



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 44 OF 2019

LEGEUS LOMOSI MUDEGU.....PETITIONER

VERSUS

ENYATTA UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Petitioner, Legeus Lomosi Mudegu is a student at Kenyatta University (the Respondent) where he is undertaking a Bachelor of Arts degree in the School of Humanities and Social Sciences.
2. The Respondent alleges that on 31st January, 2018 the Petitioner committed an examination irregularity when sitting an examination in a study unit known as EPS 100: Introduction to Psychology. After investigations, the Petitioner was suspended through a letter dated 17th September, 2018 pending his appearance before the Students' Disciplinary Committee.
3. Through the petition dated 7th February, 2019 the Petitioner prays for orders as follows:-

“(a) AN ORDER that the suspension of the Petitioner from the Respondent University pursuant to an allegation of examination irregularity constitutes a flagrant abuse of the Petitioner’s right to fair hearing and fair administrative action.

(b) AN ORDER staying the decision by the Ag Registrar Academic suspending the Petitioner from the University and an order compelling the Respondent to reinstate the Petitioner back to his studies in the School of Humanities & Social Sciences in the fourth year of study, 2nd Semester, and further compel the Respondent to administer all the examinations that the Petitioner has missed out during the period of suspension from his studies.

(c) AN ORDER that the fundamental rights and freedoms guaranteed to the Petitioner especially under Articles 27(1), 27(2), 28, 43(1)(f), 47, 48, 50(1) & 55 of the Constitution have been contravened by the Respondent.

(d) AN ORDER that the Petitioner is entitled to compensation for breaches of his fundamental rights as particularized above and the Petitioner be compensated by way of damages for mental, psychological and emotional anguish/torture and suffering he was subjected to by the Respondent due to the violation of his constitutional rights.

(e) Any further and other orders as may be deemed necessary on the facts and in the circumstances of the case.

(f) The Respondent be condemned to pay the costs of this petition.”

4. A perusal of the Petitioner’s pleadings disclose that sometimes towards the end of November, 2018 he attempted to log into his student portal with a view to registering for his 4th year, 1st Semester, examination but found that the portal had been blocked. He consulted the IT Department and he was informed to check with his department as his account could be having an issue. He was nevertheless issued with an examination card and he sat the examination scheduled for November and December, 2018.

5. The Petitioner’s case is that in December, 2018 he was summoned and served with a letter dated 17th September, 2018 suspending him from school on the ground that he was involved in examination irregularity. He was also informed through the letter that he was to appear before the Students’ Disciplinary Committee.

6. It is the Petitioner's averment that he had not been summoned to appear before the Students' Disciplinary Committee by the time he came to court.

7. It is therefore Petitioner's case that the Respondent's action had violated his right to a fair hearing as guaranteed by Article 50(1) of the Constitution. He averred that he was never given a chance to be heard before his suspension. He therefore deposed that the decision to suspend him was unreasonable and violated the principles of natural justice, fairness and equity. Further, that no reason was given for the decision.

8. The Petitioner also averred that his legitimate expectation had been violated by the Respondent. According to the Petitioner, the release of the results for the study unit in which he was alleged to have committed the examination irregularity and the fact that he had been cleared to contest student elections in October 2018 entitled him to a legitimate expectation that he had not committed any examination irregularity.

9. It is further the Petitioner's case that he had a legitimate expectation that if there was any dispute with the Respondent the same ought to have been resolved expeditiously and timeously. It is the Petitioner's position that he ought to have been informed expeditiously of his suspension and summoned before the Students' Disciplinary Committee to clear his name. His position is that the delay in the process violated his fundamental rights to human dignity.

10. The Petitioner contends that the Academic Registrar never gave him a chance to be heard and neither was he given an opportunity to cross-examine any person who gave adverse evidence against him. Further, that he was never given time to put up his defence or call his witnesses.

11. It is the Petitioner's case that the Respondent took an unreasonably long time in communicating the verdict of the Academic Registrar thereby infringing his constitutional right to an expeditious hearing that is efficient, lawful, reasonable and procedurally fair. According to the Petitioner, all the said shortcomings on the part of the Respondent denied him his right to fair administrative action as guaranteed by Article 47 of the Constitution and rendered the Respondent's decision unreasonable, illegal and devoid of procedural propriety.

12. The Respondent opposed the petition through an affidavit sworn on 19th March, 2019 by the Deputy Vice-Chancellor in Charge of Administration, Professor Fatuma Chege. The Respondent's case is that on 31st January 2018, the Petitioner was writing a re-sit examination in EPS 100: Introduction to Psychology when he was noticed walking into the examination room from outside while handing in the answer sheet. Consequently, the Registrar (Academic) was informed of the irregularity and through an Internal Memo dated 17th September, 2018, the Registrar (Academic) wrote to the Head of Senate Affairs recommending the suspension of the Petitioner.

13. It is the Respondent's case that on 17th September, 2018 the Petitioner was suspended pending his appearance before the Students' Disciplinary Committee with the intended date of appearance being 15th March, 2019.

14. According to the Respondent, the petition is ill-advised, unmerited and premature as it seeks to stop the Respondent's internal mechanism for resolving disputes on examination irregularities. Further, that the internal mechanism for resolving such disputes, which serves the purpose of ensuring there is postponement of judicial considerations in accordance with Article 159 of the Constitution, had not been exhausted.

15. The alleged violation of the Petitioner's constitutional rights is denied by the Respondent who insists that it has not missed any steps provided under the Students Information Handbook on examination irregularity.

16. It is the Respondent's case that the Petitioner seeks to stop the inquiry into his culpability in the examination irregularities and a grant of orders will result in the Respondent being unable to ensure the quality of its programmes and graduates. The court is therefore asked to dismiss the petition with costs.

17. The Petitioner filed submissions dated 28th June, 2019 and the Respondent filed submissions dated 22nd July, 2019. The advocates for the parties made brief oral highlights and indicated to the court that they would be relying on the filed submissions. I have perused the submissions and I will rely on them as I proceed to make my determination.

18. Upon perusal of the pleadings and submissions, I am of the view that the only question to be answered in this judgment is whether the Petitioner has satisfied the conditions for the grant of any or all of the orders sought.

19. Although there appears to be no contradiction as to the facts of this matter, the Respondent left several unfilled gaps in its affidavit. Be that as it may, the petition will have to be decided on the material placed before the court by the parties.

20. The genesis of this petition is the letter addressed to the Petitioner by the Acting Registrar Academic on 17th September, 2018 through which the Petitioner was informed as follows:-

“MUDEGU LOMOSI LEGEUS

P. O. BOX 2768

NAIROBI.

RE: SUSPENSION ON EXAMINATION IRREGULARITY

Following a report by the Chairman, Department of Psychology, in your involvement in examination irregularity in the Unit: EPS 100: Introduction to Psychology, held on 31st January 2018, I regret to inform you that you are suspended from studying in this University pending your appearance before the Students' Disciplinary Committee. This is in accordance with University Examinations Regulation on penalties as stipulated in the University Calendar.

You will be informed in due course when to appear before the Students' Disciplinary Committee.

Thank you.

DR. ANDANJE MWISUKHA

AG. REGISTRAR (ACADEMIC)"

21. The letter complied with Clause 4.6 of Kenyatta University Student Information Handbook which provides that:-

"A student who is involved in any examination irregularity shall be suspended immediately by the Registrar (Academic) upon receipt of an incident report pending appearance before the Students' Disciplinary Committee."

22. The letter is therefore clear that the Petitioner's case was to be heard later by the Students' Disciplinary Committee. Indeed the Petitioner later averred that he had been invited through a text message for disciplinary proceedings that were scheduled for 15th March, 2019. The hearing was suspended by consent of the parties after the Petitioner moved the court to suspend the hearing.

23. The Respondent submitted that it is incorrect for the Petitioner to claim that his right to a fair hearing had been violated. This submission is indeed correct. The Petitioner moved to court before his case was heard by the Students' Disciplinary Committee.

24. In the case of **Kenyatta University & 2 others v Elena D. Korir [2016] eKLR**, the Court of Appeal upheld the appellant's decision to postpone the graduation of the respondent pending the investigation of her PhD degree. In doing so, the Court stated that:-

"We concur with the submission that the deletion of the respondent's name from the graduation list was only deferment of the graduation pending the investigations. It also provided an opportunity for all the parties including the respondent to be heard. Therefore the complaint that the respondent was not given a hearing had not been justified, and in this regard we concur with the holding in *Lewis vs Heffer & Others [supra]* that in a situation such as this, where there was need for urgent action and where the action taken was only an interim action the rules of natural justice were not violated."

25. The Petitioner's counsel, however, submitted that the letter suspending the Petitioner indicated that it was based on a report from the Chairman of the Department of Psychology. It is the Petitioner's case that he was not heard before the report was made.

26. Counsel for the Petitioner relied on the decision in the case of **Republic v Kenyatta University & another Ex-parte Wellington Kihato Wambura** for the submission that suspension from a University is an administrative process and the rules of natural justice apply before one can be suspended. This depends on whether the suspension is at the tail end of the process or whether it is part of the process. Where a student is being suspended as a punishment then he or she is entitled to a hearing. On the other hand where the suspension is prior to a hearing, like in this case, it cannot be said that the student should have been heard first.

27. In **Re Ali Sele, Benson Wairagu & Joseph Ng'ethe Gitu [2008] eKLR** it was held that:-

"It is not in every situation that the other side must be heard. There are situations where hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the Court and there cannot be a general requirement for hearing in all situations. There will be for example situations where the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

28. It is noted that the suspension of the Petitioner was a step towards his being accorded an opportunity to be heard. The preliminary investigations by the Respondent must have disclosed that the Petitioner had a case to answer hence the decision to suspend him.

29. The Respondent did not rebut the Petitioner's claim that he was not served with the suspension letter until December, 2018. The Petitioner also averred that he received the results and he had indeed passed the re-sit in the unit in which he was being accused of examination irregularity. The Respondent never bothered to rebut the averment or explain how a student could receive results for an examination in which it was alleged that he had committed an irregularity.

30. There was also no explanation why it took the Respondent close to nine months from the date of the alleged irregularity to the time of suspension. There was also no explanation why the Petitioner was not served with the suspension letter from the time of its issuance on 17th September, 2018 until December, 2018. No explanation was given as to why the Petitioner was issued with an examination card and sat for the November/December, 2018 examination even though his student portal had been blocked.

31. The Petitioner told the court that he contested and won a seat in the students election held in October, 2018. His averment was that prior to being allowed to contest he had to be cleared by the Respondent. According to the Petitioner, this showed that he had no disciplinary issues. The Petitioner's averments did not receive any response from the Respondent. It is therefore taken that the Petitioner's statement of facts is correct.

32. Article 47(1) of the provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The words expeditious and efficient almost mean the same thing. In using the words in the Article, the drafters of the Constitution wanted administrative action to be undertaken without waste of time, money and energy. Administrative action therefore needs to be carried out without undue delay.

33. By suspending the Petitioner almost eight months after the alleged irregularity, the Respondent failed the test of expeditious and efficient administrative action in the circumstances of this case. I also find that the administrative action was not procedurally fair. The Petitioner received the suspension letter long after his results for the subject he was alleged to have committed an irregularity had been released. The Respondent offered no explanation for the delay in commencing the disciplinary process.

34. Article 47(2) of the Constitution requires written reasons for any administrative action that is likely to violate the fundamental freedom of a person or adversely affect that person. The Petitioner was simply told he was being suspended for an examination irregularity without the details of the allegation. That in my view was not good enough. He was entitled to the particulars of the alleged offence. Although that failure alone cannot be read to amount to a violation of the Constitution, decision-makers must be alive to the good governance standards envisaged by the Constitution.

35. The decision that was being made was going to affect the Petitioner's right to education as protected by Article 43(1)(f) of the Constitution. He was still being taken through the disciplinary process and the Respondent had a duty to ensure that the Petitioner was not going to be prejudiced by the process. In a normal administrative or adjudication process, the outcome is presumed to be unknown. It may have been found at the end of it all that the Petitioner was not culpable. The Respondent was therefore required to ensure that the process was expeditious and fair. In my view the Respondent failed to comply with Article 47 of the Constitution.

36. Apart from failing to serve the Petitioner with the suspension letter in good time, the Respondent proceeded to compound its sins even after this petition had been filed. I must point out that I find nothing wrong with the Respondent's decision to summon the Petitioner for disciplinary proceedings as there was no order stopping the Respondent from proceeding with the matter. The error on the part of the Respondent is that it never gave the Petitioner the particulars of his alleged offence so that he could prepare his defence.

37. In the message addressed to the Petitioner and which is annexed to his affidavit sworn on 13th March, 2019 in support of the application for stay of the summons for him to appear before the Students' Disciplinary Committee, the Petitioner is tersely informed that:-

“Good morning, this is to inform you that there will be a Student Disciplinary Committee meeting on 15th March, 2019, where you are expected to attend in the DVC – Acad Boardroom No. 22.”

Had the Respondent proceeded to hear the case against the Petitioner, the hearing would still have violated the rules of natural justice.

38. From what I have stated above, it follows that the Respondent violated the Petitioner's right to fair administrative action. However, the right to a fair hearing was not violated in the circumstances of this case as the Petitioner was going to have his day before the Students' Disciplinary Committee. I also do not find any violation of the Petitioner's right to education. When an allegation of an examination irregularity is made, the rules and regulations of the university must be followed. Those rules allowed for the suspension of a student pending hearing of the matter by the Students' Disciplinary Committee. Enforcement of the regulations cannot, be said to violate the right to education.

39. The Petitioner has urged this court to award him Kshs2 million for the violation of his rights. I do not find an award of damages appropriate in this case. The Petitioner is yet to undergo the disciplinary process. The outcome of the disciplinary process is unknown. Although I have found that the Respondent violated the Petitioner's right to fair administrative action, award of damages is not advisable in this matter. In my view, a declaratory order and an award of costs are sufficient to remedy the violation by the Respondent.

40. In the circumstances of this case the petition partially succeeds and orders shall issue as follows:-

- a. A declaration is hereby issued that the Respondent contravened the Petitioner's right to fair administrative action;
- b. The Respondent shall, if it so desires, conduct and conclude disciplinary proceedings against the Petitioner within 90 days from the date of this judgment.
- c. The Petitioner is awarded costs of the petition.

Dated, signed and delivered this 27th day of February, 2020

W. Korir,

Judge of the High Court