



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURT AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 292 OF 2017**  
**GEOFFREY ODUOR SIJENY.....PETITIONER**  
**VERSUS**  
**KENYATTA UNIVERSITY .....RESPONDENT**  
**JUDGMENT**

*Introduction*

1. The Petitioner, **Geoffrey Oduor Sijeny**, is a former student of Kenya University, the respondent herein. He was admitted to the respondent university in January 2009 and graduated on 15<sup>th</sup> July 2016 with the Bachelor of Education (Science) having completed his studies leading to the award of that Degree. He was issued with a clearance certificate on 4<sup>th</sup> August 2016, concluding his position as a student of the respondent University.

2. When he visited the respondent to collect his degree certificate, he was denied the same and instead was given a letter dated 26<sup>th</sup> September 2016 suspending him from the university on grounds of tampering with **online** examination results. He was said to have committed an examination irregularity by changing his marks and grades in one unit.

***Petition***

3. In his petition dated 5<sup>th</sup> June 2017 and filed in Court on 13<sup>th</sup> July 2017, and supported by the petitioner's affidavit sworn on 5<sup>th</sup> July 2017, the petitioner stated and deposed that he was invited by letter dated 4<sup>th</sup> October 2016 to appear before the Students' Disciplinary Committee of the respondent University on 25<sup>th</sup> October 2016 to answer charges of influencing and or tampering with on line examination data in Unit SBT 403 whose grade was changed from E to B, a unit the petitioner had undertaken in the second semester of the 2012/2013 academic year, but which the petitioner averred he had scored B.

4. The petitioner averred that he appeared before the Disciplinary Committee but the Committee did not have evidence on the charges, that no witnesses were called and that no evidence was adduced. He stated that after the hearing, he was told that he would be informed of the Disciplinary Committee's decision.

5. The petitioner further averred that the disputed unit SBT 403 was an elective one and that although he

had scored B, the grade in the portal reflected as E and after he raised the issue with **Dr. Gathara**, the unit lecturer in 2014, he was informed that the issue was due to portal fluctuation but that his grade would properly reflected once the system stabilized. The petitioner stated indeed the grade reflected B after some time.

6. The petitioner further averred that by letter dated 5<sup>th</sup> January 2017 he was informed that the disciplinary committee had found him guilty and had recommended that he be discontinued from the University and banned from accessing the university premises without express permission from the University management.

7. The petitioner stated that the suspension and subsequent discontinuation is illegal unlawful and a breach of his constitutional rights for the reason that he was not given a fair hearing and that he was no longer a student of the respondent having ceased to be so upon graduating.

8. The petitioner went on to state that by virtue of the unconstitutional acts the respondent had deprived and or denied the petitioner his fundamental rights guaranteed under the constitution including the right to equal treatment of law, subjected the petitioner to psychological torture, violated his right to education, right to fair administrative action and right to fair hearing.

9. He deposed and averred that the respondent had denied him the right of access to employment that the action amounted to unlawful, illegal and unconstitutional detention of his degree certificate yet the respondent had certified him to have successfully completed his academic studies and allowed him to graduate. On the basis of the above facts the petitioner sought the following reliefs:-

**a. A declaration that the petitioner's fundamental rights to equal treatment of the law guaranteed by Article 27 of the Constitution of Kenya 2010, right from being subjected to torture in any manner, whether physical or psychological guaranteed by Article 29(d) of the Constitution of Kenya 2010, right to education guaranteed by Article 43(f) of the Constitution of Kenya 2010, right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair guaranteed under Article 47(1) of the Constitution of Kenya 2010 and right to a fair hearing guaranteed under Article 50(1) of the Constitution of Kenya 2010 have been violated by the respondent.**

**b. An order compelling the Respondent to unconditionally release the original transcripts and degree certificate to the petitioner.**

**c. General damages for pain, suffering and mental anguish.**

**d. Exemplary damages for gross abuse of office and power by the respondent.**

**e. Costs of and incidental to the proceedings herein.**

**f. Any such other relief as this Honourable court may deem fit and just to grant.**

### **Response**

10. The respondent filed a replying affidavit by **Prof. Wangari Mwai** sworn on 18<sup>th</sup> September 2017 and filed in court in 19<sup>th</sup> September 2017. **Prof. Mwai** deposed that the petitioner commenced his studies at the respondent university in 2008 completing the studies in the second semester of 2013. It was deposed that the petitioner submitted an application to graduate during the graduation ceremony that was to be held in July 2016. It was deposed that the petitioner was cleared and subsequently participated in the graduation ceremony.

11. Regarding the charges of tampering and influencing examination results, **Prof. Mwai** deposed that an examination is marked and graded by the course lecturer and mark sheets retained for record purposes,

that the student's grades are posted on the online portal which students may access for viewing their grades, and that the portal is for communication purposes only and does not in any way verify the student's grades.

12. **Prof. Mwai** further deposed that although the petitioner was issued with a recommendation letter on 29<sup>th</sup> September 2016, the letter was not a confirmation of the petitioner's grades or completion of his course. According to **Prof. Mwai**, the petitioner was suspected of involvement in examination malpractices, and after investigations, he was suspended and later invited to appear before the Disciplinary Committee to answer charges of influencing and tampering with online examination data in unit SBT 403 by changing the grade from E to B, which he did on 25<sup>th</sup> October 2016.

13. It was deposed that the petitioner appeared before the committee and presented his case and that he was supplied with grade audit report which supported the allegations against him. It was also deposed that according to the grades report, the petitioner scored 29 marks in the concerned unit which translated for an E which was also reflected in the petitioner's consolidated mark sheet but had been irregularly altered to 69 altering the grade from E to B.

14. Prof Mwai deposed that after hearing the Disciplinary case, the Disciplinary committee recommended nullification of the Degree, that his name be removed from the roll of graduands for July 2016 and that he be discontinued from studying in the respondent university.

15. Prof Mwai further deposed that the petitioner was informed of his right of appeal; a decision that was communicated to the petitioner on 5<sup>th</sup> January 2017. Prof Mwai further deposed that the petitioner lodged an appeal against the Disciplinary committee's decision on 30<sup>th</sup> January 2017 which is yet to be heard since it could not be heard due to the existence of this petition.

16. **Prof Mwai** deposed that the decision of the committee to nullifying the petitioner's degree certificate is yet to be finalized since the petitioner's appeal is still pending. **Prof. Mwai** deposed that the petitioner is bound by the student's regulations and processes and that the Disciplinary Committee is mandated by section 37 of the Universities Act, 2012 as read with Kenyatta University Act, 2013 to deal with examination offences and irregularities committed by students.

17. **Prof. Mwai** denied that there was violation of the petitioner's rights and in particular that Article 47 of the Constitution was violated neither was the fair Administrative Act, 2015. **Prof. Mwai** further denied that there was violation of the petitioner's right to equality and freedom from discrimination or violation of the petitioner's right to be subjected to torture whether physical or psychological. According to **Prof. Mwai**, the petitioner was given a fair hearing before the Disciplinary Committee prior to its determination.

### ***Petitioner's Submissions***

18. **Mr. Mutinda**, learned counsel for the petitioner, submitted that the petitioner who was a student in the respondent University and completed his studies in 2016. Counsel submitted that during his course, the petitioner took 52 units. He submitted that the petitioner was accused of tampering with **online** examination data with regard to **Unit SBT 403** and had the marks changed from 29 to 69 thus changing the grade from E to B.

19. Learned counsel contended that the petitioner appeared before the Disciplinary Committee and was later informed of the Disciplinary Committee's decision discontinuing him from the university and indeed lodged an appeal which is still pending. **Mr. Mutinda** submitted that the petitioner took examination in the contentious unit in 2008 taught and examined by **Dr. Gathara**, but that he re-look the unit in 2014 and passed with B.

20. According to **Mr. Mutinda**, the petitioner was placed in the graduation list because he had passed university examinations. Learned counsel submitted that the discrepancy in the marks was noted in February 2010 but was not raised with him until after graduation. In **Mr. Mutinda's** view, the process of

withdrawing the petitioner's degree certificate was not procedural, that the Disciplinary Committee was not properly constituted and that the petitioner's constitutional rights under various Articles of the Constitution were violated.

21. Learned counsel argued that the petitioner was no longer a student when the disciplinary proceedings were conducted. He relied on the decision in the case of **Republic v Vice Chancellor of Kenyatta University Ex Parte Rwita Joseph Mugania [2-14]eKLR and Rose Githiga v Kenyatta University [2017] eKLR**. He also relied on the case of **Eliud Nyauma Omwoyo & 2 Others v Kenyatta University [2014] eKLR** for the submissions that Article 47 of the Constitution requires that administrative action taken should be expeditious, efficient, lawful, reasonable and procedurally fair.

### ***Respondent's Submissions***

22. **Miss Wanjiru Ngige**, Learned counsel for the respondent submitted that the Disciplinary Committee heard the petitioner and made certain recommendations including nullification of the petitioner's degree certificate, which was duly communicated to the petitioner.

23. Learned Counsel submitted that following that decision, the petitioner lodged an appeal which is pending. **Miss Wanjiru Ngige** submitted that the petitioner tampered with **online** examination result in unit **SBT 403** and had it changed from 29 to 69 (grade E to B). According to learned counsel, the petitioner scored E in his first attempt for the unit. **Miss Wanjiru Ngige** contended that the petitioner never stated in his pleadings that he had re sat the unit, but only stated that he had scored B and that any submissions that he had re sat the unit, were submissions from the bar which contradict averments in the petition as well as deposition in the supporting affidavit.

24. Learned counsel contended that the respondent was right in subjecting the petitioner to disciplinary process upon discovering that the petitioner had committed an examination malpractice. According to counsel, the petitioner was given a hearing and after the Committee's recommendations were communicated to him, he duly lodged an appeal as allowed by the university procedures which appeal is still pending. Counsel submitted therefore, that this petition is premature since no decision has been taken against the petitioner yet.

25. In learned counsel's view, the petitioner was given fair hearing and relied on the decision in the case of **Republic v National Police Service Commission ex parte Daniel Chacha Chacha [2016] eKLR** on procedural fairness and the values underlying the duty to act fairly to the effect that the individual affected should have the opportunity to protect their rights, interest or privileges using a fair impartial and open process.

26. Counsel also relied on the case of **Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 Others [2006] eKLR (p36-37)** and concluded that the petitioner did not establish that the respondent violated his rights under Articles 27, 29 and 43(f) of the Constitution.

### ***Determination***

27. I have considered this petition, the response thereto submissions by counsel for the parties and the authorities relied on. This petition challenges the respondent's decision to nullify the petitioner's degree certificate on grounds of interfering and tampering with **online** examination results. It was alleged that the petitioner who had scored E in unit **SBT 403** changed his marks from 29 (grade E) to 69 (grade B) which the petitioner denied.

28. The respondent's students' Disciplinary Committee conducted disciplinary proceedings against the petitioner found him guilty and recommended nullification of his degree and that the petitioner be barred from entering the university grounds without permission. Once the petitioner was notified of the decision, he lodged an appeal which both parties agree is still pending.

29. The petitioner's main ground in this petition was that his right to fair administrative action in terms of

Article 47 of the Constitution was violated. He said he was not given a fair hearing and that there was no evidence to support the allegations made against him.

30. The right to fair administrative action is not only an integral part of the Bill of Rights but also an essential feature of our Constitution and the soul of a democratic society without which democracy and the rule of law cannot be maintained. In that regard, the right to fair administrative action is now firmly embedded in our Constitution as a way of ensuring that administrative actions meet the standards set by the Constitution.

31. Article 47 of the Constitution provides that; **(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.** and **(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.** The Constitution has now imposed a constitutional control on administrative bodies to employ constitutional standard of legality, reasonableness and procedural fairness in any administrative actions that they take and accord person to be affected by such actions a hearing before taking the action. Where the actions would have adverse effects on the persons' right(s), they are required to give the persons written reasons for the actions. This is a right that must not be abrogated.

32. The fact that fair administrative action is now a constitutional right was stated by the *Constitutional Court of South Africa* in the case of **President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, 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...”**

33. Our Court of Appeal stated with regard to Article 47 which is similar to section 33 of the Constitution of South Africa when dealing with the issue in the case of **Judicial Service Commission v Mbalu Mutava & another** [2014] eKLR 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.”**

34. Section 4 of the Fair Administrative Action Act, 2015 reiterates the importance of this right by amplifying the prominence of Article 47 and the process to be followed in conducting administrative actions. A party coming to this Court on the basis that his or her right to fair administrative action was violated, must show that the standards enumerated in Article 47(1) as amplified by section 4 of the Fair Administrative Act were nonexistent in that administrative action and or that they were violated., and only then should the Court summon its jurisdiction under Article 165 (3) (b) of the Constitution **to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied,**

**violated, infringed or threatened.**

35. Looking at the petitioner's averments, depositions and submissions, the petitioner has not stated why he thinks the respondent violated Article 47 of the Constitution. The petitioner is not alleging that the respondent's action was not expeditious and show why not, that it was not efficient and clearly state why it was not; that it was not lawful and show why not, that it was not reasonable and procedurally fair and clearly show why he thinks so.

36. According to the evidence on record as gathered from the pleadings, the petitioner was notified of the allegations made against him and invited to attend the disciplinary proceedings before the Disciplinary Committee which he did and made presentations. The Disciplinary Committee considered the representations and made recommendations for action by the respondent's Senate. The respondent's contention was that the petitioner tampered with **online** examination results by changing his marks and grades from 29 (grade E) to 69 (grade B) respectively.

37. Once the committee made its recommendations and the petitioner notified, he took the next step allowed by the respondent's statute and lodged an appeal. This is clear at paragraph 13 of the petitioner's supporting affidavit where he deposed that **"upon receipt of the correspondence dated 5<sup>th</sup> January 2017 he lodged an appeal vide correspondence dated 30<sup>th</sup> January 2017 which appeal has not been heard"**. The respondent also admitted that indeed the petitioner lodged an appeal against the Disciplinary Committee's decision and explained that the appeal has not been heard because of this petition.

38. The process by way of appeal is legally recognized in the respondent university's statute, a process that petitioner chose to follow. Having done so, it is correct when the respondent's counsel stated that this petition is premature given that no definitive decision has been made by the respondent. It may very well be that the petitioner's appeal may succeed or the Disciplinary Appeal Committee may take a different view from that of the Students' Disciplinary Committee and decline to affirm that decision.

39. In that regard therefore, where there exists an alternative dispute resolution mechanism allowed by law, and a party chooses to follow that procedure as allowed in law, it is only important that the procedure be exhausted before turning to the Court to challenge the outcome of that process. It is improper, in my view, for a party to mount parallel processes in different forums challenging the same action without first exhausting the alternative process.

40. Section 7 of the Fair Administrative Action Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision in court or before a tribunal as the case may be in accordance with section 8 of the Act. However, section 9(2) is clear that the High Court or a subordinate court should not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

41. Courts have held times without number that where there is an alternative remedy the same should be pursued first before turning to court for redress. Such a view was expressed in the case of **Republic v National Environmental Authority** [2011]eKLR, the court observing that where there is an alternative remedy and especially where an appeal process is provided for, it is only in exceptional circumstances that an order for Judicial Review would be granted, and only if that alternative remedy is not suitable to determine it.

42. There is a procedure for appeal provided for by the university statute and the petitioner triggered that process when he lodged an appeal against the Disciplinary Committee's decision. From both jurisprudence and the law, the petitioner could only move the court after he had exhausted the alternative remedy or if he demonstrated that the alternative remedy was not suitable for resolving the problem. As it is, first, there is an appeal that has been lodged in accordance with the appeal process allowed and that appeal is pending. Second, the petitioner has not shown that the alternative remedy is not suitable for resolving the issue or that there are special circumstances that would make the court assume jurisdiction and hear the matter.

43. In my view, the issue in contention is whether or not the petitioner violated examination regulations and depending on the answer to that question, whether the petitioner could be said to have qualified to graduate. That is an issue that the Appeal Disciplinary Committee can resolve hence the petitioner has to follow the appeal process allowed by the respondent's statute and which he had opted to pursue.

44. That being my view of the matter, I find and hold that this petition is clearly premature given the pendency of the appeal before the Disciplinary Appeal's Committee. Consequently and for the reasons above, the petition dated 5<sup>th</sup> June 2017 is declined and dismissed with no order as to costs.

**Dated Signed and Delivered at Nairobi this 2<sup>nd</sup> Day of February 2018**

**E C MWITA**

**JUDGE**