



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 11 OF 2019

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23,
165(3), 258 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**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

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

AND PROCEDURE RULES 2013

BETWEEN

GIDEON OMARE.....PETITIONER

VERSUS

MACHAKOS UNIVERSITY.....RESPONDENT

JUDGEMENT

The Parties

1. The Petitioner is described in this petition as a male adult Kenyan Citizen of sound mind, who was a 3rd year student undertaking a Bachelor's Degree in Education at Machakos University, the Respondent herein, until 18th December 2018 when he was purportedly expelled from the Respondent's Institution.

2. The Respondent is a Public University established under the *Universities Act* (No. 42 of 2012) and the Machakos University Service Charter to offer tertiary education.

The Petitioner's Case

3. According to the petitioner, prior to his said expulsion, he was a third-year student of good standing without any history or prior incidents of disciplinary issues at Machakos University, having joined the school sometimes in September 2015 to pursue a Bachelor's Degree in Education. However, sometimes in September 2018, there had been a sustained general student dissatisfaction and disgruntlement with issues that were affecting them including unexplained revision of school fees, delayed issuance of student ID cards, relatively exorbitant supplementary exam charges, corruption and student elections mismanagement and which issues the students wanted the university administration to address. It was pleaded that during the said period and on or about 20th September, 2018 at around 1:00pm, the Deputy Internal Security Officer **Mrs. Christine Mwondi** rang the Petitioner through his personal mobile phone requiring the him to see her in the Security Office. In answer to the said summons, the petitioner attended before the said Security Office as required and on arrival, he was questioned about some placards the said Deputy Security Officer had seen pinned on the University's Dining Notice Board and Social Hall respectively and whether he was involved in any way in their erection. Though the petitioner denied the said suggestion, the Deputy Security Officer insisted to know more from the Petitioner. Realizing that she seemed convinced that the Petitioner knew or had something to do with the erection of the said placards, the Petitioner re-emphasized and reiterated that he did not know or had any involvement with the said erection and requested that the Deputy Security Officer reviews the University CCTV Cameras' footage to verify the Petitioner's position and in fact identify the individuals behind the erection of the said placards.

4. It was pleaded that subsequently on 21st September 2018 at around 2.00pm, the Petitioner received a text message from the Registrar Academic and Student Affairs **Prof. Ondari Okemwa**, requiring the Petitioner to see him in his office immediately. In obedience to the said request, the petitioner appeared before **Prof. Ondari** in his office where the latter also raised the same issues that had been raised by the Deputy Security Officer over the placards and the Petitioner reiterated his earlier position and further requested for a review of the CCTV Cameras' footage as he was sure this would certainly exonerate him from these allegations. **Prof. Ondari** then asked the Petitioner to accompany him to the Deputy Vice Chancellor (DVC) in charge of Student Affairs' office where upon arrival he was asked to wait outside as **Prof. Ondari** went inside the said office. After a while, **Prof. Ondari** returned and asked the Petitioner to go back as he would be called later and the Petitioner then left for the lecture hall.

5. According to the petitioner, later that day, he received a text message from the Registrar's Office asking him to pick a letter from his office. Upon reaching the said offices, the Petitioner was handed a letter and asked to confirm receipt of the same by signing a notebook, which he did. Upon perusing the contents of the said letter he was shocked that it was an indefinite suspension from the University.

6. It was averred that on 24th September 2018 at around 8.00am, the Petitioner proceeded to the DVC's offices to seek for permission to access the University premises and more particularly the school hostels, in order to pick his laptop and books that he had left in the possession of his classmates and friends even as he awaited an invitation to Students' Disciplinary Committee. While waiting at the said offices, the Petitioner was menacingly confronted by Police Officers whose intentions he did not know and unconsciously in panic mode, he found himself retreating towards the students who were within the vicinity and who in turn protested what seemed the Petitioner's impending arrest and inquired to know the reasons for his arrest while demanding that the school administration addresses them on the issues that affected them instead of suppressing them through selective student arrests and intimidation. Upon realising the turn of events and having been ordered to keep off school premises, the petitioner left the University and went to Nairobi to stay with his relatives awaiting his disciplinary process as advised in his suspension letter.

7. According to the petitioner, while serving his suspension, the Dean of Students **Dr. Kamwaria** called for an open forum and/or consultative meeting to discuss the said issues that were affecting students and which issues the students had for some time expressed their disaffection with after which a consensus was arrived at and classes resumed. However, on 25th of September 2018 at around 10.00am, the Petitioner received a phone call from the Dean of Students asking him to make a commitment in writing admitting involvement in the 24th September 2018 incident and apologizing for his association with the same. This request was declined by the petitioner since, according to him, he was not involved and read a sinister motive in the said order. The Dean then asked the Petitioner to see him in his Office as soon as practicably possible. Since the Petitioner was in Nairobi at the time, he with alacrity made travel arrangements to Machakos where he got to the University quite late at around 4.00pm. As he was approaching the Dean's Office, the Student Counsellor called him to her office where he was accosted by the police officers who arrested him informing him that the Machakos Divisional Criminal Investigation Officer (DCIO) wanted to talk to him. It is here that the Petitioner was informed by the DCIO that the University was closed on 26th September 2018 indefinitely on the grounds that the Students were protesting for his release from the police cells. The Petitioner was later charged with incitement to violence contrary to section 96(b) of the **Penal Code** in **Machakos Chief Magistrate Court Criminal Case No. 490 of 2018** where he pleaded not guilty to the said charges and was released on a cash bail of Kshs. 20,000/=.

8. Subsequently on the 19th November 2018, the Petitioner was invited to appear before the Student Disciplinary Committee on 4th December 2018 over the following disciplinary issues;

- a) Ejecting Students from their classrooms;
- b) Leading Students to barricade the road;
- c) Calling for demonstrations and/or open forum without the permission of the University;
- d) Accessing the University while on suspension without the permission of the DVC-ASA;
- e) Continuing to rally suspended students to book for a lawyer;
- f) Writing placards;

g) Using Social Media to rally support for his cause;

9. On 4th December 2018, the Petitioner attended the said Student Disciplinary Committee in the company of his biological mother and uncle. With him, he took a file and his personal mobile phone containing the evidence he wished to defend himself with against the allegations facing him. Immediately after assuming their sitting positions, the DVC who also was the presiding Chair of the Students' Disciplinary Committee ordered for the forceful confiscation of the Petitioner's file and personal mobile phone containing the said evidence arbitrarily and without any explanations leaving the Petitioner with no evidence to present before the said committee. When the Petitioner refused to surrender his file and the phone, the DVC angrily read the charges the Petitioner was facing, told the Petitioner's guardians that he had been inciting students and causing chaos within the University and had become a thorn in the flesh of the University. What was supposed to be a hearing was therefore reduced into a forum of accusations and reporting charade of the Petitioner's supposedly unbecoming behaviour to his guardians by the said DVC and the Petitioner was not allowed to talk let alone give his own account with respect to the charges. Afterwards, the DVC then informed the Petitioner and his representatives accompanying him that they would receive the decision of the Committee within two weeks. On 18th December 2018, the Petitioner received the decision of the Students' Disciplinary Committee expelling him from the University vide a letter but without disclosing the reasons thereof.

10. It was the petitioner's case that there was no evidence tabled in the disciplinary proceedings in support of the charges other than the oral accounts of what the Committee had been informed by unnamed parties, notwithstanding that the said charges were highly factual yet so generalized in a manner that prejudiced the Petitioner's response as they were incapable of a specific response. For instance;

a. The allegation that the Petitioner ejected students was very general and did not specify who was ejected? How many? Where? Further, no single student was availed or a witness account and/or statement of such student provided to support this allegation.

b. On the allegation of barricading the road, there were no particulars of the Petitioner's presence in the group that supposedly barricaded the road. Even if he was to be there, there is no evidence of who he allegedly led and on what basis it is believed that they took instructions from him to barricade the road. As a matter of fact, the Petitioner was already on suspension and was not within the school precincts at the time of the said incident.

c. On the allegation of calling for demonstrations, it was not clear how when and in what forum or capacity he called for the said demonstrations. Further, during the time of the said demonstrations, the Petitioner was already out of University serving his suspension.

d. On the allegations of accessing the University while on suspension without the permission of the DVC-ASA, it is not clear the specific times being complained and whether they include instances when the Petitioner accessed school to pick his letters of invitation to disciplinary committee, expulsion letter, presentation of Appeal and collection of the VC decision. Indeed, it is not clear how the Petitioner was expected to seek permission from the said DVC and if access of the DVC Offices to seek the said permission also amounted to unlawful access.

e. That on the allegation of continuing to rally suspended students to book for a lawyer, there was no particulars as to which students he rallied. Shockingly enough, it is not even clear how this would amount to disciplinary issue.

f. On the allegation of writing placards, it is not clear which placards were written by the Petitioner and the contents thereof that would attract a disciplinary action in the first place. Although the University has invested in CCTV Cameras, the Petitioner's plea to have the camera footage reviewed fell on deaf ears.

g. On the allegation of using social media to rally for his cause, it is not clear which social media forum or posts were offensive, what was offensive in the said posts, which cause the Petitioner was rallying and the unlawfulness of the same.

11. It was contended that the wording of the **Rules and Regulations Governing the Conduct and Discipline of Students of the University** are quite specific on the nature and constituent of the above alleged disciplinary issues in the following manner;

a. Regulation 10(2)(a) prohibits boycotts and actions in furtherance of the said boycotts of lectures, tutorials and/or other school activities.

i. There was no evidence that the Petitioner participated or caused the participation of such boycotts in the name of ejection of students. No such evidence of even a single student was put forth.

ii. The police account and the account of the school contain outright contradictions on this issue. Whereas the police statements reads that the Petitioner chased away and marshalled student to chase away their lecturers causing his arrest, the school which caused this arrest abandoned the said allegation of chasing lecturers and adopted the latter account of ejecting students from classes.

iii. It is not realistic that a single lone student would eject a crowd of students from classes and it is not demonstrated how this ejection was effected in a manner that would disabuse the fiction behind this allegation.

b. Regulation 10(2)(d) prohibits any form of picketing or organized obstruction of students. Notwithstanding its unconstitutionality, this presupposes the presence and active participation of a person in such activities. Despite the Petitioner having proceeded to suspension and left the school precincts to Nairobi, the Disciplinary Committee finds him liable for barricading the road and demonstrations that were held in his absence.

c. Regulation 10(2)(e) prohibits the writing, publishing and/or distributing of anonymous literature of a malicious or libelous nature including placards.

i. It is not demonstrated by any evidence that first the Petitioner wrote, published or even distributed the said placards.

ii. The contents of the said placards have not been demonstrated by any evidence how they are malicious or libellous.

d. Regulation 10(2)(n) prohibits the improper use of social media. However, the alleged social media posts ought to have been produced as evidence, demonstrated that they originate from the Petitioner and the manner in which they were deemed to be improper or were offensive.

e. The said regulations do not provide for disciplinary action for accessing school without permission or rallying students to book for a lawyer. In any event;

i. Impermissible access would not logically or justifiably include instances where a student accesses University to seek permission for access the said school or is under lawful summons by the authorities of the same University.

ii. Rallying suspended students to seek legal redress should earn the Petitioner a pat on his back rather than an admonition with a drastic step such as suspension

12. It was further contended that the Students' Disciplinary Committee overstepped its mandate granted by Regulation 11(7) by purporting to expel the Petitioner from the University which is the sole preserve of the University Senate. However, in excess of the said mandate, the Students' Disciplinary Committee decreed in its letter of expulsion purported to expel the Petitioner.

13. Aggrieved by the decision of the Students' Disciplinary Committee, the Petitioner decided to Appeal to the University's Vice Chancellor in accordance with the University's **Rules and Regulations Governing the Conduct and Discipline of Students of the University** and specifically requested for the minutes of the Disciplinary Committee that expelled him (which minutes ought to have been availed with the letter of expulsion anyway demonstrating the reasons for the said decision), to enable him prepare an effective Appeal to the VC.

14. Since the said minutes were not forthcoming and the timelines for the Appeal was reckoning, the Petitioner had no option other than appealing notwithstanding the failure to be provided with the said minutes. He prepared his written Appeal and specifically requested for the right of audience hoping that the VC would accord him an opportunity to be heard and present evidence against the purported expulsion on 27th December 2019. However, the VC proceeded to constitute a Committee to look into the grounds of the Petitioner's Appeal without calling him for any hearing thereby further denying him the only lifeline opportunity he hoped for to salvage his academic life that had been shuttered by the Students' Disciplinary Committee after denying him any chance of defending himself.

15. The petitioner averred that notwithstanding the Petitioner had indicated that he had evidence that was never considered before the purported expulsion, the VC's Committee proceeded to pronounce itself without a consideration of the said evidence and through a decision vide a letter dated 30th January 2019 upheld his expulsion without any reasons both as to why they declined the request for right of audience and presentation of evidence or the why they upheld his expulsion. Further, this decision was reached without a consideration that the Students Disciplinary Committee expelled the Petitioner without the mandate to do so and therefore the VC and her Committee rubberstamped an illegality with finality.

16. The Petitioner lamented that despite requesting for both the minutes of the Students' Disciplinary Committee and now the VC's Committee, the same have never been supplied to date. He complained that his academic future as a diligent student was draconically sealed and the core and essential content of his constitutional right to education derogated from by the said successive decisions that were arrived at;

a. Without any support of even the slightest single whit of evidence or any justifiable reasons.

b. Unjustifiably, unreasonably and disproportionately based on allegations that were either unknown in law or highly vindictive and hopelessly frivolous.

c. With total disregard of both the precepts of a fair administrative action and the principles of natural justice.

d. Using regulations that are out-rightly in contravention with the constitution and /or interpreting the said regulations in a manner that is inconsistent with the Constitution.

e. By authorities in excess of their legal mandate under the said regulations and the law.

17. It was his case that the decisions to suspend and expel him;

a. Were made in breach of the rules of natural justice and constitutionally guaranteed rights to education.

b. Were made in bad faith and failed to meet the legitimate expectations of the Petitioner.

c. Failed to meet the principle of proportionality which seeks to strike a balance between adverse effects of which a decision has on the rights and individual liberties and interest of the Petitioner.

d. Without a process that is fair or that can be reasonably be seen to be fair and objective.

e. Were made wholly taking into account irrelevant and/or extraneous considerations while omitting relevant considerations and relevant law and/or rules and regulations.

18. In support of his petition the petitioner swore an affidavit which he filed in support of his petition.

19. According to the petitioner, to the extent that the Respondent's **Rules and Regulations Governing the Conduct and Discipline of Students of the University** blanketly (sic) and indiscriminately without any qualification(s) prohibits any form of picketing, demonstrations and/or peaceful assembly, Regulations 10 2(d) of the said regulations is unconstitutional for being in contravention of:

a. Article 24 which provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable and that the limitation does not derogate from the right or fundamental freedom's core or essential value.

b. Article 37 which provide that every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

20. To the extent that the Respondent's **Rules and Regulations Governing the Conduct and Discipline of Students of the University** blanketly (sic) and indiscriminately without any qualification(s) prohibits or can be interpreted to prohibit the seeking of legal advice and/or representation by a Student, Regulation any form of picketing, demonstrations and/or peaceful assembly, Regulations 11 6(c) of the said regulations is unconstitutional for being in contravention of:

a. Article 25 which decrees that the right to a fair trial cannot be limited.

b. Article 47 which requires all administrative actions to be expeditious, efficient, lawful, reasonable and procedurally fair.

c. Article 48 which require the state to ensure access to justice for all persons.

d. Article 50 which decrees that every person has a right to have any dispute that can be resolved by the application of law decided in a fair hearing before an independent and impartial tribunal and that a person is entitled to legal representation and to be informed of this right in advance.

21. To the extent that the Respondent's **Rules and Regulations Governing the Conduct and Discipline of Students of the University** blanketly (sic) and indiscriminately without any qualification(s) provides for the right of the University Administration to suspend and/or expel a student without any reference to him and/or subjecting him to the Students Disciplinary Committee for having been arrested for having committed a criminal offence, Regulations 11 (7)(b) of the said Regulations is unconstitutional for being in contravention of:

a. Article 24 which provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable and that the limitation does not derogate from the right or fundamental freedom's core or essential value.

b. Article 25 which decrees that the right to a fair trial cannot be limited.

c. Article 47 which requires all administrative actions to be expeditious, efficient, lawful, reasonable and procedurally fair.

d. Article 48 which require the state to ensure access to justice for all persons.

e. Article 50 which decrees that every accused person has a right to be presumed innocent until the contrary is proven.

22. To the extent that the Students' Disciplinary Committee arrogated itself jurisdiction and mandate it did not have to expel the Petitioner and the Vice Chancellor and her Committee purported to uphold such a decision in excess of legal mandate, the following provisions of the Constitution were violated: -

a. Article 24 which provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable and that the limitation does not derogate from the right or fundamental freedom's core or essential value.

a. Article 25 which decrees that the right to a fair trial cannot be limited.

b. Article 27 on the rights of equal treatment of all persons including the right to equal protection and equal benefit of the law.

c. Article 43 which decrees that every person has a right to education.

d. Article 47, on the right to fair administrative action.

e. Article 50, on the right to have disputes decided in a fair and public hearing before a court or tribunal of competent jurisdiction.

23. To the extent that the Students' Disciplinary Committee entertained the proceedings without tabling any evidence connecting the Petitioner to the alleged charges and further without calling for even a single witness to testify against the Petitioner to enable the latter to cross-examine them, the following provisions of the Constitution were violated:

- a. Article 25 which decrees that the right to a fair trial cannot be limited.
- b. Article 47 which requires all administrative actions to be expeditious, efficient, lawful, reasonable and procedurally fair.
- c. Article 48 which requires the state to ensure access to justice for all persons
- d. Article 50 which decrees that every person has a right to adduce and challenge evidence.

24. To the extent that the Deputy Vice Chancellor (DVC) in charge of Student Affairs who was presiding over the Students' Disciplinary Committee ordered the confiscation the Petitioner's evidence in the form of personal mobile phone and file and further denied him to table the same in defense of the allegations and to the extent that the Petitioner was not accorded an opportunity to give his account of the charges in rebuttal of the said allegations, the following provisions of the Constitution were violated:

- a. Article 25 which decrees that the right to a fair trial cannot be limited.
- b. Article 47 which requires all administrative actions to be expeditious, efficient, lawful, reasonable and procedurally fair.
- c. Article 48 which requires the state to ensure access to justice for all persons
- d. Article 50 which decrees that every person has a right to adduce and challenge evidence.

25. To the extent that after hearing the proceedings before it, the Students' Disciplinary Committee proceeded to communicate its decision to expel the Petitioner from the Respondent University's School of Education by a letter that did not disclose the reasoning that led to that decision violates the following provisions of the Constitution:

- a. Article 33 which decree that every person has a right to freedom of expression which includes academic freedom and freedom of scientific research.
- b. Article 43 which decrees that every person has a right to education.
- c. Article 47 of the Constitution which requires that where a right or a fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action.

26. To the extent that the Vice Chancellor and the Committee that was formed to consider the Petitioner's Appeal did not afford him an opportunity to be heard but sat and rubberstamped the decision of the Students' Disciplinary Committee and communicated the same by a letter that did not disclose the reasoning that led to that decision violates the following provisions of the Constitution:

- a. Article 25 which decrees that the right to a fair trial cannot be limited.
- b. Article 33 which decrees that every person has a right to freedom of expression which includes academic freedom and freedom of scientific research.
- c. Article 43 which decrees that every person has a right to education.
- d. Article 47 which requires all administrative actions to be expeditious, efficient, lawful, reasonable and procedurally fair and further requires that where a right or a fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action
- e. Article 48 which requires the state to ensure access to justice for all persons
- f. Article 50 which decrees that every person has a right to adduce and challenge evidence.

27. To the extent that the Petitioner was singled out unjustifiably and unreasonably and victimized and condemned to suspension and expulsion from the Respondent University on the basis of incidences that happened in his absence, the following provisions of the Constitution were violated:

- a. Article 25 which decrees that the right to a fair trial cannot be limited.
- b. Article 27 that guarantee equality before the law and equal protection and equal benefit of the law and further prohibit direct and/or indirect discrimination on any ground including conscience and belief.
- c. Article 33 which decree that every person has a right to freedom of expression which includes academic freedom and freedom of scientific research.

d. Article 43 which decrees that every person has a right to education.

e. Article 47 which requires all administrative actions to be expeditious, efficient, lawful, reasonable and procedurally fair and further requires that where a right or a fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action.

28. To the extent that the Respondent failed to grant the Petitioner full access to the minutes of both the Students' Disciplinary Committee and the Vice-Chancellor Committee that purported to expel and uphold the expulsion respectively, the following provisions of the Constitution and the Access to Information Act have been contravened:

a. Article 35 which every citizen has the right of access to information held by the state and information required for the exercise or protection of any right or fundamental freedom.

b. Article 46 which entitle a person to the right of information necessary for them to gain full benefit from goods and services.

c. Section 4(1) & (3) of the Access to Information Act which entitles every citizen the right of access to information held by the State or any other person where that information is required for the exercise or protection of any right or fundamental freedom and this right shall be provided expeditiously at a reasonable cost.

29. In his submissions, the petitioner contended that logical proof or presentation of evidentially material of fairness of an administrative action in line with the principles of natural justice and relied on the decision of **Okwany, J in Onjira John Anyul vs. University of Nairobi [2019] eKLR**.

30. The petitioner also submitted that Article 47 of the Constitution guarantees to him the right to a fair administrative action. In so far as evidence is concerned, Section 4 (3) of the **Fair Administrative Action Act** No. 4 of 2015 (hereinafter "**the FAA Act**") which is a constitutional derivative of Article 47 ingredients supply of evidence to the Petitioner in mandatory terms.

31. Accordingly, the petitioner submitted that the failure to adduce the said evidence and witnesses to allow the Petitioner controvert the same by way of cross examination both at the time of inviting the Petitioner to the SDC hearing and at the actual hearing, irredeemably takes away the element of fairness in the whole process of disciplinary of the Petitioner by the SDC.

32. It was submitted that there is a solid jurisprudence on the constituents of a fair hearing and reference was made to **Republic vs. County Director of Education, Nairobi & 4 Others Ex-parte Abdukadir Elmi Robleh [2018] eKLR** where the learned judge cited with affirmation the holding in **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR**.

33. It was submitted that the Petitioner herein was not accorded a fair hearing in accordance with the above tenets. Firstly, he was not sufficiently informed of the case against him to enable him prepare for his defence. The charges against him as already noted were cast in vagueness and ambiguity. The evidence that was to be relied on by the SDC was not availed to him in advance at the time of invitation to the SDC. No witnesses were availed at the hearing effectively denying him the right to cross examine his accusers. In this regard the petitioner referred to the case of **Republic vs. Disciplinary Committee of Jomo Kenyatta University of Agriculture & Technology [2014] eKLR**.

34. It was further submitted that at the hearing, the Petitioner was denied an opportunity to be heard and to make representations in that regard as guaranteed by Section 4(3)(b) of the **FAA Act**. In this respect the holding in **Republic vs. Disciplinary Committee of Jomo Kenyatta University of Agriculture & Technology** (supra) was cited.

35. It was further submitted that the Petitioner was further denied access to the minutes of the SDC that expelled him despite his requesting for the same to enable him prepare for his Appeal, a fact that is admitted by the Respondent under paragraph 36 of its Replying Affidavit on the basis that he had since ceased to be a student of the University. This was a violation of his rights under the FAA Act that hampered his right to a fair hearing at the Appeal and which submission finds favour in the holding of the Court in **Republic vs. Chuka University Ex-Parte Kennedy Omondi Waringa & 16 Others [2018] eKLR**.

36. It was submitted that the Petitioner was completely denied his right of audience at the Appeal stage a fact that is admitted by the Respondent under paragraph 36(vi) of its replying affidavit. This is despite the Petitioner specifically requesting for the right of audience vide his letter of Appeal dated 27th December 2019. However, the Vice Chancellor proceeded to constitute a Committee to look into the grounds of the Petitioner's Appeal without calling him for any hearing thereby further denying him the only lifeline opportunity he hoped for to salvage his academic life that had been shuttered by the Students' Disciplinary Committee without affording him any chance of defending himself. According to the petitioner, the Respondent's excuse for not affording the petitioner a hearing is untenable as held by **Aburili, J in Lucy Wanjiku Gitumbi & another vs. Dedan Kimathi University of Technology [2016] eKLR**.

37. According to the petitioner, the last issue that impeaches the Respondent's contention that they afforded the Petitioner a fair hearing is failure to inform and/or allow the Petitioner his right to legal representation. According to the petitioner, there seems to be a confusion with regard to the right of legal representation in administrative and quasi-administrative bodies, a confusion which emanates from a disjointed reading of Sections 4(3) and 4(5) of the **FAA Act**.

38. In the petitioner's view, when the two sections of **FAA Act** above are read together harmoniously, it becomes clear that the import of the phrase "*where applicable*" is not to limit the right of legal representation. First, the said Section only excludes giving of a notice of the right to legal representation and not the substantive right to legal representation. Second, it only excludes not limit giving of a notice of the right to legal representation in circumstances where it is not necessary for such notice to be issued, for instance, in proceedings where a person has retained the services of legal Counsel from the onset.

39. It was submitted that the right to legal representation is a crucial ingredient of the right to fair hearing. It complements the right to fair hearing. This right therefore is illimitable under Article 25 of the Constitution.

40. It was submitted that since the charges that the Petitioner was charged with are of a criminal nature and the punishment of expulsion is very drastic given its effects has on a student, it behoved the Respondent to ensure that the disciplinary process was tight proof of any procedural infraction. According to the petitioner, the Respondent cannot argue that the same was not requested as that would be shifting the burden of duty to the Petitioner. Further, it is unlikely that the Petitioner would be granted his right to legal representation even if he requested for it as **Rule 11(6)(c)** of the Respondent's **Rules and Regulations Governing the Conduct and Discipline of Students of the University (hereinafter "the University's Regulations")** expressly outlaws legal representation. Indeed, My Lord, amongst the charges facing the Petitioner was that he was rallying suspended students to book for a lawyer! Failure to give this notice whether it has been requested or not was a violation of the Petitioner's right to legal representation which in effect vitiates the Respondent's disciplinary process for want of a fair hearing.

41. Out of abundance of caution, we make the following critical submission. That there are several authorities to the effect that where the rules of the disciplinary procedure expressly exclude the right to legal representation, then the notice is not applicable. We rehash our submissions at **paragraphs 36-40** above and further add that most of these authorities ought to be distinguished as they were decided before the coming into effect of the **FAA Act**.

42. It was emphasised that the decision to expel the Petitioner was arrived at by the Students Disciplinary Committee in excess of its legal mandate under the Respondent's Rules and Regulations Governing the Conduct and Discipline of Students of the University. In this regard he referred to the decision of **Mrima, J** in **Ernest Kevin Luchidio vs. Attorney General & 2 Others [2015] eKLR**. To the petitioner, an administrative body that acts in excess of its legal mandate therefore acts ultra vires and its decision cannot stand and referred to Regulation 9 of the University's Regulations vests disciplinary authority of the University on the Vice Chancellor. Regulation 11 (7) thereof.

43. According to the Petitioner, he attended the disciplinary proceedings on 4th December 2018 and the decision to expel him was communicated vide a letter dated 18th December 2018. According to the petitioner, under Regulation 11(7)(h), a student has a right of Appeal to the Vice-Chancellor against the decision of SDC within 14 days of the date of communication of the SDC's decision. Further, under the Regulations, the authority to expel a student from the University vests only on the University's Senate. Read wholesomely and harmoniously, the above Regulations then brings to fore the following interpretation with respect to the process of expulsion of a student from the University; Firstly, neither the SDC nor the Vice-Chancellor is vested with the authority or power to expel a student. The two can only recommend expulsion. The power and/or authority to expel is the exclusive mandate of the University's Senate; Secondly, given the exclusive mandate of Senate to expel, the Vice-Chancellor's decision in an Appeal is also subject of the Senate approval and adoption; Thirdly, in light of the exclusive mandate of the Senate to expel, the Senate cannot consider any recommendations from the SDC before a student exhausts the Appeal mechanism to the Vice- Chancellor. Doing so is tantamount to vesting the Vice-Chancellor with authority it doesn't have or reducing the appeal mechanism to the Vice-Chancellor as a sheer rubber stamp to the recommendations of the SDC.

44. It was submitted that the decision of the SDC having been communicated on 18th December 2018, it is curious how the Senate would have adopted the recommendations of the SDC before the same had been communicated to the Petitioner let alone exhaustion of his appeal mechanism to the Vice-Chancellor. Further, the finality of the decision of the SDC is telling. It did not recommend expulsion. It essentially expelled the Petitioner. Indeed, this submission is vindicated by the same Minutes of the Senate of 11th December 2018 that purportedly adopted the SDC's decision. Under Minute 9 titled "**Report from the Disciplinary Committee**", it is noted that; "**... out of the total, 3 Students were expelled, and the others were suspended for periods ranging from 1-4 years...**"

45. To the petitioner, the above irresistibly points to one simple fact. That the Respondent powered and accelerated its structures in concert to unprocedurally expel a student whom was considered stubborn. The SDC exceeded its mandate by meting expulsion of the Petitioner. The Vice-Chancellor also exceeded her mandate by purporting to render decision after Senate. The Senate on the other hand acted in dereliction of its duty by not consciously applying its mind on the report from SDC but merely rubberstamped without consideration of the recommendation of the SDC. Such a process, we submit, cannot withstand the test of a fair process. Further, whereas the verdict of the SDC recommending expulsion of the Petitioner could be communicated by the Registrar of Academic and Students Affairs, the communication of expulsion ought to have originated from the Senate itself. However, the same Registrar of Academics and Students Affairs purported to communicate the decision of the Senate in circumstances that are unexplained and that casts doubt as to the fairness of the whole process.

46. From the above submissions, the court was implored to find that the Petitioner was not granted a fair hearing as envisaged under Article 50(1) of the Constitution and the **FAA Act 2015**.

47. It was further submitted that Article 24 of the Constitution is explicit that a right and freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. Further, this Article decrees that a right cannot be limited so as to derogate from its core or essential content. On its part, Article 25 provides for the rights that are illimitable which includes the right to a fair trial and/or hearing. Despite these provisions however, some provisions in the University's Regulations operate either to limit rights that are illimitable or limit rights without any qualifications in a manner that derogate from the respective right's core or essential content.

48. According to the petitioner, Regulation 10(2)(a) of University Regulations prohibits any form of picketing in any manner whatsoever while Regulation 10(2)(l) prohibits any attempt to convene or organize or participate or get involved in any demonstrations where permission is required and the same has not been obtained. The right under Article 37 does not contemplate seeking of permission but service of an adequate notice of demonstration. What it requires is that the demonstration be peaceable and unarmed. To the extent therefore the Regulation 10(2)(a)&(l) blanketly (sic) and indiscriminately without any qualification(s) prohibits any form of picketing, demonstrations and/or peaceful assembly and further puts the requirement for permission is unconstitutional and this Court should declare the same null and void. Regulations 11(6)(c) of the University's Regulations, on the other hand, explicitly prohibits legal representation of a student before the SDC disciplinary proceedings. Further, Regulation 11(7)(b) thereof provides for the right of the University Management to suspend and/or expel a student without any hearing and/or conclusion of investigations. These two regulations purports to abrogate the constitutional

requirements of a fair trial and/or hearing including presumption of innocence until proven otherwise. This is notwithstanding the provisions of Article 25 of Constitution that decrees that the right of fair trial and/or hearing is non-derogable and illimitable. Accordingly, this Court was urged to find the said regulations unconstitutional, null and void.

49. As regards the relief, the petitioner relied on **Lucy Wanjiku Gitumbi & another vs. Dedan Kimathi University of Technology** (supra).

50. It was submitted that where a Court has been satisfied that the rights of a Petitioner has been violated, it is entitled under Article 23(3) of the Constitution, the Court is entitled to grant an appropriate relief including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law, an order of compensation and an order of judicial review. Further, section 11 of the **FAA Act** reiterates the reliefs under Article 23(3) of the Constitution, including an order for the award of costs or other pecuniary compensation in appropriate cases. It was submitted that the Petitioner herein was vilified for being outspoken and for agitating for his welfare and the welfare of other students. He did nothing wrong under the law. The Petitioner therefore suffered a wrongful administrative act meant to mete a punishment against him. This disrupted his academic learning and it was not until this Court intervened vide interim orders that he was able to go back to school.

51. It was submitted that the Petitioner has been brought up in a very humble background by an un-employed single mother. His education is entirely funded by HELB, bursaries and well-wishers; some of whom has since withdrawn their support owing to the decision of the Respondent to expel wrongfully the Petitioner. It is therefore important that this Court puts into consideration and awards the Petitioner compensation for violation of his constitutional rights to enable him cover the school expenses which had previously been covered by the well-wishers who withdrew their support based on the expulsion of the Petitioner by the Respondent. In this regard the petitioner referred to **Onjira John Anyul vs. University of Nairobi** (Supra).

52. In the premises, the petitioner sought the following orders:

A. A declaration that the Respondent's Regulation 10(2) and 11(7) of Rules and Regulations Governing the Conduct and Discipline of Students of the University to the extent it blanketly and indiscriminately limits the Petitioner's rights to peaceably and unarmed assemble and picket, hold and express opinion, seek legal counsel and/or representation and denies the right to presumption of innocence of an accused person until the contrary is proven, the said Regulation contravenes Articles 24, 25, 33, 37, 48 and 50 of the constitution therefore unconstitutional, null and void.

B. A declaration that the suspension and expulsion of the Petitioner from the Respondent University was null and void ab initio for having violated his Constitutional Rights under Articles 24, 25, 27, 43(1)(f), 48 and 50 of the Constitution of Kenya.

C. An order do issue compelling the Respondent to unconditionally re-admit the Petitioner to join the University's Bachelor of Education year III and further facilitate the re-admission to ensure he completes his studies at the time he was ordinarily supposed to complete his studies but for the unlawful and illegal suspension and expulsion.

D. A declaration that the Petitioner's rights as stated under paragraphs 45-53 of the Petition were violated.

E. An order of compensation including aggravated damages for violation of the Petitioner's rights guaranteed under the Constitution as aforesaid.

F. Costs of this Petition be borne by the Respondent.

G. Such other orders this Honourable Court shall deem fit.

Respondent's Case

53. The petition was however opposed by the Respondent vide a replying affidavit deposed to by **Prof. Joyce Ogallo**, the deputy Vice Chancellor, Academic and Student Affairs, on 23rd April, 2019.

54. According to the Respondent, the petition is frivolous, vexatious, unmeritorious, an abuse of the court process, premature and incompetent.

55. After admitting that the petitioner was a student of the respondent, the Respondent then proceeded to give what in its view was a chronology of events leading to unrest at the university as follows;

i. On 19th September, 2018 the Petitioner visited the deputy Vice Chancellor, Academic and Student Affairs (hereinafter DVC-ASA) office to consult on a few issues among them students' election.

ii. The petitioner was informed that the Students Association of Machakos University (hereinafter SAMU) constitution was under review and the Independent Electoral Commission of Machakos University was receiving views from stakeholders and was advised by the DVC-ASA to consult with the Dean of Students regarding the elections.

iii. On 20th September, 2018 the Petitioner coordinated the release of posters calling on students to have an open forum to discuss the issues he had raised.

iv. Upon interrogations by the director of security services together with the DVC-ASA the Petitioner acknowledged that he was the author of the posters and he was advised to desist from any activities that could cause or result in instability and tension in the University.

v. On 21st September, 2018 the Petitioner again attempted to disrupt lectures and he was suspended from the University vide a letter dated 21st September, 2018.

vi. The situation went out of control thus necessitating a Special Senate Meeting which was convened to chart the way forward as the unrest was getting out of control and in that meeting it was resolved that the university be closed, that the director of security services carry out investigations and the students involved be suspended.

vii. The director of security carried out investigations and presented a list of students involved in the unrest to the academic division for action which investigations identified the Petitioner was among the students. He was accordingly suspended from the University for being the ring leader vide a letter dated 21st September, 2018.

viii. After the suspension, the Petitioner attempted to disrupt school activities specifically on 24th September, 2018 when the school management was forced seek assistance from the police when the Petitioner was arrested on 25th September, 2018.

ix. The Petitioner was invited to appear before the Disciplinary Committee (SDC) vide a letter dated 23rd October, 2018 where he was told of the indiscipline charges he was facing but was disqualified from facing the committee on the grounds that he did not come with his parent/guardian.

x. He was again invited to appear before the Disciplinary Committee (SDC) on 4th December, 2019 vide a letter dated 19th November, 2018 where he was told of the indiscipline charges against him and he was accorded a chance to defend himself.

xi. The Petitioner faced the Disciplinary Committee where he went through the due disciplinary process as per the university Statutes and guidelines which involves being duly informed of the Indiscipline charges against him, being accorded a chance to defend himself and a verdict passed based on the evidence tendered.

xii. That Students' Disciplinary Committee (SDC) acting under the Statutes Schedule II (3) deliberated and found him guilty of the charges preferred against him and recommended for his expulsion as per Statute XXXXI.

xiii. The Petitioner was found guilty of the charges preferred against him and he was expelled vide a letter dated 18th December, 2018 which decision was approved by the University Senate.

xiv. The Petitioner therein appealed against the decision of Students' Disciplinary Committee (SDC) vide a letter dated 27th December, 2018 and a committee was formed to look into his appeal.

xv. A Committee was constituted by the Vice Chancellor to look into his appeal and give recommendations.

xvi. The findings of the Committee was that the Petitioner's appeal presented no new evidence as stipulated in the Machakos University Statutes and therefore the decision to expel him stood and the same was communicated to him vide a letter dated 30th January, 2019

56. According to the deponent there was evidence that was tendered before the SDC proving the involvement of the petitioner in the unrest and the same consisted in an admission by the petitioner that was available on You Tube and aired on national TV and a copy of the same was annexed together with the minutes recommending the suspension and expulsion of the petitioner. The deponent denied that the respondent overstepped its mandate and contended that all that the SDC did was recommend to the senate and the senate approved the recommendation as per the exhibited minutes of senate. The deponent also denied violation of constitutional rights of the petitioner because ***The Rules and Regulations Governing the Conduct and Discipline of Students*** were drawn with the constitution in mind.

57. It was submitted on behalf of the Respondent that the Petitioner was admitted in the Machakos University in year 2015 to pursue a Bachelor's Degree in Education (Arts) by then the Joint Admissions Board (JAB) (now Kenya Universities and Colleges Central Placement Service (KCCPS). Upon admission at the Machakos University and registration he was bound by Schedule IX(2) of the ***Rules and Regulations Governing the Conduct and Discipline of Students***

58. The Petitioner therefore was then bound as a *bona fide* student by these Rules and Regulations which are read together with the Respondent's Act, Charter and Statutes.

59. It was however contended that during September-December semester in 2018 the Petitioner in the company of other students disrupted learning activities causing an unrest in the university and the following were specified as the instances of the same:-

i. On 19th September, 2018 the Petitioner visited the DVC-ASA office to consult on a few issues among them students' election.

ii. He was informed that the SAMU constitution was under review and the Independent Electoral Commission of Machakos University was receiving views from stakeholders and he was further advised by the DVC-ASA to consult with the Dean of Students regarding the elections.

iii. On 20th September, 2018 the Petitioner coordinated the release of posters calling on students to have an open forum to discuss the issues he had raised. These issues regarded Students IDS, reduction of fees, abolition of supplementary examination fees and student elections.

iv. Upon interrogations by the director of security services together with the DVC-ASA the Petitioner acknowledged that he was the author of the posters and he was advised to desist from any activities that could cause or result in instability and tension in the University.

v. On 21st September, 2018 the Petitioner again attempted to disrupt lectures and he was suspended from the University vide a letter dated 21st September, 2018. The demonstration was not peaceful as provided in constitution of Kenya. On that note, he was suspended from the University but he determinedly and stubbornly continued mobilizing students to hold an open forum between 6 A.M and 8 A.M on 24th September, 2018 (Monday). While on suspension, he sneaked into the University premises contrary to the provisions stated in his suspension letter and proceeded to the tuition block (PL Building) where he moved from class to class ejecting students from the lectures and later marched to the Machakos-Wote Road. They then blocked the said Road inconveniencing road users and the general public. This prompted the police to disperse the students.

vi. The situation went out of control thus necessitating a Special Senate Meeting.

vii. A special senate meeting was then convened to chart the way forward as the unrest was getting out of control and in that meeting it was resolved that the university be closed, that the director of security services carry out investigations and the students involved be suspended.

viii. The Respondent followed due process as per University Statutes, Constitution of Kenya and the Rules of Natural Justice and ordered Directorate of Security Services to carry out investigation of students involved in the disruption of learning activities among them the Petitioner. The director of security carried out investigations and presented a list of students involved in the unrest to the academic division for action.

60. Thereafter the Respondent informed the Petitioner of his misconduct which was against the **Machakos University Statutes and Regulations Governing the conduct of student Schedule IX of University Statutes** vide a suspension letter dated 21st September, 2018 pending appearance before the Student Disciplinary Committee or conclusion of investigations where he would be given an opportunity to defend himself. He was also informed of the offences he was suspected to have committed, and was barred from entering the University premises or using its facilities during the suspension period expect with permission of the Deputy Vice-Chancellor. The Petitioner was among the students as per the investigations and he was then suspended from the University for being the ring leader vide a letter dated 21st September, 2018. The Petitioner violated the rules stipulated in the Statutes which were clearly communicated to him vide the suspension letter. The Respondent noted that the Petitioner had violated these Rules:-

a) Refrain from any conduct that might bring the University or any section or programme thereof to disrepute, ridicule or public odium; {clause 15 subsection 1(iii)},

b) Carry themselves in all public fora or places with such humility and dignity as befits their status as mature and responsible citizens; {clause 15 subsection 1(iv)},

c) Refrain from all acts of violence, hooliganism, unruly or rowdy behaviour, or any conduct likely to cause a breach of the peace and disturbance to others within or outside the University Campus; {clause 15 subsection 1(v)}.

ix. After the suspension, the Petitioner attempted to disrupt school activities specifically on 24th September, 2018 when the school management was forced seek assistance from the police when the Petitioner was arrested on 25th September, 2018.

x. The Petitioner was invited to appear before the Disciplinary Committee (SDC) vide a letter dated 23rd October, 2018 where he was told of the indiscipline charges he was facing but was disqualified from facing the committee on the grounds that he did not come with his parent/guardian.

xi. He was again invited to appear before the Disciplinary Committee (SDC) on 4th December, 2019 vide a letter dated 19th November, 2018 where he was told of the indiscipline charges against him and he was accorded a chance to defend himself.

xii. The Petitioner faced the Disciplinary Committee where he went through the due disciplinary process as per the university Statutes and guidelines which involves being duly informed of the Indiscipline charges against him, being accorded a chance to defend himself and a verdict passed based on the evidence tendered.

xiii. That Students' Disciplinary Committee (SDC) acting under the Statutes Schedule II (3) deliberated and found him guilty of the charges preferred against him and recommended for his expulsion as per Statute XXXXI.

xiv. The Petitioner was found guilty of the charges preferred against him and he was expelled vide a letter dated 18th December, 2018 which decision was approved by the University Senate.

xv. The Petitioner therein appealed against the decision of Students' Disciplinary Committee (SDC) vide a letter dated 27th December, 2018 and a committee was formed to look into his appeal.

xvi. A Committee was constituted by the Vice Chancellor to look into his appeal and give recommendations.

xvii. The findings of the Committee was that the Petitioner's appeal presented no new evidence as stipulated in the Machakos University Statutes and therefore the decision to expel him stood and the same was communicated to him vide a letter dated 30th January, 2019.

61. It was submitted on behalf of the Respondent that the Petitioner was directly involved with the students' unrest and illegal demonstration in the University premises that disrupted learning activities and the general order of the University during the September-December 2018 semester as he duly admitted the same through his letter dated 13th November, 2018 addressed to Vice- Chancellor in which he expressed himself as follows:-

- 1) *Apologize for my association with the recent Student unrest within the campus.*
- 2) *Assure you that my immature mind has learnt a lot through the current situation*
- 3) *Promise your office that I will remain a calm, peaceful and committed student with a focus on my students.*
- 4) *Assure your office that I will use my influence to ensure that my fellow students will not engage in any disruptive activities.*
- 5) *To seek pardon from your office”*

62. It was emphasised that the Respondent rightly followed **Rules and Regulations governing the conduct and Discipline of Students of the University** set in Schedule IX of the Machakos University in suspending and expelling the Petitioner from the University. The process of suspending and expelling the Petitioner from the university was procedural and lawful hence the Respondent did not breach any of the rights and fundamental freedoms of the Petitioner as alleged but only discharged its obligations as a University and a Public institution and in this regard the Respondent relied on the case of **Republic vs. University of Nairobi Ex parte Michael Jacobs Odhiambo & 7 Others [2016] eKLR** and averred that it adhered with Schedule IX in Section 9(2) to suspend the Petitioner pending appropriate disciplinary action.

63. It was submitted that the Respondent suspended the Petitioner from the University after he been suspected of committing disciplinary offences under Respondent's Regulation pending appropriate disciplinary action. The Respondent through a letter dated 19th November, 2019 informed the Petitioner of the Disciplinary Offences that he had committed and afforded him an opportunity to defend himself against the following charges which are contrary to Schedule IX of the University Schedule which require students to:-

- a) **refrain from any conduct that might bring the University or any section or programme thereof to disrepute, ridicule or public odium;**
- b) **carry themselves in all public fora or places with such humility and dignity as befits their status as mature and responsible citizens;**
- c) **refrain from all acts of violence, hooliganism, unruly or rowdy behaviour, or any conduct likely to cause a breach of the peace and disturbance to others within or outside the University Campus;**
- d) **refrain from any form of picketing or organized obstruction of students and staff in any manner whatsoever;**
- e) **refrain from writing, publishing and/or distributing of anonymous literature of a malicious or libelous nature including placards;**
- f) **refrain from any attempt to conceive, design or effect any scheme or strategy of whatever nature whose object or logical consequence is to disrupt the due operation of academic or other programme of the University**
- g) **refrain from disorderly conduct and molestation of other members of the University and or obstruction of motor vehicles within or outside the University precincts;**
- h) **refrain from any attempt to convene or organize or any participation or involvement in demonstrations, gatherings, processions or public ceremonies for which permission is required but has not been obtained from the University authorities or Government authorities;**

64. It was submitted that the Respondent categorically and predominantly stated the Petitioner's charges as stated below;

- 1) **Ejecting students from their classrooms.**
- 2) **Leading students to barricade the Road.**
- 3) **Calling for demonstrations/open forum without the Permission of the university.**

4) Accessing the University while on suspension without the permission of DVC-ASA.

5) Continuing to rally suspended students to book for a lawyer.

6) Writing of placards.

7) Using social media to rally support for his case.

65. In the same invitation letter to appear before the Students' Disciplinary Committee(SDC) the Respondent evidently informed the Petitioner that in addition to his attendance, he may send a written defense (if any) to the Deputy Chancellor (Academic and Student Affairs) before the date of the hearing. Therefore, the Petitioner cannot contend that the Respondent did not inform him of the Disciplinary Offences tendered against him. After the invitation to appear before the Students' Disciplinary Committee (SDC) the Petitioner was heard and committee's decision communicated to him vide an expulsion letter dated 18th December, 2018. In the Respondent's view, it did not act in excess of its mandate or powers but followed due process as set out in Schedule IX 12(f).

66. It was therefore summarily submitted that the Petitioner herein was subjected to Disciplinary proceedings, he was notified of the disciplinary meeting prior and accorded a chance to defend himself as such according him a fair hearing as per the rules of natural justice and Article 47 of the Constitution which guarantees every person a right to an administrative action that is expeditious, efficient and procedurally fair. The decision to suspend and expel the Petitioner was effectively and efficiently communicated to him vide letters dated 21st September, 2018 and 18th December, 2018 respectively. He was also informed of his right to lodge an appeal against the decision which he duly did but the appeal raised no new evidence and the decision to expel him stood. All necessary information touching on this matter was communicated to the Petitioner within reasonable time. There is no point did the Petitioner complain to the Respondent that he did not understand the allegations rendered against him.

67. According to the Respondent, while it is the duty of court to determine whether the Petitioner was treated fairly and the Rules of Natural Justice and Constitutional Provisions were adhered to, it is not Court's duty to govern whether the suspension and expulsion of the Petitioner was merited as held in the case of **Egerton University v Patel Maulik Prasun [2017] eKLR** and **Nyongesa & 4 Others vs. Egerton University College [1990] eKLR**.

68. The Respondent insisted that it did not contravene constitutional principles depicted under Article 10, 20, and 21 of the Constitution or act beyond its powers as undertaking disciplinary proceedings against the Petitioner was within its mandate as provided for in the University statutes. The Respondent strictly followed the procedure set in their Statute to discharge its duty. It therefore relied on the decision of **Lenaola, J** (as he then was) in **Ouma Christopher Odongo vs. Kenyatta University [2016] eKLR** where the learned judge cited with approval the decision in the case of **Arthur Kaindi Nzioka vs. Kenyatta University Misc. Appl. No.316 of 2007**

69. According to the Respondent, its Statutes and the Rules and Regulations governing the conduct and Discipline of Students of the University under which the Respondent exercised power to suspend, expel and/or fine the Petitioner do not in any way contrive the Constitution of Kenya. Also, Petitioner has not rendered any evidence that the Machakos University Statutes are unconstitutional, and until a court of competent jurisdiction declares the Machakos Act, Statutes or any of its Regulation unconstitutional, all decisions made pursuant to them are valid. Therefore, the suspension and subsequent expulsion of the Petitioner from the University was arrived at after affording the Petitioner a fair hearing, in legal mandate under the Respondent's Statutes and Constitutional Provisions based on evidence rendered and not on generic allegations as the Petitioner is asserting. The administrative decision was based upon logical proof or evidence material where the Respondent attached the extract of WhatsApp conversations, the placards, CCTV footage, and statement of the Petitioner admitting to placing of the placards on the University wall in the Replying Affidavit.

70. *It was therefore the Respondent's position that* the Petitioner is not entitled to the orders sought as the Respondent did not violate his rights and fundamental freedoms as alleged in his petition. Further, the Petitioner has not presented any evidence on the basis of which the court could make any findings on how his rights were violated by the Respondent.

71. The Petitioner. According to the Respondent, has come to this court with unclean hands. He defied the University statutes when he caused the students unrest and illegal demonstration in the University and ought to be properly sanctioned so as to set a clean record and stop occurrence of the same acts in the future. Petitioner's misconduct definitely defies the maxim of *he who comes to equity must come with clean hands* and it was submitted that this honourable court should exercise its discretion judicially and decline to grant the orders sought based on the Conduct of the Petitioner.

72. It was disclosed that that though the Court permitted the Petitioner to do the exams, the Petitioner had not complied with University Rules and had not paid all of his school fees or attended 75 % of classes and did not have the exam card as required by Examinations Regulations.

73. As regards the decision whether the petitioner should be readmitted to the University, it was submitted that quashing the decision by the University to expel the Petitioner and compelling it to re-admit the Petitioner would be compromising on the standard and quality discipline of the students and hence defeating the good administration of the public institution. Readmission to the same University where he had already been excluded following the disciplinary process, would not only be untenable but also not in the interest of the Petitioner and the Respondent's student fraternity at large. The other students in the said Public Education Institution are equally entitled to their right to protection from any negative influence that may arise from readmitting students who had already demonstrated deviant behaviour. In the circumstances of this case, readmitting the Petitioner to the University will send a very negative message to the rest of the students that disobeying University Rules attracts no consequences and thereafter the standard of Discipline in the University will deteriorate and as the Country at large we will have ungovernable and irresponsible citizens. To support this position, the Respondent relied on the decision of **Okwany, J** in case of **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**.

74. It was submitted that this petition is based on the misconception that the petitioner's rights are absolute, and that the Respondent has no rights. The petitioner's rights are subject to limitations as provided under **Article 24** of the Constitution. Therefore, the University Rules and Regulations which all the students of Machakos University including the petitioner have signed and committed themselves to abide by are lawful and contain limitations in the exercise of certain rights and freedoms that are reasonable and justifiable in Kenya's open democratic society based on human dignity, equality and freedom. The petitioner had freely and voluntarily agreed, in writing, to be bound by and to comply with the Rules and Regulations of the University.

75. According to the Respondent, the petitioner committed serious offences and so the administrative action taken is justified. The Respondent accorded a fair hearing to the petitioner more so by giving him a chance to appear before its Disciplinary Committee, granting him ample time to prepare for the hearing as the cause of action arose on 20th September, 2018 whereas the hearing at the Students Disciplinary Committee took place on 4th December, 2018, almost three months later.

76. As regards the right to hearing under Article 47 of the Constitution, the Respondent relied on the case of **Dumisani Zwane vs. Judge of the Industrial Court and Others Civil case no 404/2014 – 20145ZHC 122** cited in **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR.**

77. Regarding the alleged violation of Article 50 of the Constitution, it was submitted that the said provisions are not applicable to the present matter as these are basically disciplinary proceedings before a committee of an educational institution. The proceedings against the Petitioner were not a "trial" as contemplated under Article 50(2). Administrative proceedings are not adversarial proceedings where all the trappings of litigation are expected to be on show as stated in case of **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No.34 of 2009 in which the decision in Republic vs. Kenyatta University Ex-Parte Solomon J Mummah [2013] eKLR.**

78. **In the Respondent's view, the Petitioner's allegations are not** relevant in light of the provisions of Article 47 and 50 of the Constitution. Practitioners are cautioned not to convert disciplinary proceedings into a court-room trial. The *Petitioner* was accorded an opportunity to be heard which opportunity he gladly took and the Students Disciplinary Committee acted within the confines of natural justice by proceeding to hear and determine the matter.

79. As regards the right to be represented by an advocate of his choice, and to be informed of his right promptly based on the provisions of Article 50(2)(g) of the Constitution it was submitted that this constitutional provision is not applicable in this case as per circumstances because disciplinary proceedings before a committee of an educational institution and not trial at all and reliance was placed on **Mumbi, J's** decision in **Moses Nandalwe Wanjala vs. Kenyatta University [2015] eKLR.**

80. It was therefore submitted that the disciplinary proceedings such as the Petitioner was facing are subject to the rules of procedure of such tribunals or bodies. In this case the Petitioner was subject to the Rules of Procedure as per Machakos University Statutes that excluded legal representation. It is without dispute that the Petitioner was facing quasi-judicial proceedings but not judicial proceedings for him to require legal representation.

81. In the Respondent's view, it is clear that Petitioner's proceedings are purely administrative in nature so invoking the provisions of article 50(2) of the Constitution of Kenya which relates to the Rights of the Accused persons does not stand and the same has not been violated by the Respondent and it relied on the decision of **Muriithi, J** in the case of **Ouma Christopher Odongo vs. Kenyatta University [2016] eKLR.**

82. Based on the foregoing it was submitted that the Petitioner's rights have not been violated by the Respondent as illustrated above therefore the court is not entitled to grant of an appropriate relief as provided in Article 23(3) of the Constitution of Kenya. According to the Respondent, the Petitioner has not proved his case against the Respondent to warrant the orders sought in the petition and urged the court to dismiss the same with costs to the respondent and to compel the Petitioner to comply with the verdict of the Disciplinary Committee as per the letter served upon him dated the 30th January 2019.

Determinations

83. I have considered the issues raised in this petition. This being a constitutional petition, it is important to set out the parameters that determine whether a matter raises issues for determination in a constitutional petition or whether the issues ought to be dealt with as an ordinary suit. It is important to note that even in ordinary civil disputes, it is not difficult to find that there is some underlying constitutional principle involved. However, the mere fact that some underlying principle may be gleaned from the pleadings does not necessarily raise the matter to the level where it may qualify for determination as a constitutional issue.

84. In **Muiruri vs. Credit Bank Ltd & Another [2006] 1 KLR 385**, Nyamu, J held that a constitutional issue is that which directly arises from the court's interpretation of the Constitution; for example – what is a fair trial is a constitutional issue and the courts have interpreted what is the meaning of a fair trial. In **Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193**, Court expressed itself as hereunder:

“We find that the making of an allegation of contravention of chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court's intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings. Indeed there is a wealth of authorities on the point...Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry... It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters... In our view, it cannot be correct

to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court. Abuse of process includes using the court process for a purpose or in a significantly different way from its ordinary and proper use. My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one... The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

85. Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235:

“Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”

86. Therefore, it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution, including ordinary civil courts, are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

87. It is in that light that I understand the Court’s position in John Harun Mwau vs. Peter Gastrow & 3 Others [2014] e KLR that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

88. Similarly, in Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR, Lenaola, J (as he then was) held that:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

89. Accordingly, it was held in Jeminah Wambui Ikere vs. Standard Group Ltd and Anor Petition No. 466 of 2012 that:

“...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution.”

90. The rationale for this was given in Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011 where it was held that:

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true...I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.

91. I associate myself with the decision in Nation Media Group Limited vs. Attorney General [2007] 1 EA 261 to the effect that:

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing...Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution.”

92. So, in General Plastics Limited vs. Industrial Property Tribunal & Another [2009] eKLR, Wendoh, J expressed herself as hereunder:

“The only conclusion I can arrive at is that, it seems the Applicant is dissatisfied with the decision of the Respondent and that being so, their recourse lies in filing an appeal to the High Court under S. 115 (1) of the Industrial Property Act. In my considered view the Applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the Applicant is benefiting from interim orders against the disputed design. The statute under which the 1st Respondent is created provides procedure for a party aggrieved by that decision, that procedure must be followed instead of camouflaging every such grievance as a constitutional issue. The court must prevent abuse of its process by disallowing such applications. (See Ben Kipeno & Others vs. AG Pet15/07 and Bahadur vs. AG (1986) LRC Const 297 where the court said;

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution.”

In Speaker of National Assembly vs. Njenga Karume (1990-1994) EA 546 the Court of Appeal reiterated the above principle, that where the Constitution or A Statute provides a certain procedure to be followed, that procedure must be adhered to. In this case, failure to follow the procedure set out in the Regulations disentitles the Applicant to the Constitutional remedy sought herein. See also Harrikisson vs. AG (1979) 3 WLR 63.”

93. Further afield, in NM & Others vs. Smith and Others (REEDOM OF Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC) the Constitutional Court of South Africa stated that:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

94. Similarly, in Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755, Georges, CJ held as follows;

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22).”

95. The judge added that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

96. Our own Supreme Court has clarified its position with regard to appeals filed in accordance with Article 163(4)(a) and in Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo Petition No. 2 of 2012 in declining to hear an appeal expressed itself as hereunder:

“In the petitioner’s whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court...the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court.”

97. Subsequently, in Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board Petition No. 5 of 2012 the Court held that:

“...a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained.”

98. In this case the petitioner has raised issues touching on the constitutionality of some of the Respondent’s *Rules and Regulations Governing the Conduct and Discipline of Students of the University*. Article 2(4) of the Constitution provides as hereunder:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

99. In my view an action such as a formulation of a rule or regulation whose application, implementation or effect contravenes the Constitution is invalid and this Court not only has the power but the obligation to declare it to be so pursuant to Article 165(3)(d)(ii) of the Constitution.

100. According to the Petitioner, the Students' Disciplinary Committee overstepped its mandate granted by Regulation 11(7) by purporting to expel him from the University which is the sole preserve of the University Senate. Regulation 11(7)(a)(v) empowers the Students' Disciplinary Committee to recommend to the Senate expulsion of any student from the University. In this case it is contended that the petitioner was expelled by the said Committee. Section 7(2)(a)(i)(ii) and (iii) of the **Fair Administrative Action Act, 2015**, an Act of Parliament enacted pursuant to Article 47(3) of the Constitution, an Article that falls within the Chapter dealing with the Bill of Rights, provides that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation. In **Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271**, the Court expressed itself as follows:

“There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred.”

101. Lord Somervell in **Vine vs. National Dock Labour Board [1956] 3 All ER 939**, at page 951 held that:

“The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated...There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorise someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether “judicial” or not, cannot be delegated.”

102. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, it was held:

“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...Illegality is when the decision-making authority commits an error of law in the process of taking 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. *It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...*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...Procedural Impropriety is when there is a 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.” [Emphasis mine.]

103. In this case the letter dated 18th December, 2018 was explicit that the Committee decided that the petitioner be expelled from the University. Whereas one may argue that what the Committee actually did was to recommend to the Senate to expel the petitioner, it is clear from the decision of the Senate itself, that it understood the decision of the Committee to have amounted to expulsion since according to the Senate, the Petitioner remained expelled from the University thus upholding the decision of the Committee. This position is confirmed from the replying affidavit in which the deponent, **Prof. Joyce. J Agalo**, the Chairperson of the Student Disciplinary Committee meeting held on 24th December, 2018 deposed that the petitioner was found guilty and was expelled vide a letter dated 18th December, 2018.

104. Regulation 11(7)(h) provides for the right of appeal and states that aggrieved students have the right of appeal to the Vice Chancellor against the decision of the Students Disciplinary Committee within fourteen days of the date of communication of the Committee's decision. Exercising this right, the Petitioner duly appealed to the Vice-Chancellor. However, by his decision dated 30th January, 2019, the said appeal was dismissed.

105. What is curious about the Senate decision is that the minutes of its proceedings, proceedings which were exhibited by the Respondent itself and whose contents have not been contended to be erroneous, indicate that the Senate deliberated on the matter at its meeting dated 11th December, 2018. By then the letter communicating the Committee's decision had not even been written. If the said minutes are anything to go by then it is clear that the Senate met before the Petitioner could exercise his appellate rights since by the time it supposedly met the appellant could not have been aware of the decision which he was expected to appeal against. That clearly amounted to a violation of the Petitioner's right to challenge the decision of the Committee.

106. The Petitioner complains that though he specifically requested for the right of audience, the VC proceeded to constitute a Committee to

look into the grounds of the Petitioner's Appeal without calling him for any hearing thereby further denying him the opportunity to present his evidence. Article 47 of the Constitution of Kenya provides as follows:

(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.

107. Procedural fairness is therefore now a constitutional requirement in administrative action and the requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now clear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

108. The importance of fair administrative action as a constitutional right was appreciated in the South African case of President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, at paragraphs 135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

109. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 where it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

110. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.

111. Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

112. The right to be afforded an opportunity of being heard must however, be distinguished from the necessity to have an oral hearing especially in disciplinary matters. The procedure in such matters is aptly dealt with by **Michael Fordham** in *Judicial Review Handbook*; 4th Edn. at page 1007 as follows:

“procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case.”

113. In Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009, the Court of appeal delivered itself as follows:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.” [Emphasis mine].

114. In Russel vs. Duke of Norfolk [1949] 1 All ER at 118, the Court expressed itself as hereunder:

“There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case.” [Emphasis mine].

115. However as is stated in Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para. 639:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

116. What comes out from the above is that whatever form of proceedings adopted by the authority, it must meet the irreducible minimum elements of fairness. In this case, as already held above, it would seem that long before the appellant’s timelines for filing the appeal started running a decision had already been made by the Senate, the appellate Tribunal to which the Petitioner could have appealed. Accordingly, the Petitioner was not afforded an opportunity to present his case before the Senate before the Senate arrived at its decision upholding an already made decision by the Committee which decision itself was made in excess of jurisdiction.

117. Whereas the Petitioner need not have appeared before the Tribunal in person, the law expected that he would be heard on his case before a determination either way was made. The hearing can take the form of oral hearing or the applicant can present his case in writing. Either way is permitted. However, to completely lock out a party who has invoked the appellate jurisdiction of the Senate is unacceptable.

118. Regulation 11(7)(h) provides that an appeal to the Senate lies where there is fresh evidence that was not presented to the Committee. In my view, this provision provides for the grounds to be considered by the Senate in its determination of an appeal. A perusal of the minutes of the Senate do not show that the Petitioner’s case was considered and findings made thereon at all. One would have expected for example the decision to show that no fresh evidence was adduced. In other words, the decision did not disclose the reasons for arriving thereat. It would seem that this was a matter in which the Petitioner’s appeal was summarily dismissed, yet no provisions were cited that permitted that kind of a procedure. I therefore associate myself with the position adopted by Aburili, J in Lucy Wanjiku Gitumbi & Another vs. Dedan Kimathi University of Technology [2016] eKLR where she expressed herself as hereunder: -

“63. Furthermore, it is not denied that after the decision of the Disciplinary Committee, the applicants appealed to the Vice Chancellor who constituted an Appeals Committee to hear the appeals which was filed in writing. However, the applicants were never called upon to make oral representations of their respective appeals... 83. In my humble view, the Appeals Committee proved to be little more than a rubber stamp of the decision of the Students Examinations Disciplinary Committee since it never even called on the students to make representations in support of their written appeals before arriving at the verdict of dismissing the *ex parte* applicants’ appeals... 84The conclusions I make here is simply that due process was not accorded to the *ex parte* applicants in the hearing of the accusations against them for committing examinations irregularities... I further find that the Dedan Kimathi University of Technology also proceeded to determine the student’s appeal without according them adequate opportunity to mount an affective oral submission...”

119. I also reiterate the position in Republic vs. Chuka University Ex-Parte Kennedy Omondi Waringa & 16 Others [2018] eKLR that:

“70. Nonetheless as the Senate was considering an appeal lodged by the applicants challenging their expulsion/ suspension by Grievance Handling Appeals Committee, it was absolutely necessary that the applicants be called upon to choose whether they wished to be present at the said hearing to present their appeals orally, in person or through legal representation or by way of written submissions. Such opportunity was never accorded to them.171. In my view, the failure to accord the applicants an opportunity to be heard during the Senate hearing deprived them of their constitutional right to be heard and to be accorded a fair hearing and to a fair administrative action since the decisions that were to be taken were no doubt going to adversely affect the applicants’ rights to education...174. A party does not lose the right to be heard on appeal simply because they were accorded a hearing at the lowest level of the dispute. Being heard on appeal is an opportunity to challenge the manner in which the inferior body or tribunal handled the matter and therefore the applicants should never have been locked out of the appeal process as the denial ousted the applicants from the fair administrative process and from the judgment seat. Had the applicants been heard on appeal to the Senate, they would have had a chance to raise serious issues such as *quorum*.”

120. In Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587 the Court held:

“I would at this stage adopt the observations made in the Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77 where the court set down the general principles which should guide statutory domestic or administrative

tribunals sitting in a quasi-judicial capacity. P 386 – the court said; “1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best...; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi-lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.”

121. Unless the legal instrument provides for summary dismissal of an appeal, where the right of an appeal is provided in the instrument, the same ought not to be denied by introducing procedures which do not permit a fair hearing and adjudication of the provided avenue for redress. “Appeal” is defined in *Black’s Law Dictionary*, 10th Edition at page 117 *inter alia* as “A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal.” *Ballentines Law Dictionary* on the other hand defines the same word at page 29 *inter alia* as “The process by which a court or a higher level administrative body is asked to review the action of an administrative agency.” Clearly, what is required is not just a confirmation of the agency’s decision as the Senate purported to have done in this matter but a review of the said Student’s Disciplinary Committee’s decision.

122. In this case, the Senate did not purport to find that the grounds upon which the request for review was made did not fall within the purview of Regulation 11(7)(h). To the contrary, the Senate purportedly extensively deliberated on the appeal and decided that the decision of the Students Disciplinary Committee be upheld. The letter transmitting the decision just like the minutes did not give reasons for arriving at the said decision. How the Senate had arrived at this determination, before the applicant had even filed his appeal, defeats reason. In *Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation [1948] 1 KB 223*, Lord Greene stated (at page 229) that:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short vs. Poole Corporation [1926] Ch. 66, 90, 91* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”

123. In my view, an introduction of a procedure which does not permit the hearing of a party in his case whether orally or otherwise, may well amount to bad faith and constitute irrationality as one cannot be in a position to know what factors were considered by the authority in arriving at the decision. Such a decision may well be described as having being arbitrarily arrived at. This must necessarily be so because statutes are interpreted by reference to their purpose, and statutory powers must be exercised for the purpose for which they were conferred. Public authorities are required to promote, and not to frustrate, the legislative purpose. In my view the purpose of the procedure for review is to afford a person aggrieved by the decision made against him or her an opportunity to challenge the same. To thwart that intention by blocking a person’s grievance from being agitated without affording any reason for the same amounts in my view to thwarting statutory or legislative intent and purpose. This position was adopted in *R (Haworth) vs. Northumbria Police Authority [2012] EWHC 1225 (Admin)* at [104] cited at page 534 of *Judicial Review Handbook* 6th Edn. by Michael Fordham where the Court was dealing with the refusal to consent to police pension reconsideration, however strong the merits a decision which was found to be “not in accordance with statutory purpose”.

124. Even if the Respondent’s submission that after going through the Petitioner’s appeal vis-à-vis the Committee’s earlier decision, it found no merit in the appeal was taken as the position, section 4(3)(b) of the *Fair Administrative Action Act* provides that 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 an opportunity to be heard and to make representations in that regard. As was held in *Republic vs. Chuka University Ex-Parte Kennedy Omondi Waringa & 16 Others [2018] eKLR*:

“175. The applicants also complained that they were never supplied with the proceedings of the Students Disciplinary Committee (SDC) which was subject of the appeal. The respondent never controverted this assertion. This, in my view, violated Section 4(3) (g) of the Fair Administrative Action Act which mandates that applicants must be given information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

125. In my view the right of an appeal can only be meaningfully enjoyed if the party appealing is heard before the decision is made. For an authority or tribunal entrusted with taking administrative decisions which affect the rights of a person to close itself in an office and by way of fiat dismiss an appeal without procedurally and properly hearing the same and without indicating how the decision was arrived at whether by tossing a coin or otherwise thus leave the petitioner speculating as to the manner in which the determination was made, can be anything but fair. In my view the power given to administrative or executive authorities ought to be properly exercised and must not to be misused or abused. This is so because as elucidated by Prof Sir William Wade in his learned work, *Administrative Law*:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of [his property] just as he may wish. He may act out of malice or a spirit of

revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them..."

126. Clearly the Senate's decision is devoid of reasons. Article 47(2) states:

"Every person has the right to be given written reasons for any administrative action that is taken against him."

127. Similarly, section 4(3)(d) of the ***Fair Administrative Action Act*** provides 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 statement of reasons. In this case, the decision was that the decision of the Student Disciplinary Committee was upheld and that the Petitioner remained expelled from the University. That statement cannot also constitute the reasons for the decision. Accordingly, the decision made by the Respondent violated Article 47(2) of the Constitution and contravened section 4(3)(d) aforesaid.

128. Having considered the foregoing, I am satisfied that the manner in which the appeal was determined did not meet the standards of fairness.

129. According to the petitioner, to the extent that the Respondent's ***Rules and Regulations Governing the Conduct and Discipline of Students of the University*** blankly and indiscriminately without any qualification(s) prohibits any form of picketing, demonstrations and/or peaceful assembly, Regulations 10 2(d) of the said regulations is unconstitutional for being in contravention Articles 24 and 37 of the Constitution. Article 37 of the Constitution provides that:

Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

130. However, with the exception of the rights set out in Article 25, all other rights may be limited in the circumstances prescribed under Article 24 which provides that:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law

before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

131. Article 37 of the Constitution which provides to the right to picket falls under the Bill of Rights. The Regulation by the Respondent that outlaws any form of picketing is not just a restriction of the said right but a complete denial of the same contrary to Article 37(2)(c) of the Constitution.

132. The phrase 'justifiable in an open and democratic society' was dealt with in Obbo and Another vs. Attorney General [2004] 1 EA 265 expressed itself as follows:

“It is not correct that the test of what is acceptable and demonstrably justifiable for the purposes of limitation imposed on the freedoms of expression and freedom of the press in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies for the following reasons:- (i). First Uganda is a party to several international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy. The African Charter for Human and Peoples Rights and the International Covenant on Civil and Political Rights are only two examples. (ii). Secondly, the preamble to the Constitution recalls the history of Uganda as characterised by political and constitutional instability: recognises the people's struggle against tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. When the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails but they meant democracy as universally known...It is a universally acceptable practice that cases decided by the highest courts in the jurisdictions with similar legal systems which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so.”

133. As regards the limitation in R vs. Oakes [1986] 1 SCR 103, it was held that:

“Firstly the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective the more severe the deleterious effects of a measure, the more important the objective must be.”

134. International human rights bodies have developed a detailed guidance on how the restrictions on the right can be applied and to meet so called the 'three part test' described below.

135. First, the restrictions must be prescribed by law: this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly (see, Human Rights Committee, Leonardus J.M. de Groot v. The Netherlands, No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (1995)).

136. Second, restrictions must pursue a legitimate aim, exhaustively enumerated in Article 19(3)(a) and (b) of the *International Covenant on Civil and Political Rights* (ICCPR) as respect of the rights or reputations of others, protection of national security, public order, public health or morals.

137. Third, restrictions must be necessary and proportionate to secure the legitimate aim: Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression/information and the protected interest.

138. The provisions of Article 24 of the Constitution reflect what has emerged from judicial precedents which are persuasive in nature-see R vs Oakes (1986) ISCR 103. The limitation of rights must, first, be by law, and secondly, the objective of the law must be pressing and substantial and must be important to society -see R vs Big Drug Mart Ltd (1985) ISCR 295.

139. The third principle is that of proportionality-whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve. The question to consider in this regard is whether the legislation meets the test of proportionality relative to the objects or purpose it seeks to achieve: see R vs. Chaulk (1990) 3 SCR 1303.

140. In considering the test of reasonableness and proportionality set out in the *Oakes* case, *Emukule J*, in his decision in Martha Karua vs. Radio Africa Ltd t/a Kiss F.M. Station & 2 Others [2006] eKLR observed as follows:

“On the issue of reasonableness in relation to the limitation we fully approve and endorse the reasoning in the Canadian case of R v OAKES (1986) 26 DLR 4TH 200. One of the principles in the case concerning reasonableness of the limitation is that the interest underlying the limitation must be of sufficient importance to outweigh the constitutionally protected right and the means must be proportional to the object of the limitation. Our interpretation of the use of reasonableness in the limitation clause is that since what is at stake is the limitation of fundamental rights, that must mean the legislative objective

of the limitation law must be motivated by substantial as opposed to trivial concerns and directed towards goals in harmony with the values underlying a democratic society.”

141. With respect to the question of proportionality, **Emukule, J** expressed the view that:

“[The] Proportionality test requires the following of any limitation:

- (a) that it be rationally connected to its objective,
- (b) that it impairs the right or freedom as little as possible and
- (c) that there is proportionality between its effects and its objectives – see **OAKES case (supra)**.”

142. It is however my view that the complete abrogation of the right to picketing under Regulation 10(2)(d) of the Respondent’s Regulations violates Article 37 of the Constitution.

143. Based on the same reasoning I find that Regulation 11(7)(b) to the extent that it gives the University Management the right to suspend or expel a student without reference to him or her pending appearance before the Students Disciplinary Committee or conclusion of investigations is contrary to Articles 47 and 50 of the Constitution.

144. Under Regulation 11(6)(c), in proceedings of the Students Disciplinary Committee, a student is not entitled to legal representation. The Petitioner has taken issue with this Regulation as not being compliant with fair administrative action. Section 4(3) and (4) of the **Fair Administrative Action Act** No. 4 of 2015 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 of the Act;**
- (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.”**

145. . In support of their case, they relied on **Republic vs. Pwani University College Ex-parte Maina Mbugua James & 2 Others Misc. App. No. 28 of 2009** where the court observed that:

“The situation in Kenya was captured in the case of *Geoffrey Mwangi Kariuki vs. University of Nairobi*. – but where the distinction can immediately be drawn in that the college Disciplinary Committee refused to allow Geoffrey to be represented by advocates in the proceedings, and the High Court ruled that he was entitled to such representation. My own view is that if an individual requests for legal representation, then he should be entitled to such representation.....”

146. I agree with the position in **Republic vs. Chuka University Ex-Parte Kennedy Omondi Waringa & 16 Others** (supra) where it was held as follows: -

“89. It follows that the right to legal representation cannot be limited and is not limited by statute as it complements the right to a fair hearing. And it is the duty of the administrative or quasi- judicial body or tribunal to notify the person accused or against whom administrative proceedings are being conducted, of that right to legal representation, and not to wait and see whether the person shall request for such legal representation.

91. In the instant case, it is clear that the respondent’s Rules and Regulations applicable to student disciplinary matters bar and legal representations or agent in disciplinary proceedings. Therefore, the argument by the respondent that it was incumbent upon the applicants to request for legal representation before the committee does not hold any water. This is so because it is the Rules and Regulations themselves that limit the right to legal representation by a student facing the disciplinary committee. 92. It is trite law that Rules and Regulations of an administrative body exercising either administrative or quasi-judicial authority cannot be permitted to limit fundamental rights guaranteed by the Constitution, as they are not substantive legislation contemplated in Article 24 of the Constitution... 96. For the above reasons, I find and hold that the respondent violated the applicant’s right to legal representation in the disciplinary proceedings by failing to give him notice of.”

147. I have considered the charges which were levelled against the Petitioner, and I respectfully agree with the Petitioner that some of them were unreasonable. A charge such as rallying suspended students to book for a lawyer cannot be sustained under the current constitutional dispensation. Similarly using social media to rally support for a cause cannot by any stretch of imagination amount to a wrong doing unless by doing so a person is said to have fallen foul of Article 34(2) of the Constitution. However, a blanket rule that takes away ones constitutionally guaranteed rights is unacceptable. Apart from that some of the charges alleged that the Petitioner's actions were directed against third party students. The Petitioner contends that these students were never called to testify against him so that he could cross-examine them on their contention. This position is not controverted by the Respondent.

148. Article 47 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Similarly, section 4(1) of the **Fair Administrative Action Act**, No. 4 of 2015 provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Section 4(3) of the said Act on the other hand provides:

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; (0 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.

149. Section 4(4)(c) thereof on its part provides that the administrator shall accord the person against whom administrative action is taken an opportunity to cross-examine persons who give adverse evidence against him. However, section 4(6) of the Act provides that where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

150. The law is clear that that where a tribunal decides to hear one party then it must hear all the parties. See **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR.**

151. In **Russel vs. Duke of Norfolk [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

“There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case.”

152. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

“The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc.”

153. However, the law is now clear that where adverse evidence is given about a person, the person is to be afforded an opportunity to cross-examine the said witnesses. In this case the students who were allegedly ejected from the classrooms ought to have been called to adduce such evidence so that the Petitioner could at least respond to them. To simply state that the Petitioner ejected students from their classrooms without particulars thereof was clearly unfair. I associate myself with the decision in **Onjira John Anyul vs. University of Nairobi** (supra) that:

“35. In determining whether or not the respondent adhered to the rules of natural justice in conducting its disciplinary proceedings, it is necessary to examine the manner in which the said proceedings were conducted. I have in this regard perused the minutes of the Disciplinary Committee's proceedings that were attached to the respondent's replying affidavit as annexure “IMM4” and I note that even though the petitioner was accused of soliciting and inciting another student, namely Humphrey Ouko to attack/fight one Bramwel Kundu, and for illegally harbouring the said Humphrey Kundu in his campus room, neither the solicited student nor the one injured in the alleged attack were called as witnesses during the said disciplinary committees hearing. In effect therefore, the petitioner was not accorded an opportunity to face and cross examine his accusers... 37. In the instant case, having found that neither the victim of the alleged attack nor the alleged

attacker were called upon to testify as witnesses in the said disciplinary proceedings, I cannot hesitate but hold that the said proceedings were not conducted in accordance with the standards envisaged under Article 47 of the Constitution... 46. What this court finds most astonishing about the entire trial is the fact that even though the alleged stabbing incident that the petitioner is alleged to have orchestrated took place in a crowded place and in the full glare of several witnesses, none of the said witnesses was called to give evidence before the committee...For the above reasons, I find that the petitioner's right to fair administrative action and fair hearing were violated."

154. Based on the material placed before me I am however unable to conclusively find that the Respondent confiscated the evidence that the Petitioner intended to place before the Committee in light of the denial by the Respondent.

155. The Petitioner also took issue with the merit findings of the Respondent. **Onguto, J** in **Kenya Human Rights Commission vs. Non-Governmental Organizations Co-Ordination Board [2016] eKLR** expressed himself on that issue *inter alia* as follows:

"As to what constitutes fair administrative action, the court in President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, stated thus:

"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..." [Emphasis supplied]

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The Fair Administrative Action Act, 2015 must be viewed in that light.

The Petitioner also alleges violation of its right to fair hearing. Article 50(1) of the Constitution makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The right to fair hearing is evidently closely intertwined with fair administrative action. The oft cited case of *Ridge v Baldwin [1964] AC 40* restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put it as a 'duty lying upon everyone who decides anything' that may adversely affect legal rights.

Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."

I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of "reasonable" action under Article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50(1) of the Constitution. The court proceeding under Article 47 of the Constitution is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common law principles of judicial review are, in other words, not the only decisive factor. It may sound like stretching the precincts of traditional judicial review, but clearly by the Constitution providing for a "reasonable" administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review."

156. It follows that the merits of a decision may be looked into where an issue of substantive justice is raised. In this case, however the material placed before me does not enable me to make a conclusive determination that there was no substantive justice in the decision in question.

157. The Petitioner also complained of arbitrariness in the manner in which the Respondent meted out the sentence against him. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, the Court held:

“The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute...Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire into the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called “conduct short of expected standards of professionalism”, and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully...Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee’s findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a ‘determination’ within the meaning of empowering legislation was accordingly a nullity..... Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law...It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”

158. It follows that arbitrariness is one of the grounds for interfering with an administrative action. To my mind, in meting out punishment the Respondent was expected to exercise its discretion reasonably and not arbitrarily and capriciously or in bad faith. Therefore, where persons are charged jointly with the commission of an offence, unless reasons are given for disproportionate sentence, to subject them to different punishments may well amount to an arbitrary decision. In this case, however, the Court was not told of the charges with which the other students were charged and whether they were the same as those the petitioner faced and whether their roles were the same as that of the petitioner. In Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University [2014] eKLR it was held that:

“In any event, is discrimination based on punishment a valid ground under the law? I do not think so and it is my view and I do hold that the Disciplinary Committee is empowered to conduct disciplinary proceedings and it is within its discretion to mete out any punishment it deems fit it in accordance with the University Statute. This Court will not proceed forth to dismiss their decision and direct them to adopt a certain decision.”

159. I am therefore unable to find that the sentence meted against the Petitioner was discriminatory.

160. Having considered this petition as well as the response, I have no doubt in my mind that the manner in which the Petitioner’s disciplinary proceedings were conducted violated his rights to fair administrative action. The manner in which the same were conducted did not comply with the provisions of Article 47 of the Constitution.

161. The Respondent has however contended that this Court ought not to direct that the Petitioner be readmitted to the University. In so doing it has relied 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 where the learned judge stated as follows:-

“...The Petitioner’s main prayer was for orders that he be readmitted to the 1st respondent school so that he can continue with his studies. My take, however, is that readmission to the same school where he had already been excluded following the disciplinary process, would not only be untenable but also not in the interest of the Petitioner and the 1st respondent student fraternity at large. This court notes that the 1st respondent is a national school hosting more than a thousand students from all over the country who are equally entitled to their right to protection from the negative influence or behaviour that may arise from readmitting students who had already exhibited deviant behaviour. My humble view is that, in the circumstances of this case, readmitting the Petitioner to the same school will send a negative message to the rest of the students that disobeying school rules attracts no consequences, a scenario that may result the 1st respondent becoming an institution that has students whose behaviour is ungovernable. Needless to say the readmission of the Petitioner may not be in his best interest bearing in mind the stigma that he may suffer as a result of his past record.

42. This court further takes judicial notice of the fact that learning institutions have in the recent past faced numerous and worrying cases of indiscipline among students that has led to wanton destruction of property, serious injuries and in some cases, even loss of lives. Under these circumstances schools’ administration are expected to be extra vigilant and to take all the necessary precautions in order to protect the lives and property within their institutions and these measures include the exclusion of students who have, after going through the due process, been found culpable of the charges made against them.

43. The upshot of my decision is that, the Petitioner was taken through the due process as provided for by the statutes governing the discipline of students in schools and this court cannot therefore interfere with the administrative decision of the school and its discipline process. In sum, I find that none of the Petitioner’s rights, under the constitution, were violated and that the committee arrived at a decision that was in the best interest of the minor, considering the magnitude of the charges that were levelled against him, by excluding him from the school at the same time according him an opportunity to continue his education in another institution.”

162. In that case however the Court did not find any violation of the petitioner’s rights. In this however, there is no evidence that the readmission of the Petitioner to the University may not be in his best interest or that other students are averse to his return thereat. In Resley vs. The City Council of Nairobi [2006] 2 EA 311, the Court made a sweeping and rather blunt statement to the effect that:

“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent’s statements that the Court’s role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty’s subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place.”

163. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6:**

“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

164. The courts have recognised that unlawful interference with a citizen’s rights give rise to a right to claim redress and if the applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

165. In the premises I find this petition merited.

Order

166. Accordingly, I grant the following orders:

a) A declaration that the Respondent’s Regulations 10(2)(d) to the extent that it unreservedly outlaws picketing, 11(6)(c) to the extent that it does not allow for legal representation and 11(7)(b) to the extent that it does not allow for a hearing; of *Rules and Regulations Governing the Conduct and Discipline of Students of the University* unjustifiably limit the Petitioner’s rights under the Constitution and are therefore unconstitutional, null and void.

b) A declaration that the suspension and expulsion of the Petitioner from the Respondent University was null and void ab initio for having violated the Petitioner’s constitutional rights under the Constitution.

c) An order do issue compelling the Respondent to re-admit the Petitioner to join the University’s Bachelor of Education year III.

167. I however decline to grant an order for compensation as I do not have the basis upon which such an award can be assessed.

168. Taking into account the continuing relationship between the Petitioner and the Respondent and to avoid poisoning the same further, there will be no order as to costs.

169. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd day of July, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Manwa for the Petitioner

Miss Munyao for the Respondent

CA Geoffrey