



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

PETITION NO.181 OF 2012

BETWEEN

PATRICK MBAU KARANJA.....PETITIONER

AND

KENYATTA UNIVERSITY.....RESPONDENT

JUDGMENT

Facts

1. The Petitioner, Patrick Mbau Karanja, was an employee and student at the Kenyatta University, the Respondent herein and the Petition dated 2/5/2012 raises the issue whether the decision by the Respondent to suspend him for one year from his MBA Programme was done within the expectations of the Constitution and whether **Articles 27(1), 43(1)(f) and 47** of the **Constitution 2010** were specifically breached.
2. It is uncontested that he was admitted to the MBA Programme for the year 2010/2011 but after proceedings undertaken by the Students Disciplinary Committee of the Respondent on 11/5/2011, he was notified, on 31/5/2011, that he had been suspended for “*one (1) Semester with effect from 1st September 2011*” and as a consequence, his “*results for the papers taken in the first Semester [were] nullified*”.
3. The reason given by the Respondent for that drastic action was that the Petitioner had registered for, and sat examinations in the 1st Semester of the 2010/2011 Academic Year, while having a fee balance contrary to contrary to University Regulations.
4. By a letter dated 24/2/2012 and for the same reasons as above and apparently on the basis of the proceedings before the Students Disciplinary Committee on 11/5/2011, he was suspended for one Academic Year and the result of the examinations for the first Semester were nullified.
5. On 17/5/2012 and on 19/7/2012, both myself and Mumbi Ngugi J. ordered the Respondent to admit the Petitioner to the MBA course, register him accordingly and allow him to sit for the Semester Examinations scheduled for commencement on 23/7/2012. There is no evidence that the order was not complied with and so the issue to address in this Reference is the legality or otherwise of the suspension after the disciplinary proceedings held on 11/5/2013.

Case for the Petitioner

6. I have read the Petition, the Supporting Affidavit sworn on 2/5/2012 as well as the Submissions filed on 26/11/2012. The Petitioner's case is that what triggered the disciplinary action taken against him was what would otherwise appear to be a straight forward matter; that the Petitioner had sat examinations in the 1st Semester of his MBA Programme without paying the requisite fee and so he was suspended and the examination results were canceled.

7. His argument is that, firstly, when he enrolled for the programme, he had a credit balance of Kshs.38,042/- from his Bachelor's Degree Programme and that he intended to use that credit as deposit for his post-graduate fees and the balance of Kshs.35,408/- was to be paid at the beginning of the 2nd Semester.

Secondly, that he had the full authority of the Respondent to pay the fees by a check-off system against his salary and that the arrangement had been reached during his undergraduate studies and he understood that the same arrangement would continue during the post graduate programme.

Thirdly, that the Disciplinary Committee had no reason nor power to suspend him and it was in any event wrong for it to initially suspend him for one Semester and then to extend the suspension to one year without giving reasons for so doing.

Fourthly, that the actions of the Respondent were in violation of the **Kenya University Act of 1985 and the Constitution, 2010** and specifically **Statute XX** of the Act, and **Articles 33(1)(c) and 43(1) (f) of the Constitution, (the right to education)** and **Article 47(1) (the right to fair administration action)** thereof. He seeks the following orders and reliefs;

"a) It be declared that the suspension of the Petitioner from his MBA Programme for one year on 31/5/2011 is null and void in that the Students' Disciplinary Committee acted in excess of the powers under Statute No.XX of the University.

b) It be declared that the Respondent's Students' Disciplinary Committee's decision of 31/5/2011 to suspend the Petitioner from his MBA Course and nullify his results for the 1st Semester was taken in contravention of the Petitioner's right, under Section 47(1) of the Constitution to have the Respondent's allegation of alleged irregular course be adjudicated upon by an Independent and impartial adjudicating authority to a fair hearing of the same with a reasonable time. (sic)

c) It be declared that the Respondent's Students' Disciplinary Committee's decision of 31st May 2011 to suspend the Petitioner from his MBA Course and to cancel the Petitioner's results for the 1st Semester was taken in contravention of the Petitioner's right, under Section 27(1) of the Constitution, not to be subjected to an arbitrary and capricious exercise of public power by the Respondent in exercise of its powers under the Kenya University Act, and the said action of the Respondent is unconstitutional, null and void.

d) It be declared that the Respondent has contravened the Petitioner's right under Section 43(1)(f) of the Constitution, to education, by suspending the Petitioner from his MBA degree programme for one (1) year and canceling his 1st Semester results.

e) It be declared that the Respondent's Students' Disciplinary Committees' decision on 31st May 2011 is null and void for breach of the rules of natural justice in that the purported Students Disciplinary Committee, served as the Petitioner's prosecutors, judges and also as witnesses against him.

f) It be declared that the Respondent's Students Disciplinary Committees' decision on 31st May 2011 is null and void for breach of the rules of natural justice in that the Respondent's Disciplinary Committee, a tribunal, was improperly constituted in that no student representatives were present.

g) It be declared that the Respondent's Student Disciplinary Committees' decision on

31/5/2011 is null ad void for breach of the rules of natural justice in that the Respondent exercised its statutory power to discipline students arbitrarily and capriciously.

h) It be declared that the Respondent's Students Disciplinary Committees decision on 31/5/2011 is null and void for being given by the Respondent in excess of its jurisdiction.

i) it be declared that the Respondent's decision on 31/5/2011 to suspend the Petitioner and cancel his results for the 1st semester was taken in contravention of the rules of natural justice and is consequently null and void.

j) it be declared the decision of the Respondent to suspend the Petitioner and cancel his examination results offends the principle of proportionality in that if the Petitioner was wrong in any respect, that action did not warrant his suspension and cancellation of his examination results.

k) This Honourable Court be pleased to issue an order of certiorari to remove and bring to the High Court for the purposes of quashing the decision of the Students Disciplinary Committee of 31/5/2011 to suspend the Petitioner for one(1) year and cancel examination results for the 1st semester.

l) A permanent injunction do issue to restrain the Respondent by itself, its servants and or agents from excluding from or preventing the Petitioner from studying at the Respondent.

m) An order that the Respondent do pay to the Petitioner general damages.

n) An order that the Respondent do pay the Petitioner's costs.”

Case for the Respondent

8. The Respondent's response is contained in a Replying Affidavit sworn on 3/7/2012 by one Dr. Daniel Muindi, and all the facts as pleaded by the Petitioner are admitted save that according to the Respondent, the Petitioner had no authority to enroll for and sit examinations without payment of fees and he had no authority to treat his Bachelor's degree fees balance as a deposit. That in fact, the Petitioner admitted during the disciplinary proceedings, that one Mr. Wambua, his colleague in the Finance Department of the Respondent had assisted him to register for the MBA programme without payment of fees.

9. Further, that the Respondent's Students' Disciplinary Committee had lawfully invoked Statute XX of the Respondent's Statutes to suspend the Petitioner for one year and to cancel the results for his 1st Semester and since the Petitioner was given a hearing, no rules of natural justice were breached and no provisions of the Constitution were violated as alleged.

10. That the Petition is without merit and should be dismissed with costs.

Determination

11. I have taken into account the Submissions by learned Counsel appearing for both Parties. It seems to me that since the facts save two are uncontested, I should begin by resolving the contested ones which are the following;

i) whether the Respondent had good reasons to suspend the Petitioner for non-payment of fees for his MBA Programme.

ii) If so, whether the period of suspension, was one Semester or one academic year.

12. On issue No.(i) above, there is no doubt that the Petitioner was granted permission to pay fees for his under-graduate programme by a check-off system against his salary principally because he was as an employee of the Respondent. By letter dated 30/4/2004, he applied to do so and by an Internal Memo dated 17/5/2004, Prof. Olive Mugenda, Deputy Vice-Chancellor (Finance, Planning and Development) wrote as follows;

“SUBJECT: PAYMENT OF FEES THROUGH CHECK-OFF SYSTEM

We allowed you to pay for your fees through check off system to enable you attain higher qualifications. The new regulation is that fees for each semester are cleared before students move to the next semester.

Please let me know in writing how you plan to settle the balance by the end of the semester, given that whatever is being deducted may not add up to the required amount for the first Semester fees.”

PROF. OLIVE M. MUGENDA, Ph.D

DEPUTY VICE-CHANCELLOR

(FINANCE, PLANNING AND DEVELOPMENT)

cc Deputy Vice-Chancellor (Academic)

Although the Memo refers to attainment of “*higher qualifications*”, a vague expression, it was in reply to the Petitioner's specific request with regard to his “*Bachelor of Commerce Degree Course as a self-sponsored student in this university, starting 3/5/2004*”

13. The Petitioner, in a letter dated 8/6/2011, stated as follows in answer to the allegation that he had no authority to pay for the MBA Programmed by use of the salary check-off system;

“I relied on authority given to me by DVC (FPGD) on 17/5/2004 which I may have misinterpreted.”

He then added as follows;

“I paid the fee balance and therefore I request for lenience” (sic)

14. The import of the above exchange is that the Petitioner had no authority to assume that an arrangement reached with his employer regarding payment of fees for the undergraduate course would also be applied in the MBA Course. His admission is telling and whether or not he misinterpreted the memo of 15/5/2004, ultimately, there is no doubt that he had no authority to act as he did. In fact, it is clear to me that he reached an understanding with one, Mr. Wambua, a friend of his, not to pay fees but unlike when he applied for payment by check-off in the undergraduate course, he did not address the University Administration. His conduct was improper, and unlawful and that is a sufficient answer to issue no.(i).

15. On issue No. (ii), I have seen two letters addressed to the Petitioner by the Respondent. The first is dated 31/5/2011 and it reads in part as follows;

“It was therefore decided that you be SUSPENDED for one(1)Semester with effect from 1/9/2011. You are informed that your results for the papers taken in the first Semester are nullified.” (Emphasis added).

16. The second letter is dated 24/2/2012 and its contents are the same save that the relevant sentence

was changed to read;

“It was therefore decided that you be suspended for one (1) Academic Year with effect from 1st September 2011. You are informed that your results for the papers taken in the first Semester are nullified.” (Emphasis added).

Prior to the above letter being written, the Petitioner had written to the Registrar (Academic) of the Respondent university on 3/2/2012 and sought clearance after the one (1) Semester suspension had ended.

17. There is an obvious contradiction in the two letters and Dr. Daniel Muindi aforesaid who was the author of both letters had this to say about the matter;

“I am aware that my communication to the Petitioner with respect to the decision of the Students' Disciplinary Committee was erroneous because in fact, the Petitioner was suspended for one year and not one Semester with effect from 1st September 2011. This position was rectified in my letter dated 24th February 2012”

18. My analysis of the facts before me would point to the conclusion that Dr. Muindi should have been more forthright. Why did it take him from May 2011 to February 2012, a period of nine months to realise that his initial letter was erroneous? Why did he not respond to the Petitioner's letter seeking clearance from suspension instead of slapping him with further suspension without any reasons being given at all? It does not matter that he had exhibited unconfirmed minutes of a meeting held on 11/5/2011 by the Students' Disciplinary Committee at which the Petitioner was suspended. Those minutes were taken by the same Dr. Muindi and they purport to show that the Petitioner was indeed suspended for one academic year. The error, if at all it is an error, is serious enough to cast doubt as to the good faith of the said Dr. Muindi and the Respondent. Had he explained the reasons for his alleged error at the time the Petitioner sought clearance, I would have given him the benefit of doubt but in the circumstances, I cannot do so.

19. The answer to issue No.(ii) must be that the initial period of suspension must be taken as the correct one. I also note that in compliance thereof, the Petitioner paid the requisite fees and there is no evidence that any fees are presently outstanding.

In fact, when I ordered the Petitioner to be reinstated to the MBA Programme, I verbally told him that it could not be gainsaid that he had to pay all fees that were required.

The one year suspension has no meaning when all circumstances are taken together.

20. Turning to the issue of the Students Disciplinary Committee and with the above background, the Petitioner has obviously misunderstood the expression, *“rules of natural justice”* in the context of his case. Administrative disciplinary process such as the Students Disciplinary Committee is not expected to conduct its proceedings like a Court would. It is sufficient that he was heard and a decision made, taking into account all the matters placed before the Committee for determination. This is the same position that Musinga J. took in **H.C.Mis. Appl.54/2009, Republic vs Kenyatta University** where he stated thus;

“... it was not sufficiently demonstrated that the Students Disciplinary Committee violated the principles of natural justice in any substantial manner that would have affected its decision. The Applicant was given an opportunity to defend herself and proceedings to that effect were exhibited herein. Secondly, there is also sufficient evidence that the Disciplinary Committee considered the defence that was advanced by the Applicant before it arrived at its decision.”

I hold the same position and in addition, elsewhere above, I have shown that the Petitioner admitted wrongdoing on his part, made good by paying the fees that was being demanded, suffered suspension and I have said that save for the contradictory letters of suspension, he was wholly to blame for his predicament.

I see no breach of the rules of natural justice in this case and the other issue to address therefore is whether the Respondent breached the **Kenyatta University Act** and the **Constitution 2010**. I have read the Submissions by Counsel for the Petitioner and I have also seen paragraphs 7, and 8 of the Petition. The latter raise the issues that the right not to be subjected to discrimination (**Article 27**) the right to fair administrative action (**Article 47**) and the right to education (**Article 43(1)(f)**) were all breached by the Respondent.

21. On the alleged breach of the Act, I see that the only allegation made is that Statute XX of the Respondent's Statute was contravened. At paragraph 16 of the Petition, the Petitioner has pleaded and in reproducing that Statute has stated that it provides as follows;

“a) Every person wishing to be registered as a student for a degree, diploma, certificate or other award of the university shall pay the university such registration fees as the Council may from time to time determine.

b) The University shall have the right to preclude any student from attending classes, participating in any academic activities or enjoying any other University facilities unless such a student shall have paid to the university all fees and other dues provided that the university shall at its discretion exempt any student from this requirement.

c) The University shall have the right to stop a student who is a debtor to the University from registering or sitting for examinations.

d) The University shall have the right to withhold examination results from any student who is a debtor to the University until such debt is paid in full.

e) The University shall have the right to withhold the conferment of any degree, diploma, certificate or any award from any person until all outstanding fees and other dues are settled with the University.”

22. I will spend little time on the interpretation of the above Statute. The Petitioner was in breach of the requirement that every person who wishes to be registered for any degree course shall pay the University such registration fees as shall be determined from time and time and that any student who is a debtor can be stopped from registering or sitting for examinations. The Petitioner, by letter, admitted wrong-doing, paid the penalty imposed and what wrong had the university then committed by following the Statute? An admitted offender cannot later change his plea and blame the prosecutor for properly invoking the law.

23. The allegations about breach of Statute are no more than hot air and regarding **Articles 27, 43(1)(f)** and **47**, sadly, I see no breach of either of those rights. There is absolutely no evidence that Petitioner was discriminated against. The fact that he was suspended for his own failure cannot surely mean discrimination as understood under the Constitution. Further, he may have missed classes and his results were canceled and so he was denied education. But I have explained that the actions of the Respondent were lawful and the mere invocation of the Constitution but limited right to education cannot negate that fact. In any event, this Court ordered the Respondent to allow the Petitioner to continue with his education in good time to recover lost time and so there is nothing made of his complaint in that regard.

Similarly, having addressed the propriety of the disciplinary proceedings, there was no other administrative action expected of the Respondent to warrant a finding that fair administrative action was denied to the Petitioner.

24. I should only say this as I conclude; in Francis Waithaka vs Kenyatta University Petition No.633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further, the Court also cited with approval, the decision in Teitinnang vs Ariong [1987] LRC (Const.)517 where it was held as follows;

“Dealing now with the question, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individuals, are regulated by private Laws. The Constitution, on the other hand, is an instrument of government. It contains rules about the government of the country. It is my view, therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold.”

25. I maintain this position and it is important that simple matters between individuals which are of a purely civil or criminal nature should follow the route of **Article 165(3)(a)** and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights.

26. In any event, it is obvious to me that this matter was spent when the Petitioner returned to his MBA programme by order of this Court. Let him continue those studies subject to compliance with the requirement or fees being paid before commencement of any Semester. He has served his suspension and the Respondent need not revisit the issue.

27. Finally, save for the orders I have made above the Petition is hereby dismissed.

28. As to costs, no party has wholly succeed as each is partly at fault, so each should bear its own costs.

29. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 6TH DAY OF JUNE, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Florence – court clerk

Mr. Gito for Respondent'

No appearance for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE