



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**PETITION NO. 31 OF 2019**

**IN THE MATTER OF SECTIONS 2, 3, 10, 19, 20, 21, 22, 23,  
50, 165(3) AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS IN ARTICLES 24,25,27,33, 35, 37, 43,47, 48 AND 50 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE FAIR ADMINISTRATION ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES**

**BETWEEN**

**DICKSON NYANDORO.....1<sup>ST</sup> PETITIONER**

**RICHARD ODHIAMBO.....2<sup>ND</sup> PETITIONER**

**OBAE KEVIN.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**MACHAKOS UNIVERSITY.....RESPONDENT**

**RULING**

**The Parties**

1. At all material times, the Petitioners herein were all bona fide students at the Respondent's institution situated at Machakos Town undertaking various degree programs.
2. The Respondent, on the other hand is Public University duly established under the *Universities Act* No. 42 of 2012 and the Machakos University Charter.

**Petitioners' Case**

3. According to the Petitioners, 1<sup>st</sup> Petitioner herein, **Dickson Nyandoro**, was admitted to the Respondent's institution in September, 2016 pursuing a Bachelor's Degree in Education Arts.

4. On or about 17<sup>th</sup> September, 2018 the Respondent herein uploaded the school fees on the online students portal but the said school fees were not in consonance with the fees structure already issued by the Respondent to the students.

5. On 24<sup>th</sup> September, 2018 the Dean of Students called for a stakeholders meeting between the students fraternity and the Administration at the Institution's Amphitheatre where the following issues were addressed:

- i. The confusion about school fees.
- ii. Charges for supplementary examinations.
- iii. Issuance of students identity cards
- iv. School elections

6. There was a consensus that the issues raised would be looked into by the Respondent within the shortest timeframe.

7. On 26<sup>th</sup> September, 2018 a student of the institution was hit by a reckless Motorcycle operator plying the Machakos University route which incident led to the students undertaking peaceful demonstrations but in which the 1<sup>st</sup> Petitioner herein did not at all participate. On the evening of 26<sup>th</sup> September, 2018 things spiralled out of control and the Respondent issued a Memo indicating that the institution had been closed until further notice. The Respondent informed the students to report back for re-admission on 29<sup>th</sup> October, 2018 whereby the 1<sup>st</sup> Petitioner reported back and classes resumed.

8. On 9<sup>th</sup> November, 2018 the 1<sup>st</sup> Petitioner received a call from his father who informed him that he had been suspended from school by the Respondent. The 1<sup>st</sup> Petitioner went to school and collected a letter dated 7<sup>th</sup> November, 2018 indicating that he had been suspended indefinitely. However, on 19<sup>th</sup> November, 2018 the 1<sup>st</sup> Petitioner received another letter from the Respondent inviting him to appear before the Student's Disciplinary Committee on 4<sup>th</sup> December, 2018 at 8.30am. When on the said date at around 9 am the 1<sup>st</sup> Petitioner appeared before the Respondent's Student's Disciplinary Committee, he was asked which tribe he belonged to, the Constituency he was coming from, his relationship with one **Gideon Omare** and whether he had ccampaigned for him.

9. It was pleaded that 1<sup>st</sup> Petitioner was not asked any questions specifically in relation to the suspension and the claims made in the letter suspending him. Further, he was not given an opportunity to present his case and controvert the accusations levelled against him and the Respondent acted as the prosecutor, judge and the jury.

10. It was pleaded that on or about 18<sup>th</sup> December, 2018 the 1<sup>st</sup> Petitioner received a letter from the Respondent's Student's Disciplinary Committee indicating that he had been suspended from the Institution for a period of 4 academic years.

### **The 2<sup>nd</sup> Petitioner's Case**

11. As for the 2<sup>nd</sup> Petitioner, it was pleaded that he was admitted at the Institution on September, 2018 pursuing a bachelor's degree in Statistics and Programming. After the students' protests and subsequent closure of the institution, the 2<sup>nd</sup> Petitioner was re-admitted on 30<sup>th</sup> October, 2018 and resumed classes on 31<sup>st</sup> October, 2018. However, on 31<sup>st</sup> October while leaving the institution after classes, the 2<sup>nd</sup> Petitioner was approached by one Christine an employee of the Respondent who stated that she wanted to talk to him. The said Christine accused the 2<sup>nd</sup> Petitioner of incitement and requested the 2<sup>nd</sup> Petitioner to give her his Admission number which he did. On 1<sup>st</sup> October, 2018 the 2<sup>nd</sup> Petitioner was suspended from the institution and he was invited before the Respondent's Student's Disciplinary Committee where he was asked whether he knew one **Gideon Omare** and whether he ccampaigned for him during the previous school elections. He was further asked whether he had spoken during the consultative meeting held between the students and the administration.

12. It was similarly pleaded that the 2<sup>nd</sup> Petitioner was never granted an opportunity to defend himself and argue his case and that he was not informed of specific charges that would allow him to mount a defence. He was later dismissed and informed that the Committee would communicate its decision. On 18<sup>th</sup> December, 2018 the Respondent's Student's Disciplinary Committee issued a verdict suspending the 2<sup>nd</sup> Petitioner from the Institution for two academic years.

### **The 3<sup>rd</sup> Petitioner's Case**

13. The 3<sup>rd</sup> Petitioner, **Obae Kevin**, it was pleaded was admitted in September, 2016 pursuing a bachelor's degree in Agribusiness Management and Trade. On 26<sup>th</sup> September, 2018 while heading to school the 3<sup>rd</sup> Petitioner witnessed a student being hit by a motorcycle operator around the Machakos University area but since he was already late he rushed to class. On the same day, students conducted a peaceful protest expressing their dissatisfaction on the recklessness of the motorcycle operators around the Institution but in the evening of the same day, things spiralled out of control and the school was closed indefinitely. Though he was readmitted on 29<sup>th</sup> October, 2018 and resumed his classes without any issues, on 10<sup>th</sup> December, 2018 he was accosted by one **Christine** an employee of the Respondent at around 4 pm with an accusation that he had stolen some items. He was then locked in a room at the gate until 7pm when the Deputy Vice Chancellor came and informed him to accept the charges levelled against him and the sentence would be short and/or less harsh.

14. On the same evening, the 3<sup>rd</sup> Petitioner was issued with a letter suspending him from the Institution indefinitely and later issued with a letter to appear before the Student's Disciplinary Committee on 29<sup>th</sup> March, 2019 on which day he appeared before the said Committee and

was asked where he hailed from, his relationship with one **Gideon Omare** and whether he was leading demonstrations at the institution.

15. Just like the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents, the 3<sup>rd</sup> Respondents contended that he was not given any chance and/or opportunity to defend himself before the Committee and he was informed that it would communicate its verdict. Further the 3<sup>rd</sup> Petitioner was not issued with enough information that would allow him an opportunity to answer to specific charges. Thereafter, he was issued with a letter from the Respondent suspending him for three academic years from the institution.

16. Contrary to the averments contained in the replying affidavit, the Petitioners denied that they disrupted learning at Machakos University or participated in activities that caused unrest, tension and instability within the university. They particularly denied that they were involved in the chaotic unrest alluded to by the Respondent or that they ejected students from classes, harassed and extorted motorists along the Machakos-Wote Road. In their view, though ejecting students, harassing and extorting motorists amount to criminal conduct and is punishable under the **Penal Code** no criminal sanctions whatsoever were filed against them in court owing to the said accusations levelled against them by the Respondent. The Petitioners admitted that there had been protests at the institution over the confusion over the school fees payable to the institution, and that the students conducted peaceful protest as guaranteed in Article 37 of the Constitution of Kenya 2010.

17. They averred that the 3<sup>rd</sup> Petitioner herein admitted to having participated in the protests after being accused of stealing, locked at a room at the school gate for hours and coerced and/or misinformed by the Deputy Vice-Chancellor that if he accepted the charges, his sentence would be short and less harsh and his subsequent decision and/or admission was not independent and/or free.

18. The Petitioners averred that if the suspension was in tandem with the rules of the University and the Constitution 2010, the Respondent should have provided the minutes to refute their claims that it was marred with irrelevant questions relating to their support over one **Gideon Omare** a vocal student leader. They reiterated that the suspension was done by the Students Disciplinary Committee which decision was *ultra vires* as the powers to suspend students are only conferred to the University Senate alone. And that they were suspended by the Students Disciplinary Committee which clearly overstepped its mandate as can be discerned from their suspension letters.

19. In this petition, the Petitioners have relied on Articles 10(1) and (2), 21, 47 of the Constitution and contended that the Respondent's draconian way of conducting disciplinary proceedings does not at all uphold the tenets espoused under Article 10(2) of the Constitution of Kenya specifically respect of human rights and the process undertaken did not promote good governance.

20. It was their case that they were subjected to disciplinary proceedings and were further suspended by the same Students Disciplinary Committee which was in contravention of Rule 11(7)(a)(iv) of the Machakos Rules and Regulations which expressly provide that the mandate of the Students Disciplinary Committee is to recommend suspension to the University Senate. In this case, the Petitioners were suspended by the Student's Disciplinary Committee whose decision was *ultra vires* for offending the express provisions of the Rules and Regulations and the said decision is therefore an illegality.

21. According to Petitioners, the acts and/or omissions of the Respondent which include intimidation, threats and failing to give the Petitioners a right to mount their defence ran contrary to and the sort of questions the Petitioners were subjected to were a direct assault on Article 19 of the Constitution.

22. It was contended that the Respondent was in breach of Article 47 of the Constitution in:

- i. Failing to give the Petitioners a right to be represented by counsel.
- ii. Failing to inform the Petitioners of the charges and/or accusations levelled against them with exactitude in order to mount a defence.
- iii. Being denied a chance to defend themselves at the disciplinary proceedings.
- iv. Being prosecuted and adjudged by a body that had no mandate and/or power to suspend them as provided for under **Rule 11(7)(a)(iv) of the Machakos Rules and Regulations**.

23. It was averred that contrary to Article 50 of the Constitution, the Petitioners were denied the right to be represented by counsel which is expressly forbidden by the Regulations under provision. Further they were denied a chance of fair hearing by being asked irrelevant questions, not being told the charges levelled against them with exactitude and being denied a chance to mount a defence during the disciplinary proceedings. In addition, the Student's Disciplinary Committee proceeded to suspend the Petitioners whose mandate is solely with the University Senate and thus acted *ultra vires* Rule 11(7)(a)(iv) of the Machakos Rules and Regulations which expressly provide that the mandate of the Students Disciplinary Committee is to recommend suspension to the University Senate.

24. The Petitioners lamented that they have been subjected to extreme cruelty which has affected their emotional wellbeing and contributed to a strenuous relationship with their parents. Further, they have been denied the right to education as provided and/or guaranteed under Article 43(1)(f) the Constitution since they were denied a fair hearing.

25. It was the Petitioners' case that by repeatedly failing to address the Petitioners legitimate concerns even after multiple requests, the Respondent has not only failed to uphold the crucial tenets of human dignity, social justice and respect for human rights, it has fallen short of the principle of good governance and accountability espoused under Article 232 and 259 of the Constitution.

26. The Petitioners averred that they come from humble backgrounds and are at the risk of having their promising lives destroyed and risk being rendered destitute and vagrant unless this court intervenes and safeguards their rights from further violation by the Respondent.

27. The Petitioners therefore sought the following orders:

- a) **A declaration that the Petitioners rights to fair administrative action and fair hearing were violated by the Respondent.**
- b) **An order of Certiorari quashing the decision of the Respondent's Students' Disciplinary Committee suspending the Petitioners from the institution.**
- c) **An order of mandamus directing the Respondent to re-admit the Petitioners back into the Institution and allowing them to continue with their degree programs.**
- d) **The Respondent be condemned to pay Costs of the Petition to the Petitioners.**
- e) **Any other orders and or directions this Honourable Court deems fit to grant.**

#### **The Petitioners' Submissions**

28. On behalf of the Petitioners, it was submitted that that since the Petitioners' rights as envisaged under Article 47 and 50 of the Constitution were violated by the Respondent, this court has a mandate under the Constitution to ensure that they are protected and upheld. Based on section 9(4) of the **Fair Administrative Action Act**, it was submitted that the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it and the above reasons underscore the need for this court to hear and determine this matter. In support of their submissions the Petitioners relied on the case of **Republic vs. Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR**.

29. According to the Petitioners, the peculiar circumstances of this case places it within the exception provided for under Section 9(4) of the **Fair Administrative Action Act** as follows:

- a. *The Respondent herein was uncooperative and unwilling to issue the Petitioners with Minutes of the disciplinary proceedings in order for them to file an appeal.*
- b. *The Petitioners herein mainly challenge the procedural aspect of the suspension and only the High Court has the constitutional mandate to provide such remedies and not any other body.*
- c. *Some of the members sitting at the disciplinary proceedings which the Petitioners were subjected to, also sit at the University Senate which hears the appeal and in the circumstances any chances of fairness were slim.*

30. It was submitted that the Petitioners' rights under Article 47 and 50 of the Constitution were violated and this Court has the requisite mandate and jurisdiction under Article 165(3) to make that determination.

31. In the present case, it was submitted that the Petitioners herein were suspended by the Students Disciplinary Committee on diverse dates in 2018 and 2019. The Petitioners annexed their respective suspension letters attesting to the fact that they had been suspended by the Respondent through the Students' Disciplinary Committee. However, the procedure taken by the institution when undertaking disciplinary proceedings is provided for under the Machakos University Statute and an extract of the said rules and regulations were annexed attesting to the fact that the powers to suspend or expel a student from the institution was the sole preserve of the University Senate. With reference to the powers and/or mandate of the Students Disciplinary Committee, the rules provide that the said committee's mandate *inter alia* is to make recommendations to the University Senate about suspending a student. An extract of the said rules was also annexed to the Supplementary Affidavit in support to the Petition.

32. In the present suit, the Petitioners contend that they were suspended from the institution by the Students' Disciplinary Committee whose actions amounted to an illegality, were null and void by virtue of the fact that the committee acted in excess of the powers conferred to it by the governing rules.

33. The Petitioners further contended that the disciplinary proceedings were unfair and fell short of article 47 and 50 of the Constitution. In this regard, the Petitioners stated that they were accused of ejecting students from classrooms, barricading the roads and extorting motorists along the Machakos Wote road yet there were no witnesses who appeared before the disciplinary proceedings claiming to have been ejected from classes by the Petitioners nor were there any motorists who appeared and made claims of having been harassed or extorted by the Petitioners. Further, no criminal charges were ever brought against the Petitioners over the alleged conduct. It was accordingly submitted that the Petitioners were denied of an opportunity to cross-examine and/or controvert such allegations and reliance was placed on **Gideon Omare vs. Machakos University (2019) eKLR** and the case of **Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Co.**

34. In this case it was submitted that there is no doubt that the Petitioners were suspended by a body in excess of its powers as provided under the governing rules of the Respondent and as such the said actions and/or omissions were in contravention of articles 47 and 50 of the Constitution based on the finding in **Gideon Omare vs. Machakos University** (supra).

35. Based on the foregoing, it was submitted that the Petitioners are entitled to the orders sought in the Petition.

#### **Respondent's Case**

36. The Petition was however opposed by the Respondent.

37. According to the Respondent, the 1<sup>st</sup> Petitioner was a student at Machakos University pursuing Bachelor's Degree in Education having been admitted in September 2016 while the 2<sup>nd</sup> Petitioner was a student at Machakos University pursuing Bachelor's Degree in Statistics and Programming having been admitted in September 2017. The 3<sup>rd</sup> Petitioner was a student at Machakos University pursuing Bachelor's Degree in Agribusiness Management and Trade having been admitted in September 2016.

38. It was however averred that the Petitioners are currently not *bona fide* students of the Respondent University as they have not met the registration requirements or financial obligations thereof as required by the University Statutes as they are serving their suspension terms.

39. It was deposed that the Petitioners herein in the company of other students during the September- December 2018 semester disrupted learning activities at the Respondent University by engaging in activities that caused unrest, tension and instability within the University. It was averred that some grievances *inter alia* the confusion on school fees caused by the Respondent's system software upgrade had been raised by its Students leading to a stakeholders meeting on 24<sup>th</sup> September, 2018 between the Students fraternity and the Administration where their concerns were addressed and resolved immediately. However, on 26<sup>th</sup> September, 2018, the unrest in the University escalated and spiralled out of control necessitating a Special Senate Meeting in that there were chaotic, hostile and disruptive demonstrations that involved *inter alia* barricading of the Machakos- Wote road with effect of paralyzing the transport system therein and ejecting of peaceful students from lecture halls as classes were ongoing. A special senate meeting was convened urgently to chart the way forward as the unrest was out of control, learning had been disrupted and to avert any damage to property and loss of life and in that meeting it was resolved that the university be closed and the Director of security services carry out investigations on the students instigating the chaos and the unrest.

40. According to the Respondent, the Director of Security Services carried out investigations and positively identified the petitioners as some of the students involved in the chaotic unrest that also led to the harassing and extortion of motorists along the Machakos-Wote Road. Though the Respondent university was reopened towards the end of October 2018, tension was evidently still high, investigations had not been concluded and hence the petitioners were suspended in the interim from the University for their Participation in the unrest as revealed in the preliminary investigations pursuant to Schedule IX Clause 11 Subsection 7(i) of the University Statutes in the interest of the wider students body of about 8,000 students to prevent further unrest, for learning to resume and to prevent any tampering of evidence pending the constitution of and their appearance before the Students Disciplinary Committee.

41. It was deposed that the Petitioners were invited to appear before the Students Disciplinary Committee vide letters of invitations dated 19<sup>th</sup> November, 2018, 19<sup>th</sup> November, 2018 and 22<sup>nd</sup> March, 2019 respectively though which they were informed them of:

- I. The hearing date before the Students Disciplinary Committee
- II. The particulars of charges they were facing,
- III. The provisions of the University Statute they were in breach of
- IV. Their right to make and send a written defence to the Deputy Vice Chancellor( ASA)before hearing date.
- V. Their right and mandatory requirement to bring alongside their parent/guardian.

42. According to the Respondent, the petitioners appeared before the Students Disciplinary Committee comprising of *inter alia* the Deputy Vice Chancellor Academic and Student Affairs (ASA) who chairs the committee and two student representatives on 4<sup>th</sup> December, 2018, 4<sup>th</sup> December, 2018 and 29<sup>th</sup> March, 2019 respectively accompanied by their respective guardians. It was disclosed that on 4<sup>th</sup> December, 2018, student representatives **Stephen Kibe** and **Lydia Gathoni** were invited while on 29<sup>th</sup> March 2019, **Shadrack Mwangat** and **Jerono Cynthia** were invited and they sent other student representatives on their behalf.

43. At the said meeting, the charges facing the respective students were read to them by the Chairperson of the Committee, the Deputy Vice Chancellor Academic and Student Affairs (ASA), and they were accorded a chance to respond to the charges in their defence. The Petitioners were asked standard questions including confirmation of their names, the Programme that they were taking, the people accompanying them, whether they had read and understood the charges in the invitation letter and whether they had sent or had a written defence.

44. The deponent, who stated that he was the Chairperson of the Students Disciplinary Committee (SDC) denied asking the questions alleged by the Petitioners and disclosed that evidence including CCTV footage was adduced before the Students Disciplinary Committee proving that petitioners during the students unrest were involved in major disciplinary conduct in complete defiance of The Rules and Regulations Governing the Conduct and Discipline of Students of University in the following sense of inciting students, harassing and soliciting for money from motorists, creating disturbance, ejecting students from lecture halls, organizing and perpetrating chaotic demonstrations and road barricading contrary to Regulation 10(2)(a) The Rules and Regulations Governing the Conduct and Discipline of Students of University

45. It was averred that the demonstrations were not peaceful as envisaged in Article 37 of the Constitution of Kenya but disruptive and interfered with the rights and interests of members of the public, students who were forcefully ejected from lecture halls as classes were ongoing.

46. It was deposed that the Spirit of the University Statutes is to promote a peaceful and conducive learning environment for students at the respondent university; and that students wishing to engage in demonstrations within the University or similar activities do so with the notice but permission of the Vice Chancellor which permission was never sought by the Petitioners herein.

47. The deponent stated that she asked the respective Petitioners if they had any witnesses in support of their case but none of the Petitioners had a witness, however, in the event of a witness being present, his testimony would be heard and taken by the committee. During the disciplinary proceedings, the 2<sup>nd</sup> Petitioner first denied the charges against him but upon being positively identified on the CCTV Footage by his mother who had accompanied him to the Committee, he confessed to the Charges. The 3<sup>rd</sup> Petitioner admitted in his letter dated 22<sup>nd</sup> January, 2019 addressed to the Vice-Chancellor his involvement in the students' unrest.

48. The deponent stated that as it is the practice as the Chairperson of Student Disciplinary Committee (SDC) at the end of the disciplinary proceedings, she personally asked the petitioners herein and their respective parents to convey any comments, requests or sentiments to the committee and no complains whatsoever were raised on the disciplinary process undertaken or otherwise.

49. It was averred that the Students' Disciplinary Committee (SDC) acting under the Statutes Schedule II (3) deliberated after the disciplinary proceedings and found the Petitioners guilty of the charges preferred against them and recommended for their respective suspension by the Senate as per the University statutes.

50. In the Respondent's view, the Students Disciplinary Committee acted within its powers as mandated by the Machakos University Statutes by considering the disciplinary allegations against the respective petitioners, investigating into their conduct and recommending to the Senate the suspension of the petitioners. It was denied that the said Committee overstepped its mandate granted by Regulation 11 (7) as alleged by the petitioners because the said Committee's duty is to recommend to the Senate measures and or penalties depending on the gravity of the offence and in this particular instance the committee recommended that petitioners be suspended for Four(4), Two(2) and Three(3) Academic Years respectively with the right to resume their studies at the Respondent University after serving their periods of suspension which recommendation was approved by the senate.

51. It was disclosed that on 11<sup>th</sup> December, 2018 a Report dated the same day on the Student Disciplinary Committee meeting held on 4<sup>th</sup> December, 2018 was tabled for deliberation by the Senate on the recommendations made by the Student Disciplinary Committee in regards to the matter of *interalia* the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners which Report was approved by senate with proposed changes and it is evident from the report itself that it was a recommendation to the senate that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners be suspended for Four(4) and Two(2)years respectively. Upon the approval of the Senate, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners were suspended for a period of Four (4) Academic Years effective from September –December 2018 and two (2) Academic Years effective from September –December 2018 respectively vide letters dated 18.12.2018.

52. It was further averred that on 5<sup>th</sup> April, 2019 a Report dated 5<sup>th</sup> April, 2019 on the Student Disciplinary Committee meeting held on 24<sup>th</sup> March, 2019 was tabled for deliberation by the Senate on the recommendations made by the Student Disciplinary Committee in regards to the matter of *interalia* of the 3<sup>rd</sup> Petitioner herein which Report was approved by senate with proposed changes and it is evident from the report itself that it was a recommendation to the senate that the 3<sup>rd</sup> Petitioner be suspended for Three (3)Academic years and upon the approval of the Senate on 5<sup>th</sup> April, 2019, the 3<sup>rd</sup> Petitioner was suspended for a period of Three (3) years Academic Years effective from September –December 2018.

53. It was averred that at no time has the Respondent University through its agents unlawfully locked any student or the 3<sup>rd</sup> Petitioner herein for that matter or coerced them to make any confessions, therefore the allegation that one of the Deputy Vice Chancellors who the Petitioner has conveniently failed to name coerced him to make a confession is untrue, unfounded, baseless, reckless and defamatory. It was averred that the Petitioners were not only given an opportunity to convey their written defence, but also were accorded an oral hearing in the presence of their parents/guardians and student representatives where they were accorded an opportunity to make their oral presentations in their defence.

54. The Respondent averred that since the University Statutes provide for a right of appeal to the Vice-Chancellor which right the Petitioners were promptly informed vide their respective suspension letters, they chose not to exercise but moved this Court prematurely before exhausting the internal mechanisms as provided by the University Statutes.

55. According to the Respondent, the spirit of University Rules and Regulations encourages a student faced with an indiscipline issue to respond to the allegations personally and does not in any way curtail the right to fair hearing but rather moulds the morals of student by instilling a sense of personal responsibility and accountability. It was averred that none of the Petitioners requested and/ or informed the Committee that they would be represented by a legal Counsel or had been accompanied by one and neither did they raise the issue of legal representation during their respective disciplinary proceedings hence the issue of legal representation cannot be properly raised now as ground for challenging the decision of the Senate.

56. It was averred that the Petitioners freely and voluntarily agreed, in writing, to be bound by and to comply with the Rules and Regulations of the University when they joined the institution and the Petitioners have an obligation to abide by the University Regulations for maintenance law and order within the institution for the wider interests of the institution and 8,000 other students who were subjected to unnecessary costs, disruption of learning and inconvenience due to the activities of the Petitioners. According to the Respondent, the Petitioners were procedurally and lawfully suspended, due process was followed in accordance to the Constitution of Kenya, 2010, Rules of Natural Justice and University Statutes and the respondent has therefore not breached any of the rights and fundamental freedoms of the petitioners but only discharged its obligations as a University and a public institution and the Court was urged to dismiss the petition with costs to the Respondent.

### **Respondent's Submissions**

57. On behalf of the Respondent it was submitted that the Respondent's University Statutes provide for a right of appeal to the Vice-Chancellor which right the Petitioners were promptly informed vide their respective suspension letters and which avenue they chose not to exercise but moved this court prematurely without exhausting the internal mechanisms as provided by the University Statutes. In this regard the Petitioners relied on Section 9(2)(3) and (4) of the **Fair Administrative Action Act**, the Court of Appeal decision in **the Speaker of the**

**National Assembly vs. Karume (2008) 1KLR 425** and the case of **Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others [2015] eKLR.**

58. In this case it was submitted that there are no exceptional circumstances that existed to place this matter within the exception provided under Section 9(4) of the ***Fair Administrative Action Act*** as provided above. Secondly, the Petitioners did not apply to this Honourable Court for exemption as envisaged in the above provision. According to the Respondent, the contention by the Petitioners that the Respondent was uncooperative and unwilling to issue the Petitioners with Minutes of the Disciplinary Proceedings in order for them to file an appeal is an excuse meant to justify why they did not file an appeal as the same did not preclude them from filing an appeal.

59. Secondly, Section 9 of ***the Information Act*** provides a timeline within which Information requested from a public entity may be availed. The Petitioners herein did not accord the Respondent 21 days or time within which the relevant department could retrieve the requested information nor did they get back to the Respondent to collect the information or documents requested.

60. It was therefore submitted that the petition should be dismissed on account of the Petitioner's failure to exhaust the avenues of dispute resolution remedies provided under the Machakos University Statutes and their failure to apply for exemption from the said provisions. To the Respondent, the appeal remedy as provided in the Machakos University Statute is available, accessible, affordable, timely and effective and the Petitioners have not tendered sufficient explanation as to why they did not exhaust the available remedies no exceptional circumstances existed from exhausting the internal dispute resolution mechanism as allowed by section 9(4) of the ***Fair Administrative Action Act***.

61. According to the Respondent, the present petition does not comply with Rule 4 of the ***Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure*** as the petition does not raise substantial constitutional questions of law and the remedies sought by the petitioners does not depend on the Constitution but could be available under judicial review. In the Respondent's view, the Petitioners' claims as ascertained from the orders sought are essentially for judicial review orders as the Petitioners submit in their submissions that they challenge the procedural aspect of their suspension. In this regard the Respondent relied on **Gideon Omare vs. Machakos University [2019] eKLR** which quoted **John Harun Mwau vs. Peter Gastrow & 3 Others [2014] eKLR**, **Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011, General Plastics Limited vs. Industrial Property Tribunal & Another [2009] eKLR**, and **Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755.**

62. Regarding the issue whether the Respondent's action was ultra vires, it was submitted that the question to be answered in this regard is whether, in light of the scope of powers given to the Students Disciplinary Committee under ***Machakos University Act***, did it act beyond their given powers. According to the Respondent, the powers given to the Students Disciplinary Committee *inter alia* is to receive and consider matters of disciplinary nature affecting students on behalf of the senate and to report to senate on appropriate action taken and may further, recommend to the Senate serious disciplinary cases that may require suspension or expulsion. Accordingly, the Students Disciplinary Committee (SDC) acted within its powers as mandated by the Machakos University Statutes by considering the disciplinary allegations against the respective petitioners, investigating into their conduct and recommending to the Senate the suspension of the petitioners. The respective reports were tabled before the Senate and upon deliberation, the Senate approved the suspension of the respective Petitioners as recommended by the respective Students Disciplinary Committees.

63. As regards the issue whether the Petitioners were accorded a fair hearing the Respondent relied on the case of **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No.34 of 2009** as quoted in **Republic vs. Kenyatta University Ex-Parte Solomon J Mummah [2013] eKLR** where the court was of the view that Practitioners should not rigidly import the hearing requirements present in court room situations

64. It was submitted that the Petitioners were suspended pursuant to disciplinary proceedings and not 'trial' as contemplated under Article 50(2) of the Constitution of Kenya, 2010 and administrative proceedings are not adversarial proceedings where all the trappings of litigation are expected to be on. They were invited to appear before the Students Disciplinary Committee vide letters of invitations which informed them of the hearing date before the Students Disciplinary Committee, the particulars of charges they were facing, the provisions of the University Statute they were in breach of and their right to make and send a written defence to the Deputy Vice Chancellor( ASA)before hearing date. The petitioners appeared before the Students Disciplinary Committee accompanied by their respective guardians and present during the proceedings were two student representatives.

65. It was therefore submitted that the Petitioners were procedurally and lawfully suspended, due process was followed in accordance to the Constitution of Kenya, 2010, Rules of Natural Justice and University Statutes as detailed in our Replying Affidavit.

66. As to whether the Petitioners are entitled to the remedies sought, it was submitted based on ***Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270*** that the decision whether or not to grant judicial review reliefs is no doubt exercise of discretion and reliance was placed on the decision of **Okwany, J in H O O (a child suing through his father and next friend) P O O vs. Board of Management N School & 2 Others [2018] eKLR.**

67. It was therefore submitted that the Petitioners' rights have not been violated by the Respondent as illustrated above therefore the Petitioners are not entitled to the reliefs sought. According to the Respondent, the Petitioners were suspended by the University Senate pursuant to the recommendation of the Student Disciplinary Committee and therefore the prayer for '*An order of certiorari to quash the decision of the Respondent's Student Disciplinary Committee suspending the Petitioners....*' is misconceived and has no basis and should therefore be dismissed. The Respondent however disclosed that it was ready and willing to re- admit the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners to continue with their degree programmes immediately after their suspension terms are over. The Court was however urged to direct the Petitioners to exhaust the internal remedies available under the Machakos University Statute by appealing to the University Vice- Chancellor.

68. In the result, the Court was urged to disallow the present petition with costs to the Respondent.

#### **Determinations**

69. I have considered the issues raised in this petition.

70. The first issue for determination is whether this is the right forum for this dispute to be litigated. On behalf of the Respondent it was submitted that the Respondent's University Statutes provide for a right of appeal to the Vice-Chancellor which right the Petitioners were promptly informed vide their respective suspension letters and which avenue they chose not to exercise but moved this court prematurely without exhausting the internal mechanisms as provided by the University Statutes. I associate myself with the decision of the Court of Appeal decision in Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others [2015] eKLR, that:-

**“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution. We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed.”**

71. In Republic vs. National Environment Management Authority [2011] eKLR, it was held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment:

**“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge.”**

72. There is now a chain of authorities from the High Court as well as the Court of Appeal that where an alternative remedy is provided for, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided.

73. I therefore associate myself with the position adopted by Emukule, J in Revital Healthcare (Epz) Limited & another vs. Ministry of Health & 5 Others [2015] eKLR at paragraph 10 where he cited with approval the case of Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004 in which it was held that:-

**“...where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process.”**

74. This exhaustion doctrine has been restated by the Court of Appeal in Geoffrey Muthinka Kabiru & 2 Others vs. Samuel Munga Henry & 1756 others [2015] eKLR held that:

**“Courts ought to be a port of last resort and not the first port of call the moment a storm brews...the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that party is first of all diligent in the protection of his own interests within the mechanisms in place for resolution outside the courts...”**

75. This position has now acquired statutory underpinning by the enactment of the *Fair Administrative Action Act*, No. 4 of 2015 which is an Act of Parliament enacted pursuant to Article 47 of the Constitution. Section 9(2), (3) and (4) thereof provides:

***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

76. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies.

77. In this case according to the Petitioners, the peculiar circumstances of this case places it within the exception provided for under Section

9(4) of the *Fair Administrative Action Act* as follows:

- a. *The Respondent herein was uncooperative and unwilling to issue the Petitioners with Minutes of the disciplinary proceedings in order for them to file an appeal.*
- b. *The Petitioners herein mainly challenge the procedural aspect of the suspension and only the High Court has the constitutional mandate to provide such remedies and not any other body.*
- c. *Some of the members sitting at the disciplinary proceedings which the Petitioners were subjected to, also sit at the University Senate which hears the appeal and in the circumstances any chances of fairness were slim.*

78. However, as appreciated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425**:

**“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure....In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.”**

79. The rationale for this view is reflected in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarsteth [1985] LRC** in which it was held:

**“so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair.”**

80. It was therefore held by Nyarangi JA in **Daniel Nyongesa and Others vs Egerton University College CA No. 90 of 1989** that:

**“Courts are very loathe to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run Universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decision has been made without fairly and justly hearing the person concerned or the other side...”**

81. To my mind the Petitioners cannot escape the exhaustion doctrine simply because in their view, their chances of getting fairness is slim as some of the members sitting at the disciplinary proceedings which the Petitioners were subjected to, also sit at the University Senate which hears the appeal. They can only escape the same if they satisfy this court for example that the appellate remedy or procedure prescribed is less convenient or otherwise less appropriate. In this case, no material has been placed before me that can satisfy me that that is the position.

82. In arguing this case the parties herein have made reference to copies of the extracts of the University Regulations on the Composition of the Students Disciplinary Committee. The extracted page of the Regulations provides for the Students' Disciplinary Committee and prescribes its terms of reference. Its first terms of reference is:

**“To receive and consider matters of disciplinary nature affecting students on behalf of Senate, and to report to the Senate on appropriate action taken, provided that the disciplined student may appeal to the Vice-Chancellor within fourteen (14) days from the date of the letter communicating the decision.”**

83. The Petitioners contend that the decisions suspending them were made by the said Committee when such a decision ought to have been made by the Senate. For some reasons the parties to this petition were content with only annexing a page of the University Regulations, a page which does not set out the powers of the Senate. In those circumstances it is not possible for this Court to determine whether the Senate is the one empowered to make such a decision.

84. On the other hand, while the above regulation provides for the right of appeal to the Vice Chancellor **within fourteen (14) days from the date of the letter communicating the decision** without annexing the relevant portion of the Regulations dealing with the powers of the senate, this Court is unable to find whether the said right of appeal is from the decision of the Students Disciplinary Committee or that of the Senate.

85. In other words, based on the material placed before me this Court cannot make a finding as to whether this Petition is properly before this Court, a decision which this Court is enjoined to make before proceeding to determine the merits of the appeal since this Court ought not to proceed to deal with a matter particularly a constitutional petition while in the dark regarding the competency of the Petition. With due respect to the parties to this petition, this petition was conducted in a very casual manner. For instance, the affidavit in support of the petition was sworn by one of the petitioners who was content with exhibiting an authority to sign, swear and plead by the other petitioners. However, in the affidavit, he does not disclose his source of information or his grounds for arriving at certain beliefs, a legal requirement since affidavits ought not to contain hearsay matters unless the sources of information are disclosed.

86. On the other hand, the Respondent raised a very weighty objection to the petition but was guilty of material non-disclosure as regards the powers of the Senate.

87. In the premises, this Petition is incompetent and since both parties are culpable, it is struck out but with no order as to costs.

88. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 20<sup>th</sup> day of July, 2020.**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Kyalo for the Petitioners***

***Miss Kamau for the Respondent***

***CA Geoffrey***