



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW APPLICATION NO. 155 OF 2013**

**IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA, THE CIVIL PROCEDURE ACT CHAPTER 21 OF THE LAWS OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

**IN THE MATTER OF: KENYATTA UNIVERSITY ACT 1985 AND THE STUDENTS DISCIPLINARY COMMITTEE AND REGISTRAR ACADEMIC**

**AND**

**IN THE MATTER OF: AN APPLICATION BY ZACHARIA WANGUZA & KWAME OCHOLA OTINDA FOR LEAVE TO APPLY FOR JUDICIAL REIVEW ORDERS OF CERTIORARI, AGAINST THE DECISION OF THE KENYATTA UNIVERSITY STUDENT DISCIPLINARY COMITTEE AND REGISTRAR OF ACADEMIC SUSPENDING THE APPLICANT**

**BETWEEN**

**ZACHARIAH WAGUNZA.....1<sup>ST</sup> APPLICANT**

**KWAME OCHOLA OTINDA.....2<sup>ND</sup> APPLICANT**

**-VS-**

**OFFICE OF THE REGISTRAR ACADEMIC**

**KENYATTA UNIVERSITY .....1<sup>ST</sup> RESPONDENT**

**STUDENT DISCIPLINARY COMMITTEE**

**KENYATTA UNIVERSITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**DR. PAUL THOMAS OBADE .....INTERESTED PARTY**

**EX-PARTE APPLICANTS:**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 13<sup>th</sup> May 2013, the applicants herein **Zachariah Wangunza and Kwame Ochola Otinda**, seek the following orders:
  1. **THAT the Honourable Court be pleased to issue an order of Certiorari to remove into the high court and quash the decision of the Students Disciplinary Committee of Kenyatta University dated 28<sup>th</sup> February 2013, and Registrar of Academic suspending the Ex-applicants for one year.**
  2. **THAT the costs of this application be provided for.**

**EX PARTE APPLICANT'S CASE**

2. The Motion is supported by Statement filed on 10<sup>th</sup> May 2013 and Verifying Affidavit sworn by **Zachariah Wangunza** on 7<sup>th</sup> May 2013.
3. According to the applicant, he is a Third year Student at Kenyatta University pursuing a degree in Environmental science and sometime in November 2012, he sat for a Remote Sensing Continuous Assessment Test that was being conducted by a lecturer named called **Dr. Paul Thomas Obade**, the interested party herein. He however arrived late for the test and was not aware that an announcement had been made that there would be a lesson after the continuous assessment test. On entering the examination room he complied with the university regulations and left his bag just like all the other students at the front of the class before proceeding to write his Continuous assessment test and after the test he took his items and departed, while the 2<sup>nd</sup> Applicant stayed in the university and did attend the afternoon lessons when he learnt of the lost laptop belonging to the interested party. The 2<sup>nd</sup> Applicant was advised with other students to leave his phones with university security and to record statements and the next day he and other students reported at Kahawa Sukari Police station where they were detained for a better half of the day before being released. The deponent was later contacted by the Kenyatta University security to record a statement concerning the loss of a Fujitsu Siemens laptop belong to the interested party and he returned to the university later in the day and recorded the said statement. He later discovered that other students had also been summoned and those who had come early had been held at the Kahawa Sukari Police station but later released due to lack of evidence.
4. The Students Disciplinary Committee then summoned the deponent, the 2<sup>nd</sup> Applicant and 12 other students on 17<sup>th</sup> January 2013 demanding an explanation on the Fujitsu laptop, which the deponent attended and explained his side of the story at which hearing the interested party sat and conducted investigations. The deponent was later informed that they would get back to him and he resumed his studies. He however later received a phone call on 28<sup>th</sup> February 2013 to go collect his verdict letter which collected on 11<sup>th</sup> March 2013 and was surprised by the decision which required him to pay 27,800/= (Twenty seven Thousand and Eight Hundred Shillings) by 30<sup>th</sup> April 2012 and that “the money should not be paid into the fee account” and further that he was suspended for one academic year to resume studies in January 2014. According to him, the same letter had been addressed to four other students while two others, **Paul Ombogi Ombaso** and **Wanagre M. Kariuki**, were given stern warnings. However, in the course of consultations with his other classmates it transpired that two students, **Ouma Janavier** and **Wangari Kamkia Simon**, were penalized to pay but were not suspended.
5. According to the deponent, the committee that summoned them stated they were to answer charges on theft of a lecturers laptop and if indeed the issue was theft the committee usurped jurisdiction it did not have as theft is a criminal offence under the penal code and hence it was for

the criminal court to decide the guilt or otherwise of the accused and not a student's Committee. Whereas the interested party had gone to the police he later abandoned the matter after reporting and proceeded to the student's disciplinary committee which has no powers to investigate any alleged criminal offence. To the deponent, the student's disciplinary committee usurped the jurisdiction of the criminal court and police to investigate and charge the suspects in court with the offence of theft. It is further deposed that that the Students Disciplinary committee did not fairly exercise its administrative duties as provided under the constitution, there was lack of transparency and biased as the interested party sat on the panel that was investigating the theft of his laptop and hence the proceeding were illegal and unfair. Whereas the university rules and regulations provided for offense and section and rules that provide penalties no rule was quoted in the letter suspending the deponent hence it is not clear as to which rule was violated as well as the powers to give penalties.

6. Accordingly, the deponent believes that the decision reached by the Students Disciplinary Council ought to be quashed as it is unreasonable that no reasonable body or person directing itself to the facts and law could reach such a decision and further that the principles of natural, justice fairness and equity were thrown out the window as he did not get a fair hearing and the committee did not even give reasons for its decision and he stands to be locked out of university for one year due to a manifestly flawed administrative decision.
7. In his further affidavit the deponent averred that on the material day when he appeared before the Disciplinary Committee they were 13 students who were going into the room one by one and that the interested party sat through the proceedings and participated therein though he was not a witness. According to the deponent, he was the one who appeared last and from the cross-examination it seemed like it was the interested party who was conducting the inquiry. While admitting having visited the interested party and inquired whether he had installed a tracker, the deponent contends that his intention was purely to assist the interested party and that his action was not a manifestation of guilt. In his view by dwelling on his expensive phone which he bought before the laptop got lost the Commistte trivialized the matter and that was a sign of bias. He further averred that the minutes relied upon by the respondents were doctored. To him, the Students Disciplinary Committee did not fairly exercise its administrative duties as it was biased and was smokescreen to give an impression of fairness and provide the interested party with a forum to pursue his issue after failing to follow the right channel, hence the decision reached by the Students Disciplinary Committee ought to be quashed as it is unreasonable based on the facts alone.

### **RESPONDENT'S CASE**

8. In response to the application, the Respondents filed a replying affidavit sworn by **Dr S N Nyaga**, the Academic Registrar of Kenyatta University and the 1<sup>st</sup> Respondent herein on 8<sup>th</sup> July 2013.
9. The deponent, based on legal advice believes that the Application is unmerited and without legal basis as that the application before the court solely focuses on the merits of the 2<sup>nd</sup> Respondent's decision rather than the procedure and legality of the decision and that the process leading to the suspension and imposition of a penalty on the applicants by the 2<sup>nd</sup> Respondent was conducted lawfully and in adherence with all the known principles of Natural Justice.
10. While admitting that together with other students, the applicants attended a Remote Sensing Continuous Assessment Test that was being conducted by the interested party on 14<sup>th</sup> November, 2012 between 1pm to 2pm, he was however informed by the said interested party that the lecture subsequent to the test session had been agreed on between the students and the lecturer prior to the test session and it is therefore contradictory for the Application to assert that the 1<sup>st</sup> Applicant was not aware that there would be class after the test when in fact the 1<sup>st</sup> Applicant had stated to the 2<sup>nd</sup> Respondent as evidenced in the minutes of the disciplinary proceedings annexed hereto that the interested party did announce that there would be a class afterwards. According to the deponent, following the loss of the lecturer's laptop during the test session, all the students who had left the lecture hall by the time the laptop got lost were summoned back to the University for questioning among whom were the 1<sup>st</sup> and 2<sup>nd</sup> Applicants yet the 1<sup>st</sup> Applicant recorded his statement in relation to the case two days after the incident i.e. on 16<sup>th</sup> November 2012 because

according to him he had not been in school. Subsequently, the Applicants were among a number of students who were summoned to appear before the Students Disciplinary Committee to be heard on charges of theft of a lecturer's Laptop, contrary to the University Rules and Regulations governing students' conduct, which both Applicants had signed upon admission to the University.

11. To the deponent, the composition of the Students Disciplinary Committee in no way violated the principles of natural justice and contrary to what the Applicant alleges, the interested party was summoned and appeared as a witness and the minutes of the disciplinary proceedings confirm that he was not a member of the Committee. To him, the proceedings of the Students Disciplinary Committee were conducted lawfully in line with the Kenyatta University statutes and in accordance with the rules of Natural Justice and that different decisions were informed by the varying accounts and explanations given by the students.
12. It is further deposed that contrary to the assertions by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants that the lost laptop was an 'old model' that could not fetch more than Kshs.25,000/- each of the students who the evidence had shown to be culpable was required to pay Kshs.27,800/- because the total value of the laptop inclusive of the software installed therein was Kshs 194,000/-, as particularized in the minutes of the proceedings and it is curious that the Applicant seems well aware of the particulars of the laptop, including that it is an old model. The reason, according to the deponent why the Applicants and other students were instructed not to pay the money into the University fee account is to avoid instances where the surcharged students could use the same receipts to claim credit in respect to fees and that this was a decision made by the Students Disciplinary Committee as captured in the minutes.
13. In the deponent's view, the 2<sup>nd</sup> Respondent is empowered by the University statutes to mete out the punishment meted out in the present case and hence the Applicant has failed to demonstrate any bias or irrationality in the decision of the 2<sup>nd</sup> Respondent.

#### **APPLICANT'S SUBMISSIONS**

14. On behalf of the applicants it was submitted that the Respondents' decision was erroneous and irrational based on the fact that fourteen students could not have stolen one laptop and further it transpired that different punishments/decisions were being given for the unproven allegation. To the applicant, no reasonable body or person directing itself to the facts and law could reach such a decision.
15. In contravention of the rules of natural justice, the interested party herein sat on the Students Disciplinary Committee against the *nemo debet esse iudex in propria causa* principle that no man can be a judge in his own case, hence the impugned proceedings were tainted with bias.
16. It is further submitted that the Committee was not constituted in accordance with section 14 of the ***Kenyatta University Act*** under which there is no provision for the interested party or any lecturer to sit thereon.
17. To the applicants since the issue was theft, a criminal offence, under the ***Penal Code***, the Respondents had no jurisdiction over the same as the same fell within the jurisdiction of a criminal court.
18. It is further submitted that the Committee did not give any reasons as to how it arrived at its decision to penalise and suspended the applicants nor was an explanation given as to the different punishments meted out. It is therefore submitted that the decision went contrary to the provisions of Article 47 of the Constitution as the Committee failed to act fairly and threw out the basic tenets of natural justice. In support of the submissions the applicants relied on **Republic vs. Kajiado Land Disputes Tribunal Nairoib HCCC No. 689 of 2001**, **Republic vs. Chairman Matungu Land Disputes Tribunal Bungoma HCC No. 107 of 2010** and **Republic vs. Minister for Lands and Othders Nakuru HCMC No. 181 of 2008**.

#### **RESPONDENTS AND INTERESTED PARTY'S SUBMISSIONS**

19. On behalf of the respondents and interested parties it was submitted that the proceedings herein though cloaked as a judicial review application, are largely an appeal on the findings of guilt of the applicants on the offence of theft of a laptop as well as the penalties imposed on them and have

very little to do with the process since it is acknowledged that the applicants gave their side of the story to the Students Disciplinary Committee. In support of this submission the respondents and interested party relied on **R vs. Panel on Take-overs and mergers ex parte Datafin Plc and Another [1987] 1 All ER 546 at 580** and **Uwe Meixner & Another vs. Attorney General Civil Appeal No. 131 of 2005.**

20. With respect to the issue alleged participation of the interested party in the proceedings, it is submitted that the said allegation goes contrary to the documents on record.
21. It is further submitted that the Disciplinary Committee was empowered, under clause 4(b) titled 'General Offences' to deal with all general offences committed by students in their day to day activities within the University other than major offences hence it is untenable to exclude the offence of theft of a lecturer's laptop from the ambit of the general offences. It is further submitted that the proceedings were not criminal but were disciplinary ones supported by the punishment which the Committee could mete out.
22. On the allegation of bias and irrationality, it was submitted the meaning attached to bias by the applicants would involve the merits of the Committee's decision while on irrationality it was submitted that in order for the Court to be satisfied that the imposition of different penalties was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it recourse ought to be made to the case of **R vs. Panel on Take-overs and mergers ex parte Datafin Plc and Another** (supra). According to the submissions the Committee in meting out the punishments took into account varying levels of culpability.

### **DETERMINATIONS**

23. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

24. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.*
25. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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.”

26. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

27. Similarly in David Mugo vs. The Republic Civil Appeal No. 265 of 1997 the Court of Appeal held that so long as orders by way of judicial review remain the only legally practical remedies for the control of administrative decisions, and, in view, of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue extending so as to meet the changing conditions and demands affecting administrative decisions.

28. This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century.

29. That the Respondent has powers and jurisdiction to discipline students is not in dispute. Their power to mete out the punishments they meted to the *ex parte* applicants cannot therefore be contested. The question to be determined is whether in arriving at its decision the due process of the law was adhered to. Article 47(1) and (2) of the Constitution provide:

***(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.***

30. It is therefore clear that, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be a ground for quashing a decision if there was material on record which would have warranted a finding to the contrary.

31. The applicants contend that the interested party who was in effect the complainant sat in the course of the proceedings and in effect took the role of the prosecutor. In **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194 Platt, JA** held that:

**“Wherever any person or body of persons has authority conferred by legislation to make decisions affecting the rights of the subjects, it is amenable to the remedy of an order to quash its decisions either for an error of law in reaching it, or for failure to act fairly towards the person who will be adversely affected if the decision of failing to observe either one or other to the two fundamental rights accorded him of the rules of natural justice or fairness, viz: to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made.”**

32. In **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400**, it was held that in considering the merits of the test to be applied in a case where there is allegation of bias, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality.

33. Similarly, in **Republic vs. Attorney General & Another Ex parte Waswa & 2 Others [2005] 1 KLR 280**, the Court held that bias and unreasonableness have been recognised as grounds which stand alone in assisting the Courts to deal with the challenged decisions. The de-registration of the applicants in that case and the registration of main rivals within two days was held to be indicative of both bias and unreasonableness on the part of the decision maker and that the failure to give reasons for what was patently lack of even-handedness on the part of the decision maker did constitute procedural impropriety. In addition where there is certainly evidence of bad faith on the part of the decision maker the Court would not in cases where bad faith is proven to exist in influencing a decision, hesitate to take up this as a valid ground of argument.

34. The same issue was dealt with by the Court of Appeal **Peter Okech Kadamas vs. Municipal Council of Kisumu** (supra) in which Nyarangi, JA expressed himself as follows:

**“The rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgement to decide in that particular case, either his own case, or in any other case where he brings forward the accusation or complaint on which the order is**

made.”

35. This position in my view is reinforced by the provisions of Article 50(1) of the Constitution which 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. A hearing cannot be said to be fair where a complainant also sits as a judge in the same proceedings.
36. In order to determine the role which the interested party played in the said proceedings, it is necessary for one to peruse the proceedings. Unfortunately the only minutes which are on record are those exhibited by the Respondents. Whereas the applicants dispute the authenticity of the same they did not exhibit their own version of the proceedings before the Disciplinary Committee. Accordingly there is no basis upon which this Court can find that there were other proceedings apart from those exhibited by the Respondents. From the proceedings on record, there is nothing to support the applicants' allegation that the interested party played the role alleged by the applicants and hence there is no basis upon which this Court can find that the interested party played the role of complainant, prosecutor and judge at the same time.
37. The next ground relied upon by the applicants is that the Students Disciplinary Committee entertained a criminal case when it had no jurisdiction to do so. That theft is a criminal offence cannot be doubted. However theft may also constitute the tort of trespass to property or conversion. It is therefore my view and I hold that theft or conversion may well fall under “general offences”. To hold otherwise would in my view take away with one hand the powers given to the Disciplinary Committee to discipline errant students by the other hand. Accordingly, the mere fact that the allegations made against the applicants could well have been tried in a criminal court did not deprive the Respondents of the jurisdiction to investigate the same since the alleged offence occurred within the precincts of the University and was allegedly committed by students against a lecturer.
38. The applicants however contend that the decision made by the Respondents was irrational and this is based on two grounds. The first ground is that the laptop could not have been stolen by five students and secondly the punishment meted for the same students varied from one student to another.
39. The question to be determined by this Court is whether there is such gross unreasonableness in the impugned decision that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision and hence whether the said decision can be said to be in defiance of logic and acceptable moral standards. Ordinarily there is nothing inherently wrong with charging several people with one offence and even meting out different sentences since in the commission of an offence there are principal offenders and accessories either after the fact or before the fact. However, it is my view that such a reason must pass the test of *Wednesbury* reasonableness. In other words there ought to be a rational explanation if the decision is not to be termed as bizarre. Whereas the Respondents have contended that the punishments were meted in accordance with the roles played in the offence by the culprits, in the proceedings it is clear that the Disciplinary Committee arrived at the finding that 7 students were “key suspects”. However without giving an explanation as to why different punishments were meted against different “key suspects”, the Committee went ahead to mete out punishments which can only be termed arbitrary.
40. It is my view that such arbitrary punishments cannot pass the test of proportionality which is now recognized as one of the key considerations in judicial review proceedings. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003**, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield Vs. Minister of Agriculture and Fisheries [1968] HL.**

41. In Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090, the Court expressed itself as follows:

**“The Minister for agriculture has the duty to ensure that all arable land is properly utilised for the public benefit in the production of foodstuffs to feed the population and earn foreign exchange required for the development of the country. Section 187 of the Agriculture Act is designed to empower the Minister to take steps for preventing or delaying the deterioration of a holding due to mismanagement. Such steps are in the words of section 75 of the Constitution “in the interests of the development or utilisation of any property in such manner as to promote the public benefit. The necessity of such provision is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property.....The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law..... The management order is based on mismanagement and correctly follows the wording of section 187(1) of the Agriculture Act. In order of sale, however, the reason given is inability to develop the holding. It is an extraneous consideration, which ought not to have influenced the Minister, and it amounts to a misdirection in law. The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts..... The provisions of section 187 of the Act, being aimed at depriving the owner of his holding (even for good reason), should be construed strictly. Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void..... The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority..... An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law... It is clear that both sections 187(1) and (4) require the Minister to be “satisfied”. It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him. The farms had to be managed and supervised; that had to be done so inadequately that the result was necessity to prevent or delay deterioration. The Minister did not give evidence but he swore an affidavit. From it the minister was concerned with development and referred to his national concern relating to sugar production. In his order for sale he said that the owners were not able to develop the farm. The true test is whether the farm should be leased or sold to save it from deteriorating; the purpose of showing the cause is to allow the Minister to decide whether, in view of the deterioration, the farm had better be leased or sold. In either case, the owners are not going to be considered able to develop the farm or to continue as they have been. They are indeed, no longer in occupation. It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void.”**

42. In Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006, the Court held:

**“The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute..... Secondly, the Disciplinary Committee**

**has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called “conduct short of expected standards of professionalism”, and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully.....Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed under Section 28(1) of the Accountants Act. The Committee’s findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a ‘determination’ within the meaning of empowering legislation was accordingly a nullity..... Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law..... It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”**

43. Therefore in meting out punishment the Respondent was expected to exercise its discretion reasonably and not arbitrarily and capriciously or in bad faith. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, those in authority should give reasons and if they give none the court may infer that they had no good reasons. Similarly where the reason given is not one of the reasons upon which they are legally entitled to act, the Court is entitled to intervene since their action would then be based an irrelevant matter. In this case the Respondents gave no reason at all for imposing different sentences on the applicants from those imposed on fellow “key suspects” and in default of such reasons this Court is properly entitled to infer that there were no good reasons for imposing such sentences on the applicants or that the sentences were based on irrelevant matters.
44. To hold that the Respondents were the sole judge when it comes to the exercise of discretion with respect to the punishment to be meted would be to throw the rule of law out of the window and when whittle away the Constitutional safeguards provided under Article 47 of the Constitution. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion.
45. In the result whereas to fault the finding that the applicants participated in the alleged offence would require this Court to inquire into the merits of the decision and hence sit as an appellate Court over the decision of the Students Disciplinary Committee, it is my view and I so find that the arbitrary imposition of a more severe sentence on the applicants than the one imposed on fellow students was irrational and failed to meet the test of reasonableness.

### **ORDER**

46. In the result the order that commends itself to me is that the Respondents’ decision suspending the applicants for one year is hereby brought into this Court and is hereby quashed.
47. The applicants will have the costs of this application to be borne by the Respondents.

**Dated at Nairobi this day 18<sup>th</sup> of December 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Wanga for Mr Wandati for the Respondent***

***Mr Nyakundi for Mr Ogal for the applicant***