



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & SICHALE, JJA)

CIVIL APPEAL NO. 176 OF 2013

BETWEEN

KORI ERICK NG'ANGA..... APPELLANT

AND

THE UNIVERSITY OF NAIROBIRESPONDENT

(An appeal against the Judgment of the High Court (Githua J.) delivered by (Odunga J.) dated 20th March, 2013

in

Judicial Review No. 72 of 2010

JUDGMENT OF THE COURT

Kori Erick Ng'anga, (the appellant) brought this appeal against the judgment and order of the High Court of Kenya at Nairobi (Hon. Lady Justice C.W. Githua) delivered on her behalf by the Hon. Mr. Justice D.V. Odunga on 20th March, 2013. In the said judgment the learned judge dismissed the appellant's judicial review application under which he had sought to quash the decision of **The University of Nairobi** (the respondent/University) to expel him as a student from the University for allegedly cheating in an examination.

Briefly, the facts of this appeal are that, the appellant was a student at the respondent where he was admitted on 11th September, 2003 for an undergraduate course in Civil Engineering. On or about 12th June, 2009 while he was sitting for his final exams, FCE 526 Water Resources Engineering, the appellant was allegedly caught cheating by an invigilator. Consequently, the appellant was suspended by the respondent and he was advised that he will be called at a later date for a hearing where the issue of exam cheating will be deliberated by the respondent's disciplinary committee.

The appellant was subsequently invited for hearing of the matter through a telephone call on 18th October, 2009 wherein he was advised that the hearing will take place on 26th October, 2009. On the said date the hearing took place and the committee recommended to the respondent's Vice-Chancellor that the appellant be expelled from the University for cheating in an examination. The Vice-Chancellor through a letter dated 5th February, 2010, informed the appellant that he had approved the recommendation by the disciplinary committee and the appellant had therefore been expelled from the University.

It is that decision to expel him from the University that provoked the appellant to file an application for judicial review before the trial court. In the application before the trial Court, the appellant contended that he was expelled without being afforded an opportunity to be heard and this was therefore in breach of the rules of natural justice. The appellant contended that he was not given sufficient written notice prior to his appearance before the disciplinary committee and further that he was not given sufficient time to defend himself. The appellant therefore contended that the actions by the respondent were arbitrary, unprocedural and untenable. The appellant therefore prayed for an order of certiorari to quash the decision to expel him, as well as an order of mandamus to compel the respondent to readmit him to the university and allow him to sit his final examination in FCE 526 Water Resources Engineering.

On its part the respondent through a replying affidavit sworn by its Vice-Chancellor, Administration and Finance, maintained that the appellant was caught cheating in the examination. The respondent stated that the appellant was given enough time and opportunity to defend himself. Githua, J upon hearing the matter, held that the appellant had been given sufficient time to prepare his defence before the committee. The learned judge further held that the appellant properly participated in the proceedings and that the disciplinary committee observed the rules of natural justice when dealing with the appellant. The learned judge proceeded to dismiss the application.

Aggrieved by that judgment, the appellant preferred this appeal against the entire judgment raising seven grounds of appeal in his memorandum of appeal. Parties filed written submissions in support of their positions and respective counsel highlighted the submissions before us. The appellant submitted that he was only called to be informed about the hearing by the disciplinary committee and that the said telephone call only advised him of the date and venue of the meeting but never informed him of the reason and/or purpose as to why he was required to appear before the committee. The appellant argued that it was not enough to be just summoned for the hearing but that it was the responsibility of the respondent to explain to him the reason for the hearing and also what would be required of him at the hearing. The appellant contended that it was a fundamental right of an accused person whose actions are subject to judicial, quasi-judicial and/or administrative action to be formally informed of the charges leveled against him and the same to be explained in a language he understands and that the same should be done before the hearing.

The appellant submitted that the assumption that he knew that he was to appear before the disciplinary committee for examination cheating was unjust. The appellant argued that the internal memo by the respondent's legal office which enumerated the offences against the appellant had four counts and the said memo was presented to him at the hearing. The appellant wondered how he was supposed to defend himself against the said charges when he had no prior knowledge of the charges. The appellant submitted that though the internal memo was dated 14th July, 2009, which was a month after the alleged cheating, the same was only presented to him at the hearing before the committee on the 26th October, 2009.

The appellant further contended that the learned judge failed to appreciate that the disciplinary committee shifted the burden of proof to him and hence required him to prove that he was not cheating in the examination. According to the appellant this explains the decision by the committee to have him testify first before his accuser, the invigilator. The appellant also took issue with the fact that he was not allowed to cross-examine the invigilator. Further the appellant submitted that the learned judge failed to consider that no substantial reason was given by the senate for its decision. In conclusion the appellant in the alternative contended that the decision to expel him was too severe being a first offender. He argued that eight years have elapsed since the decision to expel him was made and according to the appellant this was punishment enough.

On its part the respondent in opposing the appeal submitted that, for an applicant to be successful in an application for judicial review he must show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety. The respondent argued that the appellant failed to substantiate his allegations that the respondent's decision to expel him did not adhere to the rules of natural justice. The respondent maintained that the expulsion process was fair and just from inception. It contended that the appellant was duly informed of the charges leveled against him vide the letter of suspension dated 3rd July, 2009 and which set out the reasons for the suspension as cheating during an examination. According to the respondent the suspension letter also informed the appellant that his case will be deliberated before the disciplinary committee at a date that was to be communicated to him. The respondent therefore argued that the appellant is estopped from denying that he was aware of the charges he faced and the reasons for appearing before the committee.

The respondent while relying on the case of ***Russel vs Duke of Norfolk [1949] 1 ALL ER 109 at P. 117-118***, submitted that the contention of impropriety by the appellant, for the reason that his testimony was heard first then followed by the invigilator's testimony and further that he was not given an opportunity to cross examine the invigilator was misconceived and based on an misapprehension of the law. Hence, the respondent submitted that it had met the standard reasonably required to meet the tenet of fair hearing. The respondent argued that the appellant did not raise any issue regarding sufficient notice and he did not inform the disciplinary committee that he wished to cross examine the invigilator. The respondent contended that the offence of examination cheating was serious and readmitting the appellant would dilute the seriousness of the offence. The respondent urged us not to interfere with the discretion of the trial court in not granting the orders sought arguing that the learned judge correctly and judicially exercised her discretion.

We have considered the record; respective submissions by learned counsel and the authorities cited. Our mandate on a first appeal is set out in **Rule 29(1)** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. Where as in this case the exercise of judicial discretion is involved the exercise of which is called to our interrogation, we remain guided by the principles enunciated in ***Selle vs Associated Motor Boat Company Ltd [1968] EA 123***; that will not interfere unless we are satisfied with the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. We are of the view that the only issue that we need our consideration is whether the appellant was given sufficient notice of the charges he is facing and ample time and opportunity to defend himself against the charges.

We have perused the record and we are clear in our minds that no charges were served upon the appellant before the date scheduled for the hearing of the disciplinary case, therefore the issue of adequate time to prepare, answer and responded to the charges is a fundamental issue which was addressed by the trial court during hearing.

Secondly it is common ground that the appellant was only informed about the hearing by way of a telephone call. That mode/method of communication is a manifest expression that the respondent did not give due weight to the nature and extent of the disciplinary matter which had the potential of expelling the appellant from the university, which was a drastic and radical outcome.

In instances where the outcome has the likelihood of resulting prejudice or injuries to an individual, it is incumbent or prudent, or reasonable to give the party adequate, sufficient and reasonable opportunity to defend or give his side of the story. Here is a case where the appellant was called to a disciplinary hearing without being given adequate and sufficient notice of what he intends to meet or expect at the hearing. It is clear that the appellant was never informed of the purpose and reasons as to why he was required to appear before the disciplinary committee. It may be argued that the appellant knew the reason but in order to show that the respondent complied with the principles of fair hearing as enshrined in Articles 47 and 50 of the Constitution, it was reasonably expected to be served with a proper notice containing the charges and informing him of the consequences of his non-attendance or even the eventual outcome of the process. In the High Court case of ***Geothermal Development Company Limited vs Attorney General & 3 others [2013] eKLR***, it was held that:

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but

when taking administrative actions as well. (See *Donoghue vs South Eastern Health Board [2005] 4 IR 217*). ...Article47 enshrines the right of every person to fair administrative action. ...In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be.

(See *Charkaoui vs Canada [2007] SCC 9*, *Alberta Workers' Compensation Board v Alberta Appeals Commission (2005)258 DLR (4th), 29, 55* and *Sinkovich vs Strathroy Commissioners of Police (1988) 51 DLR (4th) 750*.)”

We agree with the above quote, which though not binding on us is persuasive in nature, and fully adopt it. Equally it was the duty of the respondent to clearly explain in writing to the appellant, what was required of him at the hearing. The charges levied against the appellant were to be served prior to the hearing and at the hearing to be explained in a language he understands and the environment was also a factor. We are of the view that the disciplinary committee before which the appellant appeared is more or less a quasi-judicial body and though the procedure cannot be equated to criminal proceedings as submitted by the appellant, it is of fundamental importance that proper procedure is followed. The charges must be read and explained to the party/appellant. The party must be asked how he pleads to the charges facing him and he must be asked whether he is ready to proceed.

In *Nyongesa & Others vs Egerton University College (1990) KLR 692* Nyarangi JA (as he then was) pronounced himself as follows:

“Having this stated, as I think 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 justify hearing the person concerned or the other side. What constitutes a fair process is dependent on the facts and circumstances of each case.”

The requirement that adequate notice of the nature of the charges the appellant was facing and the possible outcomes of the charges being given to the applicant is informed by the fact that the appellant is entitled to have sufficient time to adequately prepare for the hearing by addressing the specific allegations and to enable him marshal evidence and mount his defence.

In view of what we have stated hereinabove we find that this appeal has merit and we accordingly allow the same. Each party shall bear costs in the High Court and of this appeal.

Dated and Delivered at Nairobi this 8th day of February, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

DEPUTY REGISTRAR