



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 93 OF 2014

REPUBLIC.....APPLICANT

VERSUS

DISCIPLINARY COMMITTEE OF JOMO KENYATTA

UNIVERSITY OF AGRICULTURE & TECHNOLOGY...RESPONDENT

JUDGEMENT

The ex-parte Applicant, Peter Kungu Muraya is a student at Jomo Kenyatta University of Agriculture and Technology (JKUAT) studying engineering. In 2013 he was taken through a disciplinary process for an alleged examination irregularity that occurred on 22nd April, 2013. At the conclusion of the process the Applicant received two letters dated 19th December, 2013 conveying different outcomes of his appeal to the Students Disciplinary Appeals Committee. This was followed by a “**correction of appeal letter**” dated 21st February, 2014 which informed the Applicant that:

“(i) You examination results for the Year/Stage be cancelled.

(ii) You be Expelled from the University.”

The Applicant being aggrieved by the said decision sought leave to commence these judicial review proceedings. Through the notice of motion application dated 21st March, 2014 the Applicant therefore prays for an order of certiorari to quash the decision of the Respondent, the Disciplinary Committee of Jomo Kenyatta University of Agriculture and Technology (JKUAT) cancelling his results and expelling him from the university. The Applicant also seeks an order of mandamus to compel the university to reinstate his results. He prays for the costs of these proceedings.

His application is supported by a statutory statement, his verifying affidavit and annexures thereto filed together with the chamber summons application for leave on 10th March, 2014.

The Applicant’s case is that it was alleged that on 22nd April, 2013 he participated in an examination irregularity by having unauthorized material within the examination room and by leaving the examination room with the answer booklet. The Applicant states that he gave an explanation in writing to the departmental chairperson on the same date.

The Applicant avers that he then proceeded with his studies up to the time they proceeded on the long break. After the long break the results were released having been signed by the Faculty Dean and the

Deputy Registrar Examinations and he was awarded marks in Physics Code 2171 which was the unit in which the alleged malpractice had occurred.

The Applicant averred that on 12th November, 2013 he received a letter informing him that a disciplinary meeting would be held on 10th October, 2013 which date had passed. He immediately lodged an appeal and his appeal was acknowledged vide a letter dated 14th November, 2013. He was informed that the appeal was scheduled for 18th November, 2013 but the letter reached him on 22nd November, 2013.

He sought a rehearing of the appeal and the Respondent relisted the appeal for hearing on 19th December, 2013. The Applicant attended this particular appeal and through a letter dated 19th December, 2013 he was informed that his appeal had been rejected and the decision dated 22nd October, 2013 which had expelled him was confirmed.

It is the Applicant's case that he did not attend the hearing of 10th October, 2013 as he was not aware of the same. Further that the decision made on 22nd October, 2013 referred to an invigilator's report and which report was not availed to him.

The Applicant asserts that on 19th December, 2013 he received two letters containing contradictory decisions. One of the letters stated that he had been expelled from the university whereas the other letter gave him a stern warning and informed him that he would be expelled from the university if he failed to comply with the rules set by the university.

It is the Applicant's case that it was wrong to cancel all his results as he was alleged to have only committed an irregularity in relation to one unit namely Physics Code 2171.

The Applicant contends that since the results were issued on 19th September, 2013 almost five months after the alleged irregularity, it was unreasonable for the Respondent to subject him to disciplinary proceedings thereafter.

The Applicant contends that he has not been treated fairly, more so when one considers the fact that expulsion from the university has drastic consequences.

The Applicant wonders why the Respondent decided to communicate to him through post yet the university had his telephone number and email address and could have easily reached him through these alternative means of communication.

The Respondent opposed the application through the replying affidavit sworn on 5th May, 2014 by Professor Romanus O. Odhiambo, the Deputy Vice- Chancellor (Academic Affairs). Through the said affidavit the deponent informs the Court that the Applicant was involved in examination irregularities relating to examination unit SPJ 2171-Physics II contrary to regulations 5(c), 6(f) and 7 (a) (iii). As a consequence a notice was duly issued to the Applicant to attend a disciplinary committee meeting scheduled for 10th October, 2013. The said notice contained the charges against the Applicant who was asked to make written submissions on the matter to the Registrar, Academic Affairs. The notice also warned the Applicant that failure to attend would not stop the committee from deciding the matter.

He avers that the Applicant was informed about the verdict vide the letter dated 22nd October, 2013 and the Applicant acknowledged receipt of the said letter by filing an appeal. He deposed that although the Applicant did not file an appeal within the requisite 14 days, the Respondent indulged him and invited him for a hearing on 18th November, 2013 using the same address it had used for all the earlier correspondences. He avers that the Applicant also failed to attend the appeal and the decision of the disciplinary committee was upheld and communication made to the Applicant through a letter dated 19th December, 2013.

It later emerged that the Applicant had been given two letters communicating different decisions. According to the Deputy Vice-Chancellor the letter dated 21st February, 2014 conveyed the correct position of the outcome of the appeal to the Applicant. It is the Respondent's case that the Applicant was given an opportunity to be heard but he failed to appear before the disciplinary committee and the appeals committee.

From the papers filed in Court, I form the opinion that the question to be answered in this judgement is whether the Applicant was taken through a fair administrative process.

The Applicant contends that it was unreasonable for the Applicant to discipline him after the results for the unit in question had been released. The Respondent did not respond to this argument. In my view, the Respondent was entitled to take disciplinary proceedings against the Applicant and it was immaterial that the results had been released.

The allegations against the Applicant were conveyed to him through the letter dated 4th October, 2013 as follows:

“RE: MEETING OF THE EXAMINATION DISCIPLINARY COMMITTEE

You are hereby invited to appear before the University Examination Disciplinary Committee on Thursday 10th October 2013, at 8.30 a.m., in the Old Boardroom Main Campus, Juja. This is to answer to charges of violating Examination Regulations 5(c), 6(f) and 7(a)(iii) relating to the examination unit SPH 2171 – Physics II. The offences related with these violations are:

(i) “Possession of unauthorized material brought to the examination venue by the candidate himself/herself or by other person(s)”.

(ii) “Copying from unauthorized material carried by the candidate himself/herself or any other person(s).”

(iii) “Obstructing the invigilator while he/she is performing his/her duties and/or use of personal violence and/or threats against the invigilator on matters relating to the sitting of an examination.”

(iv) Carrying one's answer booklet(s) out of the examination room.”

Before then you are also invited to make a written submission on the matter to the Registrar (Academic Affairs).

Please note that further to Examination Regulation 8(b), failure to present yourself for the hearing will not, in any way, deter the Committee from reaching a verdict in line with the charges preferred against you.”

The Respondent's counsel through a list of authorities dated 10th July, 2014 and filed on the same placed before the Court the Jomo Kenyatta University of Agriculture and Technology Common Examination Regulations (1st Revision) hereinafter simply referred to as the Regulations. The Applicant is said to have breached Regulations 5(c), 6(f) and 7(a) (iii). I will reproduce them for the purpose of this judgment.

Regulation 5 is titled “CONDUCTING OF EXAMINATIONS” and 5(c) states:

“Invigilators shall have powers to confiscate any unauthorized material or aid brought to the examination room, and to expel from the examination room any candidates(s) who create(s) any disturbance (s).”

Regulation 6 deals with “CONDUCT OF THE CANDIDATE” and sub-regulation (f) states:

“Candidates shall read and abide by the instructions on the front page of the answer booklets.”

Regulation 7 talks of “EXAMINATION MATERIAL” and sub-regulation 7(a)(iii) states:

“All books, papers and instruments not approved for use in the examination, and personal belongings brought to the examination (venue) must be left in such part of the room as the invigilator shall direct. All papers used during the examination must be handed to the invigilator before the candidate leaves the examination room.”

I have looked at the Regulations and I find that the cited Regulations 5(c), 6(f) and 7(a) (iii) have a correlation to the charges conveyed to the Applicant through the letter dated 4th October, 2013. The charges were therefore proper.

The only question that remains to be answered is whether the Applicant was given a fair hearing. The right to a fair hearing connotes many things. An accused person must be told the charges facing him. He must be given sufficient notice of the hearing date and the venue. He must be given an opportunity to call witnesses. He should have reports to be used against him in advance. In certain cases the authority need not comply with all these requirements. Sometimes it is enough to consider the written submissions of an accused person but at other times an oral hearing is necessary.

In a situation where the consequences are drastic and far reaching, the public body charged with the responsibility of conducting proceedings must strictly adhere to the principles of a fair hearing. In my view, a decision to expel a student from a public university is not a petty decision. It may have life lasting effects on that student aside from the loss of funds already invested in the student’s education.

The Applicant’s case is that he never received the letters calling him for the disciplinary proceedings and the one conveying the results. He would have boosted his case had he exhibited the envelopes to show the date the letters were stamped at the post office.

On the other hand, it was necessary for the Respondent to at least produce its register to show when the letters were posted. In big offices it is not uncommon for a letter to be written on a certain date but posted days later.

The letter inviting the Applicant for the disciplinary committee proceedings is dated 4th October, 2013. He was being invited for a hearing on Thursday 10th October, 2013 at 8.30 a.m. The 10th day of October, 2013 was a Thursday and this means that 4th October, 2013 was the preceding Friday. It is likely then that the letter was posted on Monday the 7th October, 2013. The Applicant has pointed out that he was in college at that time but the letter calling him for the disciplinary proceedings was dispatched to his rural home. I find that the notice inviting the Applicant to attend the hearing was too short.

The letter conveying the decision of the disciplinary committee is dated 22nd October, 2013. That letter gives the Applicant a right of appeal to the Vice-Chancellor within 14 days. It appears that the Applicant appealed through a letter dated 12th November, 2013 and the appeal was scheduled for 18th November, 2013. The Applicant asserts that the notice of the appeal scheduled for 18th November, 2013 reached him late and he asked the Respondent for a chance to argue his appeal and that chance was given to him when he was invited for a fresh hearing of the appeal on 19th December, 2013. The documents produced in this matter confirm the Applicant’s averment. That explains the issuance of two letters dated 19th December, 2013 conveying two contradictory results of the outcome of the appeal.

One letter conveys the result of the appeal heard on 18th November, 2013 and states:

“RE: APPEAL AGAINST RESOLUTIONS OF THE EXAMINATIONS DISCIPLINARY COMMITTEE

The Student’s Disciplinary Appeals Committee sat on 18th November, 2013 and considered your appeal.

It is regretted that the appeal was NOT successful. You will therefore be expected to abide by all conditions as stipulated in our letter dated 22nd October, 2013.

Kindly note that as per common Examination Regulation (8e), the decision in this matter is final.”

The other letter which conveys the result of the appeal heard on 19th December, 2013 states:

“The Student’s Disciplinary Appeals Committee sat on 19th December, 2013 and considered your appeal.

After a careful consideration of the issues you raised in your appeal, it was agreed that the former resolution be upheld.

In addition, this letter serves as a stern warning to you that any future violation of examination rules and regulations will lead to immediate expulsion from the University.

Kindly note that as per common Examination Regulations (8e), the decision in this matter is final.”

It is therefore incorrect for Professor Romanus O Odhiambo to aver at paragraph 13 of his replying affidavit:

“THAT it is crystal clear the Applicant was accorded the opportunity to be heard not once but twice but he neglected to appear before the two disciplinary committees of the Respondent and thus the decision arrived at was proper and all factors were put into consideration.”

It is clear that the Applicant attended the appeal hearing of 19th December, 2013. This particular appeal resulted in a stern warning. The Applicant cannot fault the manner in which the appeal was conducted.

At a first glance, it may appear that the appeal produced two contradictory outcomes. A closer perusal of the documents however shows that there is no contradiction at all. One letter conveys the decision of an appeal heard on 18th November, 2013. This decision was automatically set aside when the Applicant was given an opportunity to be heard. The Applicant’s appeal was heard afresh on 19th December, 2013. Although the results for the appeals heard on 18th November, 2013 and 19th December, 2013 were all released on 19th December, 2013, the only decision that can be recognised is the one for the appeal heard on 19th December, 2013.

The letter dated 21st February, 2014 which alleged to have corrected the outcome of the appeal is therefore misconceived and misdirected. There was nothing to correct. The letter dated 21st February, 2014 reinstated a decision that had already been set aside when the Appeals Committee invited the Applicant for a hearing on 19th December, 2013.

I have already pointed out that the Applicant may not have appeared for the hearing of 10th October, 2013 since the notice was too short. He therefore did not receive the charges and the hearing notice in good time. The Applicant was also entitled to the invigilator’s report which formed the basis of the charges against him. It is possible that he could have demonstrated that the person who signed the report was not

the invigilator for the examination in question. He was therefore entitled to the report before hand. The evidence that was to be used against him ought to have accompanied the letter containing the charges. I therefore find that the Applicant did not receive a fair hearing.

Something that was not raised by the parties caught my attention as I was perusing the documents in the file. The letter dated 4th October, 2013 clearly enumerated four charges against the Applicant. The Regulations that were produced by the Respondent has a schedule titled **“B. SCHEDULE OF PUNISHABLE EXAMINATION OFFENCES AND APPLICABLE PENALTIES.”** It creates 25 offences. Some of the offences have up to four sentences. When one closely looks at those sentences it appears that not all the four sentences can be imposed for a single offence. Only one sentence can be imposed for a particular charge.

For example, the sentences for the offence of **“carrying one’s answer booklet(s) out of the examination room”** are:

“(i) Cancellation of the candidates’ examination results in the unit concerned.

(ii) Suspension from the university for one academic year/stage and or re-admission repeat the year/stage and on re-admission repeat the year/stage of study in which offence was committed.

(iii) Be considered as a repeat student thereby graduating with a pass award.

(iv) A written warning.”

I suspect the Applicant was punished for the offence of **“obstructing the invigilator while he/she is performing his/her duties, and/or use of personal violence and/or threats against the invigilator on matters relating to the sitting of an examination.”**

For this offence the sentences are:

“(i) Cancellation of the examination results for the candidates(s) involved.

(ii) Expulsion from the University.”

In my view, you cannot impose both sentences for this particular offence. You can either expel a student or cancel his results. You cannot do both. I therefore find that the punishment imposed on the Applicant by the Examinations Disciplinary Committee through the letter dated 22nd October, 2013 was irregular.

Considering that the outcome of the appeal upheld the decision of the Examinations Disciplinary Committee but gave the Applicant a stern warning, it can only mean that the sentence upheld is that of cancelling the Applicant’s results for the academic year in question. There is no way the Student’s Appeals Committee could have upheld the expulsion of the Applicant and at the same time give him a stern warning. It was also not possible for the Appeals Committee to give a stern warning without cancelling the Applicant’s results since the offence of **“obstructing the invigilator while he/she is performing his/her duties, and/or use of personal violence and/or threats against the invigilator on matters relating to the sitting of an examination”** can only be punished by cancellation of results or expulsion from the university. It appears that the Applicant’s appeal succeeded only in regard to the sentence.

I have already found that the Applicant did not receive fair administrative action from the beginning. Although the appeal process was fair, the proceedings which gave rise to the appeal were poisoned by non-compliance with the rules of natural justice and the fact that the appeal process was proper does not amount to much.

I am alive to the fact that cheating in examinations is a serious indiscretion which should be discouraged.

On the other hand, universities should learn to temper justice with mercy. It would be advisable to give the least severe sentence to first offenders.

In the circumstances of this case, I allow the application and make orders as follows:

1. The letter dated 22nd October, 2013 conveying the results of the proceedings held on 10th October, 2013 by the Examinations Disciplinary Committee is removed into this Court and quashed;
2. The Respondent's two letters dated 19th December, 2013 are removed into this Court and quashed;
3. The letter dated 21st February, 2014 allegedly correcting the outcome of the appeal is also removed into this Court and quashed;
4. The release of results of any examination sat in compliance with the order of this Court shall be subject to the outcome of fresh disciplinary proceedings;
5. This matter is remitted back to JKUAT's Examination Disciplinary Committee for commencement of fresh proceedings within sixty (60) days from the date of this judgment; and
6. There will be no order as to costs.

As the matter has been remitted back to the Respondent, an order of mandamus to compel the Respondent to reinstate the Applicant's cancelled results cannot issue.

Dated, signed and delivered at Nairobi this 14th day of November, 2014

W. KORIR,

JUDGE OF THE HIGH COURT