



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.590 OF 2012

BETWEEN

MANDEE PCHAUHAN.....PETITIONER

AND

THE KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT

THE UNIVERSITY OF NAIROBI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, **Mandeep Chauhan**, completed her Bachelor of Medicine degree (Mb.Chb) in 2007 and was subsequently registered with the Kenya Medical Practitioners and Dentists Board as is statutorily required. She was at the time of filing this Petition registered as a post-graduate student specializing in Ear, Nose and Throat (ENT) surgery at the University of Nairobi. The course is partly undertaken at the ENT clinic of the Kenyatta National Hospital under the supervision of academic supervisors from the University of Nairobi and the Kenyatta National Hospital, pursuant to a Memorandum of Understanding signed on 9th June 2000 between the Ministry of Health, the University of Nairobi (UON) and the Kenyatta National Hospital (KNH).
2. In her Petition dated 21st December 2012, she alleged that her rights to a fair hearing and fair administrative action and consequently her right to education have been denied. She now seeks the following orders in that regard;

“(a) This Honourable Court be pleased to issue a declaration under Article 165(3) (b) and Article 23(3) (a) that the rights of the Petitioner to a fair hearing and fair administrative action and consequently right to education as contained in the Bill of Rights were denied, violated and infringed by the 1st and 2nd Respondents.

(b) Consequent to the grant of prayer (a) above the Honourable Court do issue an order of certiorari to quash the proceedings of the 23rd of November 2012 and decision of the 24th February 2012, of the ENT Department Disciplinary Committee of the 1st Respondent Kenyatta National Hospital and University of Nairobi.

(c) **Further, consequent to the grant of prayer (a) above the Honourable court do issue an order of mandamus to compel Kenyatta National Hospital and the University of Nairobi to readmit the Applicant into the post graduate course and training undertaken by the Kenyatta National Hospital and the University of Nairobi.**

(d) **Such other and or further orders and or directions as this Honourable Court may deem just and equitable to grant.**

(e) **The costs of and occasioned by this petition be provided for”.**

Factual Background

3. The facts forming the basis of this Petition are straight forward and are as follows;
4. On 7th February 2012, the Petitioner was accused of stealing a laptop from one of her fellow students, Dr. Ochungo. Later, the complaint was withdrawn by Dr. Ochungo but the Petitioner was still suspended pending a disciplinary hearing. On 16th February 2012, she was summoned to appear before the ENT Departmental Disciplinary Committee for disciplinary hearing which was adjourned to the 23rd February 2012. Thereafter, she was handed a letter dated 24th February 2012, written by Dr. Masinde Peter, the Head of ENT Department, expelling her from the said Department. She subsequently wrote a letter of appeal dated 12th March 2012, to the Chief Executive Officer (CEO) Kenyatta National Hospital, which appeal was dismissed.
5. It is the above proceedings and actions which triggered the present Petition.

Case for the Petitioner

6. She claimed that her rights to a fair trial as stipulated under **Article 50** of the Constitution were contravened and the hearing as conducted fell short of the principles of natural justice. She alleged that she was not made aware of the full facts and evidence in respect of the case facing her; was not advised of the consequences of the hearing and was not given an opportunity to appeal from the Disciplinary Committee's findings. That she had a legitimate expectation that she would be accorded a fair hearing to enable her proceed with her studies.
7. She further contended that the University of Nairobi is a separate and autonomous body from the Kenyatta National Hospital and the actions of Kenyatta National Hospital's ENT Departmental Disciplinary Committee in expelling her was tantamount to usurping the powers of the Senate of the University of Nairobi which is vested with the power of carrying out and undertaking disciplinary processes against its own students, like the Petitioner. She thus claimed that the ENT Department acted *ultra vires* its powers and functions.
8. She further submitted that the ENT Disciplinary Committee was biased against her right from the outset and its proceedings were biased as it did not act fairly and that its subsequent decision to expel her contravened the rules of natural justice. She contended that the ENT Disciplinary Committee used irrelevant matters in arriving at its finding and completely ignored relevant matters thus occasioning a miscarriage of justice. She further claimed that it failed to conduct a fair and proper inquiry and failed to undertake due diligence and therefore the disciplinary process contravened her rights under **Article 47** of the **Constitution**. She relied on the case of **Geothermal Company Limited v the Attorney General & Others (2013) e KLR** where Majanja J held that the right of every person to a fair administrative action enunciates various values and principles of public service including fairness.
9. It was her further submission that the ENT Disciplinary Committee as constituted was not impartial as some members sitting on it had prior involvement in the matter and had a personal connection and relationship with the complainant.

10. Further, that it failed to observe the provisions of the Memorandum of Understanding between the University of Nairobi and Kenyatta University and in particular Part D, clauses 6 and 7 with regard to the mechanism of amicable dispute resolution.
11. She thus claimed that she is in actual danger of losing her entire career and nine years of studying medicine as well as related work experience on the basis of a faulty disciplinary hearing and process. Further, that the University of Nairobi has failed to issue her with a letter confirming that she is a student at the University and has covered three and a half years of post-graduate study and without that letter she is unable to complete her studies anywhere in the world.

For the above reasons, she seeks the orders set out elsewhere above.

The 1st Respondent case

12. The 1st Respondent, the **Kenyatta National Hospital (KNH)** in response to the Petition filed a replying affidavit by Wilkister Morara, Acting Corporate Secretary, sworn on 21st March 2013. It also filed written submissions and Dr. Peter Masinde, its Head of ENT Department of the 1st Respondent gave oral evidence in support of the 1st Respondent's case.
13. According to the 1st Respondent, the Disciplinary Committee is not an isolated Kenyatta National Hospital organ but was created out of a tripartite Memorandum of Understanding between the 1st and 2nd Respondents as well as the Ministry of Health. Dr. Masinde in his testimony, explained that the Disciplinary Committee comprised of the Head of the ENT Department at KNH, the Chairman of ENT Department at University of Nairobi (U.o.N), the Chairman of the Department of Surgery at UoN, the Thematic Head of ENT at UoN, the Deputy Head of ENT at KNH, the Matron in charge of ENT Department at KNH, the Chief ENT Resident at UoN in charge of post-graduate students, the officer-in-charge of clinical officers at KNH, the officer-in-charge of Audiology at KNH, the officer-in-charge of ENT Theater at KNH and the Human Resource Administrative officer at KNH who is the Secretary of the Committee.
14. It was the 1st Respondent's submission in that regard that the process of disciplinary action against the Petitioner was undertaken by a competent Disciplinary Committee which was properly constituted for that purpose and that the Petitioner was well represented at the Disciplinary Committee by members of the 2nd Respondent. It therefore claimed that there was no bias against the Petitioner.
15. It further submitted that the Petitioner was subjected to a disciplinary process which conformed to the rules of natural justice, including affording her the opportunity to defend herself, both before and during the hearing of her disciplinary case. That her defence was found to be unsatisfactory, hence the decision of the disciplinary committee. It further argued that the Petitioner was invited to appear before the Disciplinary Committee *vide* its letter of 17th February 2012 and she wrote a defence contained in her letter of 16th February 2012 and later submitted herself to the disciplinary process without objecting or raising any issues as to the Disciplinary Committee's mandate. That the decision to suspend her was taken unanimously after the consideration of her statement in her defence, both oral and written.
16. It was also the submission of KNH that, all that was required of it in the administrative action process was to accord the Petitioner an opportunity to be heard and defend herself. That it was not required to pursue an elaborate procedure and process akin to that obtaining in criminal or other judicial processes in reaching its decision.
17. KHN further submitted that the Petitioner had never been expelled from UoN but was merely requested to vacate the 1st Respondent's premises based on her conduct which was unbecoming. That the Disciplinary Committee had found the Petitioner to have been dishonest since she had persisted in denying that she was in possession of the stolen laptop even after the withdrawal statement by Dr. Ochungo at the KNH Police Station only after she had requested Dr. Ochungo

for forgiveness for the theft. It further alleged that during the disciplinary proceedings, it emerged that the Petitioner was a habitual thief as she had been caught on closed-circuit television camera (CCTV) at KNH committing similar offences before and that she bears previous allegations of theft at the Nairobi Hospital including theft of fibro optics, mobile phones and theater forceps.

18. Dr. Masinde in his oral testimony further claimed that the Petitioner could be suffering from kleptomania, a treatable condition and that the Petitioner needs to seek appropriate medical attention so as to deal with that condition. He also testified that once the Petitioner goes through proper medication and is certified to have fully recovered, the 1st Respondent would have no problem in participating in a review of its decision and re-admit the Petitioner so as to enable her re-use its facilities. That otherwise her return would be both unprocedural and would also amount to exposing the goods of the 1st Respondent and also of her classmates and other staff members as well as patients, to enormous risk including the risk of losing vital human organs. In the alternative, that she could pursue her studies in other institutions with facilities similar to KNH such as Aga Khan Hospital, Kijabe Mission Hospital, or Nairobi Hospital and thus urged me to dismiss the Petition with costs to the 1st Respondent.

2nd Respondent's case

19. The 2nd Respondent, The University of Nairobi (UoN), in response to the Petition, filed a replying affidavit sworn by Prof Charles O. A. Omwandho, The Dean, School of Medicine.

20. He stated that the University management did not adopt the recommendations of the department of surgery, departmental disciplinary panel and the Petitioner has never been suspended and/or discontinued from the university. He however, claimed that the Petitioner was required to behave herself at all times and that the University cannot interfere with the disciplinary process initiated by KNH nor prevail upon it to allow the Petitioner to undertake her attachment within its precincts, as that it is beyond the mandate of the University under the Memorandum of Understanding.

21. He also stated that the University was aware that the Petitioner, through the reports of the KNH security office dated 21 February 2012 and by the UoN, College of Health Sciences security offices dated 14th March 2012; had been exonerated of the alleged offence of theft of a laptop.

3rd Respondent's case

22. The 3rd Respondent, the **Attorney General**, did not file any response to the Petition neither did he call any oral evidence nor file written submissions. However, Miss Mungai acting for the Attorney General in her oral submissions claimed that the Petitioner has no other facilities where she can pursue her studies, and for her to complete her post-graduate course, she must finish her attachment at KNH. That it was the first Respondent that denied her attachment and the UoN cannot interfere with the decision of the ENT Head of Department at KNH.

Determination

23. Having read and reflected on the submissions made by the parties, it is clear that the facts of this Petition are not contested. It cannot also be contested that the 1st Respondent has the mandate to discipline students attached to it. It is therefore my view that the only general issue for determination is whether the 1st Respondent invoked its mandate properly and acted procedurally and fairly while observing the rules of natural justice.

Right to fair administrative action

24. The starting point would be the old and revered rule of natural justice, *audi alteram partem*, that

every person must be heard before a decision can be taken against them. In the decision of Chigamoy Owiny Dollo in *The Management of Committee of Makondo Primary School and Anotr v Uganda National Examination Board, HC Civil Misc Applic No.18 of 2010*, the learned judge stated as follows regarding rules of natural justice;

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”

25. I agree with the learned Judge's exposition of the law and what is clear from the Affidavits before me is that before the Petitioner was expelled from the 1st Respondents' premises, she was accorded a hearing. This is so because she was given a notice dated 10th February 2012 suspending her from the ENT Department pending the disciplinary proceedings. She was subsequently invited to appear before the disciplinary committee on 23rd February 2012. She also wrote a defence statement dated 16th February 2012. On 24th February 2012, Dr. Masinde Head of ENT Department wrote an expulsion letter of the Petitioner from the ENT Department at KNH and she appealed against the decision to expel her *vide* a letter dated 12th March 2013. The KNH Department of Surgery convened a Departmental Disciplinary panel on 22nd March 2012 to review the Petitioner's case and it unanimously agreed that the Petitioner be discontinued from her attachment at KNH.

26. However, having noted as above and whereas I am in agreement that the Petitioner was given a hearing, I am not convinced that the hearing process was fair and free of bias. **Article 47** of the Constitution enshrines the principle that every person's right to fair administrative action must be protected, while **Article 232** enunciates various values and principles of public service including; responsive, prompt, effective, impartial and equitable provisions of services. In the case of *Dry Associates Ltd v Capital Markets Authority and Another Peition No. 328 of 2011*, Majanja J stated as follows;

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law...but is to be measured against the standards established by the constitution.”

Further, in the case of *Republic v Kenya Revenue Authority ex parte Lab International Kenya Ltd, Mombasa High Court Misc. Applic No. 82 of 2010*, the Court observed as follows;

“The common law in its evolution has defined the rules of conduct for a public authority taking a public decision, entrusting the overall jurisdiction in the hands of the courts of law, but for Kenya a general competence of the court is now no longer confined to the terms of Statute law and subsidiary legislation, but has a fresh underwriting in the constitution, Article 47 which imposes fair administrative action and Article 10(2)(c) demands 'good governance, integrity, transparency and accountability”.

27. In addition to the cited constitutional provisions above, the duty of a public officer to act in good faith was also well captured by Lord Jenkins in *University of Ceylon v Fernando (1960) ALL ER 631* when he stated thus;

“in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, in as much as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The board had no power to administer

an oath, and need not examine witnesses. It could, he though, obtain information in any way it thought best always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view.

I agree and I adopt the same words as if they were mine.

28. To my mind however the issue is not difficult at all because I am in agreement with the Petitioner that the disciplinary process she was subjected to was not fair and appears to have been biased *ab initio*. I say so because, even though the loss of Dr. Ochungo's laptop was dealt with initially by security officers and the issue concluded amicably leading to the withdrawal of the complaint, Dr. Masinde went ahead and issued a letter to the Petitioner three days later informing her that she had been suspended from the ENT Department of the 1st Respondent. The questions that beg answers are these; Where is the complaint that he was acting upon? Whose complaint was it? In any event on what evidence did he suspend the Petitioner when there was no pending complaint before him?
29. Further an in-depth look at the disciplinary process and the documents before me would show that the whole process was unfair for example, why did one Balera O. write a report on the loss of a laptop a day before Dr. Masinde issued his letter informing Dr. Mandeep that she was to appear before the disciplinary committee? And why was such a report written nine days after the incident and after suspension of the Petitioner? Similarly, why did Peter Mbugua write a similar report six days after the suspension letter issued by Dr. Masinde? In what capacities were these two people writing those reports? Could it be that the disciplinary committee was in a fishing expedition for the evidence to justify the initial suspension and later, the expulsion? All these issues are pertinent and the 1st Respondent gave no credible answers to them.
30. While I have nothing but respect for Dr. Masinde, I am constrained to ask the following questions;
- (a) *Why did Dr. Masinde and the Disciplinary Committee he chaired refuse to accept Dr. Mandeep's story and chose instead to believe other witness? While the documents and evidence on record demonstrate that in the reports by Mr. Matanda and Major Muia, the Security officers who initially dealt with the issue, reveal that the Petitioner did not actually steal the laptop and that although she had custody of, it a misunderstanding with Dr. Ochungo led to complaints of theft, why were they not believed?*
- (b) *Further why did Dr. Masinde claim in his testimony that those security officers' statements were tailored and skewed in favour of the Petitioner? Why? Did Dr. Masinde know something that this Court should have known and was not told?*

I do not see the reason why the security officers would have favoured the Petitioner in any way when in fact the original complaint had been withdrawn by Dr. Ochungo and in any event, the testimony of the Petitioner right from her first encounter with the security officers to her oral evidence before the disciplinary committee and testimony before the Court, has been coherent, consistent and is as it is contained in the Security officers' initial report which was the first statement recorded from her. The obvious question is; why did the Disciplinary Committee resort to substitution of the report of the security team mandated with the responsibility of ensuring security at KNH? Why did it even rubbish the report as fabricated? The answer to that question would be that the Disciplinary Committee together with its Chair, Dr. Masinde were clearly biased as against the Petitioner *ab initio* and treated her unfairly thereafter.

31. Further, Dr. Masinde testified and stated that he believed that the Petitioner was suffering from Kleptomania, and that could have been the reason why she allegedly acted as she did. He admitted that she has never been assessed and diagnosed with that disease and in the absence of any evidence to show that fact and in the absence of documents or assessment of the Petitioner's health, I am unable to believe Dr. Masinde. His further argument that the Petitioner must first be treated before being admitted back to the 1st Respondent's premises flies right out of the window for that reason and has no basis and that is all there is to say in that regard.

32. Turning to the allegation that the Petitioner's conduct was unbecoming and that she has tendencies of stealing, again there is no iota of evidence before me suggesting such tendencies. This Court, unlike the disciplinary committee of the 1st Respondent, cannot rely on hearsay and unsubstantiated allegations.
33. In any event, if the Petitioner's mannerism and conduct is that unbecoming and hopeless to the point that she cannot be entrusted with patients' vital organs, why has the 1st Respondent failed to lodge a complaint with the body responsible for the regulation and discipline of doctors of which she is a member; the Kenya Medical Practitioners and Dentists Board?
34. It is against the above background that I find the Petitioner's expulsion from KNH on unfounded claims of theft of a laptop too harsh and inhuman considering that she only had six months to complete her attachment at KNH. It is also irresponsible, in my view for Dr. Masinde to claim that she can complete her studies elsewhere. Clearly, she has invested heavily both in terms of resources and time in studying and this Court takes judicial notice of the nine years she has invested in her studies. She has also had a cordial relationship with her supervisor, Dr. Macharia and the period left for her to finalise her post-graduate studies was far too short to warrant expulsion, even if she had committed a serious offence, let alone the alleged theft of a laptop that was in any event never properly proved.
35. I note also that her allegation that her research work, log book and contact hours were at par was never disputed by the 1st Respondent and that explains the reason why the 2nd Respondent, the UoN has not expelled or suspended her from the University.

Right to Fair hearing

36. I agree with the 1st Respondent that the decision taken against the Petitioner was administrative as opposed to criminal action and in any administrative action, all that is required is for the Petitioner to defend herself before an impartial tribunal, and not subject her to a trial process. That is the essence of **Article 50(1)** of the **Constitution** but that right is not absolute and is derogable under **Article 25** of the **Constitution**. As can be seen elsewhere above, the Disciplinary Committee sitting in the Petitioner's case was not impartial, and to that extent only violated her right to a fair hearing before an impartial body. However, the right to fair trial while non-derogable under **Article 50(2)** of the **Constitution** protects the rights of an accused person who is charged in a Court of law and that is not the case here. I have already ruled on bias and impartiality and that is all that matters at the end.

Relief

37. The last matter that requires my attention is whether the Petitioner is entitled to the reliefs sought. The Petitioner sought three substantive orders; a declaration that her rights to fair administrative action and right to fair trial were violated. She also sought judicial review orders of certiorari and mandamus. And lastly, an order for costs.
38. Regarding the order of certiorari, I am being asked to quash the proceedings of the ENT Departmental Disciplinary Committee of the 1st Respondent and its decision of 24th February 2012. I am alive to the fact that judicial review concerns itself with the process as opposed to the merits of a decision. In this case I am satisfied that the ENT Departmental Disciplinary Committee was procedurally biased as against the Petitioner and where such a process offends the Bill of Rights then certiorari can properly issue under **Article 23(3)** of the **Constitution**. It therefore follows that once I have found that was reached in violation of **Article 47** of the **Constitution**, then an order to quash it must issue.
39. Mandamus as I understand it, is issued in instances where it is necessary to compel an administrative body to perform certain functions which it has neglected or refused to perform. In **Mabeya Esther Kerubo & Anor v The Kenya National Examination Council & 2 Others**,

Petition No. 7 of 2013, this Court stated as follows;

“Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right andthe order must command no more than the party against whom the application is made legally bound to perform. ...where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom an obligation is laid, mandamus cannot command the duty in question to be carried out in a specific way as stated by one judge in an erudite expression of the law”

40. An order of mandamus as I know it therefore can only compel a public body to perform its functions which it has failed to do. In the instant case, it has not been shown what the Respondents ought to have done but have failed to do so as to warrant this Court's intervention. It is thus safe to leave the matter as it is. In any event, once the unsafe decision is quashed parties are returned to their respective positions before the impugned decision.

41. Regarding costs, it is clear that I see no wrong doing on the part of the 2nd and 3rd Respondents. Indeed, the 2nd and 3rd Respondents indirectly supported the Petitioner's case. It therefore follows that costs are awarded to the Petitioner and to be paid by the 1st Respondent.

Conclusion

42. The Petition before me succeeds with the following final orders being issued;

(a) A declaration do issue that the Petitioner's right to fair administrative action under Article 47 of the Constitution was violated by the 1st Respondent.

(b) An order of certiorari do issue to quash the proceedings of the Kenyatta National Hospital's Ear Nose and Throat Departmental Disciplinary Committee and its decision of 24th February 2012.

(c) The consequence of orders (a) and (b) shall be that the Petitioner shall be allowed the opportunity to complete her attachment at Kenyatta National Hospital and the Chief Executive officer of the Hospital shall ensure compliance thereof.

(d) Costs for the Petition be borne by the 1st Respondent.

43. Orders accordingly.

DATED, DELIVERED AND SINGED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Mr. Makori for Petitioner

Mrs. Mungai for 2nd Respondent

Mr. Ashitira for 1st Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE