *Florence Moschion v Director of Public Prosecutions & 5 others* Nairobi High Court Petition 341 of 2012 [2013] eKLR, *Ezra Kaibuta v Attorney General*, Nairobi High Court petition 13 of 2013 [2013] eKLR, *Isabel Njoroge v PS Ministry of State for Provincial Administration & 4 others*, Nairobi ELC 745 of 2013 [2014] eKLR, *Republic v Registrar of Societies ex parte Joseph M'bataru* Nairobi High Court JR 451 of 2013 [2014] eKLR.

14. I think the key principles to be distilled from all these authorities are: that there are no hard and fast rules on the procedure to be adapted by various bodies; however, the administrative tribunals must achieve a *reasonable* degree of *fairness* throughout their investigations, proceedings and final decision. If that threshold is not met, then the High Court will be entitled to call for the proceedings, quash them and grant appropriate reliefs. The onus to *prove* the violation of rights rests squarely with the *ex parte* applicant. Finally, as a general rule, damages are unavailable in a judicial review application.

15. If an oral hearing is conducted, the affected party must have sufficient notice of the hearing. The party is entitled to attend and to cross-examine witnesses. He would also be at liberty to bring in legal counsel. But there is no duty to advise him to bring such counsel or at any rate to provide such services to the affected party. The tribunal must consider all the evidence, and allow, where appropriate, for the parties to comment on it before a final decision is rendered. Since the final decision may impact negatively on the livelihood or other interests of the affected party, it would

- be gainsaid that the decision should contain *reasons*. In a nutshell the rules are all about an open, transparent and fair process. See generally W.R. Wade & C.F. Forsyth; *Administrative Law*, 10th edition (2009) Oxford University Press.
16. I will now juxtapose those principles against the facts of this case. It is not contested that the *ex parte* applicant was a law student. In the academic year 2004/2005 he was in his fourth and final year. He claims there was a delay in grading his final year dissertation. It was marked in February 2006. But the material irregularities leading to his expulsion dated back to his third year. To be precise, in the year 2004 in the *Environmental Law Paper No. FLB 311*. He is accused of copying from unauthorized sources or materials; destroying; or, refusing to hand over the evidence. The *ex parte* applicant takes up cudgels on that explanation. He denies that he *admitted* the allegations.
 17. He submitted that the replying affidavit is defective because the deponent was not a member of the senate. The *ex parte* applicant wonders why the respondent waited until he completed his studies to raise the matter. He says he was subjected to an unfair administrative action; that the university breached its own statutes by failing to investigate the matter immediately; that he did not have sufficient notice or fair opportunity to defend himself; and, that in totality, the conduct of the university was high handed, biased, inhuman and illegal. It was finally submitted that the senate erred by sitting on an appeal from its own decision.
 18. That last submission is on a legal quicksand. The Senate is a creature of the Moi University Act. Under the Act, the Senate has power to regulate content of academic programmes; to determine graduands qualified for award of degrees; and, to advise the Council. It is granted power under the regulations to consider recommendations of its *ad hoc* committee formed under Regulation 7.3; and, to sit on appeals. There is no illegality there. See *Republic v Egerton University ex parte Koskey*, Nakuru, High Court Misc. Appl. 712 of 2005 [2006] eKLR, *Republic v Senate Examination Disciplinary Committee ex parte Mbau*, Nairobi, High Court Misc. Appl. 1297 of 2005 [2006] e KLR. Furthermore, the appeal by the *ex parte* applicant was successful; and, he was allowed to conduct his defence on 21st November 2007. I cannot in this case say that the *ad hoc* committee failed to give the *ex parte* applicant a hearing. See *Nyongesa & 4 others v Egerton University College* [1990] KLR 692.
 19. The senate on the other hand was required to receive the report of the *ad hoc* committee for either *adoption* or *rejection*. There was *no* requirement in the statute or regulations that the student *must* appear before the *full* senate. The reason is self-evident; the *ad hoc* committee was a committee of the senate; it was acting for and on behalf of the senate.
 20. The submission that the legal officer of the university was not competent to swear the reply is prosaic. True, she is not a member of the senate. But she holds the position of *legal officer*. She has disclosed she was *personally* seized of the material facts. But more importantly, she was *authorized* to swear the deposition. She has also *disclosed* the *sources* of her information including the statutes and regulations of the university; information from Mr. Lugulu, the Chief Invigilator of the paper in issue; John Chebii who was the dean of the law school; and, Dr. Chepkuto. The deposition passes the test under Order 19 of the Civil Procedure Rules 2010. That submission is devoid of any merit.
 21. I will now turn to the all-important matter of *notice*. Initially, the university had posted a notice on its notice board in August 2006 inviting the *ex parte* applicant for a disciplinary hearing. He never saw it because by that time, he had left the university. He lodged an appeal. The review was successful. At paragraph 16 of the *ex parte* applicant's affidavit of 13th October 2008, he concedes that on 20th November 2007, he received a telephone call alerting him of the *ad hoc* committee meeting for 21st November 2007. He went to the campus. He was then served with a letter of 19th November 2007 detailing the charges. It invited him to the meeting and advised him that he was entitled to call any witness.
 22. I have studied that letter closely. I accept it has a misleading *reference* because. The reference is to an *ad hoc* committee meeting for a different paper, *FLB 107 Contracts II*. The *ex parte* applicant had done contracts back in first year. It was clearly a typographical error. The matter under inquiry and to which he had made a statement related to the *Environmental Law paper FLB 311*. As far back as the year 2004, the *ex parte* applicant had written a response to allegations of copying from unauthorised sources. It would then be to turn logic onto its head to say that he was unaware of the allegations against him. He knew of the matter from 2004. He wrote a statement when the allegations surfaced. Considering the time frame, I disagree with the *ex parte* applicant

- that he was not given sufficient time to prepare his defence. I will deal shortly with the proceedings before the committee, its composition, and the allegations of bias.
23. The *ex-parte* applicant admits he received the decision of the senate contained in the letter dated 3rd April 2008. That letter was from the Chief Academic Officer of the University. The letter followed investigations into examination irregularities in course *FLB 311 Environmental Law* by the Senate *ad hoc* committee. The letter was addressed to the *ex parte* applicant. It concluded that he had flouted section 7.1 Group II (iv) of the *Common Rules and Regulations for Undergraduate Examinations*. The Senate considered the report of the committee; decided to cancel the results; and, to expel him.
 24. I have perused the *Common Rules and Regulations for Undergraduate Examinations (Revised May 2002)* annexed to the replying affidavit. Section 7 is devoted to *examination irregularities*. Regulation 7.2 provides that where an invigilator suspects an irregularity, he will, if possible, confiscate the offending materials *but* allow the candidate to complete writing the examination. The candidate will then be asked to make a statement to be submitted to the Chief Academic Officer. A report is thereafter made which together with the student's statement are given to the investigating committee. The investigating committee is provided by regulation 7.3. It comprises of four members of the senate or their representatives; the dean of the relevant faculty; the Dean of Students or his representative and, the Chief Academic Officer.
 25. The *ex parte* applicant contends that the committee in this case was irregular because the dean and invigilator were not present. That is not true. I have examined the report at page 25 of annexure marked *JOM3*. At page 27, the members of the committee included Mr. Chebii, Dean School of Law. Regulation 7.3 does *not* require the invigilator to be a member of that committee. The same can be said of the *ad hoc* committee report dated 13th December 2007 marked *JOM4*. Mr. Mutai represented the Dean School of Law. The Dean of Students attended both meetings. The members of the committee have appended their respective signatures to the report.
 26. I have also examined document *JOM2a*. It is an *examination incident form* for course *FLB 311* involving the *ex parte* applicant. It is authored by H.J.A. Lugulu, the Chief Invigilator. It states that the *ex parte* applicant was copying from unauthorized material. When he was discovered, he put the paper in his mouth and mixed it with chewing gum. He removed the chewing gum and material in the presence of the invigilator, Mr. Ochich, Dr. Barasa, Father Munga and D. Wand. The *ex parte* applicant in his statement to the university stated that all that was recovered was chewing gum. I don't believe him. I do not see why all the *five* academic officers or invigilating staff would have lied or sought to frame him up. In short, the *ex parte* applicant was caught red handed cheating in an examination. There is no cogent evidence suggesting that the tribulations of the *ex parte* applicant had anything to do with unpaid fees or the late marking of his final year thesis. They had everything to do with his conduct inside the examination room for the *Environmental Law Paper No. FLB 311*.
 27. The procedures adopted by the committee were as follows. Consideration of the written statements by student and invigilator; oral interviews for the invigilator and student; reference to any unauthorized materials recovered; and, reference to the Rules and Regulations. I am unable to fault the procedure. It is not the true province of the court to manage the conduct of examinations, academic discipline and procedures at the universities. The legislature has conferred those powers on the council, senate and their organs in the universities. It is not lost on me either that universities are meant to be centres of academic excellence. Cheating in examinations is the antithesis of merit ranking. Like I stated there are no hard and fast rules on the disciplinary *procedures* to be adapted by various bodies. What is critical is that the administrative tribunals must achieve a *reasonable* degree of *fairness* throughout their investigations, proceedings and final decision. The onus to *prove* the violation of rights rests squarely with the *ex parte* applicant.
 28. In this case, I am satisfied that the *ex parte* applicant made oral submissions. They are at page 87 of the document marked *JOM4*. The oral submissions of the invigilator are also on the record as well as observations by the committee. The offence was copying from unauthorized material; and destroying it by mixing it with chewing gum in his mouth. The committee recommended cancellation of results and his expulsion. I have then seen the minutes of the 173rd regular meeting of the Senate held on 2nd April 2008 (annexture *JOM5*). The Senate adopted the recommendations the *ad hoc* committee.
 29. True, by that time the student had progressed to fourth year. It was unfair for the university to

- continue to get fees from him. But the converse was also true. It would have been prejudicial to stop the *ex parte* applicant from classes before conclusion of the disciplinary proceedings. The point is that he remained a student. He had not graduated or obtained a degree certificate. The university retained the power and authority to investigate the offences at any step or stage of study. The doctrine of *effluxion of time* is inapplicable in this case. The promises by the dean that the *ex parte* applicant would graduate could not override the Senate's decision.
30. The *ex-parte* applicant and some other thirty eight students were notified of the charges. The *ex parte* applicant defended himself. He made oral representations. His written statement that I referred to earlier was before the committee. His earlier appeal for review had been considered favourably. That is why he was invited to defend himself on 21st November 2007. The committee was dealing with cases affecting *thirty eight* students. From the detailed proceedings, I cannot say the session was hurried. I cannot also say the *ex parte* applicant was *discriminated*. There is equally *no* evidence of *bias*. Even assuming the *ex parte* applicant never admitted the offence, the evidence from the five academic officers who were present in the examination room was *overwhelming*. Under Regulation 7, having unauthorized materials in the examination room would lead to cancellation of results and expulsion. I am thus unable to hold that the *ex parte* applicant was not afforded a fair hearing or that the administrative tribunal was high handed or cavalier. The final decision communicated in the letter of 3rd April 2008 contains reasons. The decision was delivered to the *ex-parte* applicant.
31. From my analysis up to this point, I find that the *ex-parte* applicant was notified of the charges; that he was granted adequate notice to respond; that he responded in writing; and, that he was heard orally. I also find that the investigating bodies and the *ad hoc* committee were properly constituted under the Moi University Act. The reasoned decision of the Senate was communicated to the *ex-parte* applicant. I accordingly find that there was *no* failure of *natural justice* or breach of Constitutional rights to a fair administrative action.
32. The upshot is that the prayers for *certiorari* and *mandamus* are unmerited. I am unable to hold that the impugned decision was tainted with *illegality, irrationality or procedural impropriety*. The *ex parte* applicant's amended notice of motion dated 21st October 2009 is dismissed. In the interests of justice; and, considering the plight of the *ex parte* applicant, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of June 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open Court in the presence of:-

Mr. Kenei for Mr. Njuguna for the *ex-parte* applicant instructed by J. N. Njuguna & Company Advocates.

Ms. Odwa for the respondent instructed by *KTK* Advocates.

Mr. J. Kemboi, Court Clerk.