



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. 206 OF 2016

SATINDERJIT SINGH MATHARUPETITIONER

VERSUS

ARMAJIT SINGH GAHIR 1ST RESPONDENT

SURINDER SINGH SIHRA 2ND RESPONDENT

JASPAL SINGH VIRDEE 3RD RESPONDENT

SARWAN SINGH KALSI 4TH RESPONDENT

HARJINDER SINGH ROOPRA 5TH RESPONDENT

EAST AFRICAN RAMAGARHIA BOARD 6TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner, former life member and General Secretary of East African Ramgarhia Board, the sixth respondent herein, a religious society established under the Societies Act Cap.108, was on 31st March 2010 expelled from membership. This prompted the petitioner through a Petition dated 19th May 2016, has sued the Board's officials as the 1-5 respondents and the Board as the 6th respondent challenging the Board's decision to expel him. He contended that the expulsion was in breach of the Constitution of the Society and that it was reached without affording him an opportunity to be heard and in contravention of the relevant provisions on association, due process, human dignity, fair administrative action and fair hearing under the former Constitution and the Constitution of Kenya 2010. The 6th respondent is a registered Society which 'owns several properties in Kenya ranging from office blocks, plots, temples and a hospital and also engages in welfare activities such as provision of free medical activities to the needy families from Guru Nanak Ramgarhia Sikh Hospitals.'

2. The petitioner filed a Notice of Motion dated 19th May 2016 for interlocutory relief, whose ruling was delivered on the 8th July 2016, principally suspending scheduled Annual General Meeting of the 6th respondent at which election of officials of the Board was to be undertaken.

THE PETITION

3. The Petition sought relief as follows:

“YOUR PETITIONER THEREFORE PRAYS THAT:

- a) *Pending the hearing and determination of the petition filed herewith, this Honourable Court be pleased to suspend and/ or stay the decision of the Respondents herein made by letter Ref. No REF/SSS/GEN/177/10 dated 13th May 2010 expelling the petitioner from the life membership of the 6th respondent;*
- b) *The Honourable Court be pleased to hold and declare that the respondents herein have infringed on, infringed and violated the petitioner’s right to equal treatment, equal protection and equal benefit of the law decreed and protected under article 27 of the Constitution of Kenya 2010.*
- c) *The Honourable Court be pleased to hold and declare that the respondents herein have infringed on, infringed and violated the petitioner’s right to human dignity and freedom and security of person decreed and protected under Articles 28 and 29(d) & (f) of the Constitution of Kenya, 2010;*
- d) *The Honourable Court be pleased to hold and declare that the respondents herein have infringed on, infringed and violated the petitioner’s right to fair Administrative Action decreed and protected under article 47 of the Constitution as read with the provision of the Fair Administrative Action Act, 2015.*
- e) *An Order of Certiorari do issue removing into this Honourable Court for purposes of being quashed the decision of the Respondents herein under letter Ref. No REF/SSS/GEN/177/10 dated 13th May 2010 expelling the petitioner from the life membership of the 6th respondent Board.*
- f) *An Order of Prohibition be and is hereby issued prohibiting the respondents herein by themselves, their servants, agents or employees from expelling the petitioner from the 6th respondent’s Board except in accordance with the Constitution of Kenya 2010 and the law and the 6th respondent’s constitution.*
- g) *The Honourable Court be pleased to award the Petitioner general damages against the Respondents jointly and severally for losses and inconveniences suffered by the petitioner.*
- h) *The Honourable Court be pleased to award the petitioner exemplary damages against the respondents herein for breach of the fundamental rights of the petitioner;*
- i) *The costs consequent upon this petition be borne by the respondents in any event on indemnity basis.*
- j) *The Honourable court do make any such other or further Orders as it may deem just and expedient in the circumstances to remedy the violation of the petitioner’s fundamental rights.”*

4. These prayers were grounds upon facts and legal contentions set out in the petition as follows:

“C. FACTS OF THE CASE

31. *The petitioner was a life member Number S069 of the Board and enjoyed all the rights, benefit and privileges in the Board.*

32. The petitioner had during his tenure held several positions in the 6th respondent Board including serving as its Honorary General Secretary and Guru Nanak Ramgarhia Sikh Hospital for 36 years as well as position of Education subcommittee Convenor
33. On 28th March, 2010, the petitioner attended the 6th respondent's annual General Meeting held.
34. The said meeting was peaceful and there was no report from the returning officer during the Annual General Meeting that the petitioner or any other member misbehaved or misconducted himself.
35. On 31st March 2010 barely two days later, the Board purportedly expelled the petitioner from life membership without giving any reasons or affording the petitioner any hearing prior to his expulsion.
36. Thereafter, the Board then waited for 45 days after the unlawful meeting on 31.03.2010 due to breach of Clause 39 of the Board's Constitution requiring 7 day's notice to members to convene such meeting and then communicated its decision to expel the petitioner.
37. The new committee convened the General meeting before it was registered with the registrar of societies. In the said meeting the purported General Secretary mischievously failed to report the petitioner's expulsion from the board during the Annual General Meeting held on 27/3/2011 nor reported to the Deputy registrar of Societies.
38. Upon receipt of the said letter, the petitioner wrote a letter to the Board in a bid to give his side of the story but the respondents failed to collect the said letter until it was returned to the petitioner.
39. Having refused and or failed to reply to the petitioner's letter, the petitioner sought the intervention of the Deputy registrar of societies who wrote another letter to the Board ordering them to reply to my letter within 21 days.
40. The Board wrote a letter to the Deputy registrar of societies claiming that the petitioner did not appeal to the expulsion letter. The Board went ahead to quote the letter allegedly not received. The said letter is wholly contradictory and does not elaborate the reasons why my membership to the board was withdrawn.
41. The State Law Office of the Attorney General wrote a very comprehensive letter dated 17/2/2012 to the board where the Attorney General adjudged the expulsion null and void and directed that I should be reinstated to the life membership. However, the directive was not complied with.
42. The board did not offer any reply to the letter from the Attorney General, a point which promoted the registrar of societies to write a follow up letter to the board.
43. The board did not bother to reply to correspondences from both the Hon. Attorney General and the Registrar of Societies.

D. VIOLATIONS BY THE RESPONDENTS

44. The Board sitting during the unlawful managing committee meeting held on 31st march 2010 in breach of Clause 39 of the constitution of the Board without giving 7 days' notice to convene the meeting unilaterally and without any colour of right expelled the petitioner.
45. The Board's decision to expel the petitioner was done in a rush without giving the petitioner a

right to fair hearing. This is a clear violation of the petitioner's constitutional right to fair administrative action as contemplated in article 47 of the Constitution of Kenya.

46. The respondent's actions violated the petitioner's right to due process and natural justice in the manner in which they conducted the disciplinary process against the petitioner. The disciplinary process was flawed and conducted in violation of **Article 27**, the rules of natural justice and the Association's own constitution and its rules.

47. The respondents did not afford the petitioner any occasion to state his case. It also overlooked its very own duty to consider an appeal made by the petitioner. The respondents termed the petitioner's appeal as a "mere observation".

48. The petitioner's attempt to amicably resolve this matter within the confines of the Association's mechanism was met with continued opposition by the respondents. The petitioner was therefore left with no option that to approach the court for resolution of this matter.

49. The petitioner also attempted to engage the Honourable Attorney General State Law Office who gave a very clear and comprehensive explanation by way of a letter dated 17th December 2012 detailing reasons why the board erred by expelling the petitioner from the Society.

50. The Deputy Registrar of Societies echoed Clause 24 of the constitution of the Board which the respondents had breached that sanctioned that a member will only be expelled after the said member has been afforded a fair hearing. However, the Board did not heed the order.

51. Clause 24 of the board provides as follows:

"A member can be **expelled from the Board for gross misbehavior** after his case has been dilly considered by the managing Committee and provided always that he will be given a fair hearing".

52. The Board on its own accord and in total disregard of the Board's constitution expelled the petitioner **without informing him the acts he is alleged to have committed constituting to gross misconduct.**

53. The expulsion of the petitioner by the respondents without following the due process in the circumstance above is egregiously unconstitutional; it was unfair and grossly unlawful.

54. The unfair expulsion of the petitioner from the Board immensely violated the dignity and humanity of the petitioner who is a respected father, husband and a former official in the 6th respondent. This violated the petitioner's right to protection of human dignity guaranteed by Articles 28 and 29(d) & (f) of the Constitution of Kenya.

55. The expulsion of the petitioner from the board is unconstitutional and an aftermath of void decision having been made without due regard to the Board's own constitution which sanctions the respondent's to abide by, in the discharge of any of their actions.

56. The petitioner states that he is helpless because the respondents have blatantly refused to comply with the Order from the Attorney General vide his directive dated 17/12/2012 that directed them to reinstate the petitioner to life membership of the Board.

57. The petitioner is suffering from diabetes and the expulsion from the Board has made him to undergo stress, tension, loss of peace of mind which are disastrous to his health.

58. In addition to above, the respondents refused to comply with the directive given by the Deputy Registrar of Societies dated 13/10/2015 to reinstate the petitioner to life membership of the Board after it found that the Board acted in excess of its jurisdiction.

59. *Flowing from the foregoing, the petitioner avers that the respondents' conduct herein above was is illegal, unconstitutional, arbitrary, oppressive, capricious, unfair and unreasonable and has and continues to violate the petitioner's rights and in breach of articles 2(4), 10, 27, 28, 29, 47 and 50(1) of the Constitution.*

60. *Owing to the respondents' unconstitutional, illegal, arbitrary, oppressive, capricious, unfair and unreasonable acts aforesaid, the petitioner has and continues to suffer loss and damage for which he claims damages against the respondents individually.*

61. *Consequently, the petitioner prays that this Honourable court be pleased to issue the declarations orders, directions and writs ad may be necessary to safeguard and prevent the violation of the petitioner's fundamental rights and freedoms decreed and protected under the constitution of the republic of Kenya, 2010.*

62. *Unless this Honourable Court grants the reliefs sought herein, the petitioner's rights as stated hereinabove and guaranteed by the constitution of Kenya, 2010 shall continue to be infringed, infringed and violated by the respondents.*

63. *There are no other or previous proceedings in any court between the petitioner and the respondents herein in respect of the same subject matter.*

64. *The petition is further supported by the affidavit of SATINDEERJIT SINGH MATHARU and upon such other and/ or further grounds as may be adduced at the hearing hereof."*

5. In addition the petition set out, undoubtedly in compliance with the Court of Appeal decision of ***Anerita Karimi Njeru*** which requires pleading of constitutional causes with sufficient particularity, the particulars of provisions of the former Constitution and the Constitution of Kenya 2010 and related statutes.

THE RESPONSE

6. The respondents filed a replying affidavit sworn by the 2nd Respondent, the current General Secretary of the Board, on 24th June 2016. On 28th June 2016, following the arguments on the interlocutory motion whose ruling was reserved for 8th July 2016, the court gave directions for the hearing of the Petition by way of affidavits and submissions and set the date for the 25th July 2016. Ruling was delivered as scheduled suspending the Board's Annual General Meeting pending hearing and determination of the Petition.

7. With leave of the Court, the parties filed supplementary affidavits, respectively by the 2nd respondent and the petitioner sworn on 6th July 2016 and 21st July 2016. Counsel for the parties then filed written submissions with authorities dated 21st July and 22nd July for the petitioner and the Respondents.

Hearing of the Petition

8. On the 25th July 2016 when the matter came up for hearing of the petition, Counsel applied for mutual cross-examination of the deponents of the affidavits and an order therefore was made by consent of eh parties. Counsel for the petitioner sought the expunction from record of paragraphs 6 -20 of the 2nd respondent's supplementary affidavit of 24th June 2016 but the court that the same be taken up in final submissions after the cross-examination of the petitioner. As it turned out, at the end of cross-examination counsel for the parties agreed to rely on the written submissions already filed with any supplementary oral arguments.

The respective cases of the Parties

9. For the petitioner, the case presented to court was that the petitioner was expelled from the Board without being given a hearing in accordance with the clause 24 of the Constitution of the Board then in force and in contravention of his right to fair administrative action in breach of his rights to equal benefit of the law and association and exposing him to indignified and degrading treatment contrary to relevant parts of Articles 47, 50, 36, 27, 28, and 29. The petitioner therefore sought reinstatement as a member of the Board and damages, including exemplary damages, for breach of his rights. The full facts and legal contentions of the petitioners are set out at paragraph 4 hereinabove.

10. For the Respondents, the defence was delivered in two parts, the first under the replying affidavit of the 2nd Respondent sworn on 24th June 2016 and the second by his supplementary affidavit of 6th July 2016. In his replying affidavit of 24th June 2016, the General Secretary contended that the petitioner was properly expelled by the Board at its meeting of 31st March 2010 in accordance with due process under Clause 24 of the Board constitution for gross misconduct in hurling insults and epithets at other members and officials during the Annual General Meeting of 28th March 2010 in the presence of officials from registrar of societies, which misconduct the petitioner had acknowledged and regretted in a letter dated 22nd June 2010. It was contended that the Board meeting of 31st March 2010 was lawful and that due process was followed before the decision to expel the petitioner was reached upon which he was accorded a right of appeal but which he had not exercised to warrant a reversal of the expulsion. The Board was, therefore, unable to comply with the direction given by the Attorney General as Registrar of Societies to reinstate the petitioner for want of due process, said the General Secretary of the Board. In any event, it was contended that petitioner's rights were subject to the rights of the other members of the Board who were over 1000 members. It was concluded at paragraph 18 of the Replying Affidavit that—

“[N]o award of damages should be granted to the petitioner as he was found guilty of gross misconduct, admitted the same and regretted his misconduct and thus was liable for expulsion. The disciplinary measures undertaken under the petitioner were thus proper in the circumstances.”

11. By his supplementary affidavit, the General Secretary of the Board, while explaining the delay in holding the Annual General Meeting and elections for the year 2016, brought up new justification of the expulsion of the petitioner stating at paragraph 2 thereof that –

“That over the years the plaintiff/applicant engaged in activities that were adjudged by the 6th Respondent as morally wrong and thus he was unfit to hold any leadership position in the 6th respondent.”

12. Two incidents were cited for the conclusion that the petitioner was unfit to hold office in the 6th Respondent, namely:

(a) An incident in 1994 of alleged rape of a woman and theft of her money at the petitioner's business premises in Industrial Area which the police and the 6th Respondent Board had allegedly investigated and established that the petitioner had drugged, raped and stolen from a named woman who he later dumped at Pangani Police Station under a pretext that he had picked her lying on the road. A letter dated 11th August 1994 by the R. A. Ndara Ndiwa, HSC, Officer Commanding Police Division, (OCPD), Kasarani, was attached to highlight the finding and recommendation of the Police Officer that-

“On 1st August 1994 Mr. Satinder Matharu was arrested and placed in cells but both opted to reconcile and sorted out the matter. The accused (Matharu) was finally released on 2/8/94 after the complainant [name withheld] withdrew the complaint. In my opinion the fellow is not a man of good morals. He should not therefore be put in influential position or take up importance position in the Temple.”

(b) Allegation that the petitioner had received Ksh.300,000/- to process the extension of the Board's named three landed properties which he instead misappropriated without processing the

leases and had upon request to refund the said sum by the Board's letter of 21/7/2009 declined to do so.

It was contended that *“the aforestated clearly show that the applicant is untrustworthy and thus was rightly expelled from being a member of the 6th Respondent”* and that *“the conduct of the respondent during the Annual General Meeting held on 28/3/2010 was thus a culmination of the applicant's gross misconduct over the years and thus he cannot claim to be innocent of any wrongdoing when his gross misbehavior has been under scrutiny for such a long time.”*

13. It is against the paragraphs of the supplementary affidavit containing these new justifications for the expulsion that counsel sought an expunction order but despite directions given by the court for that purpose counsel did not make argument in final submissions to the Court.

14. The petitioner replied to the matters raised in the Respondent's replying affidavit and supplementary affidavit by his own supplementary affidavit of 21st July 2016 in which he sought to clarify, significantly, as follows:

1. That he did not hurl insults during the AGM of 28th March 2010 and had not admitted to having committed the same, and that his letter of 22nd June 2010 only regretted that the name of Mr. Avtar Singh Suri who was a past chairman had been removed from the register of members.

2. That the meeting of 31st March 2010 was held in a rush two days after the AGM of 28th March 2010 in breach of Clause 39 which required a 7-day notice before a meeting of the Management Committee.

3. That the expulsion had caused him *“tremendous shame and disgrace especially on the basis of unsubstantiated and untrue allegations allegedly committed by me.”*

4. That the allegations of rape were fictitious, baseless, fabricated and choreographed and a ploy to find him unfit to hold the post of General Secretary of the Board, which allegations were withdrawn by the complainant of her own volition without any bribe from him and, in any event, his expulsion from the board was not connected to allegations that occurred 16years earlier. He produced a certificate of good conduct from the police and pointed out that he had never been charged with a criminal offence, and that it was inconceivable that he would have been adjudged morally unfit yet served as general Secretary for 36 years.

5. That he had not been given the sum of Ksh300,000/- to process extension of leases as alleged by the 2nd Respondent and that the money was wired by the then chairman and treasurer directly to the freelance broker, a matter which was confirmed by the then Chairman by a letter dated 15th July 2016 attached to the affidavit.

6. The petitioner came to court as a last resort after the Respondent failed to reinstate him despite numerous letters from him, the Attorney General through the office of the Registrar of Societies and his advocates on record.

15. The petitioner and the 2nd Respondent were subsequently cross-examined on their affidavits by the respective counsel for the opposing party and subsequently re-examined by their counsel.

THE ISSUES FOR DETERMINATION

16. The issue for determination in this matter is whether the petitioner's expulsion from the 6th Respondent Board was lawful and in accordance with the Constitution of Kenya 2010, the relevant law and the applicable provisions of the 6th Respondent's Constitution, and consequently whether he is entitled to the relief sought in the petition.

DETERMINATION

Findings of Fact on the Basis of Affidavits, Cross-examination and Submissions

17. On a balance of probabilities, the standard of proof applicable in civil cases, the Court finds the facts of the case as established. There was a First Board Meeting of Managing Committee of East African Ramgarhia Board held at the Registered Offices on 31st March 2010 when the petitioner and two other members were expelled for their alleged conduct during the elections of the Board.

18. From cross-examination of the deponents of affidavits filed in support and opposition to the petition, the following additional facts were established:

1. The petitioner was not invited to attend the Board Management Meeting of 31st March 2010 where the issue of his conduct at the elections was discussed. He was only informed of a right of appeal by a letter of 13th May 2010.

2. Although named official of the Registrar of Societies were present at the Annual General Meeting they did not make any report on the alleged misconduct of the petitioner and others.

3. The 2nd Respondent was not a member of the Management Committee Board in 1994; that he did not know the person who was allegedly raped by the petitioner and that he had relied on documents in the Board's files relating to the alleged rape of a woman. The General Secretary also confirmed that when the Management Committee sacked the petitioner on 28th March 2010, it did not use the information on alleged rape and had only brought it up "when the petitioner took us to court and we decided to dig out the information to supplement our case." The General Secretary testified that despite the letter of 11th August 1994 by the OCPD Kasarani indicating that the petitioner was not a fit person for leadership of the Board, the petitioner had continued to hold the General Secretary position until 2007.

4. The petitioner acknowledged that there were 'malicious allegations' of rape by a named woman JR which were withdrawn by the said woman without any bribery or compromise on his part. He denied that he was removed from the Board after the letter of 11th August 1994 was removed. The petitioner, however, agreed that the woman was not a member of the Board and that he had been 'called' to the Pangani Police Station and held there overnight and the police said they did not have evidence. The court finds that while the complaint of rape was made, the truth as to incident and the circumstances as to its withdrawal is a matter for police investigation.

5. The General Secretary joined the Board in 2008 and did not know when the sum of Ksh.300,000/- was given to the petitioner. The court therefore accepts the evidence of the petitioner that the money was paid to a consultant introduced by the then Chairman to assist in the procurement of extension of the leases.

6. The General Secretary confirmed that according to the Constitution of the 6th respondent, the petitioner could go to the Temple even after the expulsion but he could never vote in the Board.

7. The petitioner had been General Secretary of the Board for 36 years between 1975 and 2008 with interruption between 1994 – 2001 when he had been replaced, being reinstated by the AGM of 2001. The petitioner denied any misconduct on the 28th March 2010 stating that the then chairman had only democratically protested his removal for the register, and that was the subject of his regret in his letter of 22nd June 2010.

8. The petitioner agreed that he had not appealed from the decision of the Management Committee of 31st March 2010 and stated that the Board had not to-date 22 years later summoned him over any allegations of rape, the event of 28th March 2010 or the money Ksh.300,000/-.

19. However, it is important to observe that the merits of the decision of the Management Board as to whether the petitioner misconducted himself and the interpretation to be put to his regret in the letter of 22nd June 2010 are matters for determination of the disciplinary body exercising its mandate under the Constitution of the 6th Respondent and not for his court to determine. The question before the court is whether the petitioner was removed in accordance with the Constitution, of Kenya the law and the Board's own constitution. It is a question of the procedure for removal rather than the merits for the decision to remove the petitioner from membership of the Board. Any finding by this court on the matters of the merits may prejudice the determination of culpability for removal of the petitioner should this court direct that the petitioner be processed for discipline in accordance with the law.

Expulsion of the Petitioner

20. The Minutes of the Meeting which were relied on by both sides indicated that with regard to the petitioner that –

“It’s further reported that S. Satinderjit S. Matharu incited members and was very abusive calling the current Board thieves for doctoring the list when the past Chairman’s S. Avtar S. Suri’s name was missing from the list and yet there were two lists which were approved by both agents and had S. Suri’s name listed. S. Suri also had an agenda issued by S. Parminder S. Manku so the issue of inciting was not necessary.”

21. The resolution of the Board was that –

“The Chairman supported the move against them and it was UNANIMOUSLY decided that the membership of S. Swaran S. Ghariaal, S. Satinderjit S. Matharu and S. Satinder S. Sian be hereby revoked as per the constitution clause no. 24, the General Secretary to write to them and inform them of the same. They could appeal against this decision within seven days.”

22. By a letter dated 13th May 2010, the General Secretary of the Board communicated the decision to expel the petitioner as follows:

“13th May 2010

Ref/sss/Gen/177/10

S. Satinderjit Singh Matharu,

P.O. Box 72958 -00200,

Nairobi.

Dear Brother,

RE SATINDERJIT SINGH MATHARU MEMBERSHIP NO. S069

I regret to inform you that due to your gross misbehavior at the AGM on the 28th March 2010 at Ramgarhia Sikh Temple Pangani, the Board at its meeting held on 31st March 2010 concluded to expel you from its membership of EARB with immediate effect.

You have a right to appeal against this decision if you wish to.

Yours Sincerely,

Surinder Singh Sihra

Hon. General Secretary ”

Procedure for Expulsion

23. Clause 24 of the Constitution of the 6th respondent then in force^[1] set out the procedure from expulsion of a member of the Board, as follows:

“24. A member can be expelled from the Board for gross misbehavior after his case has been fully considered by the Managing Committee and provide always that he will be given a fair hearing.”

24. It is clear from the Minutes of the First Board Meeting of Managing Committee of East African Ramgarhia Board of 31st March 2010 that the petitioner and other members of the Board expelled at the meeting were not on heard before the proposal to have their membership revoked under Clause 24 of the Board’s Constitution was adopted. Nor can it be said that the matter was ***“fully considered by the Managing Committee”***. All that happened was that a report was made on their alleged conduct of the certain members was raised as Min 01.02. 01 under AOB Any Other Business and then the chairman asked for every one’s view and what action to be taken against them. None of the persons charged was invited to the meeting and no representation by these or any other member of the Management Committee or Board was taken before the decision to revoke their membership was taken. In so doing the Management Committee breached its own constitution as well as the Bill of Rights provision for fair administrative action under Article 47 of the Constitution.

25. On the petitioner’s complaint to the Registrar of Societies, the Attorney General by a letter dated 17th December 2012, found as follows:

“I therefore find the decision of the Board null and void and advise that the complainant be readmitted into the membership of the Board.”

Accordingly, the Attorney General recommended the reinstatement of the petitioner as a consequence of his decision. The Board did not comply with the advice of the Attorney General.

Post-expulsion justification of expulsion

26. The respondents justified the expulsion of the petitioner by reference to his bad conduct traced back to 16 years earlier saying ***“the aforesated clearly show that the applicant is untrustworthy and thus was rightly expelled from being a member of the 6th Respondent”*** and that ***“the conduct of the respondent during the Annual General Meeting held on 28/3/2010 was thus a culmination of the applicant’s gross misconduct over the years and thus he cannot claim to be innocent of any wrongdoing when his gross misbehavior has been under scrutiny for such a long time.”***

27. The procedure of trial or administrative proceedings is upside down and plainly wrong. It starts with a conviction then justification of the conviction by evidence not even before the decision maker at the time of decision to convict! A conviction or finding of guilt must follow a charge and an opportunity for the accused to defend the charge. To call for alleged past sins of a charged person without putting the m to him to enable him to respond, and to use these to support a decision earlier made against him sounds more like a witch-hunt than a judicial or quasi-judicial trial process. It is simply not permissible, and all the guarantees of fair hearing and rule of natural justice as to right to be heard are targeted to this obvious injustice.

28. It is also incorrect, as urged by the respondents, that the petitioner could be granted an opportunity to be heard by the right of appeal from the decision already taken and implemented. The decision of *Speaker of National Assembly v. Karume* (2008) 1KLR (Election Petitions) 430 has no application in this matter. As shown above Clause 24 of the Constitution of the 6th respondent has no provision for appeal. Although this court agrees with the statement of law in *Karume* that

“where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed”, there is no such procedure provide in this case by the Constitution or statute for addressing grievances. Moreover, the petitioner is entitled under Articles 22 and 165 (6) of the Constitution of Kenya to seek judicial review orders against decisions of subordinate tribunals which flout the rights under the Bill of Rights.

29. In another curious submission, the Supplementary Affidavit at paragraph 12 justified the expulsion of the petitioner on a ground of **obvious** gross misconduct that made the presence of the applicant at the disciplinary meeting (and therefore his right to be heard) immaterial, as follows:

“The bad behavior adjudged gross misconduct on the part of the Applicant committed on 28/3/2010 during the Annual General Meeting constituted enough material for the Management Committee to deliberate on the same vide meeting of 31/3/2010 without the presence of the Applicant. In other words, the presence of the Applicant on the 31/3/2010 was immaterial as everybody had witnessed his gross misconduct on 28/3/2010. The Applicant was thus properly expelled as he would have said nothing new that the Management Committee was not aware of.”

30. This is conviction by condemnation rather than by trial of charges levied against a person charged and an opportunity to answer to those charges. It offends the basic protections of fair trial, fair administrative action and the common law right to be heard under the Rules of Natural Justice. The defence of a person charged can never be taken for granted so as to deny him the right to put it forward before a decision on the matter is taken.

31. I respectfully agree with the decision of Lord Wright in the House of Lords case of General Council of Medical Education and Registration of the United Kingdom v. Spackman (1943) 2 ALL ER 336 at 344 that-

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. This decision must be declared to be no decision. Thus in my opinion in the present case the council has to take the inquiry up afresh.”

Right to Association and Prejudice to the Petitioner

32. Apart from the contractual rights under the Constitution of the Board as to the procedure for expulsion under Rule 24 of the old Constitution of the Board, which was replaced by the Constitution adopted in 2012, the petitioner has associational rights under the Constitution of Kenya. The petitioner rights under the Constitution of Kenya may be limited under Article 24 of the Constitution in accordance with any law be weighed against the rights of the other members of the 6th respondent Society. No such law has, however, been demonstrated by the respondent.

33. However, the 2nd Respondent at paragraph 19 of his replying affidavit argued against the suspension of the election in the interests of the larger membership of the Board as follows:

“19. That the Board has held elections annually for the last five (5) years after the expulsion of the petitioner thus stoppage of this year’s Annual General Meeting and elections on account of the absence of the petitioner will be prejudicial to the good order of the Board and its 1,000 plus members.”

As I respectfully observed in the interlocutory ruling in this matter, the mere passage of time should not be held to justify continued breach of fundamental right to freedom of association. In denying the petitioner his membership of the Board for the 6years since 31st March 2010, the Management Committee of the Board breached the petitioner’s constitutional right to Freedom of Association under Article 36 of the Constitution of Kenya 2010 and the petitioner is entitled to damages.

34. As a member, the petitioner would be entitled to vote and be voted for under Article 7 (vii) of the Board's Constitution, 2012 on Right of Participation that –

“Right of Participation:

Only Members whose names are in the Register of Members shall have the right to participate in the meetings of the Board and shall be eligible to be elected to an Office of the Board.”

35. In addition, under Article 8 (ii) of the board's constitution, ‘*the office bearers shall hold office for a term not exceeding Two (2) years from the date of election at an Annual General Meeting*’ and, therefore, if the court permitted the Annual General Meeting proceed and new officials are elected, the petitioner would then have to wait for two years before he can exercise his right of participation in electing office bearers or offering himself for election as an office bearer. The court must act against such prejudice.

36. I also respectfully agree with Emukule, J. in ***Muslim for Human Rights (Muhuri) & Anor. v. Inspector General of Police & 4 Ors.*** (2015) eKLR that “*there is no greater public interest than adherence to the Constitution and the Rule of Law, however inconvenient and cumbersome this may at times appear.*”

CONCLUSION

The Right to be heard before Decision

37. The Petitioner was, in accordance with Articles 47 and 50 of the Constitution of Kenya 2010 and Clause 24 of the Board's Constitution then in force, entitled to be heard on any complaints against him relating to his conduct at the Annual General Meeting of 28th March 2010. He was not summoned to attend the Board's meeting of 31st March 2010 or otherwise give representation to allegations of misconduct levelled against him before the Board at that meeting resolved to expel him from the Board.

38. The right to be heard is a right before a decision is taken. The proviso that the petitioner could appeal from the decision to expel him did not cure the failure to grant him a right to be heard before the decision was taken. A decision already taken cannot be ratified by findings on an appeal or subsequent proceedings that tend to justify the action taken as a right one. It is not an answer to a challenge based on failure to accord a right to be heard to say that the affected person had behaved in unacceptable manner and that he was deserving of the action taken or that the Board would have come to the same decision even if it had granted a right to be heard to the affected person because of his bad conduct.

39. It did not matter that the Committee thought the petitioner was a bad or immoral person or guilty of rape charges which had been compromised by withdrawal of the complaint by the complainant or that he had been involved in the loss of Ksh.300,000/- through improper procurement of a consultant or outright theft. The petitioner should have been processed for disciplinary action in accordance with the Constitution of the Board or for criminal prosecution in accordance with the Penal Code or other relevant laws of the country.

40. There is no conduct that is so offensive that it disentitles the person concerned to a fair trial or fair hearing of penal or disciplinary proceedings against him. Article 25 of the Constitution of Kenya is categorical in its provision that the right to a fair trial cannot be limited. Even if fair trial were restrictively construed to cover only criminal trials, it was not shown by the respondent that the constitutional right to be heard under Articles 47 and 50(1) was limited in accordance with the provisions of Article 24 of the Constitution. Indeed, Article 50 (1) also emphasizes the central place of the right to fair hearing in civil cases by providing that –

*“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a **fair and public hearing** before a court or, if appropriate, another independent and impartial tribunal or body.”*

In addition, a right to be heard is an element of the right to fair trial under Article 50 (2) of the Constitution under paragraph 50 (2) (k) which provides that “(2) *Every accused person has the right to a fair trial, which includes the right— (k) to adduce and challenge evidence*”.

41. Accordingly, no person participating in the legal process in Kenya, be it criminal trial or civil suit or quasi-judicial proceedings, may be denied a right to be heard appropriate in the circumstances of the case. Indeed, even in administrative proceedings, the right to be heard is a requirement of procedural fairness under the right to a fair administrative action under Article 47 of the Constitution. In giving effect to the right to fair administrative action, Parliament has in accordance with the constitutional authority of Article 47 (3) enacted the Fair Administrative Act, 2015.

42. Of course, the Court accepts that for purpose of the administrative proceedings in the present Petition the right to be heard is founded on the rule of procedural fairness under Article 47 of the Constitution and the common law rules of natural justice and not Article 50 of the Constitution which applies to proceedings of judicial nature. As Githinji, JA with whom Nambuye, Karanja, Mwera and Ouko, JJA. agreed, observed in **Judicial Service Commission v. Mbalu Mutava & Anor.** (2015) eKLR:

*“The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in **Ridge v Baldwin**(supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.*

[23] Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with “acting fairly”. The term “procedurally fair” used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action. In construing the contents and scope of fair administrative action, the justice of the common law will greatly influence the future development of the administrative law under the Constitution.”

See also **Onyango Oloo v. Attorney General** (1986-89) EA 456 and **De Souza v. Tanga Town Council** (1961) EA 377.

43. However, the Court in **Mbalu Mutava** case rejected the contention that the petitioner must be heard in the JSC proceedings where further proceedings were to be had before Tribunal established by the President for removal of a judge. This is wholly distinguishable from the situation in this case, where the meeting of 31st March 2010 was the sole disciplinary proceedings for the removal of the petitioner herein.

Consequential Orders

44. The Court will, therefore, grant the order stopping the AGM and reinstate the petitioner so that he can participate in the affairs of the Board, subject to removal or expulsion in accordance with the new 2012 Constitution of the Board, the Constitution of the Republic of Kenya 2010 with regard to Right to Fair Administrative Action under Article 47 and the new statutory provisions of the Fair Administrative Act, 2015.

45. No submissions were made with regard to the oral application for the expunction paragraphs 6-20 of the 2nd respondent’s supplementary Affidavit and the court does not make any order thereon. However, because of the finding of the court as regards the denial of the petitioner’s right to be heard before his expulsion from the Board and the consequential orders, nothing turns on the matter.

Allegations of Criminal Conduct

46. While the Board was **not** entitled to seek to justify its expulsion without hearing on acts of criminal nature which were not prosecuted and a finding of guilty established, the court is similarly **not** entitled to ignore the allegations especially that with regard to rape as a crime of Violence against Women of such serious nature that it should always be prosecuted rather than settled out of court in order to deter potential offenders. The petitioner accepted that such allegations which he termed malicious were leveled against him and subsequently withdrawn by the complainant, and the police did not prosecute him for want of evidence. The Director of Public Prosecution is, of course, at liberty to relook into the matter and prosecute if sufficient evidence is found. For this purpose, a copy of the Judgment in this case will be transmitted to the Director of Public Prosecution for consideration and determination, in his sole discretion, whether the matter should be reopened for prosecution as there is no statutory limitation on the criminal offences of rape, theft or other offence as may be revealed from investigations.

Exemplary Damages

47. The Court did not feel well served with arguments and evidence of aggravated circumstances to enable it to make the award of “*exemplary damages against the respondents herein for breach of the fundamental rights of the petitioner.*” The Court however, finds that the petitioner is entitled to a reasonable sum of damages as compensation for the loss of associational rights as a member of the 6th respondent Board for 6 years since 31st March 2010.

Equal Protection, etc.

48. Nor did the Court find sufficient evidence to found a holding of breach of the petitioner’s right to equal treatment, equal protection and equal benefit of the law under Article 27 of the Constitution of Kenya 2010 and right to human dignity and freedom and security of person under Articles 28 and 29 (d) & (f) of the Constitution of Kenya, 2010;

ORDERS

49. Accordingly, for the reasons set out above, the Court makes the following Orders on the Petition dated 19th May 2016:–

- 1. The Court issues a Declaration that the Respondents herein have violated the petitioner’s right to fair administrative action decreed and protected under Article 47 of the Constitution.**
- 2. The Court grants the Order of Certiorari as prayed to remove into this Honourable Court for purposes of being quashed the decision of the Respondents herein under letter Ref. No REF/SSS/GEN/177/10 dated 13th May 2010 expelling the petitioner from the life membership of the 6th respondent Board.**
- 3. The Court grant the Order of Prohibition sought by the Petitioner prohibiting the respondents herein by themselves, their servants, agents or employees from expelling the petitioner from the 6th respondent’s Board except in accordance with the Constitution of Kenya 2010 and the law and the 6th Respondent’s constitution.**
- 4. The Court awards to the Petitioner the sum of Ksh.500,000/- as general damages against the Respondents jointly and severally for the loss of his society and association rights at the 6th respondent Board resulting from breach of the petitioner’s right to be heard before disciplinary action for his expulsion was taken against him.**
- 5. The directs that the petitioner will be reinstated to the same position as a life member of the Board as at the time he was unlawfully expelled from the Board with full right to participate in the affairs of the Board including the suspended Annual General Meeting as his**

status of his membership entitles him including the right to vote and offer himself as a candidate for any of the elective offices of Board.

6. For avoidance of doubt, the 6th respondent Board is at liberty to discipline the petitioner giving him an opportunity to be heard in accordance with the provisions of the Constitution of Kenya, 2010, the Fair Administrative Action Act, 2015 and the Board's Constitution, 2012.

50. The Respondents will pay the Costs of the Petition to the Petitioner.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 7TH DAY OF SEPTEMBER, 2016.

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JUDGE

Appearances:-

Mr. Ouma instructed by M/S Ochieng' Onyango, Kibet & Ohaga Advocates for the Petitioner

Mr. Musundi instructed by M/S Magare Musundi & CO. Advocates for the Respondent

Mr. Kazungu - Court Assistant.

[1] A new Constitution for the Board was adopted in February 2012 with an elaborate procedure for the discipline of officials and members under Article 6 thereof including *'the right to appear before and make representation to the Disciplinary Sub-committee.*