



**University of Nairobi v Anyui (Civil Appeal 606 of 2019)
[2021] KECA 112 (KLR) (22 October 2021) (Judgment)**

Neutral citation: [2021] KECA 112 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 606 OF 2019
PO KIAGE, F SICHALE & S OLE KANTAL, JJA
OCTOBER 22, 2021**

BETWEEN

UNIVERSITY OF NAIROBI APPELLANT

AND

ONJIRA JOHN ANYUI RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (W.A. Okwany, J.) delivered on 9th January, 2019 in HC. Petition No. 428 of 2017)

JUDGMENT

1. This is a first appeal from the Judgment of the High Court of Kenya at Nairobi (W.A. Okwany, J.) delivered on 9th January, 2019 in a constitutional petition filed by the respondent, Onjira John Anyui, against the appellant, University of Nairobi. The learned Judge allowed the petition and issued a declaration that the expulsion and subsequent suspension of the respondent from the appellant university was null and void *ab initio* and that the respondent be re-admitted to join the appellant's Bachelor of Medicine and Surgery degree course from where he had reached before the said suspension so as to complete his studies; a declaration was issued that the respondent's rights under Articles 27, 47 and 50 of the *Constitution* had been violated; an award of Kshs.1,000,000 was made to the respondent for violation of his rights and he was awarded costs of the petition.
2. Being a first appeal Rule 29 of the *Court of Appeal Rules* requires that we re-appraise the evidence and reach our own conclusions of fact; in other words that we re-hear the case. The position on the Courts mandate in a first appeal was well summarized in the oft-cited case of *Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123* thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the



evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

3. It is common ground that the respondent was admitted to the appellant university to pursue a bachelor's degree in medicine. In the course of his studies the respondent decided to contest elections that were scheduled to be held on 1st April, 2016 by Student Organization of Nairobi University (SONU) as Campus Representative, College of Health Sciences. According to the facts set out in the petition that was presented to the High Court, those elections attracted several candidates in various elective posts and as is characteristic of such elections, there were campaigns in various campuses by candidates seeking those positions. There was such a campaign meeting on 18th March, 2016 at the University's School of Nursing at the Safari Bowling Greens Restaurant, which was open to all students as long as they had a student identification card and had purchased an entry ticket. The respondent, being qualified to attend that meeting decided to attend to advance his candidature for the said position of Campus Representative. According to the respondent he arrived at the venue of the meeting at around midnight accompanied by his friend Humphrey Ouko Otieno; they were well received and the meeting was attended by many students and candidates for various posts. The respondent addressed the meeting and according to him "... moved the gathering with his sweeping campaign agenda that left the students cheering and shouting his name as he was leaving the podium ...". He then left the meeting but on his way out he heard a commotion and learnt later that the commotion resulted from one of the candidates being denied an opportunity to address the meeting. He witnessed his friend, Humphrey Ouko, fight off rowdy students and he with his said friend Humphrey Ouko and another friend, John Orimbo went back to the student hostels. At about 9 a.m. the following morning, the respondent stated that he was woken up by the Campus Security Chief who was accompanied by two security officers and he was required to record a statement on the events that occurred the previous night at the restaurant. He did. It was thereafter that at a meeting convened by the Principal, College of Health Sciences, the respondent learnt that a student, Bramwel Kundu, had been injured during the fracas at the campaign meeting. He (the respondent) decided to drop his bid for election and when elections were held they were characterized with violence leading to their cancellation and Bramwel Kundu was expelled from the university while one Oduor was suspended. All should then have been well with the respondent who had taken a considered decision to drop out of the elections but he was surprised to receive a letter on 19th May, 2016 by the Vice Chancellor suspending him from the university. He was accused that he had solicited Humphrey Ouko, at the meeting of 19th March, 2016, to fight Bramwel Kundu; that he had illegally harbored Humphrey Ouko in his campus room and had failed to report after witnessing Humphrey Ouko attack Bramwel Kundu. He was later invited to a hearing before University's College Disciplinary Committee on 26th May, 2016 and when he appeared accompanied by his guardian he says that he was not given a fair hearing – there was no representative nominated by the College Student Organization; he was not given an opportunity to be represented by a person of his choice; his guardian was intimidated. According to the petition the respondent was prosecuted by the Campus Security Chief who did not call any witness; prosecution was through witness statements and the respondent could not face his accusers to counter their evidence. He received a letter dated 6th July, 2016 from the Vice Chancellor indicating that the College Disciplinary Committee had found him guilty on all counts. He was suspended and later expelled, and he says at paragraphs 34-36 (inclusive) of the petition:

"34. Surprisingly however neither Mr. Humphrey OUKO and Bramwel Kundu who were alleged to be involved in the fight that the petitioner is accused of witnessing and failing to report was taken through any disciplinary proceedings that found them guilty. In fact Mr. Humphrey Kundu was pardoned and even allowed to complete his studies to graduation.



35. It is also surprising that the Petitioner was suspended and later expelled from the University because he allegedly witnessed Mr. Humphrey Ouko and Bramwel Kundu engage in a fight but failed to report them to the College authorities. The Petitioner by failing to report the fight to the University authorities he did not breach any duty recognized under the law.

36. Accordingly, on 8th September, 2016 the Petitioner appealed against the decision of the College Disciplinary Committee. The appeal was heard on 26th May, 2017 but the outcome of the appeal is yet to be made for over period of over 3 months. This state of affairs leaves the Petitioner's career in limbo since he has been out of school and lost out on his education for a period of over a year, which time he will never recover in his lifetime."

The petition listed various violations of the Constitution in particular violations of rights donated by Articles 27, 33, 38, 43, 47, 48 and 50 and prayed that:

- "a) A declaration that the suspension and expulsion of the Petitioner from the Respondent University was null and void ab initio and the Petitioner be re-admitted to join the University's Bachelor of Medicine and Surgery (M.B. Ch.B.) Year V Class to complete his studies.
- b) A declaration that the Petitioner's rights as slated in the Petition were violated.
- c) Compensation for violation of the Petitioner's rights as guaranteed under the Constitution.
- d) Costs of this Petition be borne by the Respondent.
- e) Such other orders this Honourable Court shall deem fit."

In a replying affidavit Prof. Isaac M. Mbeche, the appellant's Acting Deputy Vice Chancellor (Administration and Finance) restated the facts of the case stating that the respondent had been charged with four counts relating to:

Count One: Failure to respect and adhere strictly to the administrative and academic procedures established by the University of Nairobi Charter, 2013 for the control, governance and operations of the University contrary to Part III (1) (a) (i) of the rules Governing the Conduct and Discipline of Students (RGCDOS).

Count Two: Failure to respect the rights and privileges of the members of the University Community at all times contrary to Part III (1) (a) (i) of the rules Governing the Conduct and Discipline of Students (RGCDOS).

Count Three: Failure to refrain from conduct that might bring the University or any section or programme thereof to disrepute or public odium contrary to Part III (1) (a) (i) of the rules Governing the Conduct and Discipline of Students (RGCDOS).

Count Four: Failure to carry yourself in all public places and with such humility and dignity as befits your status as a mature and responsible citizen contrary to Part III (1) (a) (i) of the rules Governing the Conduct and Discipline of Students (RGCDOS)."

Prof. Mbeche deposed that the respondent had solicited Humphrey Otieno to attack Raymond Bramwel Kundu without provocation causing him serious bodily harm; that the respondent had harbored Humphrey Otieno Ouko in Room 322, Block A which action was illegal, unlawful and against Rules Governing the Conduct and Discipline of Students; that The College Students Disciplinary Committee at the College of Health Sciences in meeting held on 9th June, 2016 with the



respondent's guardian's attendance (Ms. Hellen Kisana Ouma) recommended that the respondent be expelled from university; expulsion was vacated and replaced with a suspension of the respondent from university for three academic years; that the decision to expel and thereafter suspend the respondent was lawful, procedurally sound and discharged by the appellant in honour of its obligations as a University and public institution. The Professor penned off by stating, on advise of his lawyers, that the petition was not maintainable and was scandalous, frivolous and vexatious as the right of fair administrative action was not violated; that rights under Articles 19 and 24 of the Constitution are limited and that the respondent had not demonstrated that his individual rights had been violated in a way that could not be compensated and, why did the respondent choose the constitutional route and not other avenues?

4. The learned Judge, as we have seen, found for the respondent and made the various orders that we have stated in this Judgment.
5. There are 14 grounds of appeal set out in the Memorandum of Appeal drawn for the appellant by its lawyer, Donald B. Kipkorir of KTK Advocates where the Judge is faulted in law and fact by making a decision based on assumptions, presumptions, judge's expectations, presence and/or absence of third parties who were not party to the petition. It is said that the Judge erred in determining what is criminal in nature whereas that was not an issue before the Disciplinary Committee of the appellant; that the Judge erred in law and fact in equating the disciplinary proceedings against the respondent to quasi – criminal proceedings. It is said that the appellant followed ingredients of fairness and natural justice; that the Disciplinary Committee of the appellant was not biased; that the Judge erred in assuming that statements by Humphrey Ouko and Bramwel Kundu were not part of 24 witness statements relied on by the appellant's Disciplinary Committee; that the Judge erred in holding that rules of natural justice were not applied in the respondent's case; that the case before the Disciplinary Committee was not a criminal trial and the Judge was wrong to equate student disciplinary proceedings to proceedings in a criminal court; that the Judge erred in interfering with internal disciplinary proceedings of the appellant where courts should not interfere; that the Judge erred in awarding colossal damages and, finally, that the Judgment had no legal or factual basis. For all that we are asked to allow the appeal, set aside the said Judgment, award all costs to the appellant and make such or further orders as the court deems fit.
6. When the appeal came up for hearing before us on 23rd June, 2021 learned counsel Mr. Kanjama assisted by Mr. Muoki advocate appeared for the respondent but there was no appearance for the appellant. We were satisfied that M/S KTK Advocates, on record for the appellant, had been served with a hearing notice on 16th June, 2021 but despite a virtual link being shared by the Registrar of this Court to that law firm, there was no appearance.
7. Both sides had filed written submissions as directed in the said hearing notice and as per Case Management Directions given on 14th July, 2020.
8. In written submissions the appellant set out the history of the case which we have visited in this Judgment and set out grounds of appeal in Memorandum of Appeal which we have also spoken to. The appellant relies on the case of *Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah [2014] eKLR* for the proposition that this Court can only interfere with the decisions of the trial court where that court has misdirected itself in a matter with the result that the court made a wrong decision that occasioned miscarriage of justice. The appellant submits that the trial court erred in holding that the respondent was not accorded a fair hearing; that the court proceeded on assumptions and interfered with administrative functions of the appellant where the court should stay away from administrative roles and functions of institutions such as the appellant. Further, that the court was wrong to consider that the respondent had been expelled when, by the time of hearing the



petition, the expulsion had been lifted and replaced with a suspension. Relying on the case of *Africa Nazarene University v David Muteru 103 Others [2017] eKLR* the appellant asks us to interfere with the findings of the trial Judge who the appellant faults for considering disciplinary proceedings at a university to be in the nature of criminal proceedings in court. The appellant further submits that there was observance of fair trial rights in the proceedings before the appellant's Disciplinary Committee and before the Senate. It is submitted for the appellant that the award of Ksh.1,000,000 for alleged violation of constitutional rights was excessive where expulsion had been converted to a 3 year suspension and, in conclusion, we should allow the appeal.

9. In a highlight of written submissions Mr. Kanjama, learned counsel for the respondent relied on regulations governing discipline of students and, citing the Judgment of the High Court, counsel submitted that the respondent's legal rights had been violated. He relied on provisions of Fair Administrative Actions Act which provides *inter alia* for rights to a fair hearing submitting that the respondent was denied those rights. On the award of compensation, counsel submitted that the respondent was entitled to that award having been expelled while in 4th year and lost 5 years of education. It is submitted for the respondent that although administrative bodies are free to determine their procedures, courts will interfere with such proceedings where the rules of natural justice are side-stepped and for this proposition the respondent cites the case of *Nyongesa & 4 Others v Egerton University College [1990] eKLR* where this Court while addressing the issue of administrative actions of colleges and universities observed:

“Courts are very loathe 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 a decision has been made without fairly and justly hearing the person concerned or the other side. It is the duty of the courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people. Whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character.”

It is submitted for the respondent that the High Court was right to interfere in the case before it as the respondent says that the appellant had conducted a sham disciplinary process which denied the respondent an opportunity to face his accusers and arrived at a decision that offended logic. It is finally submitted that the award of damages was not wrong and the quantum was not excessive.

10. We have considered the whole record, submissions by counsel and the law and this is how we determine this appeal.
11. There were various allegations made against the respondent by the Vice-Chancellor, University of Nairobi, in the letter dated 18th May, 2016 under the title “SUSPENSION FROM THE UNIVERSITY”. It had been reported to the Vice-Chancellor that on 19th March, 2016 the respondent had solicited and incited Humphrey Otieno Ouko to attack Raymond Bramwel Kundu without provocation causing him serious bodily harm; he (the respondent) had illegally harbored the said student in his room and he had witnessed the said Humphrey Otieno Ouko committing the said crime but failed to report to the relevant authority. The Vice-Chancellor stated in the letter that the respondent's conduct was in contravention of the Rules and Regulations Governing the Organization, Conduct and Discipline of students which regulations the respondent had signed and was bound to abide with. It was said that the respondent's conduct aided, abetted, counseled and or procured the commission of criminal offences against the University, its stakeholders and the general public and disturbed the peace and for all that the respondent was suspended from the university with



immediate effect pending investigations and further disciplinary action. A detailed copy of specific charges and particulars was to follow; the respondent would be invited to appear before the appropriate Disciplinary Committee and, in the meantime, the respondent was to keep away from university premises.

12. The Registrar, College of Health Sciences by his letter of 26th May, 2016 required the respondent to appear before the College Disciplinary Committee on 9th June, 2016 where he was to make his defence otherwise a decision would be made. The letter informed the respondent that he was entitled to call a witness in his defence and to be accompanied by his parent/guardian and charges laid against him were enclosed in the letter. Those charges from the Acting Chief Legal Officer to the Registrar (Student Affairs) are well captured in the Judgment subject of this appeal and we have reproduced them referring to in the replying affidavit of Prof. Isaac Mbeche.
13. The respondent appeared before the Disciplinary Committee and the results of those proceedings are captured in the Vice-Chancellor's letter of 6th July, 2016 where the respondent was informed that he had been found guilty on the charges relating to soliciting and inciting Humphrey Otieno Ouko to attack Raymond Bramwel Kundu; that of illegally harboring the student and the charge of witnessing the attack and failing to report the same to the relevant authority. The respondent was informed that Senate had approved the recommendation of Disciplinary Committee to expel him from the University and the respondent was thus expelled from the university with effect from 9th June, 2016.
14. Minutes of the Students Disciplinary Committee meeting held on 9th June, 2016 at 9 a.m. on the case of the respondent are attached and appear at page 101 of Record of Appeal. It is stated that the charges against the respondent were read out to him by the Chairman of the College Students Disciplinary Committee and he pleaded not guilty to all the 4 charges. The respondent was then allowed to make "oral submissions" where he confirmed that he had attended the student's meeting of 19th March, 2016 but denied that he had incited Humphrey Otieno Ouko to attack Raymond Bramwel Kundu. He also denied having facilitated the said Humphrey Otieno Ouko to attend that meeting; he denied accommodating the said student in his room which room anyway did not belong to him; that he left the venue of the meeting immediately and did not know what transpired after he had left; that he was not responsible for Ouko's actions and he regretted joining student politics.
15. The said proceedings show that one Dismus Aminga, Senior Security Officer, gave evidence but there is no indication that the respondent was given any opportunity to challenge that evidence or cross-examine the said witness. The proceedings show that the Committee cross-examined the respondent at length on all the counts that he faced and in its deliberations that followed the respondent was found to be dishonest, insincere and casual; that he could not be believed; that he acted in an irresponsible manner and was guilty as charged. The Committee recommended that the respondent be expelled from the University.
16. There are also Minutes of the Senate Student Disciplinary Committee meeting held on 26th May, 2017 which considered an appeal lodged by the respondent. After hearing his mitigation the Committee vacated the earlier decision and replaced it with a suspension from the University for 3 academic years with effect from 18th May, 2016.
17. The learned Judge analyzed the facts of the case and found that fair trial rights donated by Article 50 of the Constitution of Kenya, 2010 were applicable to the case. She found that those rights as well as rights under Article 47 of the Constitution had been violated in the way that the appellant dealt with the respondent's case. The Judge found that the proceedings that were initiated against the respondent were in the nature of quasi-criminal proceedings.



18. Upon our own analysis and considerations of the matter before the High Court we hold the same views and reach the same findings as those reached by the Judge.
19. As found by the Judge, procedural fairness is now a constitutional requirement in administrative action and as this Court stated in the case of *Judicial Service Commission v Mbalu Mutava [2015] eKLR*:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

The appellant alleged that the respondent had solicited and incited a student, Humphrey Otieno Ouko, to attack another student, Raymond Bramwel Kundu at the students meeting of 19th March, 2016. It was not shown what power or control the respondent had over Humphrey to have him attack the other student. The respondent testified that he gave a speech at the said meeting that was well received by those in attendance and that he left the meeting immediately after his speech. This evidence was not contradicted by any other evidence and the Security Officer, the only other witness who testified before the Disciplinary Committee did not disclose the sources of his information that had led to the respondent being required to record a statement and thereafter charges being laid against him. Neither Humphrey Otieno Ouko, the alleged attacker, nor Raymond Bramwel Kundu, the alleged victim, were called as witnesses.

20. We note from the record that the Disciplinary Committee considered written statements of various witnesses – Guda Osiniho, Kundu Raymond Bramwel, Kodiwo Antony Benard, Gishohi Zackary Kariithi, Manyala Fredrick Owiti, Opera Wesley Owuor, Bethiel N. Lunani, Wabiswa – but none of these people were called to testify therefore the respondent was not accorded his right to cross-examine them. That was certainly not action that was procedurally fair as required by Article 47 of the Constitution. It was not a fair hearing – it violated Article 50 of the Constitution and provisions of Fair Administrative Actions Act.
21. There is no evidence on record showing that the appellant took any disciplinary or any other action against the alleged attacker (Humphrey) or the victim. What is on record is that at the 55th Congregation for the Conferment of Degrees and Award of Diplomas on Friday, September 2, 2016 at Chancellor’s Court, University of Nairobi awarded Ouko, Humphrey Otieno Bachelor of Science in Meteorology (Second Class Honours (Lower Division)). That is an interesting development considering that the appellant’s case against the respondent was that he (the respondent) had used an unstated power to solicit Humphrey to launch an attack where another student suffered injuries. Humphrey is then awarded a degree while the respondent is expelled; suspended for 3 academic years.
22. There was no fair hearing and the appellant was convicted on trumped up charges which were not proved as witnesses were not called; witness statements were considered by the Disciplinary Committee without according the respondent a right to challenge the authors of the statements; there was no cross-examination and the respondent was denied the right to challenge evidence before the Committee.
23. Those grounds of appeal as relate those issues are dismissed.



24. The appellant says that the award of Ksh.1,000,000 for violation of rights was excessive. First, the Judge was entitled under the Constitution and The Fair Administrative Actions Act to award compensation. Secondly, it has been the law in this country that this Court will not interfere with an award of damages by the High Court unless the same is inordinately high or inordinately low – *Butt v Khan [1978] KLR 349*.
25. The sum awarded is not inordinately high at all. It is fair compensation for the rights which the respondent was entitled to and which were violated by the appellant.
26. We find no merit in this appeal which we dismiss with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

**I certify that this is a true copy of
the original.**

Signed

DEPUTY REGISTRAR

