



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

PETITION NO. 06 OF 2020

PAINITO KHAHU SHITAMBASI.....PETITIONER

VERSUS

FRIENDS THEOLOGICAL COLLEGE KAIMOSI.....1ST RESPONDENT

DR. ROBERT J. WAFULA

(THE PRINCIPAL,

FRIENDS THEOLOGICAL COLLEGE KAIMOSI).....2ND RESPONDENT

JUDGMENT

1. The petition herein, dated 4th June 2015, was brought by Painito Khahu Shitambasi, to be known hereafter as the petitioner. The petitioner is an undergraduate student at the 1st respondent, while the 2nd respondent is the principal of the 1st respondent.

2. The factual background to the matter is set out in the body of the petition. While the 1st respondent was closed after the outbreak of the Covid-19 pandemic, on 20th March 2020, the petitioner received a letter from the respondents, which was undated, suspending his studies over an incident that had allegedly happened on 18th March 2020, when the petitioner had allegedly conducted himself in a manner that was alleged to have breached discipline. The petitioner avers that he was suspended without being given a chance to defend himself. When he sought a chance to respond, it was not given to him. His name was thereafter, on 18th May 2020, removed from the list of the students due to sit examinations.

3. The legal and constitutional foundations of the petition are set out, to be Articles 10, 22(1), 23(1), 27, 28, 31(a), 35, 47, 50, 57, 165 and 249 of the Constitution of Kenya, on national values and principles, the right to institute proceedings, the right to equal protection, the right to equal dignity and respect of that dignity, the right to privacy, the right to information, the right to fair administrative actions, the right to fair trial, the right of older citizens to participate in the society, the jurisdiction of the High Court to entertain constitutional petitions, and institutions being subject to the Constitution and bound to observe the Bill of Rights. The petition is also grounded on sections 4(1), 6 and 12 of the Fair Administrative Action Act, 2015.

4. The petitioner contends that the respondents acted unconstitutionally in suspending him without affording him a hearing, and arrived at conclusions without hearing his side of the matter. He argues that his suspension, for the period running from 30th March 2020 to 5th January 2021 was a final decision of the disciplinary proceedings, which condemned him unheard. He contends that he was not afforded a right or opportunity to appeal or seek review of the decision. He further argues that he was never given notice of the proceedings, nor furnished with statements or charges, neither did he get a chance to cross-examine his accusers. He contends that the letter of suspension did not give him a chance to respond, and that the said letter was sent to him via email, at a time when the 1st respondent was closed due to the Covid-19 pandemic. He further contends that the letter of suspension considered matters that were beyond the events of 18th March 2020. He argues that the suspension was irrational, unreasonable and malicious, and violated his right to fair administrative action. He submits that the action was not founded on any complaint, and that the respondents were on a fishing expedition. He points to malice on the grounds that the suspension was published to the local church and its leaders. His avers that being an older member of the community his suspension violated his right to personal growth and development. He avers that his rights to fair administrative action under Article 47 of the Constitution and a right to fair hearing under Article 50(1) of the Constitution were violated, and so were Articles 27, 28, 31, 33 and 57 of the Constitution were also violated.

5. The petitioner, therefore, seeks the following reliefs:

- (1) a declaration that the respondents have violated the petitioner's rights and fundamental freedoms;

(2) an order of *certiorari* to quash and set aside the undated letter of suspension given to the petitioner by the respondents;

(3) an order of *mandamus* compelling the respondents to admit the petitioner and to administer the examinations that he has missed during the suspension; and

(4) an order that the petitioner is entitled to compensation for breach of his fundamental rights, by way of damages for mental, psychological, mental anguish, torture and suffering.

6. In reply to the petition, the respondents aver that the suspension followed a decision by an administrative meeting of the 1st respondent, held on 20th March 2020. The petitioner had been summoned to attend the meeting but he did not, he did not justify his failure to attend the meeting and he has not exhausted any internal mechanism provided by the 1st respondent. It is averred that the petitioner received an email that he did not respond to, he had been given ample time to respond but did not. It is further averred that there is an established procedure for addressing or challenging any decision of the 1st respondent. The petitioner is accused of frustrating all the efforts to get him to respond to the complaints well informed to him, and refused to participate in the disciplinary proceedings. It is further averred that the decision to conduct the examinations was not linked to the disciplinary process.

7. In the replying affidavit by the 2nd respondent, it is averred that after the incident of 18th March 202, it was decided that the petitioner be summoned to give an account of his conduct. The 2nd respondent called upon the petitioner to see him, but he did not, instead he left the campus on 19th March 2020, purporting to seek medical attention, and thereby avoided any disciplinary meeting that was to held prior to the closure of the institution on 20th March 2020. The administrative board of the 1st respondent met on 20th March 2020, and resolved to suspend him for one year. Attached to that affidavit are minutes of the meeting of the administrative board of 20th March 2020.

8. The petitioner responded to the reply, by way of a reply to the reply and a supplementary affidavit. He avers that he was not contacted on 18th March 2020, nor on 19th March 2020, over the events of 18th March 2020, and that he had no notice of the meeting of 20th March 2020 where his fate was decided. . .

9. Directions were given on 15th October 2020, for filing of written submissions. In his written submissions, the petitioner has elaborated on the constitutional and statutory provisions cited in his petition, and has cited the decisions in *Nyongesa & 4 others vs. Egerton University* [1990] eKLR (Nyarangi, Gachuhi and Masime JJA), and *Suyianga & 7 others vs. Kenyatta University & 2 others* [2007] eKLR (Wendoh J). I have read through the materials and noted the arguments made. The respondents did not file written submissions.

10. It is not in dispute that the respondents met and deliberated on the incident of 18th March 2020, and arrived at a decision which had an adverse effect on the petitioner. The petitioner was not heard on his defence with respect to the allegations against him. A decision was made to suspend him for a year. No provision was made, in that decision, for him to be heard, and, therefore, the outcome of the meeting of 20th March 2020 was final. Although the 2nd respondent avers that he summoned him or contacted him prior to the meeting of 20th March 2020, there is no mention of how he was summoned, whether verbally, or by short text message (SMS), or letter or email or by telephone. No documentary evidence of the summons was exhibited. The respondents, therefore, have no evidence that they ever summoned the petitioner to a meeting where he could have defended himself, before action was taken against him. There is no evidence that he was ever invited to reduce his defence into writing, if a meeting with him was not viable. There was only one meeting held to deliberate on his conduct, and that meeting decided to make the final resolution to have him suspended for one year.

11. This is a fairly straightforward matter. I agree with the petitioner. He was condemned unheard. No notice was given to him of the case against him. No invitation was made to him to defend himself. He was not afforded opportunity to confront his accusers or the accusations made against him. He did not get a fair hearing before he his fate was decided. He did not get fair administrative action. There was procedural impropriety. In coming to the conclusion above, I am guided by *JNN (a Minor) MNM, suing as next friend vs. Naisual Holdings Limited t/a N. School* [2008] eKLR (Mativo J), *JMOO vs. Board of Governors of St. M's School, Nairobi* [2015] eKLR (M. Ngugi J), and *Nyongesa & 4 others vs. Egerton University* [1990] eKLR (Nyarangi, Gachuhi and Masime JJA)

12. In the end, I allow the petition dated 4th June 2020, in terms of prayers 1, 2 and 3. This being a constitutional petition, there shall be no order as to costs. Any party aggrieved by the orders made, herein, is at liberty to move the Court of Appeal appropriately. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF SEPTEMBER 2021

W MUSYOKA

JUDGE