



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLANEOUS CIVIL APPLICATION NO. 27 OF 2017

IN THE MATTER OF: JUDICIAL REVIEW ORDERS OF *CERTIORARI* AND *MANDAMUS*

AND

IN THE MATTER OF: THE EXPULSION OF RODNEY ONGUKA ODHIAMBO FROM JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY (JKUAT)

AND

IN THE MATTER OF: THE RULES AND REGULATIONS GOVERNING THE CONDUCT AND DISCIPLINE OF STUDENTS AT THE UNIVERSITY (JKUAT)

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26, LAWS OF KENYA, SECTION 8 AND 9

RODNEY ONGUKA ODHIAMBO.....APPLICANT

VERSUS

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....RESPONDENT

JUDGMENT

1. The Applicant is a student at the Respondent University (the "University"). He is a Third Year Student undertaking a course in Bachelor of Medicine and Surgery. He faced certain disciplinary proceedings at the University. The proceedings were before the Disciplinary Committee. On or about 31/08/2017, the Applicant received a letter from the University informing him that after due deliberation, the Disciplinary Committee had resolved to expel the Applicant from the University "with effect from the date of [that] letter."
2. The letter communicating the expulsion was dated 24/07/2017. It stated that: "In the event that you are dissatisfied with the committee's decision, you can appeal to the undersigned within fourteen days from the date of this letter."
3. The Applicant says that the letter was only released by the University on 31/08/2017. The University does not deny this.
4. The Applicant is aggrieved by the decision by the University to expel him and approached this Court for leave to file Judicial Review proceedings. The Court granted leave pursuant to which the Applicant filed the Notice of Motion dated 24/10/2017. The Application was argued by way of Written Submissions after both parties consented to that direction by the Court.
5. There was a brief period when, at the nudging of the Court, it appeared that the parties might reach an amicable resolution to the dispute. However, the attempts to settle seem to have failed and the parties asked the Court to issue its judgment.
6. The Applicant has three complaints against the process and decision by the University:
 - a. First, he alleges that the Disciplinary Committee violated rules of Natural Justice in its proceedings;
 - b. Second, the Applicant argues that the Disciplinary Committee exceeded its powers when it recommended that he be expelled; and

c. Third, the Applicant argues that the decision to expel him was in bad faith and failed to meet the principle of proportionality “which seeks to strike a balance between the adverse effects of which a decision has on the rights and liberties of individuals” especially in view of the fact that the Applicant is separately facing criminal charges arising from the same incident which gave rise to the disciplinary proceedings.

d. The University has vehemently resisted the Application. Through its lawyers, the University filed a Replying Affidavit sworn by Dr. Esther Muoria, the Registrar.

e. The facts of the case are not much contested. The Applicant received a letter from the University dated 28/06/2017 which contained the following consequential paragraph describing the charges he faced:

It has been reported that on 25th March, 2017 at 3:00am, you were taken to hospital by your colleagues while bleeding profusely. You were drunk and extremely violent and went about soiling walls, corridors and benches with blood intentionally and even throwing benches and cabinets. You further hit a security guard with a metal cabinet, banged and destroyed a door lock and rails at the medical records office, Later on 28th May, 2017 at 11:30pm, you went to JKUAT Hospital while drunk and was shouting that you were on a revenge mission, you banged and kicked the main glass door and broke it. You are therefore charged with violence and assaulting a University Officer while on duty and exuding indecent behaviour.

9. The case, then, turns on the legal signification of the facts. The University contests each of the three points raised by the Applicant. I will quickly rehash the respective arguments by each party on each of the three complaints in addition to one aspect of the case raised by the Respondent as dispositive, and then indicate my disposition on each of the issues.

A. Did the University Fail to Adhere to Rules of Natural Justice?

10. First, the Applicant says that the rules of natural justice were violated. He complains that there was no hearing which would have given him an opportunity to defend himself. Instead, there was simply a call for an explanation from the Committee on what transpired. He complains that a proper hearing should have included the following steps – but that it did not:

- a. Earlier information regarding the nature of the offences the Applicant was facing;
- b. A reading of the charges to the Applicant;
- c. Oral testimony by the complainant who, in this case, was a security guard;
- d. Oral testimony by a University Official charged with securing University property;
- e. An opportunity to cross examine the Security Guard and the University Officer in-charge of University property;

11. The Applicant further complains that it was a violation of the Fair Administrative Action Act (especially section 4 thereof) for the University not to have informed him that he had a right to bring his own witnesses and a lawyer to represent him if he so wanted. The Applicant relied largely on *Lucy Wanjiku Gitumbi & Another v Dedan Kimathi University of Technology [2016] eKLR* in this regard.

12. The University insists that the letter dated 28/06/2017 summoning the Applicant was clear as to the charge to which the Applicant was to answer before the Disciplinary Committee – and that this clearly complied with section 4(3)(a) of the Fair Administrative Action. The University further relies on the captured minutes of the proceedings (which are attached to the Replying Affidavit of Dr. Muoria) to demonstrate that the charge was read to the Applicant. Additionally, the University argues that the attached minutes are clear that the Applicant was accorded an opportunity to defend himself; in addition to the fact that the letter summoning him had informed him that he was at liberty to tender a written defence if he so wished.

13. It is the University’s position, therefore, that it accorded the Applicant an opportunity to defend himself as provided for in the Fair Administrative Action Act.

14. On the issue of legal representation, the University argues that there is no evidence that the Respondent barred the Applicant from having legal representation at the meeting of the Disciplinary Committee. Neither was the Applicant barred from calling any witnesses. The University argues that our case law has established that there is no violation of FAAA where an individual has not asked to be represented by counsel and barred from doing so. The University cited *Victoria Mutai & 28 Others v Kirinyaga University [2017] eKLR* and *Moses Nandalwe Wanjala v Kenyatta University [2015] eKLR*.

15. A review of the proceedings and the uncontested factual position in the case, in my view, easily renders the conclusion that the Applicant was not, in any way, denied his right to be heard. I agree with the University that the Applicant was informed well in advance of the charges he was facing – indeed, at the request of student representatives an earlier hearing date was postponed to give him ample time to prepare. I also agree that the charges were clearly and specifically indicated in the letter dated 28/06/2017 which summoned him for the hearing. Indeed, it is hard to imagine a clearer and more specific statement of charges.

16. Additionally, I do not agree with the Applicant that absent a specific request by a party to have a specific person be present to adduce evidence and be available for cross-examination, that it is a violation of principles of fair administrative procedures not to have the parties who make allegations available at the hearing in quasi-judicial proceedings. As our case law has severally pointed out, quasi-judicial proceedings are subject to the rules of procedure of the tribunal to which a party is appearing: it is incumbent upon a party desiring particular

facilities or accommodation to request for them before they can allege a violation of their rights to have such facilities or accommodation available. See *Oluoch Dan Owino v Kenyatta University [2014] eKLR*.

17. Finally, respecting the claim that the University ought to have informed the Applicant of his right to have legal representation, I can do no better than quote Mumbi Ngugi J. in *Moses Nandalwe Wanjala v Kenyatta University [2015] eKLR*:

...I can find no basis for imposing a requirement on the Respondent to inform the Petitioner that he had the right to choose, and be represented by an advocate. Neither can this Court find a basis for faulting the Respondent on the basis that it did not inform the Petitioner of the right to be represented by Counsel when he did not make such a request and was denied by the Respondent. I am, therefore, unable to find a violation of the Petitioner's rights under Article 50(2) [of the Constitution], even it had been applicable in the circumstances of this case, which it was not.

18. I therefore find no basis for holding that the proceedings before the Disciplinary Committee were tainted by a violation of the rules of natural justice.

B. Did the Disciplinary Committee Exceed its Powers in Recommending Exclusion?

19. The Applicant complains that the Disciplinary Committee exceeded its powers when it recommended that the Applicant be expelled from the University. The argument is simple: expulsion is a preserve of the University Council and, to that extent, the Disciplinary Committee acted in excess of its powers by purporting to make a decision to expel the Applicant.

20. The University resists this position and states that the Disciplinary Committee is empowered to “impose any other penalty or penalties as the Committee may deem fit to impose....” The University says that “expulsion” is one of the other “penalties” referred to in that provision.

21. The powers of the University’s Disciplinary Committee are provided for under section 22(vi)(a) of the Jomo Kenyatta University of Agriculture and Technology Statutes, 2014. The section reads as follows:

The Committee shall have power to impose any one or more of the following measures and/or penalties depending on the nature and gravity of the offences committed and the evidence in support thereof:

- i. To dismiss the case against the student;*
- ii. To issue a letter of warning or reprimand and such letter shall form part of the student’s personal record and a copy thereof shall be sent to the parent or guardian of the affected student;*
- iii. To require the student to make good any loss or damage to University property and/or pay damages commensurate with the nature and gravity of the offence;*
- iv. To suspend the student from the University for a specific period;*
- v. To expel the student from the Halls of Residence;*
- vi. A combination of any two or more of the above; and*
- vii. To impose any other penalty or penalties as the Committee may deem fit to impose.*

22. The Applicant insists that the powers of the Disciplinary Committee enumerated in this section clearly do not include the right to expel a student. He bolsters his argument by the fact that the Statute, at a different section, preserves the power to expel a student with the University Council, the highest deliberative body in the University. Hence section 22(vi)(b) of the Jomo Kenyatta University of Agriculture and Technology Statutes, 2014 provides that:

The University Council shall have the right to expel a student who commits any or a combination of the following offences without reference to him or her....

23. It seems clear to me that the Applicant is surely right on this score. The appropriate interpretation of clause (viii) of the enumerated powers of the Disciplinary Committee will have to be one that deploys the *ejusdem generis* rule of interpretation: the kind of penalty comprehended in that general clause must be of the same kind as the penalties enumerated before it. All the penalties enumerated as appropriate penalties for the Disciplinary Committee to mete out fall short of the radical penalty of expelling the student. That penalty is, by text of the same University Statute, reserved for the highest decision-making body of the University, namely, the University Council. It cannot be that the University Statute intended to give the Disciplinary Committee exactly the same powers regarding disciplinary matters as the University Council.

24. In the circumstances, I hold that the Disciplinary Committee acted in excess of its powers when it purported to recommend expulsion of the Applicant.

C. Was the Decision of the Disciplinary Committee Proportionate?

25. The Applicant's last salvo is that the University has acted irrationally for exposing the Applicant to University disciplinary proceedings while he is still facing criminal charges for the same actions. The Applicant argues that somehow this infringes on the Applicant's rights to a free and fair trial and the right to be presumed innocent until proven guilty.

26. It requires no laborious analysis to conclude this position taken by the Applicant as untenable. The University is at liberty to pursue criminal charges as a complainant while it pursues disciplinary proceedings against the Applicant. The two sets of proceedings have no bearing on each other -- and the doctrine of proportionality has no relevance in this regard.

D. Was the Applicant Obligated to Exhaust Local Remedies Under the University Statute?

27. The University contends that the Applicant ought to have appealed against the decision by the University first before approaching the Court. It points that the University gave the Applicant 14 days to file his appeal and places reliance on section 22(vi)(g) of the Jomo Kenyatta University of Agriculture and Technology Statutes, 2014. That section reads as follows:

Students have the right to appeal to the Vice Chancellor against the decision of the Disciplinary Committee if he considers himself aggrieved by the said decision and such appeals will be made in writing within 14 days of the date of communication of the Committee's decision.

28. The University submitted that the Applicant failed to appeal within the given time or seek an extension of time to so appeal. The University therefore argues that the application before the Court is premature as the Applicant has not exhausted the internal mechanisms as required by law. The University cited the Fair Administrative Action Act at section 9(2) as well as **Gregory Magara Magare v University of Nairobi & Another [2017] eKLR**.

29. The Applicant, on the other hand, complains that he received his verdict in a letter dated 28/07/2017 but which was received on 31/08/2017. That letter clearly indicated to him that he had a right of appeal within 14 days from the date of the letter – not the date of receipt of the letter. The Applicant, therefore, concluded that the University had calculated to deny him his right appeal by delivering the letter late. The Applicant argues that it would, therefore, be very prejudicial to hold that the Applicant was required to exhaust internal mechanisms in the circumstances.

30. I would agree with the Applicant that while the University Statute is clear that the Applicant had a right to appeal against the decision by the Disciplinary Committee within 14 days of receipt of the letter, the letter he received clearly spoke of the right to appeal being exercisable within 14 days of the date of the letter. Since the letter was received after the passage of the 14-day window, it would be plainly ridiculous to turn around and argue that the Applicant ought to have exhausted the local remedies before approaching Court. This is clearly one of the instances where it would have been futile, by the text of the communication by the University, for the Applicant to have tried to exercise his right of appeal. I would therefore hold that the requirement for exhaustion of available local remedies does not bar the Applicant from seeking relief in Court in the circumstances of this case.

E. What Reliefs, if any, should be Granted?

31. The University has argued that even if the Applicant is successful, the orders sought should not be granted because of their potential to disrupt orderly conduct of business in a public university. The University has urged the Court to consider the interests of the University's community of students and staff together with the University's property in light of the Applicant's "violent, disruptive, and destructive behaviour."

32. The University urged me to refuse to grant any relief on the facts of this case. It cited Odunga J. in **R vs Energy Regulatory Commission Ex Parte Pekenya Gas Supplies Limited [2016] eKLR** where the Learned Judge remarked as follows:

...[T]he decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270:

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.'"

33. I wholeheartedly agree with Odunga J. that the reliefs of Judicial Review are discretionary – and are always granted with an eye to public interest – foremost of the considerations being the effect the orders would have on the functioning of the public body in question. Indeed, this Court is empowered by Article 23(3) of the Constitution to grant "appropriate reliefs" in specific cases fashioned to accord to the circumstances of the case at hand. See **Minister of Health & Others vs Treatment Action Campaign & Others**^[1]

34. In the present case, I have come to the conclusion that the rules of natural justice were not violated in the course of the hearing before the Disciplinary Committee in terms of procedure. However, the Disciplinary Committee, in my view acted in excess of its authority in recommending expulsion of the Applicant from the University. At the same time, the University acted unfairly by (mis)communicating to the Applicant that his right of appeal was pegged to the date the letter was authored rather than the date it was received.

35. In the circumstances of this case, the relief that commends itself, then, is as follows:

- a. The decision by the Disciplinary Committee recommending the expulsion of the Applicant, Rodney Onguka Odhiambo, from the University is quashed for being *ultra vires* only to the extent of the penalty issued;**
- b. The decision is remanded back to the Disciplinary Committee for reconsideration of the appropriate penalty after an appropriately fashioned re-hearing for that purpose;**
- c. The Applicant shall have a right to appeal any decision if he is aggrieved to the Vice Chancellor within 14 days from the date the decision is communicated to him;**
- d. For avoidance of doubt, while the disciplinary process is being completed, the Applicant shall remain a student “under suspension” until a verdict is reached. To maintain the rights and balance the interests of all the sides, the decision of the Disciplinary Committee must be made and communicated to the Applicant within sixty (60) days of today.**
- e. In view of the circumstances of this case – and the reluctance of the Applicant to pursue an eminently available out-of-court settlement which was disclosed in Court as a way forward, each party shall bear its own costs.**

37. Orders accordingly.

Dated and delivered at Kiambu this 4th day of June, 2018.

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JOEL NGUGI

JUDGE

[\[1\]](#) (2002) 5 LRC 216 at p. 249.