



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.297 OF 2014

BETWEEN

OUMA CHRISTOPHER ODONGO.....PETITIONER

AND

KENYATTA UNIVERSITY.....RESPONDENT

JUDGMENT

Introduction

1. This Petition was filed on 2nd July 2014 by Ouma Christopher Odongo, a former student of the Kenyatta University who was expelled on 28th May 2013 for alleged misconduct.

2. In the Petition, he challenges the decision to expel him and seeks the following orders:

a) A declaration that the decisions of the Students' Disciplinary Committee warning and subsequently expelling him from Kenyatta University were made in breach of the rules of natural justice as set out in Article 47(1) of the Constitution that guarantees administrative action that is lawful, reasonable and procedurally fair.

b) A declaration that the Petitioner was not given reasonable or adequate time and facilities to prepare his defence before the Students' Disciplinary Committee in accordance with his fundamental right and freedom guaranteed under Article 50(2) of the Constitution.

c) A declaration that the Students' Disciplinary Committee failed, refused and/or neglected to inform the Petitioner that he had the right to be defended by an advocate in accordance with his fundamental right and freedom guaranteed under Article 50(2) of the Constitution.

d) A declaration that the hearings before the Students' Disciplinary Committee and the Appeals Committee were neither fair nor independent as is required under Article 50(i) of the Constitution.

e) A declaration that in all the circumstances, the decision to DISCONTINUE the Petitioner from pursuing his studies at Kenyatta University was harsh, excessive and amounted to cruel, inhuman or degrading treatment outlawed under Article 25(a) of the Constitution.

f) A declaration that the Petitioner was not accorded a proper or fair appeal.

g) An order consequential upon the above declarations directing Kenyatta University to re-admit the Applicant to complete his studies.

h) An order awarding the Petitioner damages for breaches of his constitutional rights as pleaded in paragraph 11(i) to (vi).

i) Costs.

j) Interest on (h) and (i) above.

k) Such further orders as the Honourable Court may deem expedient and just.

Petitioner's Case

3. The Petitioner's case as can be gleaned from his Petition, Supporting Affidavit and Written Submissions is that he had been a diligent student at Kenyatta University since his admission to study there and was surprised to receive a letter dated 31st January 2012 from the Registrar (Academic) requiring him to appear before the students' Disciplinary Committee on 2nd February 2012 to answer charges relating to allegations that;

i) He had incited other students in questioning why the University had not been closed following a Lecturers' strike in November 2011.

ii) He had deliberately spread misinformation to antagonize students and to rise against the University's Management following the death of a student known as Felix Ogeto on 26th November 2011.

iii) He caused mayhem and caused the derailment of a KUSA (Kenyatta University Students Association) retreat on 6th January 2012. He had also allegedly falsely accused the KUSA Executive of having been compromised to accept increased prices for students' meals.

iv) He had caused an ugly scene at the University's Nakuru Campus and greatly embarrassed members of staff present.

4. According to the Petitioner, whilst he dutifully appeared before the Students' Disciplinary Committee, he noted the following:

i) He was not furnished with any evidence to support the accusations leveled against him.

ii) He was not informed that he had the right to be represented by an advocate.

iii) He was not given any time to prepare his defence.

iv) He was not allowed to challenge the composition of the committee.

5. In any event and notwithstanding the above anomalies, a decision against him was reached in the following terms;

"It was therefore decided that you be STRONGLY WARNED against your actions in this regard. Please NOTE that flouting the University Rules & Regulations in the future shall lead to your expulsion from the University."

6. After the above warning, the Petitioner claims that he peacefully continued with his studies but on 28th

May 2013, he was again summoned to appear before the Students Disciplinary Committee where he was informed that he had committed an examination irregularity and by a letter dated 28th May 2013, he was informed that his studies had been discontinued for breach of the University Rules and Regulations Governing Students Conduct. His appeal against that decision was subsequently dismissed and thereafter he decided to file the present Petition.

7. His chief complaints in the said Petition are the following:

i) The decisions of the Students' Disciplinary Committee warning and subsequently expelling him from Kenyatta University were made in breach of the rules of natural justice as set out in Article 47(1) of the Constitution that guarantees administrative action that is lawful, reasonable and procedurally fair.

ii) The Petitioner was not given reasonable or adequate time and facilities to prepare his defence before the Students' Disciplinary Committee in accordance with his fundamental right and freedom guaranteed under Article 50(2) of the Constitution.

iii) The Students' Disciplinary Committee failed, refused and/or neglected to inform the Petitioner that he had the right to be defended by an advocate in accordance with his fundamental right guaranteed under Article 50(2) (g) of the Constitution.

iv) The hearings before the Students' Disciplinary Committee and the Appeals Committee were not fair, nor independent as is required under Article 50(i) of the Constitution.

v) In all the circumstances, the decision to DISCONTINUE the Petitioner from pursuing his studies at Kenyatta University was harsh, excessive and amounted to cruel, inhuman or degrading treatment outlawed under Article 25(a) of the Constitution.

vi) The Petitioner was not accorded a proper or fair appeal.

8. In his Submissions, Counsel for the Petitioner added that the issues that require determination are the following:

i) Was the Petitioner granted sufficient notice of the hearing of the Disciplinary Committee?

ii) Did the hearing of the Petitioner's case by the Disciplinary Committee amount to a fair and impartial administrative action?

iii) Did the conduct of the Respondent in the Disciplinary Committee and the subsequent appeal amount to a violation of the Constitution?

9. In that regard, Counsel submitted that following *inter alia* the decisions in **Eliud Nyauma Omwamo & 2 Others v Kenyatta University [2014] e KLR**, **Nyongesa and Others v Egerton University College [2006] eKLR**, **Joseph Mwenda Mbuko v Provincial Police Officer, Central Police and 2 Others [2013] e KLR**, where an administrative body fails to adhere to the rule that every person affected by its eventual decision is entitled to the rules of natural justice then its actions are a nullity in law on the right to fair administrative action would have been violated. Similarly, the right to be heard would have been violated where the affected person is not given the opportunity to cross-examine all witnesses who had testified against him. Reliance on the latter proposition was placed on the decisions in **Union Insurance Co. of Kenya Ltd v Ramsan Abdul Dhanji Civil Application No. Nai.179 of 1998** and **R v Inspector General of police ex-parte Patrick Nderitu [2015] e KLR**.

10. In a nutshell, Counsel urged the point that **Articles 47 and 50 of the Constitution** were violated by the Respondent and therefore the Petitioner is entitled to the orders elsewhere set out above.

Respondent's Case

11. The Respondent, by a Replying Affidavit sworn on 30th September 2014 by Dr. S. N. Nyaga, its Registrar (Academic) and by Submissions filed by its Counsel has made the point that the Petition is misguided because firstly, the Petitioner was caught red-handed with unauthorized written material inside an examination room in December 2012. Disciplinary action was later recommended and by letter dated 19th February 2013, he was invited to appear before the Students Disciplinary Committee.

12. Secondly, that on 28th February 2013 when he appeared before the said Committee, the Petitioner answered to the charge read out to him without either seeking further particulars of it or legal representation and the hearing was thereafter adjourned to 31st March 2013 to enable a Mr. Charles Kamau Ndung'u to give evidence in support of the Petitioner's answer to the allegations against him. The said Mr. Ndung'u did so and his testimony was taken into account when a decision was made regarding the Petitioner's alleged misconduct.

13. Fourthly, that the Committee, upon consideration of the evidence presented to it, decided that the Petitioner's studies at Kenyatta University ought to be discontinued and his right of appeal was explained to him. He exercised that right without any reservations but his appeal was dismissed by the Students Appeals Committee at its meeting of 27th June 2013.

14. It is the Respondent's case therefore that the Petitioner was granted a hearing, allowed to call a witness in his defence, was granted the right of appeal which he exercised and that at no time did he seek to be represented by an advocate neither did he complain about any of the disciplinary processes that he underwent.

15. In submissions, Counsel for the Respondent stated that contrary to the Petitioner's contention, on 7th January 2012, he was informed that he was suspected of involvement in examination irregularities "***in the Unit ECU 500: Professional Ethics and Practice held on Monday 10th December 2012***". Further, that he was informed on 19th February 2013 that on 28th February 2013 he would answer charges of having been "***found with unauthorized written material in the examination room and you also walked out of the examination room with the answer booklet***". That at no point did the Petitioner complain that he did not understand the allegations and needed time to prepare his defence save that he sought time to call his witness which request was promptly granted.

16. In Counsel's view therefore, following the decisions in **Peris Wambogo Nyaga v Kenyatta University [2014] e KLR**, **R v Pwani University Ex-Parte Maina Mbugua James and 2 Others [2010] e KLR** and **Immanuel Masinde Okutoy & Others v National Police Service Commission and Anor [2014] e KLR** where adequate notice and substance of any charges are given to an affected person, the disciplinary proceedings against such a person cannot be invalidated.

17. On whether the Petitioner was given a fair hearing by an impartial body, Counsel relied on the decision in **Eliud Nyauma Omwoyo (supra)** to make the point that the proceedings against the Petitioner were fair and the Students Disciplinary Committees and the Students Appeals Committee acted impartially at all material times.

18. As to whether there was any unconstitutionality in the Respondent's conduct *vis-à-vis* the Petitioner's case, Counsel submitted that once he was afforded a fair hearing at the first instance and on appeal, there cannot be any basis for a claim of unconstitutionality. Least of all, there was no evidence that the Petitioner was subjected to cruel, inhumane and degrading treatment.

19. Finally, Counsel submitted that the Petition is without merit and should be dismissed with costs.

Determination

20. The Petition before me is predicated on **Articles 47 and 50** of the **Constitution** which guarantee the right to fair administrative action and the right to a fair trial. Have any of these rights been violated in regard to the Petitioner?

Right to Fair Administrative Action

21. **Article 47** provides as follows:

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*
 - (b) promote efficient administration.*

22. The legislation envisaged by **Article 47(3)** is the **Fair Administration Act, 2015** which, of relevance to the present Petition provides at **Section 4(3)** as follows:

- “4.1) ...*
- 2) ...*
- 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 where applicable; or*
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*
- 4) ...*
- 5) ...*
- 6) ...”*

23. In that regard, the Petitioner has contended that the proceedings, principally those before the Students Disciplinary Committee, were unlawful, unreasonable and procedurally unfair because he was not informed that he was entitled to an advocate at the hearing; he was not furnished with any evidence to enable him prepare his defence and the Committee was not properly constituted as there was no student representative present on the material day.

24. Having reflected on the above complaints and seen the response by the Respondent, I note that it is uncontested that Nyarangi J. A. in **Nyongesa (supra)** correctly outlined the basis upon which a Court in Kenya in the past and present constitutional dispensations have addressed questions of administrative actions in Colleges and Universities. The learned Judge stated thus:

“Courts are very loathe 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 decisions of any bodies when the courts are moved to do so where it is manifest that a decision has been made without fairly and justly hearing the person concerned or the other side. It is the duty of the courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people. Whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character.”

25. Wendoh J. in **Arthur Kaindi Nzioka v Kenyatta University Misc. Appl. No.316 of 2007** also stated and I agree;

“When it comes to such matters of discipline it is up to those institutions/clubs to ensure that they strictly follow procedure that is laid down in their respective statutes... if such institutions want the court to keep off interfering with the management of their institutions, they have to comply with and adhere to all procedure laid down in their respective statutes to avoid courts intervention... in the circumstances, considering the respondent’s total failure to comply with procedure relating to discipline, this court cannot just sit back throw its hand up and say that it is powerless to say anything to uphold the applicants rights.”

26. In the above context, it cannot be true that the Petitioner did not know of the charge facing him because evidence before me points to the fact that on 7th January 2013, he was informed of the alleged irregularity that he had committed i.e. that he had been found with unauthorized written material in an examination room while undertaking Unit ECU500: Professional Ethics and Practice on 10th December 2012. Subsequently, on 9th February 2013, he was again informed that he would have to appear before the Students Disciplinary Committee on 28th February 2013 to explain himself which he did without raising any question as to either the clarity of the charge against him or the notice given for him to do so. It is very difficult in the circumstances to fault the Respondent on that aspect of the Petition – See also **Peris Wambogo Nyaga (supra)**.

27. Regarding the complaint that the Respondent failed to inform the Petitioner that he was entitled to an advocate during the hearing before the Students Disciplinary Committee, **Section 3(e)** of the **Fair Administration Act** qualifies the right to legal representation to circumstances where such a right is applicable. In my view however, an administrative body has no mandatory obligation to inform a person before it that an advocate ought also to be present. Administrative proceedings are not adversarial proceedings where all the trappings of litigation are expected to be on show – see **Simon Gakuo v Kenyatta University and 2 Others Misc. Civil Application No.34 of 2009**. That is all I have to say on that matter.

28. Regarding the complaint that the Committee was not fully constituted, while Dr. Nyaga in his Replying Affidavit stated at paragraph 19 that one Mr. Anzazi Kiti, Vice-President of KUSA was present at the meeting of 28th February 2013, the minutes of that meeting do not show that he was present and an attendance list annexed thereto relates to proceedings against Murugi John Muchiri and not the Petitioner. I take it therefore that indeed the Petitioner is right in his assertion. What is the import thereof?

29. Save from the factual statement that a students’ representative was not present at his disciplinary proceedings, the Petitioner said nothing more. What rule of the Committee’s procedure was thereby violated? Was there no quorum for example? Was a students’ representative a mandatory attendant?

Without answers to those questions, it is difficult to fault the disciplinary proceedings, for that reason alone.

30. Having held as above, it follows I am that unable to find a violation of **Article 47** of the **Constitution** as alleged.

Right to Fair Hearing

31. **Article 50** of the **Constitution** provides as follow:

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

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

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

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—

(a) the person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

(b) new and compelling evidence has become available.

(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

32. I have reproduced the whole Article for the reason that the Petitioner’s complaint in the above regard is that he was not granted a fair hearing by an impartial body neither was he granted the right to call witnesses or cross-examine those who testified against nor was he granted the right to be represented by an advocate.

33. I have partly addressed the above issues but I should only add that **Article 50(1)** specifically requires that a dispute resolution body must be independent and impartial. These two pre-conditions also necessitate that such a body therefore ought not to be driven by bias or malice in the making of its findings. Administrative bodies such as the Students Disciplinary Committee while conducting its business is expected to abide by these tenets of the law. Can it therefore be faulted in the manner that it conducted the hearing in issue?

34. The Petitioner has alleged that the Committee was predisposed to expel him from the University because of prior issues which had nothing to do with the charge that led to the drastic action against him. Sadly, the said contention was nothing more than speculative. The charge that he faced was specific, related to a specific incident which was later addressed with the same specificity and while prior conduct

was noted, I see no evidence that it played any role in the eventual decision against him.

35. The Petitioner indeed responded to that specific charge, sought time to call a witness in his favour, a request that was granted and so I see no misconduct on the part of the Committee in that regard.

36. I have, in addition, read the Minutes of the Meeting of 28th February 2013. They are detailed as to what transpired including the Petitioner's responses to the charge against him. Similarly, the proceedings of 21st March 2013 were detailed including the Petitioner's witness' statement on the incident in question. Again, I see no impropriety on the part of the Respondent in that regard.

37. As I understand it therefore, where a body out to resolve a dispute acts within its procedural norms, meets the expectations of the Rule of Natural Justice and does not exhibit malice or bias, then it has upheld the rule of fair hearing under **Article 50(1)** of the **Constitution** and **Article 50(2)** is irrelevant to the present proceedings as the Petitioner was not an accused person.

Conclusion

38. Having disposed of the two main issues arising for determination, I should only note that the complaints relating to the appeal proceedings at the Students Appeal Board would necessitate the same findings as those I have made with regard to the Students Disciplinary Committee and I shall say no more.

39. Turning back to the prayers in the Petition, prayer (a) is premised on alleged violations of **Article 47** of the **Constitution** and I have stated that I see no such violations.

40. Prayers (b) and (c) allege violations of **Article 50(2)** of the **Constitution**. That Sub-Article relates to rights of accused persons and it is unclear how it would apply to the present proceedings which were purely administrative in nature. Even if I were to apply the same, I have found no violation thereof. The same finding would apply to prayer (d) which is premised on **Article 50(1)** of the **Constitution**.

41. Prayer (e) has invoked **Article 25(a)** of the **Constitution** which outlaws cruel, inhuman or degrading treatment. Save the mention of that violation in the said prayer, neither in the body of the Petition nor in submissions was anything said about it. I note however that the Respondent on its part robustly responded to the issue in its submissions. I find no violation thereof in any event.

42. Prayer (f) relates to the appeal proceedings and I have addressed that issue above. Prayers (g) and (h) on re-admission of the Petition to the University and damages are all consequential orders which cannot for reasons given be granted.

43. On costs, while the Petitioner has not succeeded in his claim and while the Respondent has certainly incurred costs, the Petitioner's circumstances would not tilt my mind to awarding costs against him.

44. Lastly, I owe the parties an apology for delay in the delivery of this Judgment due to exigencies of duty.

Disposition

45. Having held as I have done above, it follows that the Petition dated 6th June 2014 is without merit and is dismissed. Let each party bear its own costs.

46. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2016

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 7TH DAY OF DECEMBER, 2016

EDWARD MURIITHI

JUDGE