REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 68 OF 2019

IN THE MATTER OF AN APPLICATION FOR DECLARATIONS AND ORDER OF CERTIORARI

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 4, 6, 7, 8 AND 9 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

EX-PARTE: LOSEM NAOMI CHEPKEMOI

JUDGMENT

Introduction

1. Losem Naomi Chepkemoi (hereinafter "the *ex parte* Applicant"), was a student of Kenyatta University. She has sued the said University (hereinafter "the University") as the Respondent herein. The said University discontinued the *ex parte* Applicant's studies on 11th April 2017, and she claimed that it then declined to hear her appeal. The *ex parte* Applicant thereupon sought legal redress in **R v Kenyatta University ex parte Losem Naomi Chepkemoi, Judicial Review Application No. 573 of 2017.** Upon hearing the said application this Court (Odunga J.) on 24th January 2018 ordered the University to accept the *ex parte* Applicant's appeal, and to determine it with 30 days. The Court further ordered that in default, the University's decision to discontinue the *ex parte* Applicant from her studies shall, unless otherwise ordered, remain quashed.

2. The *ex parte* Applicant has now moved this Court by way of a Notice of Motion dated 3rd April 2019, seeking the following orders:

> **a. It be declared that the letter inviting the applicant to appeal hearing and the appeal proceedings conducted against her on 27th September, 2018, as well as the decision to dismiss her appeal against discontinuation from the University contained in the letter dated 11th February, 2019 amount to contravention of the orders of the court made on 24th January, 2018 and 19th June, 2018 respectively, by this court in *Judicial Review Application No. 573 of 2017; R v Kenyatta University ex parte Losem Naomi Chepkemoi* and that the decision to discontinue the applicant from the University contained in letter dated 11th April, 2017 remains quashed.**
>
> **b. It be declared that the letter inviting the applicant to appeal hearing and the appeal proceedings conducted against her on 27th September, 2018, as well as the decision to dismiss her appeal against discontinuation from the University contained in the letter dated 11th February, 2019, amount to a contravention of the applicant's right under Articles Article 47 of the constitution to a fair administrative action that's is expeditious, efficient, lawful, reasonable and procedurally fair with regard to her appeal and article 50 of the constitution to have her appeal accorded a fair hearing within a reasonable time.**
>
> **c. It be declared that the letter inviting the applicant to appeal hearing and the appeal proceedings conducted against her on**

27th September, 2018, as well as the decision to dismiss her appeal against discontinuation from the University contained in the letter dated 11th February, 2019, amount to contravention of the applicant's rights under the Fair Administrative Action Act, 2015.

d. That this Court be pleased to issue an order of certiorari to remove and bring to the High Court for the purposes of quashing and to quash the decision to dismiss the ex parte applicant's appeal against discontinuation from the University contained in the letter dated 11th February, 2019.

e. An order that the respondent do pay to the Applicant general damages/pecuniary compensation.

f. An order that the respondent do admit the applicant back to the University.

g. That this Court be pleased to make any other or further order/directions to secure enforcement of the applicant's fundamental right to fair administrative action as it will deem fit.

h. An order that the respondent do pay to the applicant costs of this application.

3. The application is supported by a Statutory Statement dated 15th March 2019, and the Verifying Affidavit sworn by the *ex parte* Applicant on 14th March 2019.The University filed a replying affidavit in opposition to the application, which was sworn on 29th July 2019 by Aaron Tanui, its Legal Officer. This Court directed the parties to canvass the application by way of written submissions. Gacheru Nganga & Company Advocates, the advocates on record for the *ex parte* Applicant, filed submissions dated 14th January 2020. Kinoti & Kibe Company Advocates, the University's Advocates, on their part filed submissions dated 31st January 2020. The parties also highlighted their submissions in a hearing held on 3rd February 2020. A summary of the parties' respective cases is as follows.

The *ex parte* Applicant's Case

4. The *ex parte* Applicant's case arises from, and challenges the appeal proceedings subsequently carried out by the University pursuant to the decision in **R v Kenyatta University ex parte Losem Naomi Chepkemoi (supra)**. The *ex parte* Applicant's account of the events that occurred after the said decision are as follows. On 9th February 2019 she duly presented her appeal which was accepted by the University, on the same day. However, that the University deliberately refusing to hear and determine the said appeal within 30 days as ordered, and the decision to discontinue her studies consequently stood quashed. That on 18th April, 2018, she filed an application seeking an order that the University be ordered to forthwith admit her back to her studies, which application was compromised on 19th June, 2018, with the court making further orders by consent of the parties that the University do hear and determine the appeal within 30 days.

5. The *ex parte* Applicant contended that upon further refusal to hear the appeal, she filed a second application on 3rd September, 2018, seeking to commit the University for contempt of court and that it be ordered to forthwith admit her back to her studies. That while the said application was pending hearing, the University by way of a letter dated 14th September, 2018 invited her for a hearing of the appeal on 27th September 2018. Thereupon, that by a letter dated 11th February, 2019, she was notified of the decision to dismiss her appeal against the discontinuation from the University. In support of her case, the *ex parte* Applicant annexed the copies of the pleadings and decisions in the previous cases and applications, her appeal, the letters from the University and the minutes of the hearing of the appeal.

6. The legal arguments put forward by the *ex parte* Applicant's advocates were that the letter of invitation to the appeal hearing, the appeal hearing itself, and the letter communicating the University's decision contravened her right to fair administration action under Article 47 of the Constitution, her right to be heard before an adverse decision is made under Article 50, and the provisions of the Fair Administrative Action Act, 2015. The advocates cited the decision on the principles of a fair hearing set out in **De Souza vs Tanga Town Council [1961] EA 377,** which they submitted are now codified in section 4(3) of the Fair Administrative Action Act.

7. The specific grounds relied upon by the advocates were first, that from the letter inviting the applicant to appeal hearing dated 14th September, 2018, it is clear that the University was dealing with an appeal purportedly filed vide a letter dated 15th September, 2017, yet the *ex parte* Applicant's appeal which was received by the University was in a petition of appeal filed on 9th February, 2019 which was filed pursuant to the court order made on 24th January, 2018.

8. That this was a fundamental error of law and fact that vitiated the appeal in terms of section 7(2)(d) of the Fair Administrative Action Act, and was not a typographical error. Furthermore, that the letter was not rationally connected to the purpose for which it was taken, or the purpose of the empowering order of the court made on 24th January, 2019 or the information before the University in terms of section 7(2)(i)-(iii) of the Fair Administrative Action Act, 2015 (hereinafter "the Act").

9. Second, that the fundamental error with regard to the appeal is further evidenced by the proceedings of the appeal hearing, in which the University acknowledged the existence of the court order where it had been directed to accept and hear the appeal within 30 days. However, that the University found that the *ex parte* Applicant did not appeal against the discontinuation as advised by the court and the Students Disciplinary Committee, which statement was clearly wrong, as the appeal was filed on 9th February, 2018 pursuant to a court order and the University acknowledged receipt. Its decision was therefore not rationally connected to the appeal since it did not deal with the appeal that was before it, and did not deal with or address the weighty grounds raised in the appeal of 9th February, 2019.

10. Third, that the letter inviting the applicant to appeal hearing and the proceedings themselves denied the *ex parte* Applicant a fair hearing by denying her a reasonable opportunity to put her case in terms of section 7(2)(a)(v) of the Act. This was for the reasons that the averments that she received the letter inviting her to the hearing on 25th September, 2018, only 2 days to the hearing, were not controverted. Further

that her Advocate who was out of the country could not attend the hearing given the short notice, which she explained to the committee hearing the appeal, and also communicated the advice of her Counsel, that the hearing be adjourned to await the outcome of a related application which was pending in court.

11. However, that the Committee declined to adjourn the hearing. In addition, that by conducting the appeal hearing in the manner it did, the University deprived the *ex parte* Applicant her right to legal representation under sections 4(3)(e) and 4(4)(a) and 4(5) of the Fair Administrative Action Act.

12. Fourth, the letter inviting the applicant to the appeal and the proceedings themselves were aimed at defeating the *ex parte* Applicant's application for contempt and readmission to the University which was due for hearing on 3rd October, 2018, and which the University was well aware of. Furthermore, that the evidence indicates that the letter inviting her to the appeal hearing was issued after the University had been served with the application, which had a direct bearing on the appeal. Therefore, that the appeal proceedings and the decision were procedurally unfair in terms of section 7(2)(b of the Act, were taken with an ulterior motive or purpose and calculated to prejudice the *ex parte* Applicant's legal rights in terms of section 7(2)(e), and was made in bad faith in terms of section 7(2)(h) of the Act.

13. Lastly, that the University declined to give the reasons for its decision contrary to section 4(2), 6(3) and (4) of the Act. A letter by the *ex parte* Applicant's advocates dated 2nd June 2017 requesting for reasons of the decision to discontinue her studies was relied upon, and it was submitted that the University has never supplied the written reasons for the decision to-date. Therefore, that the University violated the *ex parte* Applicant's right to fair administrative action and fair hearing. In conclusion, it was submitted that due to the matters stated above, the letter inviting the *ex parte* Applicant to the hearing, the appeal proceedings, as well as the final decision on the appeal were unreasonable, violated the *ex parte* Applicant's legitimate expectation and were unfair in terms of section 7(2)(k), (m) and (n) of the Act.

The Respondent's Case

14. The University denied that it disobeyed the orders of this Court of 24th January, 2018 or any other orders of this Court emanating from **R v Kenyatta University ex parte Losem Naomi Chepkemoi (supra),** and further stated that this Court in its ruling dated 25th February, 2019 dismissed the contempt application filed by the *ex parte* Applicant. The University also confirmed that the *ex parte* Applicant presented her appeal and requisite fees on 9th February, 2018, and stated that it first invited her to appear before the Students Disciplinary Appeals Committee on 1st March, 2018 at 8.00 am, by a letter dated 26th February, 2018. However, that on that date the Students Disciplinary Appeals Committee could not sit as some of its members were away, and further, that the University Council and the Vice Chancellor's Office has been in transition in 2017 and 2018 hence the difficulties in constituting the Students Disciplinary Appeals Committee.

15. Nonetheless, that pursuant to orders of this Court, the *ex parte* Applicant was invited to appear before the Students Disciplinary Appeals Committee vide a letter dated 14th September, 2018, and did so appear on 27th September, 2018. According to the University, upon appearing before the said Committee, the *ex parte* Applicant was contemptuous and hostile towards it, stating that she was awaiting hearing before the High Court yet there no stay orders or injunctions had been issued by the Court preventing the Committee from hearing her appeal. Further, that *o*n being asked why she was disrespectful towards the Committee members, she kept quiet and walked out of the hearing.

16. It is the University's case that the *ex parte* Applicant therefore did not give the Committee any reason to vacate the previous decision, and it recommended to uphold her discontinuation. That the *ex parte* Applicant was subsequently *i*nformed of the failure of her appeal by a letter dated 11th February, 2019, and that she has been informed of the reasons for her discontinuation specifically that she was found guilty of influencing tampering with her online examination in five units.

17. The University denied that its letter of invitation to the appeal hearing as well as the decision communicating the failure of the appeal contravened the *ex parte* Applicant's fundamental rights of the provisions of the Fair Administrative Action Act. It stated that it acted in line with the provisions of the section 9 of the Fair Administration Act, 2015 and Article 159 (2) (c) of the Constitution that provides for and promotes the usage of internal mechanisms of dispute resolution prior to seeking intervention of the Court. Further, that the it was the *ex parte* Applicant's unwillingness to exhaust internal dispute mechanisms that has led to the current predicament where the court has been moved on successive judicial review applications around the same set of facts.

18. In particular, the University stated that the averments that its action was influenced by an error in law has no basis, as the *ex parte* Applicant would not have been invited to appear before the it's appeal body if there was no appeal before it. In addition, that there was no ulterior motive to the invitation to appear before appeals Committee, other than to comply with the Court's judgement of 24th January, 2018, and that there were no orders of stay or injunction that prohibited the said Committee from hearing the appeal.

19. The advocates for the University submitted that the University's Statute XLVI on University Examinations Regulations at page 140, No. 7 of the 2014-2017 of the University Calendar states that any student found guilty of an examination irregularity shall be discontinued. In this regard that both the Students Disciplinary Committee and the Students Disciplinary Appeals Committee acted in accordance to the University's regulations in dealing with the Applicant's infringement of the regulations. Further, that both tribunals did not exceed their power, and were not tainted by illegality, irrationality or procedural impropriety.

20. The decisions in **Republic v University of Nairobi & 3 others Exparte Patrick Best Oyeso [2018] eKLR** and of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** were relied on for the applicable principles in judicial review cases, and for the submission that the *ex parte* Applicant has failed to discharge the burden in proving that the decision to discontinue her was unjust, unreasonable, unlawful, arbitrary, capricious, or an abuse of discretion by the University. It was further submitted that on the contrary, she seeks to overturn the decision of the appeals Committee on its merits which is beyond the scope of these judicial review proceedings.

21. On the allegations made that the letter inviting the *ex parte* Applicant to appear before the appeals Committee was irrational and a

violation of section 7(2) (d) of the Act as it referred to a wrong date, the University submitted that invitation was ordered in the judgement in **Republic v Kenyatta University Ex parte Losem Naomi Chepkemoi (supra), and it** cannot therefore be said that the invitation constituted an error in law. It was also the University's submission that the *ex parte* Applicant had more than sufficient notice of her appeal from the date of the said judgement on 24th January, 2018, until the letter inviting her for the hearing of her appeal of 14th September, 2018 while the hearing date was 27th September, 2018. Reliance was made to the decision in **Republic v Kenyatta University Ex parte Martha Waihuini Ndungu [2019] eKLR** wherein it was stated that adequate notice means that a person must be given enough time to respond to the planned administrative action.

22. The University's submissions on the allegations that it denied the *ex parte* Applicant her right to legal representation were that being aware of the orders of the judgement of 24th January, 2018 and the several applications since then seeking adverse orders against it, was hard pressed to accede to the prayer for adjournment during the appeal proceedings. Therefore, that the *ex parte* Applicant cannot claim to have been denied representation, as her advocate was well aware of the orders of the Court and the urgency of hearing her appeal, and had the opportunity to provide a written presentation before the appeals Committee if he was unable to attend. Further, that it was the *ex parte* Applicant s presentation and demeanor before the appeals Committee that gave it no choice but to uphold the Student's Disciplinary Committee's decision to discontinue her.

23. As regards the allegations that the proceedings before the appeals Committee was an abuse of the Court process and done in bad faith, it was contended by the University that there were no orders preventing the hearing of the Applicant's appeal before the appeals Committee, rather there was an order by the Court that the *ex parte* Applicant's appeal should be heard. Further, that the University's actions in this regard followed procedure set out in the University Statute, and the allegations of bias on its part due to actions with regard to other students are also unfounded, as they were conducted in 2012 with a different University Calendar, and every case is considered separately with regard to the particulars therein.

24. Lastly, the University submitted that the *ex parte* Applicant was fully aware of the reasons for her suspension and subsequent discontinuation from the University. That the letter she annexed dated 19th January, 2017 inviting her to appear before the Student Disciplinary Committee clearly stipulates the charges against her, and the letter dated 11th April, 2017 informing her of the determination of the disciplinary committee clearly states it was for an examination irregularity. In conclusion the University submitted that the *ex parte* Applicant has failed to show any violation of Articles 47 and 50 of the Constitution and any sections of the Fair Administrative Action Act, 2015.

The Determination

25. This Court needs to clarify at the outset that the decision and actions that are subject to this Courts review jurisdiction in the present case are those undertaken in relation the Respondent's letter dated 11th February, 2019, that dismissed the *ex parte* Applicant's appeal against her discontinuation from the University. Therefore, any prior actions or events not related to this decision, and in particular those related to the prior decision made by the Respondent on 11th April 2017 are beyond the purview of this Court's jurisdiction, and to the extent that they were the subject of the decision in **R v Kenyatta University ex parte Losem Naomi Chepkemoi, Judicial Review Application No. 573 of 2017,** are also *res judicata*.

26. In particular, the prayer seeking this Court to make a declaration that the Respondent is in contravention of this Court's orders was the subject of a decision delivered by this Court (Mativo J.) on 25th February 2019, on an application brought by the *ex parte* Applicant to cite the Respondent's officers in contempt of Court for similar reasons. Moreover, such a finding can only be made in separate proceedings under the applicable law on contempt of court, and in **R v Kenyatta University ex parte Losem Naomi Chepkemoi, Judicial Review Application No. 573 of 2017**, where the orders alleged to have been contravened were given.

27. I will therefore proceed to consider the issues that properly fall within the remit of this Court's jurisdiction. The three substantive issues to be determined therefore are firstly, whether the Respondent accorded the *ex parte* Applicant a hearing of her appeal; secondly, whether the Respondent acted fairly; and lastly whether the remedies sought are merited.

28. Before embarking on a consideration of these issues, it is necessary to reiterate the grounds for judicial review as stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
>
> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
>
> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
>
> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid**

down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

29. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** as follows:

> **“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”**

30. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator or make the orders stipulated in Section 11 of the Act.**

31. I shall now proceed to analyse and consider the issues raised in the present case with these parameters in mind.

Whether the ex parte Applicant’s Appeal was accorded a Hearing

32. The Respondent argues that it did invite the *ex parte* Applicant to a hearing of her appeal, and did proceed to hear the appeal. The *ex parte* Applicant on the other hand disputes that her appeal was heard, as the letter of invitation referred to a different appeal, and therefore her appeal was not considered.

33. The Respondent in this respect provided evidence of a copy of the letter dated 14th September 2018 informing the *ex parte* Applicant of the appeal, which read as follows:

> **“Losem Naomi Chepkemoi 14th September 2018**
>
> **P.O Box 557-30600**
>
> **KAPENGURIA**
>
> **Dear Ms. Losem,**
>
> **RE: APPEAL AGAINST DISCONTINUATION**
>
> **Reference is made to your appeal letter 15th September 2017 on the above subject.**
>
> **This is to inform you that you are required to appear before the Students Disciplinary Appeals Committee (SDAC) ON Thursday 27th September 2018 at 9.00am in the Deputy Vice-Chancellor (Academic)’s Boardroom No. 122 Central Administration Complex in regard to your appeal against discontinuation.**
>
> **In case you are unable to appear in person, please send your written memorandum to the Registrar (Academic) enclosing any relevant evidence that you feel will support your appeal. This information should be delivered either in person, via postal mail or email to the Registrar Academic’s office….by 21st September 2018.**
>
> **Thank you,**
>
> **DR. ANDANJE MWISUKHA**
>
> **AG REGISTRAR (ACADEMIC)”**

34. The Respondent did not avail a copy of the appeal letter dated 15th September 2017 indicated in the invitation to the hearing. The *ex parte* Applicant on the other hand brought evidence of her Petition of Appeal dated 9th February 2018, which bore a stamp evidencing receipt by the Respondent on the same date. The said Petition of Appeal indicated it was an appeal from the Respondent’s Student Disciplinary Committee’s decision on 26th January 2017, and communicated in a letter dated 11th April 2017. The *ex parte* Applicant raised five grounds of appeal therein, that of inadequate notice of the nature and reasons of the administrative action taken against her; denial of her right to legal representation; denial of the right to cross-examine witnesses; non-disclosure of the materials and evidence relied on in making the decision, and that the decision was made in bad faith.

35. It may be the case that the *ex parte* Applicant’s appeal that was indicated in the letter of invitation was an inadvertent error on the part of

the Respondent, and that they intended to hear the *ex parte* Applicant's appeal dated 9th February 2018. In this event, the position as the appeal under consideration would then have easily been clarified by the record of the proceedings during the hearing of the appeal.

36. The Respondent in this respect provided a copy of the minutes of the hearing of the *ex parte* Applicant's appeal held by the Students Disciplinary Appeals Committee on 27th September 2018. The first observation this Court makes as regard the said minutes is that no reference is made therein to the *ex parte* Applicant's appeal and the contents thereof, whether of 15th September 2017 or of 9th February 2018. This was despite the said minutes providing the procedural posture leading to the said hearing, including the court case filed by the *ex parte* Applicant to challenge the decision of the Student Disciplinary Committee to discontinue her studies.

37. The second observation is that the Students Disciplinary Appeals Committee specifically recorded that it noted as follows:

> "**The SDC observed that Ms. Losem:**
>
> **a. She was not truthful in her oral submissions**
>
> **b. According to the audit train, her marks for five units were enhanced using Alphonse Wafula account**
>
> **c. There was no way her grades could have changed without having paid to facilitate the enhancement**
>
> **d. She was guilty of influencing tampering with her online examination date**."

38. It is notable in this respect that the said SDC was the Student Disciplinary Committee whose decision was being appealed from by the *ex parte* Applicant. There is no evidence in the said minutes that the grounds raised in the *ex parte* Applicant's Petition of Appeal as regards the said findings by the Student Disciplinary Committee were noted or considered by the Students Disciplinary Appeals Committee. The *ex parte* Applicant in her Petition of Appeal had specifically sought to be provided with the information and evidence leading to these findings, and to cross-examine any witnesses in this regard.

39. It was also the Students Disciplinary Appeals Committee's observation in its minutes, that the *ex parte* Applicant did not appeal against the discontinuation as advised by the Court and the Student Disciplinary Committee, and that she did not give the Committee a reason to vacate the previous verdict by the Student Disciplinary Committee. This observation was obviously incorrect and cannot hold in light of the evidence produced by the *ex parte* Applicant that she did lodge her appeal after the decisions of the Student Disciplinary Committee and court that are referred to, and which was shown to have been duly received by the Respondent.

40. It is imperative in this regard that the right to be heard includes not only being afforded the opportunity to be heard, but also being accorded a fair hearing. The right to a fair hearing includes the opportunity to put forward one's case based on the issues before the decision maker for consideration, and the entitlement to a reasonable decision based on the evidence and facts before the decision maker. It was held as follows in this regard by Nyarangi JA in the decision by the Court of Appeal in **Nyongesa & Others vs Egerton University College (1990)e KLR:**

> **"I respectfully think that the particular body hearing a student on an allegation, should demonstrate by apt procedure or appropriate language that the representations and evidence of the student has been fairly considered before a decision is reached. Rules of natural justice apply because any decision would affect the rights and legitimate expectations of those concerned."**

41. It is evident in the present case that the hearing held by the Students Disciplinary Appeals Committee was for all intents and purposes a façade, and the main objective appears to have been to illustrate that the Committee had gone through the motions of a hearing. There was no evidence that it tabled the issues raised by the *ex parte* Applicant in her appeal, or that the said issues were considered by the said Committee and a decision made thereon.

42. To the contrary the evidence provided by the Respondent points to the fact that the *ex parte* Applicant's appeal of 9th November 2018 was not considered at all, and it appeared that the Students Disciplinary Appeals Committee entirely relied on the findings by the Students Disciplinary Committee which were being appealed from, without considering any of the reasons given by the *ex parte* Applicant as to why they may have been flawed. it is therefore the finding of this Court that the *ex parte* Applicant was not accorded a hearing of her appeal dated 9th November 2018.

Whether the Respondent acted Fairly

43. While the finding made in the foregoing is sufficient to dispose of this application, this Court is of the view that it must also comment on the conduct of the hearing of the *ex parte* Applicant's appeal by the Students Disciplinary Appeals Committee on 27th September 2018. The said Committee was in this respect required to act fairly, which is now a constitutional imperative under Article 47 of the Constitution, which provides as follows in this regard:

> **"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."**

44. In addition, section 4 (3) and (4) of the Fair Administrative Action Act, lays down the procedure to be adopted when taking an administrative action or decision as follows:

> **"(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."**

45. The core of the duty to act fairly and the requirement of fairness is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken. The minutes of Students Disciplinary Appeals Committee in this regard detail what transpired at the hearing of the *ex parte* Applicant's appeal as follows:

> **i. On appearing before the Students Disciplinary Appeals Committee, Ms. Losem stated that she was not ready for an interview since she was awaiting a hearing of the case the following week.**
>
> **ii. She was hostile and contemptuous towards the Committee.**
>
> **iii. On being asked why she was disrespectful to the Committee, she kept quiet and walked out**
>
> **iv. She did not appeal against the discontinuation as advised by the Court and the Student Disciplinary Committee**
>
> **v. She did not give the Committee a reason to vacate the previous verdict by the Student Disciplinary Committee .**

46. It is evident that the *ex parte* Applicant did indicate that she was not ready for the hearing and sought an adjournment. She also averred that "this was for the additional reason that her advocate was not available on the date of the hearing. The denial of a request for an adjournment during an administrative decision making process may or may not amount to unfair decision depending on the circumstances. Factors to be considered in this regard include the reasons being given for the adjournment. In this particular case the fact of the ongoing cases between the *ex parte* Applicant and Respondent were known to both parties, and the *ex parte* Applicant in her Petition of Appeal dated 9th February 2019 specifically gave notice that she would need, and would be represented by a legal counsel.

47. In addition, considering that the effect of not according her a hearing would prejudice the *ex parte* Applicant's academic and professional standing and opportunities, fairness would have required that the Respondent accord her the adjournment and opportunity for legal representation. It is also apparent from the minutes that the Appeals Committee proceeded to make its decision after the *ex parte* Applicant walked out of the hearing, in her absence and without her participation.

48. I am minded and guided by the fact that the requirements of fairness are flexible and dictated by the context of a case, including the interests at stake, the character of the decision making body and decision making process, and the effect of a decision on rights. I agree with the holding in **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua, Nairobi HCMCA No. 1298 of 2004** that:

> **"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of**

additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence……..

49. Lastly, it is notable that no reasons were given in the minutes of the hearing held by the Students Disciplinary Appeal Committee, or in the Respondent's letter dated 11th February 2019 communicating the Students Disciplinary Appeal Committee's decision to discontinue the *ex parte* Applicant from studying at the University. In particular, no reason related to the grounds raised in the *ex parte* Applicant's Petition of Appeal was proffered by the Respondent.

50. It is thus my finding that the procedure and conduct adopted by the Students Disciplinary Appeal Committee in hearing the *ex parte* Applicant's appeal was wanting in many respects, in light of the applicable requirements to act fairly set out in Article 47 of the Constitution and the Fair Administrative Actions Act.

Whether the Remedies sought are Merited

51. The *ex parte* Applicant has sought the remedies of mandamus, certiorari, declarations and damages. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances when orders of mandamus can issue as follows:

""The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed…… ."

52. As regards the issue of an order of certiorari , the Court of Appeal held as follows:

...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

53. The remedy of a declaration is on the other hand normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a body's powers and duties, and the rights of individuals or the law on a particular issue.

54. In certain circumstances, a claim for a monetary award such as damages can also be included in a claim for judicial review, where an individual has suffered loss or damage as a result of infringement of a right. However such claims are still subject to the rules as regards proof. The Privy Council in **Siewchand Ramanoop vs The AG of T&T, PC Appeal No. 13 of 2004**, held as follows in this regard:

"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damage will often be a useful guide in assessing the amount of this compensation. "

55. Applying these principles to the present case, I find that as the Respondent has breached the *ex parte* Applicant's constitutional rights and its statutory duties by failing to give the *ex parte* Applicant a hearing and opportunity to present her case, and has acted unfairly in the hearing of her appeal, the order sought of certiorari to quash the Respondent's decision to dismiss her appeal is merited. Likewise, the *ex parte* Applicant is also entitled to the order of declarations sought, so as to clarify the legality of the Respondent's actions and her rights in this respect.

56. On the order of mandamus sought to readmit the *ex parte* Applicant back to the Respondent University, the question that needs to be answered is whether the Respondent is under such a duty, and whether it has breached the duty. In this respect the Respondent was under a legal duty on the strength of an order issue by a Court of law in **R v Kenyatta University ex parte Losem Naomi Chepkemoi, Judicial Review Application No. 573 of 2017**, to hear and determine the *ex parte* Applicant's appeal within certain timelines, failing which it was required to admit the *ex parte* Applicant back to her studies. The Respondent provided reasons why it was not able to comply with the timelines in the Court's orders, and it may also be argued that the *ex parte* Applicant did in this regard compromise on applications brought in relation to the said timelines.

57. These facts notwithstanding, the Respondent was still under a further duty to consider the *ex parte* Applicant's appeal in accordance with the provisions of the Constitution and Fair Administrative Action Act, when it finally got round to do so, and after having been given a second chance to do so by the Court. The Respondent's conduct during the hearing of the said appeal shows a pitiful attempt to comply with its Constitutional and statutory duties towards the *ex parte* Applicant as illustrated in this judgment. In the circumstances, it would not be in the interests of justice and equitable to accord the Respondent a third chance, given its previous conduct in this matter. I therefore find that the order sought of mandamus is merited for this reason.

58. I am in this respectably guided by the decision in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** expressed himself, *inter alia*, as follows:

> **". *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature….**

59. Lastly, on the claim for damages and compensation, I note that the *ex parte* Applicant did not elaborate the loss and damage she has suffered as a result of the Respondent's actions in her pleadings, so as to lay sufficient basis for this claim, and to enable the Respondent respond to it. While there is no particular rule requiring extensive evidence to be provided by the *ex parte* Applicant in this regard, there must be a statement of the grounds for the claim in sufficient detail, for the Court and Respondent to understand the nature of the monetary claim and why. This particular relief is therefore not merited.

60. In the premises this Court finds that the *ex parte* Applicant's Notice of Motion dated 3rd April 2019 is merited to the extent of the following orders:

> **I. A declaration that the letter inviting the *ex parte* Applicant to appeal hearing and the appeal proceedings conducted against her on 27th September, 2018, and the decision to dismiss her appeal against discontinuation from the University contained in the letter dated 11th February, 2019, contravened the *ex parte* Applicant's right under Article 47 of the Constitution to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair with regard to her appeal, and contravened her right under Article 50 of the Constitution to have her appeal accorded a fair hearing.**
>
> **II. A declaration that that the letter inviting the *ex parte* Applicant to appeal hearing and the appeal proceedings conducted against her on 27th September, 2018, as well as the decision to dismiss her appeal against discontinuation from the University contained in the letter dated 11th February, 2019 contravened the *ex parte* Applicant's rights under the Fair Administrative Action Act, 2015.**
>
> **III. An order of certiorari be and is hereby issued to remove and bring to the High Court for the purposes of quashing and to quash the Respondent's decision to dismiss the *ex parte* applicant's appeal against discontinuation from the Respondent University contained in the letter dated 11th February, 2019.**
>
> **IV. An order of mandamus be and is hereby issued compelling the Respondent to unconditionally re-admit the *ex parte* Applicant back to the Respondent University forthwith.**
>
> **V. The Respondent shall meet the *ex parte* Applicant's costs of the Notice of Motion dated 25th September 2019.**

61. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE