



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wafula & 7 others v Rongo University (Judicial Review E001 of 2024)  
[2024] KEHC 16614 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16614 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
JUDICIAL REVIEW E001 OF 2024  
RPV WENDOH, J  
DECEMBER 16, 2024**

**BETWEEN**

**EDWIN SIMIYU WAFULA & 7 OTHERS & 7 OTHERS ..... APPLICANT**

**AND**

**RONGO UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. Pursuant to leave granted by Judge Kiarie to the applicants to file a Judicial Review application dated 18/1/2024, the applicants filed the Notice of Motion dated 29/1/2024 seeking the following orders; –
  1. An order of certiorari to remove into the High Court for the purpose of its being quashed, the decision made by the Examination irregularities committee of the Senate, Rongo University, made on 6<sup>th</sup> September, 2023 that the examination results in various units complained of be cancelled and that the applicants be suspended for ONE (1) academic year effective from August 2023;
  2. An order of mandamus directed to the Rongo University to admit the applicants to the ongoing academic programme;
  3. An order of prohibition prohibiting the suspension of the applicants;
  4. An injunction restraining Rongo University from suspending the applicants;
  5. A declaration that the decision/verdict of the Examination irregularities Committee of the Senate Rongo University made on 6<sup>th</sup> September was and is invalid and void and of no effect.
  6. A declaration that the Rongo University Examination Irregularities Committee is in breach of its own regulations, particularly on duration of dealing with exam irregularities. The University had the duty under Clause 7.3 of its Common Rules and Regulations for University Examinations that provides that; all exam irregularity cases shall be handled within a period



of one (1) month from receipt of the examination irregularity report. the university processed the applicants' case for a period of 4-5 months from the date the alleged irregularities report was made;

7. A declaration that the Rongo University Examination Irregularities Committee failed to give the Applicants adequate notice thereby violating their right to fair hearing and natural justice. The Respondent summoned the Applicants vide letters dated 10<sup>th</sup> August 2023, requiring them to appear before the Examination irregularities Committee on 17<sup>th</sup> August 2023
  8. A declaration that the Rongo University Examination Irregularities Committee failed to give the Applicants adequate chance to respond to the allegations levelled against them.
2. The application was supported by the undated statutory statement and a verifying affidavit dated 14/1/2024. The grounds upon which the application was premised are contained in the statutory statement and are to the effect that applicants are students at Rongo University (the respondent), that the Respondent accused the applicants of violating the Rongo University examinations Rules on diverse dates in April 2023; that through the Respondent's Examination Irregularities Committee, of the Senate, they summoned the applicants vide the letters dated 10/8/2023 to appear before the Committee on 17/8/2023 to answer to the said allegations; that vide the letters dated 6/9/2023, the Respondent suspended the applicants on account of breach of the aforesaid examination Rules. The committee had found that.
- a. "The examination results in the courses complained of be cancelled.
  - b. The applicants be suspended for one (1) academic year from August 2023."
3. According to the applicants, the verdict was passed in total disregard of the Respondents common Rules and Regulations for University Examinations clause 7.3 which reads. "All examination irregularity cases shall be handled within a period of one month from the receipt of examination irregularity report"; that the Respondent had no basis for suspending the applicants because they had violated their own regulations and demand notices issued to the Respondents on 16<sup>th</sup> and 8<sup>th</sup> November 2023 were ignored by the Respondents; that the unprocedural suspension of the applicants for one (1) academic year will cause irreparable damage to the applicants who had paid fees for the whole academic year.
4. In the Statutory statement, the applicants sought nine (9) reliefs including, order of certiorari, mandamus, prohibition, declarations, damages but on 18/1/2024 Judge, Kiarie granted leave to the applicants to commence these Judicial Review proceedings for only prayer 1 in which the applicants sought leave to bring Judicial Review proceedings for an order of certiorari to bring into the High Court for the purposes of being quashed, the decision made by the Examination Regulations Committee of the Senate Rongo University on 6/9/2023; that the examination results in various units complained of be cancelled and that the applicants be suspended for one (1) academic year effective August 2023,
5. The applicants filed the substantive Notice of Motion on 29/1/2024 in which the Counsel reproduced all the prayers that had been sought in the chamber summons. The 1<sup>st</sup> applicant Edwin Simiyu Nyongesa swore an affidavit dated 29/1/2024 which accompanied the notice of motion and a Replying Affidavit to the affidavit filed by the respondent dated, 28/3/2024.
6. In opposing the Notice of Motion, Prof. Samuel Gudu, the Vice Chancellor of the Respondent, filed the affidavit dated 11/3/2024 in which he denied all allegations and put the applicant on strict proof. He deponed that the decision of the Examination irregularities committee of Senate to suspend



the applicants was anchored on Rule 7.4 of the Respondents Common Rules and Regulations for University Examinations (PSG.1); that the suspension was to run for one year from 6<sup>th</sup> September 2023 and was to end on 5/4/2024, hence the readmission of the Respondents into the institution at the time was not going to help them as they could not fit in the programme; that as per the Almanac, the applicants will all sit for special exams in August 2024 as per the University's Academic year (PSG3) and that the Respondent has no intention to suspend the applicants because of filing this Judicial Review application; that the prayer to invalidate the Respondents decision by the examination committee is time barred and ill-informed; that processing of the examination irregularities did not breach any Rules because the applicants were on four (4) months long holiday and it was impractical to bring them back to the institution for disciplinary hearing.

7. As regards school fees; the Chancellor deponed that the applicants will be provided with special exams in August 2024; As for the seven (7) days' Notice, the Respondent urged that even if the period may not have been adequate, it was sufficient in the spirit of Fair Administrative action for expeditious handling of administrative activities; that the Rules do not specify the period of notice for invitation to the committee for hearing; that the invitation letter to appear before the committee gave them, the freedom to invite witnesses they wished and could tender evidence before the committee and even examine witnesses. He exhibited an excerpt of the minutes of the committee; that the applicants were allowed time to respond to the questions raised and also allowed to mitigate; that the Rules allowed the applicants to have legal Counsel to represent them at the Senate. It was the Respondent's contention that the suspension and cancellation of the affected units by the respondents was lawful and such disciplinary proceedings are undertaken because cheating is rampant in the institution. He urged the court not to grant the orders sought or damages or costs as that would disable the institution from enforcing any internal controls on students following irregularities.
8. In reply to the Respondent's affidavit Edwin Simiyu swore a further affidavit dated 28/3/2024 in which he deponed that the Respondent had failed to adhere to its own regulations in processing the applicants and especially clause 7.3 of the Common Rules and Regulations for exams; that whereas their letters were dated 6/9/2023 and served on applicants referred to one Academic year effective from August 2023 and did not specify when the one year suspension expires and hence, indefinite and hence necessitated the courts intervention; that the applicants have lost two semesters, September- December 2023 and January – April 2024 due to the unfair suspension and could not therefore sit for exams for units that they did not sit in class; that since the Respondents Regulations do not provide for enlargement of time, it was obliged to undertake the disciplinary process within the timelines set in its own regulations; that unless directed by this court, the applicants will lose the fees they had paid for the two semesters; that they were not informed of their rights to legal representation.
9. I have now considered the application, the response by the Respondents and the applicants' submissions. From the header of the application, it is expressed to be brought under Articles 10,23,25,47 and 50 of the Constitution, sections 3,4,5,7,10 and 12 of the Fair Administrative Actions Act. Section 12,35 (b) and 67 of Universities Act, No. 42 of Laws of Kenya, sections 8 and 9 of the Law Reform Act and Order 53 of Civil Procedure Rules.
10. Since the promulgation of the Constitution in 2010, there now exists in Kenya, two Judicial Review Processes "the common law orders of the Judicial Review under Order 53 CPR and sections 8 and 9 of the Law Reform Act and Constitutional Judicial Review under Article 23 (3) and 47 of the Constitution. This was aptly captured in the case of Masai Mara (SOPA) Ltd V. Narok County Government (2016) eKLR where the court said "On the issue of the application of Order 53 of the Civil Procedure Rules to a Constitutional petition where a party seeks judicial review reliefs, I must hasten to point out that since the promulgation of the Constitution in 2010, administrative law actions



and remedies were also subsumed in the Constitution. This can be seen in the eyes of Article 47 which forms part of the Bill of Rights. It is safe to state that there is now substantive Constitutional Judicial Review when one reads Article 47 as to the right to fair administrative action alongside Article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of Rights, to grant by way of relief an order for judicial review.”

11. In *IEBC V. National Alliance & 6 others* (2017) eKLR, the court recognized the two types of Judicial Review and added that one can approach the court by adopting either process or both. In this case the applicants seem to have adopted both processes as they allege illegality of the decisions made and breach of their fundamental rights to fair hearing. It is however noteworthy that the judge granted leave to commence Judicial Review for an order of certiorari only. It means that no leave was granted for orders of prohibition and mandamus at prayer 2 and 3. The court will however consider whether an order of certiorari can issue and the other prayers for declaration and injunction
12. The issues that seemed to emerge are -
  1. Whether the Respondents notice to the applicants was adequate;
  2. Whether regulation 7.3 was breached;
  3. Whether the Respondents failed to notify the applicants of their right to representation
  4. When does the one-year suspension end?
  5. Whether the applicants’ fees for academic year 2023 -2024 has been wasted;
  6. Whether the respondent complied with provisions on fair administrative action and the rules.
  7. Whether the orders of certiorari can be issued.
  8. Who bears the costs?
13. Section 3 and 4 of the Fair Administrative Action Act provides for the application of the Act and fairness when a person or body makes a decision that may adversely affect a person’s rights or freedoms. The sections reads as follows; Section 3.

“This Act applies to all state or non-state agencies, including any person;

  - (a) Exercising administrative authority
  - (b) performing a judicial or quasi-judicial function under the Constitution or any written law; or
  - (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.
4. Administrative action to be taken expeditiously, efficiently, lawfully etc.
  - 1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
  - 2) Every person has the right to be given written reasons for any administrative action that is taken against him.
  - 3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-



- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- 4) The administrator shall accord the person against whom administrative action is taken an opportunity to–
- (a) attend proceedings, in person or in the company of an expert of his choice;
  - (b) be heard;
  - (c) cross-examine persons who give adverse evidence against him; and
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- 5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- 6) Where the administrator is empowered by any written Law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

**Whether Notice period was adequate:**

14. As admitted by the applicants, there is no specific notice period provided for in the Rules. It would be expected as properly submitted, that the period is reasonable. I have seen some of the letters attached to the application and apart from one letter in respect of Sylvia Makori inviting her to the committee on 15/8/2023, the others were dated 10/8/2023 and the applicants were to appear before the committee on 17<sup>th</sup> August. Each person was accorded seven (7) days to prepare for the hearing. In my view, reasonable time depends on the circumstances of each case so that even one day, may be adequate notice depending on the case. The applicants have not alluded to what they intended to use more time. They have not told court that they failed to call certain witnesses because of the 7 days’ notice. In effect they have not demonstrated what prejudice they suffered due to the seven (7) days’ notice. In any event Rule 7.3 required that cases to be concluded within one month. If notice was given for more than seven (7) days there would not be enough time to hear and determine the cases. In my view, seven (7) day notice was ample time for the applicants to respond and appear before the Senate Committee.

**Whether Rule 7.3 of the Rules was breached:**

15. The applicants complained that the examination irregularity cases should have been handled within one month from the receipt of the examination irregularity. The Respondent explained the reason why



they could not comply because the issue arose during four (4) months holiday. In my view that was a satisfactory explanation

### **Whether the applicants were not informed of right to representation;**

16. Counsel submitted that Article 47 of the Constitution raised the bar in administrative actions to be responsive to Constitutional requirement that administrative action should meet the constitutional threshold of procedural fairness in protecting the individuals' fundamental rights. Counsel relied on the South African case of President of the Republic of South Africa and others VS. South African Rugby Football Union and others (CCT 16/98) 2000(1) SAI

17. Where the court said

“The right to a just administrative action is now entrenched as constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with constitutional standards of administrative justice....” (emphasis)

18. The right to representation is entrenched in section 4(3) and (4) of the Fair Administrative Act which I have alluded to earlier. I have seen the notices of invitation to the committee. The applicants were only informed that they could come with witnesses but they were not informed of the right to representation. Although the Respondent contends that the Rules did not bar the applicants from getting legal counsel, but the law requires that the respondent should have informed them. I am satisfied that the Respondent breached the applicants right to fair hearing by failing to inform them of their right to legal representation.

19. It was the Respondent's contention that the applicants' suspension was going to end on 5/4/2024 but the letter of 6/9/2023 notifying the applicants of the Senate's decision was clear that they were suspended for one academic year, but it did not clarify when the year would end. I agree with the applicants that there was no specific time as to when that academic year would end. This matter was reserved for ruling on 28/5/2024 so that if the applicants had been re admitted to the University in April, this court would have been notified. The decision to suspend the applicants for one academic year was therefore vague.

20. As to whether the applicant's fees has gone to waste, the Respondents in their replying affidavit confirmed at Paragraph 14 thereof, that the fees will not be forfeited save that the fees for January/ April 2023 will have been spent. The court will take the Respondent at its word and believe that one semester's fees will be available to the applicants and will cover the semester they will resume.

### **Whether the applicants are entitled to damages:**

21. The applicants had a duty to lay a basis for the award of damages. No doubt the Respondent was discharging their mandate when they failed to advice the applicants to get legal representation. As pointed out by the Respondent, examination malpractices are rampant in institutions of higher learning and if indeed the applicants, committed an irregularity, awarding the applicants damages would be sending the wrong message to other students. Besides that, the Respondent is not a profit-making institution and an award of damages may cause untold suffering to the institution. I find no basis to award damages has been laid and there was not even an attempt to demonstrate what is awardable.



22. In Judicial Review, the remedies are discretionary in nature and they are not concerned with review of the merits of the decision but the process/procedure. It is therefore upon the applicant to provide sufficient evidence in support of the relief sought and show that it is the most efficacious remedy in the circumstances. In Halsbury's Laws of England 4<sup>th</sup> Edition Volume 11-page 805 paragraph 1508, it states that the court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. It therefore means that judicial review remedies are not guaranteed and a court may decline to grant them even where deserved.
23. In the instant case, although the Respondent breached the applicants the right to fair hearing by not informing the applicants of their right to legal Counsel and the period of suspension unclear, granting an Order of certiorari to quash the decision would be made in vain since the period for suspension is already over. By now the applicants must have been reinstated and the court cannot grant the Order as it will serve no purpose.
24. As regards damages, I have already observed that no basis was laid for their grant. The other prayers for injunction had been overtaken by event.
25. In the end, I find that none of the orders in the Motion were deserved. The application is dismissed with each party bearing its own costs.
26. I must end by apologizing for the delay in writing this judgment. However, it was due to factors beyond my control. Apart from the court being on transfer, some of the Respondents documents were missing occasioning a delay in drafting this judgement.

**DELIVERED, SIGNED AND DATED AT KAPENGURIA THIS 16<sup>TH</sup> DAY OF DECEMBER, 2024**

**R. WENDOH.**

**JUDGE.**

Judgment delivered in open court in the presence of;

Applicant - Mr. Juma

Respondent - Mr. Imbo

Court Assistant - Juma/Hellen

