



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**Miscellaneous Civil Application 28 of 2009**

**MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI**

**A N D**

**IN THE MATTER OF: PWANI UNIVERSITY COLLEGE**

**A N D**

**IN THE MATTER OF: THE VERDICT OF PWANI UNIVERSITY COLLEGE STUDENTS DISCIPLINARY  
COMMITTEE AND DECISION OF PWANI UNIVERSITY COLLEGE OF 5<sup>TH</sup>  
MAY 2009**

**B E T W E E N**

**REPUBLIC .....APPLICANT**

**A N D**

**EX-PARTE**

- 1. MAINA MBUGUA JAMES**
- 2. KURERE THERDEUS KIPYEGON**
- 3. KAULA MOHAMED KENYATTA**

**VERSUS**

**PWANI UNIVERSITY COLLEGE .....RESPONDENT**

**R U L I N G**

By a Notice of Motion dated 24th June 2009, made under section 8 and 9 of the Law Reform Act (Cap 26) and order LIII Rule 3(1), 4(1) and 7(2) of the Civil Procedure Rules, the applicants seek for an order of certiorari, to quash the verdict by Pwani University College Students Disciplinary Committee, that the ex-parte applicants are guilty of the charges made against them, and the decision of Pwani University College of 5th May 2009, expelling the ex-parte applicants from Pwani University College. Further that the respondents be condemned to pay costs of the application.

It is based on grounds that:

The respondent was established as a University College pursuant to Pwani University College Order by legal No. 164 as a constituent college of Kenyatta University Act.

On 25<sup>th</sup> August 2008, the ex-parte applicants were admitted and registered as students for undergraduate degree course at the respondent University. The respondent is empowered to discipline students under regulations made by the Council pursuant to section 12(3) (e) of the Pwani University College Order 2007.

Between 28<sup>th</sup> February 2009 and 1<sup>st</sup> March 2009, there occurred clashes between students from the respondent and residents of Kilifi Town, outside the respondent's premises, leading to the closure of the respondent on 3<sup>rd</sup> March 2009.

The respondent suspected the exparte applicants of having been involved in the clashes and suspended them from the University on 10<sup>th</sup> March 2009.

The respondent organized disciplinary proceedings against the ex-parte applicants on 5<sup>th</sup> May 2009 under the University College Students Disciplinary Committee. It is the exparte applicants' contention that the proceedings were conducted contrary to the rules of national justice in that:

- (1) They were not given sufficient notice of the specific charges they were to face during the disciplinary proceedings to enable them prepare their defences.
- (2) The applicants were not given an opportunity to cross-examine the witnesses who had given information against them in order for them to test the veracity and credibility of the witness so as to establish the truthfulness of the information
- (3) The applicants were not given the opportunity to call and lead their witnesses in support of their defence.
- (4) The applicants were not allowed to engage advocates to represent them during the proceedings, despite their request.
- (5) Efforts by the applicants to explain their defences were thwarted by the disciplinary committee members
- (6) The applicants were not afforded adequate opportunity for being heard against the charges leveled against them by the respondent
- (7) The respondent decided to expel the exparte applicants from the university and that respondent had already decided to find them guilty and expel them.
- (8) As a result of the action the applicant's university education has been curtailed and their chosen career prospects is now doomed to fail.

The first applicant in his statement describes herself as pursuing an undergraduate Degree Course in Bachelor of Science (Hospitality and Tourism Management). He repeats the grounds in support of the application and further states that he was ambushed with the following charges that:

- (1) He had abused and threatened a member of staff executing his duties on 26-1-09.
- (2) Returned his electrical coil to the campus
- (3) On 28-2-09, he participated in a meeting at the university dining hall, which led to the clashes between student and *boda boda* operators outside the university premises.
- (4) On 28-2-09, he damaged school property and a motorcycle belonging to *boda boda* operators.
- (5) On 28-2-09, he attacked a member of staff causing him injury where the member of staff was trying to stop the processes.
- (6) On 28-2-09, he attacked and whipped other students in the university hostels 1, 2, 3, 4, and 5 and the common room.

The third respondent's statement is that he was ambushed with the following charges that:

- (1) He had been the leader of burning of the school bus.
- (2) He had been the leader of writing letter of incitement to the students
- (3) He had been involved in the planning of phase 2 of the strike

The application is opposed, and in a replying affidavit sworn by Prof. Mohammed S. Rajab, who is the Principal of the University College. It is deponed that the action, decision and/or verdict by the respondent was as is provided by section 2(3) (e) of the Pwani University College Order 2007. He confirms that there were clashes which occurred from 28<sup>th</sup> February 2009 to 1<sup>st</sup> March 2009, between the respondent's students and residents of Kilifi town, which clashes spilled over to the respondent's campus. The clashes paralyzed the operations of the university and no meaningful studies could continue and as a result, the university was closed on 10-3-2009. It is his contention that the ex-parte applicants were at the heart of the said clashes and were also involved in planning of what was then described as Phase II of the clashes, which included among other actions, burning of some of the institution's buildings and retaliation by the students against the local residents.

Further that the student demonstrates involved intensive planning by the organizers and this gave the respondent adequate opportunity to gather enough evidence to make the respondent believe that the expelled students had organized the clashes and were involved in every aspect of it. It is denied that there existed bad blood between the expelled students and any staff member of the respondent as to warrant applicant's claim of victimization. It is averred that the respondent only concerns itself with its core business of imparting knowledge to its students and is alive to the fact that every person is entitled to fundamental rights and freedom but such entitlements are not absolute and the exparte applicants should not expect to benefit from their own misdeeds. Respondent insists that it adhered to the principles of natural justice in that:

- (1) Adequate notices were given because letters inviting the applicants to the Disciplinary Committee proceedings were dispatched on 21-4-2009 requiring them to appear before the Committee on 5-5-2009 – a period of 14 days.
- (2) The applicants were notified of the charges in their respective letters.
- (3) The applicants were given adequate time to offer their defences and/or call witnesses if any
- (4) To make sure that a fair decision/verdict was arrived at, the Students Disciplinary Committee took it upon itself to calling any student whom it felt could assist in reaching fair decision.
- (5) The Students Disciplinary Committee is an ad hoc committee set up pursuant to the University College Rules and regulations – hence no need to involve advocates and/or lawyers as it is not intended to be acrimonious, as it is an internal affair
- (6) No member of the Disciplinary Committee thwarted the ex parte applicant's wishes to call any witnesses/evidence in their defence.

It is further deponed that none of the ex parte applicant has named a particular member of the disciplinary committee as having been biased and/or even having requested his/ her disqualification from the proceedings and the allegation of unfairness or bias is an afterthought. Respondents maintain that it duly complied with the Rules of natural justice as it constituted the committee as provided by its rules and regulations and affording each of the applicants an opportunity to give their defence and/or call witnesses. Also that respondent gave reasonable notices to each of the applicants to prepare adequately for their defence and all the students who were mentioned in the proceedings were called.

The action of expelling the ex parte applicants is defended as it is provided for in the University College Rules and Regulations Part IV and V which mandates the respondent to expel students involved in activities similar to those the applicants herein are accused of without reference to the culprits – yet that notwithstanding respondent ensured that none of them was condemned unheard and minutes of the Disciplinary Committee are annexed to buttress that position.

The respondent points out that applicants were in breach of the University Rules and Regulation which they had executed in acceptance and they cannot be heard to claim to be victimized as they were authors of their own misfortune. The application is termed as premature, brought in bad faith as the respondents Rules and Regulations provide for an appeal to the chairman of the Council, which appeals have not been made.

Respondent's contention is that it is in the interest of the greater student's Community that the ex-parte applicants be removed/expelled from the institution as their continued presence is a potential danger to the safety of fellow students as well as members of staff and the community neighbouring the university.

At the hearing of the application, Mr. Shujaa submitted on behalf of the ex parte applicants that, the proceedings by the

University were conducted contrary to the rules of natural justice and that the letters to the applicants did not contain the charges – then when they appeared before the Disciplinary Committee each faced well over five charges – which ought to have been made known to them early so as to enable them prepare their defences and such failure was prejudicial to the exparte applicants.

He reiterated the contents of the exparte applicants statement and argued that even if the proceedings were internal affairs, they amounted to quasi Judicial proceedings with sanctions against the applicants and they required legal representation.

In response Mr. Kuria for the respondents repeated the contents of the affidavit sworn by Prof. Rajab concerning their observance of the rules of natural justice. He referred to the minutes annexed and submitted that the proceedings were quasi-judicial in nature conducted according to the rules of the institution and even the institution did not invite its lawyer to participate. Further that there is no evidence of requests by the applicants seeking to be granted permission to call their advocates and their lament is a mere allegation, and there is no evidence of any particular member turning down requests by the applicants to cross-examine the witnesses.

There is no dispute that

- (1) Applicants were students at Pwani University College, where they were pursuing undergraduate courses.
- (2) There were incidences of violence involving the student community and residents of Kilifi.
- (3) The applicants were suspected to have been deeply involved in the clashes.
- (4) Disciplinary proceedings were conducted and as a consequence the applicants were expelled.

Did the respondent in carrying out the proceedings act against the rules of natural justice? Were applicants given fair treatment? It must be understood that jurisdiction to review cannot be exercised on grounds that the decision as erroneous on merit – so the issue as to which witness said what, and the weight of the evidence presented at the proceedings is not the crux of the matter – this is because an investigation into the merits of a decision falls within the province of appellate jurisdiction. Judicial review is not an appeal from a decision, it is a review of the MANNER in which a decision has been made. In considering the legality of the administrative action taken by the respondent this court must look into the Rules and Regulations governing the process which the respondent adapted.

The Pwani University College Order 2007, provides for the creation of a council which is the governing body through which the University shall act. Section 12(3) (e) gives the Academic Board Power to make regulations governing “such other matters as are within its powers.”

The regulations are incorporated into the letter of acceptance which every student admitted to the institution signs, binding himself/herself to abide by the university rules and regulations

Regulation 3(g) addresses the issue of procession and demonstration and provides as follows:

***“(I) It shall be a serious offence for any student or group of students, whilst within the university, to convene, organize, participate or in any way be involved in any demonstration, gathering or procession or in any unauthorized ceremonies or demonstrations for which permission has not been obtained from the university or government authorities***

***(II) It shall be a serious offence for any student or group of students to organize or participate in pictures or in any manner prevent any student or member of staff from performing their normal duties.***

Section 4 of the Rules and Regulations deals with disciplinary procedures and subsection (II) (b) provides that:

***“A student shall be given an opportunity of being heard before the Students Disciplinary Committee makes its decision.”***

Among the penalties provided are suspension and expulsion from the University.

Were adequate notices sent to the exparte applicants? The exparte applicants do not deny signing such letter of acceptance. The exparte applicants had initially been suspended vide letter dated 10<sup>th</sup> March 2009 – which stated in part the nature of the clashes, and that investigations revealed that exparte applicant had together with others masterminded the events, and had been involved in planning further clashes.

This was then followed by a letter dated 21<sup>st</sup> April 2009 (which made reference to the letter of 10<sup>th</sup> March 2009 and invited the applicants to appear before the Disciplinary Committee on 5<sup>th</sup> May 2009, to answer charges and ***“you will have an opportunity to defend yourself”***

For a notice to be valid, it should be served on the person to be affected by the proceedings and must give sufficient time to the person to prepare his case. That notice should state the subject matter of the dispute or the nature of the charge. In my considered view, the notices contained in the letters of 10<sup>th</sup> March 2009, were sufficient and reasonable and I detect no element of ambush or foregone conclusion on the part of the respondents.

It would be a denial of justice if for instance the exparte applicants had been required to appear before the disciplinary committee, and been served a few hours to the proceedings and it is indeed not enough for a notice to merely inform and require the affected person to appear before a tribunal to defend themselves against a complaint (see **David Onyango Oloo v Attorney General CA No. 152 of 1986 (unrep)** which is distinguishable from the present circumstances.

Very clearly, the charges or allegations against the applicants had been disclosed to them as early as 10<sup>th</sup> March 2009 when the letters of suspension were sent to them – none of them denies receiving the suspension letters, which made them aware of the nature of complaint against each one of them. In considering whether a notice meets the legal requirements, the High Court in the case of **KMTC exparte Jones Chepkonga Kindagor (2006)e KLR** set out the principles as follows....”(i) the business must be clearly stated (ii) the date, time and place are indicated (iii) notice is issued to every person entitled to aid and receive it. I am satisfied that the notices met this test.”

Indeed the opening paragraph of the letters dated 10-3-2009 read “Several persons were injured including one student who was hospitalized. One member of staff was stoned and injured...”

Which is a condition precedent to hearing as given.

So what transpired during the proceedings?

This is disclosed by the minutes which are annexed as MSR1(a) and 1(b). At page 3 of EX MSR 1(a) minutes of Monday 11<sup>th</sup> May 2009 – at minute 2/5/2009 in respect of 1<sup>st</sup> exparte applicant, it is shown that the committee agreed to have two witnesses named by the applicant to be invited to verify the first exparte applicant's version of events.

Min 5/5/2009 relating to 2<sup>nd</sup> exparte applicant also shows that persons be invited to appear before the committee and shed more light on their averment in the riots.

Min 6-5-2009 – related to third exparte applicant, and it was agreed that the persons he had mentioned were to be called to appear before the committee.

Did these proceedings offend the rules of natural justice? Natural justices embodies two broad procedural ideals (a) Audi alteram partem – the rule that no man shall be condemned unheard (i.e the right to be heard)

(b) Nemo Judex in re causa sua – no man shall be a judge in his own cause (i.e the rule against bias).

To borrow from several jurists, let me paraphrase and state that fair hearing encompasses many aspects such as the need for prior adequate notice, opportunity to sufficiently present one's case – but these components are not fixed and are variable, their scope and applicability varying from case to case.

From the minutes of 5-5-09 which summarize the proceedings over the two days, there is a clear demonstration that the applicants were given a right to tell their story. See **Errington v Minister of Health (1935)1 KB 249** on a right to be heard. The exparte applicants did not apply for an opportunity to call witnesses, but the committee upon considering their defences, agreed that there was need to call certain persons named by the exparte applicants. Should the exparte applicants have been given a right to cross examine witnesses and have legal representation?

In their book, *Judicial Review of Administrative Actions in Kenya; Law and Procedure* by P.L.O. Lumumba and P. O. Kaluma (Jomo Kenyatta Foundation) at Chapter 6 page 111, the two scholars note that natural justice does not demand that proceedings before quasi – Judicial tribunals be as formal as court process as that would then defeat the purpose of having quasi Judicial tribunals outside the regular court system.

***“Adjudicating tribunals, in fact, enjoy a great deal of freedom in ordering their hearing procedures except for the universal conditions that they must be impartial and that everybody appearing before them must have a fair opportunity to present his case. Hearing procedures in quasi – Judicial tribunals thus vary from tribunal to tribunal.”***

Cross-examination, in the legal environment is certainly the most efficient method of establishing truth and exposing falsehoods BUT whether an opportunity to cross-examine should be granted depends on the circumstances of each case and the statute under which the hearing is being held. The general principle is that when there is an oral hearing and witnesses are

examined against a person, he has a right to cross-examine the witnesses – if he demands such right and is denied then, that would be an infringement to the right to be heard. It is the duty of the person against whom evidence is given, to demand the opportunity to cross-examine – if he fails to do so, he is precluded from complaining later – (this was the decision in **University of Ceylon v Fernando (1960)1 LR 223(also reported in (1960)1 ALL ER pg 631** – this seems to fit in with the scenario here – as the respondent repeatedly pointed out in the replying affidavit – there wasn't a single instance pointed out where the exparte applicants applied for and were denied the right to cross-examine, and its too late in the day to now turn around and cry wolf, BUT what about legal representation?

The respondent's contention is that there was no denial of legal representation since there was no such request in the first instance. There doesn't seem to be a hard and fast rule – going by the different approaches – in **Enderby Town FC Ltd v The Football Association (1971) on 591 at 605** Lord Denny ruled:

***“It may be a good thing for the proceedings of a domestic tribunal to be conducted informally, without legal representation. Justice can often be done better by a good layman than by a bad lawyer.”***

The situation in Kenya was captured in the case of **Geoffrey Mwangi Kariuki v University of Nairobi**. – but where the distinction can immediately be drawn in that the college Disciplinary Committee refused to allow Geoffrey to be represented by advocates in the proceedings, and the High Court ruled that he was entitled to such representation. My own view is that if an individual requests for legal representation, then he should be entitled to such representation but in the present scenario there was no such request and no such denial, so the breach alleged does not arise at all. The issue of bias or partiality remains a mere allegation since not one instance is cited to demonstrate such a position.

The upshot is that there is no reason whatsoever to interfere with the decision made by the respondent in terms of the procedure adapted.

I think as regards merits of the decision – the Rules and Regulations provide an avenue of redress by way of an appeal. The application is dismissed with costs to the respondents.

Delivered and dated this 28<sup>th</sup> day of April 2010 at Malindi.

Read in absence of parties.

**H. A. OMONDI**  
**LADY JUSTICE**