REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 276 of 2011

ALICE NJERI NGICHIRI…….…….....PETITIONER

VERSUS

KENYATTA UNIVERSITY…….……..RESP0NDENT

JUDGMENT

Introduction

1. This judgment relates to **Petition No. 261 of 2011 Alice Njeri Ngichiri-v- Kenyatta University** and **Petition No. 276 of 2011- Edgar Nyabengi Otiema-v- Kenyatta University.** Both petitioners had filed their respective Petitions and Chamber Summons Applications seeking interim orders directed at the respondent to compel it to place them on the graduation list of the respondent scheduled to take place on 9th December 2011 or, in the alternative, to stop the graduation altogether.

2. I heard the application for interim orders in Petition No. 261 and delivered a ruling on the 6th of December 2011. Following the ruling in that matter, the parties agreed that as the prayers sought in the petitions are similar, the orders made in Petition No. 261 of 2011 would apply to Petition No. 276 of 2011 and that the petitions would proceed to hearing together after the disciplinary proceedings against both petitioners. In this judgment, I shall, for the sake of convenience, refer to the petitioners as Alice and Edgar.

The Facts

3. The facts that give rise to both these petitions are not in dispute and do not differ in material respects. Both the petitioners were students pursuing courses of study at the respondent, a public university established under the provisions of the Kenyatta University Act. Both petitioners were removed from the respondent's graduation lists for similar reasons and in similar circumstances which I shall set out below. Both allege violation of several of their rights under the Constitution of Kenya 2010.

4. Alice was a student in the respondent's School of Pure and Applied Sciences. She finished her degree course in April 2011 and allegedly passed all her units and was classified for graduation in the degree of Bachelor of Science, Upper Division, in the provisional graduation list for 9th December, 2011 as candidate no. 31. In anticipation of the graduation, she states that she had prepared and informed friends and relatives and even paid a sum of Kshs.20,000.00 for a graduation venue at Travellers Inn in Thika.

5. She avers that on 18th November, 2011, when she went to the Finance Department to clear,

she was informed that her name was removed from the list of graduands on 15th November, 2011 when the list was being revised after it was discovered that her marks had been tampered with. She was not informed by whom the results had been tampered with.

6. After the review of the marks and the disciplinary process that was undertaken in December 2011, it was determined that Alice would re-sit some of the units that it was found she had failed. Her Counsel, Mr. Gacheru, informed the court that the respondent required that she re-sit the exams in September 2012 while there were exams being offered in January and May 2012. At any rate, following the disciplinary proceedings against her, Alice was permitted to re-sit some of her units and to graduate upon qualification.

7. It was her case that her rights under Article 47 and 50 of the Constitution had been violated by the respondent as there was no adherence to the principles of natural justice in that she was not heard before the decision to remove her from the provisional graduation list was made.

8. Like Alice, Edgar was a student at the respondent university undergoing a course of education in the School of Education. He too, filed his petition dated 28th November 2011, seeking similar prayers to those sought by Alice. He states in his petition that he was a student in the Bachelor of Education Degree programme in the School of Education at the respondent. He was approved through the respondent's online system to graduate with a Bachelor of Education Degree, Second Class Honours , Upper Division, on 1st July 2011.

9. Without his knowledge, however, he was removed from the list of graduands for the graduation ceremony set to be held on 1st July 2011, ostensibly on the basis that his marks in the respondent's online system had been tampered with. He had, in preparation for his graduation, booked a graduation venue and paid Ksh. 20,000.00, and had invited friends and family to the graduation ceremony. He had also paid Kshs 1,800 for the graduation gown. He learnt on 20th June 2011 that his name had been removed from the graduation list on the basis that there had been tampering with 6 of his examination units results as posted in the University website. He states that he visited several offices of the respondent in order to have the problem solved and was promised by the Registrar and the Exams Officer that he would graduate in the next ceremony which was to be held in December 2011.

10. He states that by 9th November 2011, his name was still not included in the list of graduands for 9th December 2011 but that nonetheless in anticipation of this second graduation ceremony, he had paid for a graduation venue at Comfy Hotel at Kahawa in Nairobi and invited friends and family as well, including his brother who lives in Canada. He avers that it was not until after the second graduation ceremony of 9th December 2011, when this suit was pending, that the respondent invited him to attend a Students' Disciplinary Committee on 15th December 2011.

11. On 13th March 2012, his Counsel, Mr. Gacheru, informed the court that Edgar was permitted, after the conduct of disciplinary proceedings, to proceed and graduate on the basis of the new marks awarded following the disciplinary proceedings and adjustments to his grades made thereafter. At the hearing of this matter on the 19th of September, 2012, Mr. Gacheru informed the court that Edgar had graduated on 12th of July 2012.

The Case for the Petitioners

12. The petitioners base their case in claiming damages for the violation of their rights on the finding by this court in its ruling dated 6th December 2011 on the interlocutory application by Alice Njeri Ngichiri, the applicant in **Petition No.. 261 of 2011, Alice Njeri Ngiciri –v- Kenyatta University**. In the said ruling, this court had found that on the basis of the evidence before it, there was a violation of the petitioner's right to fair administrative action under Article 47 of the Constitution.

13. The argument advanced by Learned Counsel for the petitioners, Mr. Gacheru, is that the

respondent had violated the petitioners' fundamental rights under Article 47 of the Constitution as the decision to remove them from the list of graduands was made without informing them and they were not given an opportunity to defend themselves before that decision was taken.

14. Mr. Gacheru asked the court to adopt a broad interpretation of the right to life guaranteed under Article 26 and find that the petitioners' right to life had been violated. He also contended that the petitioners' rights to equality and not to be discriminated against under Article 27, as well as the right to human dignity under Article 28 and not to be held in servitude under Article 30 were all violated by the acts of the respondent. Further he asked the court to hold that fees paid to the respondent by the petitioners amount to property within the meaning of Article 40 and the actions of the respondent denied them value for that money and thus amounted to taking away their property arbitrarily.

15. With regard to the quantum of damages, Mr. Gacheru asked the court to award damages of Kshs 4,000,000 and Kshs6,000,000.00 to Alice and Edgar respectively, on the basis that they had undergone stress and lost time as a result of not graduating when they ought to have graduated.

The Case for the Respondent

16. The respondent opposes both petitions and filed a replying affidavit and a further affidavit sworn by Dr. Daniel Muindi on 5th December 2011 and 21st February 2011 respectively. They also filed written submissions dated 15th March 2012 addressing the issues raised in both petitions.

17. According to the respondent, during the course of verifying the petitioners' grades as is the practice at the respondent university, it was found that there was an alteration of grades as held by the petitioners' respective departments mark sheets and the grades that appeared in the respondent's online system. In view of these discrepancies, the respondent decided to remove the petitioners from the graduation lists pending investigation of the anomalies. The respondent thereafter instituted disciplinary proceedings which resulted in Alice being required to re-sit some units and Edgar being awarded lower grades than had been indicated in the respondent's online system.

19.While not disputing the facts as set out by the petitioners, the respondent through its learned counsel, Mr. Mogere, submitted that the petitioners cannot rely entirely on the findings of the court in its ruling of 6th December 2011 in **Petition No. 261 of 2011,** as that approach would be wrong. Mr. Mogere submitted that the court at that point was dealing with an interlocutory application in which it had been asked to either include the applicant in the graduation list for the graduation to be held on 9th December 2011 or stop the graduation ceremony altogether; that the court had not been asked to make any declarations, and that as it was seized of an interlocutory application, it did not have an opportunity to consider the matter on its legal and factual merits. He pointed out that the court had stated in its ruling that what it was concerned with at that interlocutory stage was whether the petitioner had made out an arguable case with a probability of success, and that the court had not granted the orders sought by the petitioner.

20. It was the respondent's case that there had been no violation of Article 47 and 50 of the Constitution in respect of the petitioners in this case; that the principles of natural justice do not apply in circumstances such as this court is confronted with due to what Mr. Mogere termed as '*the established legal principles relating to what is notoriously termed as* ***'suspension made as a holding operation pending inquiries' or 'administrative suspension.'*** According to Mr. Mogere, under this principle, a decision to suspend pending investigation need not be made after a formal hearing and that the rules of natural justice do not apply at that stage.

21. Mr. Mogere referred the court to the case of **Hon. Justice Amraphael Mbogholi Msagha -v- The Hon, Chief Justice of the Republic of Kenya and 7 Others, Misc Applic No. 1062 of 2004; Lewis -v- Heffer & Others (1978) 3 ALL ER 354; Petition of the Newtongrange Branch of Scottish National Party and Others, Judicial Review of a Pretended Decision of the National Executive Committee of the Scottish National Party dated 10th July 1999** and **Maurice Mangena -v- Nelson**

Mandela Metropolitan Municipality and Another, ECJ No. 034 of 2005. He submitted that on the basis of the holdings in the above decisions, the action taken by the respondent to remove the petitioners' names from the list of graduands pending the subsequent inquiry was a matter of good administration especially if viewed against the background that it was alleged that the petitioners' examination grades on the online system had been altered and the students admitted being complicit in the process. It had to take the action that it took to allow subsequent investigations.

22. Mr. Mogere contended that the right to fair administrative action arises at the stage of disciplinary committee hearing. He relied on the decision in **Hon, Justice Amraphael Mbogholi Msagha –v-. The Hon, Chief Justice of the Republic of Kenya and 7 Other (supra)** where it was held that unless the applicant presents himself before the tribunal set up to investigate his conduct, he cannot be heard to say that he was not heard by an independent and impartial tribunal. It was therefore the respondent's contention that the petitioners could not allege that they were not heard unless and until they presented themselves before the Student's Disciplinary Committee.

23. With regard to the alleged violation of Articles 26, 27, 28, 30 and 40 of the Constitution, the respondent submitted that it was trite law that in a petition alleging violation of constitutional provisions, the applicant must be precise and to the point not only in relation to the section, but also to the subsection and where applicable, the paragraph or sub-paragraph of the section allegedly contravened as well as the relevant act of that contravention so that the respondent knows the nature and extent of the case it faces to enable it prepare its case. He relied in support of this argument on the decision of the court in the case of **Cyprian Kubai –v- Stanley Kanyonga Mwenda, Nairobi High Court Misc. Applic No. 612 of 2002**. In his view, the petitioners had merely stated that the respondent's decision contravenes the cited Articles of the Constitution without particularising how they had been violated. The respondent therefore claimed it was deprived of an opportunity to know the nature of the petitioner's claim and thus urged the court to dismiss the petitions.

Determination

24. The matter before me concerns two important but competing interests, which interests are in turn underlain by two troubling possibilities. The first is the right of a student, who has undergone a course of study at the respondent University, to realize the purpose of that course of study in a timely and efficient manner. The other relates to the interest that the University has in ensuring that those qualifying from its academic training do so with the grades that they deserve, and that there is no cheating or tampering with grades which would undermine the credibility and integrity of degrees awarded by the institution.

25. The first troubling possibility goes to the integrity of students pursuing courses of study at the University and the institutions own staff: that students and staff of the respondent are willing to reduce the award of grades and qualifying degrees to a transactional exchange in which students' grades are altered to reflect better than the students have been awarded by their tutors. The other troubling possibility is that the respondent's examination systems are so inefficient and compromised that it cannot safeguard the integrity of the grades it awards. In light of these possibilities, the court is called upon, in my view, to balance these competing interests while bearing in mind the greater public interest in a system of higher education that can be relied on to help achieve societal goals in education. I shall revert to a consideration of the issue of greater public interest that this matter raises later in this judgment.

26. The gist of the petitioners' respective cases is that by removing them from the graduation list scheduled for the 9th of December 2011 and for 1st July 2011 in the case of Alice and Edgar respectively, the respondent violated their rights under Articles 26, 27, 28, 30, 47, and 50 of the Constitution of Kenya 2010. The petitioners take the position that the finding of this court in its ruling of the 6th of December disposes of the issue of violation of the right to a hearing and fair administrative action under Articles 47 and 50 of the Constitution.

27. The respondent is, however, correct in its submission that the court was at that stage dealing with the matter at an interlocutory stage at which the petitioner was only required to establish a *prima*

facie case in order for the court to issue orders in her favour. See **Giella –v- Cassman Brown & Co Ltd, (1973) EA 358.** The court has a duty, at the substantive hearing of the petitions, to examine the facts and establish whether indeed there was a violation of the petitioners' rights under the Constitution, and if there was, whether such violations would justify the grant of the orders and declarations sought in the petitions. The petitioners have alleged violation of their rights under Articles 26, 27, 28, 40, 47 and 50 of the Constitution. I will consider first the position with regard to the alleged violation of Articles 47 and 50 which form the core of the petitioners' grievance.

Alleged Violation of Articles 47 and 50

28. The facts, as indicated above, are undisputed. The petitioners were placed on the respondent's graduation lists, then their names were removed without according them an opportunity to be heard before the removal.

29. Alice's case is that she was on the graduation list for 9th December 2011. She was, however, removed from the list on 15th November 2011. She was not notified of the allegations against her nor was she afforded an opportunity to be heard. She was only summoned before the Students' Disciplinary Committee after the court had made its ruling on her application in December 2011. With regard to the disciplinary proceedings, the outcome was that she was required to re-sit some of the exams which she had failed, but which, according to the respondent, had been tampered with to reflect that she had passed with good grades.

30. In the case of Edgar, he states that he was in the graduation list for 1st July 2011 as at 6th June 2011. He was removed from the graduation list on the 20th of June 2011 without being heard on the allegation that his exam results had been tampered with. He avers that while he had been informed that he would graduate in the graduation scheduled for December 2011, his name was not on the list, and at the time he filed his petition, he did not know when and if he would ever graduate. He was eventually invited to attend the Students' Disciplinary Committee on the 15th of December 2011.

31. The petitioners have referred the court to the decisions in the cases of **Winrose Gathigia -v- Kenyatta University, Petition No. 1029 of 2007, Lempaa Vincent Suyianke & Others –v- Kenyatta University a 2 Others, Misc Applic. No. 1118 of 2003, Hypolito Cassiano De Souza –v- Chairman and Members of Tanga Town Council (1961) EA 377** and **Awuni & Others v West Africa Examinations Council (2005) 1LRC 594** all of which support the position that statutory bodies such as the respondent, acting in an administrative or quasi- judicial capacity, are required to observe the rules of natural justice, and the principles that should guide their actions are well settled.

32. The respondent, while not denying that it was exercising administrative action and performing a quasi-judicial function, and while conceding that the petitioners were not heard before their removal from the graduation lists, contends that in the circumstances then prevailing, they were not entitled to observance of the rules of natural justice and there was therefore no violation of their rights under Article 47 and 50 of the Constitution.

Fair Administrative Action -v- Suspension as a Holding Operation

33. Article 47 of the constitution 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. '

34. The question that arises is whether, as the respondent alleges, this right can, in the circumstances of this case, be displaced by what the respondent calls ***'suspension made as a holding***

operation pending inquiries' or 'administrative suspension'. Under this principle, a decision to suspend pending investigation need not be made after a formal hearing and the rules of natural justice do not apply at that stage. In support of this proposition the respondent relied on the case of **Lewis v Heffer & Others (1978) 3 ALL ER 354,** in particular the words ofLord Denning that

'Very often irregularities are disclosed in a government department or in a business house, and a man may be suspended on full pay pending inquiries. Suspicion may rest on him, and so he is suspended until he is cleared of it. No one, so far as I know has ever questioned a suspension on the ground that it could be done unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumour and suspicions. The others will not trust the man. In order to get back to work, the man is suspended. At that stage the rules of natural justice do not apply.' *(Emphasis added).'*

43. The court in that matter went on to state that

'Where suspension was made as a holding operation pending inquiries the rules of natural justice did not apply because the suspension was a matter of good administration.'

35. The respondent also referred the court to the case of **Hon, Justice Amraphael Mbogholi Msagha -v- The Hon, Chief Justice of the Republic of Kenya and 7 Other (supra)** and submitted that the three judge bench seized of the matter recognised the principle of holding operation pending inquiries and stated as follows:

'So once again, we find and hold that the suspension of the Applicant's is in the words of Megarry J in John -v- Rees (supra), a holding operation, pending inquiries by the Tribunal into the question of removal of the Applicant from his office of judge and not a final punishment, as a suspension from the Law Society for instance after being found guilty of some malpractice. No rules of natural justice were therefore violated.'

36. The respondent further relied on the decision in Scotland in the **Petition of the Newtongrange Branch of Scottish National Party and Others Judicial Review of a pretended decision of the National Executive Committee of the Scottish National Party dated 10th July 1999** where Lord Osborne upheld the concept of administrative suspension as stipulated in **Lewis v Heffer** (supra) and stated as follows:

'In this kind of situation, at an early stage when action of some sort requires to be taken and taken firmly, in order to set the wheels of investigation in motion, in my view, natural justice would not demand the steps concerned. ….indeed where an administrative suspension is decided upon, pending an investigation into some controversial circumstances, it would be inappropriate to hold a hearing into those circumstances, separate from the contemplated investigation itself.'

37. The respondent also asked the court to be guided by the decision of the High Court in South Africa in **Maurice Mangena –v- Nelson Mandela Metropolitan Municipality and Another, ECJ No. 034 of 2005** where the court upheld the principle and stated that:

'the purpose of the suspension was not to impose discipline, but for reasons of good administration. It was to ensure that the investigation proceeded unhindered and without any interference, in the first instance, and to protect the interests of the first respondent having regard to the nature of the alleged misconduct, the position of applicant and the obvious consequences of the alleged misconduct, should it be proved.'

38. I believe that there can be no argument that certain circumstances do call for operation of the principle of administrative suspension or a holding operation pending inquiries as enunciated in the cases cited above. The question, though, is whether the circumstances of this case fall under this principle as

contended by the respondent, to which the rules of natural justice do not apply. In the affidavits sworn by Dr. Daniel Muindi the Registrar, Academics, of the respondent, the respondent sets out the conditions which students must satisfy before they can be classified and approved by the Senate to graduate: one must have passed in all the required examination units; one must have met the financial obligations to the respondent, and must not have any disciplinary case pending; the online examination results must be verified against the primary examinations records held by the respective departments of the respondent.

39. According to the respondent, the purported final results as posted online are not final results but provisional, and are subject to verification. Under the Kenyatta University statute, the provisional results are released by the respective Deans of various Schools after that School's Board of Examiners meet, while the final results are released by the Senate after they are verified and approved. The respondent contends that it was during the verification process that the variances in the petitioners' examination grades as they appeared online and those held by their respective departments were noted.

40. The respondent submit that in view of the irregularities detected in the verification of results, it appointed a committee to investigate the causes of variances in examination records, and the committee found that the petitioners and other students were complicit, with staff members of the respondent responsible for the administration of the online system, in tampering with the online results. In view of these findings, the respondent would not allow the petitioners to graduate given the glaring inconsistencies in the grades obtained for some units and the entries contained in the online system.

41. My reading of the cases relied on by the respondents which I have set out above is that the principle of *'holding operation pending investigations'* will apply in a situation where urgent action needs to be taken at once, where there are time constraints that limit the possibility for observing the rules of natural justice that require that a party be heard before action is taken against them. The words of Lord Osborne in **Petition of the Newtongrange Branch of Scottish National Party and Others Judicial Review of a pretended decision of the National Executive Committee of the Scottish National Party dated 10th July 1999** are that

'In this kind of situation, at an early stage when action of some sort requires to be taken and taken firmly, in order to set the wheels of investigation in motion, in my view, natural justice would not demand the steps concerned.

42. Was this the position in this case? Alice qualified, according to her initial results, in April, 2011. She was put on the graduation list, but it was not until November, 2011, seven (7) months later, that she was removed from the graduation list and informed that her online results and her department results did not tally. She was suspended from the University on 25th November 2011 and summoned to attend disciplinary proceedings on 15th December 2011.

43. Edgar completed his course at the University, as he avers in his affidavit sworn on 28th November 2011, in December 2010. He applied for graduation in April, 2011 and in May 2011 he was classified by the respondent's School of Education to graduate with a degree in Bachelor of Education, Second Class Honours, Upper Division. He was placed on the graduation list for July 1st 2011, but was removed from the list on 20th June 2011 and informed that he would graduate in December 2011. By letter dated 25th November 2011 which is annexed to the affidavit of Dr. Daniel Muindi, he was suspended from the University and also summoned to attend disciplinary proceedings on 15th December 2011. The evidence before me shows that a period of at least 6 months elapsed between the period when Alice completed her course and her suspension, and close to 12 months between the time Edgar completed his course and the time he was summoned to attend the disciplinary proceedings.

44. The respondent argues that it could not allow the petitioners to graduate on the basis of the grades they had obtained as a result of the tampering with the grades in the respondent's online system. It states that it had carried out investigations and established that the tampering with the grades was done through collusion between students and its employees. It has annexed to the affidavit of Prof. Muindi its committee's report detailing the manner in which the tampering with results was carried out. It has also

annexed letters from students confessing that they paid money to fellow students to have their grades altered, and that this money was passed on to employees of the respondent who carried out the alterations.

45. From the evidence before me, it is clear that, at least by August, 2011, the respondent was aware that there had been alterations of students' grades by staff in collusion with students, and the manner in which this alteration had taken place. The committee report annexed to the affidavit of Dr. Muindi indicates that one of the staff members involved in the alterations, a Mr. Kevin Mwenda, was interviewed in August, 2011. The respondent also indicates that it had the committee report in September, 2011. It therefore had at least two months between the time it got the report and the time it removed Alice from the graduation list on 15th November 2011. It had a similar period with regard to Edgar.

46. In the above circumstances, I am not persuaded that the argument by the respondent that their action was a 'holding operation pending investigations' is of much avail. Had they discovered the tampering with the grades in November, 2011, with the graduation set for December, 2011, one could understand the failure to accord the petitioners a hearing before removing them from the graduation list. In the case of Edgar, the respondent removed him from the graduation list in June, 2011, on the allegation that his results had been tampered with, but did not subject him to disciplinary proceedings till December 2011. How can this lapse be justified on the basis of a 'holding suspension pending investigation'?

47. As an institution that has the mandate to educate students and has been doing so for decades, it is difficult to comprehend how the institution is not able to put systems in place that ensure that its grades are safe from manipulation, for the circumstances that this case reveal indicate that the quality of degrees from the institution is truly suspect. If the racket of altering grades has been going on for years, and was only discovered in 2011, how many underserved degree certificates are circulating in the employment market? The implications for the quality of education and the labour force that those who graduate from the institution bring to the market are dire.

48. Given the period of time that the respondent had after its investigations and before the graduation, it had ample time to inform the petitioners about the accusations or suspicions against them, and to give them an opportunity to present their defence, before they were removed from the graduation list. That the respondent did not use this period to establish which of its students had been complicit in the tampering with the grades, and only did so less than a month before the graduation, and without informing them of the action to be taken against them did not meet the requirements of natural justice.

49. I believe there is no dispute as to what these requirements are when the body in question is, as in the case of the respondent, a statutory body which performs a public function. In the case of **Winrose Gathigia –v- Kenyatta University (Supra)** the court (Wendoh J) cited with approval the principles laid down by the East Africa Court of Appeal in the case of **Hypolito Cassiano De Souza –v- Chairman and Members of the Tanga Town Council [1961] EA 377** which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. The principles require, among other things, that prescribed statutory procedures binding on the administrative body are followed, and if there are no such procedure prescribed, some form of inquiry must be made to enable the tribunal to fairly determine the question at issue. Further, the person concerned must know the nature of the accusations made against him or her, and an opportunity must be given to correct or contradict any statement prejudicial to their view. Put simply, a party against whom action will be taken by a body exercising a quasi-judicial function must be given an opportunity to tell his side of the story. Further, the provisions of Article 47 of our Constitution cited above guarantee to everyone administrative action that is fast, efficient, and fair.

50. In light of the above matters, I take the view that, in the circumstances of this case, the respondent failed to observe the rule of natural justice that requires that a party be heard before a decision is taken against him or her that is prejudicial to his or her interests. I do not think that, in the context of this case, and given the lapse of time between the investigations and the date that the students were taken from the graduation list, the respondent's actions can be excused on the basis of a 'holding operation pending investigation.'

Violation of Other Rights

51. The petitioners have asked the court to find that there has been, in addition, a violation of their rights under Articles 26, 27, 28, 30 and 40 of the Constitution, and to expand the right to life to include all the elements that go into making a meaningful lie.

52. I must, however, consider the situation of the petitioners and the alleged violation of their rights in the totality of the evidence before me in order to determine whether indeed there was any violation of their rights under the Constitution other than the right to fair administrative action and the right to be heard.

53. From the evidence before me and statements made by their Counsel in the course of the proceedings before me, both petitioners accepted the disciplinary proceedings against them, as well as its verdict or outcome. In the case of Alice, she was required to re-sit several units which it appears she had failed but the grades in respect of which had been tampered with in the respondent's online system to reflect that she had passed. In Edgar's case, he had his grades adjusted downwards, and graduated on the basis of the new grades. Clearly, therefore, both petitioners accepted that the grades that had been reflected in the respondent's online system after the alleged tampering had not been merited, and they therefore did not deserve to graduate on the dates they allege they should have graduated. While this court is not concerned with determining whether or not the petitioners were complicit in the tampering with their results, from the manner in which the alteration of grades was allegedly done as set out in the respondent's affidavit and the annexures thereto, requiring the registration numbers of students and the units to be changed to be passed on to those carrying out the alterations, it is hard to conclude that the petitioners were not somehow involved in the alteration of their grades.

54. In the circumstances, I believe that the respondent cannot be said to have violated their rights under Articles 26, 27, 28, 30 or 40. There is nothing to indicate that the petitioners were treated any differently from the other students whose grades were found to have been altered in the respondent's online system. The failure of the respondent only lay, in my view, in not availing the petitioners an opportunity to be heard before making its decision to remove them from the graduation list. Had it used the opportunity presented by the period immediately following upon its investigations in August 2011 to notify the petitioners that there were suspicions about their grades and qualifications, and that they would therefore not be graduating until they had faced a disciplinary panel, I believe this matter would not have proceeded as it did.

Claim for Damages

55. The petitioners have asked the court to make an award of damages in their favour for the violation of their rights. In considering the issue of damages, the court must ask itself whether, in the circumstances of this case, it would be proper to award damages to the petitioners.

56. As I have observed above, it is clear that the petitioners were not innocent victims of an uncaring and arbitrary administrator. They admit, albeit indirectly and by way of accepting the verdict of the respondent's disciplinary committee which led to the re-sit of several units by Alice and the downgrading of Edgar, that the grades on the online system on the basis of which they were demanding that they should graduate were inaccurate and had been tampered with. In such circumstances, I believe it would be against the public interest to award damages to the petitioners. It would amount to a party who has been complicit in wrongdoing benefitting, albeit indirectly, from such wrong doing. An award of damages in circumstances such as this would send the message that even if one is found to have tampered with examination results or grades, he or she may well get monetary compensation if one is removed unprocedurally from the respondent's graduation list. It would be against the public interest for students whose grades have been tampered with to either be permitted to graduate with such grades, or to be compensated in damages for removal from the graduation list.

57. In the circumstances, though I do find that there was a violation of the right to be heard and of fair administrative action, and balancing the right of the petitioners to be heard against the greater public interest to ensure that students graduate from our institutions of higher learning with the grades that they deserve, and thus preserve the integrity of our tertiary education, I make no award of damages against the

respondent.

58. I must observe, however, that while the respondent may not be an uncaring and arbitrary administrator, this case demonstrates very serious weaknesses in its examination administration system. While some of its students and staff may be dishonest and ready to turn the award of grades into a transactional system where one gets grades, not on the basis of merit but on the basis of ability to pay for them, the respondent has an obligation to take all steps necessary to ensure that such tampering is eliminated. It is not enough to graduate students in ever increasing numbers: the role of a university I believe, goes beyond churning out large numbers of paper graduates. The public expects universities to produce quality, well trained and educated young people of integrity who can make a positive contribution to the economic development of the country.

59. That the respondent has failed to put in place strong systems to protect the integrity of its grades, thus allowing them to be tampered with and rendering the quality and integrity of its degrees suspect, is a serious indictment of the respondent's administration. It has an obligation to ensure that such tampering becomes a thing of the past, and the court trusts that it has learnt valuable lessons from its dealings with the petitioners in this case on the best way of dealing with similar situations.

60. As the petitioners have succeeded partially in their petitions in light of my findings with regard to the failure of the respondent to accord them a hearing before removing them from the graduation list, they shall have the costs of this petition.

Dated, Delivered and Signed at Nairobi this 4th day of December 2012

MUMBI NGUGI

JUDGE

Mr. Gacheru instructed by Kamau, Kuria & Kiraitu Advocates for the petitioners

Mr. Wetangula and Mr Mogere instructed by Mohamed Muigai & Co. Advocates for Respondent.