REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

JUDICIAL REVIEW NO. 219 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE BY WAKOLI

KUNANI FOR AN APPLICATION FOR LEAVE TO

INSTITUTE JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF THE DECISION OF THE SENATE OF

UNIVERSITY OF NAIROBI CONTAINED IN THE LETTER

DATED 21ST APRIL, 2016

AND

IN THE MATTER OF ARTICLE 25(C), 27, 47 AND 50 OF THE CONSTITUTION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

LAZARUS WAKOLI KUNANI,

MAGAWI MAXWELL ODHIAMBO & CHORE ROBERT OUKO...EX PARTE APPLICANTS

JUDGEMENT

Introduction

1. By their Notice of Motion dated 18th May, 2017, the ex parte applicants herein, **Lazarus Wakoli Kunani**, **Magawi Maxwell Odhiambo** and **Chore Robert Ouko**, seek the following orders:

1) That the Honourable Court be pleased and do hereby grant Judicial Review order of Certiorari

to remove into this Honourable Court and quash the decision of the Disciplinary Committee and by extension to The Senate bodies of the Respondent to suspend and or expel the Applicants herewith.

2) That the Honourable Court be pleased and do hereby grant Judicial Review order of Prohibition to remove into this Honorable Court and prohibit the Respondent, their agents and or employees from further subjecting the Applicants to any illegal, unlawful disciplinary measure, harassing and or denying them access to the University of Nairobi.

3) That the Honourable Court be pleased and do hereby grant Judicial Review order of Mandamus to remove into this Honourable Court and compel the Respondents, their agents and or employees to facilitate the Applicants access to the University of Nairobi and continue with their education.

4) That the Honourable Court be pleased and do hereby grant Judicial Review order of Mandamus to remove into this Honourable Court and compel the Respondents, their agents and or employees to recall the Expulsion letters dated 21st April, 2016 and reinstate the Applicants as students of the University of Nairobi.

5) That the cost issues further and other reliefs it may deem just and expedient to grant.

6) That this court issues further and other reliefs it may deem just and expedient to grant.

Applicants' Case

2. According to the applicants, they were were admitted and registered students of the University of Nairobi actively pursuing the following courses:

i. **Magawi Maxwell Odhiambo** Registration No. G34/3297/2014 a second year student pursuing a Bachelor of Laws.

ii. **Wakoli Kunani** Registration No. F16.2324/2011 a fourth year student pursuing a **Bachelors of Civil Engineering**

iii. **Chorre** Robert Ouko registration No F21/2240/2014 a third year student pursuing a Bachelor of Environmental and Bio systems Engineering

3. It was averred that by a written letter dated April 21st 2016 and so appended by the Vice Chancellor of the University of Nairobi the applicants were arbitrarily expelled from the Institution based on the recommendation of the university Disciplinary Committee and thereafter by the approval of the School Senate to issue for alleged participation in school riots.

4. According to the applicants, the said disciplinary Committee did issue them with 4 days' notice to appear before it and plead out accusation meted out against them which were so attached with charges. It was disclosed that as a matter of fact the 3rd Ex parte applicant was issued with a suspension letter before being offered an opportunity to be heard contrary to the students Handbook.

5. According to the applicants notwithstanding the gravity of the charges, the Respondent never reported to the police.

6. It was averred that the first applicant was unable to attend the said hearing on the 19th April, 2016 on which day he was verily ill and sent a sick chit to the school to explain his non attendance but the same was so disregarded. Similarly, the second applicant was interested in bringing legal representation but the students Handbook does not allow for legal representation. As regards the 3rd applicant, he did actually attend the sitting of the disciplinary committee and despite the fact that the Dean actually found that he had done nothing wrong he was summarily expelled anyway together with several other students despite being assured that the same would not occur.

7. According to the applicants, the said restriction on the right to legal representation goes against the grain of the Constitution and their rights, from being ably and fully represented. It was therefore the applicants' case even if they were to appear before the said disciplinary panel, they would not have been allowed to be properly represented. To them, given the gravity of the charges against them, it was not only unfair but also unjust to deny them such representation.

8. The applicants lamented that notwithstanding the fact that they were denied ample opportunity to defend themselves, the disciplinary committee elected to expel them from the institution immediately and hence prejudiced to their academic pursuits.

9. Whereas, they were given the option to appeal the said expulsion, it was their case that the said appeal did not permit them to continue with their studies as their awaited to be heard by the school.

10. With respect to the threshold and grounds for judicial review, the applicant relied on **Pastoli vs. Kabale District Government Council and Others [2008] 2 EA 300**.

11. It was submitted that the University's Disciplinary Committee did not comply with the rules of the book by not according the applicants a chance to be heard in accordance with Article 47 and 50 of the Constitution. To the applicants, the said Committee being a statutory body ought to comply strictly with what is provided in the statute. In their view the Respondent's decision has the effect of impinging upon the applicant's rights to education and had the potential of restricting human rights and fundamental freedoms under the Bill of Rights hence it was unreasonable for the Respondents to have come to a decision of expelling the applicants without hearing them.

12. In support of their submissions the applicant relied on **Ridge vs. Baldwin (1946) AC 40** and **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR** and contended that the rules of natural justice, in particular the right to fair hearing applies not only to bodies having a duty to act judicially but also those exercising administrative duties and the said duty encompasses the right to be heard by an unbiased tribunal; the right to have notice of the charges of misconduct; and the right to be heard in answer to those charges.

13. It was submitted on behalf of the applicants that the University did not adduce any evidence to show that indeed the applicants were guilty of the charges levelled against them and the applicants were not allowed to call witnesses while the evidence they adduced were disregarded by the Disciplinary Committee hence amounting to gross unreasonableness. In this respect the applicants relied on **Republic vs. Honourable the Chief Justice of Kenya & Others vs. Moijo Ole Keiwua HCMCA No. 1298 of 2004** and **Onyango Oloo vs. Attorney General [1986-1989] EA 456 and Republic vs. Truth, Justice and Reconciliation Commission & Another ex parte Beth Wambui Mugo [2016] eKLR** and submitted that the denial of the applicants' right rendered the decision null and void.

14. It was averred that the applicants' evidence was disregarded on the basis that they were collected from River Road hence to the applicants the Committee did not act within the confines of the law. It

was further submitted that the applicants' right to appeal was never taken into consideration as the 2nd applicant appealed on 23rd May, 2017 but was never called back or given directions as to when the matter would be heard.

15. It was disclosed that it was only after these proceedings were commenced that the Respondent invited the 2nd applicant vide a letter dated 11th May, 2017 to appear before the Senate for appeal. However being the body that issued the expulsion letter, it was the applicant's feeling that he would not get any justice.

16. It was the applicants' case that the charges levelled against them were untrue as the demonstrations in question were peaceful.

17. In support of their case the applicants relied on **Republic vs. University of Nairobi ex parte Michael Jacobs Odhiambo & 7 Others [2016] eKLR**.

Respondents' Case

18. The application was opposed by the Respondent.

19. According to the Respondent, the Students Organization of Nairobi University (hereinafter referred to as ***"SONU")*** is formed pursuant to section 41 of the ***Universities Act No. 42 of 2013***, Laws of Kenya, as an organization to secure for students academic freedom, excellence, liberty and welfare. In line with the SONU Constitution, the Respondent's student's fraternity held elections on 1st April 2016 to elect the leaders of SONU for the 2016/2017 academic year and on 2nd April 2016, election results in respect of the said elections were declared whereby **Paul Owino Ongili** was declared the newly elected chairman of SONU.

20. Following the declaration of the poll results, students who were dissatisfied with the declaration took to the streets in protest and proceeded to stone motorists along Nyerere Road as well as harassing pedestrians. It was further revealed that on 4th April 2016, a group of students, in a bid to disrupt the swearing-in ceremony for the newly elected leaders of SONU protested yet again and disrupted traffic along University Way and sections of Uhuru Highway and yet again stoned motorists while engaging the police in running battles. The students also caused destruction of the Respondent's property by, *inter alia*, setting the SONU offices on fire.

21. According to the Respondent, following the turbulent situation as afore-deposed, a special Senate meeting of the Respondent was held on 5th April 2016 whereat it was resolved that the Respondent institution be closed indefinitely as a solution was being considered. Following that decision, the Respondent of 5th April 2016, issued a notice of closure and directed all the students to vacate the University by 5 p.m. on 5th April 2016.The students yet again protested this move and a faction of them burnt down one of the male prefabricated hostels and damaged property of unascertained value.

22. It was averred that thereupon, the Respondent commenced investigations on the student unrest and destruction of public property which led to closure of the University. The purpose of the investigations was to, *inter alia,* identify the particular students who participated in the unrest and destruction of public property and thereafter commence disciplinary process against those students.

23. According to the Respondent, after the preliminary investigations were conducted by the Respondent, a list of sixty two (62) students were found to have participated in the student arrest and destruction of public property. Consequently, the Respondent suspended the students from any further

studies with the Respondent pending investigation and further disciplinary action. A notice indicating the names of the suspended students was published in the ***Daily Nation Newspaper*** issue of 12th April 2016. By the aforesaid notice, students were asked to collect the suspension letters from the Registrar, Student's Affairs latest by Friday, April 15, 2016 and amongst the students whose names featured on the notice published in the ***Daily Nation Newspaper*** issue of 12th April 2016 as having been suspended on account of participation in the student unrest and destruction of public property are the Applicants.

24. According to the Respondent, the Applicants were suspended on account of commission of offences contrary to the Respondent's Rules and Regulations. Each of the aforestated Applicants was issued with a suspension letter whereby:

a. The 1st Applicant was suspended as a result of unlawful assembly while in the company of a group of students and led a group of students to protest.

b. The 2nd and 3rd Applicants were suspended as a result of inciting fellow students to burn the SONU offices, breaking the glass leading to Gandhi Wing and forcefully entering Ariziki Restaurant where they stole and ate food.

25. It was averred that the suspension letters in respect of each suspended student informed the particular student of the allegations levelled against them and particulars of the offences were disclosed therein. It was further averred that the Respondent caused to be published in the ***Daily Nation Newspaper*** issue of 15th April 2016, a notice informing the suspended students to collect their individual charge sheets from the office of the Registrar of the Respondent's specific colleges. The notice further stipulated the specific disciplinary panel, venue, date and time of their individual hearings before the College of Students Disciplinary Committees.

26. It was disclosed that on diverse days, the 2nd and 3rd Applicants herein appeared before a disciplinary committee to answer to the particular offences as stated in their respective charge sheets and that the disciplinary committees were distinct for each of the Applicants. Each of the Applicants was accorded a fair hearing by the respective college disciplinary committees and after taking into consideration the presentation made by each Applicant, the college disciplinary committees made the decisions that the Applicants be expelled from the Respondent which decisions were on 21st April 2016 approved by the Respondent's Senate Student Disciplinary Committee. Consequently, the Applicants were issued expulsion letters.

27. It was the Respondent's case that its decisions were made in accordance with the Rules and Regulations governing the organization, conduct and discipline of the Students as set out in the Respondent's students information handbook 2015/2016 (hereinafter referred to as "***the Rules and Regulations"***)***.***

28. The Respondent contended that upon joining the University all the Applicants signed a declaration declaring that they had read the regulations governing the Organization, Conduct and Discipline of Students at the University of Nairobi and understood their content and meaning and undertook to abide by them. It was its case that all the Applicants were accorded an opportunity to be heard and were granted ample time to defend themselves. Hence, the Applicants were granted a fair hearing before the respective students' disciplinary committees.

29. According to the Respondent, pursuant to the Rules and Regulations, students appearing before the Disciplinary Committee were permitted to representation either in person or by someone of their choosing, to call witnesses to their defence and to appeal to the Senate Disciplinary Committee as

provided in Part IV (c)(2)(vi) which stipulates as follows;

"At all proceedings or a Disciplinary Committee before which he/she is summoned, the student shall be entitled to a fair hearing and to representation either in person or by someone of his/her choice, to call witnesses in his/her defence and to appeal to the Senate Disciplinary Committee…"

30. The applicants were therefore accused of not being truthful in stating that they were not permitted to call witnesses in their defence. The Rules and Regulations, it was averred are very clear as regards representation and calling of witnesses. However, none of the Applicants was denied their right to representation and calling of witnesses. It was further averred that pursuant to the provisions of Part IV C) (2) (iv) of the Rules and Regulations, the Applicants have a right to appeal against the decision of the Students Disciplinary Committees to the Senate Disciplinary Committee which appeals the Applicants filed as required by the Respondent's rules and regulations. However, the Applicants have failed to exhaust the appellate process which is the appropriate remedy before coming to court. To the Respondent therefore the commencement of this suit is ill advised and the suit should be dismissed since the right to appeal subsists notwithstanding Senate approval of the Disciplinary Committee's decision on expulsion.

31. The Respondent explained that the charges leveled against each of the Applicants were varied and each of the Applicants was given a fair hearing as shown below;-

Lazarus Wakoli Kunani

1) That the Notice published in the Daily Nation Newspaper on 15th April 2016 was very clear that the 1st Applicant's hearing was scheduled for 20th April 2016.

2) That despite being aware of the day of his hearing, the 1st Applicant failed to appear before the Disciplinary Committee. Consequently, the hearing proceeded in the absence of the 1st Applicant.

Magawi Maxwell Odhiambo

1) That the Notice on 15th April 2016 in the Daily Nation Newspaper was very clear that the 2nd Applicant's hearing was scheduled for 20th April 2016.

2) That the 2nd Applicant collected his notification letter on 15th April 2016 whereof his hearing was scheduled for 20th April 2016 giving him a period of about 5 days within which to prepare for the hearing. The aforesaid notice of 5 days was adequate.

3) That the 2nd Applicant's hearing took place on 20th April 2016. During the aforesaid hearing, the 2nd Applicant was accorded a fair hearing and was given ample time to defend himself.

4) That the 2nd Applicant was familiar with the circumstances of the charges that had been brought against him. He did not ask the Committee to give him more time to prepare his defence and the Respondent cannot therefore be accused of breaching the rules of natural justice on this score.

5) That the 2nd Applicant was at liberty to call witnesses as per Part IV (c)(2)(vi) of the Rules and Regulations. He cannot thus argue that he was not given an opportunity to call witnesses in his defence.

Chore Robert Ouko

1) That the Notice on 15th April 2016 in the Daily Nation Newspaper was very clear that the 3rd Applicant's hearing was scheduled for 19th April 2016.

2) That the 3rd Applicant's hearing took place on 19th April 2016 and he was accorded a fair hearing and was given ample time to defend himself.

3) That the 3rd Applicant was familiar with the circumstances of the charges that had been brought against him. He did not ask the Committee to give him more time to prepare his defence and the Respondent cannot therefore be accused of breaching the rules of natural justice on this score.

4) That the 3rd Applicant was at liberty to call witnesses as per Part IV (c)(2)(vi) of the Rules and Regulations. He cannot thus argue that he was not given an opportunity to call witnesses in his defence.

32. It was therefore contended that the Applicants were all accorded an opportunity for a fair hearing. They were well informed of the accusations leveled against them, given sufficient notice of the date of their hearings, given sufficient time to defend themselves and the Disciplinary Committees considered the defence of the Applicants in reaching the decision to suspend/expel the Applicants. To the Respondent, the conduct of the Applicants which led to the Respondent's decision to suspend and/or expel them was contrary to the Rules and Regulations governing the organization, conduct and discipline of the Students as set out in the Respondent's student's information handbook. Its case was that its decisions were made in accordance with the Rules and Regulations as set out in the student's information handbook and that there was no impropriety in the decision making process.

33. It was therefore its case that to in effect reinstate the suspended and/or expelled students would be most detrimental to the Respondent and render it impossible to maintain any discipline in the University.

34. It was submitted on behalf of the Respondent that Judicial Review is concerned with reviewing not the merits of the decision of which the application is made but the decision making process itself and it relied on **Republic –vs- Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** .

35. In this case it was submitted that since the Respondent made the decision to expel the Applicants after granting the Applicants an opportunity to be heard, the Applicants are seeking a review of the decision on its merits and not on the decision making process. In this regard the Respondent relied on **Ndombi Tom Wachakana Osolika vs. Disciplinary Committee of the Law Society of Kenya & Another [2015] eKLR.**

36. It was submitted that the Respondent's decisions were made in accordance with the Rules and Regulations governing the organization, conduct and discipline of the Students as set out in the Respondent's students information handbook 2015/2016 which provides for the disciplinary procedure. To the Respondent:

i. On diverse days each of the Applicants herein appeared before a disciplinary committee to answer to the particular offences which were set out very clearly in their respective charge sheets.

ii. The disciplinary committees were distinct for each of the Applicants. Each of the disciplinary committees was chaired by the principal or acting principal of the various colleges. Each of the Applicants was accorded a fair hearing by the respective college disciplinary committees and after taking into consideration the presentation made by each Applicant, the disciplinary committees recommended that the Applicants be expelled from the Respondent.

iii. On 21st April 2016, the Respondent's Senate Student Disciplinary Committee approved the decisions of the various college disciplinary committees.

37. In light of the foregoing it cannot be argued that the Respondent failed to adhere to the procedure set out in the Respondent's handbook.

38. As regards the allegation of denial of legal representation, it was submitted that the Rules and Regulations which the Applicants were fully conversant with, provide that the Applicants were entitled to representation and to call witnesses. In this regard reference was made to part (c) on Disciplinary Procedures.

39. It was submitted that it is not alleged that any of the Applicants made a request to be allowed representation and calling of witnesses and it was denied. In this respect the Respondent relied on **O luoch Dan Owino & 3 Others –vs- Kenyatta University [2014] eKLR** and **Republic –vs- Pwani University College Ex parte Maina Mbugua James & 2 Others, Miscellaneous Civil Application No. 28 of 2009**.

40. As regards the short notice, it was submitted that none of the Applicants requested for an adjournment of proceedings before the Committee on the basis that the notice to appear before the Committee was not adequate and such an adjournment was denied. Hence, the disciplinary process cannot be faulted on the alleged ground of short notice. In this respect reference was made to section 4(4) of the ***Fair Administrative Action Act*** which provides as follows:

The administrator shall accord the person against whom administrative action is taken an opportunity to

a) attend proceedings, in person or in the company of an expert of his choice;

b) be heard;

c) cross-examine persons who give adverse evidence against him; and

d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

41. It was therefore the Respondent's case that the Applicants were all accorded an opportunity for a fair hearing. They were well informed of the accusations leveled against them, given sufficient notice of the date of their hearings, given sufficient time to defend themselves and the Disciplinary Committees considered the defence of the Applicants in reaching the decision to suspend/expel the Applicants.

42. With respect to the allegations of the 1st applicant that he was not granted an opportunity to be heard, it was submitted that the 1st Applicant despite having been aware of the hearing date failed to appear for the hearing as had been scheduled and no communication was made to the Disciplinary Committee regarding the 1st Applicant's inability to attend the hearing as alleged.

43. Dealing with the gravity of the punishment meted, it was submitted that the Applicants signed a declaration to the effect that they had read the regulations governing the Organization, Conduct and Discipline of Students at the University of Nairobi and understood their content and meaning and undertook to abide by them. The Applicants knew the existence of the Respondent's disciplinary procedure. The Applicants were duty bound to comply with the Rules and Regulations of the Respondent. Immediately, they failed to do so, the Respondent was at liberty to apply its disciplinary

procedure. To this end the Respondent relied on **Oluoch Dan Owino vs. Kenyatta University, High Court Petition No. 54 of 2014** and **J M O O vs. Board of Governors of St. M's School, Nairobi [2015] eKLR**.

44. To the Respondent, its decision to suspend and/or expel the Applicants was not unreasonable. The Applicants were duty bound to comply with the Rules and Regulations of the Respondent. Immediately, they failed to do so, the Respondent was at liberty to apply its disciplinary procedure and since expulsion and suspension are some of the penalties which the Respondent has power to impose as a disciplinary action, the Respondent's decisions cannot thus be said to be unreasonable. To the Respondent, since any institution faced with similar circumstances as the Respondent could have imposed the same penalties as the Respondent imposed upon the Applicants, the Respondent's decision cannot be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived it. In this respect it relied on **Kokebe Kevin Odhiambo & 12 Others vs. Council of Legal Education & 4 others [2016] eKLR.**

45. It was submitted that the Applicants have a right of appeal which they have failed to exhaust before resulting to Judicial Review. To the Respondent, it is a cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. Pursuant to the provisions of Part IV (C) (2) (iv) of the Respondent's students information handbook 2015/2016, the Applicants have a right of appeal which they have failed to exhaust before coming to court and in this case, the 4th, 6th, 7th and 8th Applicants have filed their respective appeals which are pending hearing and determination. It was the Respondent's case that an appeal to the Senate Disciplinary Committee is the appropriate remedy and that the right to appeal subsists notwithstanding Senate approval of the Disciplinary Committee's decision on expulsion. Accordingly, commencement of this suit is ill advised and the suit should be dismissed. In this respect the Respondent relied on section 9(2) of the ***Fair Administrative Action Act, No. 4 of 2015*** and contended that whereas subsection (4) of the aforesaid section gives the Court the powers to *exempt such person from the obligation to exhaust any remedy in exceptional circumstances if the court considers such exemption to be in the interest of justice, t*he onus is upon the Applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case however, it has not been demonstrated that the appeal mechanism would be a less convenient or less appropriate remedy.

46. In this respect the Respondent relied on **Environmental & Combustion Consultants Ltd vs. Kenya Pipeline Company Limited & 2 others [2016] eKLR** and **Republic vs. Kenya Revenue Authority exparte Interactive Gaming & Lotteries Limited [2016] eKLR.**

47. In conclusion, it was submitted that the Respondent has a duty to maintain discipline in the University and it is not the role of the judicial review court to determine whether the Applicants committed the acts which they were charged with or not. The role of the judicial review court is to ensure that the Respondent's decision was arrived at in accordance with the principles of natural justice and in this case the Applicants have not demonstrated that the Respondent flouted any of the principles of natural justice. Hence, the notice of motion herein ought to be dismissed. In this respect the Respondent cited the House of Lords decision in **Chief Constable vs. Evans [1982] 3 ALL ER 141**.

48. To the Respondent, it is responsible for all the students' affairs including that of disciplining students as are deserving of discipline and for good reason. It would otherwise be chaotic and absurd to expect that an external body would step in and take charge of the University's disciplinary matters with regard to its students and cited the holding in **Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University**

[2014] eKLR and ***Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009***.

49. To the Respondent judicial review remedies are discretionary and I relied on **Republic vs. National Transport & Safety Authority & 10 Others Ex parte James Maina Mugo [2015] eKLR.**

50. In the Respondent's view, to in effect reinstate the suspended and/or expelled students would be most detrimental to the Respondent and make it impossible to maintain any discipline in the University hence the Court was urged to dismiss the notice of motion herein with costs.

Determinations

51. I have considered the issues raised herein.

52. It is clear that from the Rules and Regulations Governing the Organisation, Conduct and Discipline of Students exhibited by the Respondent, that that there are 2 levels at which disciplinary proceedings are to be undertaken at the initial stage. Where an offence is committed within the Halls of Residence or relate to the proper conduct of residential affairs, the matter is to be reported to the Halls Disciplinary Committee for action. It is only where such a matter is, in the opinion of that Committee essentially of an academic nature or involves issues extraneous to residential affairs of the hall concerned that the same is transmitted to the appropriate College Disciplinary Committee for action.

53. The Halls Disciplinary Committee is comprised of the Warden as its Chair, the Dean of Students, the Director of Students Welfare Association (SWA), a representative of the Faculty of the student concerned, the Head Custodian of that Hall, the Student Hall Chairperson and the Hall Administrator as its Secretary.

54. All other disciplinary offences wherever committed are to be handled by the College Disciplinary Committee which has the Principal as its Chair, and comprises of the Dean of Faculty/ Director of Institute of School, the Chairman of the Student's Department where appropriate, one representative nominated by the College Student's Organization, one representative from the Student's Hall of residence nominated by the Student's Hall Chairman and the College Registrar as the Secretary. It is however expressly stated that in respect of offences relating to examination and other academic matters, students' presentation are excluded.

55. It is provided that in such proceedings a summoned student is entitled to a fair hearing and to representation either in person or by someone of his/her choice, to call witnesses in defence, and to appeal to the Senate Disciplinary Committee. However, legal representation is expressly excluded.

56. It is however expressly provided under the Regulations that no student may be expelled from the University, and any penalty imposed by a Disciplinary Committee shall not take effect without the approval of the Senate Disciplinary Committee. In arriving at its decision, the appropriate Committee is however at liberty to take into account the student's past conduct.

57. The first issue for determination is therefore whether the Respondent complied with the disciplinary procedures in the process of arriving at its determination. That question, it is my view falls squarely within the judicial review jurisdiction. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

58. The requirement for stringent compliance with procedural rules is even more crucial in disciplinary matters. The powers and the procedure before disciplinary bodies was dealt with in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** where the Court expressed itself as follows:

"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute…Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully…Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

59. In **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and

that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See **London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

60. That a Tribunal ought to be properly constituted is trite. In This was the position in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** where the Court held:

"I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; "1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, *which should be properly constituted*, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi–lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."

61. In the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** it was held:

"It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission..."

62. What are the consequences of failure to adhere to the procedural rules" In **Resley vs. The City Council of Nairobi [2006] 2 EA 311,** the Court made a sweeping and rather blunt statement to the effect that:

"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed…If a local authority does

not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."

63. In my view however the right approach should be the one adopted in **Pastoli vs. Kabale District Local Government Council and Others** (supra) at page 305 that:

"When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory."

64. In this case it is clear that the decision by the Respondent has the effect of impinging upon the applicants' right to education. Whereas students are entitled to their right to education this Court gave a word of caution in **Oluoch Dan Owino vs. Kenyatta University, High Court Petition No. 54 of 2014**, that:

"…the right to education does not denote the right to undergo a course of education in a particular institution on one's terms. It is my view that an educational institution has the right to set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions."

65. In my view where the action under challenge has the potential of restricting human rights and

fundamental freedoms under the Bill of Rights, any procedural rule enacted with a view to ensuring the due process is adhered to before any adverse action is taken ought to be considered seriously since under Article 19 of the Constitution, the Bill of Rights is the framework for social, economic and cultural policies and the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. Our Constitution appreciates that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. This position was restated with respect to the rules of natural justice by the Uganda Supreme Court in **The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, as follows:

"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

66. Our own High Court (**Nyamu, J**) in **Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787**, eloquently asserted as follows:

"The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World. The *ex parte* order could not have been spared in any event for the reason that it would have hindered the smooth flow of the streams of justice for all by blocking the 221 persons while the rivers of Constitutional Justice or any justice at all should flow pure for all to drink from them."

67 The applicants alluded to the fact that the 4 days' notice given to them to appear before the College Disciplinary Committee were too short for them to prepare their case. In **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 v South Eastern Health Board* **[2005] 4 IR 217).** Hilary Delany **in his book,** *Judicial Review of Administrative Action***, *Thomson Reuters 2nd edition, at page 272,* notes that, '*Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision'…* Article47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including *'(c) responsive, prompt, effective, impartial and equitable provision of services' and '(f) transparency and provision to the public of timely, accurate information'…* Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in**

this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* **[1994] 2 IR 439)…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 v Canada* [2007] SCC 9,** *Alberta Workers' Compensation Board v Alberta Appeals Commission* **(2005) 258 DLR (4th), 29, 55 and** *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750).***"**

68 .This was the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies *ex parte* Githungo [2001] KLR 299,** where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

69. Section 4(3) of the ***Fair Administrative Action Act, 2015,*** (hereinafter referred to as "the Act"), a statute enacted pursuant to Article 47 of the Constitution, provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

70. Section 4(4) on the other hand provides as follows:

The administrator shall accord the person against whom administrative action is taken an opportunity to

(a) attend proceedings, in person or in the company of an expert of his choice;

be heard;

(b) cross-examine persons who give adverse evidence against him; and

(c) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.;

71. Similarly, section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** provides that a court or tribunal may review an administrative action or decision, if the person who made the decision denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case.

72. One must however appreciate that what the law requires is a right to be afforded an opportunity of being heard as opposed to the right to be heard. Whereas under Article 47 of the Constitution the applicants were entitled to a fair administrative action which in my view would connote *inter alia* that the applicant be given adequate time to prepare for the case, where an opportunity of being heard has been afforded it is upon the applicant to bring to the notice of the Tribunal that the time given to him does not accord him time of adequately preparing for his case and to seek more time to do so and it is only when the Tribunal declines to afford him adequate time to properly present his case that the discretion may be faulted. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

73. In this case, however, the applicants have not contended that they asked for time to enable them adequately prepare for the proceedings. The reason for adequate notice is meant to enable the person facing administrative proceedings time to adequate prepare for the same not only in terms of addressing the allegations against him but also to enable him marshal his evidence in order to controvert those allegations. Where therefore the notice though *prima facie* short, the person charged feels that he or she is properly armed to deal therewith the Court will not interfere. It is therefore for an applicant to show that the period of the notice given taking into account the circumstances was not adequate for him to adequately rebut the same. According to the minutes exhibited before this Court there is no evidence that the applicants requested for adjournment as they was entitled to pursuant to section 4(4)(d) of the ***Fair Administrative Action Act, 2015***. Accordingly, I cannot find that the period of the notice was prejudicial to the applicants who appeared before the Committee.

74. As regards the 1st applicant, his case was that he was unable to attend the proceedings due to the fact that he was taken ill and that he informed the Committee accordingly. However the applicants have neither attempted to prove that this communication was passed to the Committee nor have they exhibited a copy of the said treatment chit. There is therefore no basis upon which the 1st applicant’s contention can be sustained.

75. It was also contended by the applicants that the said notice never informed them of their right to representation and to call witness. Under the Respondent’s Regulations, the applicants were entitled to call witnesses in their defence. There is however no evidence that they requested to call any witness.

76. That the applicant was entitled to representation either in person or by a person of his choice is clear from the ***Rules Governing the Conduct and Discipline of Students***. This representation however

expressly excludes legal representation. Under section 4(3)(e) of the ***FAA Act***, a person who is subject to administrative proceedings is only entitled to "*notice of the right to legal representation, where applicable*." In other words the right to legal representation only applies where permitted under the relevant procedure. In this case, such a right was expressly excluded. On this issue it was held in **Enderby Town FC Ltd vs. The Football Association [1971] 1 All ER 218** that:

"The case thus raises this important point: is a party who is charged before a domestic tribunal, entitled as of right to be legally represented" Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter of discretion of the tribunal. It is master of its own procedure; and if it, in the proper exercise of its discretion declines to allow legal representation, the courts will not interfere....in many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than a bad lawyer...But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: 'We will never allow anyone to have a lawyer to appear for him.' The tribunal must be ready, in a proper case, to allow it. That applies to anyone in authority who is entrusted with a discretion. He must not fetter his discretion by making an absolute rule from which he will never depart."

77. Similarly in **Oluoch Dan Owino & 3 Others vs. Kenyatta University** (supra) the court held that:

"**The petitioners have also argued that their right to choose, and be represented by, an advocate, and to be informed of this right promptly was violated. The right of a party to be represented by Counsel in quasi-judicial proceedings such as the petitioners were subjected to is well recognized, but is subject to the rules of procedure of the tribunal to which a party is appearing before, and must be requested for before a violation of the right to legal representation can be alleged…the issue of legal representation was not raised before the Disciplinary Committee, and it cannot therefore properly be raised now as a ground for challenging the decision of the Committee."**

78. The same position was adopted in **Republic –vs- Pwani University College Ex parte Maina Mbugua James & 2 Others, Miscellaneous Civil Application No. 28 of 2009**, where the High Court held as follows:

"My own view is that if an individual requests for legal representation, then he should be entitled to such representation but in the present scenario there was no such request and no such denial, so the breach alleged does not arise at all."

79. In any event the provisions of section 4(6) of the Act ought to be taken into consideration when determining whether or not the procedure adopted was fair. That provision provides that:

Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

80. In other words an administrator may be empowered by a written law to follow a procedure other than the one prescribed under the ***Fair Administrative Action Act*** and such a procedure will not faulted as long as it does not derogate from the provisions of Article 47 of the Constitution.

81. In any event there is no evidence that the 1st applicant requested for such legal representation even if the same had been open to him to seek. In this respect in **Republic vs. Pwani University College Ex parte Maina Mbugua James & 2 Others , Miscellaneous Civil Application No. 28 of 2009**, the High Court held as follows:

"My own view is that if an individual requests for legal representation, then he should be entitled to such representation but in the present scenario there was no such request and no such denial, so the breach alleged does not arise at all."

82. From the documents exhibited, it is clear that the disciplinary proceedings took place before the College Disciplinary Committee. That the ***Rules Governing the Conduct and Discipline of Students*** provide for student representation on the Disciplinary Committee is not in doubt. It is my view however, that without a person properly designated as a student representative in the Disciplinary Committee, one cannot say that the Committee was properly constituted. In this respect I refer to **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Nairobi HCMA NO. 688 of 2006 [2008] KLR 362** where the Court expressed itself as follows:

"We have considered regulations 27 (1) & (2) and 35 (2). The chairperson establishes the hearing panel under regulation 27 (1 & 2) which comprises the presiding Commissioner, and others appointed by the chairperson, legal counsel and members of the Legal Services Department. That regulation envisages a panel consisting of more than one Commissioner, legal counsel and other staff. Regulation 35 (2) comes into play during the course of the hearing when for good reason, there is need to replace the absent Commissioners. There is no provision for the sitting of one Commissioner on the panel. Regulation 35 (2) does not apply here because right from the on set, only one Commissioner was appointed to preside over the dispute and the issue of replacement does not arise. The appointment of Godana, a single Commissioner to preside over the dispute out rightly contravenes regulation 27 (1) & (2) and is unlawful. It is the duty of the respondent to ensure that the requirements of the panel's composition are met ie regulation 27. They cannot constitute the panel contrary to provisions of the law. In this case we find that Mr Godana had no power to sit alone on the panel presiding over the dispute between the applicant and the 1st Interested Party, as it is offends clear provisions of the law. The respondent purported to rely on regulation 36 which provides that an irregularity resulting from a failure to comply with any provision of this part or any direction of the hearing panel before it has reached its decision shall not of itself render any proceedings void. We find that regulation 36 cannot remedy that omission because the composition of the Panel having been specifically provided for is a fundamental provision which should ideally have been in the Act. Those proceedings presided over by Godana contrary to statute call for intervention of this Court by way of judicial review." See **Equator Inn vs. Tomasyan [1971] EA 405.**

84. That a Tribunal must be properly constituted was emphasized in **Gathigia vs. Kenyatta University [2008] KLR 587** in which the Court held:

"I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; "1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.*In such a case the tribunal, which should be properly*

***constituted, must do its best to act justly and reach just ends by just means*. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi–lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."** [Emphasis added].

84. See also **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003** and **Republic vs. Tongaren Land Disputes Tribunal & Others Ex Mukhwana Kitale HCMA No. 23 of 2008.**

85. I, accordingly, associate myself with the position adopted by **Musinga, J** (as he then was) in **Nairobi High Court Misc. Appli No 257 of 2010 - R vs. The Communications Appeal Tribunal and Others (2011) e KLR** at page 6 that:

"A proper construction of the law is that a board, committee or tribunal should be established with the numbers and qualifications as required by the relevant law for it to perform its statutory duties…But where the Minister is by law required to appoint five members of a tribunal following a given criteria and he appoints only three…to the extent that the tribunal is lacking two members, it is not properly constituted… The Tribunal was not properly constituted when it heard and determined the appeal. The purported proceedings were null and void and of no legal consequences."

86. In the instant case it is clear from the Rules and Regulations that the Disciplinary Committee was required to be constituted by *inter alia* one representative nominated by the College Student's Organization. That there was no representative nominated by the College Student's Organisation is clear from the only set of minutes of the meeting exhibited by the Respondent with respect to the 1st applicant. The minutes in respect of the other meetings are not exhibited though the date of the meeting was the same. Section 109 of the ***Evidence Act*** provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

87. In this case it is the Respondents who contend that the procedure adopted by it was factually correct. It was upon the Respondent to exhibit all the relevant minutes showing this. To only exhibit the one's for the 1st applicant and to omit to do so in respect of the other applicants can only lead this Court to draw adverse inference that had the said minutes been exhibited they would have manifested the failure to lawfully compose the committee just like the 1st applicant's committee since the meetings took place the same day and it is not contended that the applicants belonged to different colleges.

88. I therefore find that the Disciplinary Committee that heard and determined the complaints against the applicants was not procedurally constituted. In **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly.

89. Apart from the foregoing, the Rules and Regulations provide that a student subjected to either disciplinary committee proceedings is entitled to appeal to the Senate Disciplinary Committee. It is however provided that no student may be expelled from the University, and any penalty imposed by a Disciplinary Committee shall not take effect without the approval of the Senate Disciplinary Committee.

90. In the letter transmitting the decision of the Disciplinary Committee which was written by the Respondent's Vice Chancellor, it was expressly stated that the recommendation to expel the applicants was approved by *the Senate*. In my view this is not the body empowered to approve the penalties imposed by the respective Disciplinary Committees. That body is expressly stated to be the Senate Disciplinary Committee which is to be comprised of the Deputy Vice-Chancellor (Academic Affairs) as the Chair, Principal/Director of SWA, Dean of Students, Dean of Faculty, Warden or equivalent, Two (2) Senate Representatives, Three (3) Students Representatives and Academic Registrar as the Secretary.

91. There is no provision in the Rules and Regulations permitting that body to delegate its powers. As was held by **Lord Somervel** in **Vine vs. National Doc Labour Board [1956] 3 All ER 939**, at page 951:

"The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duly and the character of the person. Judicial authority normally cannot, of course, be delegated…There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorise someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether "judicial" or not, cannot be delegated."

92. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** it was held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. *It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission*...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision." [Emphasis mine.]

93. Similarly in **Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271,** the Court expressed itself as follows:

"What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer's evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director's powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred."

94. With respect to disciplinary matters I associate myself wih the position adopted in **Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University [2014] eKLR,** where the High Court cited with approval the decision in ***Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009***, in which it was held that:

*"**Discipline at the Respondent's University is necessarily an internal process conducted using internal personnel. It would be impractical to sub-contract or delegate as it were, this function to an outside agency."***

95. This position is restated in section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.

96. Whereas it may well be that the members constituting the Senate Disciplinary Committee are the same as the Members of the Senate, and there is no evidence to this effect, the law is that when carrying out its mandate as the Senate Disciplinary Committee it must constitute itself as such since the Rules and Regulations are very specific about the composition of the Senate Disciplinary Committee. It is however clear that the members of the Senate Disciplinary Committee are not necessarily members of the Senate. Therefore if the approval was made by the Senate as the letter indicates, and there is no evidence to the contrary, then the decision meting punishment on the applicants was clearly unlawful and without jurisdiction. It was null and void and of no consequence.

97. It is therefore my view that there is no evidence that the decision of the Disciplinary Committee was approved by the Senate Disciplinary Committee in order for it to have taken effect and the purported penalty meted against the Applicants was imposed by a body that had no authority to do so hence the action was *ultra vires* null and void *ab initio*. This position is supported by section 7(2)(b) of the ***Fair Administrative Action Act, 2015*** which empowers this Court to review an administrative action or decision, if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

98. According to the Applicants, the penalties are not proportionate in the circumstances and in this respect they relied on Article 43(1)(f) of the Constitution which provides that every person has a right to education. It is true that section 7(2)(l) of the ***Fair Administrative Act*** provides that a court may review a decision of an administrative body if the decision is not proportionate to the interests or rights affected. In this case, the Rules and Regulations provide for different types of punishments with some being more

serious than others. Whereas sentencing is at the discretion of the Respondent, the exercise of the discretion must be based of rational grounds and ought not to be arbitrary. It is my view that such arbitrary punishments cannot pass the test of proportionality which is now recognized as one of the key considerations in judicial review proceedings. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield vs. Minister of Agriculture and Fisheries [1968] HL.**

99. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court expressed itself as follows:

"The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law…In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons…Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void…The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law…"

100. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** the Court held:

"An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

101. Therefore in meting out punishment the Respondent was expected to exercise its discretion reasonably and not arbitrarily and capriciously or in bad faith. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, those in authority should give reasons and if they give none the court may infer that they had no good reasons. Similarly where the reason given is not one of the reasons upon which they are legally entitled to act, the Court is entitled to intervene since their action would then be based an irrelevant matter. That administrative bodies are now enjoined to consider relevant matters and avoid relying on irrelevant ones is now trite. Section 7(2)(f) of the ***Fair Administrative Action Act*** provides that a court or tribunal may review an administrative action or decision, if the administrator failed to take into account relevant considerations.

102. It is therefore my view that where there are various sentences provided by the law without the law

specifying which penalty applies to what offence, where the administrative body opts for the heaviest penalty it ought to give reasons for the same if it is to escape the accusation of arbitrariness. Such considerations may, as indicated in the Rules and Regulations, include the conduct of the student (past and present). However the reasons for imposing such sentencing ought to be disclosed.

103. With respect to whether the applicants were guilty of the offences they were charged with, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be aground for quashing a decision if there was material on record which would have warranted a finding to the contrary. It is not for this Court to interfere with the decision of an administrative body arrived at on merits unless such a decision is in the circumstances irrational.

104. It was contended by the Respondent that even if the application is merited, this Court ought not to grant the orders sought as the applicants had not exhausted the appellate remedy that was available to them. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

105. However as was appreciated **Nyamu, J** (as he then was) in **Stephen Mutuku Muteti vs. The Director of Land Adjudication & Settlement & Others Nairobi HCMA 246 of 1998**:

"The court deals with limits of power because the Government is limited by law and when public officers act outside the law aggrieved parties are as of right entitled to ask for relief from the Courts so that those limits of power are defined by the Court and the necessary sanctions are given. Where the decision making process is clearly flawed in that the public officers clearly acted outside their jurisdiction and their acts were both biased, unreasonable and not supported by any provision under the relevant Act, a constitutional and judicial review court cannot deny the applicant a judicial remedy because the illegality brings the matter within the judicial review ambit.

106. Whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action simply because there is a right of appeal provided by the statute especially where such a right is less convenient, effective and beneficial

107. As this Court held in **Republic vs. Ministry of Interior and Coordination of National Government & the Public Procurement Administrative Review Board Ex-Parte: ZTE Corporation and ZTE Corporation (Kenya) Limited Judicial Review Case No. 441 of 2013**

"…ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality… However, where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable."

108. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved.

109. In this case I have found that the purported decision effectuating the penalty imposed on the applicants was no decision at all since the body that purportedly took the decision was not properly constituted. In those circumstances it is my view that the same was null and void *ab initio* and there was nothing to be appealed against. This is in line with the celebrated decision in **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169** at **1172** to the effect that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so.

110. Before I conclude this judgement, I must make it clear that this decision has not determined the merits of the complaints levelled against the applicants but only dealt with the disciplinary process. In **Oluoch Dan Owino –vs- Kenyatta University, High Court Petition No. 54 of 2014**, this Court observed as follows:

"As I understand it, the right to education does not denote the right to undergo a course of education in a particular institution on one's terms. It is my view that an educational institution has the right to set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions."

111. A similar view was held in **J M O O –vs- Board of Governors of St. M's School, Nairobi [2015] eKLR**, in which the Court stated as follows:

"**It is correct that the Constitution guarantees to children the right to education, and it also requires that in every matter concerning the child, the best interests of the child must be the primary consideration. However, it must be restated and re-emphasised that rights have their corresponding responsibilities, and the responsibility of students in school is to abide by the school's regulations. It would certainly not be in the best interests of the petitioner, or of the other students in the respondent school, were the respondent to ignore disruptive conduct on the part of the petitioner, or of any other student. As this Court observed in the case of *Fredrick Majimbo & Another vs The Principal, Kianda School, Secondary Section High Court Petition No. 281 of 2012*:**

[26.] In my view, the school, in suspending the petitioners' daughter, used the guidelines and processes set out in its Code of Conduct, and in accordance with the agreement reached between the school and the petitioners on 4th April 2012. From the evidence before me, the petitioners had accepted the school's regulations, as had their daughter, in gaining admission to the school. They had agreed on 4th April 2012, and they had confirmed this agreement on 1st May 2012, that in the event of one more transgression of the school's regulations by their daughter, she would be asked to leave the school. I can therefore find no basis for alleging violation of the rights of the petitioners' daughter. She does indeed have a right to education, and her best interests must be taken into account in any decision affecting her. The respondent has been, in my view, very accommodating of the petitioners' daughter in the face of frequent, and on the face of it, unapologetic infractions. To deal with the petitioners' daughter in a manner different from the way they have dealt with her would doubtless have been against her best interests as it would have been to condone indiscipline and misconduct, to the detriment of her long term interests.

[27.] Further, as the respondent correctly argues, the rights of the petitioners' daughter must be considered alongside the rights of the other students in the school. The school has an obligation to all its students, and as the respondent submits, failing to discipline the students who break rules would set a bad precedent and affect students and parents who are willing to abide by school regulations

[28.] There is no material placed before me from which I can properly find any violation of the petitioners' daughter's rights under Articles 43(1)(f) or 53(2) The school must be allowed to govern its student body on the basis of the provisions of the Education Act and its Code of Conduct, and the court will be very reluctant to interfere unless very strong and cogent reasons for interfering with its decisions are placed before it, which has not been done in this case. I agree with the sentiments of Nyarangi, JA in *Nyongesa & 4 Others -v- Egerton University College (1990) KLR 692*, which were cited with approval by Musinga J in *Republic -v- Egerton University ex parte Robert Kipkemoi Koskey Nakuru Misc. Civil Application No 712 of 2005* that:

"Having thus 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 decision 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."

112. The limited role of the Courts in such matters was appreciated in **Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University [2014] eKLR,** where the High Court cited with approval the decision in ***Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009***, in which it was held that:

*"**Most bodies established under statute also establish disciplinary committees. Kenyatta University is no exception. The composition of the disciplinary committee is set out in the Statute, and it comprises University officers. The University has jurisdiction to conduct its own disciplinary proceedings. This must necessarily be so. The suggestion that disciplinary proceedings are a matter for courts is untenable…the existence of such a disciplinary committee has always been recognized by the courts. The courts also recognize that their relationship with such committees is limited to supervision."***

113. In the premises I find merit in this application on the grounds of the defective composition of the Disciplinary Committee and the unlawful decision making process by a body not permitted to do so.

Order

114. Consequently, the orders which commend themselves to me and which I hereby grant are as follows:

1. An order of certiorari to removing into this Court for the purposes of being quashed and quashing the decision of the Disciplinary Committee and by extension to the Senate bodies of the Respondent to suspend and or expel the Applicants herein.

2. An order of mandamus compelling the Respondent to take the necessary steps to facilitate the Applicants to access and continue with their education unless and until their education at the Respondent University is otherwise lawfully terminated or suspended.

115. As the merits of the charges levelled against the applicants remain unresolved there will be no order as to costs.

116. It is so ordered.

Dated at Nairobi this 30th day of November, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nyagah for the Respondent

CA Ooko