



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS.**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 325 OF 2016**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLES 19, 22 AND 23**

**AND**

**IN THE MATTER OF UNFAIR ADMINISTRATIVE ACTION UNDER ARTICLE 47 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE UNIVERSITIES ACT- 2012 SECTION 63 OF THE ACT**

**AND**

**IN THE MATTER OF VIOLATION OF THE ARTICLES 27, 28, 29 AND 43 OF THE  
CONSTITUTION**

**GREGORY MAGARA MAGARE.....PETITIONER**

**VERSUS**

**UNIVERSITY OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**DEAN OF SCHOOL OF MEDICINE, UNIVERSITY OF NAIROBI...2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Petitioner, a student at the 1<sup>st</sup> respondent university, filed a petition dated 27<sup>th</sup> July, 2016 against the 1<sup>st</sup> respondent a public university and the 2<sup>nd</sup> respondent, Dean of the School of Medicine in the same university and sought the following reliefs.

- a) A declaration that the letter of suspension issued dated (sic) 29<sup>th</sup> June 2016 and served on 26<sup>th</sup> July 2016 was issued in breach of the petitioner's right to a fair hearing and right to fair administrative action under Article 47 of the Constitution.*
- b) A declaration that any suspensions meted out to the petitioner over issues related students election commission and which affect his academic program is unconstitutional.*
- c) An order directing the respondents to respect the petitioner's right to education and legitimate expectation not to hinder in any way the petitioner's right to sit for and be examined for his rotation and final exams as he pursues his degree in Bachelor of Medicine and Bachelor of surgery (MBCHB).*
- d) A declaration that any purported disciplinary proceedings are unconstitutional.*
- e) Costs of the petition.*

The facts giving rise to the petition are that the petitioner who is a 5<sup>th</sup> year Bachelor of Medicine student at the 1<sup>st</sup> respondent University, and a student commissioner for purposes of student elections, was assigned responsibility of generating a list with names of students who were to be officials during students' election that were to be held on 1<sup>st</sup> April 2016. After generating the list, the petitioner forwarded it to the relevant officials of the 1<sup>st</sup> respondent, through the 2<sup>nd</sup> respondent. The list caused some disagreements which were however sorted out.

After elections, the petitioner forwarded names of students who had worked as election officials to the 2<sup>nd</sup> respondent for purposes of payment. This once again raised issues as some students who had worked were not on the list while some of those on the list had not worked at all, and were therefore not entitled to payment. The petitioner was accused of causing the anomaly, and was suspended from the 1<sup>st</sup> respondent institution by letter dated 26<sup>th</sup> June 2016. He filed this petition seeking the reliefs above. He accused the respondents of violating his fundamental rights including right to fair administrative action.

The respondents filed a replying affidavit through the 2<sup>nd</sup> respondent who was himself a staff commissioner for purposes of that election. He averred that the petitioner was to generate a list for presiding officers, polling clerks and ushers. The list was for students who were in the college of Health Sciences where the petitioner is a student and the 2<sup>nd</sup> petitioner, the Dean of the school. The list was to be both inclusive and representative. The initial list was however not representative since it omitted some outgoing student leaders who would have been presiding officers themselves. After consultations and intervention, an acceptable list was generated and election proceeded as scheduled.

After elections, the 2<sup>nd</sup> respondent asked the petitioner to reconfirm details of the students who worked on the voting day for purposes of payment which the petitioner did and forward the names to him. The 2<sup>nd</sup> respondent in turn forwarded the list to the Registrar, student affairs at the 1<sup>st</sup> respondent institution. At the time of payment, it turned out that some students' names had been replaced by those who had not work on the elation day. Payment was stopped and the petitioner suspended to give way for investigations and possible disciplinary action.

Parties filed written submissions which are on record. The petitioner's Counsel submitted that the petitioner was suspended without justification. He submitted that the 2<sup>nd</sup> respondent forwarded the list for payment and that no any other list existed and that there was no evidence of such second.

Counsel submitted that **Article 47** of the Constitution was violated, that the petitioner was not treated as required by **Section 4(3)** of the Fair Administrative Action Act that he was not accorded equal treatment, and that his right to education was undermined. Counsel cited the case of **Man deep Chauhan v Kenyatta National Hospital and 2 others [2013] eKLR** to emphasize the point that the petitioner was entitled to be heard before a decision was taken against him. He also referred to the case of **Republic v**

**Cabinet Secretary Ministry of Information and Communication and 10 others Exparte Adrian Kamotho Njenga [2015] eKLR** for the proposition that the court has a duty to ensure that decision making process is fair and just.

Finally Counsel submitted that the petitioner had a legitimate expectation to complete his academic studies at the 1<sup>st</sup> respondent university, where he was to sit for his final examination. He referred to the case of **Republic v Nairobi City Counsel Exparte Wainaina Kigathi Mungai [2014] eKLR** on the fact that legitimate expectation is founded on fairness. The petitioner also relied on the case of **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR** and Article 50 to buttress his submission that there was no fair hearing.

For the respondents, it was submitted that the petitioner has not demonstrated that his rights have been violated to the extent that he cannot be compensated, and that it has not been established that an administrative action is a constitutional right. Counsel further submitted that the petitioner was served with a suspension letter pending investigations and further disciplinary proceedings, hence his right to fair administrative action was not violated. Counsel referred to the case of **Dry Associates Limited v Capital Markets Authority & Another [2012] eKLR**, where the court stated that elements of procedural fairness in Article 47 must be balanced against reasonableness, expediency and efficiency in decision making process.

Secondly, it was submitted that the petition does not meet Constitutional threshold. According to Counsel, the petition does not state constitutional provisions allegedly breached and therefore the case falls short of the principle set in the case of **Anarita Karimi Njeru (No. 2) [ 1979] KLR 154** and **Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR**, which require that there be reasonable precision in drafting and framing of issues in Constitutional petitions-that is defining the dispute the court is called upon to decide, give particulars of the complaint and manner of alleged infringement. “The petitioner, apart from citing constitutional provisions, has not provided particulars.” Counsel submitted.

The third submission is that the petitioner has failed to justify why he filed a constitutional petition rather than pursue an appeal within the 1<sup>st</sup> respondent institution after which he could move to court. Counsel cited **Matalunga & Others v Attorney General [1972]EA 518**, for the proposition that before a declaration can be granted there must be real and not a theoretical question in which the person raising it must have a real interest and there must be someone with a present interest in opposing it. The respondent’s Counsel concluded therefore, that the petitioner was required to set out with some degree of precision his complaint, the infringement and manner of the alleged infringement which is not the case in this petition.

I have read the record of pleadings, considered submissions made on behalf of both parties and authorities cited. The key questions arising for determination in this petition are; whether the right to fair administrative action is a constitutional right; whether the petitioner’s right to fair administrative action was violated; and whether the petitioner is entitled to the orders he seeks. To answer the first question, reference has to be made to the constitution. **Article 47(1)** provides:-

***“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”***

The right to fair administrative action forms part of the Bill of Rights in the constitution, which is a set of values and principles aimed at protecting everyone. These rights must be respected and protected and may not be violated by any individual, institution, or government. The right to fair administrative action is now anchored in the Constitution, the constitution having clearly declared it a right and everyone has to enjoy it just like any of the many fundamental rights in the **Bill of Rights**. This basic right aims to ensure that government or institutional administrators make decisions in a fair way. Any contemplated

administrative action must therefore be subject to the constitutional standard set in **Article 47(1)**. The right to fair hearing which had its foundation in common law, has attained constitutional basis. It is now a constitutional requirement that anybody who takes administrative action, must do so expeditiously, act reasonably and be procedurally fair. In the case of **Judicial Service Commission v Mbalu Mutava & Mother [2015] eKLR**, the Court of Appeal restated the transformation brought about by **Article 47** as follows-

*“Article 47 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 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 common law was developed”.*

**Article 47** has raised the bar in administrative action to make it responsive to constitutional requirement that administrative actions to be taken, meet the constitutional threshold of procedural fairness thus protecting the fundamental rights of person(s) against whom administrative action is taken or contemplated.

The fact that fair administrative action is a constitutional right was emphasized in the **South African case of President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT 16/98)2000(1) SAI** thus-

*“The right to a 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 constitutional standards of administrative justice...” (emphasis)*

**Section 33** of the South African Constitution is similar to our **Article 47**. As a constitutional right, a breach of the right to fair administrative action, would amount to an infringement of fundamental rights and would attract sanctions just like breach of any of the other fundamental rights. This is so, because the right to fair administrative action is granted by the constitution. **Article 47(2)** has gone further to demand that where a right to fundamental freedom is likely to be adversely affected by administrative action, a person has a right to be given reasons for the action. The constitution recognizes that this right may be violated and has prescribed measures that must be met to avoid infringement. Speed, procedural fairness as well reasonableness as the hallmarks of fair administrative action must be the guiding principle whenever such action is to be taken ,as a way of ensuring that the person knows from the onset what action to expect and reasons for it.

The constitution placed an obligation on Parliament to enact a law to ensure that the right to fair administrative action is respected. In compliance with **Article 47(3)**, Parliament enacted the **Fair Administrative Act (NO 4) of 2015**, whose section 4(3) provides:-

*“Where an administrative action is likely to adversely affect the rights of 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 right to legal representation where applicable;*

*f) Notice of the right to cross examine where applicable; or*

*g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action”*

The Act places a legal obligation on administrators to take steps that are in line with **Article 47(2)** in ensuring that the person who is likely to be adversely affected by intended administrative action, has had an opportunity to fully understand what action he is likely to face, and the reasons for it. This is in line with the rule that the person should not be condemned unheard. (*avai alteram pertem rule*) as espoused in **Halsbury’s laws of England, 5<sup>th</sup> Ed. Vol.61** page 539 paragraph 639 thus:-

*“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 (avai alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern proceedings of bodies other than Judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in right of the right under the convention for the protections of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination and civil rights or obligations on any criminal charge.”*

Following the discourse above, the answer to the first question, therefore, is that fair administrative action is a constitutional right. The constitution has placed a requirement on those taking an administrative action to ensure that it meets constitutional standard respecting speed, reasonableness and procedural fairness .It cannot be treated as a lesser right.

The second issue is whether the Petitioner’s right to fair administrative action was violated. But before I deal with this issue, there is a submission that I should address first. The respondents have argued that the petition was not precisely framed to meet the standard required for pleading in Constitutional petitions. Reference was made to the cases of **Anarita Karimi** (supra) and **Mumo Matemu** (supra). In Counsel’s view, the petition did not state the constitutional provisions allegedly breached and the infringement complained of. This failure, it was submitted, made the petition untenable.

The principle set in the **Anarita Karimi** case is that a party should not just cite omnibus provisions of the constitution. There must be reasonable precision where the petitioner frames issues in the constitutional petition showing particulars of the complaint, the infringement alleged and the jurisdictional basis for it. That case established the principle that there be reasonable precision while framing constitutional petitions to enable the court discern the issue complained of as well as the infringement alleged so that the court is able to fully appreciate the dispute presented before it for determination.

In the **Mumo Matemo** case (supra), although the court appreciated the importance of substantive justice under Article 159 of the Constitution, it stated-

*“The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective. Principle under section 1A and 1B of the civil procedure Act (Cap 21) and Section 3A and 3B of the appellate Jurisdiction Act Cap 9.*

*Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with*

***justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extract of this principle”.***

I have perused the petition filed herein, and it is clear that the same is not as precisely drawn as it ought to be, as laid down in the **Anarita Karimi’s** case and emphasized in **Mumo Matemu’s case**. (supra).The petition refers to **Articles** 27, 28, 29 and 43 of the constitution. Apart from Article 27 which is on discrimination, I do not see the relevance of the rest of the **Articles**. To that extent, therefore, it is right to say the petitioner simply cited constitutional provisions without laying a basis for it. Even in their submission, no reference was made to those Articles. I agree with the respondents that the petition did not meet the test set in **Anarita karimi**. That notwithstanding, it is clear from the petition that the petitioner’s complaint is based on **Articles 47** and **50** of the constitution. The court is able to appreciate the petitioner’s complaint; that he was denied fair administrative action and fair hearing. The petitioner has even pleaded **Article 47** as one of the **Articles** violated. I do not therefore think this petition is so hopeless to warrant its dismissal on that ground alone. It would however be necessary that parties ensure constitutional petitions comply with the principle set in those cases.

That then brings us to the question whether the petitioner’s right to fair administrative action was violated and or infringed. The petitioner was suspended from the 1<sup>st</sup> respondent institution by letter dated 29<sup>th</sup> June, 2016, said to have been served on him on 26<sup>th</sup> July 2016. The letter informed the petitioner reasons for his suspension. He was being suspended due to some disciplinary issues relating to students’ election where anomalies in the list containing names of students entitled to payment for overseeing that election were noted. The letter further informed the petitioner that he would be subjected to disciplinary proceedings before a committee, and that charges and further information would be given to him later. That means, the petitioner would have an opportunity to answer to any charges to be laid against him during those disciplinary proceedings.

From the letter of suspension, the Author, the Vice Chancellor of the 1<sup>st</sup> respondent intimated that there is an internal mechanism that would deal with the petitioner’s issue. I have perused the **Rules and Regulations** governing conduct of students of the 1<sup>st</sup> respondent and in particular, **Part IV** thereof which gives the Vice Chancellor power to suspend a student pending disciplinary proceedings. For avoidance of doubt, I reproduce the regulation here below; -

***IV)“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, but 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 this regulation from the University pending disciplinary action;***
- iii) Take any other measures necessary for the proper operation of disciplinary procedures set out herein.” (emphasis)***

The regulations are clear that the Vice Chancellor had power to suspend the petitioner pending disciplinary proceedings. That power is exercisable when dealing with issues of discipline of students within the 1<sup>st</sup> respondent University.

The law is now settled that where there is an internal mechanism for dealing with administrative issues, that internal process must be concluded before one can move to court to seek redress in overturning administrative action or decision. **Section 7** of the Fair Administrative Act states that a party aggrieved with an administrative action may apply for review of that administrative action or decision in a court in accordance with **Section 8** of the Act. **Section 9(2)** provides that a court should not review an

administrative decision or action unless the mechanisms including internal mechanisms for appeal or review and all remedies have been exhausted. This was intended to ensure that administrators or institutions develop their own internal mechanisms for dealing with internal disputes in order to ensure fairness in those administrative actions. As Majanja J observed in **Moses Kiarie Kariuki & 4 Others v Attorney General & 3 others**[2014] eKLR **Article 47** intends to bring discipline to administrative action so that values and principles of the constitution are infused in matters of public administration.

In the same vein, parties should not rush to court before exhausting internal mechanisms for resolving administrative actions. I do not therefore see any breach of **Article 47** of the constitution or infringement of fundamental rights of the petitioner through the suspension slapped on him. The petitioner would still have to undergo disciplinary process and answer to any allegations made against him, and if at that stage there would be any violation, doors of the court of justice are still open and the petitioner would be at liberty to move to the court in accordance with **section 8** of the **Fair Administrative Action Act**.

The Supreme Court decision in the case of **Communication Commission of Kenya & Others v Royal Media Services & Other**[ 2015] eKLR is material here. The court stated:-

**“Article 47 in the circumstances, is a deliberate step towards the attainment of a fair and dependable government advancing expeditious, efficient, lawful reasonable and procedurally fair Public policies. A breach of Article 47 attracts remedies in Judicial review especially where an aggrieved person had cause to expect that the attendant aspects of fair administrative action would be adhered to. It is clear that the essence of Article 47 is to protect a party’s legitimate claim of entitlement that is, procedural solidity and not a mere promise of consideration. As such, the court can quash any decision arrived at unprocedurally or unfairly but reserves itself no right to engage in the administrative duties of the body in question. The court must remain a court.”**

The 1<sup>st</sup> respondent as an institution has mandate drawn from its internal regulations to manage conduct of its students. This is a self-regulating mechanism and courts should be slow in interfering unless it is so obvious that the university has acted unlawfully and without jurisdiction. This position was expressed by **Nyarangi JA** in the case of **Nyongesa and 4 others v Egerton University** [1990]eKLR 2 thus:-

***“Courts are loath to interfere with decisions of domestic bodies and tribunals including college bodies. However, the courts will interfere to quash decisions of any bodies when moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.”***

I have also noted that suspension letter was served on 26<sup>th</sup> July 2016 and the petition was promptly filed on 27<sup>th</sup> July 2016. This court would have been concerned had the petitioner alleged that the 1<sup>st</sup> respondent had delayed in commencing disciplinary proceedings leading to violation of fair administrative action which is not the case here.

The petitioner has also complained about lack of fair hearing under **Article 50** of the constitution over his suspension **Articles 47** and **50** should not be assumed to cover the same rights or be used interchangeably. Even though both deal with the rules of natural justice and the right to be heard, **Article 47** is more concerned with administrative actions while **Article 50** deals with the right to be heard before a court, impartial tribunal or body. The distinction should be clear when one pleads infringement of any of the two **Articles**.

The petitioner is yet to be heard as he is bound to during the disciplinary proceedings. He cannot at this stage complain that he has not been heard because that moment has not arrived yet. Since the 1<sup>st</sup> respondent is a self-regulating Public body, it is, in my view, unnecessary at this stage to interfere with what I see as an independent internal process of an institution. I agree with **Mumbi Ngugi J’s** holding in the case of **Republic v Kenyatta University and 2 Others ex parte Jared Juma HC Misc. App. No 90 of 2009**, where the learned judge said:-

***The university has jurisdiction to conduct its own disciplinary proceedings. This must necessary be so. The suggestion that disciplinary proceedings are a matter for courts is untenable.***

***... statute xxx schedule 4(4) establishes the disciplinary committee of Kenyatta University. The existence of such disciplinary committee has always been recognized by the courts. The courts also recognize that their relationship with such committees is limited to supervision.”***

The petitioner finally argued that the acts complained of had nothing to do with his academic standing which, in his view, would have been subject to disciplinary proceedings. The suspension, he submitted is unconstitutional to that extent. The allegations contained in the suspension letter include falsifying of list of students entitled to payment, an act which according to the 1<sup>st</sup> respondent, led to loss of money. If I understood his argument correctly, the petitioner says that the act of loss of money is criminal in nature hence no disciplinary proceedings could be conducted against him by the 1<sup>st</sup> respondent.

I do not agree with this view. The 1<sup>st</sup> respondent as an institution has mandate to regulate conduct and discipline of its students and that regulation cannot be limited to certain cases only. If a criminal act takes place within an institution, the responsible institution would have mandate to investigate and where possible conduct disciplinary proceedings against suspected students. That does not mean the student(s) is guilty. Rather the institution would want to establish what actually happened and take corrective measures, and that is why the petitioner would be given a chance to appear before the committee and make his case. Whatever decision the disciplinary committee came up with, would still be subject to review by a court of law.

In the case of **Alex Mburu Gitau v Kenyatta University [2015]eKLR**, the court dealt with a similar issue where the petitioner had argued that disciplinary proceedings against him related to a criminal offence which was not within the mandate of the disciplinary committee of the university. The court dismissed that argument and stated:-

***“The petitioner’s argument in this regard is... untenable. He was accused of participating in incidents of robbery with violence against his colleagues at the university at the railway line and in the respondents’ perimeter walls. His argument, if accepted, would mean that the respondent, even if a criminal offence has been committed inside its wall, or even a lecture theatre, would have no power to discipline the perpetrator. It is an argument that I find unacceptable and unsupportable... The respondent was within its jurisdiction in subjecting the petitioner to its disciplinary processes.”***

I adopt the above position and hold that the action taken by the 1<sup>st</sup> respondent to suspend the petitioner pending disciplinary proceedings was within its mandate and for that reason; there was nothing unconstitutional about it. The petitioner must submit himself to that internal process and there after move the court in accordance with the provisions of the Fair Administrative Action Act, if necessary.

The final question is whether the reliefs sought should be granted. Going by what I have said above and specifically my finding on the second issue, that there was no violation of the petitioner’s right to fair administrative action, it is obvious that the prayers do not commend themselves for granting.

The ultimate result is that the petition dated 27<sup>th</sup> July, 2016 fails and is hereby dismissed. However, costs being discretionary, the order I make is that each party do bear their own costs.

**Dated Signed and Delivered at Nairobi this 14<sup>th</sup> Day of February 2017**

**E C MWITA**

**JUDGE**