



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 44 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA**

**AND**

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

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**UNIVERSITY OF NAIROBI....RESPONDENT**

**EX PARTE: BILLY GRAHAM MUKENYE**

**JUDGMENT**

**The Application**

1. The Application before the Court for determination is an application by way of a Notice of Motion dated 27<sup>th</sup> March 2019 brought by Billy Graham Mukenyee (hereinafter “the Applicant”). The said Applicant was a student at the University of Nairobi, which is an institution of higher learning established under the Universities Act, and which is the Respondent herein. The Applicant is seeking the following orders in the said application:

- a. An Order of Certiorari removing to this Court for the purposes of quashing the Respondent’s letter of 5<sup>th</sup> November 2018 expelling the Applicant as a student in the 1<sup>st</sup> Respondent University, and an order compelling the Respondent to readmit the Applicant into school to catch up with a few lost lessons.
- b. Costs be borne by the Respondent.

2. The application was supported by a statutory statement dated 18<sup>th</sup> April 2019, and a verifying affidavit sworn by the Applicant on the same date. The counsel for the Applicant, Amadi & Amadi Advocates, additionally filed written submissions dated 6<sup>th</sup> June 2019. The Applicant's case, as summarized from the pleadings he filed, is as follows. The Applicant joined the Respondent University in 2015 to pursue a degree in statistics. He contends that the Respondent's College Disciplinary Committee, *vide* a letter dated 6<sup>th</sup> July 2016 allegedly suspended the Applicant in what it termed as contravention of the Rules and Regulations governing the organization, conduct and discipline of the students. The Applicant contends that the letter did not expound on how and to what extent the Applicant had breached the said rules/regulations.

3. The Applicant further contends that on 9<sup>th</sup> August, 2017, he was accused of assaulting one of the staff members, which was reported, and the Applicant was subsequently charged at the Milimani Law Courts in **Case Number 1979 of 2017- R vs Billy Graham Mukenye & Others**, which proceedings are currently underway. Further, that on 3<sup>rd</sup> October 2017, the Applicant alongside others were charged in another case ongoing at the Criminal Division of the Milimani Law Courts, namely **Case Number 1980 of 2017- R vs Billy Graham Mukenye & Others**, after having been suspected of participating in burning the Student's Welfare Authority. The Applicant contends that in spite of the courts being seized of the said matters, the Respondent's College Disciplinary Committee convened a meeting so as to deliberate further on the said matters.

4. According to the Applicant, he notified and reminded the said Committee by an email dated 28<sup>th</sup> September 2018 that he was preparing for the matters pending before court. The Applicant contends that the Committee's subsequent action was to purportedly expel him from the University *vide* a letter dated 5<sup>th</sup> November 2018. This, it is contended, was done without due regard to his explanation or reasons for not being able to attend the Committee meeting contrary to the rule of natural justice. The Applicant contends that he was not given an opportunity to defend his actions, and also cites double jeopardy on the premise that the subject of his expulsion are cases pending in court.

5. The Applicant submitted that the Respondent's decision to expel him was unprocedural, unfair and disproportionate, and against the rules of natural justice. That in spite of the courts being seized of the matter, the Respondent's College Disciplinary Committee conveniently convened a meeting so as to deliberate further on the said matter. The Applicant submits that in spite having communicated his reasons for not being able to attend the disciplinary proceedings, the Senate Student Disciplinary Committee upheld the decision of the College Disciplinary Committee to expel him. In this regard, it is submitted that the Respondent is biased as it took a personal interest in ensuring the Applicant was expelled from school and convicted for an offence he did not commit. Further, that the Respondent advised the complainant staff not to engage in any out of court settlement and/or withdraw the matter to allow the Applicant to continue with school.

6. The Applicant cited Section 4(2) and (4) of the Fair Administrative Action Act in support of his submissions that he was not allowed an alternative time to defend himself against the allegations, and was therefore also denied the opportunity to cross examine his accusers and to challenge the evidence tabled against him. Further, that the Applicant was not furnished with the evidence and material relied upon to arrive at the impugned decision. It is also submitted that the Applicant was not given a notice of a right to review or an internal appeal of the Respondent's College Disciplinary Committee and the final decision of the Senate Disciplinary Committee. According to the Applicant, the Respondent maliciously instituted the two aforesaid court cases against him, in both of which the Respondent is either a direct complainant or an interested party.

7. The Applicant also cited the case of **Lucy Wanjiku Gitumbi & Another vs Dedan Kimathi University of Technology (2016) e KLR** in support of the submission that he was not afforded an opportunity to be heard. It is also the Applicant's submission that his rights to education pursuant to section 35 of the Education Act were breached by the Respondent's act of expelling unfairly and unprocedurally, and he cited the case of **G N vs Chumani Secondary School Board of Management [2014] e KLR** for this position.

### **The Response**

8. The application was opposed through a replying affidavit sworn on 24<sup>th</sup> April 2019 by Prof. Isaac M. Mbeche, the Respondent's Deputy Vice Chancellor (Student Affairs). The Respondent's Advocate, Akide & Company Advocates, in addition filed written submissions dated 22<sup>nd</sup> July 2019. According to the deponent, the Applicant was admitted to the University in 2016 under student registration number 163/4329/2016 and accordingly signed the Rules and Regulations governing the Conduct and Discipline of Students.

9. The deponent narrated that on 5<sup>th</sup> May 2016, the Applicant snatched and willingly returned a green beret from an NYS serviceman while celebrating the release of then Students Organization of Nairobi Chairman (SONU) Chairman, Babu Owino. As a result, the Applicant was suspended via letter dated 9<sup>th</sup> May 2016 and was invited and appeared before the College Disciplinary Committee on 14<sup>th</sup> June 2016. It is averred that the Committee found him guilty of all charge preferred and recommended a 1-year suspension for contravention of Part III(1)(a) (ii), (iv), Part III(3)(b) and Part IV(b)(iii) of the Rules Governing the Conduct and Discipline of Students. It is deponed that the suspension was effected *vide* a letter dated 6<sup>th</sup> July 2016.

10. It is averred that the Applicant appealed against the suspension by a letter dated 18<sup>th</sup> October 2018, but the Senate Student Disciplinary recommended that he serves the suspension after which he would be readmitted. That, the Applicant was subsequently readmitted via a letter dated 27<sup>th</sup> July 2017, albeit with a strong warning not to contravene the Rules and Regulations governing the Conduct and Discipline of Students. The Respondent contends that the Applicant was once again suspended from the University by a letter dated 20<sup>th</sup> September 2017. This, it is contended, was after the Applicant and others stormed the office of the Deputy Chief Halls Officer of the Students Welfare Authority, one Mr Zadock Opole, and punched him in the chest causing bodily harm.

11. It is further averred that the Applicant in further violation of the terms of his suspension, convened an unlawful assembly on 10<sup>th</sup> March 2018 and assaulted two students on 21<sup>st</sup> February 2018. It is contended that the Applicant was issued with a letter dated 28<sup>th</sup> March 2018 and invited to appear before the College Disciplinary Committee on 10<sup>th</sup> July 2018. That, the Applicant therein declined to plead to the charges against him because the matter was pending in Court, and he wanted the court proceedings concluded first before the commencement of a

criminal case against him.

12. Prof. Mbeche explained that the said Committee in its response to the Applicant stated that the disciplinary case was an internal matter, and that his suspension had not been challenged in a court of law. Further, that the Committee observed that the Applicant violated the terms of his suspension on 8<sup>th</sup> November 2017 when he forcefully and without authority took a mattress from House 6 Room 4 along Mamlaka Road and took the same to SQ7 without having been allocated a room. He also stated that the Applicant was arrested on 1<sup>st</sup> December 2017 and charged with arson and causing malicious damage to University property. It is averred that the College Disciplinary Committee found the Applicant guilty of the charges, and made a recommendation to the Senate for his expulsion from the University. That, the Applicant was accordingly expelled *vide* a letter dated 5<sup>th</sup> November 2018.

13. It is the Respondent's contention that apart from perpetuating violence, the Applicant has been a nuisance to fellow students, staff members, members of disciplined forces and the general public. It is contended that the disciplinary process leading to the Applicant's expulsion was fair, just and in the Respondent's best interest. In the circumstances, the Respondent termed the Applicant's Notice of Motion dated 27<sup>th</sup> March 2019 an afterthought and prayed that the same be dismissed with costs to the Respondent.

14. The Respondent's counsel cited the case of **Republic vs University of Nairobi & 3 Others Ex Parte Patrick Best Oyeso (2018) e KLR** in his submissions, where the Court addressed its mind to the guiding principles on judicial review as found in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300**. On the requirement for illegality, the Respondent submits that it acted in accordance with the Rules and Regulations Governing the Organization, Conduct and Discipline of Students in arriving at its decision to suspend and expel the Applicant. It was submitted that upon completion of his suspension, the Applicant was readmitted to the University but once more contravened Part IV (b) (ii) b of the Rules and Regulations after causing bodily harm to the Respondent's staff member, and was consequently suspended *vide* a letter dated 20<sup>th</sup> September 2017.

15. Further, that the Applicant violated the terms of his second suspension by taking a bed and mattress from House 6 Room 4 along Mamlaka Road forcefully and without authority, and taking the same to the halls of residence without having been allocated any room by the Respondent. This, it was submitted, is contrary to Part IV (b) (ii) g of the Rules on admission of unauthorized persons into the Halls of Residence. The Respondent also submitted that the Applicant was arrested on 1<sup>st</sup> December 2017 and charged with arson and causing malicious damage to University property contrary to Part IV (b) (ii) e of the Rules on malicious willful damage to, or loss of University property. It was the Respondent's case that it invited the Applicant to disciplinary hearings, but he failed to attend the same, and was consequently expelled. The Respondent cited the case of **Republic vs Kenyatta University Ex Parte Martin Waihuni Ndungu (2019) e KLR** for this position.

16. On the requirement of irrationality, it was the Respondent's submission that the Applicant's behavior, as aforesaid, is tainted with willful bad conduct contrary to the said Rules and Regulations. It was further submitted that the Applicant repeatedly violated the terms of his two suspensions despite the Respondent's warnings. Therefore, that the Respondent acted reasonably and rationally in arriving at the decision to expel the Applicant from the University. Accordingly, the Respondent relied on the case of **Republic vs University of Nairobi Ex Parte Antony Mwambia Thurairira (2018) e KLR**.

17. On procedural impropriety, the Respondent submitted that the disciplinary process leading to the Applicant's expulsion was procedurally proper and fair in accordance with the Rules and Regulations Governing the Organization Conduct and Discipline of Students. The Respondent cited Part IV (c) of the said Rules and Regulations which outlines the disciplinary procedures undertaken by the Respondent thus: i) all disciplinary offences shall be reported and dealt with by committees; ii) any matter reported to the Halls Disciplinary Committee is in its opinion essentially of an academic nature or involves issues extraneous to the residential affairs of the Hall concerned, such a matter shall be transmitted at once to the appropriate College Disciplinary Committee for action; iii) all other disciplinary offences wherever committed shall be reported to the appropriate College Disciplinary Committee for action.

18. Lastly, it was submitted that when the Applicant appeared before the College Disciplinary Committee on 10<sup>th</sup> July 2018 as earlier explained, the charges against the Applicant were read to him, but he refused to plead to the same on the grounds that the matter was in court. The Respondent submits that it informed the Applicant that the disciplinary proceedings against him and the criminal case all running concurrently were different, hence the question of double jeopardy does not arise. In this respect, the Respondent relied on the case of **Republic v K.S Bunyasi, the Principal Hospital Hill School & 3 Others Ex Parte A.W.O. (minor suing through his father and next friend N.O) & Another (2019) e KLR** where this Court held that administrative proceedings can be contemporaneously undertaken with criminal proceedings arising from the same action or event, and the two types of proceedings are different. It was therefore submitted that the Applicant's expulsion was justifiable as he was in violation of the Rules and Regulations, and had failed to appear before the Senate Student Disciplinary Committee on 9<sup>th</sup> October 2018 citing an ongoing court case against him.

### **The Determination**

19. Three issues have been raised by the pleadings and submissions in this application, that require determination. These are firstly, whether the Respondent's Vice Chancellor's decision to expel the Applicant was procedurally unfair; secondly, whether the said decision was unreasonable; and lastly, whether the Applicant is entitled to the relief he seeks.

### **On Procedural Fairness**

20. It is not in dispute that the Respondent expelled the Applicant by way of a letter by the Respondent's Deputy Vice Chancellor (Student Affairs) dated 5<sup>th</sup> November 2018. It is also not in contention that the applicable rules in this regard are the Respondent's Regulations Governing the Organisation, Conduct and Discipline of Students, which were cited by both the Applicant and Respondent. The said Rules and Regulations are made by the Respondent's Senate and Council in accordance with the provisions of the Respondent's Charter.

21. Under sections 19 and 20 of the Universities Act of 2012, a University Charter is the instrument that establishes and gives legal status and authority to a University to *inter alia* undertake its academic programmes. The University of Nairobi Charter was granted to the Respondent by Legal Notice 192 of 2012, and provides that Senate shall propose regulations for the discipline of students which are approved by its council, and under section 22 of the Charter, it is the Council that is given the power to make statutes that prescribing Student's conduct. Part IV A of the Regulations Governing the Organisation, Conduct and Discipline of Students in this regard provides as follows with respect to disciplinary actions against students:

**“(A) Disciplinary Authority:**

**For purposes of these regulations the Vice-Chancellor, acting on behalf of Council, is the disciplinary authority of the University and may in that capacity :-**

**(i) Vary or add to the list of disciplinary offences specified herein until such action shall cease to have effect unless approved at the next meeting of Council;**

**(ii) Suspend any student suspected of committing any disciplinary offence under the regulation from the University pending disciplinary actions.**

**(iii) Take any other measures necessary for the proper operation of disciplinary procedures set out herein.”**

22. At the procedural front, Part 1V(C) of the Regulations Governing the Organisation, Conduct and Discipline of Students is dedicated to the procedure to be followed when a student is alleged to have committed a disciplinary offence as follows:

**“(C) Disciplinary Procedures**

**(i) All disciplinary offences shall, in the first instance be reported to and dealt with by Committees constituted as follows:-**

**A) At the residential level (hereinafter the Halls Disciplinary Committee)**

- **The Warden - Chair**
- **The Dean of Students**
- **The Director of S.W.A.**
- **A representative of the Faculty of the student concerned**
- **The Head Custodian of that Hall**
- **The Student Hall Chairperson**
- **The Hall Administrator - Secretary**

**2. At the College level (hereinafter the College Disciplinary Committee);**

- **The Principal - Chair**
- **The Dean of Faculty/Director of Institute or School**
- **The Chairperson of the student's Department where appropriate one representative nominated by the College Student 's organization one representative from the Students' Hall of Residence nominated by the Students' Hall Chair**
- **The College Registrar - Secretary**

**(ii) All disciplinary offences committed within the Halls of Residence or all such offences as relate essentially to the proper conduct of residential affairs shall be reported to the Halls Disciplinary Committee for action.**

**(ii) If any matter reported to a Halls Disciplinary Committee is, in its opinion essentially of an academic nature or involves issues extraneous to the residential affairs of the hall concerned, such a matter shall be transmitted at once to the appropriate College Disciplinary Committee for action.**

**(iii) All other disciplinary offences wherever committed shall be reported to the appropriate College Disciplinary Committee for action.**

**(iv) All appeals from the decisions of Halls and College Disciplinary Committees in respect of matters falling within their respective jurisdictions shall lie with the Senate Disciplinary Committee constituted as follows:-**

- **Deputy Vice-Chancellor (Academic Affairs) - Chair**
- **Principal / Director of S.W.A.**
- **Dean of Students**
- **Dean of Faculty**
- **Warden or equivalent**

- Two (2) Senate Representatives
- Three (3) Students Representatives
- Academic Registrar - Secretary

(v) Provided that student representation shall be excluded in offences related to examination and other academic matters.

(vi) At all proceedings or a Disciplinary Committee before which he/she is summoned, the student shall be entitled to a fair hearing and to representation either in person or by someone of his/her choice, to call witnesses in his/her defence, and to appeal to the Senate Disciplinary Committee. Legal representation is not allowed.

Disciplinary Committee at the Halls or College levels shall have power to impose any one or more of the following penalties:-

- a) A letter of warning or reprimand
- b) The payment of damages commensurate with the nature and gravity of the offence committed,
- c) Suspension from the University for a specified period,
- d) Expulsion from the Halls of Residence,
- e) Any other penalty which the Committee in question may deem fit to impose or recommend to the Senate Disciplinary Committee.

(ii) No student may be expelled from the University, and any penalty imposed by a Disciplinary Committee in accordance with sub clause (1)- (5)- herein shall not take effect without the approval of the Senate Disciplinary Committee.

(iii) In arriving at an appropriate penalty or combinations thereof, the appropriate Disciplinary Committee shall be at liberty to consider the total conduct (past and present) of the student within or outside University and not merely the immediate circumstances furnishing the reason for disciplinary action against him/her.

(iv) The record and decision of any disciplinary action taken against a student shall be reported to his/her Warden, Chair of the Department, Dean of Faculty, College Principal and the Vice-Chancellor and shall form part of the student's record at those levels.

**2. Nothing in this section shall preclude Senate from proceeding against any student under Statute XX (6), nor shall anything in these regulations be read so as to impede."**

23. It is noteworthy that it is specifically provided for in the said Regulations that penalties including suspension can only be recommended and imposed after a student has been accorded a hearing and upon approval by the Senate Disciplinary Committee. In addition, it is now a core requirement of the Bill of Rights in the Constitution that every person who is to be affected by a decision must be accorded fair administrative action under Article 47 of and also by the Fair Administrative Action Act of 2015. The core aspect of the duty to act fairly under these provisions and also under the common law rules of natural justice is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken, so that he or she has the chance to influence it. Article 47 of the Constitution in this regard 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.**

24. Section 4(3) and (4) of the Fair Administrative Action Act provides the key procedural steps that are required to satisfy the requirements of fairness as follows:

- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
  - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
  - (b) an opportunity to be heard and to make representations in that regard;**
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
  - (d) a statement of reasons pursuant to section 6;**
  - (e) notice of the right to legal representation, where applicable;**

**(f) notice of the right to cross-examine or where applicable; or**

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a) attend proceedings, in person or in the company of an expert of his choice;**

**(b) be heard;**

**(c) cross-examine persons who give adverse evidence against him; and**

**(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

25. In addition, section 7(2) of the Fair Administrative Action specifically provides for the grounds on which this Court may review an administrative action or decision, which includes denial of a reasonable opportunity to state one's case or where there is procedural unfairness as follows:

**“(a) the person who made the decision-**

**(i) was not authorized to do so by the empowering provision;**

**(ii) acted in excess of jurisdiction or power conferred under any written law;**

**(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;**

**(iv) was biased or may reasonably be suspected of bias; or**

**(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**

**(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**

**(c) the action or decision was procedurally unfair;**

**(d) the action or decision was materially influenced by an error of law;**

**(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;**

**(f) the administrator failed to take into account relevant considerations;**

**(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;**

**(h) the administrative action or decision was made in bad faith;**

**(i) the administrative action or decision is not rationally connected to-**

**(i) the purpose for which it was taken;**

**(ii) the purpose of the empowering provision;**

**(iii) the information before the administrator; or**

**(iv) the reasons given for it by the administrator;**

**(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;**

**(k) the administrative action or decision is unreasonable;**

**(l) the administrative action or decision is not proportionate to the interests or rights affected;**

**(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;**

**(n) the administrative action or decision is unfair; or**

**(o) the administrative action or decision is taken or made in abuse of power.”**

26. Evidence was availed by the Respondent in support of its position that it followed the laid down procedure, and that Applicant was afforded the opportunity to be heard before being expelled. In this respect, the Respondent annexed the following documents to its replying affidavit:

a. “Annexure IMM 11” which were the minutes of the College Students’ Disciplinary Committee meeting held on July 10<sup>th</sup> 2018 and which record that the Applicant was present and that the charges against him were read to him.

b. “Annexure IMM 12” which was a letter to the Applicant from the Respondent dated 1<sup>st</sup> October 2018 requiring to appear before the Senate Student Disciplinary Committee on 9<sup>th</sup> October 2018.

c. The minutes of the hearing by the Senate Student Disciplinary Committee on 9<sup>th</sup> October 2019 which were annexed as “Annexure IMM 13” and indicated that the Applicant failed to appear before the Committee and that he informed the Committee through a letter that he was advised by his lawyer not to present himself until the case against him for arson was heard and determined by the Court.

27. The Respondent’s letter of expulsion dated 5<sup>th</sup> November 2018 also detailed the procedure employed by the Respondent and read as follows:

“163/4329/2016

**Mukenye Billy Graham**

**Tel 0705 133905**

**MATUNDA**

**KAKAMEGA**

**Dear Mr. Mukenye,**

**EXPULSION FROM THE UNIVERSITY**

**Reference is made to a letter dated September 20, 2017 suspending you from the University and a subsequent letter dated December 7, 2017 for violation of your suspension. Further reference is made to an invitation to appear before the College Disciplinary Committee held on July 10, 2017 where you did not present yourself. The committee deliberated your case in your absence and found you guilty of the offences as charged and recommended to Senate that you be expelled from the University.**

**The University convened a Senate Student Disciplinary Committee on October 9, 2018 to consider recommendations of the College Disciplinary Committee to expel you from the University. It is noted that you were invited in good time but failed to appear citing an ongoing Court case.**

**The Senate Student Disciplinary committee deliberated on your case and agreed to uphold the recommendations of the College Disciplinary Committee to expel you from the University.**

**Subsequently, I wish to inform you that you have been expelled from the University with effect from July 10, 2018. TAKE NOTE AND STRICTLY COMPLY. Failure to comply shall lead to criminal prosecution.**

**Yours sincerely**

**PETER M. F. MBITHI, PhD, EBS.**

**VICE CHANCELLOR**

**AND PROFESSOR OF VETERINARY SURGERY”**

28. This Court is in this respect guided by the core requirement of procedural fairness, namely that a person who is affected by a decision is given an effective opportunity to make representations before it is taken. The procedural steps stated in Section 4(3) and (4) of the Fair Administrative Action Act such as adequate notice of the nature of the hearing and an opportunity to be heard being given, are all aimed at affording this effective opportunity. The Applicant does not dispute that he was given notice of the charges against him and hearings by the

Respondent, and it is also evident that he failed to participate in the hearings of his own volition.

29. The Applicant argues that the Respondent nevertheless acted unfairly by proceeding with the hearings even when he had informed it that he would not attend and was proceeding with his Court cases first. This Court is reluctant to find that the Respondent acted unfairly in the circumstances, as the resultant unfairness was caused not by the Respondent failing to provide an opportunity for the Applicant to be heard, or failing to hold a hearing, but by the Applicant's own acts and omission of failing to attend the hearing.

30. In Al- Mehdawi vs Secretary of State for the Home Department (1990) 1 AC 876, the House of Lords held that in such circumstances there will be no procedural unfairness, and that to allow the acts or omissions of the affected individual to impugn a decision, where no unfairness was caused by the decision maker, could undermine the finality of litigation and create a very wide and unprincipled exception to the rules on procedural fairness that would be unworkable. This approach was also applied in R (Mathialagan) vs Southwark LBC (2004) EWCA Civ 1689, where a party failed to attend a hearing due to an advisor's negligence. I am persuaded by the holding in the two decisions, and thus find that there was no procedural unfairness on the part of the Respondent.

#### **On Reasonableness**

31. The Applicant alluded to the Respondent having acted unreasonably by having proceeded with the hearing despite the reasons he gave for not attending. From my reading, it is apparent that the Applicant's contention is that the Respondent subjected him to disciplinary proceedings while there were criminal cases on the same matter(s) pending in court namely, **Case Number 1979 of 2017 - R vs Billy Graham Mukenye & Others** and **Case Number 1980 of 2017- R vs Billy Graham Mukenye & Others**. According to the Applicant, this was sound ground for him not to answer to and/or appear before the Respondent's College Disciplinary Committee and the Senate Student Disciplinary Committee.

32. Unreasonableness is an established ground for judicial review, and was settled by the decisions in Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223 and Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374. This ground was also explained in Pastoli vs Kabale District Local Government Council & Others, (supra) as follows:

**“...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...”**

33. The Respondent can only be found to have acted unreasonably if the Applicant would have suffered double jeopardy as alleged, as a result of proceedings with the disciplinary hearings. Disciplinary hearings are in this regard however regulated by different laws, rules, procedures from criminal proceedings, and different thresholds also apply for culpability. In addition, the Applicant did not point this Court to any law that bars the Respondent from undertaking disciplinary procedures against him pending the hearing of the criminal cases. I also adopt the decision of this Court in the case of Republic v K.S Bunyasi, the Principal Hospital Hill School & 3 Others Ex Parte A.W.O. (minor suing through his father and next friend N.O) & Another (supra), wherein it was held as follows:

**“...Therefore, to establish that there was double jeopardy, one must establish firstly, that you are an accused person in a criminal trial, and secondly, that you have previously been acquitted or convicted of the same offence by a competent court of law.**

**In the present application, the Applicants were not subjected to a second criminal trial by the Respondents, but were subjected to administrative action. Therefore, the rule against double jeopardy does not arise nor apply, and there was no illegality committed by the Respondents on this account. Indeed it is also notable in this regard that administrative proceedings can be contemporaneously undertaken with criminal proceedings arising from the same action or event, and the two types of proceedings are different.”**

34. It is thus my view that arising from the foregoing, the fact that the Respondent was aware that there were on-going criminal cases against the Applicant at the time of the disciplinary hearings, and did not uphold the Applicant's request to await the decision of criminal cases, did not make the Respondent's decision patently unreasonable.

#### **On the Relief Sought**

35. The Applicant in his prayers seeks an order of certiorari and mandamus. I am on this issue guided by the parameters for the grant of the judicial review orders, as set out by the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, Civil Appeal No. 266 of 1996 thus:

**“...The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a**

person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

36. This Court has found that the Respondent is clothed with powers to discipline the Applicant, and the Applicant has not established that the Respondent was procedurally unfair or unreasonable in exercise of these powers. The Applicant therefore does not merit the judicial review orders he seeks. In the premises, I find that the Applicant’s Notice of Motion dated 27<sup>th</sup> March 2019 is not merited, and the same is declined with no order as to costs.

37. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER 2019**

**P. NYAMWEYA**

**JUDGE**