REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITIN NO 54 OF 2014

OLUOCH DAN OWINO...…… 1ST PETITIONER

ODHIAMBO JUSTUS ONYANGO ……..…..…. 2ND PETITIONER

OMONDI OCHIENG JILALI…….……...……. 3RD PETITIONER

ODERA ANYANGO BEATRICE….…….…….. 4TH PETITIONER

VERSUS

KENYATTA UNIVERSITY…… RESPONDENT

JUDGMENT

Introduction

1. The petitioners in this matter were at all times material to the petition students at the respondent university pursuing diverse courses. The 1st, 3rd and 4th petitioners were in their third year of study while the 2nd petitioner was a second year student. The petitioners filed this petition alleging violation of their constitutional rights under Articles 27, 37, 38, 43, 47 and 50 of the Constitution following their subjection to a disciplinary process by the respondent, a public university established under the Kenyatta University Act, 1985.

Background

2. The events giving rise to the petition occurred on 15th March 2013. On that day, officers of the Independent Electoral and Boundaries Commission (IEBC), which had, with the consent of the respondent, used the respondent's facilities as a training centre for electoral officials and other personnel involved in the elections, went to collect their material from the university premises. The IEBC officials encountered a group of students engaged in public demonstrations at the University in the course of which University and IEBC property was damaged and one vehicle belonging to IEBC was burnt.

3. Following the incident, a number of students including the petitioners herein, were accused of various breaches of University regulations and disciplinary action taken against them. The 1st petitioner was charged with causing the disturbances within the University that led to the damage of the University property; being in possession of stolen IEBC materials, jackets and ballot papers,

burning the IEBC vehicle and putting the University in bad light by misinforming the mass media about issues in the University, and coordinating an outsider's movement within the University without permission. These offences were said to be in breach of **Sections 3 (b), (d), (g), 3 (i), i (ii), j (i), (ii)** of the Kenyatta University Regulations.

4. The 2nd petitioner was alleged to have caused the disturbances that led to damage of University property and handling stolen property contrary to s**ections 3 (b), 3 (d)** and **3 (g) (i)** and **(ii)** of the **Regulations.** The 3rd and 4th petitioner were also charged with similar offences.

5. On diverse dates thereafter, the respondent sent letters to the petitioners summoning them to attend disciplinary proceedings on different dates in August 2013. The petitioners duly appeared before the Students Disciplinary Committee. Thereafter, they received letters from the respondent informing them of the decision and action taken against them pursuant to the disciplinary proceedings.

6. The 1st petitioner was, by a letter dated 21st August 2013, informed that a decision had been made to expel him from the respondent university. The 2nd and 3rd petitioners were informed, by letters dated 21st August 2013, that they had each been suspended for a period of two semesters, to resume their studies during the first semester of the 2014/2015 academic year. They were also required to pay **Kshs. 30,000/=** each to cater for damage caused during the disturbances. The 4th petitioner was, by a letter dated 21st August 2013, informed that she had been suspended for a period of four semesters, to resume studies during the first semester of the 2015/2016 academic year. She was also required to pay Kshs. **30,000/=** to cater for damage caused to university property during the disturbances.

7. On diverse dates between 26th August 2013 and 1st October 2013, each of the petitioners appealed to the Students' Appeal Committee against the decision of the Students Disciplinary Committee. Their appeals were heard, but were ultimately unsuccessful, prompting the filing of the present petition.

The Petitioners' Case

8. The petitioners' case is contained in their Petition dated 3rd February 2014. The petition is supported by an affidavit sworn on the same date by the 1st petitioner and a further affidavit also sworn by the 1st petitioner on 20th May 2014. They have also filed submissions dated 27th May 2014, which were highlighted by their Counsel, Mr. Gitobu Imanyara and Mr Lempaa.

9. The petitioners contend that the decisions against them were based on provisions of the Kenyatta University Regulations Governing the Conduct and Discipline of Students, **Regulations 3 (b), (d), (g), 3 (i), I (ii), j (i), (ii),** that were ultra-vires the Constitution and hence a nullity in terms of **Article 2 (4)** of the **Constitution.** They contend that the four regulations contain limitations that offend **Article 24(2) (c)** and/or derogates from its core or essential content and are therefore unconstitutional in light of **Article 2(4)**.

10. The petitioners contend that **Regulation 3(b)** does not create any offence; that its heading is "**Responsibility of University Property''** and simply holds that a student or group of students will be held responsible for any damage to University property resulting from misuse, without defining what "misuse" is or "willful" means; that "Responsibility of University Property" is not defined either in the Regulations or in the Penal Code so as to constitute an "offence."

11. The petitioners contend further that **Regulation 3 (d)** which is simply headed "Noise" and then proceeds to state that it shall be an offence against University Regulations to create unreasonable noise or behave in an unruly or rowdy manner to the disturbance or annoyance of other occupants of University premises without defining what "unreasonable noise" is or whether "unruly or

rowdy manner "relates to noise or other behavior is neither clear nor specific and that **Regulation 3(g) (i)** headed "Procession and Demonstrations" expressly contradicts **Articles 37** and **50 (4)** of the Constitution; and is, on the face of it, quite patently unconstitutional to the extent that they are unreasonable limitations that derogate from the core or essential content of the provisions of the Constitution.

12. The petitioners further contend that the decision to expel or suspend them was arrived at in breach of **Article 47 (1)** of the **Constitution** in that none of them received the letters purported to have been sent to them; that they instead received sms messages on their phones and phone calls on the day before the purported hearing of their cases before the Students Disciplinary Committee; and that they were only given copies of the letters as they arrived at the University.

13. It is also their contention that none of them was called for interrogation on 25th, 26th, 29th, and 30th April or on 6th, 16th or 26th of June or at all as alleged; and that the respondent does not show any evidence of delivery of any of the letters inviting them for disciplinary proceedings.

14. The petitioners contend further that they were not given reasonable or adequate time and facilities to prepare their defence before the Students Disciplinary Committee and accordingly their fundamental rights and freedoms guaranteed under **Article 50 (2) (c)** of the **Constitution** were breached; that they were denied the right to defend themselves by Counsel in violation of their rights under **Article 50 (2);** and that they were not afforded a fair hearing by an independent, impartial and fair body as required under **Article 50 (1)** of the **Constitution**. It is their submission that the Disciplinary Committee as constituted was neither independent nor impartial.

15. The petitioners further allege that the decision to expel or suspend them was discriminatory in that they were singled out of hundreds of others solely on the basis of their ethnic and/or political considerations in that they were all members of the Orange Democratic Movement Political Party; and that such action was a violation of **Articles 27 (1)** and **(5)** of the **Constitution.** They further aver that they were treated differently from other students solely on the basis of being of the Luo ethnic community and known members and supporters of CORD, a coalition of political parties that had contested the presidential election in the last general election whose candidate was the Rt. Hon. Raila Amolo Odinga, Leader of the Orange Democratic Movement; and that they were entitled to be members of the said coalition in exercise of their fundamental rights and freedoms guaranteed under **Article 38(c)** of the **Constitution**. It is their contention that their rights under the said Article were also breached.

16. The petitioners contend that no or no sufficient or credible evidence was placed before the Students Disciplinary Committee to prove that they were guilty of any of the offences for which they were found guilty, convicted and sentenced; that the evidence upon which they were convicted was obtained in a manner that violated their fundamental right to peaceably assemble, demonstrate and picket guaranteed under Article 37 of the Constitution, which was a violation of their right under **Article 50(4)** of the **Constitution.**

17. The petitioners argue that the legitimate purpose of the disciplinary proceedings against students under the Kenyatta University Act is not to criminalize the exercise of fundamental rights and freedoms guaranteed under the Constitution of Kenya, in particular the right to education guaranteed under **Article 43(1) (f)** of the Constitution, and that the sentences meted out to them was in all circumstances harsh, excessive and amounted to cruel, inhuman or degrading treatment outlawed under **Article 25(a)** of the **Constitution.**

18. The petitioners further argue that they were subjected to the disciplinary proceedings and punished for exercising the fundamental right enshrined in **Article 37** to peaceably assemble and demonstrate against the politicization of the University institution by allowing it to be used for political purposes. It is their case that they were convicted and punished for conduct that did not amount to an offence in Kenya and therefore their fundamental right under **Article 50(n) (i)** of the **Constitution** was breached.

19. The petitioners further contend that they were not accorded the right to appeal against the decision made against them. However, in apparent contradiction of this contention, they argue that some members of the Disciplinary Committee also sat in the Appeals Board that heard their appeals. They cite the example of one Dr. S.N Nyaga Registrar (Academic), a Mrs. Mwololo and one Miss M. Mati of Senate Affairs Section as having sat in both the Students Disciplinary Committee and participated in the deliberations and also sat in the Appeals Board. The petitioners submit therefore that neither the Disciplinary Committee proceedings nor the proceedings in the Appeals Board were in accordance with principles of fair hearing.

20. The petitioners have also taken issue with the documents relied on by the respondent. They argue that the documents relied on are unconfirmed minutes of purported meetings; that none of them contains any evidence of any of the petitioners being notified of the hearing dates for the appeals or their right to Counsel.

21. In support of their case, the petitioners have relied on a number of authorities, among them the case of **Joseph Mwanda Mbuko vs Provincial Police Officer, Central Police & 2 Others [2013] eKLR, Daniel Nyongesa & Others vs Egerton University College, C.A. No. 90 of 1989,Arthur Kaindi Nzioki vs Kenyatta University Misc Application 316/2007,** and **Lempaa Vincent Soyinka & 4 Others vs Kenyatta University & 2 others [2007]**.

22. The petitioners make various averments of fact regarding the events that led to the disciplinary proceedings against them. They concede that they participated, with other students, in the demonstrations at the university but deny that any of them caused any damage or handled any stolen property. They term the charges against them by the university as wholly false and as having been manufactured by the University administration to punish those who were in the CORD Coalition. They invite the court to independently analyse the minutes and other evidence placed before the Disciplinary Committee in order to satisfy itself that the petitioners exercise of their constitutional rights was not unlawfully criminalized.

23. It is their contention that the expulsion of a student is the most extreme punishment possible and has lifelong implications for a student; that it offends the purpose for which the Constitution elevates the right to education as a fundamental right; that no evidence was tendered to show that the 1st petitioner had participated in previous conduct that would provoke such extreme punishment; and they asked the court to take judicial notice of the fact that even the Kenya National Examination Council allows capital offence convicts on death row to take examinations. They submit further that expelling a student on the basis of the kind of evidence that was used against the 1st petitioner amounts to the cruelest punishment possible; and the court should, on this basis alone, interfere with the decision of the Disciplinary Committee. It is their contention that the entire disciplinary process against them was unfair and the court should follow the precedent set in the **Lempaa Suyianka** case and award damages to the petitioners, and further issue the following orders against the respondent:

a. ***An order quashing the decision of Kenyatta University contained in letters respectively;***

i. ***Dated 21st August 2013 expelling the 1st Petitioner, Oluoch Dan Owino from Kenyatta University.***

ii. ***Dated 22nd August 2013 suspending the 2nd Petitioner Odhiambo Justus Onyango for a period of two semesters and fining him Kshs. 30,000/-.***

iii. ***Dated 22nd August 2013 suspending the 3rd Petitioner Omondi Ochieng Jilali for two semesters and fining him Kshs. 30,000.***

iv. ***Dated 21st August 2013 suspending the 4th Petitioner Odera Anyango Beatrice for four semesters and fining her Kshs. 30,000.***

v. ***Damages for breaches of the fundamental rights and freedoms set out as having been breached.***

vi. ***Costs and interest.***

vii. ***Such further orders as the Honourable Court may deem expedient and just.***

The Case for the Respondent

24. The respondent's case is set out in the Replying Affidavit sworn on its behalf by **Professor P. K Wainaina** on 14th March 2014 and submissions dated 17th June 2014. It was presented by its Learned Counsel, Mr Kibe Mungai.

25. In his submissions on behalf of the respondent, Mr. Kibe Mungai contended that there was a serious disconnect between the petition and the affidavits filed in support; that the petitioners have not, in accordance with the requirements of Rule 10(2) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (the "**Mutunga Rules"**) particularized how the respondent has violated the petitioner's rights; and that the respondent is not clear on which Article of the Constitution was violated, and no declaration has been sought with regard to the violation of rights.

26. The respondent contends that this petition is an afterthought; that the petitioners had a right under Article 22 to file court proceedings during the proceedings before the Disciplinary Committee, but did not; that it was only after they had gone through the proceedings and an appeal from the decision of the Disciplinary Committee that they filed the petition.

27. To the petitioners' allegation of discrimination on the basis that they were members of ODM and supporters of the Coalition for Reform and Democracy, the respondent submitted, first, that the issue was not raised at the hearing before the University during the disciplinary proceedings, and no evidence has been adduced with regard to whom was discriminating against the petitioners. The respondent further submitted that it was at all material times unaware of the political parties the petitioners support or associate with and such actual or alleged membership has never been a factor in the affairs and operations of the respondent.

28. With regard to the reliance by the petitioners on Article 50 of the Constitution, the respondent contended, first, that Article 50(2) does not apply to a person who is not facing criminal charges and so should be disregarded. It maintained, however, that the petitioners were offered an opportunity to defend themselves against the charges leveled against each of them and a fair verdict was reached in each case.

29. The respondent denied that the Kenyatta University Act or Regulations Governing the Conduct and Discipline of Students under which the respondent exercised power to expel, suspend and/or fine the petitioners contravene the Constitution. It is its case that no evidence has been presented to demonstrate that the Regulations are unconstitutional, and until a court of competent jurisdiction declares the Kenyatta University Act or any of its Regulation unconstitutional, all decisions made pursuant to them are valid.

30. The respondent further submitted that the petitioners have not demonstrated that its decisions were either invalid or unlawful; that the petitioners were procedurally and lawfully suspended or expelled; and the respondent has therefore not breached any of the rights and fundamental freedoms of the petitioners but only discharged its obligations as a University and a public institution, Counsel placed reliance on the case of **Geothermal Company Limited vs the Attorney General and Others (2013) eKLR** in support of this contention.

31. The respondent further argued that this petition is based on the misconception that the petitioners' rights are absolute, and that the respondent has no rights. It was its submission that the petitioners' rights are subject to limitations as provided under **Article 24** of the **Constitution**; and that

therefore the University Rules and Regulations which all the students of Kenyatta University including the petitioners have signed and committed themselves to abide by are lawful and contain limitations in the exercise of certain rights and freedoms that are reasonable and justifiable in Kenya's open democratic society based on human dignity, equality and freedom; and that each of the petitioners had freely and voluntarily agreed, in writing, to be bound by and to comply with the Rules and Regulations of the University.

32. The respondent further relied on the decision in **Glynn vs Keele University and Another (1970) Ch. D 89** in support of its case that the petitioners committed serious offences and so the administrative action taken is justified; **Chauhan vs Kenyatta National Hospital and 2 others (2013) eKLR** in support of their argument that indeed they accorded a fair hearing to the petitioners more so by giving them a chance to appear before its Disciplinary Committee; and that they had given the petitioners ample time to prepare for the hearing as the cause of action arose on 15th March 2013 whereas the hearings at the Students Disciplinary Committee took place on 7th and 8th August, almost five months later. It prayed that the petition be dismissed with costs.

Determination

33. From the pleadings of the parties and their respective submissions which I have summarized above, I take the view that the following issues arise for determination in this matter:

i. ***Whether the Kenyatta University Rules and Regulations under which the petitioners were convicted violate Article 24 (2) (c) and are therefore unconstitutional;***

ii. ***Whether the actions of the respondent have violated the petitioners' rights under Articles 37, 38(c), (43(1)(f), 47 (1) and 50 (1), (2) (c), (g) (j) (n) and (4) of the Constitution.***

iii. ***What reliefs (if any) to grant to the petitioners.***

34. In addressing my mind to the issues raised in this petition, I must at the outset decline the invitation by the petitioners to enter and inquire into the merits of the case against them before the respondent's Students' Disciplinary Committee. As has been held in many decisions in this and other jurisdictions, for the court to do so would be to arrogate to itself the mandate of an appellate body entering into a merit review of the decisions of the respondent. The duty of the court in an inquiry such as is now before me is confined to checking the respondent's decision for any illegalities, unreasonableness or procedural improprieties, that is non-compliance with the rules of natural justice. This view of the matter was reiterated by the Court of Appeal in **Civil Appeal No. 180 of 2013- Isaack Osman Sheikh -vs- IEBC & Others** where the Court expressed itself as follows:

"A judicial review of administrative, judicial and quasi judicial action and decisions of inferior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction flowing from Article 165(6) of the Constitution is not in the nature of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High Court a power to arrogate to itself the decision-making power reserved elsewhere."

35. This is also the position well articulated in the House of Lords decision in **Chief Constable vs Evans [1982] 3ALL ER 141** in which the Lord Chancellor, Lord Hailsham of St. Marylebone, stated at p 143:

"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".

36.I now turn to consider the issues which I have set out above against the law and the respective submissions of the parties.

Whether the Kenyatta University Regulations Contain Limitations That Offend Article 24 (2) (c)

37.The petitioners allege that the Kenyatta University Regulations under which they were convicted contain limitations of constitutional rights that offend Article 24(2)(c) and are therefore unconstitutional in light of Article 2(4) of the Constitution. This Article provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission that contravenes the Constitution is invalid.

38.The petitioners argue that the respondent's regulations violate the provisions of Article 24(2)(c). It is useful to set out the provisions of Article 24 in its entirety. At Article 24(1), the Constitution provides as follows with regard to limitation of rights and fundamental freedoms:

> ***24. (1) 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—***
>
> ***(a) the nature of the right or fundamental freedom;***
>
> ***(b) the importance of the purpose of the limitation;***
>
> ***(c) the nature and extent of the limitation;***
>
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
>
> ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***
>
> ***(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—***
>
> ***(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;***
>
> ***(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and***
>
> ***(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.***
>
> ***(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.*** (Emphasis added)

39.The evidence before me indicates that disciplinary matters at the University are vested in the respondent by statute. **Section 12** of the **Kenyatta University Act Cap 210C** establishes a Council of the University, whose functions are set out at section 13 as including to provide for the

welfare and discipline of the students and staff of the University. It has the power, in consultation with the Senate, to make regulations governing the conduct and discipline of the students of the University generally or specifically authorized by the Council in that behalf. It would appear that it is pursuant to these provisions that the impugned Kenyatta University Regulations were formulated.

40. The petitioners argue that the provisions of the Kenyatta University **Regulations Governing the Conduct and Discipline of the Students of the University** are unconstitutional as they offend the provisions of section 24(2)(c) set out above. The Regulations indicate that they are prepared in accordance with the **Kenyatta University Act, 1985.** The sections of the Regulations impugned in this petition are Regulation 3(b) (d) and (g). They provide as follows:

Section 3

(b)* Responsibility of University property *(sic)

"A student or group of students will be held responsible for any damages to university property resulting from misuse or willful destruction of such property by that student or group of students."

(d) Noise

"It shall be an offence against the University regulations to create unreasonable noise or behave on an unruly or rowdy manner to the disturbance or annoyance of other occupants of University premises."

(g) (i) Procession and Demonstrations

"It shall be a serious offence for any student or group of students whilst within the University to convene, organize, participate or in any way be involved with any demonstrations, gatherings or processions or in any unauthorized ceremonies, gatherings, or demonstrations for which permission has not been obtained from the University or government authorities.

(ii) it shall be a serious offence for any student or group of students to organize or participate in pickets or in any manner prevent any student or member of staff from performing their normal duties."

41. Do these rules violate the provisions of Article 24 set out above? What rights do they limit? I shall consider the alleged violation of the petitioners' rights in the following section. However, looking at the words used in the Regulations in their ordinary meaning, and considering what appears to be the intention behind their promulgation in the context of an academic institution, it is difficult to see grounds for the petitioners' dissatisfaction with them.

42. It appears that the intention behind the rules, which were prepared, as stated, pursuant to statute, is to promote a peaceful and conducive learning environment for students at the respondent university; and that students wishing to engage in demonstrations within the University or similar activities do so with the authority of the Vice Chancellor. I take this view while bearing in mind the pivotal role of an institution such as the respondent, which was recognized in the words of the court in **Eliud Nyauma Omwoyo and Others vs Kenyatta University Petition No. 365 of 2012** as follows:

"Section 4 (c) of the Kenyatta University Act gives the Respondent the power, to determine who may teach and what may be taught and how it may be taught in the University. Further it must play an effective role in the development and expansion of opportunities for Kenyans wishing to continue with their education. The Respondents mission statement shows that it is committed to providing quality education and training, promote scholarship, service, innovation and creativity and inculcate moral

values for sustainable individual and societal development. **[61]** ***Some of its general objectives include the promotion of development of the student's welfare systems for the attainment of academic excellence and an all-round education and to create equal opportunities for those qualified to pursue University education."*** (Emphasis added)

43. I am therefore unable to find anything unconstitutional in the above regulations. The respondent was granted the mandate, under the establishing Act, the Kenyatta University Act, to prepare and require compliance with Rules and Regulations aimed at ensuring a conducive learning environment.

Whether the Actions of the Respondent have Violated the Petitioners' Constitutional Rights

44. The petitioners have alleged violation of their rights guaranteed under a number of Articles of the Constitution. The alleged violations relate, first, to what the petitioners perceive as their being denied the right to freely associate for being members of the Orange Democratic Movement. Secondly, the petitioners allege violation of their rights in the course of the disciplinary proceedings against them. I shall deal with these instances of violation separately.

Violation of Article 27(5)

45. The petitioners allege that they were discriminated against by the respondents in that they were singled out from 19 others and subjected to the disciplinary proceedings and subsequently harsh sanctions were passed against them. They allege violation of **Article 27 (5)** of the Constitution. Article 27 contains the anti-discrimination provisions of the Constitution and is, so far as is relevant for our purposes, in the following terms:

"27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3)…

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)." (Emphasis added)

46. The petitioners allege that they were discriminated against on the basis that they were members of the Luo ethnic group, members of the Orange Democratic Movement Party and supporters of the Coalition for Reform and Democracy (CORD). From the evidence before me, however, and aside from the 1st petitioners' averments and the certificates he annexes to his affidavit, I am unable to find anything that supports their contention that they were singled out because of their ethnic origin or political affiliation. No evidence has been placed before me to show who the other students who went through the disciplinary process were, or what their ethnic or political affiliations were. The essence of discrimination is that one was subjected to less favourable treatment than others similarly situated on any of the prohibited grounds. Without clear evidence of such discrimination, I am unable to find violation of this right by the respondent.

Violation of Article 37 and 38(1)(c)

47. The petitioners also allege violation of Article 37 and 38. Article 38 protects freedom of assembly, demonstration and picketing in the following terms:

"Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities."

48. At Article 38, the Constitution guarantees political rights to everyone. Article 38(1) which is relevant for present purposes states as follows:

38. (1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

49. The events forming the basis of this petition involved certain demonstrations at the respondent university in which the institution's property and property belonging to the IEBC was damaged. It has not been averred, and no evidence has been tendered, to demonstrate that the respondent in any way sought to prevent the petitioners or anyone else from peaceably demonstrating or picketing, or from joining or participating in the affairs of a political party, or from campaigning for a political party or cause. I believe that no one would argue with the view that demonstrating or picketing peaceably, participating in the affairs of a political party, or campaigning for such political party or cause, cannot translate to violence or destruction of public or private property. It is therefore my finding that no violation of Article 37 and 38 has been demonstrated.

Violation of Article 43 (1) (f)

50. The petitioners have alleged violation of the right to education guaranteed under Article 43(1)(f). The 1st petitioner was expelled from the respondent university after being found guilty of various infractions of university regulations. The 2nd, 3rd and 4th petitioners were suspended for some time, with the right to resume their studies at the respondent after serving their periods of suspension.

51. 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. I can therefore find no violation of the right to education in respect of the petitioners.

Violation of Article 47 and 50

52. The second limb of the petitioners' case revolves around the due process provisions of the Constitution. The petitioners have alleged violation of their rights under Articles 47 and 50 with regard to the disciplinary process that they were subjected to by the respondent.

53. Article 47 provides for fair administrative action in the following terms:

"47.(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."

54. Article 50 contains the constitutional guarantees with regard to fair hearing. The petitioners have alleged violation of their rights under various sub-articles of Article 50 namely 50(1), 50(2)(c), (g) (j), (n) and 50(4) which provide as follows:

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 –***

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

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

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

   (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;

3. ***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."***

55. Articles 47 and 50 give constitutional underpinning to the rules of natural justice with regard to administrative action and the demands of procedural fairness. Whatever the merits of a decision, if it is not arrived at through a process that can be said to be fair, then it cannot be allowed to stand. In **Central Organisation of Trade Unions –vs- Benjamin K Nzioka & Others Civil Appeal No. 166 of 1993** where the Court of Appeal expressed itself as follows:

"This principle of law is well settled and was recently reaffirmed in the ruling of this court in Central Organisation of Trade Unions (Kenya) and Benjamin K. Nzioka and Others Civil Application No. NAI 249 of 1993 (108/93) (UR) in the following words:

"As a concept, it is derived from the Latim maxim 'audi alteram partem' which in English means 'hear the other party'. This rule obliges a judges or an adjudicator faced with the task of making a choice between two opposing stories to listen to both sides. He should not base his decision only on hearing one side. In the case of a judge he should give equal opportunity to both parties to present their cases or divergent view points. And in doing so, should hold the scales fairly and evenly between them".

56. In the recent decision of the Swaziland High Court in **Dumisani Zwane vs Judge of the Industrial Court and Others Civil Case No 404/ 2014 2014 SZHC 122,** the court observed as follows:

"***[26] It is well-settled that procedural fairness is the yardstick to determine whether the employer has conducted the hearing fairly and justly before imposing the penalty. The requirements of procedural fairness were developed by the courts from the rules of natural justice, and, they have nothing to do with the merits of the case [27] as stated in the preceding paragraphs, procedural fairness also requires that the presiding officer must be impartial. This requirement enables the presiding officer to weigh up the evidence and to make an informed and considered decision on the***

guilt or otherwise of the employee, and, if necessary on the appropriate sanction. The presiding officer should keep an open mind and not exhibit bias or gives an impression of being biased."

57. There is no dispute that the respondent in this case was, through its Students Disciplinary Committee, performing a quasi-judicial function. The question then that the court is called upon to determine is whether the petitioners were afforded administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair; and whether their case was decided in a fair hearing, before an independent and impartial body.

58. As observed elsewhere, disciplinary matters at the University are vested in the respondent under section 12 and 13 of the **Kenyatta University Act.** The reasons for vesting such powers in the respondent were well articulated in the case of **Republic –vs- Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009** where the court 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."

59. The petitioners have argued that the Disciplinary Committee as constituted was neither independent nor impartial. Unfortunately, they have not demonstrated in what way the Disciplinary Committee lacked independence or impartiality. I have also not heard them complain about the composition of the Committee that heard their cases in the first instance I am therefore constrained to find that there is no basis for the allegation of lack of independence or impartiality on the part of the Students Disciplinary Committee that heard their cases and determined the course of action contained in the letters dated 21st and 22nd August 2013.

60. The said letters also indicated that the petitioners had a right of appeal, and so their complaint that they were not accorded an opportunity to appeal against the decision of the Committee is not supported by the evidence. Indeed, they concede this when they go on to challenge the composition of the Appeals Committee that heard and dismissed their appeal.

61. While their complaint against the Students Disciplinary Committee lacks merit, there appears to be some basis for their complaint regarding the composition of the body that heard their appeals. The petitioners have alleged that the Appeals Committee comprised persons who had sat in the initial committee hearings against them. They point out in particular that Dr. S.N Nyaga, Registrar (Academic), a Mrs. Mwololo and one Ms M. Mati of Senate Affairs Section sat in both the Students' Disciplinary Committee and in the Appeals Committee. They therefore allege lack of impartiality on the part of the appellate body. I have not heard the respondents to dispute this, or to offer an explanation for the presence of these persons in both committees. I have also read the minutes of the two committees and noted the presence or attendance of Mrs E. Mwololo, Dr S. N Nyaga and Ms Marianne Mati in both the Students Disciplinary Committee and the Students Appeals Committee.

62. In the case of **Nkosinathi Ndzimandze and Another vs Ubombo Sugar Limited 476/05 [2008] SZIC 5a)** the High Court in Swaziland, in dealing with the question of an appeal from a labour dispute, expressed the rationale for an appeal as follows:

"A right to an appeal is an important safeguard, giving the affected employee a chance of persuading a second tier of authority that the adverse decision was wrong or that it should otherwise be reconsidered. In the end, the final decision will have been the subject of more careful scrutiny,

prolonged debate and sober reflection. <u>It has also been held that disciplinary appeal proceedings must be more than a mere formality, and the members of the appeal panel must apply their minds fairly and impartially to all the relevant facts</u> and considerations in the same manner as the labour courts have long required of the disciplinary enquiry itself."

63. I am persuaded that the reasoning of the court above is sound, and it calls, in my view, for consideration of a case on appeal by a different panel than that which initially heard the matter. If one can draw an analogy with the hierarchy of courts in this and other jurisdictions, it would doubtless defeat or greatly compromise the purpose of an appeal if some of the judges or magistrates who heard a matter at first instance were again to sit on appeal on the same matter. In this regard therefore, the appeal process before the respondent's Appeals Committee fell short of the requirements of impartiality demanded by Article 50(1) of the Constitution.

64. The petitioners have argued that they were not accorded a fair hearing as they did not receive the letters inviting them for the disciplinary hearing, and that they were invited by way of short text messages (sms). I have considered the letters inviting the petitioners for the hearings. The letters are addressed to the petitioners at addresses to which other letters from the respondent to the petitioners contained in the replying affidavit are addressed. It would perhaps have been prudent for the respondent to obtain a certificate of posting or some other evidence of delivery of the letters, but in the end, I am not satisfied that the petitioners' claim in this regard has merit, for two reasons. First, I note that the respondent took the further step of inviting the petitioners to the hearings by way of short text messages and telephones. More importantly, I note that all the petitioners attended the disciplinary proceedings on the scheduled dates and did not raise the issue of the non-delivery of the letters at the hearing before the Committee, nor did they seek an adjournment of the hearing.

65. 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. In the case of **Republic vs Pwani University College Ex-parte Maina Mbugua James & 2 Others Misc App No. 28 of 2009**, the court stated:

"The respondent's contention is that there was no denial of legal representation since there was no such request in the first instance. There doesn't seem to be a hard and fast rule – going by the different approaches – in <u>Enderby Town FC Ltd v The Football Association (1971) 591 at 605</u> Lord Denny ruled: "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 better by a good layman than by a bad lawyer." The situation in Kenya was captured in the case of <u>Geoffrey Mwangi Kariuki v University of Nairobi</u>. – but where the distinction can immediately be drawn in that the college Disciplinary Committee refused to allow Geoffrey to be represented by advocates in the proceedings, and the High Court ruled that he was entitled to such representation. <u>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.</u>" (Emphasis added).

66. In this case, as with the allegation that the petitioners did not have adequate time and facility to prepare a defence, 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.

67. Further, like the challenge to the disciplinary offences with which the petitioners were charged and convicted by the Students Disciplinary Committee, these challenges are premised on the provisions of Article 50(2), and the petitioners have also placed reliance on Article 50(4). It is, however, my view that these provisions, particularly 50(2), have no application to the circumstances of this case. I am persuaded in this view by several decisions of the High Court and

the Court of Appeal.

68. In the case of **Republic –vs- Public Service Commission of Kenya ex parte James Nene Gachoka, Misc App No. 516 of 2005, Majanja J** stated as follows:

"In this case, what the applicant faced were disciplinary proceedings. Neither section 77(5) of the former Constitution nor Article 50(2)(0) of the Constitution apply to proceedings of another nature other than criminal proceedings."

69. In the case of **Daniel Ndungu -vs- Director of Public Prosecutions & Another, Petition Number 69 of 2012,** the petitioner, like the applicant in **James Nene Gachoka (supra)** challenge disciplinary proceedings against him as being in violation of his rights under Article 50(2)(o). This Article guarantees to an accused person the right ***"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."*** In holding that the provisions of Article 50(2) did not apply to disciplinary proceedings, the court stated:

[18] ***It is not necessary to delve into what a "trial" and a "prosecution" mean (as the Petitioner would want me to) because it is generally agreed that proceedings before the Committee relate to "professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate" – Section 60 of the Advocates Act. Criminal prosecutions on the other hand relate to the "determination of the guilt or innocence of a person charged with crime" - Black's Law Dictionary, 5th Edition – page 1099.***

[19]*Proceedings before the Committee cannot therefore by any shade of doubt (sic) be termed "a criminal trial" and the mere choice of the word, "convict" at the end of its proceedings cannot criminalize the actions of the Respondent in those proceedings. In fact the standard of proof is much higher in criminal proceedings; beyond reasonable doubt which is not the same standard as in the Committee.* **[20]** ***The Petitioner has invoked the doctrine of autrefois acquit applicable to his situation. In Connelly vs DPP [1964] A.C. 1254, Lord Devlin stated as follows;***

"For the doctrine of autrefois to apply, it is necessary that the accused person should have been put in peril of conviction for the same offence as that which he is charged. The word "offence" embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in Law"

70. The Learned Judge then concluded that the invocation of Article 50(2)(o) of the Constitution in the circumstances of the case was in vain.

71. In the case of **Julius Kamau Mbugua -v- Republic Criminal Appeal No. 50 of 2008,** the Court of Appeal held that the rights guaranteed under Article 50(2) are trial related, the implication being clear that they were specific to a person charged with a criminal offence. However, in the case of **Judicial Service Commission -vs- Gladys Boss Shollei & Another Civil Appeal No 50 of 2014,** the Court of Appeal was categorical that the provisions of Article 50(2) do not apply to disciplinary proceedings. In reversing the decision of the Industrial Court in the matter, the Court observed as follows:

"The question is was the disciplinary process undertaken by the appellant a quasi-criminal process? And if so, was Criminal Law and Procedure applicable to the disciplinary process such that it can be said that the process was flawed without observance of such procedure? [61] The disciplinary process undertaken by the appellant was a quasi- judicial process as it involved the appellant in an adjudicatory function that required the appellant to ascertain facts and make a decision determining the respondent's legal rights in accordance with the Constitution and the Judicial Service Act, both of which provided for fair hearing. The disciplinary proceedings were anchored on a contractual relationship and the appellant was not empowered to provide penal sanctions. Notwithstanding the seriousness of the allegations made against the respondent, the disciplinary

proceedings could not be treated like criminal proceedings, as the nature of the sanctions that could be imposed in the disciplinary proceedings did not include penalties or forfeitures akin to those that could be applied in a criminal trial. Thus the learned Judge misdirected himself, in holding that the disciplinary proceedings were quasi-criminal. The Criminal Procedure Code which is an Act providing for the procedure in criminal cases had absolutely no application in the disciplinary proceedings, and the learned Judge erred in applying the provisions of the Criminal Procedure Code… "(Emphasis added)

72. With regard to the provisions of Article 50(2) of the Constitution, the Court expressed itself as follows:

[68] ***"Article 50(2) of the Constitution provides for a right to a fair trial to an accused person in criminal trials. That sub-article was not applicable in the disciplinary proceedings against the respondent which, as already noted were neither criminal proceedings nor quasi-criminal proceedings. The respondent was entitled to a right to a fair hearing as provided under Article 50(1) of the Constitution that deals with "any dispute that can be resolved by application of law."*** (Emphasis added)

73. I agree fully with the views expressed in the above matters. The proceedings to which the petitioners were subjected before the Students Disciplinary Committee were quasi-judicial in nature, and they were entitled to the rights guaranteed under Article 50(1). However, the alleged violations of the provisions of Article 50(2) cannot arise in the present circumstances.

Disposition

74. In summary, the findings of this court on the issues for determination are as follows:
    i. ***The Kenyatta University Rules and Regulations under which the petitioners were convicted do not violate Article 24 (2) (c) of the Constitution;***
    ii. ***The actions of the respondents did not violate the petitioners' rights under Articles 37, 38(c), (43(1)(f), and 47 (1) of the Constitution;***
    iii. ***The hearing of the petitioners' appeals before the Appeals Committee that comprised persons who had sat in the Students Disciplinary Committee was in violation of the provisions of Article 50 (1);***
    iv. ***There was no violation of Article 50 (2) (c), (g) (j) (n) and (4) of the Constitution in respect of the petitioners as this Article has no application to disciplinary proceedings such as the petitioners were subjected to.***
75. Having found that the composition of the Committee that heard the petitioners' appeals was improperly constituted, the orders of this court are for the respondent, as soon as is reasonably possible but within **ninety days (90)** from the date of this judgment, to accord to each of the petitioners an opportunity to appeal the decision of the Students Disciplinary Committee dated 21st and 22nd August 2013, as the case may be, before an independent committee which does not include any of the persons involved in the Students' Disciplinary Committee hearings or the subsequent appeals.
76. In conducting such appeals, particularly with regard to the 1st petitioner, the respondent should bear in mind the dire consequences that its actions may have on the future prospects of a youth such as the 1st petitioner and temper its justice with mercy.
77. With regard to costs, as the petitioners have partially succeeded, they shall have half the costs of the petition from the respondent.
78. I am grateful to the parties for their extensive and well researched submissions and authorities. If I did not refer to them in the judgment, it is not because they were not of value to the court.

Dated and Signed at Nairobi this 5th day of December 2014

MUMBI NGUGI

JUDGE

Dated, Delivered and Signed at Nairobi this 5th day of December, 2014

ISAAC LENAOLA

JUDGE

Mr. Imanyara and Mr. Lempaa instructed by the firm of Kitobu Imanyara & Co. Advocates for the Petitioner

Mr Kibe Mungai instructed by the firm of Kinoti & Kibe & Co. Advocates for the Respondent