



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANEOUS CASE NO. 383 OF 2009**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION  
AND MANDAMUS**

**AND**

**IN THE MATTER OF KENYATTA UNIVERSITY**

**AND**

**IN THE MATTER OF DISCIPLINARY PROCEEDINGS UNDER THE KENYATTA  
UNIVERSITY ACT CAP 210C OF THE**

**LAWS OF KENYA AND RULES MADE THEREUNDER**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**KENYATTA UNIVERSITY .....RESPONDENT  
EX PARTE .....HARON NJOROGE NJOGU**

**RULING**

Haron Njoroge Njogu, the ex parte applicant, (hereinafter referred to as **“the applicant”**) was an employee of the Respondent in its Information Technology (I.T.) department. He was engaged as Computer Systems and Communications Technologist. Shortly after his employment he enrolled as a student at its School of Pure and Applied Sciences for a Masters Degree course which he completed in March 2006.

By a letter dated 3<sup>rd</sup> March, 2009 his services were terminated by the respondent. The reason given to him for the said action were that he had tampered with University data by accessing examination results on-line and changing them to reflect grades he had not earned and to reflect courses he had not done. He was also accused of abuse of office by failing to disclose his status as a student and using his position to change his marks.

Being aggrieved by the respondent’s action of terminating his services, the applicant filed an application and sought the following orders:

- “1. That an order of certiorari be issued to remove to this honourable court for the purpose of being quashed the decision of the respondent contained in the letter dated 3<sup>rd</sup> March, 2009.**
- 2. That an order of mandamus be issued to compel the respondent to reinstate the applicant to employment.**
- 3. That an order of prohibition be issued to restrain the respondent from acting on its decision contained in the letter dated 3<sup>rd</sup> March, 2009 to rescind, cancel, interfere with, or vary the applicant’s grades for course work in the Master of Computer Application (MCA) programme in the department of Information and Communication Technology.**
- 4. That costs of this application be borne by the respondent.”**

The application was made on the following grounds:

- “(a) The applicant’s right to be heard was substantially negated and hollowed by the failure, refusal or negligence of the respondent to allow the applicant to face witnesses/informers whose allegations precipitated the disciplinary proceedings.**
- (b) The disciplinary proceedings are viciated by procedural impropriety engendered by the refusal, negligence or failure of the respondent to confront the applicant with evidence upon which the charges facing him were founded.**
- (c) The respondent’s senior Board of Discipline had no jurisdiction to hear and determine the charge against the applicant namely “tampering with University date” which conduct or actions constitute criminal offences under the Penal Code (Cap 63).**
- (d) Clause 9.4 Section (iii) (b) of the Terms of Service does not vest the respondent with powers to suspend the applicant for conduct amounting to a criminal offence.**
- (e) Unless and until the accused was convicted by a competent criminal court for the alleged criminal conduct, it was not available to the respondent to suspend the applicant for “Good Cause” within the meaning of Clause 9.4 Section (iii).**
- (f) The Kenyatta University Act Cap 210 C, the respondent’s statutes, rules and regulations**

**governing the disciplinary organs do not confer the respondent power, authority and jurisdiction to adjudicate upon the conduct that is essentially and preponderantly criminal in nature.**

**(g) The respondent's Disciplinary Board had no jurisdiction to hear and determine the charges relating to or revolving around the status of the applicant as a student of Master of Computer Applications in the respondent's School of Pure and Applied Sciences.**

**(h) The jurisdiction to adjudicate upon the charges levelled against the applicant vests in the Students Disciplinary Committee of the Senate established under Statute XV, Section 4A rather than the Senior Board of Discipline.**

**(i) The Board was not properly constituted in that the head of the applicant's department namely Director of Information Technology Department, Mr. Andrew Mungai or his representative did not attend/participate in the disciplinary proceedings."**

It was also argued that the respondent's decision was *ultra vires* because the Senior Board of Discipline has not formulated the Code of Conduct of the University employees under its terms of reference. The applicant further contended that the respondent's act breached fundamental principles of natural justice and was Wednesbury unreasonable.

In his affidavit in support of the application, the applicant stated that on 7<sup>th</sup> December, 2006 the respondent appointed Messrs Parity Information Systems Limited to install and commission the Uni-plus and ACCPAC Student Management System in its academic and finance departments with a view to improving efficiency and effectiveness in service delivery. The applicant was assigned the responsibility of implementing the Uni-plus/ACCPAC system while the said consultants were involved in training the staff on how to use the system and aiding students in accessing their fees statements and result slips and aiding correct any anomaly in their marks and fees.

On 20<sup>th</sup> July, 2008 the server of the aforesaid system broke down thereby paralyzing operations of the entire University especially in areas touching on student's matters and finance. However, the system implementation team including the applicant managed to restore the system after sometime but soon thereafter the applicant's system password was confiscated thereby rendering him jobless since his work revolved around the system.

By a letter dated 26<sup>th</sup> September, 2008 the applicant was informed that he had been suspended from duty with immediate effect on account of reports that he had tampered with his academic marks to reflect grades that he had not earned and in courses he had not done. The letter did not specify details of those allegations but stated that he would be informed in due cause when to appear before the Senior Board of Discipline. By an internal memo dated 7<sup>th</sup> November, 2008 the applicant was invited by the respondent's Deputy Vice Chancellor – Administration, to attend a meeting of an ad hoc committee known as Server Breakdown Committee (SBC) scheduled for 24<sup>th</sup> November, 2008 at 9.00 a.m. in the University Board Room. The applicant said that he received the memo on 24<sup>th</sup> November, 2008 at 12.30 p.m. As a result of the late service of the memo the said meeting aborted. The applicant was invited to another meeting set down for 19<sup>th</sup> January, 2009 at 2.30 p.m. but he did not attend that meeting. His refusal to attend the meeting was actuated by, *inter alia*, his belief that the issue was connected with his suspension on allegation of tampering with the University data and so the proper organ to deal with the matter was the Senior Board of Discipline.

By a letter dated 13<sup>th</sup> February, 2009 the applicant was invited by the respondent's registrar to appear before the respondent's Senior Board of Discipline to defend himself against tampering with University data. The letter also invited him to send a written defence, if any, to the Deputy Vice Chancellor –

Administration before the date of the meeting. Because the said letter did not specify when the offence was committed and the particulars of the offence and the evidence against him the applicant alleged that he was not able to exercise the option of forwarding a written defence. On 27<sup>th</sup> February, 2009 the applicant attended the scheduled meeting of the Board and realized that the Chairman of the ICT Department, Mr. Andrew Mungai, and one Mr. Wasike, whom he believed was his accuser, were absent. The applicant was asked whether it was true that he had tampered with the system to his advantage to which he answered in the negative. He requested for further particulars of the offences that he was alleged to have committed but they were not given.

The applicant alleged that the proceedings of the Board were distinctly unfair and irregular because its members were biased, accusatory and disposed against any possibility of his innocence. He further alleged that his efforts to have the precise charges that had been preferred against him were futile and materials supposed to be evidence against him were known to him for the first time during the said meeting. Further, the witnesses or persons who had incriminated him were not present so that he could cross examine them. Shortly thereafter the termination letter was sent to him. The applicant alleged that the decision to terminate his services was actuated by malice arising from the controversy between senior administrators over the Parity System. He further stated that the respondent abused its powers and followed the wrong procedure in dealing with his disciplinary case.

The respondent filed a replying affidavit that was sworn by **Professor Paul Wainaina, the Deputy Vice Chancellor-Administration**. He stated that the decision to terminate the applicant's employment cannot be said to be *ultra vires* because before that action was taken, the applicant was accorded audience before the Senior Disciplinary Board which was properly constituted and which had prerequisite jurisdiction to adjudicate on the matter. The applicant was informed of the charges levelled against him. The matter with which the applicant was being charged was done in his capacity as an employee of the University and not as a student. In the circumstances therefore, it was the Senior Disciplinary Board that had the mandate to hear the matters in issue and not the Students Disciplinary Committee, Professor Wainaina stated. He further denied that the respondent's decision offended the fundamental principles of natural justice since the applicant was informed of the charge and the particular section of the relevant rules and/or regulations that he had contravened, the venue, time and date of the Board meeting. Further, the decision of the Board was neither unreasonable nor actuated by bad faith as alleged, the respondent stated.

The parties filed their respective submissions and Mr. Kibe Mungai for the applicant and Mr. Mogere for the respondent highlighted their respective clients' submissions. I have carefully considered all the affidavits and the submissions on record.

To begin with, I must point out that judicial review is not an appeal from a decision but a review of the manner in which the inferior body or tribunal made that decision. It was so held in **CHIEF CONSTABLE OF NORTH WELLS POLICE vs. EVANS [1982] 3 All ER 141**. Judicial review concerns itself with the decision making process and not the merits of the decision.

In **DE SOUZA vs. TANGA TOWN COUNCIL [1961] EA 377** the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity were summarized as hereunder:

- (a) If a statute or statutory rules or regulations binding upon the tribunal describe the procedure to be followed, that procedure must be observed.**
- (b) If no procedure is laid down, there must be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue.**

(c) **The tribunal must be properly constituted, it must do its best to act justly and reach just ends by just means. The tribunal must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as if it were a trial, it need not examine witnesses and it can obtain information in any way it thinks best.**

(d) **The person accused must know the nature of the accusations made.**

(e) **A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view.**

(f) **The tribunal should see that the matter which has come into the existence for the purpose of quasi-lis is made available to both sides and, once the quasi-lis has started, if the tribunal receives a communication from one party or from a third party, it should give the other party the opportunity of commenting on it.**

Although the applicant was both a student and an employee of the respondent the judicial review proceedings arise from matters relating to his employment and not as a student. That is why he sought to be reinstated to his employment. In my view, therefore, the proceedings which are now the subject matter of these judicial review proceedings were rightly conducted by the Senior Disciplinary Board which deals with matters of staff as opposed to the Students Disciplinary Committee which deals with students disciplinary matters.

The applicant was summoned before the Senior Disciplinary Board on a date and venue that were made known to him. He was also duly notified of the charges that he was to face. Although he alleges that he was not given detailed particulars thereof, my finding is that the letter summoning him to appear before the Board contained sufficient information to enable the applicant defend himself accordingly. The applicant was also given an opportunity to tender a written defence. It was not a legal requirement that the applicant meet the person whom he perceived to be his accuser, a Mr. Wasike. The applicant was given an opportunity to defend himself against the charge of tampering with University data and also accessing his examination results on-line. Thereafter the Senior Disciplinary Board deliberated on the matter and came to a decision that the applicant's services had to be terminated. In reaching that decision, the Board was satisfied that the provisions of **Clause 9.4** of the Terms of Service had been complied with.

There was no sufficient evidence adduced by the applicant that the said decision was actuated by malice or bad faith on the part of the respondent. It was also not sufficiently demonstrated that there was any procedural impropriety, illegality or irrationality to warrant the orders of certiorari, mandamus and prohibition as sought by the applicant.

As regards the prayer for an order of mandamus to issue to compel the respondent to reinstate the applicant to employment, such an order cannot be granted because contracts of service have mutuality of rights and obligations for both parties and this court does not have jurisdiction to impose upon an employer an employee whom it does not wish to retain in its establishment. See **ERIC V.J. MAKOKHA & 4 OTHERS vs. LAWRENCE SAGINI & 2 OTHERS [1994] eKLR.**

Having taken into consideration all the relevant issues, I find no merit in the applicant's application and dismiss the same with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – court clerk**

**Mr. Wanyaga for Mr. Kibe for the ex parte applicant**

**Mr. Ogunde for Mr. Mogere for the respondent**