**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI( NAIROBI LAW COURTS)**

**Miscellaneous Application 1029 of 2007**

**WINROSE GATHIGIA……APPLICANT**

**Versus**

**KENYATTA UNIVERSITY……RESPONDENT**

**JUDGMENT**

On 14th September 2007, Winrose Gathigia Mbuthia filed this petition pursuant to S.84(1) of the Constitution alleging contravention of her fundamental rights under Sections 71, 72, 73, 7, 77 (9), 80 and 82 of the Constitution. She seeks 28 declarations and 9 orders against Kenyatta University. The orders and declarations can be summed as follows;

i. declarations and orders sought to nullify the Respondent's actions and granting the petitioner orders to enable her resume her studies at the Respondent Institution following the Respondent barring her from sitting examinations and subsequent discontinuation of her studies as specifically prayed under Nos 9 (7), (9) and (11)

ii. compensation for the controvention of her rights under Sections 71, 72, 77, 80 and 82 of the Constitution & specified under prayers 2 and (hh);

iii. Costs to be provided for.

It was agreed by the parties that petitions Nos. 1030 to 1033/07 for Winrose Gathigia, Beatrice Wangari, Roselydia Mutua, Margaret Weru and Jane Wanjiru raise identical questions of fact and law and this one whose Gathigia will be used as a test suit. The Counsel for the Petitioners, Dr. Kuria introduced the documents upon which the petitions were premised as the affidavit of Winrose dated 14th September2007, a further affidavit dated 29th October 2007 and further affidavits of Beatrice and Roselydia dated 29th October 2007. He also filed submissions on 9th November 2007 and a further bundle on 30th November 2007. Counsel indicated that generally, they seek 7 reliefs of certiorari to quash the decision to discontinue the petitioner, prohibition to interfere with them, a mandatory injunction, prohibitory injunctions, and an alternative remedy of mandamus to compel the Respondent to reinstate the petitioner, damages and costs of this petition.

The facts underlying this petition are contained in a 101 paragraphed affidavit of the Petitioner. In summary, the Petitioner's case is this; the Petitioner herein enrolled for a degree programme in 2003 at the Respondent Institution having been a P1 teacher since 1990. Upon admission she was issued with Rules and Regulations that govern the degree course. The course was to cost Kshs.70,000/= per year. The course includeded working people who would be studying at their own convenience, and the candidates would send their assignments to their lecturer through a regional co-ordinator. With her on the

programme were inter alia, Rosalind Kihara, Roselydia Mutua, Margaret W. Weru, Margaret Karara, Beatrice Kuria, Naomi Ngunjiri and they had a study group which met in Nyeri. The 1st academic year ended in December 2003. The 2nd academic year started July 2004 and lectures were now held at Kenyatta University not at Kimathi Institute of Science and Technology. In May 2005, while in 2nd year, their lecturer, Ogogo Collins gave them a take away assignment to be typed and handed in May 2005. After discussions in her group, she did her assignment and took it to Serena Stationers & Printers, a computer bureau owned by one Mr. Ngatia, for typing and typesetting and was asked to proof read it, which she did. She learnt from her colleagues Jane Kimotho, Rosalind Kihara, Roselydia Mutua, Margaret Weru, Margaret Karara and Beatrice Kuria that they handed in their assignments for typing and proof reading at the same place. She collected her assignment when it was ready and bound it and handed it in for marking.

It was not until July 2006 while in her third year that after she had sat one paper at the end of her second semester that the invigilator informed her and her friends that the Respondent's senate had instructed her to bar the Petitioner and her above named friends from sitting further examinations, on account of alleged examination irregularity with respect to the ECT 300 assignment. That Dr. Collins Ogogo had never informed her of the irregularity and that the bar to sit examinations was in breach of rules of natural justice because she had not been given a chance to be heard on the alleged irregularity. They were informed by Dr. Mwaniki that they had copied their work from one source which was irregular. She went to ask Mr. Ngatia who had typed her work what had happened and he wrote a letter dated 18th July 2006 explaining what might have happened, that there may have been a mix up – (WGM 10)

The Petitioner was summoned by the Respondent on 20th July 2006 to attend on 3rd August 2006 to answer charges of examination irregularity in respect of ECT 300. (WGN 11). The said letter did not contain particulars of the said irregularity and was therefore in breach of rules of natural justice that she should be given adequate notice of the charges she was to face. She appeared before the Students Disciplinary Committee which was chaired by the Deputy Vice Chancellor Mr. Otiende instead of the Vice Chancellor and there was also no student representative in the Committee. All the 5 of them who had been barred were heard on the same day and thereafter she confronted Mr. Ngatia who confirmed having made a mistake in printing the article for all of them and he swore an affidavit to that effect (WGN 12) dated 21st September 2006.

In September 2006, she received a letter dated 11th September 2006 (WGN 13) indicating that she had been found guilty of examination irregularity. According to her, that said decision was made in excess of jurisdiction and contrary to rules of natural justice. She Appealed to the Vice Chancellor in light of Mr. Ngatia's admission (WGN 14) but in January 2007, the appeal was rejected by the Chancellor. She appealed again on 26th February 2007 to the Vice Chancellor, WGN 16 while her colleagues lodged their appeals on 5th April 2007 (WG 17) but the same were rejected on 19th July 2007. It is the Petitioner's submission that the rule governing appeals contravenes rights to a fair hearing under S. 77 (9) of the Constitution in that the appeal was heard by the same Vice Chancellor who chaired the Disciplinary proceedings. That the said decision is capricious and unreasonable in refusing to accept the explanation by Mr. Ngatia. As a result, she has not fulfilled her desire to complete university education and earn a salary of a graduate. She has also suffered loss due to the loans she had taken to finance her education.

Dr. Gabriel Katana, the Academic Registrar swore an affidavit dated 19th October 2007, opposing the Petition and the Chamber Summons. The Respondent also filed skeleton arguments on 3rd October 2007. In his affidavit, Mr. Katana agreed with the Petitioners version of the events upto the time the petitioners handed in their assignments. Dr.Katana deposed that in the course of marking the assignments, it was noted that they were similar save for the cover pages and that that amounted to an examination irregularity under the University Statutes, Regulation 17(2) (d). Paragraph 8 of the University Statutes XXI on University Examination Regulations and KU/2 University Regulations No. 4 all provide for expulsion or discontinuation if the Regulations are breached. That pending further investigations, the Senate agreed to disbar the Petitioners. That Rosalind and Winrose were informed of the decision of the Senate in January 2006 by Dr. Mwaniki after sitting the 1st examination. That the

delay in informing the Petitioners was due to the length of time taken to mark the examination with thoroughness and also taking into account the number of students. That they were informed of the cases against them on 7th July 2006 which also invited them to appear before the Disciplinary Committee on 3rd and 4th August 2006. G.K. 1 (a-e). That the said committee was properly constituted in terms of Section 2(f) & 14(2) of the Kenyatta university Act for purposes of investigating the allegations. He exhibited the minutes of the said sessions as GK 2, and dated 3rd and 4th August 2006. That the Vice Chancellor was represented by the Deputy Vice Chancellor pursuant to Section (7) (1) of the Act and so were the representatives present. That during the meetings, Rosalind was exonerated after it was established that the assignment was her original production. On 11th September 2006, the Committee recommended that the matter be discontinued after due process was followed. It is the Respondent's contention that their decision is sound, in accordance with the contracts that the petitioners signed upon joining the institution and that they have acted without bias nor malice which is evidenced by exoneration of Rosalind Kihara. That the letters addressed to the petitioner on 20th October, 2006 informed them of the charges they were to face to enable them defend themselves. That the Petitioners were given an opportunity to be heard and even filed 2 appeals but in exercise of the discretion of the Vice Chancellor, the Respondent found the explanations inadequate and the Disciplinary Committee complied with all the Regulations and Rules of natural justice and the petitioners are not entitled to any compensation.

In his submissions, Dr. Kuria made reference several authorities including **LEMPAA VINCENT & OTHERS V. KENYATTA UNIVERSITY NRB. HCC 1118/03, PETER WAWERU V. REPUBLIC MISC. APPL. 118/04, P.M. BAGWATI, DOMESTIC APPLICATION OF HUMAN RIGHTS IN DEVELOPING HUMAN RIGHTS JURISDICTION; ARTHUR KAINDI NZIOKI V. KENTATTA UNIVERSITY 316/07; The Kenyatta University Act and Statutes HYPOLITO CASSIANI DE SOUZA V. CHAIRMAN MEMBERS OF TANGA TOWN COUNCIL 1961 E.A. 77**.

I have now considered all the affidavits filed herein, the counsel's submissions and all the case law that has been cited. The questions this court will endeavour to answer are as follows:

1. Whether the applicant was notified of the charges against her before she was debarred from sitting her examination;

2 whether the petitioner was given adequate notice of the charges she was to face before the disciplinary committee;

3. whether the Disciplinary Committee was properly constituted;

4.whether the petitioner was awarded a fair hearing in light of failure by the Respondent to avail adequate particulars of the charges and call witnesses;

5 whether the Vice Chancellor was a Judge in his own course by sitting on appeal;

6. whether the petitioner's rights under Sections 71, 72, 73, 74, 77(a) and 82 of the Constitution were contravened.

I would at this stage adopt the observations made in the **DE SOUZA case (supra)** where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P. 386 – the court said;

"**1. if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that 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 such as will enable the tribunal fairly to determine the question at issue;**

**3. In such a case the tribunal, which should be properly constituted, must do its best to act justly**

**and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…….;**

**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 and to make any statement they may decide to bring forward;**

**6. The tribunal should see to it that matter which has come into existence for the purpose of the 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 an opportunity of commenting on it."**

This court will consider each of the above principles to establish whether or not the Respondent which performed a quasi – judicial function when they purported to hear and determine the petitioners cases relating to examination irregularity and the decision to expel them from the Respondent institution, abided by the above rules or guidelines.

Before I do that, Counsel purported to rely on this court's decision in the Arthur Nzioki's case but the facts of that case were quite different in that the University totally flouted the rules of procedure, had no minutes of the proceedings and the court had nothing to look at.

The 1st question is whether the Respondent notified the petitioners of the examination irregularities. Winrose deponed at paragraph 52 of her affidavit that after sitting her 1st paper, the invigilator Dr. Mwaniki informed her and her colleagues that she had instructions from the Senate to bar Winrose from sitting the examination for alleged examination irregularity with respect to ECT 300 assignment. Mr. Katana in his Replying Affidavit (para 9) confirmed that it is Dr. Mwaniki who informed the petitioner of the Senate's decision. There is no evidence to the effect that the applicants were ever heard before the decision to bar them was made. It is however clear that the decision communicated by Dr. Mwaniki was not a final decision it that must have paved way for the letter of 20th July 2006 from Dr. Katana. That letter required the petitioner to appear before the Students' Disciplinary Committee on 3rd August 2006 at 9.00a.m. to answer charges of examination irregularity in the Unit ECT 300. Educational Technology on 28th may, 2005. Winrose confirmed that she received the same information from Dr. Mwaniki – that the debarring related to the irregularity in the ECT 300 Examination. The letter of 20th July 2006 followed the debarring, 3 days later. I would equate the notice by Dr. Mwaniki as suspension of the applicants from college to allow for investigations pending a proper hearing of the petitioner's case. At that stage, I would not find that there was any breach of rules of natural justice because after 3 days the notice was followed by a notice giving the petitioner time to prepare their defence against the allegations levelled against them. In my considered view, I find that the notice given to the petitioner by Dr. Mwaniki on 17th July 2006 was immediately followed up by the letter of 20th July 2006 notifying the petitioner of the alleged irregularity and when they would be heard and I find no breach of rules of natural justice at that stage.

Was the Students Disciplinary Committee properly constituted? The petitioner alleges that there was no student representative as required by the Rules and that the committee was chaired by a Deputy Vice Chancellor yet the law requires that it should be chaired by he vice Chancellor. The petitioner herein and the Respondent exhibited the letter of acceptance of the vacancy at the Respondent's Institution which contains the University Rules and Regulations made pursuant to Kenyatta University Act 1985. Paragraph 4 thereof provides for Disciplinary Procedures. Paragraph 4 (ii) provides for rules governing breach of Examination Regulations and lists down what constitutes such an offence It reads as follows;

"**what constitutes an examination offence or irregularity;**

· **Trying to copy from un-authored material or other candidates in the examination room.**

· **Passing material or written communication to other**

**candidates in the examination room.**

· **Being in possession of used or unused examination answer books outside the examination room.**

· **Being in possession of un-authorized material in the examination room.**

· **Availing written material for use by other candidates.**

· **Copying from other candidates.**

· **Copying from un authorized material carried by the candidates himself/herself.**

· **Returning of examination answer books with written answers after the examination.**

**Involvement in any examination irregularities will automatically lead to expulsion from the University."**

The membership of the Senate is provided for under Section 14(1) K of the Kenyatta university Act as read with Statute XV (i). At Paragraph (2) it provides that under Section 14 (1) (4) of the Act, the membership of the Senate shall include the Dean of Students and such other persons as the Senate may determine from time to time. Section 14 of the Act which creates the Senate comprises many members who are listed there under from Paragraph 1 (G-J) and, under Section 14 (I) (K), other members may be provided for. Under section XV, the duties of the Senate are inter alia, the discipline of Students of the University. Other powers are found in paragraph (3) of Schedule XV. The Senate under statute (3) appoints committees through which it performs its functions. Statute XXI Part 8 provides that if there is any irregularity in the examination, it will be dealt with by the Statutes and the Regulations governing Discipline. I have already set out the above Regulations. It is admitted that the Vice Chancellor did not chair the committee trying the applicant but the Deputy Vice Chair did. The minutes of the meeting of 4th August 2006 confirm that the chair was Prof. J.E. Otiende the Ag. Deputy Vice Chancellor. It was deponed by Mr. Katana that Section 17(1) allows the Deputy Vice Chancellor to chair the meeting if the Vice Chancellor is incapacitated. Dr. Katana did not disclose the nature of the Vice Chancellor's incapacity. It was submitted that the Respondent did not discharge the burden to prove that the Vice Chancellor was incapacitated because it is not shown that she was sick, or was outside the country. Section 17(1) of the Act envisages a situation where the Vice Chancellor will not be present or even the deputy and provides for who will take over in that event. Though it is not disclosed how the Vice chancellor was incapacitated so as not to chair the meeting, I find that the Ag. Deputy Vice Chancellor is a person qualified to chair the said proceedings and there would be no miscarriage of justice in having him chair the meeting and there is no evidence that the Petitioner suffered any prejudice as a result. The meeting was properly chaired.

S. 14 also provides that the Senate shall include two members elected by the students organization. I have seen the list of those in attendance and the names of Mr. John Kabuchia and Ms Manyanu Mugo appear as representations of KUSA I believe they are representatives of the students body. In my considered view the committee was properly constituted and I find the Applicants allegation unfounded.

The Petitioner also challenges the inclusion of the Vice Chancellor in the committee to sit on appeal of the Petitioner's case having been a judge of first instance. As earlier noted S. 14 provides for the composition of the Senate and the chairman of the said Senate is the Vice Chancellor. The letter of 11th September 2006 allowed an appeal to be made to the Vice Chancellor but the appeal was dismissed. A second appeal was made on 5th April 2007 but the same was rejected on 19th July 2007. The Petitioner has faulted the decision of the Vice chancellor who is supposed to chair the Students Disciplinary Committee for sitting on appeal. I do agree that the Vice Chancellor cannot be a judge at first instance

and also on appeal. However, in the instant case the Vice Chancellor did not take part in the Disciplinary Committee proceedings and his sitting on appeal in the matter cannot be said to be prejudicial to the Petitioners case in any way. Had the Vice Chancellor sat on the 1st Committee then he would have lacked capacity to sit on appeal.

Ordinarily I would agree that the provision that the Vice Chancellor sits both at 1st instance on the case and on appeal would be contrary to rules of natural justice and unconstitutional The regulation authorizing the Vice Chancellor to sit as a judge in the 1st instance and on appeal should be relooked at. In this case however I find that rules of natural justice were not flouted by the Vice Chancellor sitting on appeal.

It is the Petitioners contention that the letter of 20th July 2006 (WGM 11) from Dr. Katana, the Registrar (Academics) did not adequately state the particulars of the alleged examination irregularity committed by the Petitioner. The Letter reads;

"**Winrose G. Mbugua**

**P.O. Box 2866-0100**

**NYERI**

**Dear Ms. Mbuthia**

**RE: STUDENTS DISCIPLINARY CASE**

**This is to inform you that you are required to appear before the students Disciplinary Committee on Sunday, 3rd August 2006 at 9.00 a.m. in the University Boardroom, to answer charges of examination irregularity in the Unit ECT 300: Education Technology on 28th May 2005.**

**Should you fail to appear, disciplinary action will be taken against you without further reference to you**

**Thank you**

**DR. G. KATANA**

**REGISTRAR (ACADEMICS)**

**Cc**

**Director, Students Affairs**

**Director, CASB."**

A reading of the above letter does not disclose the nature of the charges that the Petitioner was going to meet at the Committee on 3rd August 2006. It was very general. All that the Petitioner would have known is that she violated Unit ECT 300, Education Technology but not how she violated it.

The minutes of 4th August 2006 which relate to the Applicant are at No. 2.2. It was stated that;

**(ii)The committee presented samples of other similar assignment to the Petitioner for her perusal and noticed the assignment was the same.**

**(iii) That she copied an assignment, word for word and presented it purporting it to be hers on 28th**

**May 2005"**

**She was found guilty of "copying from other candidate's answers" under R. 17 (d)."**

When the Petitioner was summoned to attend the Committee the Respondent was aware that they had other similar assignments they were going to put to the Petitioner on allegation of copying. She should have been informed in the letter of 20th July 2006 that the allegation against her was that she copied the paper from others and that is why she had been suspended from the institution and why the summons. I find that the letter of 20th June 2006 did not contain sufficient particulars of the offence that the Petitioner was to face to enable the petitioner mount her defence. As earlier noted in the DE SOUZA case (supra), it is a requirement of rules of natural justice that the person accused must have known the nature of the accusation in order for her to prepare their defence. In **ONYANGO V AG (1987) KLR P 13** where the Commissioner of Prisons, purported to deny a prisoner his right to remission, and the decision was challenged, the court held,

"**In deciding to deprive a prisoner of his remission, natural justice would require that the prisoner should be informed of the alleged disciplinary offence, giving him sufficient time to prepare his case……..**"

In the instant case the letter of 20th June 2006 did not disclose the nature of the accusation nor did Dr. Mwaniki tell the petitioner the exact charges the Petitioner would meet.

The Petitioner in 1030/07 Beatrice Wangari Keya also received the letter dated 20th July 2006 from Dr. Katana. The letter read thus:-

"…..**This is to inform you that you are required to appear before the Senate's Disciplinary Committee on Thursday, 3rd August 2006 at 9.00 a.m. in University Boardroom to answer charges of examination irregularity in the unit EAP 201. Curriculum Development on 29th November 2004.**

**Should you fail to appear, disciplinary action will be taken against you without any further reference to you.**

**Thank you**

**Dr. Katana**

However when Beatrice appeared before the committee (See notes of 4/6/06) she was accused of examination irregularity to the Unit ECT 300: Education Technology. That she copied assignment word for word and presented it as her own on 28th May 2005. She was found guilty of the offence of "**copying from other candidate's answers."**

It is apparent that the contents of the notice dated 20th October 2006 were at total variance with the charge and allegations levelled against Beatrice. Apart from the allegation in the letter of 20th July 2006 being vague and not specifying the offence she would be facing the same was not consistent with the charge. The result is that Beatrice could not have been able to satisfactorily defend herself as she was not prepared for the charges read to her by the committee. The charges must be clear and consistent with the evidence. I find that rules of natural justice that the applicant would be in good time, notified of the charges she faced were flouted.

The Applicant has alleged breach of other constitutional rights under S.71, 72, 73, 74, 77 (9) and 82 of the Constitution. The alleged violation are as here under:-

S.71 - Protection of right to life.

S.72 - Protection of right to personal liberty.

S.73 - protection from slavery and forced labour.

S.74 - protection from inhuman treatment.

S.77 - secure protection of the law and fair hearing

S.80 - Protection of freedom of Assembly and Association

S.82 - Protection from discrimination

S.71 - provides that no person shall be deprived of his life entirely save in execution of the sentence in respect of a criminal offence. It is the Applicants contention that right to life includes right to fulfillment through University education and enhancement of one's earning capacity which would be achieved the by attaining a University degree. In my view, the fact that the Petitioner was discontinued from the University Education does not mean she has been denied her right to life. She will still continue with employment as a teacher. If she had been denied a chance to go back to work, then it would mean that the Petitioner would have been deprived of her right to a good life or livelihood. There is some inconvenience and loss suffered by the Applicants but the right to life has not been taken away. I find no breach committed.

S.72 provides for protection of the individual's liberty. I find nothing alluded to in the proceedings to suggest that the petitioner's liberty was interfered with in any way and that Section has not been breached.

S.73 provides that nobody should be held in slavery or forced labour. There is no suggestion any where in these pleadings that the Applicant was restrained or held in servitude by the Respondent. The Petitioner is free to move about or do whatever she wishes.

S. 74 offers protection against inhuman treatment. The fact that the Petitioner was subject to expulsion in my view does not amount to inhuman treatment. The expulsion was a consequence of some penal action being taken after alleged breach of Regulation.

S. 77 provides for hearing both before a criminal and civil court – S.77(1) and 77 (9) respectively. S.77(1) reads:-

"**If a person is charged with a criminal offence then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**

**(2) Every person who is charged with a criminal offence**

**a) shall be presumed to be innocent until he is proved or has pleaded guilty;**

**b) shall be informed as soon as reasonably practicable in a language that he understands and in detail, of the nature of the offence charged;**

**(c) shall be given adequate time and facilities for the preparation of his defence as shall be permitted to defend himself before the court in person or by a legal representative of his own choice;**

**(d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the evidence and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;**

**(e) shall be permitted to have without payment the assistance of an interpreter if he cannot**

**understand the language used at the trial of the charge.**

**and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.**

**(3)** …….

**(4)**

**(5)**

**(6)**

**(7)**

**(8)**

**(9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time**

**10 …… 15"**

It is the applicant's contention that the Respondent's right to a fair hearing was breached because she was not given prior notice before being disbarred because the notice of 20th July 2006 did not contain adequate particulars to enable the applicant know what case she was to face. The failure by the accusers to reveal to the applicant the evidence they had against her before the hearing at the Committee was a breach of her right to a fair hearing.

I do agree and find that failure to disclose the full particulars of the charges that the applicant was to face was a breach of her right to a fair hearing. The respondent was adopting a method of ambushing the Respondent with charges and she had no time to prepare to defend herself. Section 77 (9) was breached.

Section 80(1) of the Constitution provides that except with his own consent, no person shall be included in the enjoyment of his freedom of assembly and association, that is to say his right to assemble freely and associate with other persons, and in particular, to form and belong to trade unions, or other associations for the protection of his interests. The Petitioner has not demonstrated how her rights under the said section were violated and the court finds no evidence of breach under the above section. She was not barred from associating with any particular group of people or joining trade unions.

Section 82 provides as follows:

"**S. 82 (1) subject to subsection (4),(4) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.**

**(2) Subject to subsection, (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.**

**(3) n this section, the expression "discriminatory means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence, or other local connexions, political opinions, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such**

**description are not made subject or are accorded privileges or advantages, which are not accorded persons of another such description."**

The Respondent has not demonstrated the nature of discrimination she has suffered at the hands of the Respondent. She has not categorized the nature of the discrimination. Was it on account of sex, tribe, political opinions? She needed to specifically plead to that and no evidence of breach under that section has been alluded to and that claim must fail.

Is the Petitioner entitled to compensation? The Petitioner's Counsel suggested an award of Shs. 3,401,916/= to enable her to resume and complete her studies. The counsel urged that this court do make a global award as this court did in **VINCENT LEMPAA's case (supra**) and the case of **ORONY (supra)** where an award for damages was made for breach of the right to protection from inhuman and degrading treatment. Before the court can consider an award, I have found that of all the allegations made against the Respondents the Respondent, substantially complied with due process save for failure to notify the Petitioner of the case she faced and hence breach of the rules of natural justice and breach of Section 77 (9) of the Constitution in respect of a fair hearing. I further note that the Petitioner conceded to the fact that Mr. Ngatia who typed and typeset her assignment scripts is the one who made a mix up and that he swore an affidavit to that effect but it was rejected. It means that the Respondent did not believe the said Mr. Ngatia. He wrote the leter dated 18th July 2006 and affidavit explaining what might have happened. What this amounts to is that there was truth in the Respondent's contention that the assignments were similar and that could have only been arrived at by copying. Due to the fact that there was some fault or anomaly in the Applicant's scripts and the respondents decision is only faulted because of some lapse in procedure this court would be reluctant to make any award in damages. Besides, the Respondent is a learning institution which is run by funds derived from students' fees and may be grants. It would be endangering the institution if the court were to consider awarding of damages in such situation unless it was found that the Respondent totally breached their Rules and Regulations. In **Vincent Lampaa's case** the matter was assigned to this court by the Hon. The Chief Justice for purposes of assessing damages only. This court did not deal with the issue of liability. Besides in that case the breach did not relate to breach of the institution's Regulation but political opinion.

Section 84 (2) (b) of the Constitution gives this court a wide discretion "……**.. to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enjoyment of any of the provision of Sections 70 and 83 (inclusive)."** Since this petition is brought under that section, the court can grant any order including declarations and Judicial Review orders. In **Misc. 118/04 PETER WAWERU V REPUBLIC** Nyamu Ibrahim and Emukule JJJ granted orders of certiorari, mandamus, prohibition in a constitutional application. The court cannot however grant constitutional orders in a purely Judicial Review application.

In the result, this court will therefore find and declare the decisions of the Respondent dated 17th July 2006, 20th July 2006 and 11th September 2006 to be null and void for breaching rules of natural justice as considered above and also in breach of Section 77 (9) of the Constitution as relates to fair hearing; and grants declarations (g) (m) and (r) and prayers cc (i) is granted that an order of certiorari do hereby issue quashing the decision of the Respondent dated 11th September 2006, that of 19th March 2007 and 19th July 2007 upholding the committee's decision ((cc (ii) and (iii)); prayer (ee) is also granted and An order of mandamus do issue directed against the Respondent to hear the Petitioner's case in accordance with the law. An order of prohibition cannot issue because the decisions have already been acted upon. Prayer (gg) cannot issue because the Respondent has a duty under the Act and Regulations to discipline students and that statutory right cannot be taken away. The rest of the prayers must fail.

The Petitioner succeeds in part and the court orders that the Respondent pays costs to the Petitioner. As agreed, Petitions No.1030/07, Beatrice Wangari Kuria v Kenyatta University, Misc 1031/07, Roselydia K. Mutua vs Kenyatta University, Misc 1032/07, Margret Wathika Weru v Kenyatta University and Misc 1033/07, Jane Wanjiru Kimotho v Kenyatta University are similar to the present and these orders apply thereto. Orders accordingly.

Dated and delivered this 5th day of September 2008

R.P. V WENDOH

JUDGE