



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 164 OF 2016

**IN THE MATTER OF: EXPULSION OF THE APPLICANTS FROM THE RESPONDENTS
INSTITUTION.**

AND

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

AND

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS FROM MANDAMUS, CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES 2010, ORDER 53

AND

IN THE MATTER OF: BREACH OF RULES OF NATURAL JUSTICE

BETWEEN

LUCY WANJIKU GITUMBI1ST APPLICANT

ESTHER NJERI NG'ANG'A.....2ND APPLICANT

VERSUS

DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY.....RESPONDENT

JUDGMENT

1. The exparte applicants in this Notice of Motion dated 28th April filed on 29th April 2016 pursuant to leave to apply granted on 19th April 2016 are **Lucy Wanjiku Gitumbi** and **Esther Njeri Ng'ang'a**, who, at all material times to this Judicial review proceedings were both continuing students of Dedan Kimathi University of Technology (DeKUT).

2. The ex parte applicants seek for Judicial Review Orders of certiorari to move into this court and quash their expulsion, the decision of the disciplinary committee of the Dedan Kimathi University of Technology from expelling them from the said institution, vide letter dated 26th October 2015. The ex parte applicants also seek for Judicial Review Orders of prohibition directed to the respondents prohibiting them from interfering or denying the applicants their rights to education; They also seek for Judicial Review Orders of Mandamus to compel the respondent University to allow them to continue with normal learning and to complete their education in the said institution; They also prayed for costs of the Notice of Motion.

3. The Notice of Motion is predicated upon the grounds set out in the statutory statement filed together with the verifying affidavit of the applicants and annexures thereto. In the verifying affidavit sworn on 28th April 2016 by Lucy Wanjiku Gitumbi, on her own behalf and on behalf of her co-applicant Esther Njeri Ng'ang'a, the ex parte applicants depose that they were not given a fair trial and a right to defend the accusations leveled against them. Further, that the decision by the Disciplinary Committee was made in bad faith and in breach of the Rules of natural justice and constitutionally guaranteed rights to education as shown by LWG2 and LWG3 copies of the impugned decision. In addition, it was deposed that the DeKUT University took into account irrelevant considerations that they ought not to have considered.

4. In the statutory statements of facts dated 28th April 2016, the ex parte applicants aver that the decision to expel them from the respondent University was made in breach of the Rules of natural justice and constitutionally guaranteed rights to education; that the decision was made in bad faith and failed to meet the legitimate expectation of the applicants; that the decision to expel them from the University fails to meet the principle of proportionality which seeks to strike a balance between adverse effects of which a decision has on the rights and liberties of individuals and interests; that the decision was unreasonable, illegal and arbitrary which the administrative bodies have a duty and right to act rationally; that the respondents did not accord the applicants the right to defend the allegations; and that no evidence was adduced to the Examination Disciplinary Committee to show that any examination malpractice had occurred.

5. The facts leading to the cause of action herein are that both the ex parte applicants herein were students at the respondent University pursuing Bachelors Degree in Purchasing and Supplies. That the respondents accused the ex parte applicants of examination malpractices. The 1st applicant was charged with organizing with the 2nd applicant to write an examination – Quantitative Methods Supplementary Examination whereas the second applicant was accused of attempting to impersonate another candidate in the examination venue with the intention of sitting papers HPS 2205 Quantitative Methods J Supplementary Examination.

6. The University directed the students/applicants to appear before the Examination Disciplinary Committee to show because why the examinations malpractices occurred and found them guilty and expelled from the university.

7. The applicants aver that the decision to expel them from the University was made without any evidence being adduced to prove the occurrence of the examination malpractice; that they were not allowed to give evidence and or defend themselves against the allegations; and that their appeals were summarily dismissed without giving them an opportunity to be heard. Further, the applicants aver that unless the decision of the University is quashed, the applicants who are 4th & 3rd year students respectively stand to suffer irreparably as they have spend time and money being at the University pursuing higher education. The applicant's skeletal submission filed on 29th April 2016 mirror their statutory statement, verifying affidavit and grounds.

8. The notice of motion by the ex parte applicants was opposed by the respondent University who filed a replying affidavit sworn by Nelius Mwangi the Legal Officer of the respondent University on 3rd June 2016 contending that the application was fatally defective as it offends the mandatory provisions of Order 53 Rule 4(1) of the Civil Procedure Rules; the application does not meet the requirements of

granting the orders sought as the respondent did not act without jurisdiction; in excess of jurisdiction or in violation of the rules of natural justice; That the applications for prerogative orders are brought and are issued in the name of the Republic and this application violates this requirement hence it should be dismissed.

9. The respondents further contend that the applicants who were students taking Bachelors of Purchasing and Supplies Management in 4th year and 3rd year respectively were on 29th September 2015 caught with examination irregularities wherein the 2nd applicant Esther Njeri Ng'ang'a impersonated the 1st applicant Lucy Wanjiku Gitumbi with intent to sitting exam Unit Code HPS 2205 for her as per exams attendance sheets for BPSM/P&L DPT dated 29th September 2015 together with invigilator's examination record form marked D/175/1 and D/175/11 respectively.

10. That the two students/applicants were charged with gross disciplinary offences under Section 9B 20 for conspiracy to impersonate another candidate during examinations which is punishable by both cancellation of examination results in the concerned unit and expulsion from the university for the candidates involved in the conspiracy. That the two applicants were duly invited to the Disciplinary Committee vide annexed letters dated 2nd October 2015 and that they duly attended the hearing with their appointed representatives and were duly heard as shown by the attendance list and minutes of that date of 23rd October 2015 D/175/V and D/175/V1. The respondent University also annexed copies of the minutes the Disciplinary Committee and the verdict and penalty D/175/VII as communicated to the applicants vide letters dated 26th October 2015 annexed.

11. That following the appeals lodged to the Vice Chancellors the said appeals were heard and determined and a memo dated 14th December 2015 shows the constitution of the committee that considered the said appeals as per attendance sheet of 27th January 2016 which verdict was communicated to the two applicants vide letters dated 23rd February 2016.

12. That the Appeals Committee followed the laid down procedure for conducting disciplinary proceedings and the applicants were given an opportunity to be heard both in writing and orally and the decisions reached in accordance of with the statutes of the respondent University.

13. Further, that the Respondent University is under a statutory duty to ensure the academic standards of the respondent and the country are maintained and not compromised hence the decision arrived at was not unreasonable, illegal or arbitrary.

14. That in any event, evidence of examination malpractice was produced by the exams invigilator who knew the 1st applicant Lucy Wanjiku Gitumbi very well and that the 2nd applicant could not even write the 1st applicant's name properly (writing Githubi instead of Githumbi. The respondent prayed that the Notice of Motion should be dismissed with costs.

15. In a rejoinder to the replying affidavit the applicants filed a further affidavit jointly sworn by the two exparte applicants on 4th July 2016 wherein they also annexed their coloured passport size photographs to show their appearances. They further contended that the replying affidavit filed by the respondent is vexatious, scandalous, and full of false hoods, lack merit and an abuse of the court process. They denied all the allegations contained in the replying affidavit and maintained that the respondent handled the matter very casually and that the rules of natural justice were never followed, as the offences allegedly committed by the applicants were never proved, that they were never given any opportunity to defend themselves and or examine the evidence and that the disciplinary committee admitted the evidence which was not corroborated; that they were never supplied with witness statements and that the evidence was just adopted and admitted as being conclusive, accurate and reliable, thereby violating the applicants' rights to a fair hearing; that whereas they admit the procedure adopted in disciplining them, they were limited to the person whom they could appoint as pupils and their role was just to sit in the Disciplinary Committee and not represent the applicants as advocates.

16. That it was unfair to be required to make submissions in writing since the applicants had not been supplied with any witness statements and the matter had not been heard.

17. That there was no presumption of innocence on their part and that they had already been condemned unheard hence the exams Disciplinary Committee hearing was a mere sham, unlawful and unfair; That it is not noted who gave the report which the determination of their guilty was reached; That there were no independent persons constituted in the appeals committee since the Appeals Committee members who were appointed by the Vice Chancellor were his staff therefore the hearing of the appeal violated the rules of natural justice and that therefore the decision reached would still be unfair and unlawful.

18. Further, that none of the students' representatives appointed to the Examinations Disciplinary Committee had any legal experience hence the decisions arrived at were unfair. The applicants also maintained that their appeals were not considered or at all and that they were not heard; That the respondent's procedures are unlawful and unjust and in violation of the applicant's rights and meant to defeat the ends of justice; That the decision reached was unreasonable, illegal and or arbitrary and without any basis; and that the evidence adduced was not subject to any cross examination.

19. Both parties' advocates filed written submissions and authorities in support of their respective rival positions. The applicant's brief submissions filed on 29th April 2016 mirror the verifying affidavit, the statutory statement and the further affidavit as well as the grounds relied on in support of the application. The applicants also filed a list of authorities albeit they did not submit on the applicability of those authorities to their Judicial Review prayers. The authorities are:

1. HCC Kisumu Judicial Review 48/2010 Paul Orwa Ogila V St Joseph's Medical Training College and

2. HC Nairobi Judicial Review 460 of 2014 Republic vs Kenyatta University.

20. In the 1st authority of **Paul Orwa Ogila**, the exparte applicant moved the court for grant Judicial Review Orders of certiorari to quash the disciplinary proceedings and the decision of the respondent college suspending the applicant from the respondent college and further requiring the applicant to pay shs 60,000 before readmission into the college; Judicial Review Orders of mandamus to compel the respondent to unconditionally readmit the applicant into the respondent college but the applicants' counsel never bothered to highlight any part(s) of that decision she considered was/were more material to this case.

21. In the second authority of exparte **Njoroge Humphrey Mbuthi V Kenyatta University**, the Exparte applicant sought for Judicial Review Orders of certiorari to bring into court for purposes of quashing the respondent's decision to suspend the exparte applicant from studies for a period of two academic years and payment of a fine of shs 30,000; and Judicial Review Orders of Mandamus directing the respondent to readmit the applicant so as to continue with his studies. Again, no submission was made referring to the above decision on its applicability to this case and neither did the advocate for the exparte applicant make any highlights on the relevance or applicability of the decision. She left it to the court to explore its applicability/relevance.

22. In the respondent's written submissions filed on 11th July 2016 dated 9th July 2016, it was submitted first, that the named applicants are not the Republic and this being an application for Judicial Review prerogative orders, it is trite law that it must be brought in the name of the Republic and not the exparte applicants herein who are not the Republic. Reliance was placed on **Mohammed Ahmed V Republic [1957] EA 523** where the court held that prerogative orders, like the older prerogative writs, were issued in the name of the crown at the instance of the applicant..... Applications for such orders must be instituted and served accordingly. Further reliance was placed on the **Farmers Bus Service & Others V Transport Licensing Appeal Tribunal [1957] EA 779** where it was held that prerogative orders are issued in the name of the crown and application for such orders must be correctly instituted. It was therefore submitted that the Judicial Review application before court

is incompetent and a nonstarter and should fail on that ground alone.

23. On the merits of the Notice of Motion, it was submitted that the applicants were not challenging the jurisdiction of the decision makers; that the applicants are not denying that they were given notice and heard before the decision was made and that neither are they complaining that the decision makers took into account irrelevant matters but are challenging the merits of the decision which is not within the realm of Judicial Review. Reliance was placed on **CA 185/2001 Municipal Council of Mombasa V Republic & Another [2002] KLR** where the Court of Appeal held that.....

“.....acting as an appeal court over the decider would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision, which was not the province of Judicial Review.”

24. Further, reliance was placed on the decisions in **Republic V Isaac Gathungu Wanjohi & Another & Director of City Planning County Council of Nairobi & Another [2014] e KLR** which decision followed the **Municipal Council of Mombasa** (supra) case. Other decisions relied on are **Republic of Nairobi City Council exparte Elma Limited [2014]; Republic V Nairobi County Council Exparte Gurcharn Singh Sihra & 4 Others [2014] e KLR** which latter case at paragraphs 43-53 sets out principles upon which Judicial Review Orders may be granted, with the court declining to grant an order of prohibition. It was further submitted that the joint affidavit sworn by both applicants on 4th July 2016 and filed on 6th July 2016 violates the mandatory provisions of Section 8 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya which stipulates that Oaths shall be as prescribed in the Schedule in the first person. It was contended that it was not clear as to who was making the averment.

25. Finally, it was submitted that applicants have not demonstrated that they were not heard or that the decision was not without jurisdiction and that in any case, they admitted that the offences were punished in accordance with the statutory (sic) powers of the respondent. The respondents prayed to dismiss the applicants' application with costs.

Determination.

26. I have carefully considered the exparte applicant's Notice of Motion, the statutory statement, the grounds, verifying affidavit and further affidavit, I have equally considered the replying affidavit filed by the respondent as well as both parties written submissions, annexures and authorities filed. The issues that flow for determination are:

1. Whether the exparte applicant's application for Judicial Review orders not being made in the name of the Republic is competent.
2. Whether the joint affidavit sworn on 4th July 2016 by both the applicants is competent before the court.
3. Whether the applicants are entitled to the Judicial Review orders sought.
4. What orders should this court make?
5. Who should bear the costs of the Judicial Review application/proceedings?

27. On the first issue of whether the Judicial Review application herein is competently before the court for reasons that it was not made in the name of the Republic, I have carefully considered this issue in line with the current constitutional order. In my humble view, the Judicial Review Orders of Certiorari, Mandamus and prohibition are strictly speaking founded on the new constitutional dispensation and not the historically related prerogative orders which used to be issued in the name of the crown, in England. Further, Article 23(3) (f) of the Constitution as well as Article 22 of the Constitution clearly guarantee every person the right to approach the court for Judicial Review

Orders, as well as Article 47(3) of the Constitution which guarantee that every person is entitled to fair administrative action. Furthermore, Article 159 2 (d) of the Constitution is clear that justice shall be administered without undue regard to procedural technicalities.

28. In my humble view, the mode of bringing Judicial Review proceedings is merely form and not substance that goes to the root or the jurisdiction of the court. The right to fair administrative action being a fundamental constitutional right under the Bill of Rights cannot be subject of procedural technicalities to be sacrificed at the altar of substantive justice. The cases cited by the respondent were no doubt decided nearly 60 years ago and followed by decisions made in the early 2000 during the clamour for the new constitutional order. Those decisions, in my humble view, do not override the constitutional provisions of Articles 47(3), 22 and 23 of the Constitution as well as Article 159 (2) (d) of the Constitution.

29. Accordingly, I find that the objection by the respondent as to the competency of this Judicial Review proceedings on account of the application being brought in the applicant's own name and not in the name of the Republic lacks merit and the same is dismissed.

30. The other issue for determination is whether the joint affidavit sworn on 4th July 2016 by both applicants is competent and or whether it offends the provisions of Section 8 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya which stipulate that depositions shall be sworn in the first person as prescribed in the Schedule. According to the respondent, paragraph 4 of the impugned affidavit reads. "***That I am further duly authorized to swear this affidavit on my own behalf and on the 2nd applicant herein Esther Njeri Nganga***" and therefore the question posed is who is now making this averment? It was submitted that the said affidavit should be discarded and struck out all together for being scandalous and an embarrassment.

31. I have examined the impugned affidavit, which is a further affidavit sworn on 4th July 2016 jointly by Lucy Wanjiku Gitumbi and Esther Njeri Ng'ang'a. I note that indeed the *jurat* shows that both deponents signed the affidavit as commissioned by George Korongo. The *Chapo* or introductory part of the said affidavit is clear that "*We Esther Njeri Nganga.....and Lucy Wanjiku Gitumbi do hereby make oath and state as hereunder:-*

1. That we are female adults of sound mind and disposition and hence competent to swear this affidavit.
2. That we have read and understood the respondent's. Replying affidavit dated 3rd June 2016 and wish to respond thereto as follows:-
3. That the said replying affidavit is vexatious, scandalous, full of falsehoods, lacks merit and an abuse of the court process and the same should be struck off the court record as all allegations in the replying affidavit are denied and the respondent is put to strict proof of the same.
4. *That I am further duly authorized to swear this affidavit on my own behalf and of the 2nd applicant herein Esther Njeri Ng'ang'a.*
5. That paragraph 8 of the replying affidavit is denied.

32. I note that paragraph 4 above is a replica or cut and paste of paragraph 2 of the verifying affidavit sworn by Lucy Wanjiku Gitumbi on 6th April 2016. Other than the above paragraph which falls out of place as the affidavit clearly shows that it was sworn jointly by both the applicants and not by Lucy Wanjiku Gitumbi alone, there is nothing to show that the whole affidavit is defective and that it offends the provisions of the Oaths and Statutory Declarations (OSDA) Act. Furthermore, it is sworn in the first person "We" which is in plural.

33. Accordingly, I reject the contention that the impugned affidavit is fatally defective instead, I would in the circumstances of this case hold that paragraph 4 of the affidavit sworn on 4th June 2015 is superfluous and I would proceed to strike it out and expunge that paragraph from the affidavit. The striking out of the paragraph 4, nonetheless, does not render the entire affidavit as jointly sworn by the applicants fatally defective. I therefore decline to strike out the entire affidavit.

34. Ancillary to the respondent's objection regarding the applicants' affidavit is that that affidavit is scandalous and an embarrassment. However, the respondent has not pointed out any specific paragraph of the impugned affidavit sworn by the applicants that is scandalous and or an embarrassment for purposes of being discarded. Although the court has power under Order 19 rule 6 (3) of the Civil Procedure Rules to strike out from any affidavit any matters which are scandalous, irrelevant or oppressive, Order 19 Rule (7) thereof is clear that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

35. In this case, as I have stated above, I do not find anything in the impugned affidavit that would fit the description of scandalous or oppressive or irrelevant material capable of being struck out. A mere allegation that the affidavit is scandalous or an embarrassment without proof is nothing. In the end, I reject all the technical objections raised by the respondent which are basically on form and or imagined irregularities which have not been proved to affect the substance of the Notice of Motion.

36. On whether the applicants are entitled to the Judicial Review Orders sought, the respondent in their submissions contend that the application before the court does not challenge the jurisdiction of the decision makers; that the applicants do not deny that they were given notice and heard before the decision was made and that neither are the applicants complaining that the decision makers took into account merits of the decision which is not within the realm of Judicial Review. In that regard, the respondents have relied on **CA 185/2001 Municipal council of Mombasa V Council of Mombasa V Republic & Another.**

37. In support of the three Judicial Review Orders of Certiorari, Mandamus and prohibition, the applicants statutory statement sets out the following grounds upon which the reliefs are sought.

1. That the decision was made in breach of the rules of Natural Justice and constitutionally guaranteed rights to education.
2. That the decision was made in bad faith and failed to meet the legitimate expectation of the applicants.
3. That the decision to expel the applicants fails to meet the principle of proportionality which seeks to strike a balance between adverse effects of which a decision has on the rights and liberties individuals interests.
4. That the decision was unreasonable, illegal and arbitrary which the administrative bodies have a duty and right to act rationally.
5. That the respondents did not accord the applicants rights to defend themselves against the allegations.
6. That no evidence was produced to the examination disciplinary committee to show that any examination malpractice occurred ...thus the principle or ground of relevant consideration was breached.

38. The applicant's counsel's submissions as filed mirrored the above grounds. The question is whether the above grounds challenge the merits of the decision arrived at by the respondents or the procedure and or jurisdiction of the respondents.

39. The above question leads this court to determine the question of whether the respondent had jurisdiction to discipline and therefore expel the applicants from the University and secondly, whether the applicants were given a fair and impartial hearing; third, whether the applicants were expelled from the respondent University for valid reasons and in terms of a fair procedure and finally, what remedy (s) if any, are available to the applicants.

40. In answering the first question, it is important to note that the applicants have not challenged the jurisdiction of the respondents in disciplining them for alleged examinations malpractices. Consequently, it would serve no purpose to delve into the issue of jurisdiction of the respondent and whether or not they exceeded their jurisdiction.

41. The next important question is whether the applicants were given a fair and impartial hearing. The burden of proof lies on he who alleges in this case, the burden of proving that the respondent did not accord them a fair and impartial hearing or that the allegations against them lacked veracity lay on the applicants. It is trite that the applicants were 4th and 3rd year university students pursuing a degree in Supplies and Purchasing Management when it was alleged that the 2nd applicant Esther connived with the 1st applicant Lucy Wanjiku Gitumbi and that they conspired for one to impersonate the other and sit a supplementary examination on behalf of the other student, which conspiracy was discovered at the commencement of the examination paper after signing in for the other student. Both students were subjected to disciplinary proceedings in accordance with University Examination Regulations and were found guilty and expelled from the University. They appealed against that decision of the Disciplinary Committee to the Vice Chancellor within the stipulated period of 14 days and their appeals were also dismissed.

42. In my humble view the decision to discipline by expulsion of the applicants from the University was an administrative decision or action within the meaning of Article 47 of the Constitution whose object is to promote and protect administrative justice with regard to administrative action affecting persons. Article 47(1) of the Constitution provides that:

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."

43. It therefore follows that the respondent University, in the exercise of its administrative jurisdiction of disciplining the applicants was under a duty to ensure that its action was expeditious efficient, lawful, reasonable and procedurally fair. Procedural fairness requires that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. Further, it is a requirement under the Constitution that a person be given written reasons for the action.

44. From the onset, this court must therefore not fall into the temptation of deciding whether or not there was sufficient evidence placed before the Disciplinary Committee of the respondent to warrant a decision to expel the applicants from the University for allegedly engaging in examinations malpractices. Rather, the court is entitled to determine whether the process followed by the respondent in disciplining and finally expelling the applicants from the respondent University was lawful, reasonable, and procedurally fair.

45. The tenets of procedural fairness were spelt out in **Pastoli v Kabale District Local Government Council & Others[2008] 2 EA 300** that procedural impropriety is one of the grounds upon which a court of law would be entitled to grant judicial review orders. The court pronounced itself as follows:

"Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in the process of taking a

decision. The unfairness may be in the non- observance of the Rules of Natural Justice or to act with procedural fairness towards one affected d by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

46. Thus, in this case, the respondent was expected to accord the applicants a hearing before making its decision which decision of expelling the applicants from the University no doubt affected their right to education. The Court of Appeal in **Onyango Oloo V The Attorney General [1986-89] EA 456** held that:-

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at..... Denial of the right to be heard renders any decision made null and void ab initio.”

47. In **Selvara Jan V Race Relations Board [1976] 1 ALL ER 12** the English Court of Appeal, deliberating on the manner in which boards and committees should conduct investigations to satisfy the requirement of fairness stated as follows- per Lord Denning MR:-

“ What the duty to act fairly requires depends on the nature of the investigation and the consequences which it may have on the person affected by it. The fundamental rule is that, if a person may be adversely affected by the investigation and report, he should be informed of the substance of the case made against him and he afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure.”

48. In the instant case, I note that the applicants in their further affidavit sworn on 4th June 2015 admitted the procedure adopted in disciplining them but contended that they were limited to the persons whom they could appoint as pupils and that the role of the appointee student was just to sit in the Disciplinary Committee and not to represent the applicants as advocates.

49. Annexure D/175/X1X General Disciplinary matter provides under Clause 36 composition of the Student’s Disciplinary Committee which comprises:

i. Deputy Vice Chancellor – Academic Affairs(AA) as chair

ii. Director of Student’s Welfare

iii. Registrar Academic Affairs(AA)

iv. Dean/Director of the school/institute in which the affected student is registered;

v. At least two other Deans/Directors of school/Institute.

vi. Chair person of the department referring the case.

vii. Two students appointed from the University or the interim committee as the case may be or students who are leaders of recognized or registered societies of clubs in the university or a facility/class representative to sit in the panel.

a) The appointees shall sit in the Disciplinary Committee and shall be part of the panel for purposes of ensuring that the process is fair but shall not act as advocates.

b) It is the responsibility of the student accused if violation of the Rules and regulations governing students to ensure attendance and participation of his/her appointees.

c) If the student's appointees do not turn up for Disciplinary Committee meeting, it will be deemed that the student accused of the violation of the rules and regulations governing students does not wish to have appointees in the panel and the committee shall continue with the proceedings without him.

(a) The student accused of violation of rules and regulations governing students can also choose not to have appointees.

viii. Any other person co-opted by the committee.

(b) Meetings of the Disciplinary committee

I.....

II Notice of meeting - the Secretary shall notify the affected student and the complainant of the date and time of the meeting and of their right to be present and to call a witness or witnesses.

III At all proceedings of the a Disciplinary Committee before which a student is summoned the procedure adopted shall be determined by the committee and the student shall be entitled to representation in person and not by any other person or lawyer.

IV The committee shall hold an inquiry but shall not be required to adhere to the rules of evidence or procedure as applied in a court of law. However, the committee shall ensure that both sides are heard and that persons required to be witnesses do not sit as members of the committee.

V.

50. The applicants were served with notice of meeting dated 2nd October 2015 for Disciplinary Committee proceedings to be conducted on Friday 23rd October 2015 at 9.30 am in the Dome Centre, Phase II. The notice spelt out the charges of Violating Rules & Regulations Governing the conduct and discipline of students that is University Regulations Section 3.3 (v) which states:

“ All students shall apply themselves diligently to the course of study approved by the DeKUT Senate and for which they are registered for which they are registered and in particular shall-

Not engage in plagiarism, cheating or any other academic irregularity which may undermine the academic standing of the university.

The 1st applicant Lucy Gitumbi Wanjiku was further accused of violating provisions of regulating/relating to examination unit HPS 2205: Quantitative Methods I Supplementary Examination done on 9th September 2015 whereby she:

“You had organized with another candidate to sit an examination on your behalf i.e. another candidate impersonated you.”

51. The notice further stated that “in accordance to the Resolutions of Dedan Kimathi University of Technology Council arrived at in a meeting held on 6th October 2014, she was to appoint two students who are leaders of a registered club or society. In the University, or faculty or class

representatives. The applicants 'appointee shall sit in the Disciplinary committee and shall be part of the panel.

Please note

a. It is your responsibility to ensure that your appointees attend and participate in the Disciplinary Committee Meeting.

b. If your appointees do not turn up for the Disciplinary Committee Meeting, it will be deemed that you do not wish to have your appointees in the Disciplinary Panel and the committee shall continue with the proceedings without them.

c. You can also choose not to have appointees.

d. That your appointees will sit in the Disciplinary Committee to ensure fairness of the process and not as advocates.”

52. A similar notice of meeting was issued to Esther Ng'ang'a Njeri on the same day for the same date and time, the only difference being the specific charges or violation of the same regulation in that she was accused of.

“Attempting to impersonate another candidate in the examination venue.

53. The Disciplinary Committee went on as Scheduled on 23rd September 2015 at the time and stated venue as per the minutes on pages 6-9 of the minutes D/175/VII Both applicants appeared in person as per the regulation reproduced above with Lucy Gitumbi availing two appointees Mr Bosire Masara and Mr Samuel Mutuku. She did not have any written submissions. She however was recorded as having given 3 lines of her oral submissions denying the charge; claiming that she presented herself for the examination and ; that she was aware that someone attempted to impersonate her. The proceedings then proceeded with observations and discussions and what was reported; verdict of guilt and the penalty which was cancellation of her results for the examination paper and expulsion from the University.

54. The same procedure was adopted for Esther Ng'ang'a who was also represented by two appointees Mr Bosire Masara & Mr Samuel Mutuku. She had no written submission but she gave her oral submission denying the change and gave an alibi that she was at her home in Githunguri on that day and claimed she had no examination so she was not in the University.

55. The said minutes were approved and signed by Professor G.K. Muthakia the Chairman, as recorded by Mr Isaac Maina (SAA). There was no provision for mitigation by the accused students.

56. From the record of proceedings or minutes of the Disciplinary Committee, it is clear that the applicants were not allowed, to be represented by any advocate. The regulations expressly excluded representation by advocates in such disciplinary proceedings. Further, their student appointees were merely observers to ensure fairness and not to act as their advocates or intermediaries.

57. whereas this court does agree that in such disciplinary proceedings, strict rules of evidence are inapplicable, and that the Disciplinary Committee regulates its own procedure, the procedure so adopted in conducting the disciplinary proceedings must not only be fair but be seen to be fair and objective and should not prejudice the rights and interests of the persons accused of violating examination regulations. In **Onyango Oloo v Attorney General** (supra) the Court of Appeal stated that :

“ it is improper and not far that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matter

could have persuaded him to decide in the manner he decided .

In the course of decision making the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officer, the conclusions of which are sent to the decision making body or person, who having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings

It is not to be implied that the rules of natural justice are excluded unless parliament expressly so provides and that involves following the rules of natural justice to the degree indicated.....courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair.

Denial of the right to be heard renders any decision made null and void ab initio.”

58. What the respondent attached to its replying affidavit is an extract of the relevant rules on General Disciplinary matters. However, annexure 'LWG3' is the Rules and Regulations Governing the Conduct and Discipline of students of the University which every student was expected on admission to the University, to sign a declaration appended thereto and undertaking to be bound thereby before being registered.

59. Clause 6.0 relates to the Discipline of students and offences fall under Clause 6.2. The relevant offences which the applicants were accused of can be found at clause 6:2: XVI that of – involvement in cheating in academic matters, examination leakages or impersonation in University examinations. Clause 6:6:7 is on expulsion and the offences for which the University would expel the student if found culpable without reference to her or him. ***Of importance to note is that the offences with which the applicants were charged with do not fall among or in the category of violations for which the ultimate verdict would be expulsion*** from the University.

60. In addition, Clause 6:6:8 On General, gives the considerations the University would take into account in arriving at an appropriate penalty among them, the past and present conduct of the student within or without the University and not merely the immediate circumstances furnishing the reason for disciplinary action against him/her. The courts note that in the present case, the applicants were accorded a hearing as per the notice and the minutes of the meeting. The applicants also appointed two fellow students to appear and observe the proceedings. However, there is no name of the person accusing the students. Assuming it is the University, the University is an abstract entity, represented by individuals. The alleged conspiracy between the applicants took place in an examination room or venue. It was expected therefore that whoever uncovered or discovered the conspiracy gives evidence which is supported and the accused students allowed an opportunity to ask him/her question if any. This was not done.

61. In addition, the person who was reporting the occurrence of the violation or examination malpractice was not named in the minutes/proceedings. It is also not clear how the two appointee students who were merely observes and not witnesses would guarantee the applicants a fair hearing. Further, the students were never given any opportunity to mitigate, which mitigations would have influenced the kind of disciplinary measure to be accorded to the applicants. And in some instances, the proceedings show that students/applicants herein were the first to give their side of the story then the matter is discussed before an anonymous reportee gives a detailed statement of what transpired and without according the students an opportunity to answer to those allegations, a verdict was reached and punishment meted out without any mitigations. In other words, the accused students were first called

upon to exonerate themselves before evidence could be led by their accusers to prove that the conspiracy took place.

62. In all the above circumstances, and in the absence of an advocate to represent the student's interests, in my humble view, I find that the applicants were not accorded a fair hearing that would guarantee them a fair outcome. Section 4 (3) of the Fair Administrative Action Act No. 4 of 2015 which came into effect before these proceedings were instituted on 17th June 2015 provides inter alia:

“Where administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected 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 the 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;***
 - g) Information, materials and evidence to be relied on in making the decision or taking the administrative action;***
- 4) The administrator shall accord the person against whom administrative action is taken an opportunity to-***
- a) Attend proceedings, in person or in the company of an expert of this choice***
 - b) Be heard;***
 - c) Cross examine persons who give adverse evidence against him; and***
 - d) Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.***
- 5) Nothing in this Section shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.***

65. From the facts presented before this court, it is clear that albeit the applicants were given adequate notice of hearing and were indeed heard, it is my humble view that Section 4 of the Fair Administrative Action Act No. 4/2015 was not complied with in that:

- a. The applicants were not accorded (e) notice of the right to legal representation if they so wished and as a result, were prejudiced by the regulation that barred them from appearing with their legal representatives or advocates.
- b. (f) they were never given any notice of the right to cross examine their accusers or witnesses who presented the report of malpractice.
- c. The applicants were also not accorded an opportunity to mitigate before being sentenced to

expulsion from University.

d. In the premises, I am entitled to find that the decision of the respondent was materially influenced by an error of law; the decision was procedurally unfair and or the administrator failed to take into account relevant considerations. Consequently, I find that the decision of the Disciplinary Committee was unreasonable illegal and arbitrary.

63. Furthermore, it is not denied that after the decision of the Disciplinary Committee, the applicants appealed to the Vice Chancellor who constituted an Appeals Committee to hear the appeals which was filed in writing. However, the applicants were never called upon to make oral representations of their respective appeals. The applicants filed this a Judicial Review after exhausting the internal appeals mechanisms with the respondent University as contemplated by the Rules and Section 9(2) and (3) of the Fair Administrative Review Act No. 4/2015.

64. I also find that albeit it was in the discretion of the University impose an appropriate sanction for the alleged violations, nonetheless the Rules having clearly excluded from therein the specific category of offence or violation for which the offender may be expelled from the University, In my view, the respondent did not exercise its discretion fairly when it imposed an expulsion penalty against the applicants, when the offences or violations allegedly committed by the applicants, according to the Rules, did not attract the penalty of expulsion from the University. In my view, the sanction imposed was not reasonable and no right minded person could impose a penalty that was not provided for, or which was expressly excluded with regard to the specific violation. In my humble view, no reasonable administrator would have expelled the applicants in the absence of a regulation specifying that the specific violation would attract an expulsion from the University.

65. In **Dry Associates Ltd V Capital Market Authorities & another [2012] e KLR**. Majanja J stated that the element of procedural fairness in Article 47 of the Constitution must be balanced against reasonableness, expediency and efficiency in the decision making process.

66. The court further notes that albeit the letters dated 26th October 2015 Ref DeKUT/EXM/ED/9 communicating the Resolution of the Examination Disciplinary Committee to the applicant Esther Njeri Nganga mentions that the Committee had taken into consideration her oral mitigation together with the invigilator's report and therefore resolved to expel her from the University, the minute of the Disciplinary Committee are clear that the applicants herein were never given an opportunity to mitigate after they were found guilty of exams irregularities. There is a whole difference between defence and mitigations. Defence is an answer given to the charges leveled against the suspect whereas mitigations are given after the violator or offender is found guilty or culpable and convicted for the violation, and which goes a long way in influencing what sentence should be meted out to a convicted person.

67. I reiterate that in my humble view, failure to accord the applicants an opportunity to mitigate denied them a fair hearing and therefore a outcome of the charges they were facing.

68. Due to the unique status of the University students, expulsion from a University raises serious constitutional problems. The courts are faced with the onerous task of affording the student certain basic constitutional guarantees without exceedingly intruding into academic affairs of the University. The new Constitutional order in Kenya, with the inclusion of Article 47 and the enactment of Fair Administrative Action Act No. 4/2015 produced increased demand for constitutional protection in the processes of expulsion of University students. The court acknowledges that the precise nature of the interests involved is a paramount consideration in the determination of what constitutes adequate due process safeguards, as espoused in the Fair Administrative Action Act No. 4 of 2015. However, the importance of Higher Education today in Kenya cannot be understated. It is an indicator of the magnitude of the interest involved and therefore some serious due process protection is desirable to prevent unreasonable and arbitrary action on the part of the University Administration. The students' right to due process cannot be conditioned or limited.

69. This is not to say that the University should have subjected or subject the student/applicants to a full judicial hearing as that might be detrimental to the University Administration's educational atmosphere and standard setting. Nonetheless, from the wordings of the Fair Administrative Action Act, 2015, it is the duty of the Administrative Institution to give notice to the student violator to call witnesses, to exercise the right to be represented by counsel at the hearing; to cross examine the witness; to be allowed to mitigate. However, in the instant case, it is clear that the University Administration Rules expressly excluded legal representation at the hearing and also provided no opportunity for the applicants to cross examine their accuser, whom the proceedings or minutes do not even disclose.

70. In my humble view, the touch stones in the area of University's procedural due process are 'fairness and reasonableness which were not met in the process of disciplining the applicants. In other words, the applicants, in my humble view, were not accorded a full opportunity to be heard. In the United States of America case of **Dixon V Alabama State Board of Education, 294 F 2d at 157**, the court held that:

“ The precise nature of the private interest involved in this case is the right to remain at a public university or institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society.”

71. In Kenya, the right to education is a fundamental right enshrined and guaranteed by Article 43(1) (f) of the Constitution. The court also notes that although the applicants were served with notice containing a statement of specific charges and grounds, it was not shown that the charges, if proven would justify the applicant's expulsion under the Regulations of the University. Therefore, whilst the court does respect academic freedom, the court exists to vindicate constitutional rights of students. There is absolutely no reason why the applicants students were never accorded an opportunity to cross examine their accusers which I consider was essential to due process as it is inevitably a factor which the court will consider in determining the overall fairness of an administrative proceeding, even though the hearing was not conducted by persons experienced in legal process. Further, the court acknowledges that to require the University to strictly adhere to the complex rules of evidence would place an unreasonably harsh burden on universities' administrators who are usually untrained in law.

72. The court's attitude towards dismissal for academic reasons is that overriding academic considerations dictate a strong presumption of reasonableness in favour of the university procedure. Thus, academic expulsion without a fair hearing will be reviewed by the court where such dismissal is alleged to have been arbitrary, capricious, or in bad faith, and a hearing will be ordered where appropriate.

73. Further, examining Clause 6:5:6 of the Students Rules and Regulations on the power of the Students Disciplinary Committee, the rule provides that 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 called 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. (Not from the University).**emphasis added.**

vi. *A combination of any two or more of the above.*

vii. *To impose any other penalty or penalties as the committee may deem fit to impose.*

74. Thus, the Students Rules and Regulations Clause 6: 5: 6 does not provide for expulsion of a student as being one of such powers of the Students Disciplinary Committee. However, as stated earlier, the expulsion is provided for in Clause 6:6:7 of the Students Rules and Regulations. In that Clause, only the University Council has the power or the right to expel a student, who commits any or combination of the offences listed there under. Nonetheless, from the Student Disciplinary Committee proceedings exhibited as D/175/VII at pages 6-9 thereof, it is clear that the Student's Examinations Disciplinary Committee chaired by Professor G.K. Muthakia DVC Academic Affairs, upon making a finding that the applicants herein were guilty of organizing with another student to impersonate her and sit an examination- in the case of Lucy W. Githumbi and in the case of Esther Nganga, upon being found guilty of impersonation, imposed on both students the penalty of expulsion from the University.

75. The rules provide that only the University Council has the mandate to expel a student from the University. There is no evidence that the Students Examination Disciplinary Committee recommended to the Council to expel the applicants from the University. This is confirmed by letters dated 26th October 2015 addressed to the applicants signed by the DVC (AA) conveying the Resolution of the Examination Disciplinary Committee and specifically stating that the Committee (**not the Council**) resolved that: "**You be expelled from the University.**"

76. In addition, Regulation 6:3:1 is clear that in disciplinary procedures, the Dedan Kimathi University of Technology Senate Board of Examiners is the appropriate body that shall receive and approve recommendations from Faculty/School Board of Examiners with respect of inter alia the following matters:

a) *Who qualifies to sit University examinations*

b) *Who writes supplementary examinations*

c) *Who repeats which years?*

d) ***Who has breached Examination Regulations (emphasis added).***

e) ***Who should be discontinued from approved programmes of study (emphasis added)?***

77. In the instant case, it is clear that the discipline case involved breach of violation of Examination Regulations. However, there is no evidence that the matter was referred to or placed before the Senate Board of Examiners to approve recommendations with regard to the impugned irregularity(s) and for a decision as to the discontinuation of the students from the approved programmes.

78. On the whole, the court finds that the whole procedure of disciplining and eventual expulsion of the exparte applicants students from the Dedan Kimathi University of Technology was flawed. It was not only contrary to the established University Disciplinary procedures, but also contrary to the provisions of Fair Administrative Action Act No. 4 of 2015.

79. Further, although the Disciplinary procedures in the Regulations provided for an appeal in order to ensure fairness as per Clause 6:6:8(v) of the Regulations, and despite Clause 6:1 providing that the Vice Chancellor acting on behalf of the Council, is the disciplinary authority of the University and may, among others, suspend any student suspected of committing any disciplinary offence under the regulations from the University pending appropriate disciplinary action; clearly, there is no such provision empowering the Vice Chancellor to make an individual or unilateral decision on behalf of the Council, in disciplinary matters, to expel any student. No minutes of the Council were produced to

show that the proceedings of the Student's Examinations Disciplinary Committee chaired by the Deputy Vice Chancellor, Academic Affairs DVC (AA) were ratified by the Council with regard to the ultimate penalty involving expulsion of the exparte applicants herein, as required by Regulation 6:6:7 of the Students Rules and Regulations.

80. Further, that the Appeals Committee as appointed on 14th December 2015 by the Vice Chancellor had the mandate of considering the appeals and making recommendation to the Chair of the Senate by 23rd December 2015, It was therefore expected that after considering the appeals as filed by the exparte applicants, the Appeals Committee would make recommendations to the Chair of the Senate. This was not done.

81. In the letter dated 23rd February 2016 communicating the decision of the Appeals Committee to the exparte applicants herein, it is clear that the Vice Chancellor is the one who is communicating the decision to the applicants, not in his capacity as Chair of the Senate or even on behalf of the Council.

82. And as earlier stated, there is no evidence that the decisions of the Students Examinations Disciplinary Committee and the Appeals Committee were considered and ratified by the University Council as required by Clause 6:6:7 of the Student's Rules and Regulations.

83. In my humble view, the Appeals Committee proved to be little more than a rubber stamp of the decision of the Students Examinations Disciplinary Committee since it never even called on the students to make representations in support of their written appeals before arriving at the verdict of dismissing the exparte applicants' appeals...

84The conclusions I make here is simply that due process was not accorded to the exparte applicants in the hearing of the accusations against them for committing examinations irregularities. I also find that the Respondent Dedan Kimathi University of Technology deviated from its own internal disciplinary procedures relating to discipline and expulsion of students in matters of examinations irregularities. I further find that the Dedan Kimathi University of Technology also proceeded to determine the student's appeal without according them adequate opportunity to mount an affective oral submission; I further find that the Dedan Kimathi University of Technology failed to give notice to the applicants to exercise the right to be represented by an advocate at the hearing; It failed to permit the exparte applicants to exercise their right to cross examine or meet their accusers; students exparte applicants were expelled by a University body that had no powers or authority to expel them from the University; and the offence for which the exparte applicants were expelled from the University was not among the violations listed in the Regulations 6:5:7 of the Student's Rules and Regulations calling for expulsion; I also find that the exparte applicants were never given an opportunity to mitigate; and finally, I find that even if the expulsion of the exparte applicants would have been merited in the circumstances of this case, such expulsion could only have been carried out by the University Council and not by the Students Examinations Disciplinary Committee as was the case here.

85. Accordingly, I find that although the respondents may have had a good case against the applicants, that is immaterial to the matter at hand, as due process was not adhered to in the disciplinary process. In other words, it may be that the violations allegedly committed were so grave that the applicants deserved severe penalties, but the respondent's own Rules and Regulations do not provide for expulsion in the circumstances of the case herein and if such expulsion is to be effected, it must be by the Council and not a Disciplinary Committee which clearly couched the verdicts and the penalties as ultimate and not as recommendations to the Council.

86. Furthermore, the Fair Administrative of Action Act and the Constitution of Kenya requires that if behavior is to be sanctioned then the state must ensure fairness in the due process, and especially where the applicants students had much at stake, the errors and omission committed by the respondent University which could have been avoided render the risk of unfairness intolerably high, with no meaningful opportunity afforded to the applicants to present their defences both at the first level of disciplinary process and at the appellate stage which deficiencies are incurable as they resulted in constitutional and statutory violations of procedural due process.

87. Consequently, I have no option but to Order as follows:

1. That the decisions of the Students Examination Disciplinary Committee of the Dedan Kimathi University and that of the Appeal's Committee, expelling the ex parte applicants Lucy Wanjiku Gitumbi and Esther Njeri Ng'ang'a from Dedan Kimathi University of Technology made on 26th October 2015 be and are hereby called into this court and quashed and expunged from the records by a judicial review order of *certiorari*.

2. That a Judicial Review Order of Mandamus be and is hereby issued compelling the respondent Dedan Kimathi University of Technology to allow the ex parte applicants herein Lucy Wanjiku Gitumbi and Esther Njeru Ng'ang'a back into the DeKUT University to continue with their normal learning to complete their University Education in the said institution.

3. The prayer for prohibition is dismissed.

4. Each party shall bear their own costs of these Judicial Review proceedings. Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 7th day of September 2016.

R.E. ABURILI

JUDGE