REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 963 of 2007

REPUBLIC ..... APPLICANT

AND

MASENO UNIVERSITY STAFF

DISCIPLINARY COMMITTEE ..... 1ST RESPONDENT

THE MASENO UNIVERSITY COUNCIL..... 2ND RESPONDENT

JUDGMENT

By the Notice of Motion dated 28/8/07, the ex parte Applicant, Mary Gorretti Kariaga challenged the decision of Maseno University Staff Disciplinary Committee, the 1st Respondent, which was made on 1/2/07 terminating the Applicant's services with the 1st Respondent. She seeks to have it quashed by an order of certiorari. The Applicant also seeks to have the decision of the Maseno University Council, the 2nd Respondent, which was made on 8/3/07, dismissing the Applicant's appeal, quashed by an order of certiorari. The motion is supported by the Applicant's verifying affidavit dated 23.5.07, a statutory statement of the same date and skeleton arguments filed in court on 31/10/08. The Applicant was represented by Mr. Oluoch, Advocate. The Respondents opposed the motion. Prof. Mary Walingo filed a replying affidavit dated 15/10/08 and skeleton arguments filed in court on 31/10.08. The Respondent also filed the Notice of Motion dated 15/10/08 seeking to set aside the orders of leave to commence Judicial Review proceedings dated 27/8/07. That Application is brought pursuant to section 3A, 80 Civil Procedure Rules and S.9 Law Reform Act and Order LIII Rule 2 and XLIX Rule 1 Civil procedure Rules and supported by the affidavit of Prof. Mary Walingo.

Briefly, the facts of this case are that until February 2007, the Applicant was an employee of Maseno University where she worked as a lecturer in the Department of Botany and Horticulture. The letter of employment is dated 18/12/1996 (MGK 1). On 1/12/06 she was summoned by the Staff Disciplinary Committee to appear before the Committee on 7/12/06 to answer charges of '**acting in a scandalous manner'** contrary to clause 25.2.1 of the University terms and conditions of service. The letter dated 1/12/06 indicates that the Applicant had earlier been suspended on 27/10/06. The letter gave particulars of the alleged breach of Regulations. On 10/1/07 the University wrote to the Applicant and framed fresh and additional charges (MGK 2). The applicant was invited to attend a hearing 16/1/07 but she received the letter on 15/1/07. It is the Applicants contention that she had prepared to defend herself on the charges in the letter dated 1/12/06. She attended the Staff Disciplinary Committee on 16/1/07 and on

1/2/07 her services were terminated under S.25:2:1(c) of the University terms and conditions.

The reasons for the termination were indicated at para.2 of the letter. It is the Applicant's contention that the particulars of the charges in the letter dated 1/12/2006 and that of 10/1/07 are inconsistent with the particulars of the charge upon which she was found guilty and convicted and that the dismissal was unfair. The Applicant is aggrieved by the failure by the Respondents to give her adequate notice and the fact that she was convicted of an offence she was not charged with. The Applicant appealed to the 2nd Respondent through the Vice Chancellor but (MGK 11) the appeal was dismissed for having no grounds. The Applicant alleges that the Respondent's actions were made in excess of their jurisdiction under the University Act, was unreasonable, made in bad faith and breached the Applicant's legitimate expectation that they would act fairly and according to the laid down procedure. Specifically, the Applicant alleges that the Respondent was in breach of Article XVII 4 (b) and (c) of the University statutes which require compliance with rules of natural justice, of notice, hearing and right to call witnesses.

The Applicant relied on the following decisions

1. **REPUBLIC V MASENO UNIVERSITY EX PARTE Ochieng Okumu Misc. App. 277/03**

2. **DAVID ONYANGO OLOO V AG (1987) KLR 210**

3. **RIDGE V BALDWIN (1964) AC 40** where Lord Reid held that a decision made without observing principles of natural justice is void. The other two cases of **Ochieng and Oloo** were of the same view.

4. **REP V JSC ex parte PARENO 1025/03**

5. **REP V P/S MINISTRY OF HEALTH ex parte ZACK AWINO H.C. MISC.** 536/06 where the court affirmed the decision in **CCSU V MINISTER FOR CIVIL SERVICE (1980) AC 174** where the court said that where one is promised that there will be consultation, before a decision is made, a legitimate expectation will arise that that has to be done.

In her replying affidavit, Prof. Mary Walingo, the Deputy Vice Chancellor Administration and Finance, Maseno University deponed that indeed the Applicant was summoned by the Respondent to answer charges of behaving in a scandalous manner under S. 25:2:1 of the terms and conditions of service. She attended the Disciplinary Committee to answer the charges on 16/1/07 and the decision of the Committee communicated to her on 1/2/07 with right of appeal within 14 days. She denies that the charges are inconsistent with the findings of the committee. That the committee observed rules of natural justice under Article XVII 4 (b) and (c) of the University Statutes. That the Applicant was given sufficient notice, the letter giving notice having been written on 1/12/06 as she was supposed to appear before the Committee on 7/12/06 (MKW 3). That the letter of 10/1/07 informed the Applicant that the hearing before the committee was on 16/1/07 (MKW 4). That the Respondent complied with the Terms and Conditions, 2001 and that this being a contract of employment, any party to the relationship can terminate it. That the Applicant had been interfering with the institution's activities and the Respondent can not be forced to retain her as a lecturer. That the Respondent's actions were lawful, reasonable and made in good faith. In addition, Mr. Wasuna counsel for the Respondents submitted that the Applicant never alleged that the notice was inadequate when she appeared before the committee. It was also submitted that the Applicant is challenging the merits. of the Respondent's decision and the orders sought can not avail. That based on the case of **ERIC MAKOKHA & UNIVERSITY OF NAIROBI CA 20/1994** the court should not grant the orders sought. That the relationship between the Applicant and Respondent being contractual, the court should not force it since the Applicant has failed to perform her contractual duties. Counsel also made reliance to the **PARENO** case and **KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC CA 266/96.**

Having considered all pleadings on record, submissions filed and made by counsel for the parties and the case law relied upon, I think that the issues I need to determine in this judgment are;

1. Whether the Notice of Motion is competent;

2. Whether the 2nd Respondent made any decision that can be the subject of judicial Review:

3. Whether the Respondents complied with the University Statutes, Article XVII and (b) and (c),

4. whether the Respondents are in breach of rules of natural justice;

5. Whether the Respondent's decision was unreasonable

6. Whether the Applicant's legitimate expectation was breached;

7. Whether the remedies of Judicial Review are available to the Applicant;

8. Who bears the costs of this application.

It is the Respondents case that an order of certiorari can not issue because this application was brought outside the 6 months, allowed under Order 53 Rule 2 Civil Procedure Rules. That Rule provides that a party who seeks an order of certiorari must challenge the impugned decision within 6 months of the making of the decision. The Respondent filed the application dated 15/11/07 seeking to strike out the application, Notice of Motion or set aside the leave and stay orders given on 27.8.07. On that basis, the Respondent contends that the decision to dismiss the Applicant having been made on 16/1/07, the application for leave should have been made by 31/1/07. Instead the applicant came to Court on 27/8/08 about 23 days after the 6 months lapsed. Counsel relied on the case of **FRANCIS AKO V THE SPECIAL DISTRICT COMMISSIONER** Kisumu (1989) **KLR 163 and OKUMU V OUKO (1999) I KLR – 122** where the Courts have held that the Court has no jurisdiction to extend the time for filing of an application for Judicial Review. In **NYAGA V REP MISC. 109/1991** Bosire J refused to extend time for granting leave after 6 months had expired on the ground that S 9 (1) of the Law Reform Act which donates power to Rule 2 of Order 53 Civil Procedure Rules prohibits the bringing of an application for certiorari after 6 months of the decree or judgment under attack. Similarly, in **OKUMU V OUKO (1999) KLR 122** the Court found that S. 9 (1) of the Law Reform Act imposes an absolute period of limitation in an application for certiorari to remove any judgment, conviction, order decree or any other proceeding. Contrary to the above thinking, Nyamu, Ibrahim and Makhadia JJJs in **R Vs THE JUDICIAL COMMISSION INTO THE GOLDENBERG AFFAIR ex parte MWALULU MISC. APP. 1279/04** held that the 6 months limitation period does not apply to decisions which are nullities or void but only applies to decisions, judgments, orders which are final orders of the court. J. Ibrahim reiterated the above reasoning in his decision in the case of **KENYATTA NATIONAL HOSPITAL V THE MINISTER FOR LABOUR MISC. APP. 880/04.** The decision of the Council is not an order of the Court, a judgment, decree or proceedings. Besides if such decision is found to be a nullity then an order of certiorari should lie even if challenged after 6 months. I subscribe to the above view that a nullity can not be subject of the 6 months period because it does not exist and so can be challenged outside the 6 months. If the 1st Respondent failed to observe rules of natural justice and the 1st Respondents own Statutes promulgated under S. 25 (1) (f) of the Act, then they have acted without jurisdiction and the decision is a nullity and could be challenged even after 6 months. I find the leave granted was proper and this application is properly before this Court. The Notice of Motion seeking to have the leave set aside or the Motion struck out, does not have any merit.

Further to the above, I do agree with Applicants assertion that the Respondent's application is also incompetent and this Court's jurisdiction has not been properly invoked. The Respondents brought the application pursuant to S 3A and 80 of the Civil Procedure Act, Section 9 (3) of the Law Reform Act and Order 53 Rule 2 and XLIX Rule 1 of the Civil Procedure Rules. It is trite law (see S. 8 (1) of the Law Reform Act) that the Civil Procedure Act and Rules do not apply to Judicial Review applications save for Order 53 Civil Procedure Rules. That was by the Court of Appeal's decision in **KUNSTE HOTEL LTD VS THE COMMISSIONER OF LANDS (1994 – 98) KLR 1**. The Court of Appeal held that Judicial

Review is a special jurisdiction provided under S.8 and 9 Law Reform Act and the Civil Procedure Act and Rules do not apply save for order 53 Civil Procedure Rules. The sections of the Civil Procedure Act and Rules cited by the Respondent do not apply. Under Order 53 Civil Procedure Rules and S.9 of the Law Reform Act there is no provision for setting aside of orders or striking out. The applicant could only have come under the inherent powers of the Court. The Notice Motion dated 15/11/07 is incompetent and the orders would not be granted in any event.

It is not in dispute that the Applicant was an employee of Maseno University till her termination on 1/2/07. Maseno University is a creation of the Maseno University Act, 2000 (M GK 6). Under S.3 (2) of the said Act, it is a body corporate capable of suing and being sued. The same Act sets up a Council under S 14 and the functions of the Council (2nd Respondent) are set out in S.13. The functions of the Council include, governance, control, administration of the university, administration of property, provision of Welfare of the Staff and Students of the University. Under S. 25(1) the Council is mandated to promulgate Rules and Regulations to deal with matters relating to employment and dismissal. S 18 (5) of the Act subjects the Staff of the University to the general authority of the Council and the Vice Chancellor under S.25 (1) (f).

The Council is charged with the duty of settlement of the terms and conditions of service including qualifications, appointment, dismissal, retirement of staff etc.

The Regulations promulgated under S. 25 (1) are called Statutes and Statute X provides for the functions of the Council. The Council has power to delegate its powers to Committees which consist of members of the Council. The Committee that deals with discipline is the Staff Disciplinary Committee. This is the Committee that purportedly terminated the Applicant's services (1st Respondent).

The impugned decision is contained in the letter dated 1/2/07. It emanates from the office of the Deputy Vice Chancellor. It reads

"***Ms Mary A. Kariaga***

Department of Botany and Horticulture

Maseno University

Dear Mrs Kariaga

RE: TERMINATION

Following your appearance before Staff Disciplinary Committee on 16/1/207 to answer charges of behaving in a scandalous manner contrary to section 25: 2: 1 (c) of your terms of service, you were found guilty of the offence.

The committee took with serious exception, your involvement in issuing directions through the mass media to students and parents which is a sole prerogative of the University senate. The committee also took note of the fact that you have consistently failed to discharge your duties in the department as is required. The committee therefore decided that your services with Maseno University be terminated with immediate effect as provided for under Article 25.2.1 of the terms of service for Academic Staff of the University. You will be paid 3 months salary in lieu of notice.

Please make arrangements to clear with the university as soon as possible to enable us process your benefits. In the meantime, take note that you can appeal on the decision within fourteen days from the date of this letter.

Yours sincerely

PROF. M.K. WALINGO

AG. DEPUTY VICE CHANCELLOR

ADMINISTRATION & FINANCE"

The Applicant has raised two issues over this termination. She contends that she was not given adequate notice of the charges she was to face and secondly that she was convicted of an offence she was not charged with.

The first letter that the Applicant received inviting her to appear before the Staff Disciplinary Committee was dated 1/12/06. She was supposed to appear before the Committee on 7/12/06 at 9.00 to answer the following charges

"***CHARGE:- Behaving in a scandalous manner contrary to section 25 of your terms and conditions of service***

Count 1 Organising a meeting of staff at Graduation Square, on University campus on 23rd and 24th October 2006, without permission from the University as is required by regulations.

(ii) Inciting lecturers to go on strike at meeting on various dates despite the fact that the strike had been declared illegal by the Minister for labour and Industrial court order restraining staff from going on strike being in force.

Yours sincerely

MATHEW O. ONYANGO

REGISTRAR – ADMINISTRATION"

This was however followed with the letter dated 10/1/2007 referring to the date of 1/12/06 and a further letter postponing the meeting of 7/12/07. The letter was inviting the Applicant to the Staff Disciplinary Committee on 16/1/07 at 9.00 a.m. and listed the charges against her. They were no longer 2 charges but they had increased to 6. The other 4 charges were

" (iii) That on or about 23rd October 2006 you participated in an alleged strike thus neglecting your duties, an act which is contrary to your terms of service.

(iv) That on or about 4th December 2006 you contravened the administration directions to keep away from the University while on suspension;

(v) That on or about 4th December 2002 you unlawfully entered into one of the classrooms within the University and interfered with a class that was going on;

(vi) Participating in activities that incite students and stakeholders to undermine management directions.

(vii) Please come along with all your original certificates.

Yours Sincerely

MATHEW ONYANGO

REGISTRAR ADMINSTRATION".

Earlier on, I have set out the offences which the Applicant was found guilty of;

"***your involvement in issuing directions through the mass media to students and parents which is a sole prerogative of the University Senate. The Committee also took note of the fact that you have constantly failed to discharge your duties in the department as is required"***

These two charges in the termination notice which the termination was founded upon were not included in the charges that the Applicant faced at the committee. She did not therefore have notice of the said charges and was not accorded a chance to correct or contradict any allegations to the offences she was convicted of. The University Statutes, Article XVII 4 (b) and (c) have incorporated the requirement for compliance with rules of natural justice. Article XVII 4 (b) and (c) read as follows,

"***(b) subject to the Act, these Statutes and Regulations, no person shall be removed from office by council or from membership of any body within the University by council, unless he/she shall be given a reasonable opportunity to be heard in person by the council,***

(c) Subject to the Act, these Statutes and Regulations, no person shall be removed from employment under this Statute unless he shall be given adequate notice of any charge made against him and reasonable opportunity to

(1) be heard in person

(2) call witness and

(3) examine witnesses called against him."

In the instant case I find that the Respondents breached their own Statutes in that the Respondent convicted the Applicant on a charge that she had not been given an opportunity to defend herself. Secondly this action by the Respondents amounts to procedural impropriety and the decision of the Respondent would not be allowed to stand. The said decision has also breached the rules of natural justice on the right to be heard and I would agree with the decision in **DAVID ONYANGO OLOO V AG CA 152/1986** where Nyarangi held:

"***Decisions which affect the rights of prisoners are subject to rules of natural justice like rights of people at liberty. A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated it matters. not that the same decision would have been arrived at."***

In **RIDGE V BALDWIN** (1964) AC Co. Hood Reidg Said,

"***..... a declaration decision given without reference to the principles of natural justice is void .... the body with the power cannot lawfully proceed to make a decision until it has offered the person affected a proper opportunity to state his case"***

In **HYPOLIT0 CASSIANO DE SOUZA V CHAIRMAN & MEMBERS TANGA TOWN COUNCIL 1961 EA 377**

The court set out the principles which an administrative body needs to take into account in decision making. The court set out some of the requirements as follows;

"***(1) If a statute prescribes, or statutory rules or regulations binding on domestic tribunal prescribe the procedure to be followed, the procedure must be observed.***

(2) If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made as will enable the tribunal fairly to determine the question at issue

(3) ----------

(4) The person accused must know the nature of the accusation made.

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

(6) ....."

In the instant case, the 1st Respondent breached its own Statutes respecting hearing of the disciplinary case. Firstly, the charges which the Applicant was found guilty of, were different from those she was charged with, and therefore she did not know the accusation that she was going to face before the Committee and lastly she was not given an opportunity to controvert or correct or contradict the allegations that she was found guilty of. The Respondents were in total breach of the rules of natural justice and the Statutes that govern discipline in the 1st Respondent's institution and their decision is unsustainable. I find that the failure to observe rules of natural justice and failure to observe the Respondent's own Statutes renders the decision of the Respondent void and subject to intervention by way of Judicial Review.

The Applicant also alleged that the letter dated 10/1/07 was left in her pigeon hole on 15/1/07 and her case came up for hearing on 16/1/07 she did not therefor receive sufficient notice to prepare for her case. It is one of the principles of natural justice that one be given adequate notice to prepare their case. The Respondents have denied that the Applicant ever raised that issue at the proceedings. I would agree with the Respondents that if no adequate notice was issued, that should have been raised at the earliest opportunity, at the Disciplinary proceeding and if the Applicant was denied time to prepare her case, then she would have cause to raise it at this stage. Having failed to raise that issue during the disciplinary proceedings this court considers it an afterthought to raise it at this stage.

The Applicant alleges that the Respondent breached her legitimate expectation that she would be treated fairly and be given an opportunity to be heard in accordance with the Rules of the University. Legitimate expectation is all about fairness. The body making a decision that will affect ones rights is under a duty to act fairly and that one will get his entitlement. In the celebrated case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR CIVIL SERVICE 1985 of AC 374.** Lord Diplock defined what legitimate expectation means.

He said;

"***It seems established that in certain cases where an Applicant has been promised that there will be for instance consultation before a decision is made, then a legitimate expectation will arise then that consultation will take place and if it does not, then there will be a breach of the duty to act fairly. If the decision maker unreasonably departs from the publicly stated policy or controversy, practice or reneges. on an earlier decision or undertaking thus confounding the Applicants legitimate expectation from the decision maker, then it can also be argued that there has been breach of the duty to act fairly".***

In the instant case, there is a laid down procedure on how the disciplinary proceedings would be conducted. One would be notified of the charges, given adequate notice, be heard and even allowed to call witnesses. The Applicant expected to be treated in that manner and failure to do that was unfair and that breached her legitimate expectation to fair treatment.

It was the Respondent's submission that pursuant to Statute XVII Rule 7, a member of the Academic Staff like the Applicant, if dissatisfied with the decision of the 1st Respondent, had a right of appeal to the council. That the Applicant did not appeal to the council but appealed to the Vice Chancellor who had no jurisdiction to entertain the appeal and that is why it was dismissed for want of jurisdiction. I have seen the two letters of appeal by the Applicant dated 11/1/07 and 8/2/07. The one of 11/1/07 is addressed to the secretary Maseno University Council and titled '**Appeal against suspension and summary dismissal'.** The 2nd letter of 8/2/07 is addressed to the Vice Chancellor Maseno University. Indeed Statute XVII Article 7 provide that a member of staff may appeal against the decision of the Disciplinary

Committee and if it is on Academic Staff, they will appeal to the Council but if it is middle level staff, to the Vice Chancellor. There is no doubt that the letter of 11/1/07 appealing against the decision to dismiss the Applicant was addressed to the secretary of the Council. That is in accordance with Statute XVII Article 7. By the letter dated 8/3/07, a letter was addressed to the Applicant making reference to the letter of 8/2/07, and it stated that the appeal was considered and found to have no grounds and was dismissed. The Vice Chancellor never indicated that the appeal was incompetent nor did he deny having jurisdiction to hear it or that it was directed at the wrong person. The letter specifically addressed the Applicant and found there were no grounds. In any event, under S. 11 (2) (a) the Vice Chancellor is the secretary to the Cuncil. So both the letters that were written by the Applicant were directed at him. Under S. 11 (2) (d) the Vice Chancellor is responsible to the Council for the general conduct and discipline of the students and staff of the University. This provision gives the Vice Chancellor the last say in decisions of discipline. He would still have a say in the appeal. The appeal was made to the proper forum and the same was dismissed and it cannot be alleged that the Applicant had not exhausted the avenues of redress provided under the Act and Statutes. There therefore exists the decision of the Council dated 1/2/07 that that can be subject to quashing.

No doubt the relationship between the Applicant and 1st Respondent was one of master and servant. The letter of termination indicated that the Applicant's services were terminated under S.25:2:1 (c) of the terms of service. I find no such provision in the terms of service. However, I find that it is clause 26.2.1 which provides that the University can terminate an appointment by giving notice in accordance with clause 27 by paying the member of staff basic salary in lieu of notice. S. 27 provides the period of notice for staff like the Applicant to be 3 months. Para.26.2. 1 (c) provides that one may be dismissed for misconduct that is considered scandalous or disgraceful. However, the provision does not seem to tally with the reasons contained in the Applicants letter of termination dated 1/2/07. I have already set out that letter. Statute XVII Article 6 does allow the council to invoke the provisions of the Employment Act (Cap. 226) Laws of Kenya, (now repealed). Under the Employment Act, S.17 provides for summary dismissal if an employee misconducts themselves. In this case however, before the Respondents could invoke the Employment Act, they would have to comply with Rules of natural justice provided under the Statutes. But the Respondent having put into operation the Statutes, they had to abide by them. The role of the Applicant in the University was not an insignificant one. She was a lecturer. Her dismissal would have an impact on many people. For her to have been dismissed summarily there had to be very good reasons which had to be demonstrated by the Respondent. The Respondent cannot claim to have proceeded under the Employment Act and at the same time adopt the procedure under the Statutes.

As noted above, the relationship between the Applicant and Respondent is master servant and Judicial Review being a public remedy would not apply see **REP. V EAST BERKSHIRE Exparte Rule WALSH (1985) QB 152** and **CONSOLATA KIHARA & OTHERS V DIRECTOR TRYPANO SOMIASIS RESEARCH INSTITUTE (2003) KLR 232**. In the ordinary master and servant disputes, the law of contract would apply. However where a specific procedure is provided in a Statute for removal of an employee, then that procedure has to be followed. In **ERIC MAKOKHA V LAWRENCE SAGINI CA 20/1994** the Court of Appeal observed that where an employee's employment is statutorily underpinned then he can not be removed unless that procedure is observed. There is procedure for discipline of staff under the Regulations made pursuant to sec. 25 of the Maseno University Act and specifically Statute XVIII. That procedure has to be followed. It was not put in place to decorate the books but to ensure fairness in disciplinary matters. Judicial Review is invoked to ensure fairness, that a party who comes before a public body for determination of his rights is treated fairly. The Respondents did not act fairly in the instant case for reasons given above.

Can these orders sought be?

An order of certiorari issues to quash a decree made in excess or without jurisdiction or for breach of rules of natural justice. The decision of both the Staff Disciplinary Committee and the Council dated 1/2/07 and that dated 8/2/07 respectively, are made in excess of the Respondents jurisdiction, in breach of rules of natural justice and must be quashed by an order of certiorari. In Judicial Review the Court can not grant any other orders than those specified in the statement and Notice of Motion and the Court will only grant prayers 1 and 2 as prayed.

Costs to the Applicant.

It is so ordered.

Dated and delivered at Nairobi this 5th day of August, 2009.

R.P.V. WENDOH

JUDGE

Delivered in the presence of:

Mr. Oluoch for Applicant

Ms Amondi holding brief for Mr. Wasuna Respondent

Muturi: court clerk