



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 212 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF UNIVERSITY OF NAIROBI RULES AND REGULATIONS
GOVERNING THE ORGANIZATION, CONDUCT AND DISCIPLINE OF STUDENTS**

AND

IN THE MATTER OF SECTIONS 8 & 9 OF LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

AND

THE UNIVERSITY OF NAIROBI.....RESPONDENT

EXPARTE APPLICANTS

1. MICHAEL JACOBS ODHIAMBO

2. HAROLD MUGOZI

3. ELWAK GEORGE BENEDICT

4. MARK OKETCH OJWANG'

5. ANTONY RODRICKS OTIENO

6. RAYMOND KUNDU BRAMWEL

7. PAUL OGONO ANYANGA

8. ARTHUR OTIENO ORIWO

JUDGEMENT

Introduction

1. In this application the applicants herein seek the following orders:

1. An order of CERTIORARI to quash the decisions by the Respondent to expel and suspend the Applicants.

2. The Respondent to take the necessary steps to facilitate Applicants to access and continue with their education.

3. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

4. Costs of and incidental to the application be provided for

Applicants' Case

2. According to the applicants, until the decision made by the Respondent that gave rise to the cause of action herein, they were students at the University of Nairobi, the Respondent herein (hereinafter referred to as "the University").

3. The 1st Applicant's case was that on 1st April 2014 the Respondent held its Students' Organization of Nairobi University election in all its Campuses in which he participated as a candidate for SONU Chairmanship. However the outcome of the elections led to the student unrest and protest within and outside the Main Campus.

4. The 1st Applicant averred that through Tuesday April 12, 2016 Daily Nation Newspaper, he was required to collect his suspension letter from the Registrar Students' Affair of the Respondent by 15th of April, 2016. He proceeded to the said Registrar Students' Affair and collected same and on Friday April 15, 2016 through the Daily Nation Newspaper, he was informed by the Respondent to collect charge sheet from the office of the Registrar by Friday, 15 April, 2016 and appear before the disciplinary panel on 20th April, 2016 at 8.15 am. When he however went to collect the letter dated 14th April, 2016, from the Respondent he was informed to appear before a College Disciplinary Committee on Thursday, April 21, 2016 at 11.30 am. In his view, the notice to appear before the College Disciplinary Committee was too short for him to prepare his case and further the said notice never informed him of his right to representation and to call witness.

5. It was averred by the 1st Applicant that when he collected the charge sheet, he found out that he had been charged with six counts of offences contrary to Part III of the Rules Governing the Conduct and Discipline of Students (hereinafter referred to as "The Rules"). It was however his view that Part III of the said rules does not create any offences but provides for general conduct by students. To him the alleged offences were not clear to him and no clarification was made to him about the same, and therefore it was virtually impossible to defend himself against the same.

6. The 1st Applicant deposed that all the offences had the same particulars of offence to the effect that he led students to destroy the property of the University, an allegation which he denied as he did not have control and power over the said group of students and could not be held liable for their actions.

7. The 1st Applicant deposed that no witness from the alleged group of students was called to testify against him and that despite there being CCTV Cameras around the University compound, none was produced to prove his presence in the University. However, the Disciplinary Committee did not take these factors into account. In addition, there was no relationship between the alleged statement of offence and particulars of offence and or the particulars of the offence did not support the offence.

8. The 1st Applicant averred that when he appeared before the College Disciplinary Committee he was neither represented nor allowed to call any witness of his choice in his defence as provided for by the Rules and Regulations Governing the Organization, Conduct and Discipline of Students of the University of Nairobi and that there was no student representation on the Disciplinary Committee. He was however only accorded five minutes to defend himself which was too short for the purpose and was never issued with minutes of the meeting but was told that the outcome would be communicated later. On Friday April 22, 2016 through the *Daily Nation* Newspaper he was informed by the Respondent of the verdicts of the Senate Students Disciplinary Committee and requested to collect letter communicating the same which letter he collected on 22nd April, 2016 from the Respondent's precincts. According to the said letter the recommendation of the Disciplinary Committee to expel him was approved by Senate on April 21, 2016. He however contended that the decision to expel him from the Respondent's premises cannot take effect without the approval of the Senate Student Disciplinary Committee as per the Rules governing conduct and discipline of the Students.

9. The 1st Applicant asserted that if the notice on the *Daily Nation* Newspaper stating the verdict of the Senate Student Disciplinary Committee is to go by then his right to appeal as enshrined in the Rules governing the conduct and discipline of the student has been shut out by the same body to which his appeal lies hence this application.

10. The 1st Applicant averred that the process leading to his expulsion was unprocedural for failure of the Senate Student Disciplinary Committee to approve the decision by the College Disciplinary Committee and if they approved, they denied him a right to appeal. Further the charge sheet is defective for failure to disclose the offences as highlighted by Part IV of the rules governing the conduct and discipline of the student.

11. It was the 1st Applicant's case that this is a case deserving the exercise of supervisory powers over the Respondent by this Honourable Court and that it is in the interest of justice and fairness that the Respondent's decision be quashed and he be allowed to access the university to continue with his education.

2nd Applicant's Case

12. Apart from reiterating the averments of the 1st Applicant, the 2nd Applicant, **Harold Mugozi**, averred that he participated in the aforesaid elections as a contestant for the position of Secretary General. Through the Tuesday 12th April, 2016 *Daily Nation* Newspaper, he was required to collect my suspension letter from the Registrar Students' Affair of the Respondent by 15th of April, 2016 which he did and on Friday 15th April, 2016 through the *Daily Nation* Newspaper, he was informed by the Respondent to collect charge sheet from the office of the Registrar by Friday, 15th April, 2016 and appear before the disciplinary panel on 20th April, 2016 at 10.30am. However when he collected the letter dated 14th April, 2016, from the Respondent he was informed that the hearing date had been changed and he had to appear before a College Disciplinary Committee on Thursday, April 21, 2016 at 2.00 pm though the letter did not inform him of his right to representation and to call witness.

13. From the charge sheet he found out that he had been charged with six counts of offences contrary to Part III of the Rules Governing the Conduct and Discipline of Students (hereinafter referred to us 'The Rules') which Part, according to him does not create any offences but provides for general conduct by students. His evidence was similar in material aspects to that of the 1st Applicant save that when he availed himself on 21st April, 2016 at 2.00 pm for the hearing before the College Disciplinary Committee

at the Deputy Principal's Boardroom, College of Humanities and Social Sciences, he was referred to the office of the Vice Chancellor and to the office of Deputy Vice Chancellor and then to the office of Registrar where he was informed that his case was heard in his absence on 20th April, 2016 at 10.00 am. On the said date he was issued with a letter dated 21st April, 2016 indicating that he had been expelled from the Respondent.

14. According to the 2nd Applicant, the decision to expel him was made without being given a chance to defend himself. However when on 22nd April, 2016 he applied for a disciplinary, the Respondent refused to take his copy. To him, the verdict of the Senate Students Disciplinary Committee is against his right of appeal. Further the decision to expel him from the Respondent's premises cannot take effect without the approval of the Senate Student Disciplinary Committee as per the Rules governing conduct and discipline of the Students. Accordingly, the process leading to his expulsion was unprocedural for failure of the Senate Student Disciplinary Committee to approve the decision by the College Disciplinary Committee and if they approved, they denied him the right to appeal.

15. He contended that the charge sheet was defective for failure to disclose the offences as highlighted by Part IV of the rules governing the conduct and discipline of the student and that the decision by the Respondent to expel him and other students was out of pressure, ruthless and calculated to appease the public since the Respondent was about to hold its annual open day hence this is a case deserving the exercise of supervisory powers over the Respondent by this Honourable Court and it is in the interest of justice and fairness that the Respondent's decision be quashed and he be allowed to access the university to continue with his education.

3rd Applicant's Case

16. According to the 3rd Applicant herein, **Elwak George Benedict**, he was in the Faculty of Arts and on 13th April, 2016 was suspended by the Respondent from the school. He averred that he was scheduled to appear before the Disciplinary panel on 21st April, 2016 at 11.00 am to answer to the charges and was charged with four offences none of which disclosed offences but general conduct of the students as per part III of Rules Governing the Conduct and Discipline of Students.

17. It was averred by the 3rd Applicant that on 21st April, 2016 he was expelled from the Respondent School based on pieces of partly smoked "*cannabis sativa*" (bhang) found in 1st Respondent's hostel room no 108, Tom Mboya Hall 9 following a search was conducted when the University had been closed and in his absence. He however averred that he was never shown the said substance by the Respondent and no witnesses were called to testify against him. To him, he had never been an occupant of the said room in the Respondent's institution as his room until expulsion by the Respondent was unit no. G4 at Veros Apartment managed by the Ivory Homes Care Limited.

18. The 3rd Applicant averred that he was not given an opportunity to call witnesses of his choice in his defence hence the Respondent failed to take into account these factors when arriving at the decision. It was contended by the 3rd Applicant that the process leading to his expulsion was unprocedural for failure of the Senate Student Disciplinary Committee to approve the decision by the College Disciplinary Committee and if they approved, they denied him right to appeal. Further, there was no student representation in the Disciplinary committee and that the offences committed in halls of Residence are within the Jurisdiction of the Halls Disciplinary Committee and not College Disciplinary Committee.

19. The 3rd Applicant further reiterated the averments made by the 1st and 2nd Applicants and asserted that the particulars of offences against him did not relate to the student unrest and destruction of property as mentioned in the notice of suspension appearing in the newspapers and the University notice board.

4th Applicant's Case

20. According to the 4th Applicant, **Mark Oketch Ojwang'**, he was the student of the Respondent at the

College of Humanities and Social Sciences, Faculty of Economics. Apart from reiterating what the other applicants stated, the 4th Applicant averred that on 13th April, 2016 he was suspended by the Respondent from the school and was scheduled to appear before the Disciplinary panel on 21st April, 2016 at 12.00 Noon to answer to the charges which date was later changed to 19th April, 2016.

21. He averred that though he was charged with four offences none of the allegations discloses offences but general conduct of the students as per Part III of Rules Governing the Conduct and Discipline of Students. His suspension, according to him was grounded on the allegation that prohibited and unauthorised items were found in the Respondent's Hostel room no 033, Hall 9 though he was never shown the said substance by the Respondent and no witness was called to testify against him. In addition he was never informed of the inspection by the Respondent, and the same was done after the University had been closed and in his absence. The 4th Applicant however averred that at the time of the alleged inspection he was not an occupant of the said room no 033, Hall 9 but was occupying room number 029 Hall 11 (Jamhuri) in the Hostel of the Respondent. However, the Disciplinary Committee did not take these factors into consideration when arriving at the decision.

22. It was therefore averred that the process leading to his suspension was unprocedural for failure of the Senate Student Disciplinary Committee to approve the decision by the College Disciplinary Committee and if they did, he was denied the right to appeal. He contended that offences committed in the halls of residence are heard and determined by the Halls Disciplinary Committee as opposed to the College disciplinary committee and that there was no student representation on the Disciplinary Committee. Further he was not given a chance to call own witnesses in his defence to the charges which in his view did not relate to the student unrest and destruction of property as mentioned in the notice of suspension appearing in the newspapers and the University notice board.

5th Applicant's Case

23. As for the 5th Applicant, **Antony Rodricks Otieno**, while reiterating the substance of his colleagues' averments averred that on 13th April, 2016 he was suspended by the Respondent from the school and was scheduled to appear before the Disciplinary panel on 20th April, 16 at 4.00 pm to answer to the charges.

24. He averred that though he was charged with four offences none of the allegations discloses offences but general conduct of the students as per part III of Rules Governing the Conduct and Discipline of Students and on 21st April, 2016 he was expelled from the Respondent's premises. His suspension, according to him was grounded on the allegation that prohibited and unauthorised items were found in room no 520, Hall 9, though he was never shown the said substance by the Respondent and no witness was called to testify against him. In addition at the time of inspection, he was not an occupant of the said room no 520, Hall 9 and the said inspection was done in his absence since at the time of inspection, he was not a resident at the Respondent premise but a tenant at Downhill Apartments managed by Jaki House Developers and Management Agencies Ltd. Further, at the time of inspection and alleged student unrest, he was serving a suspension and was therefore not within the premises of the Respondent University but the Disciplinary Committee did not take these factors into consideration when arriving at the decision.

25. It was therefore averred that the process leading to his suspension was unprocedural for failure of the Senate Student Disciplinary Committee to approve the decision by the College Disciplinary Committee and if they did, he was denied the right to appeal. He contended that offences committed in the halls of residence are heard and determined by the Halls Disciplinary Committee as opposed to the College disciplinary committee and that there was no student representation on the Disciplinary Committee. Further he was not given a chance to call own witnesses in his defence to the charges.

6th Applicant's Case

26. According to the 6th Applicant, **Raymond Kundu Bramwel**, and save for the common issues raised

by his co-applicants, on 11th April, 2016 he was suspended by the Respondent University from the School and on Friday 15th April, 2016 through the *Daily Nation* Newspaper, he was informed by the Respondent to collect charge sheet from the office of the Registrar by Friday, 15th April, 2016 and appear before the disciplinary panel on 19.4.2016 at 10.30 am. He was however not notified of his right to representation and call witness.

27. According to him, when he collected the charge sheet, he found out that he had been charged with six counts of offences contrary to Part III of the Rules Governing the Conduct and Discipline of Students which Part does not create any offences but provides for general conduct by students. In his evidence the alleged offences were not clear and no clarification was made to him about the same, and therefore it was virtually impossible to defend himself against the same. While denying that he led students to destroy the property of the University, the Applicant averred that on 3rd April, 2016 he travelled to Bungoma and returned on 7th April, 2016, and therefore was not within the Respondent University on 4th April, 2016 when it is alleged that the offences were committed. He averred that despite there being CCTV Cameras around the University compound, none was produced to prove his presence in the University.

28. The Applicant therefore averred that the Disciplinary Committee did not take these factors into consideration when making a decision and that at the hearing, the witness for the Respondent did not confirm the particulars of the offence against him and he was not given an opportunity to call his witness in his defence.

29. He was however expelled on 21st April, 2016 from the Respondent's premises through a process which in his view was unprocedural for failure of the Senate Student Disciplinary Committee to approve the decision by the College Disciplinary Committee and if approved, denied him a right to appeal.

7th Applicant's Case

30. Apart from reiterating the facts as deposed by the 6th Applicant in substance, the 7th Applicant herein, **Paul Ogono Anyanga**, averred that there is no relationship between the alleged statement of offence and particulars of offence and or the particulars of the offence do not disclose the statement of the offence.

31. He however deposed that when he availed himself on 20th April, 2016 at 8.30 am for the hearing before the College Disciplinary Committee at the Deputy Principal's Boardroom, College of Humanities and Social Sciences in main Campus, he was referred to Lower Kabete and upon arrival thereat, he was informed that his case was heard in his absence on 20th April, 2016 at 8.30 am, and was informed by the Chairman of the Panel **Prof. Kobonyo** to write an urgent request to the Vice Chancellor for his case to be reheard which he did. Instead of receiving a response thereto, he was informed by the Respondent of the verdicts of the Senate Students Disciplinary Committee through the *Daily Nation* Newspaper and requested to collect letter communicating the said verdict. And was issued with a letter dated 21st April, 2016 indicating that he had been expelled from the Respondent. He therefore contended that the decision to expel him was made without being given a chance to defend himself. Further the decision to expel him from the Respondent's premises cannot take effect without the approval of the Senate Student Disciplinary Committee as per the Rules governing conduct and discipline of the Students. However, if the notice on the *Daily Nation* Newspaper stating the verdict of the Senate Student Disciplinary Committee is to go by then his right to appeal as enshrined in the Rules governing the conduct and discipline of the student has been shut out by the same body to which his appeal lies hence this application.

8th Applicant's Case

32. According to the 4th Applicant, **Arthur Otieno Oriwo**, on 13th April, 2016 he was suspended by the Respondent from the school and was scheduled to appear before the Disciplinary panel on 21st April, 2016 at 12.00 noon to answer to the charges.

33. He averred that though he was charged with four offences none of the allegations discloses offences but general conduct of the students as per part III of Rules Governing the Conduct and Discipline of Students. His suspension, according to him was grounded on the allegation that prohibited and unauthorised items were found in the Respondent's Hostel room no 521, Tom Mboya Hall 9 though he was never shown the said substance by the Respondent and no witness was called to testify against him. In addition he was never informed of the inspection by the Respondent, and the same was done after the University had been closed and in his absence. The 8th Applicant however averred that at the time of the alleged inspection he was not an occupant of the said room no 521, Tom Mboya Hall 9 but was occupying room number 502 in the Hostel of the Respondent. However, the Disciplinary Committee did not take these factors into consideration when arriving at the decision hence the process leading to his suspension was unprocedural for failure of the Senate Student Disciplinary Committee to approve the decision by the College Disciplinary Committee and if they did, he was denied the right to appeal. He contended that offences committed in the halls of residence are heard and determined by the Halls Disciplinary Committee as opposed to the College disciplinary committee and that there was no student representation on the Disciplinary Committee. Further he was not given a chance to call own witnesses in his defence to the charges which in his view did not relate to the student unrest and destruction of property as mentioned in the notice of suspension appearing in the newspapers and the University notice board.

34. It was submitted on behalf of the applicants that the applicable Disciplinary Procedure is contained in the University of Nairobi Information to New Students and the Joining Instructions Manual of 2016/2017 Academic year which procedures are contained in form JI/13A of the Manual as Rules and Regulations Governing the Organization, Conduct and Discipline of Students. The Rules are divided into four sections/parts. Of relevance to this suit is Part III and IV of the rules. Part III sets out the (a) General conduct, (b) Academic conduct and (c) Residential conduct of the students. Part IV sets out the (a) Disciplinary Authorities, (b) Disciplinary offences, (c) Disciplinary procedures and (d) Penalties.

35. According to the applicants, the Disciplinary procedures provide that all Disciplinary offenses shall in the first instance be reported to and be dealt with by either College Disciplinary Committee or Halls Disciplinary Committee whose jurisdictions are separate with the Halls Disciplinary Committee dealing with disciplinary offenses committed within the Halls of Residence or such offenses as relate essentially to proper conduct of residential affairs. The College Disciplinary Committee deals with all other offenses and those transmitted to it by the Halls Disciplinary Committee.

36. With respect to the composition of the Halls Disciplinary Committee, it was submitted that the same is to be constituted by the Warden- Chair, the Dean of Students, the Director of S.W.A, a representative of the Faculty of the Student concerned, the Head Custodian of the Hall, the Student Hall Chairperson and the Hall Administrator- Secretary. The College Disciplinary Committee, on the other hand is to be composed by the Principal- Chairman, the Dean of Faculty/ Director of Institute of School, the Chairman of the Student's Department where appropriate, one representative nominated by the College Student's Organization, one representative from the Student's Hall of residence nominated by the Student's Hall Chairman and the College Registrar / Secretary.

37. It was however submitted that in matters related to examination offences, student representation is excluded and during the disciplinary proceedings, the student is entitled to a fair hearing, representation in person or by someone of choice, to call witness and to appeal to Senate Disciplinary Committee. Procedurally, it was submitted that after the Disciplinary proceedings, the penalties proposed by either College or Halls Disciplinary Committee are place before the Senate for approval before communication to the Student while appeals against the said decisions go to the Senate Students Disciplinary Committee which is properly constituted, in terms of examination and other academic matters when made up of Deputy Vice Chancellor (Academic Affairs)- Chairman, three Senate Representatives and registrar Academic. However the Principle of the College, the Dean/Director of the Faculty/School/Institute and the Chairman of the Department are permitted to attend. With respect to all matters other than Academic or Examinations, the same Committee is to be comprised of the Deputy Vice Chancellor (Student Affairs)- Chairman, three Senate Representatives, three Student Representatives, Principal of College and Registrar, Student Affairs- Secretary. Similarly the Director, Student Welfare Authority, the Dean of

Students and the Warden are expected to attend.

38. It was however submitted that in both Committees, all persons who have previously participated in the primary committees shall be excluded from voting/or consensus discussion for the purpose of determining the penalty and that no student may be expelled from the University and any penalty imposed by a disciplinary Committee shall not take effect without the approval of the Senate Disciplinary Committee.

39. In this case it was submitted that all the Applicants, except the 2nd and 7th Applicants appeared before the College Disciplinary Committees at various colleges for the hearing of their cases and while the 1st, 2nd, 6th and 7th Applicants were charged with offences relating to events of student unrest and demonstration, the 3rd, 4th, 5th and 8th Applicants were charged with offences arising from their Halls of Residence.

40. It was submitted that since the decisions of the Respondent were made in accordance with the rules and Regulations governing the organization, conduct and discipline of the Students as set out in the Respondent's students information handbook 2015/2016 instead of the applicable rules and Regulations governing the Organization, Conduct and Discipline of the Students of 2016/2017, the decisions were a nullity *ab initio* since the Application of the wrong rules prejudiced the students and compromised a fair trial to the extent that the students were found guilty for offences that do not exist under the rules, and that they were tried by committees that did not have jurisdiction over the matter.

41. It was contended firstly that the Disciplinary Panels were improperly constituted due to the absence of the Student Representative, and secondly the absence of mandate to handle disputes arising from the Halls of Residence. Although the rules under the Disciplinary Committees provide that the College Disciplinary Committees must have a student representative, all the Disciplinary Committees did not have student representatives and therefore they were improperly constituted. On that basis, the Committees lacked the jurisdiction to hear and determine disciplinary cases touching on the Applicants hence their decisions ought to be quashed.

42. Further, since the rules required that the Committees be chaired by the College Principals, the role of the chairman could not be delegated to another person who is not the Principal of the relevant College. Therefore to the extent that the Committees were chaired by persons who were not the Principals, the same were not properly constituted and therefore lacked the jurisdiction. In support of this submission, the applicant relied on **Nairobi High Court Misc. Appli No 257 of 2010 - R vs. The Communications Appeal Tribunal and Others (2011) e KLR** and **Vine vs. National Doc Labour Board [1956] 3 All ER 939.**

43. Secondly, it was submitted that the rules provide that offences committed from the halls of Residence shall be heard in the first instance by the Halls Disciplinary Committees, unless the Halls Disciplinary Committee determines that the matter does not fall within its jurisdiction. Therefore as the offences with which the 3rd, 4th and 5th Applicants were charged were committed in the Halls of residence and fell within the Jurisdiction of the Halls Disciplinary Committee, it was submitted that the College Disciplinary Committee lacked the jurisdiction to hear and determine the same.

44. According to the applicants, the proper procedure as set out as above is contained in the 2016/2017 RGCDOS, which the Respondent admits that it did not follow. The rules provide that after the Disciplinary proceedings, the penalties proposed by either College or Halls Disciplinary Committee are place before the Senate for approval before communication to the Student. There is, however no evidence that this requirement was followed and there is no evidence that the Senate approved the same before communication to the Student. Secondly the same rules provide that no student may be expelled from the University and any penalty imposed by a disciplinary Committee shall not take effect without the approval of the Senate Student's Disciplinary Committee. However, the Applicants were expelled and other penalties imposed with immediate effect without the approval of the relevant Senate Student's Disciplinary Committee.

45. It was further submitted that whereas the rules provide that Appeals from the decisions of the Halls and College Disciplinary Committee are made to Senate Students Disciplinary Committee, the Senate Student's Disciplinary Committee were never constituted either to hear the appeals from the students or to approve the penalties imposed by the Disciplinary Committees. To the applicants, the proper procedure would have been for the Respondent to inform the Applicants of the outcome of the Disciplinary Committees as well as inform them of their right to appeal and the timelines for constitution of the Senate Student Disciplinary Committees before the penalties could take effect. The fact that the penalties took effect immediately denied the Applicants an opportunity to pursue their right of Appeal. Furthermore, the public notice appearing in the daily Nation Newspaper dated 22nd April, 2016 purports to inform the students of the '*verdicts of Senate Students Disciplinary Committees*'. Anybody reading such a notice would reasonably believe that indeed the Senate Students Disciplinary Committee had been constituted and had deliberated on the matter and approved the same for the penalties to take effect immediately. Consequently, the verdicts of the disciplinary Committees would have no effect in the absence of the approval by the Senate Student Disciplinary Committee.

46. To the applicants, the procedural improprieties herein are a violation of the rules of natural justice and relied on **Christopher Gatuiri vs. Commissioner of Police, Misc Appl. 267 of 2006 (2007) eKLR** where **Wendoh, J** at page 4 held that:

“If the appeal lay to the Commissioner of Police then the sentencing should have been done by an officer of a lower rank than the Police Commissioner. By the presiding officer sending the matter to the commissioner for sentence, the Applicants’ right of appeal was taken away, which is gross procedural lapse...From consideration of all the above provisions, the Police Act has specifically set out procedure to be adopted in discipline matters of its officers and the same has to be followed. I find the Respondent to be guilty of gross procedural impropriety.”

47. The applicants further relied on the provisions of section 4 (3) (c) of **Fair Administrative Actions Act No. 4 of 2015**, and averred that to the extent that no such notice of right to appeal as envisaged under the forgoing provisions of the law which are in mandatory terms, the decision of the Respondent was procedurally unfair and ought to be quashed.

48. According to the Applicants, the penalties are not proportionate in the circumstances. Article 43(1)(f) of the Constitution provides that every person has a right to education. Further part 3 of the Bill of rights creates special rights which require greater protection and these are the rights of children, Persons with disabilities, Youth, minorities and marginalized groups and older members of the society. Youth is defined under Article 260 of the Constitution as a person who has attained the age of eighteen years but has not attained the age of thirty-five years hence the applicants fall within these brackets of youth. Article 55 of the Constitution provides that the State has a duty to ensure that that the youth has access to relevant education and training while Article 24 (1) provides that a right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is *reasonable and justifiable* in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and the extent of the limitation, the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

49. It was submitted that the expulsion or suspension is a serious limitation to enjoyment of right to education or access to education and training as provided for under Articles 43(1)(f) and 55 and that the nature of the limitation is that it completely denies the right or access to the same. Such a limitation must be justified in terms of the importance of the purpose of limitation and that the requirement of the limitation must overwhelm the enjoyment of the fundamental right. The justification must further be weighed against the other less restrictive means to achieve the same purpose. Therefore, the Respondent not only needed to demonstrate that the purpose of limiting a fundamental right overrides the need to enjoy the same, but also that there were no other less restrictive measures to achieve the same purpose. In the circumstances, the Respondent failed to demonstrate any overwhelming objective or purpose to be achieved by the expulsion or suspension of the Applicants, and in any event, there are far much less

restrictive measures which would have achieved the same objective or purpose if any. For instance the rules provide for a warning letter and payment of damages commensurate with the nature and gravity of the offence. Such measures, according to the applicants are less restrictive of the enjoyment of the fundamental right and it has not been shown that the same purpose or objective will not be achieved. Accordingly the applicants relied on **Eldoret High Court MiscAppli No: 1 of 2009, R vs. The Kenya National Examination Council, [2009] eKLR.**

50. To the, applicants, section 7 (2) (1) of the ***Fair Administrative Act*** provides that a court may review a decision of an administrative body if the decision is not proportionate to the interests or rights affected, as it is in this case.

51. In addition to the forgoing grounds, the 1st, 2nd, 3rd, 4th, 6th, 7th Applicants submitted that the decision against him was manifestly unfair, unreasonable and took into account irrelevant considerations instead of relevant considerations. First, it is alleged that the Applicant led a group of students who proceeded to SONU office, broke the steel door and torched the office, burnt one plastic water tank, 3 leather seats, one desk, one table, and smashed 6 window panes, acts which were unlawful, uncalled for and ill intended. Further, that on the same date and time led the same group of students to Gandhi Wing where they damaged the glass door entrance, forced their way into Arziki Restaurant, ate the food that was ready in the kitchen, and carried away the rest through the Hyslop gate, an act which was unlawful, uncalled for, and in blatant contravention of the rules governing the conduct and discipline of Students.

52. It was further noted that the Applicants incited students to demonstrate instead of seeking the prescribed alternative to the grievances.

53. It was submitted that the Applicants were charged with six counts arising from the above facts and was found guilty on all the counts. First the said rules under which the Applicants were disciplined do not create all the offences by which the Applicants were found guilty. For instance Part III(1)(a)(iv) does not exist under the rules as provided in the Respondent's Affidavit, yet the Applicants were was found guilty of violating that part. Further, the rules have no Parts III (3) (b) and IV (b) (ii) (b) yet the Applicants were required to defend themselves against them.

54. It was submitted that there is no offence of leading or inciting created under the rules. The Applicants were not the leaders of any group, and therefore was no basis to hold them responsible for the conduct of fellow students who were not under their effective control, power or command. The committee wrongfully held that the Applicants had lost control of the crowd when the crowd was not under their authority, power or control. Furthermore the Constitution creates a right to demonstrate, and therefore the same cannot be an offence at the same time.

55. To the applicants, the committee did not take into consideration the following factors: that the offences with the Applicants were was charged were not set out and or provided for in the rules applied by the Committee, that Applicants did not break the doors or windows of any building, that the Applicants were the leaders of any defined group upon which he could exercise power, control and authority and that the right to demonstrate is not an offence and therefore he could not have incited people to commit what is not an offence. That if the committee had taken into account these factors, then they would not have arrived at the same decision, and therefore the decision was unreasonable for failure to take into account relevant factors.

56. The applicants relied on the persuasive Article by **Judge Bakone Justice Moloto**, *Command Responsibility in International Criminal Tribunals*, 3.Berkeley J. Int'l Law. 1 (2009).12 at page 15 that:

To hold a person criminally responsible under the doctrine of command responsibility for an international crime, the prosecution must prove three legal elements:

1. The existence of superior-subordinate relationship between the accused as superior and the perpetrator of the crime as his subordinate;

2. *That the superior knew or had reason to know that the crime was about to be or had been committed; and*

3. *That the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof.*

Superior-subordinate relationship

The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his or her subordinates. In this respect, a military hierarchy is not required, the ICTY, the ICTR, and the Special Court have all held that the doctrine of command responsibility applies not only to military commanders, but also to political leaders and other civilian superiors in possession of authority. It is also not necessary that a formal, de jure subordination exist. A superior position for purposes of command responsibility can be based on de facto powers of control. Furthermore, the perpetrator does not need to be directly subordinated to the superior, but can be several steps down the chain of command. At least in the military context, command responsibility applies to every commander at every level of command, even if the troops were only temporarily commanded by the superior.

What matters is whether the superior has actual powers to control the actions of his or her subordinates. To determine this, all three aforementioned tribunals apply the “effective control” test, which aims to determine whether the superior has “the material ability to prevent and punish criminal conduct.” If a superior has this ability, then there is a legal basis for command responsibility. Lesser degrees of control, however, for example “substantial influence,” do not incur command responsibility.

In determining whether the “effective control” test had been satisfied, a tribunal must consider the evidence of each particular case. There are, however, factors that may be generally indicative of an accused’ position of authority. Some indicia of authority include: the accused’s official position, his or her capacity to issue orders, the procedure for appointment, the accused’s position in the military or political structure, and the actual tasks that he or she performed. In cases of irregular armed groups with less formal structures, it becomes more important to focus on the superior’s de facto authority.

57. The 2nd Applicant submits in addition to the forgoing, that he was denied an opportunity to be heard. The public notice issued in the daily Nation on 15th April, 2016 indicated that the Applicant was to appear before the College Disciplinary Committee of the College of Humanities and Social Sciences on 20th April, 2016 at 10.30 am. The letter issued to the Applicant informing him of disciplinary proceedings indicated that he was to appear before the same disciplinary committee on 21st April, 2016 at 2.00pm. Strangely, the Respondent has annexed a letter dated 1st April, 2016 addressed to the Applicant informing the Applicant to appear before the Committee on 20th April, 2016 at 8.15 am. Further the minutes of the Committee proceedings indicates that the Committee proceeded in Applicant’s absentia on 21st April, 2016 at 11.00 am. There was no notice of hearing issued to the Applicant for 21st April, 2016 at 11.00 am. The matter is further complicated in the Respondent’s Affidavit sworn by **Prof. Mutoro**, DVC-Academic Affairs, in which he swears at paragraph 36 that the Applicant’s hearing was scheduled for 20th April, 2016 at 10.30 am in line with the public notice in the daily newspaper. The 2nd applicant wondered why the Committee proceeded with the hearing on 21st April, 2016 at 11.00, a day later and 30 minutes earlier.

58. To him, the glaring inconsistencies in the hearing notice denied him an opportunity to present his case before the Committee. Upon realizing the mistakes, it is alleged that the committee members tried to call the Applicant on his cell phone to no avail. Then they blamed the Applicant for having his phone off. The actions of the Respondent, it was submitted were clearly in breach of the rules of natural justice that one should not be condemned unheard.

59. Further the 2nd and 7th Applicant submitted that the Committee as constituted had no powers to hear his case. The Committee was chaired by unauthorised person contrary to the rules which required the Committee to be chaired by the College Principal. That duty or role could not be delegated as it was held in Vine's Case above.

60. For the 3rd Applicant, in addition to the forgoing grounds, the decision against him was manifestly unfair, unreasonable and took into account irrelevant considerations instead of relevant considerations.

61. It is important to note that the Committee took into consideration the following irrelevant factors: that the Applicant had been arrested for similar charges before which was not true, that the Applicants friends were too well known peddlers and that he had been arrested with them, and therefore on the basis of bad character evidence concluded that the Applicant was guilty of the offences, and that no evidence of the alleged items were produced to the committee or shown to the Applicant during the hearing, and therefore their existence or otherwise could not be proved. That if the Committee had not taken into account the irrelevant factors, then they would not have arrived at the same decision, and therefore the decision was unreasonable for failure to take into account relevant factors.

62. Further the 3rd Applicant submits that the Committee as constituted had no powers to hear his case. The Committee was chaired by unauthorised person contrary to the rules which required the Committee to be chaired by the College Principal. That duty or role could not be delegated as it was held in Vine's Case above.

63. For the 4th Applicant, in addition to the forgoing grounds, he submitted that he was charged with four counts arising from the above facts and was found guilty on all the counts. The committee failed to take into account the fact that the Applicant was not a resident in the alleged room. The Committee further failed to consider the student's evidence that he was allocated a room different from where the offence was committed. The committee wrongly held that the Applicant forcefully and illegally allocated himself room 033 when he had no such powers and he could not have done so without the approval from the Respondent and that no evidence of the alleged items were produced to the committee or shown to the Applicant during the hearing, and therefore their existence or otherwise could not be proved. That if the Committee had not taken into account the irrelevant factors, then they would not have arrived at the same decision, and therefore the decision was unreasonable for failure to take into account relevant factors.

64. For the 5th Applicant in addition to the forgoing grounds, it was submitted that the Committee failed to take into account the fact that the Applicant was not a student of the Respondent having been previously suspended, and that he was not a resident in the Respondent's Halls of Residence, and that the Applicant could not have possibly committed the offences in the Halls of Residence when he was neither a student nor a resident and that no evidence of the alleged items were produced to the committee or shown to the Applicant during the hearing, and therefore their existence or otherwise could not be proved. That if the Committee had not taken into account the irrelevant factors, then they would not have arrived at the same decision, and therefore the decision was unreasonable for failure to take into account relevant factors.

65. On the forgoing submissions by the individual Applicants, we rely on Nairobi High Court MiscApp'l No 416 of 2006, Eric Kotut vs. Judicial Commission of Inquiry in Goldenburg Affairs (2008) eKLR in which Nyamu, Wendoh and Dulu, JJ sated at page 16 as follows:

“From the above, we find no evidence to support the conclusion contained in paragraphs 647 and 588 of the Report as against the applicant. Our finding on this is that it is improper and unlawful for a decision maker to leave out relevant matters or to take into account irrelevant matters. In the circumstances of this case such findings or observations unsupported by any evidence and which ignore relevant matters are also evidence of bias and with respect to the Commissioners, this led them to act irrationally in that no reasonable tribunal of the same stature would have come to the same findings observations or conclusions in the face of the evidence availed to them as set out in (a) to (e) above.

We therefore adopt as good law the finding in the case of **REPUBLIC v HOME SECRETARY exparte VENABLES (1998) AC 407** and also in the **RE RECAL** case cited earlier to the effect that a decision is unlawful if the maker leaves out of account relevant matters, or takes into account irrelevant matters.

The commissioners at paragraph 642 observed that there was an understanding among the 3 at the meeting to flout regulations and the law for an agreed purpose.

The conclusion was made by the Commission despite their having clear and uncontroverted evidence of inter alia the applicant's passport clearly indicating that he was outside the country on the above date and during the entire period referred to – see Commission exhibit 154 (bb) and verbatim report of 24th July 2004 page 14401, and the applicant could not possibly have received the notification of GIL proposals contained in the letter of 1st November, 1990 as he was out of the country during the entire period.

Our finding on this is that this error attracts judicial review interventions based on bias, failure to take into account relevant considerations or taking into account irrelevant considerations, together with irrationality and therefore the findings of the case cited in (iii) apply with equal force.”

66. The applicants relied on Halsbury's Laws of England 4th Ed para 76 which states that;

In exercising their functions, public bodies evaluate evidence and reach conclusions of fact. The Court will not ordinarily interfere with the evaluation of evidence or conclusions of facts reached by a public body properly directing itself in law. The exercise of statutory power on the basis of mistaken view of the relevant facts will, however, be quashed where there no evidence available to the decision maker on which; properly directing himself as to the law, he could reasonably have formed that view. The court may also intervene where a body has reached a decision which is based on a material misunderstanding or error of facts.

67. According to the applicants, there is no alternative remedy, the penalties having taken full effect. The right of appeal is available before the Senate Student Disciplinary Committee approves the penalties. That right seems to have been taken away when the penalties took effect purportedly upon the approval of the same Senate Student Disciplinary Committee. However, in any event and without prejudice to the forgoing, the Applicants submitted that the proceedings were a nullity *ab initio* for lack of jurisdiction and therefore there was nothing to appeal in the first place hence the Appropriate remedy is an order of certiorari. They relied on Nairobi High Court Misc. Civ. Appli. 723 of 2007, R vs Resident Magistrate, Milimani Commercial Court and Another (2010) e KLR in which **Wendoh, J** held page 7 that:

“The Magistrate’s Court had no jurisdiction to entertain the matter... it is true that the Applicant could have appealed that decision, but the decision is a nullity *ab initio* and the best mode of redress is by way of Judicial Review. It is trite law that availability of an alternative remedy is not a bar to Judicial Review...Judicial Review is supposed to be a speedy mode of resolving disputes and the whole proceedings being a nullity, the best mode to come to court was by way of Judicial Review.”

68. Further reliance was placed on Nairobi High Court Misc Appl. No 698 of 2009, R vs The Disciplinary Committee, Law Society of Kenya and Another [2013] e KLR where this Court held at page 4 that:

“Whereas the existence of an alternative procedure does not necessary bar the remedy of certiorari, the fact that a remedy exists which has been resorted to is a factor which the court takes into account in deciding whether or not to award the discretionary remedy of certiorari. However that avenue must be beneficial, convenient or effectual.”

69. It was disclosed that some students had attempted to file appeals but by the time this case was instituted, the appeals had not been heard and the Respondent had not even constituted Appeal committees considering the urgency of the matter. Such a slow pace cannot be said to be beneficial, convenient or effectual in the circumstances of urgent redress of this nature.

70. It was submitted that there was no joinder of causes of action as alleged since there is only one cause of action, which is Judicial Review against one respondent. Judicial Review is all about review of procedure. The disciplinary process was initiated by the Respondent against the Applicants. The disciplinary committees were not independent bodies from the respondent. The Committees merely made recommendations which were adopted by the Respondent into final decisions. In any event, the misjoinder of causes of actions is not fatal to attract the striking out of the case. A preliminary objection based on a misjoinder of causes of action cannot be sustained where the order to strike out or not is discretionary and reliance was placed on **Nairobi High Court Civil case No. 507 of 2005, Kenya Commercial Bank vs Titus Kilonzo Mutua and Others, [2006] eKLR.**

71. In view of the forgoing, the applicants prayed that this application be allowed.

Respondents' Case

72. The application was opposed by the Respondent.

73. According to them, the Students Organization of Nairobi University (hereinafter referred to as "**SONU**") is formed pursuant to section 41 of the **Universities Act** No. 42 of 2013, Laws of Kenya, as an organization to secure for students' academic freedom, excellence, liberty and welfare. In line with the SONU Constitution, the Respondent's student's fraternity held elections on 1st April 2016 to elect the leaders of SONU for the 2016/2017 academic year and on 2nd April 2016, election results in respect of the said elections were declared and the 1st Applicant herein who was a candidate for the position of SONU chairman came second. **Paul Owino Ongili** was declared the newly elected chairman of SONU.

74. It was averred that following declaration of the poll results, students who were dissatisfied with the outcome, led by the 1st Applicant, took to the streets in protest and proceeded to stone motorists along Nyerere Road as well as harassing pedestrians. On 4th April 2016, a group of students led by the 1st Applicant, in a bid to disrupt the swearing-in ceremony for the newly elected leaders of SONU protested yet again and disrupted traffic along University Way and sections of Uhuru Highway and yet again stoned motorists while engaging the police in running battles. The students also caused destruction of the Respondent's property by inter alia setting the SONU offices on fire.

75. It was averred that following the said turbulent situation a special Senate meeting of the Respondent was held on 5th April 2016 whereat it was resolved that the Respondent institution be closed indefinitely as a solution was being considered and the Respondent issued a notice of closure and directed all the students to vacate the University by 5 p.m on 5th April 2016. The students yet again protested this move and a faction of them burnt down one of the male prefabricated hostels and damaged property of unascertained value. Upon closure of the Respondent, the Respondent commenced investigations on the student unrest and destruction of public property which led to closure of the University. The purpose of the investigations was to *inter alia* identify the particular students who participated in the unrest and destruction of public property and thereafter commence disciplinary process against them. During the investigations, the Respondent also decided to engage in cleaning up of the halls of residence and rooms for possible weapons, alcohol and drugs.

76. It was averred that after the preliminary investigations were conducted by the Respondent, a list of sixty two (62) students were found to have participated in the student arrest and destruction of public property and consequently, the Respondent suspended the students from any further studies with the Respondent pending investigation and further disciplinary action. A notice indicating the names of the suspended students was published in the *Daily Nation* Newspaper issue of 12th April 2016. By the aforesaid notice, students were asked to collect the suspension letters from the Registrar, Student's

Affairs latest by Friday, April 15, 2016. Amongst the students whose names featured on the notice published in the *Daily Nation* Newspaper issue of 12th April 2016 as having been suspended on account of participation in the student unrest and destruction of public property are the 1st, 2nd, 6th and 7th Applicants. The 3rd, 4th, 5th and 8th Applicants were however suspended on account of commission of offences not relating to participation in the student unrest and destruction of public property and each of the aforesaid Applicants was issued with a suspension letter. It was clarified that the 3rd & 4th Applicants were suspended as a result of there having been found pieces of partly smoked “*Cannabis Sativa*” (bhang) in their allocated rooms in the Respondent’s Halls of Residence in contravention of the Rules Governing the Conduct and Discipline of Students while the 5th Applicant was suspended as a result of there having been found apparatus used to prepare rolls of “*Cannabis Sativa*” (bhang) in his allocated room in the Respondent’s Halls of Residence in contravention of the Rules Governing the Conduct and Discipline of Students. The 8th Applicant, on the other hand was suspended as a result of there having been found with six (6) rolls of partly smoked “*Cannabis Sativa*” (bhang) and Sixty Four (64) pieces of bromine paper used to print fake currency in his allocated rooms in the Respondent’s Halls of Residence in contravention of the Rules Governing the Conduct and Discipline of Students.

77. It was contended that the suspension letters in respect of each suspended student informed the particular student of the allegations levelled against them and particulars of the offences were disclosed therein. According to the Respondent, it caused to be published in the *Daily Nation* Newspaper issue of 15th April 2016, a notice informing the suspended students to collect their individual charge sheets from the office of the Registrar of the Respondent’s specific colleges which notice further stipulated the specific disciplinary panel, venue, date and time of their individual hearings before the College of Students Disciplinary Committees.

78. It was averred that on diverse days each of the Applicants herein appeared before a disciplinary committee to answer to the particular offences which were set out very clearly in their respective charge sheets and that the disciplinary committees were distinct for each of the Applicants. Each of the Applicants was accorded a fair hearing by the respective college disciplinary committees and after taking into consideration the presentation made by each Applicant, the disciplinary committees expelled the 1st, 2nd, 3rd, 5th, 6th and 7th Applicants from the Respondent while the 4th and 8th Applicants be suspended therefrom.

79. It was averred that on 21st April 2016, the Respondent’s Senate Student Disciplinary Committee approved the decisions of the various college disciplinary committees and consequently, the 1st, 2nd, 3rd, 5th, 6th and 7th Applicants were issued expulsion letters whilst the 4th and 8th Applicants were issued suspension letters.

80. To the Respondent, its decisions were made in accordance with the Rules and Regulations governing the organization, conduct and discipline of the Students as set out in the Respondent’s students information handbook 2015/2016 (hereinafter referred to as “***the Rules and Regulations***” which are similar to the Rules and Regulations annexed in the 1st Applicant’s Supplementary Affidavit filed on 27th May 2016. The copy of the Rules and Regulations annexed in the Supplementary Affidavit is the copy that was handed to the 1st Applicant at the time of joining the Respondent in the year 2012 but the Rules have been set out in the student information handbook 2015/2016 which all students are supposed to keep themselves apprised of at all times during their period of study at the University. Upon joining the University all the Applicants signed a declaration declaring that they had read the regulations governing the Organization, Conduct and Discipline of Students at the University of Nairobi and understood their content and meaning and undertook to abide by them.

81. The Respondent asserted that all the Applicants were accorded an opportunity to be heard and were granted ample time to defend themselves hence were afforded a fair hearing before the respective students disciplinary committees.

82. It was the Respondent’s case that:

i. Pursuant to the Rules and Regulations, it was not a mandatory requirement for there to be a student representative on the Disciplinary Committee since IV(C)(2) of the Rules and Regulations provides as follows for:

...where appropriate one representative nominated by the College Student's organization one representative from the Students' Hall of Residence nominated by the Students' Hall Chair.

Given the circumstance of the disputed elections leading to unrest in the University, the Disciplinary Committee did not deem this a situation where student representatives were appropriate.

ii. The suspension letters in respect of each suspended student informed the particular student of the allegations leveled against them and particulars of the offences were disclosed therein. Further the particular offences were set out very clearly in their respective charge sheets. During the hearing, none of the Applicants requested for any clarification of the offences.

iii. Pursuant to the Rules and Regulations, students appearing before the Disciplinary Committee were permitted to representation either in person or by someone of their choice, to call witnesses to their defence and to appeal to the Senate Disciplinary Committee since Part IV (c)(2)(vi) provides as follows;

At all proceedings or a Disciplinary Committee before which he/she is summoned, the student shall be entitled to a fair hearing and to representation either in person or by someone of his/her choice, to call witnesses in his/her defence and to appeal to the Senate Disciplinary Committee...

Hence the Applicants are not being truthful in stating that they were not permitted to call witnesses in their defence. The Rules and Regulations are very clear as regards representation and calling of witnesses. None of the Applicants was denied their right to representation and calling of witnesses.

83. It was averred that pursuant to the provisions of Part IV C) (2) (iv) of the Rules and Regulations, the Applicants have a right to appeal against the decision of the Students Disciplinary Committees to the Senate Disciplinary Committee. However, only, the 4th, 6th, 7th and 8th Applicants have filed their respective appeals which are pending hearing and determination. It was therefore contended that the Applicants have failed to exhaust their appellate options before coming to court yet an appeal to the Senate Disciplinary Committee is the appropriate remedy. In the Respondent's view, the right to appeal subsists notwithstanding Senate approval of the Disciplinary Committee's decision on expulsion.

84. It was the applicant's case that the charges levelled against each of the Applicants were varied and each of the Applicants was given a fair hearing.

85. With respect to the 1st Applicant, **Michael Jacobs Odhiambo**, it was averred that he collected his charge sheet on 15th April, 2016 whereas his hearing was set for 21st April 2016 giving him a period of about five (5) days within which to prepare for the hearing which period in the Respondent's view as adequate since the 1st Applicant was familiar with the circumstances of the charges that had been brought against him and did not ask the Committee to give him more time to prepare his defence. Accordingly, the Respondent cannot be accused of breaching the rules of natural justice on this score.

86. It was averred that the 1st Applicant's charge sheet dated 13th April 2016 clearly stated the particular provisions of the Rules Governing the Conduct and Discipline of Students that the 1st Applicant was alleged to have breached as well as stating the offences alleged to have been committed hence the Respondent discharged its obligation. It was averred that the 1st Applicant's hearing took place on 21st April 2016 was accorded a fair hearing and was given ample time to defend himself and not five minutes as alleged. Two witnesses also testified against the 1st Applicant. Since the 1st Applicant was at liberty to

call witnesses as per Part IV (c)(2)(vi) of the Rules and Regulations, it was the Respondent's position that he cannot argue that he was not given an opportunity to call witnesses in his defence.

87. The Respondent disclosed that the 1st Applicant had previously been suspended from the University as from 29th April 2015 for failure to respect and adhere strictly to the administrative and academic procedures and that when he appeared before the Disciplinary Committee on 17th June 2015, his suspension was lifted but he was served with a warning letter to deter him from similar behaviour in future. However, it should be noted that the 1st Applicant is not keen on adhering to the Rules and Regulations governing the organization, conduct and discipline of the Students in the University.

88. With respect to the 2nd Applicant, **Harold Mugozi**, it was averred that he collected his notification letter on 15th April 2016 whereof his hearing was scheduled for 20th April 2016 10.30 am. To the Respondent, the Notice on 15th April 2016 in the *Daily Nation* Newspaper was very clear that the 2nd Applicant's hearing was scheduled for 20th April 2016 at 10.30 am. However, despite being aware of the day of his hearing, the 2nd Applicant failed to appear before the Disciplinary Committee. Though the Disciplinary Committee attempted to get in touch with him by calling and texting, he switched off his phone hence the Disciplinary Committee was constrained to proceed in his absence.

89. It was the Respondent's case that the letter the 2nd Applicant annexed to his affidavit is not correct and can only be a forgery in order to excuse the 2nd Applicant's absence at his hearing.

90. As regards the 3rd Applicant, **Elwak George Benedict**, it was averred that he was allocated Room No. 108 at Tom Mboya Hall 9 and payments for the same were regular and up to date and that the provisions of the Rules and Regulations prohibit students from swapping without permission from the Student's Welfare Association once allocation is done.

91. Whereas the 3rd Applicant alleged that no witness was called to testify against him, the Respondent contended that there was a witness, **Mr. David Kimani**, Acting Deputy Director Safety and Security Services of Student Welfare Authority who testified against the 3rd Applicant. The 3rd Applicant was however at liberty to call witnesses as per Part IV (c)(2)(vi) of the Rules and Regulations and cannot thus argue that he was not given an opportunity to call witnesses in his defence. To the Respondent, the 3rd Applicant was granted an opportunity to defend himself but after considering all the available evidence, the Disciplinary Committee found him guilty of possession of pieces of partly smoked "*Cannabis Sativa*" (bhang) in his allocated room in the Respondent's Halls of Residence, in contravention of the Rules Governing the Conduct and Discipline of Students.

92. With respect to the case of the 4th Applicant, **Mark Oketch Ojwang'**, the Respondent responded that he was present during his hearing on 21st April 2016 whereof he pleaded guilty to all the offences he was charged with. He however lodged an appeal against the decision of the Disciplinary Committee and the appeal is awaiting hearing and determination.

93. It was the Respondent's case that the 4th Respondent attempted to confuse the members of the Disciplinary Committee on the issue of the Room allocated to him and though he was allocated room no. 029 situated in Hall 11, however without seeking permission from the Student Welfare Association, he refused to take the room but instead evicted a student from room No. 033 in Hall 9 and allocated himself the same. When room No. 033 was found to have prohibited substance of *cannabis sativa*, he sort to abandon claims over it and went back to his original room. To the Respondent, there was a witness, **Mr. Francis Onyango**, night custodian, Tom Mboya Hall 9 who testified against the 4th Applicant.

94. To the Respondent, the 4th Applicant was at liberty to call witnesses as per Part IV (c)(2)(vi) of the Rules and Regulations hence he cannot thus argue that he was not given an opportunity to call witnesses in his defence.

95. Responding to the case of the 5th Applicant, **Anthony Rodricks Otieno**, the Respondent disclosed that the 5th Applicant, had previously been charged of assaulting a fellow student on 23rd June 2015 and was found guilty by the Disciplinary Committee and put on a six months suspension commencing 21st December 2015. Despite having been placed under suspension, the 5th Applicant continued occupying Room 520, Hall 9 and at the hearing, he confirmed that he did not hand over his room upon suspension despite the fact that he was as a result thereof prohibited from being on school premises until expiry of his suspension.

96. The Respondent averred that there was a witness who testified against the 5th Applicant, **Mr. Kimani Githecha**, Deputy Director Security and Safety Services and that at his hearing on 20th April 2016, the 5th Applicant was found as being a repeat offender who had violated the terms of his previous suspension and was also found guilty of having been found in possession of narcotic drugs. Since the 5th Applicant was at liberty to call witnesses as per Part IV (c)(2)(vi) of the Rules and Regulations, he cannot argue that he was not given an opportunity to call witnesses in his defence.

97. With respect to the 6th Applicant, **Raymond Kundu Bramwel**, it was averred that he was granted an opportunity to defend himself after which it was found to have been lying to the Disciplinary Committee. However, two witnesses testified against him and he was at liberty to call witnesses as per Part IV (c)(2)(vi) of the Rules and Regulations hence he cannot argue that he was not given an opportunity to call witnesses in his defence.

98. The Respondent disclosed that on 28th April 2016, the 6th Applicant filed his Appeal with the Respondent which appeal is pending hearing.

99. With respect to the 6th Applicant, **Paul Ogono Anyanga**, it was averred by the Respondent that he was required to appear before the Disciplinary Committee on 20th April 2016 and the venue for his hearing was the Deputy Principal's Boardroom, College of Humanities and Social Sciences which venue was clearly indicated as No. 183 in the notice set out in the *Daily Nation* Newspaper of 15th April 2016 at 8. 30 a.m. but as at 9.20 a.m., the 7th Applicant had not appeared for the hearing and hence the Disciplinary Committee proceeded with the hearing after being satisfied that the 7th Applicant was fully aware of his hearing date having collected his charge sheet and the notice informing students to collect their charge sheets is the same notice that had informed students of the venue of the hearings.

100. It was contended that the 7th Applicant was granted an opportunity to defend himself but declined to appear on the day of the hearing. Whereas the 7th Applicant alleged that he confused the venue of his hearing, the venue was clearly stipulated in the notice and he was made aware of the venue six days to the hearing date, hence there was no satisfactory reason as to why he failed to appear for his hearing.

101. It was averred that there was a witness who testified against the 7th Applicant, **Mr. Indumuli Phaniel Ambuya**, Deputy Director Security and Safety Services. The Committee further noted that the 7th Applicant was a student admitted in the university in the year 2009 and who should have graduated in the year 2013 and after considering all the available evidence, found the 7th Applicant guilty of the charges against him and a decision was made to expel him from the University. On 20th April 2016, the 7th Applicant filed his Appeal with the Respondent and the same is pending hearing.

102. With respect to the case of the 8th Applicant, **Arthur Otieno Oriwo**, it was averred that he was allocated Room No. 521, Tom Mboya Hall 9 and he was charged with having been found with six (6) rolls of partly smoked "*Cannabis Sativa*" (bhang) and Sixty Four (64) pieces of bromine paper used to print fake currency in his allocated room in the Respondent's Halls of Residence, in contravention of the Rules Governing the Conduct and Discipline of Students. During his hearing, two witnesses testified against him, **Mr. Charles Nasiali**, Halls Officer and **Mr. David Kimani**, Acting Deputy Director Safety and Security Services of Student Welfare Authority and after considering the 8th Applicant's testimony as

well as the evidence adduced during the hearing, the Committee found him guilty of the charges against him and he was suspended for one (1) academic year from the university and three (3) academic years from the halls of residence.

103. According to the Respondent, the 8th Applicant was at liberty to call witnesses as per Part IV (c)(2) (vi) of the Rules and Regulations thus cannot argue that he was not given an opportunity to call witnesses in his defence. However, on 6th May 2016, the 8th Applicant filed his Appeal with the Respondent and the same is pending hearing.

104. It was therefore the Respondent's case that the Applicants were all accorded an opportunity for a fair hearing and were well informed of the accusations levelled against them, given sufficient notice of the date of their hearings, given sufficient time to defend themselves and the Disciplinary Committees considered the defence of the Applicants in reaching the decision to suspend/expel the Applicants. It was its position that the conduct of the Applicants which led to the Respondent's decision to suspend and/or expel them was contrary to the Rules and Regulations governing the organization, conduct and discipline of the Students as set out in the Respondent's students' information handbook. To the Respondent, its decisions were made in accordance with the Rules and Regulations as set out in the student's information handbook and there was no impropriety in the decision making process. The Respondent asserted that to in effect reinstate the suspended and/or expelled students would be most detrimental to the Respondent and make it impossible to maintain any discipline in the University.

105. In the submissions, the Respondent contended that they demonstrated as follows;

i. The Applicants were all accorded an opportunity for a fair hearing. They were well informed of the accusations levelled against them, given sufficient notice of the date of their hearings, given sufficient time to defend themselves and the Disciplinary Committees considered the defence of the Applicants in reaching the decision to suspend/expel the Applicants.

ii. The conduct of the Applicants which led to the Respondent's decision to suspend and/or expel them was contrary to the Rules and Regulations governing the organization, conduct and discipline of the Students as set out in the Respondent's students' information handbook.

iii. The Respondent's decisions were made in accordance with the Rules and Regulations as set out in the student's information handbook. There was no impropriety in the decision making process.

iv. Pursuant to the Rules and Regulations, it was not a mandatory requirement for there to be a student representative on the Disciplinary Committee since Part IV(C)(2) of the Rules and Regulations provides as follows:

where appropriate one representative nominated by the College Student's organization one representative from the Students' Hall of Residence nominated by the Students' Hall Chair.

Given the circumstance of the disputed elections leading to unrest in the University, the Disciplinary Committee did not deem this a situation where student representatives were appropriate.

v. The suspension letters in respect of each suspended student informed the particular student of the allegations levelled against them and particulars of the offences were disclosed therein. Further the particular offences were set out very clearly in their respective charge sheets. During the hearing, none of the Applicants requested for any clarification of the offences.

vi. Pursuant to the Rules and Regulations, students appearing before the Disciplinary Committee were permitted to representation either in person or by someone of their choosing, to call witnesses to their defence and to appeal to the Senate Disciplinary Committee. Part IV (c)(2)(vi) provides as follows;

“At all proceedings or a Disciplinary Committee before which he/she is summoned, the student shall be entitled to a fair hearing and to representation either in person or by someone of his/her choice, to call witnesses in his/her defence and to appeal to the Senate Disciplinary Committee...”

The Rules and Regulations are very clear as regards representation and calling of witnesses. None of the Applicants was denied their right to representation and calling of witnesses.

vii. To in effect reinstate the suspended and/or expelled students would be most detrimental to the Respondent and make it impossible to maintain any discipline in the University.

106. The Respondent submitted that the Applicants’ submissions are directed at the merits of the decision and not on the decision making process and relied on **Republic –vs- Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR, Seventh Day Adventist Church (East Africa) Limited – vs- Permanent Secretary, Ministry Of Nairobi Metropolitan Development & Another [2014] eKLR, Ndombi Tom Wachakana Osolika vs. Disciplinary Committee of the Law Society of Kenya & Another [2015] eKLR, and Republic vs. Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue [2016] eKLR.**

107. It was the Respondent’s position that its decisions were made in accordance with the Rules and Regulations governing the organization, conduct and discipline of the Students as set out in the Respondent’s students information handbook 2015/2016 (hereinafter referred to as “***the Rules and Regulations***”) which rules all students are supposed to keep themselves apprised of at all times during their period of study at the University. It was therefore contended that the Rules and Regulations as contained in the University of Nairobi Information to New Students and the Joining Instructions Manual of 2016/2017 Academic Year are not at variance with the Rules contained in the Respondent’s students information handbook 2015/2016 and to the Respondent, the offences with which the Applicants were charged with are offences under the Rules and Regulations.

108. It was the Respondent’s case that pursuant to Part IV(C)(2) of the Rules and Regulations, it was not a mandatory requirement for there to be a student representative on the Disciplinary Committee in light of the circumstances of the disputed elections that led to unrest in the University.

109. To the Respondent, the disciplinary procedure as set out in the Respondent’s handbook was adhered to prior to the decision made by the Respondent to suspend and/or expel the Applicants which decisions were on 21st April 2016, approved by the Respondent’s Senate Student Disciplinary Committee. Consequently, the 1st, 2nd, 3rd, 5th, 6th and 7th Applicants were issued expulsion letters whilst the 4th and 8th Applicants were issued suspension letters.

110. With respect to the allegation of denial of representation, it was submitted that the Rules and Regulations Part (c) on Disciplinary Procedures which the Applicants were fully conversant with, provide that the Applicants were entitled to representation and to call witnesses. It is not alleged that any of the Applicants made a request to be allowed representation and calling of witnesses and it was denied. In this respect the Respondent relied on **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR and Republic vs. Pwani University College Ex parte Maina Mbugua James & 2 Others , Miscellaneous Civil Application No. 28 of 2009,** in which the High Court held as follows:

“My own view is that if an individual requests for legal representation, then he should be entitled to such representation but in the present scenario there was no such request and no such denial, so the breach alleged does not arise at all.”

111. To the Respondent, the Applicants were all accorded an opportunity for a fair hearing. They were well informed of the accusations levelled against them, given sufficient notice of the date of their hearings, given sufficient time to defend themselves and the Disciplinary Committees considered the defence of the Applicants in reaching the decision to suspend/expel the Applicants. With respect to the 2nd applicant, it as submitted that despite having been aware of the hearing date he failed to appear for the

hearing which took place on 20th April 2016 as had been scheduled. The Respondent, it was submitted, filed a Supplementary Affidavit indicating that the minutes of the 2nd Applicant's hearing had a typing error, the hearing was on 20th April 2016 and not 21st April 2016.

112. It was the Respondent's submissions that the applicants having signed the Respondent's Code of Conduct bound themselves to follow the Rules and Regulations set out therein and cannot claim that expulsion or suspension is a serious limitation to enjoyment of right to education and training as provided for under Article 43 (1) (f) and Article 55 of the Constitution.

113. Further reliance for this position was sought in the holding in the case of **J M O O vs. Board of Governors of St. M's School, Nairobi [2015] eKLR**, where the Court stated as follows;

“It is correct that the Constitution guarantees to children the right to education, and it also requires that in every matter concerning the child, the best interests of the child must be the primary consideration. However, it must be restated and re-emphasised that rights have their corresponding responsibilities, and the responsibility of students in school is to abide by the school's regulations. It would certainly not be in the best interests of the petitioner, or of the other students in the respondent school, were the respondent to ignore disruptive conduct on the part of the petitioner, or of any other student. As this Court observed in the case of Fredrick Majimbo & Another vs The Principal, Kianda School, Secondary Section High Court Petition No. 281 of 2012:

[26.] In my view, the school, in suspending the petitioners' daughter, used the guidelines and processes set out in its Code of Conduct, and in accordance with the agreement reached between the school and the petitioners on 4th April 2012. From the evidence before me, the petitioners had accepted the school's regulations, as had their daughter, in gaining admission to the school. They had agreed on 4th April 2012, and they had confirmed this agreement on 1st May 2012, that in the event of one more transgression of the school's regulations by their daughter, she would be asked to leave the school. I can therefore find no basis for alleging violation of the rights of the petitioners' daughter. She does indeed have a right to education, and her best interests must be taken into account in any decision affecting her. The respondent has been, in my view, very accommodating of the petitioners' daughter in the face of frequent, and on the face of it, unapologetic infractions. To deal with the petitioners' daughter in a manner different from the way they have dealt with her would doubtless have been against her best interests as it would have been to condone indiscipline and misconduct, to the detriment of her long term interests.

[27.] Further, as the respondent correctly argues, the rights of the petitioners' daughter must be considered alongside the rights of the other students in the school. The school has an obligation to all its students, and as the respondent submits, failing to discipline the students who break rules would set a bad precedent and affect students and parents who are willing to abide by school regulations

[28.] There is no material placed before me from which I can properly find any violation of the petitioners' daughter's rights under Articles 43(1)(f) or 53(2) The school must be allowed to govern its student body on the basis of the provisions of the Education Act and its Code of Conduct, and the court will be very reluctant to interfere unless very strong and cogent reasons for interfering with its decisions are placed before it, which has not been done in this case. I agree with the sentiments of Nyarangi, JA in Nyongesa & 4 Others -v- Egerton University College (1990) KLR 692, which were cited with approval by Musinga J in Republic -v- Egerton University ex parte Robert Kipkemoi Koskey Nakuru Misc. Civil Application No 712 of 2005 that:

“Having thus stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run

universities or indeed any other bodies. However, courts will interfere to quash decision of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.”

114. **To the Respondent, its decision to suspend and/or expel the Applicants was not unreasonable.** The Applicants were duty bound to comply with the Rules and Regulations of the Respondent. Immediately, they failed to do so, the Respondent was at liberty to apply its disciplinary procedure and since expulsion and suspension are some of the penalties which the Respondent has power to impose as a disciplinary action, the Respondent’s decisions cannot thus be said to be unreasonable. To the Respondent, since any institution faced with similar circumstances as the Respondent could have imposed the same penalties as the Respondent imposed upon the Applicants, the Respondent’s decision cannot be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. In this respect it relied on **Kokebe Kevin Odhiambo & 12 Others vs. Council of Legal Education & 4 others [2016] eKLR**, the High Court stated as follows:

“It must be remembered that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.”

115. It was submitted that the Applicants have a right of appeal which they have failed to exhaust before resulting to Judicial Review. To the Respondent, it is a cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. Pursuant to the provisions of PART IV (C) (2) (iv) of the Respondent’s students information handbook 2015/2016, the Applicants have a right of appeal which they have failed to exhaust before coming to court and in this case, the 4th, 6th, 7th and 8th Applicants have filed their respective appeals which are pending hearing and determination. It was the Respondent’s case that an appeal to the Senate Disciplinary Committee is the appropriate remedy and that the right to appeal subsists notwithstanding Senate approval of the Disciplinary Committee’s decision on expulsion. Accordingly, commencement of this suit is ill advised and the suit should be dismissed. In this respect the Respondent relied on section 9(2) of the ***Fair Administrative Action Act, No. 4 of 2015*** and contended that whereas subsection (4) of the aforesaid section gives the Court the powers to *exempt such person from the obligation to exhaust any remedy in exceptional circumstances if the court considers such exemption to be in the interest of justice*, the onus is upon the Applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case however, it has not been demonstrated that the appeal mechanism would be a less convenient or less appropriate remedy.

116. In this respect the Respondent relied on **Environmental & Combustion Consultants Ltd vs. Kenya Pipeline Company Limited & 2 others [2016] eKLR**, in which the court stated as follows:

“In this case there is no evidence on which I can find that there exist exceptional circumstances which would justify, the exemption of the applicant from exhausting the available remedies. This was the position adopted in Civil Appeal No. 84 of 2010; Republic vs. National Environmental Management Authority, where the Court of Appeal held that:

“...where there was an alternative remedy and especially where Parliament had provided a

statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example *R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD* case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge.”

117. In addition, the Respondent relied on *Republic vs. Kenya Revenue Authority exparte Interactive Gaming & Lotteries Limited* [2016] eKLR, where the court stated as follows;

“There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute...It is now therefore a cardinal principle that, save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. In *Re Preston* [1985] AC 835 at 825D Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.”

118. In conclusion, it was submitted that the Respondent has a duty to maintain discipline in the University and it is not the role of the judicial review court to determine whether the Applicants committed the acts which they were charged with or not. The role of the judicial review court is to ensure that the Respondent’s decision was arrived at in accordance with the principles of natural justice and in this case the Applicants have not demonstrated that the Respondent flouted any of the principles of natural justice. Hence, the notice of motion herein ought to be dismissed. In this respect the Respondent cited the House of Lords decision in *Chief Constable vs. Evans* [1982] 3 ALL ER 141, where the Lord Chancellor, **Lord Hailsham of St. Marylebone**, stated at p 143 as follows with respect to the judicial review remedy:

“This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration, is intended to protect the individual against abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner”.

119. To the Respondent, it is responsible for all the students’ affairs including that of disciplining students as are deserving of discipline and for good reason. It would otherwise be chaotic and absurd to expect that an external body would step in and take charge of the University’s disciplinary matters with regard to its students and cited the holding in *Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University* [2014] eKLR, where the High Court cited with approval the decision in *Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009*, where it was held as follows:

“Discipline at the Respondent’s University is necessarily an internal process conducted using internal personnel. It would be impractical to sub-contract or delegate as it were, this function to an outside agency. Most bodies established under statute also establish disciplinary committees. Kenyatta University is no exception. The composition of the disciplinary committee is set out in the Statute, and it comprises University officers. The University has jurisdiction to conduct its own disciplinary proceedings. This must necessarily be so. The suggestion that disciplinary proceedings are a matter for courts is untenable...the existence of such a disciplinary committee

has always been recognized by the courts. The courts also recognize that their relationship with such committees is limited to supervision.”

120. To the Respondent judicial review remedies are discretionary in nature and in **Republic vs. National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR**, the High Court held as follows:

“I am cognisant of the fact that judicial review remedies being discretionary, the Court would not grant them in certain circumstances even if the same are merited. As is appreciated, in *Halsbury’s Laws of England* 4thEdn. Vol. 1(1) para 12 page 270:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief.

121. In the Respondent’s view, to in effect reinstate the suspended and/or expelled students would be most detrimental to the Respondent and make it impossible to maintain any discipline in the University hence the Court was urged to dismiss the notice of motion herein with costs.

Determinations

122. I have considered the issues raised herein. In my view it is important for the determination of the issues raised in these proceedings to understand the Respondent’s disciplinary procedures. The Respondent contends in paragraph 21 of the replying affidavit sworn by **Prof. Hentry W. Mutoro** that the Rules and Regulations Governing the Organisation, Conduct and Discipline of Students exhibited on behalf of the Respondent are similar to those exhibited by the 1st Applicant in his Supplementary Affidavit filed on 27th May, 2016.

123. It is however clear that the copies of the alleged Regulations exhibited by both parties are not exactly the same. However from the submissions filed on behalf of the Applicants, it seems that the copy exhibited by the Applicants is an abridged version of the one exhibited by the Respondent, though the said abridged version omits material particulars contained in the copy exhibited by the Respondent. For example, the composition of the Halls Disciplinary Committee seems to have been omitted from the said abridged version.

124. It is clear that from the Rules and Regulations Governing the Organisation, Conduct and Discipline of Students exhibited by the Respondent, which Rules and Regulations I must say suffer from poor draftsmanship, that there are 2 levels at which disciplinary proceedings are to be undertaken at the initial stage. Where an offence is committed within the Halls of Residence or relate to the proper conduct of residential affairs, the matter is to be reported to the Halls Disciplinary Committee for action. It is only where such a matter is, in the opinion of that Committee essentially of an academic nature or involves issues extraneous to residential affairs of the hall concerned that the same is transmitted to the appropriate

College Disciplinary Committee for action.

125. This particular Committee is comprised of the Warden as its Chair, the Dean of Students, the Director of Students Welfare Association (SWA), a representative of the Faculty of the student concerned, the Head Custodian of that Hall, the Student Hall Chairperson and the Hall Administrator as its Secretary.

126. All other disciplinary offences wherever committed are to be handled by the Principal- Chairman, the Dean of Faculty/ Director of Institute of School, the Chairman of the Student's Department where appropriate, one representative nominated by the College Student's Organization, one representative from the Student's Hall of residence nominated by the Student's Hall Chairman and the College Registrar as the Secretary. It is however expressly stated that in respect of offences relating to examination and other academic matters, students' presentation are excluded.

127. It is provided that in such proceedings a summoned student is entitled to a fair hearing and to representation either in person or by someone of his/her choice, to call witnesses in defence, and to appeal to the Senate Disciplinary Committee. However, legal representation is expressly excluded.

128. It is however expressly provided under the Regulations that no student may be expelled from the University, and any penalty imposed by a Disciplinary Committee shall not take effect without the approval of the Senate Disciplinary Committee. In arriving at its decision, the appropriate Committee is however at liberty to take into account the student's past conduct.

129. The first issue for determination is therefore whether the Respondent complied with the disciplinary procedures in the process of arriving at its determination. That question, it is my view falls squarely within the judicial review jurisdiction. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected 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.”

130. The requirement for stringent compliance with procedural rules is even more crucial in disciplinary matters. The powers and the procedure before disciplinary bodies was dealt with in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, where the Court expressed itself as follows:

“The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute...Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the

Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called “conduct short of expected standards of professionalism”, and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully...Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee’s findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a ‘determination’ within the meaning of empowering legislation was accordingly a nullity...Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law...It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”

131. In Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

132. That a Tribunal ought to be properly constituted is trite. In This was the position in Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587 where the Court held:

“I would at this stage adopt the observations made in the Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77 where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; “1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best...; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi-lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.”

133. In the case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 it was held:

“It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a

public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...”

134. What are the consequences of failure to adhere to the procedural rules? In **Resley vs. The City Council of Nairobi [2006] 2 EA 311**, the Court made a sweeping and rather blunt statement to the effect that:

“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent’s statements that the Court’s role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty’s subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place.”

135. In my view however the right approach should be the one adopted in **Pastoli vs. Kabale District Local Government Council and Others** (supra) at page 305 that:

“When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be “substantial compliance” with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory.”

136. In this case it is clear that the decision by the Respondent has the effect of impinging upon the

applicants' right to education. Although the applicants contended that they are youths as defined by the Constitution, there is no evidence before me on the basis upon which I can find that this is so. The mere fact that the applicants are students does not automatically place them within a certain age-bracket. What cannot be doubted however is that they are students and are entitled to their right to education. Caution must however be exercised as was appreciated by this Court in **Oluoch Dan Owino vs. Kenyatta University, High Court Petition No. 54 of 2014**, that:

“As I understand it, the right to education does not denote the right to undergo a course of education in a particular institution on one’s terms. It is my view that an educational institution has the right to set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions.”

137. In my view where the action under challenge has the potential of restricting human rights and fundamental freedoms under the Bill of Rights, any procedural rule enacted with a view to ensuring the due process is adhered to before any adverse action is taken ought to be considered seriously since under Article 19 of the Constitution, the Bill of Rights is the framework for social, economic and cultural policies and the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. Our Constitution appreciates that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. This position was restated with respect to the rules of natural justice by the Uganda Supreme Court in **The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, as follows:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”

138. Our own High Court (Nyamu, J) in **Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787**, eloquently asserted as follows:

“The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society’s values and morals including economic and social conditions etc whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World. The *ex parte* order could not have been spared in any event for the reason that it would have hindered the smooth flow of the streams of justice for all by blocking the 221 persons while the rivers of Constitutional Justice or any justice at all should flow pure for all to drink from them.”

139. According to the 1st Applicant, the notice to appear before the College Disciplinary Committee was too short for him to prepare his case and further the said notice never informed him of his right to representation and to call witness. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR**, it was held that:

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present

a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2nd edition, at page 272, notes that, ‘Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision’...Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including ‘(c) responsive, prompt, effective, impartial and equitable provision of services’ and ‘(f) transparency and provision to the public of timely, accurate information’...Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* [1994] 2 IR 439)...In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (See *Charkaoui v Canada* [2007] SCC 9, *Alberta Workers’ Compensation Board v Alberta Appeals Commission* (2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police* (1988) 51 DLR (4th) 750.)”

140. This was the position adopted by **Kasanga Mulwa, J** in ***Republic vs. Registrar of Companies ex parte Githungo*** [2001] KLR 299, where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

141. Section 4(3) of the *Fair Administrative Action Act, 2015*, (hereinafter referred to as “the Act”), a statute enacted pursuant to Article 47 of the Constitution, provides as follows:

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

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

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

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

(d) a statement of reasons pursuant to section 6;

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

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

1432. Section 4(4) on the other hand provides as follows:

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 his choice;

be heard;

(b) cross-examine persons who give adverse evidence against him; and

(c) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.;

143. Similarly, section 7(2)(a)(i)(ii) and (iii) of the *Fair Administrative Action Act, 2015* provides that a court or tribunal may review an administrative action or decision, if the person who made the decision denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case.

144. One must however appreciate that what the law requires is a right to be afforded an opportunity of being heard as opposed to the right to be heard. Whereas under Article 47 of the Constitution the 1st applicant was entitled to a fair administrative action which in my view would connote *inter alia* that the applicant be given adequate time to prepare for the case, where an opportunity of being heard has been afforded it is upon the applicant to bring to the notice of the Tribunal that the time given to him does not accord him time of adequately preparing for his case and to seek more time to do so and it is only when the Tribunal declines to afford him adequate time to properly present his case that the discretion may be faulted. As was held in Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

145. In this case, however, the applicant has not contended that he asked for time to enable him adequately prepare for the proceedings. The reason for adequate notice is meant to enable the person facing administrative proceedings time to adequately prepare for the same not only in terms of addressing the allegations against him but also to enable him marshal his evidence in order to controvert those allegations. Where therefore the notice though *prima facie* short, the person charged feels that he or she is properly armed to deal therewith the Court will not interfere. It is therefore for an applicant to show that the period of the notice given taking into account the circumstances was not adequate for him to adequately rebut the same. According to the minutes exhibited before this Court there is no evidence that the 1st applicant requested for adjournment as he was entitled to pursuant to section 4(4)(d) of the *Fair Administrative Action Act, 2015*. Accordingly, I cannot find that the period of the notice was prejudicial to the 1st applicant.

146. It was also contended by the 1st applicant that the said notice never informed him of his right to representation and to call witness. Under the Respondent's Regulations, the 1st applicant was entitled to call witnesses in defence. There is however no evidence that the 1st applicant requested to call any witness in his defence. This same argument applies to the allegation that the particulars of the charges levied against the 1st applicant were not clear as he ought to have applied for the same to be clarified to him and if necessary sought more time to adequately prepare for the same.

147. That the applicant was entitled to representation either in person or by a person of his choice is clear from the *Rules Governing the Conduct and Discipline of Students*. This representation however

expressly excludes legal representation. Under section 4(3)(e) of the *FAA Act*, a person who is subject to administrative proceedings is only entitled to “*notice of the right to legal representation, where applicable.*” In other words the right to legal representation only applies where permitted under the relevant procedure. In this case, such a right was expressly excluded. On this issue it was held in **Enderby Town FC Ltd vs. The Football Association [1971] 1 All ER 218** that:

“The case thus raises this important point: is a party who is charged before a domestic tribunal, entitled as of right to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter of discretion of the tribunal. It is master of its own procedure; and if it, in the proper exercise of its discretion declines to allow legal representation, the courts will not interfere....in many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than a bad lawyer....But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: ‘We will never allow anyone to have a lawyer to appear for him.’ The tribunal must be ready, in a proper case, to allow it. That applies to anyone in authority who is entrusted with a discretion. He must not fetter his discretion by making an absolute rule from which he will never depart.”

148. Similarly in **Oluoch Dan Owino & 3 Others vs. Kenyatta University** (supra) the court held that:

“The petitioners have also argued that their right to choose, and be represented by, an advocate, and to be informed of this right promptly was violated. The right of a party to be represented by Counsel in quasi-judicial proceedings such as the petitioners were subjected to is well recognized, but is subject to the rules of procedure of the tribunal to which a party is appearing before, and must be requested for before a violation of the right to legal representation can be alleged...the issue of legal representation was not raised before the Disciplinary Committee, and it cannot therefore properly be raised now as a ground for challenging the decision of the Committee.”

149. In any event the provisions of section 4(6) of the Act ought to be taken into consideration when determining whether or not the procedure adopted was fair. That provision provides that:

Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

150. In other words an administrator may be empowered by a written law to follow a procedure other than the one prescribed under the *Fair Administrative Action Act* and such a procedure will not faulted as long as it does not derogate from the provisions of Article 47 of the Constitution.

151. In any event there is no evidence that the 1st applicant requested for such legal representation even if the same had been open to him to seek. In this respect in **Republic vs. Pwani University College Ex parte Maina Mbugua James & 2 Others , Miscellaneous Civil Application No. 28 of 2009**, the High Court held as follows:

“My own view is that if an individual requests for legal representation, then he should be entitled to such representation but in the present scenario there was no such request and no such denial, so the breach alleged does not arise at all.”

152. The 1st applicant however contended that there was no student representation on the Disciplinary Committee. That the *Rules Governing the Conduct and Discipline of Students* provide for student representation on the Disciplinary Committee is not in doubt. It is my view however, that without a person properly designated as a student representative in the Disciplinary Committee, one cannot say that the Committee was properly constituted. In this respect I refer to **Kenya Commercial Bank Ltd vs.**

Kenya National Commission on Human Rights Nairobi HCMA NO. 688 of 2006 [2008] KLR 362
where the Court expressed itself as follows:

“We have considered regulations 27 (1) & (2) and 35 (2). The chairperson establishes the hearing panel under regulation 27 (1 & 2) which comprises the presiding Commissioner, and others appointed by the chairperson, legal counsel and members of the Legal Services Department. That regulation envisages a panel consisting of more than one Commissioner, legal counsel and other staff. Regulation 35 (2) comes into play during the course of the hearing when for good reason, there is need to replace the absent Commissioners. There is no provision for the sitting of one Commissioner on the panel. Regulation 35 (2) does not apply here because right from the on set, only one Commissioner was appointed to preside over the dispute and the issue of replacement does not arise. The appointment of Godana, a single Commissioner to preside over the dispute out rightly contravenes regulation 27 (1) & (2) and is unlawful. It is the duty of the respondent to ensure that the requirements of the panel’s composition are met ie regulation 27. They cannot constitute the panel contrary to provisions of the law. In this case we find that Mr Godana had no power to sit alone on the panel presiding over the dispute between the applicant and the 1st Interested Party, as it is offends clear provisions of the law. The respondent purported to rely on regulation 36 which provides that an irregularity resulting from a failure to comply with any provision of this part or any direction of the hearing panel before it has reached its decision shall not of itself render any proceedings void. We find that regulation 36 cannot remedy that omission because the composition of the Panel having been specifically provided for is a fundamental provision which should ideally have been in the Act. Those proceedings presided over by Godana contrary to statute call for intervention of this Court by way of judicial review.” See Equator Inn vs. Tomasyan [1971] EA 405.

153. That a Tribunal must be properly constituted was emphasized in Gathigia vs. Kenyatta University [2008] KLR 587 in which the Court held:

“I would at this stage adopt the observations made in the Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77 where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; “1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best.....; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi-lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.” [Emphasis added].

154. See also Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003 and Republic vs. Tongaren Land Disputes Tribunal & Others Ex Mukhwana Kitale HCMA No. 23 of 2008.

155. I accordingly associate myself with the position adopted by Musinga, J (as he then was) in Nairobi High Court Misc. Appli No 257 of 2010 - R vs. The Communications Appeal Tribunal and Others (2011) e KLR at page 6 that:

“A proper construction of the law is that a board, committee or tribunal should be established with the numbers and qualifications as required by the relevant law for it to perform its statutory duties...But where the Minister is by law required to appoint five members of a tribunal following a given criteria and he appoints only three...to the extent that the tribunal is lacking two members, it is not properly constituted... The Tribunal was not properly constituted when it heard and determined the appeal. The purported proceedings were null and void and of no legal consequences.”

156. In this case it is clear from the Rules and Regulations that the Disciplinary Committee was required to be constituted by *inter alia* one representative nominated by the College Student’s Organization. That there was no representative nominated by the College Student’s Organisation is clear from the minutes of the meeting exhibited by the Respondent. However, the Respondent’s contention was that pursuant to Part IV(C)(2) of the Rules and Regulations, it was not a mandatory requirement for there to be a student representative on the Disciplinary Committee in light of the circumstances of the disputed elections that led to unrest in the University. Whereas, it is not clear from the copy of the Rules exhibited whether the phrase “where appropriate” refers to the Chairperson of the Students Department or to the representative nominated by the College Students’ Organisation, it is my view that the onus was upon the Respondent to show to the satisfaction of this Court that it was inappropriate for the 1st applicant to be afforded the benefit of students’ representation at the Committee. Bare averments in my view cannot suffice in disciplinary proceedings where the rights of a person as enshrined under the Constitution are at stake. I therefore find that the Disciplinary Committee that heard and determined the complaints against the 1st applicant was not procedurally constituted. In **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly.

157. It was further contended by the 1st applicant that on Friday April 22, 2016 through the *Daily Nation* Newspaper he was informed by the Respondent of the verdicts of the Senate Students Disciplinary Committee and requested to collect letter communicating the same which letter he collected on 22nd April, 2016 from the Respondent’s precincts. According to the said letter the recommendation of the Disciplinary Committee to expel him was approved by Senate on April 21, 2016. He however contended that the decision to expel him from the Respondent’s premises cannot take effect without the approval of the Senate Student Disciplinary Committee as per the Rules governing conduct and discipline of the Students. Procedurally, it was submitted that after the Disciplinary proceedings, the penalties proposed by either College or Halls Disciplinary Committee are place before the Senate for approval before communication to the Student while appeals against the said decisions go to the Senate Students Disciplinary Committee. In this case however the penalties were not approved by the said Senate Disciplinary Committee.

158. The Respondent on the other hand was of the view that the right to appeal subsists notwithstanding Senate approval of the Disciplinary Committee’s decision on expulsion.

159. It is important to set out the relevant post-college and Hall Disciplinary Committees’ provisions. According to the Rules and Regulations, a student subjected to either disciplinary committee proceedings is entitled to appeal to the Senate Disciplinary Committee. It is however provided that no student may be expelled from the University, and any penalty imposed by a Disciplinary Committee shall not take effect without the approval of the Senate Disciplinary Committee.

160. In the letter ratifying the decision of the Disciplinary Committee which was written by the Respondent’s Vice Chancellor, it was expressly stated that the recommendation to expel the 1st applicant was approved by *the Senate*. In my view this is not the body empowered to approve the penalties imposed by the respective Disciplinary Committees. That body is expressly stated to be the Senate Disciplinary Committee which is to be comprised of the Deputy Vice-Chancellor (Academic Affairs) as the Chair, Principal/Director of SWA, Dean of Students, Dean of Faculty, Warden or equivalent, Two (2) Senate Representatives, Three (3) Students Representatives and Academic Registrar as the Secretary.

161. There is no provision in the Rules and Regulations permitting that body to delegate its powers. As was held by Lord Somervell in Vine vs. National Dock Labour Board [1956] 3 All ER 939, at page 951:

“The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated...There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorise someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether “judicial” or not, cannot be delegated.”

162. In the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected 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.” [Emphasis mine.]

163. Similarly in Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271, the Court expressed itself as follows:

“What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer’s evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director’s powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred.”

164. This position is restated in section 7(2)(a)(i)(ii) and (iii) of the *Fair Administrative Action Act, 2015* where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in

contravention of any law prohibiting such delegation.

165. Whereas it may well be that the members constituting the Senate Disciplinary Committee are the same as the Members of the Senate, and there is no evidence to this effect, the law is that when carrying out its mandate as the Senate Disciplinary Committee it must constitute itself as such since the Rules and Regulations are very specific about the composition of the Senate Disciplinary Committee. It is however clear that the members of the Senate Disciplinary Committee are not necessarily members of the Senate. Therefore if the approval was made by the Senate as the letter indicates, and there is no evidence to the contrary, then the decision meting punishment on the 1st applicant was clearly unlawful and without jurisdiction. It was null and void and of no consequence.

166. It is therefore my view that there is no evidence that the decision of the Disciplinary Committee was approved by the Senate Disciplinary Committee in order for it to have taken effect and the purported penalty meted against the 1st Applicant was imposed by a body that had no authority to do so hence the action was *ultra vires* null and void *ab initio*. This position is supported by section 7(2)(b) of the ***Fair Administrative Action Act, 2015*** which empowers this Court to review an administrative action or decision, if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

167. The applicants have however contended that by approving the penalty before the appeal was determined, the Respondent in effect locked them from preferring the appeals. If this position was correct it would warrant this Court to invoke its judicial review jurisdiction since section 7(2)(e) of the ***Fair Administrative Action Act, 2015*** empowers this Court to review an administrative action or decision, if the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant.

168. I have looked at the Rules and Regulations exhibited and there is no provision that gives the timelines within which an appeal is to be filed. Accordingly to hold the Senate hostage in its determination when no appeal is forthcoming would be unreasonable. I therefore hold that there is nothing barring the Senate Disciplinary Committee from approving the penalty proposed by the initial Disciplinary Committees before the appeal if any is filed and determined though as I have commented hereinabove the said Rules and Regulation would have benefited from better draftsmanship. Similarly, it is my view that nothing bars a student from lodging an appeal even after the Senate Disciplinary Committee has approved the penalty.

169. It was further contended based on section 4(3)(c) of ***Fair Administrative Actions Act No. 4 of 2015***, that to the extent that there was no notice of right to appeal as envisaged under the forgoing provisions of the law which are in mandatory terms, the decision of the Respondent was procedurally unfair and ought to be quashed. That provision provides as follows:

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision notice of the right to a review or internal appeal against an administrative decision where applicable.

170. To my mind the failure to notify the student of his right of appeal does not necessarily nullify an otherwise valid decision though it may be a ground for extending the period for appealing where timelines are stipulated for doing so.

171. According to the Applicants, the penalties are not proportionate in the circumstances and in this respect they relied on Article 43(1)(f) of the Constitution which provides that every person has a right to education. It was submitted that the expulsion or suspension is a serious limitation to enjoyment of right to education or access to education and training as provided for under Articles 43(1)(f) and 55 and that the nature of the limitation is that it completely denies the right or access to the same. Such a limitation must be justified in terms of the importance of the purpose of limitation and that the requirement of the limitation must overwhelm the enjoyment of the fundamental right. The justification must further be weighed against the other less restrictive means to achieve the same purpose. Therefore, the Respondent

not only needed to demonstrate that the purpose of limiting a fundamental right overrides the need to enjoy the same, but also that there were no other less restrictive measures to achieve the same purpose. In the circumstances, the Respondent failed to demonstrate any overwhelming objective or purpose to be achieved by the expulsion or suspension of the Applicants, and in any event, there are far much less restrictive measures which would have achieved the same objective or purpose if any. For instance the rules provide for a warning letter and payment of damages commensurate with the nature and gravity of the offence. Such measures, according to the applicants are less restrictive of the enjoyment of the fundamental right and it has not been shown that the same purpose or objective will not be achieved. In **Paul Kuria Kiore vs. Kenyatta University Petition 396 of 2014**, this Court expressed itself as follows:

“That the Respondent has powers and jurisdiction to discipline students is not in dispute. Their power to mete out the punishments they meted to the *ex parte* applicants cannot therefore be contested. The question to be determined is whether in arriving at its decision the due process of the law was adhered to... Therefore in meting out punishment the Respondent was expected to exercise its discretion reasonably and not arbitrarily and capriciously or in bad faith... To hold that the Respondents were the sole judge when it comes to the exercise of discretion with respect to the punishment to be meted would be to throw the rule of law out of the window and when whittle away the Constitutional safeguards provided under Article 47 of the Constitution. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion.”

172. I accordingly concur with the position adopted by **Ibrahim, J** (as he then was) in **Eldoret High Court MiscAppli No: 1 of 2009, R vs. The Kenya National Examination Council, [2009] eKLR**, in which he stated at page 11 as follows:

“I agree that the cancellation of the entire examination results due to an irregularity in respect of one question in one part of a subject has led to very dire and serious ramifications for the candidates:-

- i. The Candidates have been completely locked out of future professional careers they would have wished to pursue upon completion of their 8.4.4 education as they shall not get any Certificate and cannot therefore get a chance to further their studies.**
- ii. The cancellation renders their entire studies from kindergarten up to Form Four a waste both in terms of resources expended and considering that the job market requires a basic minimum of KCSE Certificate before one can be employed in any meaningful field.**
- iii. The Candidates character, reputation and esteem in the eyes of their parents, the local community and society at large has been adversely and negatively impaired and dented.**
- iv. The Candidates and the school have been stigmatized and will certainly be ostracized. They will forever carry the tags of cheats and academic thieves.**
- v. Any ambition to continue with their education and careers has been nipped in the bud in shame and disgrace. They remain with no moral or dignity in all aspects.**
- vi. The school being Church associated will be shunned and even the sponsors may withdraw support or call for expulsion of the Head Teacher, Teachers and Management.**
- vii. The Candidates may be negatively affected in their churches and religious associations.**

The Respondent has submitted that it looks at the Applicants as Candidates and not young

girls. That may be so, however, this Court looks at the Candidates as young girls many of them possibly minors. They are our children and are flesh and blood. They are our Kenyan youth and the future leaders in this Country. They have feelings, dignity, emotions and hearts that can be broken.

They have livelihoods, careers and the future which are on the verge of destruction. How can we look in their eyes and say that they have no right to be heard in respect of the charges of collusion and misconduct in examinations of cheating and dishonesty in examinations. Collusion borders on fraud and even criminality in the mores of the society.

Should a Judicial Review Court allow the said to be countenanced or to happen again in future? The “Wednesday Principle” states that:-

“Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonable could have reached that decision.”

I agree as stated in the CHARLES KANYINGI CASE (P.7) that:-

“An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have no rights, liberties or interest of the person concerned and the purpose which the authority is seeking to pursue.:

The Counsel may well have made its decision in pursuance of its mandate to conduct examinations in the public interest. Be that as it may it would amount to a total miscarriage of justice, gross violation of the cardinal principles of Natural Justice and a mockery of the Rule of law in a country that prides itself to be Democratic Society with a Constitution that protects the individual rights and freedoms of its citizenry and others to allow the sacrifice of the Applicants’ fundamental rights at the altar or institutional convenience, expediency or unproven public interest as in this case.”

173. This view now has statutory underpinning since section 7(2)(l) of the *Fair Administrative Act* provides that a court may review a decision of an administrative body if the decision is not proportionate to the interests or rights affected. In this case, the Rules and Regulations provide for different types of punishments with some being more serious than others. Whereas sentencing is at the discretion of the Respondent, the exercise of the discretion must be based of rational grounds and ought not to be arbitrary. It is my view that such arbitrary punishments cannot pass the test of proportionality which is now recognized as one of the key considerations in judicial review proceedings. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003**, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield Vs. Minister of Agriculture and Fisheries [1968] HL.**

174. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, the Court expressed itself as follows:

“The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or

if he plainly misdirects himself in fact or in law...In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons...Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void...The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority...An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law..."

175. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, the Court held:

“ An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law...It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”

176. Therefore in meting out punishment the Respondent was expected to exercise its discretion reasonably and not arbitrarily and capriciously or in bad faith. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, those in authority should give reasons and if they give none the court may infer that they had no good reasons. Similarly where the reason given is not one of the reasons upon which they are legally entitled to act, the Court is entitled to intervene since their action would then be based an irrelevant matter. That administrative bodies are now enjoined to consider relevant matters and avoid relying on irrelevant ones is now trite. Section 7(2)(f), a court or tribunal may review an administrative action or decision, if the administrator failed to take into account relevant considerations.

177. It is therefore my view that where there are various sentences provided by the law without the law specifying which penalty applies to what offence, where the administrative body opts for the heaviest penalty it ought to give reasons for the same if it is to escape the accusation of arbitrariness. Such considerations may as indicated in the Rules and Regulations include the conduct of the student (past and present). However the reasons for imposing such sentencing ought to be disclosed.

178. It was submitted that there is no offence of leading or inciting created under the rules. The Applicants contended that they were not the leaders of any group, and therefore was no basis to hold them responsible for the conduct of fellow students who were not under their effective control, power or command. Furthermore the Constitution creates a right to demonstrate, and therefore the same cannot be an offence at the same time. Whereas the Constitution creates the right to demonstrate, it must be noted that the right is not absolute and under Article 24(1)(d) of the Constitution, the enjoyment of that right ought not to prejudice the rights and fundamental freedoms of others while under Article 37 the right is only available in situations where the person exercising it does so peaceably and unarmed.

179. With respect to whether the 1st applicant was guilty of the charges laid against him, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be aground for quashing a decision if there was material on record which would have warranted a finding to the contrary. It is not for this Court to interfere with the decision of an administrative body arrived at on merits unless such a decision is in the circumstances irrational.

180. It was contended by the Respondent that even if the application is merited, this Court ought not to grant the orders sought as the 1st applicant had not exhausted the appellate remedy that was available to

him. As was held by this Court in Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013:

“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission 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. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

181. However as was appreciated Nyamu, J (as he then was) in Stephen Mutuku Muteti vs. The Director of Land Adjudication & Settlement & Others Nairobi HCMA 246 of 1998:

“The court deals with limits of power because the Government is limited by law and when public officers act outside the law aggrieved parties are as of right entitled to ask for relief from the Courts so that those limits of power are defined by the Court and the necessary sanctions are given. Where the decision making process is clearly flawed in that the public officers clearly acted outside their jurisdiction and their acts were both biased, unreasonable and not supported by any provision under the relevant Act, a constitutional and judicial review court cannot deny the applicant a judicial remedy because the illegality brings the matter within the judicial review ambit.

182. Whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action simply because there is a right of appeal provided by the statute especially where such a right is less convenient, effective and beneficial

183. As this Court held in Republic vs. Ministry of Interior and Coordination of National Government & the Public Procurement Administrative Review Board Ex-Parte: ZTE Corporation and ZTE Corporation (Kenya) Limited Judicial Review Case No. 441 of 2013

“...ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality... However, where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable.”

184. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person’s right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved.

185. In this case I have found that the purported decision effectuating the penalty imposed on the 1st applicant was no decision at all. In those circumstances it is my view that the same was null and void *ab initio* and there was nothing to be appealed against. This is in line with the celebrated decision in Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 to the effect that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and

there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so.

186. In my view the preliminary objection based on the availability of alternative remedies fails and is disallowed.

187. With respect to misjoinder, it is my view that the same is inapplicable to public law litigation which is concerned with public rights as opposed to personal aggrandisement of the litigants.

188. Since the 1st applicant's case is substantially on all fours with the 6th Applicant's case the findings in respect of the 1st Applicant's case apply *mutatis mutandi* to the 6th Applicant's case. With respect to the common issues raised by all the applicants, the above determinations will similarly apply.

189. With respect to 2nd Applicant, he averred that he was never afforded an opportunity of being heard due to misleading information given to him which made him not attend the said proceedings. It is clear that the said letter summoning him to appear before the Committee stated that he was to attend the same on 21st April, 2016 at 2.00pm though the Respondent contends that this letter was a forgery and exhibited its own letter dated 14th April, 2016 by which the 2nd Applicant was required to appear on 20th April, 2016 at 8.15am. Both letters were purportedly authored by one **H N Njeru** who has not sworn any affidavit to dispute the authenticity of the letter exhibited by the 2nd Applicant. In the absence of that affidavit, there is no basis upon which I can find that the letter exhibited by the 2nd Applicant was in fact a forgery. If the Respondent's version is correct one wonders why it was necessary for the Committee to make attempts to get in touch with the 2nd Applicant by calling him and sending him text messages.

190. In the premises, I find that due to the misleading information given to the 2nd Applicant, he was never afforded an opportunity of being heard.

191. Similarly, the 7th Applicant averred that when he availed himself on 20th April, 2016 at 8.30 am for the hearing before the College Disciplinary Committee at the Deputy Principal's Boardroom, College of Humanities and Social Sciences in main Campus, he was referred to Lower Kabete and upon arrival thereat, he was informed that his case was heard in his absence on 20th April, 2016 at 8.30 am.

192. The Respondent however maintained that the hearing of the 7th Applicant's case was never altered and that the same proceeded as scheduled.

193. What is however intriguing is that from the minutes this applicant pleaded not guilty and according to the Committee the determination was arrived at after he had been interviewed. The minutes are however clear that he was absent. It is therefore clear that the minutes themselves do not reflect what actually took place on that day.

194. As for the 3rd, 4th, 5th and 8th applicants, their cases were that the purported unlawful items and substances with which they were charged were allegedly found in rooms which they were not in occupation of. Further that the right body which ought to have presided over their cases were the respective Halls Disciplinary Committee. From the Rules and Regulations it is clear that these were offences which were allegedly committed within the halls of residence and ought to have been dealt with by the respective Halls Disciplinary Committees. The minutes are however clear that they were not so dealt with. No reasons have been advanced as to why the procedure was not adhered to.

195. It is therefore clear that the Tribunal that purportedly heard the cases against the 3rd, 4th, 5th and 8th Applicants had no powers to hear their cases unless the same were referred to them by the Halls Disciplinary Committees. There is no evidence and no averment that such reference was made.

196. As already discussed hereinabove an improperly constituted Tribunal has no power to preside over an administrative action.

197. In my view the Respondent opted for shortcuts to very important disciplinary proceedings which proceedings were bound to dictate the path that the applicants' future would take. As this Court has held before, parties and their legal advisers ought to take the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** seriously that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. The Court in **Macharia vs. Wanyoike [1981] KLR 45**, was of the view that experience has repeatedly shown that short-cuts invariably result in being more expensive and time-absorbing in the end. Similarly, in **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** it was held that:

“The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision.”

198. In the end having considered this application, it is my view and I so find that the procedure adopted by the Respondent was replete with procedural errors. The several errors disclosed in the manner in which the Respondent conducted the disciplinary proceedings against applicants in my view constitute unfairness in the manner in which the Respondent treated the applicants.

199. Before I conclude this judgement, I must make it clear that this decision has not determined the merits of the complaints levelled against the applicants but only dealt with the disciplinary process. I can do no better but to rephrase the decision of **Mumbi Ngugi, J** in **F M vs. The Principal Kianda School Nairobi No. 281 of 2012** that the rights of the applicants must be considered and balanced alongside the rights of other students at the University and the general public and that the University has an obligation to all its students, and that failing to discipline students who break the rules and regulations of the University would set a bad precedent and affect students who are willing to abide by the University Rules and Regulations and where such conduct infringe upon the rights of the public, the University has the right, the power and the obligation to act in accordance with the law.

200. In the premises I find merit in this application.

Order

201. Consequently, the orders which commend themselves to me and which I hereby grant are as follows:

- 1. An order of certiorari to removing into this Court for the purposes of being quashed and quashing the decisions Respondent to expel and suspend the Applicants.**
- 2. An order of mandamus compelling the Respondent to take the necessary steps to facilitate the Applicants to access and continue with their education unless and until otherwise their education at the Respondent University is otherwise lawfully terminated or suspended.**

202. As the merits of the charges levelled against the applicants remain unresolved there will be no order as to costs.

203. It is so ordered.

Dated at Nairobi this 14th day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ojwang for the Applicants

Miss Nyagah for the Respondent

CA Mwangi