



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.191 OF 2016
BETWEEN
ROBERT OUKO ONCHIEKU.....PETITIONER
AND
MAASAI MARA UNIVERSITY.....RESPONDENT
JUDGMENT

Background

1. The Petitioner, Robert Ouko Oncheku was a student at Maasai Mara University where he had been admitted to study a Bachelor of Business Management (BBM) degree.
2. On 6th May 2015 he, however, received a letter from the University's Vice-Chancellor suspending him from further studies. The suspension was indefinite and the reasons given for that drastic action were that since the beginning of the year 2015, he had allegedly been involved in **“activities bordering on incitement to other students”** with intention to cause student unrest within the University. Further, that his **“actions are criminal and go against the rules and regulations governing the conduct of students of Masai Mara University”**
3. By letter dated 29th January 2016, the Petitioner wrote a letter of appeal to the Vice-Chancellor where he also gave a chronology of events that had occurred relating to his suspension. In that letter he particularly stated that he was ready to defend himself in any disciplinary proceeding against him should such proceedings be conducted. His father, Eric Ondieki also wrote a letter on the same day to the Vice Chancellor seeking further and better particulars of his son's alleged misconduct and threatening legal action against the Vice-Chancellor, one Prof. Mary Walingo for *inter alia* defaming the Petitioner. He also demanded that a hearing be conducted for the Petitioner to clear his name.
4. The Petitioner's father wrote another letter dated 16th February 2016 to the Vice-Chancellor stating that without any response to his earlier letter aforesaid, the University and its Vice-Chancellor were denying his son the right to education without any lawful cause.
5. In a prior letter dated 15th October 2015, the Petitioner's father had however indicated that his son's behaviour leading to his suspension was uncalled for and that he knew that his son had acted in breach of the **University's Rules and Regulations**. He therefore requested for a pardon and indulgence from the University on his son's behalf.

6. It would seem that none of the above letters were responded to and the Petitioner then filed the present Petition. Although he filed a Notice of Motion simultaneously with the Petition, seeking a stay of the Respondent's decision aforesaid, the same would seem to have been abandoned.

Petitioner's case

7. In the Petition, submissions and in a Supplementary Affidavit sworn on 30th June 2016, the Petitioner's case is that his indefinite suspension without any hearing before or after that act offends the provisions of **Article 47** of the **Constitution** on fair administrative action that ought to be expeditious, efficient, lawful, reasonable and fair. Further, that he was denied the right to fair hearing under **Article 50(2)(b)(e)** and **(f)** thereof as the suspension letter was vague and lacked any details to enable him respond effectively to it.

8. The Petitioner also alleged that in using the University's security personnel to harass and intimidate him from having audience with the Vice-Chancellor, he was subjected to torture, cruel and inhuman treatment contrary to **Article 29(d)** and **(f)** of the **Constitution**.

9. Counsel for the Petitioner in submissions added that the response to the Petition is inadequate, is unsupported by any credible evidence and relying on the High Court's decision in **County Government of Nyeri and Anor v Cecilia Wangeci Ndung'u [2015] eKLR** urged the point that where an administrative action is based on unclear circumstances, and lawful grounds for, then it ought to be nullified forthwith.

10. The Petitioner, for the above reasons, seeks the following orders:

1). An order of mandamus directed to the Respondent commanding it to forthwith lift the suspension it imposed on the Petitioner and reinstate the Petitioner as a student at the Respondent University.

2). An order of permanent injunction directed to the Respondent retraining it from further intimidating, victimizing, harassing or in any other way breaching or continuing to breach the Petitioner's rights and fundamental freedoms.

3). General damages.

4). Costs and interest.

5). Any other order or relief the Court may deem fit to grant.

Respondent's case

11. The Respondent, by an affidavit sworn on 10th June 2016 by Prof. Mary Walingo, stated that while at the University, the Petitioner was a trouble maker, failed to devote his time to studies, colluded with some members of staff and students to cause unrest at the University, was involved in frequent fights with university security personnel, was generally abusive, unruly and a threat to the good order and authority at the University.

12. Further, that the above actions, amounting to serious misconduct, were reported to the University Council which directed suspension of the Petitioner. That even after the suspension and before exhaustion of the internal disciplinary processes at the University, the Petitioner allegedly working under the instructions and support of a senior official at the institution, has repeatedly mobilised students and his relatives to storm the Vice-Chancellor's office and demand that his suspension be lifted and has therefore become a security threat leading to his being barred from accessing the University campus in Narok.

13. In submissions on behalf of the Respondent, it has been stated that the suspension (indefinite as it is) has not led to any final decision with regard to the Petitioner and therefore the present Petition is premature. Reliance in that regard was placed on the decision of **Francis Gitau Parsimei & 2 Others v**

National Alliance Party & 4 Others [2012] eKLR as prematurity of Petitions under the Constitution.

14. Regarding alleged violations of constitutional rights, it was the Respondent's submission that none of the Petitioner's rights have been violated and the action taken against him was proper under the law to protect the university, its staff and students from security threats posed by the Petitioner and his confederates.

15. While I note that the Respondent concluded its submissions by making reference to dismissal of the Application for stay orders as if what is before me is the said Application, I consider the same a sufficient response to dispose of the Petition.

Determination

16. Looking at the prayers sought in the Petition, the first issue to determine is whether the Petitioner's suspension was lawful and whether his rights under **Articles 29, 47 and 50(1)** were violated. Upon determination of those two issues, I will then determine what remedies, if any, are available to him.

17. Suspension of a student or an employee is ordinarily a punishment meted temporarily pending other disciplinary proceedings. The Petitioner's letter of suspension dated 6th May 2015 however stated that he was suspended "**indefinitely**" under the **Rules and Regulations** governing the conduct of students at Masai Mara University. The Respondent did not exhibit those **Rules and Regulations** and I do not therefore know what they provide in the circumstances.

18. Having so stated, both parties have traded grave accusation against each other but the issue at hand is whether due process was followed before and after the Petitioner's suspension. It is now close to two years since that action and yet, despite his plea to be granted a hearing, the Respondent has completely refused to do so. In that context, **Article 47(1) and (2) of the Constitution** provide as follows:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

19. Further, **Section 4 of the Fair Administrative Actions Act** provide thus:

1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2) Every person has the right to be given written reasons for any administrative action that is taken against him.

3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a) Prior and adequate notice of the nature and reasons for the proposed administrative action;

b) an opportunity to be heard and to make representations in that regard;

c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

d) a statement of reasons pursuant to Section 6;

e) notice of the right to legal representation, where applicable;

- f) Notice of the right to cross-examine or where applicable; or*
- g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

20. I need not go further but to state that whatever misconduct the Petitioner may have committed, he was entitled to due process including a hearing for him to defend himself before or after the suspension. Only then could the Respondent make a determinate finding in that regard. To suspend a student indefinitely is to suspend his life in a most unfair manner.

21. I have no doubt therefore that **Article 47(1) and (2)** of the **Constitution** were violated and as regards violation of **Article 50(1)**, once I have found that the right to a fair administrative process has been denied, I see no reason to delve into the right to fair hearing under **Article 50(1)**.

Conclusion

22. Having held as above, the Petitioner's prayers are not tenable because by judicial fiat, this Court cannot lift the suspension which may have been done with good reason. Neither can an injunction be granted in the manner the Petitioner suggests. General Damages were also pleaded but nothing was said of the claim beyond the prayer for the same.

23. I have however found that **Article 47(1) and (2)** were violated and under **Article 23(3)** of the **Constitution**, the proper remedy is to direct the Respondent to conduct a disciplinary hearing under its **Rules and Regulations** within 45 days and having heard the Petitioner and his witnesses, if any, make a lawful decision within those **Rules and Regulations**. The Petitioner will be at liberty to take such other action as he deems fit after the hearing aforesaid.

Disposition

24. The Petition herein is therefore determined in the following terms only:

- i) Let the Respondent conduct a disciplinary hearing in respect of the Petitioner's alleged misconduct within 45 days following its Rules and Regulations. The Petitioner shall be at liberty to take any lawful action thereafter**
- ii) Let each Party bear its own costs.**

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MAY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF MAY, 2017

E. CHACHA MWITA

JUDGE