



**REPUBLIC OF KENYA**

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

**PETITION NO. 1 OF 2017**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 25C, 27(1), 20(D), 29(F), 35(1), (B), 37, 43(1) (F), 47, 48, 50(2) (A) (B) (C) AND (G) AND 55**

VICTORIA MUTAI.....1<sup>ST</sup> PETITIONER  
KIPCHUMBA VINCENT.....2<sup>ND</sup> PETITIONER  
BONIFACE KOMU.....3<sup>RD</sup> PETITIONER  
PHILIP KEAR NJAYA.....4<sup>TH</sup> PETITIONER  
DANIEL KIMANI WANDAKA.....5<sup>TH</sup> PETITIONER  
ONGILI PANCRAS.....6<sup>TH</sup> PETITIONER  
WAMBUA MWENDWA.....7<sup>TH</sup> PETITIONER  
KAMAU JANE W. ....8<sup>TH</sup> PETITIONER  
JUDY WANGUI W. ....9<sup>TH</sup> PETITIONER  
KIBET MESHACK.....10<sup>TH</sup> PETITIONER  
FELIX KIBET.....11<sup>TH</sup> PETITIONER  
DANIEL MUGI.....12<sup>TH</sup> PETITIONER  
MAINA DAVID KAMAU.....13<sup>TH</sup> PETITIONER  
KORIR FESTUS.....14<sup>TH</sup> PETITIONER  
MBUGI ERIC GITONGA.....15<sup>TH</sup> PETITIONER  
BEATRICE KAMONDO.....16<sup>TH</sup> PETITIONER  
AYUKA OBINO MOSES.....17<sup>TH</sup> PETITIONER

WANYAMA D. SIMIYU.....18<sup>TH</sup> PETITIONER

OTIENO JACOB.....19<sup>TH</sup> PETITIONER

OUMA JACOB OTIENO.....20<sup>TH</sup> PETITIONER

BOSCAR SABA TAWAI.....21<sup>ST</sup> PETITIONER

MUGAMBI BRIAN NGATIA.....22<sup>ND</sup> PETITIONER

NJERI ELIUD KAMAU.....23<sup>RD</sup> PETITIONER

MURIUNGI MOSES KITHINJI.....24<sup>TH</sup> PETITIONER

KAMAU R. ELIJAH.....25<sup>TH</sup> PETITIONER

KAMAU VICTOR CHEGE.....26<sup>TH</sup> PETITIONER

CORNELIUS NG'ENO.....27<sup>TH</sup> PETITIONER

IJAMY VINCENT SANDAJI.....28<sup>TH</sup> PETITIONER

GIDEON KIPKOSGEI KEMBOI.....29<sup>TH</sup> PETITIONER

**VERSUS**

KIRINYAGA UNIVERSITY.....RESPONDENT

**RULING**

1. The petitioners Victoria Mutai, Kipchumba Vincent, Philip Kear Njaya, Daniel Kimani Wandaka, Ongili Pancras, Wambua Mwendwa, Kamau Jane w., Judy Wangui W., Kibet Meshack, Felix Kibet, Daniel Mugi, Maina David Kamau, Korir Festus, Mbugi Eric Gitonga, Beatrice Kamondo, Ayuka Obino Moses, Wanyama D. Simiyu, Otieno Jacob, Ouma Jacob Otieno, Boscar Saba Tawai, Mugambi Brian Ngatia, Njeri Eliud Kamau, Muriungi Moses Kithinji, Kamau R. Elijah, Kamau Victor Chege, Cornelius Ng'eno, Ijamy Vincent Sandaji, Gideon Kipkosgei Kemboi, filed a petition pursuant to **Rules (4) 1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** seeking the following orders against Kirinyaga University:

*a. A declaration that the respondent has violated the petitioners' constitutional rights and fundamental freedoms as protected under Articles 10, 25c, 27(1), 29(d) 29(f), 35(1) (b), 37, 43 (1) (f), 47, 48, 50(1), 50(2) (a) (b) (c) and (g) and 55 of the Constitution.*

2. Together with the petition, the petitioners filed a Notice of Motion under **Rule 23** which is the subject of this ruling seeking the following orders:

*i. Spent*

*ii. That the Honourable court be pleased to issue an interim conservatory order in favour of the Applicants/petitioners and order the respondent to stay their suspension and/or order it to re-admit them forthwith pending the hearing and determination of prayers 4, 5, 6, 7 and 8 herebelow.*

*iii. That the Honourable Court be pleased to issue an interim conservatory order and stay the hearing of the appeal lodged by the petitioners against the verdicts of the disciplinary committee pending the hearing and determination of prayers 4, 5, 6, 7 and 8 herebelow.*

*iv. That the honourable court be pleased to issue a conservatory order in favour of the Applicants/Petitioners and order the respondent to stay their suspension and/or order it to re-admit them forthwith pending the hearing and determination of the main petition herein.*

*v. That the Honourable Court be pleased to issue a conservatory order and stay the hearing of the appeal lodged by the petitioners against the verdicts of the disciplinary committee pending the hearing and determination of the main petition.*

*vi. That the Honourable Court be pleased to order the respondent to furnish the applicants with the following documents pending the hearing and determination of the petition herein;*

*a. Certified copies of the proceedings and decision of the disciplinary committee in regard to the hearings conducted on 15<sup>th</sup> December, 2016, 16<sup>th</sup> December, 2016 and 5<sup>th</sup> January, 2017.*

*b. A copy of the KyU statute.*

*c. A copy of the Class Attendance Registers for 10<sup>th</sup> and 11<sup>th</sup> November, 2016.*

*d. Any evidence that may have been relied on by the disciplinary committee.*

*vii. That the Honourable Court be pleased to issue such further or better relief as it may deem fit and just to.*

*viii. That the costs of this application be provided for.*

3. The application is based on the following grounds:

*a. That the petitioners were subjected to disciplinary proceedings of the respondent's disciplinary committee which were unconstitutional and were conducted in an unconstitutional manner.*

*b. That the petitioners were punished by being suspended for unreasonably long periods, 4 years; save for the 4<sup>th</sup> petitioner who was given 2 years suspension. The said punishment was and is cruel and inhuman.*

*c. That the respondent has failed to set the dates for hearing of the petitioners' appeal against suspension.*

*d. That the respondent has declined to admit the petitioners to the University pending the hearing of their appeals.*

*e. That the petitioners' right to education as protected under Article 43 (1) (f) of the constitution has been violated and there is serious threat of continued and aggravated violation of the same unless the petitioners are allowed to continue learning pending the hearing of this petition.*

*f. That unless this application is heard urgently the petitioners stand to suffer substantial loss and aggravated psychological torture.*

*g. That the petitioner asked for the respondent to furnish them with the documents listed herebelow which would enable them to exercise and protect their constitutional rights and fundamental freedoms to no avail;*

- i. Certified copies of the proceedings and decision of the disciplinary committee in regard to the hearings conducted on 15<sup>th</sup> December, 2016, 16<sup>th</sup> December, 2016 and 5<sup>th</sup> January, 2017.***
- ii. A copy of the KyU statute.***
- iii. A copy of the Class Attendance Registers for 10<sup>th</sup> and 11<sup>th</sup> November, 2016.***
- iv. Any evidence that may have been relied on by the disciplinary committee.***
- v. That the said documents are crucial in the prosecution of the petition herein.***
- vi. That it is only mete and just to allow this application.***

It is supported by the affidavit of Kipchumba Vincent sworn on 14<sup>th</sup> February, 2017.

4. The Court granted interim orders in terms of prayer No. 3 and 4 in the Notice of Motion. However, the respondent Kirinyaga University, was aggrieved by the *ex parte* orders issued in favour of the petitioners on 21<sup>st</sup> February, 2017 and filed an application under Certificate of Urgency to set aside the orders. The respondent argued that the orders were issued through concealment of material facts, were final in nature and had serious implications on the respondents system of governance and administration. The respondent was seeking the following orders:-

***(i) .....***

***(ii) That this Honourable Court be pleased to order a stay of execution of the orders issued by this Honourable Court on 21<sup>st</sup> February, 2017 against the Respondent/Applicant pending the hearing of this application inter partes.***

***(iii) That this Honourable Court be pleased to order a stay of execution of the orders issued by this Honourable Court on 21<sup>st</sup> February, 2017 against the Respondent/Applicant pending the hearing and determination of this application.***

***(iv) That this Honourable Court be pleased to discharge, vary or set aside the orders issued by this Honourable Court on 21<sup>st</sup> February, 2017 against the respondent/Applicant.***

***(v) That this Honourable Court be pleased to stay any further proceedings herein pending the hearing and determination of the appeals lodged by the Petitioners/Respondents against the Applicant/Respondent's decision to suspend or expel them from Kirinyaga University.***

***(vi) That the costs of this application be provided for.***

It is based on the following grounds:

***i. ....***

***ii. Rule 25 of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 grants an aggrieved party like the Applicant in this instance a recourse to come to this court and have the orders discharged, varied or set aside.***

***iii. The Petitioners are bound by the respondent's Statutes that has established Student's Disciplinary Committee (DC) whose functions are as follows:***

- a. To receive and consider matters of disciplinary nature affecting students on behalf of Senate, and to report to the senate on appropriate action taken, provided that the disciplined***

student may appeal to the Vice Chancellor.

b. To investigate issues surrounding misconduct by students which may have adverse effect on the students and to recommend to Senate appropriate corrective measures.

c. To formulate and review, from time to time the code of conduct for University students and in particular to recommend to Senate amendments to the **“Rules and Regulations Governing the Conduct and Discipline of Students”** if the need arises.

iv. Pursuant to the terms of reference of DC, the Petitioners and other students were taken through the disciplinary hearing and a verdict was made whereby some students were found guilty.

v. The Statutes of the Respondent provide the affected student with 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 Fourteen (14) Days of communication of the Committee’s decision.

vi. The Petitioners have lodged their respective appeals against the DC decision and the University had started the appeal process only for the orders herein to be issued blocking the process.

vii. The University contends that this Honourable Court should not interfere with its laid down disciplinary procedure to exhaustively handle disciplinary offences against the Petitioners.

viii. There is no justification pleaded by the Petitioners before the court as to why they cannot wait for the Appeal process to be concluded before approaching this Honourable Court for a redress.

ix. The Applicant maintains that a Constitution Petition lodged by the Petitioners which focus on the merits of the decision is not an effective remedy to resolve the present dispute between the parties. This Honourable Court is ill-suited to expeditiously investigate the issues placed before the Court especially before the respondent’s Appeal Committee makes its decision.

x. The Respondent’s Statutes have provided a clear procedure to be followed by any student who considers himself aggrieved by the decision of the Disciplinary Committee and in fact the same procedure has been invoked by the Petitioners and it is only fair and just to allow the process to be exhausted.

xi. Having nominated a legal process open to them, the Petitioners are estopped from contemporaneously seeking to invoke another jurisdiction vested in the High Court of Kenya.

xii. It is not every allegation of the denial, violation, infringement of the Bill of Rights that entitles a person to approach or invoke jurisdiction of the High Court to interrogate every matter. A party must meet the criteria under rule 3 of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

xiii. In the present proceedings, the High Court has no appellate jurisdiction to intermeddle in an established appeal process in an agreed dispute resolution framework. Indeed, section 9(2) of the Fair Administrative Action Act, No. 4 of 2015 is categorical that the High Court shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

xiv. By allowing this application, this Honourable court shall be promoting alternative forms of dispute resolution mechanisms under Article 159(2) of the Constitution of Kenya.

***xv. This application has been made without any unreasonable delay in the interests of equity and justice.***

5. The Court ordered a stay of the orders based on **rule 9 (2) of Fair Administration Action Act** and ordered the two applications to proceed.

6. The facts giving rise to this application are that, on 14<sup>th</sup> November, 2016 the respondent Kirinyaga University posted a notice to the students that the University had been closed with immediate effect for the reasons of an ongoing boycott of classes and tense situation in the University.

7. All the students who included the petitioners herein left the University. Subsequently the petitioners apart from the 10 and 30 received summons to appear before the Disciplinary Committee of the respondent on 15<sup>th</sup> December, 2016, 16<sup>th</sup> December, 2016 and 5<sup>th</sup> January, 2017. The petitioners were notified that they could not be represented by any other person or lawyer during the hearing before the disciplinary committee. The complaint by the respondent against the petitioners was that they violated **KyU Statutes Schedule III Part 10 (b) (VI) and IX** on various dates between 12 and 16 – 11- 2016 at the University and surroundings.

8. It was alleged that they designed, conceived or effected a scheme or strategy which was an attempt to disrupt normal operations of the University and whose logical consequence was to disrupt the due operation of academic or other programmes of the University. During the hearing before the Disciplinary Committee no evidence was presented against them. They however, gave evidence and denied having committed the alleged transgressions. The petitioners were thereafter suspended for a period of two and four academic years.

9. The petitioners were aggrieved by the decision of the disciplinary committee and lodged their appeals claiming that their constitutional rights to legal representation was denied and they requested for certified copies of the proceedings, copy of KyU Statute, copy of Class Attendance Register for 10<sup>th</sup> and 11<sup>th</sup> November, 2016 and any evidence that may have been relied on by the committee.

10. The petitioners were informed by the Respondent that the hearing of their appeals would be communicated within 14 days and that they could be represented by an advocate. The respondent continued to violate the petitioners' constitutional rights by refusing to set the appeals down for hearing in reasonable time. The respondent has also refused and/or failed to furnish them with the documents requested. The petitioners' right to education continues to be violated by the respondent which continues to psychologically harass and torture the petitioners.

11. It is against this background that the petitioners applied for conservatory orders to stay the petitioners' suspension and stay the hearing of the appeal. I have considered the application, the affidavits and the submissions in court. From the petitioners' application, the issues which arise are denial of legal representation, failure to set down the appeals for hearing.

12. The petitioners aver that they were denied the right to legal representation when they appeared before the disciplinary committee. This they claim violated their right as guaranteed under **Article 50** of the **Constitution**. The respondents depose that the application is based on a misapprehension of the Constitution.

13. **Article 50** of the **Constitution** provides:

***“Every accused person has a right to a fair trial which includes the right:-***

***(c) to have adequate time and facilities to prepare a defence;***

***(g) to chose and be represented by an advocate and to be informed of this right promptly.***

***(j) To be informed in advance the nature of the evidence the prosecution intends to rely on***

***and to have reasonable access to that evidence.”***

The High Court has in various authorities addressed the rights under **Article 50** of the **Constitution** with regard to proceedings which are quasi-judicial in nature. In the case of **Oluoch Dan Owino -V- Kenyatta University (2014) eKLR** the court held that the proceedings to which the petitioners were subjected before the Students Disciplinary Committee were quasi-judicial in nature and they were entitled to the rights guaranteed under **Article 50(1)**. However, the alleged violations of the provisions of **Article 50(2)** cannot arise in the present circumstances. The right of a party to be represented by counsel in quasi-judicial proceedings such as the petitioners were subjected to is well recognized but is subject to the rules of procedure of the tribunal to which a party is appearing before, and must be requested for before a violation of the right to legal representation is alleged.

14. The petitioners deposed that the summons notified them that they could not be represented by any other person or lawyer during the hearing before the Disciplinary Committee. The notice KU3, the offending paragraph states:

***“In view of this you shall be entitled to representation in person and not by any other person or lawyer. You may also present your case in writing although the board will give you a chance to plead your case. Failure to appear will not hinder the mention and determination of your case.”***

It was submitted by counsel for the respondent that the summons did not bar the petitioners from bringing witnesses. That what it did was to require the petitioners to appear in person. From the wording of the summons, it was telling the petitioner to appear in person and not to send another person on his behalf or a lawyer.

15. These proceedings were quasi-judicial and were not bound by strict procedures of criminal trial. The counsel for the respondent referred the court to **Petition No. 181/2012 Patrick Mbau Karanja -V- Kenyatta University** where Judge Isaak Lenaola (as he then was) observed:

***“Administrative disciplinary process such as students disciplinary committee is not expected to conduct its proceedings like a court would. It is sufficient that he was heard and decision made taking into account all the matters placed before the committee for determination.***

This finding is persuasive? I agree with the finding.

16. The counsel for the applicant urged the Court to consider that the rule by the respondents that denied students legal representation was unconstitutional. This was held in **Republic -V- Kirinyaga University College and Another Civil Application 114/2013 H.C. Kerugoya** Justice Limo. The decision is persuasive and does not bind this Court. I am of the view that the petitioners were summoned to appear in person before the disciplinary committee and were free to request that they be allowed to call witnesses and be represented by a counsel. It gave them a chance to be heard before the Disciplinary Committee made its decision.

17. The right to legal representation before a tribunal must be requested before a violation of the right to legal representation can be alleged. The Court of Appeal in the case of **Judicial Service Commission - V- Gladys Boss Shollei & Another C.A. No. 50/2014** was categorical that the provisions of **Article 50(2)** do not apply to disciplinary proceedings. It stated:-

***“Article 50(2) of the Constitution provides for a right to a fair trial to an accused person in criminal trials. That sub-article was not applicable in disciplinary proceedings against the respondent which, as already noted were neither criminal proceedings nor quasi criminal proceedings. The respondent was entitled to a right to a fair hearing as provided under Article 50 (1) that deals with any dispute that can be resolved by application of the law.”***

18. The petitioners once they were called to appear in person before disciplinary committee which essentially gave them an opportunity to be heard, ought to have applied to be given an opportunity to be

represented by counsel. In the case of **Republic -V- Pwani University College Ex-parte Maina Mbugua James & 2 Others Misc. application No. 28 of 2009**, the court stated:

***“The respondent’s contention is that there was no denial of legal representation since there was no such request in the first instance. There doesn’t seem to be a hard and fast rule – going by the different approaches – in Enderby Town FC Ltd v the Football Association (1971) 591 at 605 Lord Denny ruled: “It may be a good thing for the proceedings of a domestic tribunal to be conducted informally, without legal representation. Justice can often be done better by a good layman than by a bad lawyer.” The situation in Kenya was captured in the case of Geoffrey Mwangi Kariuki v University of Nairobi. – but where the distinction can immediately be drawn in that the college Disciplinary Committee refused to allow Geoffrey to be represented by advocates in the proceedings, and the High Court ruled that he was entitled to such representation. My own view is that if an individual requests for legal representation, then he should be entitled to such representation but in the present scenario there was no such request and no such denial, so the breach alleged does not arise at all.”***

19. The petitioners have not indicated that they requested for legal representation and they were denied. As such there could have been no violation of **Article 50(2)** of the **Constitution**.

20. The 2<sup>nd</sup> issue is that the respondent refused to set down the appeal for hearing and failure to supply the requisite documents. The respondent had indicated that the hearing of the appeals would be communicated within 14 days but they failed to do so. They also failed to supply the documents requested.

21. The respondent are claiming that they have started the process of hearing the appeals. They are also stating that the students requested for some information to enable them defend themselves after the verdict. They were informed of the appeals body. The respondent states that there was appeal process and they came to this Court to ask that the appeal process be exhausted before the Court can assume jurisdiction. That it is the students who appealed and the respondent should be allowed to tender fair administrative action to conclude the appeal.

22. The petitioners were served notice and were given an opportunity to be heard. The respondent deposed that the students were served with summons to appear for the hearing. The disciplinary committee heard the students who appeared some were found guilty and others not guilty. Those who were found guilty lodge appeals. The respondent was in the process of addressing the appeals. It is proved that there was a disciplinary process which was going on. The petitioners are seeking to stay the appeals which they filed pending the hearing of the application and the petition.

23. It has been held that courts will not interfere with the disciplinary process unless the procedure relied on offends fairness or due process by not upholding the rules of natural justice; **James Maina Muriithi & Others -V- Kirinyaga Water and Sanitation Company (Kiriwasco) Employment & Labour Court 108/2016**.

As already pointed out the applicants were given an opportunity to be heard. It is sufficient that they were given that opportunity. They appealed against the verdicts and is at that stage that they requested for documents.

24. The petitioners ought to have submitted to the appeal process. In the case of **Nyongesa & 4 Others - V- Egerton University College (1990) eKLR** The Court of Appeal stated:

***“.....I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. However, courts will interfere to quash decisions of any bodies when the courts are 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.”***

25. Having found that the petitioners were given an opportunity to be heard and filed the appeals which

were in the process, the respondents should be allowed to conduct the appeals. The Court will not interfere with the quasi-judicial function which provides for appeal avenues. What this Court should do is to order the respondents to set the appeal down for hearing within a scheduled time bearing in mind that the learning of the petitioners has been disrupted. The petitioners should be supplied with the requested documents to enable them prepare for the appeal.

26. The petitioners were seeking conservatory orders. The counsel for the petitioners raised various issues in his submissions touching on composition of the disciplinary committee, discrimination and whether statutes were gazetted. These are issues which can be addressed in the appeal. The appeal should have been pursued. That is why as learned counsel for the respondent pointed out, the learned counsel for petitioners proceeded as though he was arguing the petition. This was premature as the respondents have not even filed a response to the petition. The petitioners are seeking conservatory orders to stay their suspension and/or re-admit them and to also stay the hearing of the appeal pending hearing of the petition.

27. The respondents allege that the orders issued on 21<sup>st</sup> February, 2017 were final in nature and the implication is that some of the students will have completed their studies by the time the application is heard and determined thereby making the disciplinary process meaningless. The counsel for the respondent submits that what the petitioners want to achieve is not what is contemplated. That a conservatory order envisaged under **Rule 23 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules** is not what petitioners are asking. That such an order is expected to tell a party not to take action before the main petition is heard. That it will make the Status Quo remain intact. That it is to keep the subject matter insitu. The counsel argues that the students were on suspension and had filed appeals. That it was impracticable to enforce the order as the University opened on 3<sup>rd</sup> January, 2017. The other students went on with their studies. The examinations were done from 30<sup>th</sup> January, 2017 to 20<sup>th</sup> February, 2017. That for a student to move and proceed to the next semester, a student must have attended 2/3 of the semester and sat for examination. It is argued that by the time they filed this matter their colleagues had sat for examination and moved to next semester. The petitioners will face these requirements and it will be impracticable to comply with the order.

28. The petitioners had activated the appeal process as provided under the statutory procedures **Section 9(2) Fair Administrative Action Act** provides:-

***“The High Court or a sub-ordinate court under sub-section (1) shall not review an administrative action unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”***

The petitioners having activated the appeal process ought to have exhausted the procedure before coming to this Court. The respondent informed the petitioners of the right to appeal and that they would be allowed legal representation. For the reasons stated, I order that prayers 2, 3, 4, and 5 are without merits and are dismissed. Prayer 6 is allowed. The respondent is allowed to conduct the appeals and comply with the rules of Natural Justice and the Constitution. The respondent to conduct the appeals within 30 days. The petitioners’ application is dismissed. The respondent’s application is allowed. The petition to be heard after 30 days.

***Dated and delivered at Kerugoya this 7<sup>th</sup> day of April, 2017.***

**L. W. GITARI**

**JUDGE**

Read out in open Court, in the presence of Mr. Abubakar for the Petitioners, Mr. Kamotho and M/S Ndegwa for the Respondent and court assistant Naomi Murage this 7<sup>th</sup> day of April, 2017.

**L. W. GITARI**

**JUDGE**

**7.4.2017**