REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 567 OF 2009

REPUBLIC …….APPLICANT

VERSUS

KENYATTA UNIVERSITY……...……1ST RESPONDENT

VICE CHANCELLOR, KENYATTA UNIVERSITY…….....……..2ND RESPONDENT

SENATE, KENYATTA UNIVERSITY ……....……...3RD RESPONDENT

DEPUTY VICE CHANCELLOR (ADMINISTRATION)

KENYATTA UNIVERSITY……...…….…….4TH RESPONDENT

SPECIAL SENATE COMMITTEE TO)

INVESTIGATE STUDENT DISTURBANCES)

THAT LED TO THE CLOSURE OF THE)

UNIVERSITY ON 18TH AND 30TH MARCH, 2009:)

PAUL K. WAINAINA, EDWIN GIMODE,)

JOHN F. KOGA, CHARLES OMBUKI, TOM KIMANI,)

NZUKI MWINZI, ALICE ONDIGI, FUCHAKA WASWA,)

FRANCIS KIRATHE, AARON TANUI, STEPHEN N.)

NYAGA, NICHOLAS C MALAU)……5TH RESPONDENT

Ex-parte

DR. ELENA DOUDOLADOVA KORIR

JUDGEMENT

1. The ex-parte Applicant, Dr Elena Doudoladova Korir is a lecturer at Kenyatta University. Kenyatta University; the Vice Chancellor of Kenyatta University; the Senate of Kenyatta University; the Deputy Vice Chancellor (Administration) of Kenyatta University; and the members of the Special Senate Committee to Investigate Student Disturbances that led to the closure of Kenyatta University on 18th March, 2009 and on 30th March, 2009 are the 1st to 5th respondents respectively.

2. The facts of this matter are that on 18th March, 2009 students went on the rampage disrupting teaching and learning programmes at Kenyatta University. An urgent Special Senate Meeting was convened and it resolved to close the University with immediate effect.

3. Following the closure of the University a Special Senate Meeting was again convened on 20th March, 2009 to deliberate on the disturbances. The Senate appointed a Special Senate Committee chaired by Prof Paul K Wainaina. Dr John F Koga, Dr Catherine Ndungo, Dr Charles Ombuki, Dr Tom Kimani, Mr. Nzuki Mwinzi, Dr Edwin Gimode, Mr Aaron Tonui, Mr Francis Kirathe, Dr Alice Ondigi and Dr Fuchaka Waswa were appointed as members of the Committee. Dr Stephen Nyaga and Mr Nicholas Malau were the joint secretaries whereas Ms Marianne Ruth Mati was the secretary.

4. The Special Senate Committee, hereinafter referred to as the 'Committee', prepared a preliminary report recommending disciplinary measures against students who played leading roles in the riots. Consequently the Senate met and announced that the University would re-open from 27th to 29th March, 2009. The Senate also directed that the University examinations commence on 30th March, 2009 immediately after the re-opening.

5. The examinations did not take place as a more destructive strike occurred on 29th March, 2009 leading to the second closure of the University on 30th March, 2009. The Senate once again met and the Committee's mandate was expanded to cover the disturbances of 29th March, 2009.

6. After concluding its work, the Committee on 18th May, 2009 submitted its report titled "Report by the Special Senate Committee on investigation into the student disturbances that led to the closure of the University on Wednesday 18th and Monday 30th March, 2009". The report will henceforth be simply referred to as the "Report." From page 40 onwards the Report recommends disciplinary action against named students and staff. The name of the Applicant appears at page 44 and the recommendation against her is: "Forward the name to the University Council for disciplinary action."

7. On 11th August, 2009 the 4th Respondent wrote to the Applicant as follows:

> **"RE: <u>ALLEGATIONS OF INCITEMENT OF STUDENTS TO VIOLENT DEMONSTRATION</u>**
>
> **The University has received a report that you were involved in one way or another in the events leading to the violent demonstration by University students on 29.03.09, which resulted in the loss of life of one student, injuries to many others, extensive damage to and loss of University property and the ultimate closure of the University on 30.03.09.**
>
> **In particular, you are reported to have incited the students to participate in the demonstration by informing them that you supported the demonstration and you were not willing to give the examination hence you provided moral support to the demonstrators which conduct contravenes article 9(iii)(c) of your terms of service.**
>
> **These are very serious allegations against you which, if proven, may result in an equally serious disciplinary action being taken against you.**
>
> **The University, therefore, wishes to establish the correctness or otherwise of these allegations. Consequently, and in order to enable the University to do so, you are**

requested to respond to the above charges in writing, addressed to the undersigned within the next seven (7) days from the date of delivery of this letter."

8. The letter was responded to by the Applicant's advocates through a letter which though dated 7th August, 2009 must have been written after receipt of the letter dated 11th August, 2009. The Applicant responded as follows:

"ALLEGATIONS OF INCITEMENT OF STUDENTS TO VIOLENT DEMONSTRATION

We write to you on behalf of Dr. Elena D. Korir.

Dr. Korir has instructed us to reply to your letter dated 11th August, 2009 on the matter under reference.

The matters raised in your said letter were substantially addressed in our letter dated 7th August 2009 (copy attached) in which Dr. Korir asserts the allegations herein are unfair and malicious and maintains she had nothing to do with the strike and would have no reason to incite students to strike.

On behalf of Dr. Korir, we demand to be furnished with the following documents for appropriate reply:-

a. **A copy of the report implicating Dr. Korir in the matter;**
b. **All information and/or materials relied upon as the basis for the allegations;**
c. **Confirmation by the University of our right, as Dr. Korir's Advocates, to attend and represent her at disciplinary proceedings, if the same take place.**

We await your favourable reply noting that Dr. Korir is incapacitated and unable to respond to your letter and to the allegations without the documents demanded herein."

9. It seems that earlier on, the Applicant having gotten wind of the Report of the Committee had on 7th August, 2009 written to the Senate as follows:

"KENYATTA UNIVERSITY STRIKE

We write to you on behalf of Dr. Elena D. Korir.

The attention of our client has been drawn to a report appearing at page 12 of the Thursday, August 6, 2009 on the above matter suggesting that our client incited students to go on strike.

This serious allegation has come as a great surprise to Dr. Korir who maintains she had nothing to do with the strike and would have no reason to incite students to strike.

Dr. Korir is concerned that this grave allegation is being made against her, without being accorded an opportunity of hearing. In the period preceding the strike, Dr. Korir was nursing her child who was sick and hospitalized.

We also bring to your attention the fact that Dr. Korir has suffered institutional harassment and mistreatment by the University ever since the court case (High Court Misc. Application No. 1285 of 2007) was filed and the High Court made a decision ordering her PhD graduation. Some of the instances of such mistreatment include:-

a. **The court decision ordering Dr. Korir's graduation was only complied with reluctantly. Dr.**

Korir's name was not included in the graduation booklet and was given a letter to attend the graduation in the evening preceding the date graduation when the University was threatened with an action for contempt of court;

b. **Following the graduation (26/6/2009) the University published a special edition of the *Kenyatta University Newsletter* to congratulate PhD Graduands. The newsletter had photographs (taken by the University during conferment of degree), names and fields of study of all PhD graduands; EXPCEPT for Dr. Elena Korir;**
c. **The University continues to refer to Dr. Korir as "Mrs Korir", even following the conferment of the PhD degree. This is confirmed by a number of correspondence/communication coming from the University after the graduation and even the report alleged to be implicating Dr. Korir in the student riots herein;**
d. **Unauthorized deductions were made on our client's salary of July, 2009;**
e. **On 28th July, 2009, the University wrote to Dr. Korir falsely accusing her of insubordinating the Chairman, Biochemistry Department. The letter which threatened disciplinary action against Dr. Korir maliciously accused her of among others 'storming' the office of the Chairperson, 'shouting' at the Chairperson calling him a tribalist and using 'foul language';**
f. **In April 2008, the University refused to give Dr. Korir a letter confirming she was/is an employee at the University for the purpose of a loan for her daughter's education abroad;**
g. **Dr. Korir had served the University for 17 years without a single promotion.**

Dr. Korir is concerned that she appears to be the subject of an arranged institutional harassment by the University. A scheme appears to be developing in which everything bad is undeservedly thrown at Dr. Korir; this is the context in which Dr. Korir takes the accusations to the effect that she incited students to riot. Dr. Korir feels unfairly treated by the University she is deeply dedicated to.

We demand to be furnished with a copy of the Report implicating Dr. Korir in the riots to enable her understand the basis of this grave accusation against her and take necessary action. At the very least, Dr. Korir demands duly published apology from the University for these false, unfounded, malicious and defamatory accusations.

We also request that Dr. Korir be accorded a sound environment to serve the University."

10. It seems that the respondents did not reply to the Applicant's letters. On 1st October, 2009, the Applicant approached this Court through the chamber summons application dated 1st October, 2009 and sought and obtained leave on the same date to apply for an order of certiorari to remove into this Court the Report of the Committee and quash the same in so far as it relates to her.

11. Between the time of the grant of leave and the time when this matter was heard on 5th March, 2015 many events have taken place. Of importance to note is that the Applicant parted ways with her advocate and she opted to prosecute her case. It is also important to note that the Applicant applied and was allowed by this Court to amend her statutory statement and notice of motion.

12. Through the amended statement dated 15th December, 2014 the Applicant lists the grounds upon which she seeks relief. Those grounds can be summarised as follows:

a. That the Report was made contrary to the rules of natural justice as the Applicant was neither notified of its preparation and neither was she granted a hearing despite the gravity of the accusations;
b. That the Report has no merit as the allegations against the Applicant are based on the evidence of a single witness;
c. That the Report is malicious, arbitrary, capricious and unfair;
d. That the Report is based on extraneous, irrelevant and improper considerations, actuated by bad faith, contrary to the Applicant's legitimate expectations, ultra vires, unlawful and null and void;

e. That the University has implemented the Report in as far as it relates to students by expelling or suspending them and a member of staff called Mr. Daniel Wafula has already been dismissed from work as a result of the recommendation made therein;
f. That the Report is discriminatory as the Committee does not explain how five out of the sixty two lecturers initially accused of inciting students to riot had been identified;
g. That the Parliamentary Committee on Education, Research and Technology which is superior to the Kenyatta University Special Senate Committee had on 3rd December, 2009 tabled a report in Parliament titled *"the Parliamentary Committee on Education, Research and Technology on the Inquiry into the Students' Disturbances at the Kenyatta University in March 2009"* which had cleared the Applicant of any wrongdoing and had instead recommended the investigation of the Vice Chancellor and Deputy Vice Chancellors over their involvement in the strike;
h. That the inclusion of the Applicant's name in the Report is connected to her obtaining orders in Nairobi High Court Misc. Application No. 1285 of 2007 Republic v Kenyatta University & 2 others, ex-parte Elena D Korir compelling the University to include her among the PhD graduates;
i. That the judgment delivered on 19th May, 2014 in Nairobi Industrial Court Cause No. 1715 of 2011 determined that the Applicant had been discriminated based on her race;
j. That the Report has been used to deny her promotion;
k. That the Assistant Minister and the Permanent Secretary in the Ministry of Education Science and Technology took the Report seriously and recommended that stern action be taken against those named in the Report;
l. That the Applicant is an excellent lecturer as per the Kenyatta University report from the 'Centre for Teaching Excellence & Evaluation dated 22nd July 2014 REF: KU/CTEE/RSTS/SLE NOV'13' which gave her a distinction of grade A at 95%; and
m. That the Applicant could not have played any role in the riots as she was nursing her sick child who had been hospitalised at the time of the disturbances.

13. At the time of filing the amended statement on 15th December, 2014 the Applicant also filed a notice of motion. This was supposed to be the amended substantive notice of motion. When the matter came up for mention on 4th February, 2015 the Applicant informed the Court that what she had filed on 15th December, 2015 was not the amended substantive notice of motion. She therefore sought the leave of the Court to file a proper amended notice of motion and her request was granted. She subsequently filed the amended notice of motion dated 5th February, 2015 in which she seeks an order of certiorari to quash the Committee's findings and recommendations in the Report in so far as they relate to her.

14. Counsel for the Respondent did not file any response to the substantive notice of motion opting to instead rely on the replying affidavit sworn by the Deputy Vice Chancellor (Administration) Professor Paul K Wainaina on 28th January, 2015 and filed in Court on 30th January, 2015. The affidavit is stated to be in response to the amended notice of motion dated 27th October, 2014, the amended statement dated 27th October, 2014 and the verifying affidavit sworn by the Applicant on 27th October, 2014.

15. The reference by Professor Wainaina to the pleadings filed on 27th October, 2014 can be explained by the fact that the Applicant had filed a chamber summons application dated 27th October, 2014 seeking to amend her pleadings. The chamber summons application was allowed on 26th November, 2014. The Applicant was directed to amend her pleadings and file them within 21 days from that date. That explains why the Applicant filed the amended statement and the notice of motion on 15th December, 2014.

16. The notice of motion filed on 15th December, 2014 prayed for orders as follows:

"1. THAT the Honourable Court be pleased to accept the amended Application.

2. THAT costs be provided for."

17. The notice of motion was accompanied by a supporting affidavit sworn by the Applicant on the same date. I will treat the supporting affidavit as the affidavit verifying the facts relied on for purposes of

Order 53 Rule 1(2) of the Civil Procedure Rules, 2010.

18. When the amended statement and the supporting affidavit are read together with the amended notice of motion dated 5th February, 2015 one can say the Applicant has met the minimum requirements of Order 53 of the Civil Procedure Rules, 2010. The Respondent's concerns about the propriety of the Applicant's application are thus addressed. I will therefore proceed to deal with the substance of the matter.

19. From the affidavit of Professor Paul K Wainaina, the respondents' case can be summarised as follows. The respondents' case is that the impugned Report was not only merely investigative, but was specific to the role of the students in the disturbances. According to Professor Wainaina it is only the recommendations made against the students in the Report which have been implemented. Further, that the name of the Applicant was included in the Report after she was implicated by a student who gave evidence before the Committee thus the inclusion of the name of the Applicant was not arbitrary.

20. Professor Wainaina avers that no adverse recommendation had been made against the Applicant as the Committee only made recommendations. It is the respondents' argument that it was up to the Senate or Council to decide whether or not to adopt the recommendations in the Report. Further, that the Committee recommended in the Report that the name of the Applicant be forwarded to the University Council for disciplinary action.

21. The respondents contend that the recommendation of the Committee is not final and does not constitute a decision and it is upon the University Council to decide what to do with the Report.

22. Professor Wainaina avers that this application is premature as the Applicant will be given an opportunity to be heard once a decision is made to institute disciplinary proceedings. According to the respondents, the letter dated 11th August, 2009 was inviting the Applicant to state her side of the story and that shows that the University had not taken the allegations against the Applicant as factual and neither had any adverse decision been made against her. Further, that the letter gave the Applicant an opportunity to respond to the allegations in writing. It is the respondents' case that the Applicant replied to the allegations through a letter date 7th August, 2009.

23. It is also the respondents' case that it followed the right procedure. Further, that the application is premature and unmerited as no further action has been taken by the University Council upon the receipt of the Applicant's response.

24. The respondents assert that judicial review remedies are not available against investigative reports or recommendations. The respondents deny giving the media a copy of the Report.

25. Looking at the pleadings, the evidence and the submissions of the parties herein, I find that the only question is whether judicial review orders are available in the circumstances of this case.

26. In **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** the purpose of judicial review was stated as follows:

> **"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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
>
> **Illegality is when the decision making authority commits an error of law in the process of taking the decision 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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in 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. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

27. In essence, the purpose of judicial review is to ensure fairness to those who appear before public authorities. Judicial review is different from an appeal as an appellate court looks into the merits of a decision whereas judicial review is only interested in the legality, rationality and propriety of the process through which the decision was reached.

28. The facts in this matter are not in dispute. The first question to be answered is whether the Committee complied with the rules of natural justice when executing its mandate. The parties are agreed that the Applicant was not invited by the Committee to give her side of the story before the Report was prepared.

29. The next question is whether failure to comply with the rules of natural justice in this particular case should result in the issuance of orders as prayed by the Applicant.

30. The scope and reach of the rules of natural justice has been discussed by the learned authors of Halbury's Laws of England at paragraph 95 in page 218 of the 4th Edition (Administrative Law, Admiralty) Vol 1(1) as follows:

"Natural justice comprises two basic principles; first that no man is to be a judge in his own cause (*nemo judex in causa sua*) and second that no man is to be condemned unheard (*andi alteram partem*). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct.

The rules of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or by necessary implication, or by reason of other special circumstances. However, the obligation to observe natural justice is not confined to persons acting in judicial or quasi-judicial capacities. Now when any administrative decision is taken it will be presumed that it is to be taken fairly. Similarly, the distinction previously drawn between the determination of rights, where the obligation applied, and the determination of privileges, where it did not, is also defunct. For these reasons the courts now tend to speak in terms of procedural fairness or of a general duty to act fairly. The fact that these distinctions have now been eroded does mean that in some circumstances it is difficult to determine either the boundaries of the application of the duty to act fairly or the substance of its contents, or both. However, whether a decision is 'administrative' or quasi-judicial', or whether the subject matter of the decision may be regarded as a 'right' or a 'privilege' is relevant in order to determine what fairness requires in any particular situation. The content of the duty to act fairly is highly flexible. Although the two rules stated above must normally, though not invariably, be observed, the precise procedure to be followed in a given situation depends upon the subject matter of the decision or adjudication and upon all the circumstances of the case.

Further, it is now clear that a person may complain of a breach of natural justice even though it is not the decision making body itself which is at fault, although the court will

not intervene where the fault is that of the person himself."

(I have omitted the footnotes)

31. In **Martin Nyaga Wambora & 3 others v County Assembly of Embu & 4 others [2015] eKLR**, the importance of compliance with the rules of natural justice was stressed as follows:

> **"176. Scholars have debated about the import and extent of these principles but the courts have had no problem with understanding what these rules mean. The overriding consideration is that the rules are applicable on a case by case basis. The underlying foundation of these principles is that in so far as the *audi alteram partem* rule is concerned, before a decision is taken, the person to be affected by the decision must be informed of the impending decision or action, notice of the matters to be taken into account against the person should be given, and that person must be given an opportunity to be heard. In a serious matter like the one before us, those rules must be applied without exception.**
>
> **177.As for the *nemo judex in causa sua* rule, the first requirement is that no man should sit as an adjudicator in a case in which he has an interest. This is a rule that should be followed strictly, for one cannot be expected to be fair where the outcome of his decision will affect his interests. Secondly, no biased person should be allowed to sit in judgement over the fate of another. The bias could be real or perceived. What amounts to actual bias or perceived bias will be deduced from the facts of the case and the general observations on the behaviour and actions of the umpire."**

It is therefore clear that the applicability of the rules of natural justice and the extent of compliance will vary from case to case.

32. In the case before this Court the respondents have stated that the Report of the Committee was investigative in nature. Counsel for the respondents submitted that there is therefore no decision made capable of being quashed. It is the respondents' case that the Applicant will have an opportunity during the actual hearing to cross-examine the witnesses and adduce evidence in her defence.

33. In support of this contention the respondents' counsel cited the decisions in **R v Mactarlane (1973) HCA 36**;**Republic v Kenya African National Union (KANU) & 5 others, Ex parte Rotino (2008) 2KLR (EP) 764** and **Nottinghamshire cc v Secretary of State (1986) 1 ALL RE 199.** The thread running through all these cases is that recommendations are not amenable to judicial review because it is only decisions that impact on the rights of the individual that can be reviewed.

34. At pages 466 to 467, H.W.R. Wade and C.F. Forsyth in the 10th Edition of *Administrative Law* discuss the principles governing the application of the rules of natural justice to reports and investigations. They state as follows:

> **"Natural justice is concerned with the exercise of power, that is to say, with acts or orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to persons affected.**
>
> **The House of Lords considered this question in an income tax case where the tax authorities, before they could take the taxpayer before the tribunal which determines whether the object of some transaction is tax avoidance, were required to show a prima facie case to the tribunal. The tribunal refused to allow the taxpayer to be represented, or to see the evidence submitted to it by the authorities, at that stage.**

The House of Lords upheld this ruling, since the taxpayer would have full opportunity to state his case to the tribunal in the later proceedings. As Lord Reid said, every public officer who has to decide whether to prosecute ought first to decide whether there is a prima facie case, but no one supposes that he need consult the accused. There was nothing inherently unjust in the procedure, which as a whole was found to be fair in its statutory context. But the House of Lords strongly reaffirmed the general doctrine of the right to a fair hearing, and held that there was nothing about the determination of a prima facie case which automatically excluded it: the procedure must pass the test of fairness at each and every stage.

In general, however, the courts are favourable to the observance of natural justice in the making of preliminary investigations and reports which may lead to serious legal consequences to some person. The Commission for Racial Equality and its committees must act fairly in making their investigations, though considerable latitude is allowed as to its procedure. Inspectors investigating the affairs of a company under statutory powers must give the directors a fair opportunity to meet criticisms, even though the object is merely to make a report. A police officer threatened with compulsory retirement is entitled to have the report of a preliminary inquiry disclosed to his own doctor. A gas company should be given the opportunity to comment on an adverse report by a gas tester which might lead to an order against it by the local authority. These are really instances of the right to know the opposing case. But an academic board considering a student's record and recommending his expulsion was not obliged to give him a hearing since it merely made a recommendation and there was adequate opportunity for his case to be heard by the governing body when considering the recommendations."

(Citations omitted)

35. Ordinarily recommendations, preliminary acts or investigation reports do not attract judicial review orders. However, there are exceptions to this general legal principle. One exception was expressed in the case of **Re Pergamon Press Ltd [1971] Ch.388** as follows:

"This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly."

36. It is therefore clear that where a recommendation or report will have direct impact on the rights of an

individual, the individual must be given an opportunity to defend himself or herself before the report is compiled. In my opinion, the greater the impact on an individual, the more the need to give the individual a hearing before an investigatory report is prepared.

37. The other exception is that if the report is likely to be adopted as it is or if the adopting body has no discretion over the adoption of the report, then its preparation must comply with the rules of natural justice.

38. Are the exceptions applicable to the Applicant's case? The Applicant contends that the Report has been used to terminate the services of one Daniel Wafula. It is, however, not clear from her pleadings whether the said termination arose directly from the recommendation in the Report or whether it was a decision taken after a disciplinary process. This particular argument cannot be used to reach the conclusion that the Report will be implemented without recourse to a hearing that will comply with the rules of natural justice. The Applicant, to date, remains an employee of Kenyatta University and it cannot be said that the Report has had adverse impact on her employment.

39. Additionally, there is no evidence placed before this Court to show that the disciplinary organ to which the Applicant may be subjected to is bound to act on the recommendations to the greatest extent possible. The disciplinary organ has a duty to evaluate the allegations against the Applicant and arrive at an independent decision. It should give the Applicant an opportunity to test any evidence against her by way of cross-examination.

40. The University has clearly stated that the Applicant will have an opportunity to heard, if disciplinary proceedings will be commenced. I do not imagine that the managers of the University think that it is sufficient to take action against the Applicant on the strength of her response to the notice to show cause letter dated 11th August, 2009. This is a proper case for having a hearing with the Applicant or her lawyer, if the regulations allow, being given an opportunity to cross-examine the witnesses.

41. It is important to remember that the 2009 riots at Kenyatta University resulted in loss of life and destruction of property. Those involved must be tried and if found guilty, disciplined accordingly.

42. The Applicant stated that the evidence was from one witness and she was never given an opportunity to cross-examine the witness. She alleged that a Parliamentary Committee which was formed to probe the cause of the riots had exonerated her from any wrongdoing and instead blamed the University administration for the occurrence of disturbances. It is her case that she is not culpable since she was nursing a sick child in hospital when the disturbances occurred.

43. All these are good defences which she can raise before the disciplinary body if a decision is made to take her through a disciplinary process. She is an employee of the University and the only body that is mandated to deal with the allegations against her is the one established for that purpose by the statute and/or regulations and/or rules governing the operations of the organisation. This Court would be overstepping its boundaries were it to conclude that the evidence against her is insufficient to take her through a disciplinary process. The Court will have usurped the power of the University to discipline its employees.

44. At the end of it all, I agree with the Respondent that this application was premature. The same lacks merit and the Applicant's case is therefore dismissed. Considering that the relationship between the Applicant and the respondents is that of an employee and employer, and in order to ensure harmony between the parties, I will not award costs to the respondents but direct each party to meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 3rd day of June, 2015

W. KORIR,

JUDGE OF THE HIGH COURT