



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO. 264 OF 2013

REPUBLIC.....APPLICANT

VERSUS

KENYATTA UNIVERSITY.....1ST RESPONDENT

THE STUDENTS DISCIPLINARY COMMITTEE,

KENYATTA UNIVERSITY2ND RESPONDENT

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

GATETUA MACHARIA KENNEDYEX-PARTE

JUDGEMENT

The *ex parte* Applicant, Gatetua Macharia Kennedy through the notice of motion application dated 14th August, 2013 prays for orders that:

- “1. This Honourable Court be and is hereby pleased to call up and bring into this Honourable Court and to quash the decision of the Students Disciplinary Committee of 25th July, 2012 vide its letter dated 5th October, 2012 and that of the Students Appeal Committee of 10th January, 2013 as against the *ex parte* Applicant herein.
2. This Honourable Court be and is hereby pleased to issue an order of Mandamus directing the 1st and 3rd Respondents to issue the *ex parte* Applicant with his Degree Certificate.
3. That costs of this Application be provided for.”

The 1st to 3rd respondents are Kenyatta University, the Students’ Disciplinary Committee of Kenyatta University and the Senate of Kenyatta University.

At the time the decisions giving rise to these proceedings were made, the Applicant had completed his studies at Kenyatta University and was awaiting his graduation. Matters took a different turn when by a letter dated 11th July, 2012 the Applicant was summoned to appear before the Students’ Disciplinary Committee (the Disciplinary Committee) on 25th July, 2012 to answer to charges of influencing

tampering with online examination grades in eleven units.

The Applicant appeared before the Disciplinary Committee on the appointed date where he was accused of paying a University employee, who could access an online portal where students could among other things view examination results, so that the said employee could interfere with the results. The Applicant denied the charges. Through a letter dated 5th October, 2012 the Applicant was informed that he had been found guilty of influencing tampering with online examination data in twelve units. The punishment was discontinuation from studying in the University. He was given an opportunity to appeal to the Chairman of the Senate within 14 days from the date of the receipt of the letter.

The Applicant appealed to the Students' Appeals Committee (the Appeals Committee) through a letter dated 25th October, 2012. He later received a letter dated 18th February, 2013 informing him that his appeal was unsuccessful. The Applicant thereafter commenced these proceedings.

According to the statutory statement, the verifying affidavit and the annexures thereto the Applicant seeks relief on several grounds. In the first ground the Applicant asserts that the letter summoning him to appear before the Disciplinary Committee neither stated the method used to influence the alleged tampering nor did it include any documentary or electronic evidence of the tampering. He submitted that during the hearing, no evidence or testimony was adduced by any person on the alleged tampering of electronic results but the Disciplinary Committee went ahead to find him guilty and this contravened the rules of natural justice. He contends that he was put on his defence on the allegation of tampering with online examinations data without any prosecution save for the reading of the charges against him. He claims that he was blackmailed to admit the offence and name his accomplices so that the Disciplinary Committee would be sympathetic and pass a lenient sentence.

The second ground upon which the Applicant seeks relief is that by the time he was being taken through the disciplinary process, he had already successfully completed his studies and completed the clearing process and was only awaiting the graduation ceremony. He therefore holds the view that after clearing with the University he became unreachable by its disciplinary organs.

Thirdly, the Applicant argues that he was charged and convicted for an offence unknown to University's Students Handbook, 2012–2015. He contends that he had not been accused for breaching a specific regulation.

Fourthly, the Applicant deposed that he was never given an opportunity to argue his appeal.

The respondents opposed the application through the replying affidavit of the 1st Respondent's Academic Registrar, Dr S.N. Nyaga sworn on 17th October, 2013. He averred that for one to be awarded with a degree other than an honorary degree, the Deputy Vice-Chancellor (Academic) should certify that the candidate has met certain conditions including passing all the required units, meeting all financial obligations, having no pending disciplinary cases and the online examination data should be the same with the examination records held by the respective departments.

He averred that in the process of the verification of the results of the Applicant and other students in the graduation year in question, it was found that there were variances between the examination marks as they appeared online and those held by the respective departments. The Applicant had higher marks online from those held by the departments.

The 1st Respondent appointed a Committee to investigate the cause of the variance in examination records. The Committee later submitted a report to the Vice-Chancellor pointing to collusion between members of staff and students in interference with online results. This led to action being taken against the staff members who were involved in the malpractice.

He averred that the report of the Committee showed how the alteration of marks was done by the employees after being paid by the concerned students. He deposed that several students confessed their

involvement in the syndicate. The units in which marks were altered included those for which the Applicant faced disciplinary action. He averred that upon the discovery of this syndicate, the students whose results were tampered with were suspended from graduating pending further investigations. The decision was conveyed to the Applicant through a letter dated 22nd December, 2011.

The Registrar deposed that when the Applicant appeared before the Disciplinary Committee on 25th July, 2012 he was given an opportunity to defend himself and he admitted to instances of wrongdoing related to his marks and he was found guilty of the charges against him. As a result, discontinuation was recommended.

The Registrar confirmed that the Applicant appealed to the Appeals Committee which deliberated on the appeal in a meeting held on 10th January, 2013. The Appeals Committee upheld the decision of the Disciplinary Committee.

The Registrar wrapped up the respondents' case by stating that Kenyatta University has a duty, and the public has an interest in the performance of that duty, to ensure that those qualifying from its academic training do so with the grades that they deserve. He asserted that cheating or tampering with grades would undermine the credibility and integrity of degrees awarded by the institution.

The Applicant replied to the respondents' case by swearing a further affidavit on 29th November, 2013. He averred that the replying affidavit of the Academic Registrar was full of falsehoods as the grades shown therein did not tally with the grades that were presented to the Disciplinary Committee. He averred that even if the online data had not been tampered with as alleged, he would still have graduated by virtue of the marks held by the various departments. Further, that the "Report on Investigations on Variance in Examinations Records" did not mention him and neither did the key witness in that report, one Kevin Mwenda, testify against him.

The Applicant stuck to his story that no evidence was adduced against him during the hearing by the Disciplinary Committee. He reiterated that he was never invited for the hearing of his appeal which allegedly took place on 10th January, 2013.

The respondents were given an opportunity to respond to the Applicant's further affidavit. In the further affidavit sworn on 13th March, 2014 Dr S. N. Nyaga averred that the offence for which the Applicant was found guilty was that of tampering with online examination grades and not failure to attain the minimal grades to pass and graduate from the University.

He pointed out that the Applicant did not controvert the fact that he had confessed to wrongdoing during the hearing of his case by the Disciplinary Committee. It is the respondents' case that the Applicant was given an opportunity to be heard.

This case raises the common issue of whether a person has been subjected to a fair process by a public body. For purposes of record, the Court derives its **"supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function"** from **Article 165(6) of the Constitution.**

In exercising its supervisory jurisdiction over such bodies, the courts do not derive pleasure in setting aside their proceedings. This was clearly stated by the Court of Appeal in **NYONGESA & 4 OTHERS v EGERTON UNIVERSITY COLLEGE [2006] eKLR** where Nyarangi, JA opined:

"Having thus stated, as I think it to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person

concerned or the other side.”

It is therefore clear that judicial review will come to the aid of a student who has been subjected to an illegal, unreasonable or unfair process.

The Applicant complains about lack of a fair hearing. The concept of natural justice is founded on two cardinal principles namely that no man should be a judge in his own cause and neither should he be condemned unheard. In the case before me there is no claim that the Applicant was subjected to a biased panel. As such, I am only concerned with establishing whether the Applicant was taken through a fair process. The importance of an opportunity to be heard can never be overemphasized. In **KANDA v THE GOVERNMENT OF MALAYA (1962) AC 322** at page 337 it is stated that:

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

The Court of Appeal in **NYONGESA & 4 OTHERS (Supra)** affirmed this principle with Masime, JA stating that:

“In my respectful view a student who has studied to the completion of a university course and who claims to be entitled to the award of a degree, diploma, certificate or other award should not suffer the penalty of deprivation of such award without notice of a hearing. That must be so since such a penalty would clearly take away his “prize” and future source of academic standing and livelihood and all that appertains to it. Prior notice of the proposal to impose such a penalty and of proceedings therefore must in my view be given to persons liable to be directly affected so that they are able to:

(i) make representation on their own behalf if they wish;

(ii) appear at the hearing if one is to be held; and

(iii) effectively prepare their own case and answer the allegations which they have to meet.”

In order for one to be said to have been availed an opportunity to be heard, there should be evidence of adequate notice of the date and place of hearing. He must be given advance notice of the charges facing him. The charges must be specified so that he can clearly understand what he is alleged to have done or not done. This also includes a chance to call witnesses where necessary.

In approaching a case like the one before this Court, the caution given by D. Musinga, J (as he then was) in **REPUBLIC v EGERTON UNIVERSITY EX-PARTE ROBERT KIPKEMOI KOSKEY [2006] eKLR** should be borne in mind. In that case, the learned Judge observed that:

“However, for purposes of judicial review, what is important for this court to consider is whether the disciplinary procedure as laid down in Egerton University Statute XXIV Section 7.2 on pages 8 and 9 of the said statute was followed. It is not the function of this court to probe into the accuracy, truth or otherwise of the allegations of examination malpractice that were alleged by the respondent against the applicant. The court is interested in knowing whether the rules of natural justice were observed by the respondent in the conduct of its investigation as against the applicant. It has been held that Judicial Review is not an appeal from a decision, but a review of the manner in which the decision was made...”

In Nairobi High Court **Petition No. 365 of 2012 (consolidated with Petition Nos. 430 of 2012, 469 of 2012, 470 of 2012, 471 of 2012 472 of 2012, 500 of 2012, 98 of 2013, 550 of 2012 and 474 of 2013)**

ELIUD NYAUMA ONMWEYO & 2 OTHERS v KENYATTA UNIVERSITY, Lenaola, J who was dealing with cases arising out of the incident that led to the discontinuance of the studies of the Applicant herein, addressed the issue of fair hearing and concluded that:

“In this Petition, the letters have summoned the Petitioners to disciplinary proceedings to answer to charges of influencing tampering with on-line grades in particular units. The questions that I would ask then are, was the letter supposed to reveal the manner of influencing tampering with on-line grades? Was it supposed to reveal any evidence? Was it supposed to reveal the nature of the tampering and the Parties involved? Was it supposed to reveal the sources of the evidence that the Petitioners were to be charged with? My answer to these questions would be in the affirmative. I say so because the letters were basically inviting them for proceedings whereby they would be required to give their defense and side of the story. It was also at these proceedings that the Respondent was going to lay down the evidence that he had against the Petitioners but obviously this did not happen. In fact even at these proceedings, the Respondent merely stated that “investigations revealed that the Petitioners were complicit in the tampering of online grades”. As to what evidence had led the Respondent to such a conclusion, none was placed before me at all, and like the Petitioners, I take the view that the Respondents treated the matter rather casually.”

The Applicant was taken through the same process with the petitioners in the said cases. The observations of the learned Judge are therefore pertinent to this case.

Having stated the applicable law, I will now proceed to apply the law to the facts of this case. Apart from some excerpts provided by the respondents, I did not have the benefit of the regulations governing disciplinary proceedings at Kenyatta University. However, the lack of regulations will not hamper my determination of this matter.

The first question is whether the Applicant having completed his studies and cleared with the University was no longer subject to its disciplinary process. The Applicant argued that the fact that he had cleared with the University meant that he was no longer a student and he could not therefore be discontinued from studying at the University.

The respondents think otherwise. It is the respondents’ case that it is a prerequisite for the conferment of a degree from a university that a student has met all the university’s requirements for the award of the same. As such, he only ceases to be a student upon conferment of his degree and the fact that he has completed his studies and cleared with the university is immaterial. Further, that it is the duty of every university to ensure that students qualify for the degrees they deserve.

I am indeed pursued by the respondents’ argument that only deserving students should be awarded degrees. No student should be allowed to benefit from a study process that is tainted with examination irregularities. No student should get grades higher than what he or she has sweated for. I agree that upon discovering the tampering with the grades online, Kenyatta University had a duty to investigate and discipline those who were found to be culpable. The Applicant’s argument that he ought to have been allowed to graduate based on tainted grades is untenable. His argument that he could not be discontinued therefore fails.

The second question is whether the Applicant was taken through a fair disciplinary process. He says he was not but the respondents hold the opposite view. The letter dated 11th July, 2012 inviting the Applicant for a hearing stated:

“RE: STUDENTS DISCIPLINARY CASE

This is to inform you that you are required to appear before the Students’ Disciplinary Committee (SDC) on Wednesday, 25th July 2012 at 8.30 a.m. at Kenyatta University Business and Students’ Services Centre to answer charges of influencing tampering with

on-line examination grades in the following eleven (11) units:

SMS 160 SMA 200 AEC 300 ASC 303

SMA 261 SMA 201 AEC 301

SMA 104 AEC 202 AEC 307

Kindly report to Kenyatta University Business and Students' Services Centre Room 273 for registration.

Please note that should you fail to appear, disciplinary action will be taken against you without any further reference to you."

From a reading of the said letter it is clear that the offence is one of "***influencing tampering with on-line examination grades.***" The Applicant has correctly pointed out that the particular regulation or rule that created the offence with which he was charged was not pointed out. No student should be charged and convicted for an offence unknown to the regulations of the university. Counsel for the respondents submitted that since the offence did not fall under examination irregularities, then it fell under general offences. That is acceptable but the regulation creating the general offence ought to have been pointed out to the Applicant. If the indiscretion was one unknown to the University's regulations, then the Applicant ought to have been awarded his degree, if he had qualified, based on the marks held by the various departments. Thereafter the 1st Respondent could have then proceeded to amend its regulations so as to cover this kind of irregularity. From the evidence placed before the Court, I find that the process to which the Applicant was subjected did not meet the basic standards of fairness.

My finding is firmed by the fact that the Applicant was not provided with the report that formed the basis of the accusation against him. No witness was called to give evidence against him. In short, no evidence was adduced in support of the charges facing him.

There was an allegation by the respondents that the Applicant confessed to the offence. The Applicant denied admitting any wrongdoing. From the minutes of the meeting of the Disciplinary Committee held on 25th July, 2012 and the minutes of the meeting of the Appeals Committee held on 10th January, 2013 it is clear that the Applicant confessed to submitting marks for a Continuous Assessment Test (CAT) he had set and marked for himself. He also admitted having presented forged documents purported to be from Kenyatta National Hospital. As can be seen, the confessions were in respect of incidents not related to tampering with online marks.

Further evidence of non-compliance with the rules of natural justice is found in the fact that the Applicant was found guilty of tampering with results for 12 units whereas he had been accused of tampering with the results for 11 units. No explanation was given to him about the change in the number of the units he allegedly interfered with.

In his appeal, the Applicant raised a pertinent point. He submitted that the offence of influencing tampering with online examination data was not provided for in the University Calendar and the Students Handbook. In the minutes provided by the respondents for the meeting of 10th January, 2013, it is clear that the Appeals Committee did not make any decision on this issue. The Appeals Committee therefore failed to consider material information placed before it. It did not act as is expected of an appellate body and its decision must be quashed.

The respondents argued that it is only the outcome of appeal which can attract a quashing order as the decision of the Disciplinary Committee was made over six months prior to the filing of these proceedings. The answer to this question is very simple. The disciplinary process was a continuous process. It started with the issuance of a hearing notice followed by the actual hearing. The Applicant properly exercised his right of appeal. This entire process was a single process and anything done during the process was subject to *certiorari* so long as the proceedings were filed within six months from the

date of the notification of the outcome of the appeal. The respondents' argument that the hearing before the Disciplinary Committee is separate and independent from the appeal is untenable. Such an argument must fail.

Should the prayers sought be granted as prayed? The Court cannot compel Kenyatta University to award the Applicant a degree as proposed. This Court cannot purport to sanitize what is claimed to be a tainted process. The Applicant has not satisfactorily answered the question as to who upgraded his online marks.

The dilemma the courts face in a situation like this was aptly captured by Mumbi Ngugi, J in **ALICE NJERI NGICHIRI v KENYATTA UNIVERSITY [2012] eKLR** when she opined that:

“24. The matter before me concerns two important but competing interests, which interests are in turn underlain by two troubling possibilities. The first is the right of a student, who has undergone a course of study at the respondent University, to realize the purpose of that course of study in a timely and efficient manner. The other relates to the interest that the University has in ensuring that those qualifying from its academic training do so with the grades that they deserve, and that there is no cheating or tampering with grades which would undermine the credibility and integrity of degrees awarded by the institution.

25. The first troubling possibility goes to the integrity of students pursuing courses of study at the University and the institutions own staff: that students and staff of the respondent are willing to reduce the award of grades and qualifying degrees to a transactional exchange in which students' grades are altered to reflect better than the students have been awarded by their tutors. The other troubling possibility is that the respondent's examination systems are so inefficient and compromised that it cannot safeguard the integrity of the grades it awards. In light of these possibilities, the court is called upon, in my view, to balance these competing interests while bearing in mind the greater public interest in a system of higher education that can be relied on to help achieve societal goals in education...”

In the circumstances, the right to a fair hearing should be balanced with the need to ensure that students leave universities with degrees and certificates they have worked for.

In the circumstances of this case the suitable orders are:

1. An order of certiorari calling into this Court and quashing the decisions of the Students' Disciplinary Committee made on 25th July, 2012 and the decision of the Students' Appeals Committee made on 10th January, 2013;
2. The Applicant's case is remitted back to the 1st Respondent (Kenyatta University) for commencement of fresh disciplinary proceedings not later than 60 days from the date of this judgment; and
3. As the Applicant has partly succeeded, I direct the parties to meet their own costs.

Dated, signed and delivered at Nairobi this 3rd day of December, 2014

W. KORIR,

JUDGE OF THE HIGH COURT