REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR NO . 65 OF 2018

IN THE MATTER OF AN APPLICATION BY JACKAN MWANYIKA MWASI FOR JUDICIAL REVIEW ORDERS OF *CERTIORARI* AND *MANDAMUS*

AND

IN THE MATTER OF ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA, SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015, SECTION 11, 23 OF THE UNIVERSITY OF NAIROBI ACT, PART IV OF THE UNIVERSITY OF NAIROBI, STUDENT INFORMATION HANDBOOK 2016/2017-RULES AND REGULATIONS GOVERNING THE ORGANIZATION, CONDUCT AND DISCIPLINE OF STUDENTS, STATUTE 111, XIV, UNIVERSITY OF NAIROBI STATUTES 1991.

BETWEEN

REPUBLIC.....APPLICANT

AND

UNIVERSITY OF NAIROBI.....….....…….....RESPONDENT

JACKAN MWANYIKA MWASI.....*EX PARTE* APPLICANT

JUDGMENT

Introduction

1. It is convenient to start by stating that the disciplinary power of a university is quite often derived from the Act by which the university was established, or the statute from which it derives its authority. It is common for the "primary" statute to empower the university Council or some other body to make disciplinary rules or Regulations. Thus, the University of Nairobi Regulations governing the conduct and Discipline of Students provides for *inter alia* general conduct of students.

2. It is common ground that a student of the University is subject to the disciplinary provisions prescribed in the Regulations. At the

time of admission, a Student executes a Bond binding himself/herself to observe the rules and Regulations governing the conduct of the Student while at the University.

3. A university is not just a corporate body created by operation of law. It is also a community of people associated in activities related to thought, truth, and understanding. It must therefore be a place where the broadest possible latitude is accorded to innovative ideas and experiments, where independence of thought and expression are not merely tolerated but actively encouraged. Because thought and understanding flourish in a climate of intellectual freedom; because the pursuit of truth is primarily a personal enterprise, a Code of Discipline must be strongly anchored on principles of intellectual freedom and personal autonomy. The code should be interpreted and applied with these principles firmly in mind.

The reliefs sought.

4. Pursuant to the leave of this court granted on **16th** February 2018, the *ex parte* applicant seeks the following orders:-

*a. An order of certiorari to quash the decision of the Respondent made on **6th** October 2017 expelling the ex parte applicant from the Respondent's institution.*

b. An order of mandamus compelling the Respondent to facilitate, allow access to, and re-admit the ex parte applicant into the Respondent's institution and an order for him to continue his education at the Respondent's School of Engineering.

c. The costs of this suit be borne by the Respondent.

Grounds relied upon.

5. The grounds relied upon as far as I can distil them from the substantive application, the application seeking leave, the statutory statement, the verifying Affidavit and annextures are that the disciplinary process leading to the decision to expel the *ex parte* applicant from the University was tainted with gross procedural impropriety.

6. The *ex parte* applicant contends that he was suspended on an allegation that while sitting for a university examination on **23rd** December 2016, (i.e. **FME 4532**: Material Science and Engineering **111)**, he was caught in possession of a mobile phone with a page open with information relevant to the examination. He avers that on **2nd** May 2017, he appeared before the Respondent's College Disciplinary Committee for a disciplinary hearing to answer the charge of being in possession of a mobile phone while sitting for a university examination, but, to date, the Disciplinary Committee has failed to render a decision or communicate its findings.

7. Further, he states that failure by the Respondent's College Disciplinary Committee to furnish him with its findings offends Article **47(2)** of the Constitution which imposes an obligation on administrative bodies and decision makers to give reasons for their action. Additionally, he states that he never appeared before the Respondent's Senate Examination Disciplinary Committee that purported to have sat and considered his case.

8. He also avers that the Senate Examination Disciplinary Committee acted unlawfully and in breach of the principles of natural justice by failing to serve him with a hearing notice, thereby denying him an opportunity to present his case. Further, he states that the Senate Examination Disciplinary Committee acted unlawfully by determining and finding him guilty of an offence other than that for which he was charged with.

9. The *ex parte* applicant also faults the Senate Examination Disciplinary Committee, which is an appellate body, for flouting the Respondent's Rules and Regulations by entertaining his case at the first instance, thereby denying him the right to appeal. Additionally, the *ex parte* applicant states that despite the above, he preferred an appeal against the said decision, and he was invited for the hearing of the appeal, but a hearing date scheduled for **30th** August 2017 was adjourned. Further, he states that vide a letter dated **6th** October 2017, he was notified that the vice chancellor had exhaustively considered his appeal and found it to have no merit. He also states that the Vice-chancellor acted *ultra vires* for want of authority under the Universities Act,[1] The University of the Nairobi Statutes 1991, and the Rules and Regulations Governing the Organization, Conduct and Discipline of Student's.

10. The *ex parte* applicant also states that by failing to communicate an alternative hearing date for the appeal, or list it for hearing before the proper forum, or accord him an opportunity to be heard, the Respondent offended the rules of Natural Justice. Additionally, he averred that the sentence meted against him permanently discontinuing his education is irrational, null and void. Also, he stated that in arriving at the said decision, the Respondent failed to consider that the *ex parte* applicant was not charged with the offence of cheating in an examination, but, that of being in possession of a mobile phone while sitting for a university examination. Also, he stated that the invigilator did not testify that the phone was on or had an open page. Further, he faulted the Respondent for failing to consider that the *ex parte* applicant was a final year student, and, that, throughout his study period, he conducted himself responsibly.

11. He stated that in arriving at the said decision, the Respondent considered an extraneous/irrelevant fact of cheating in an examination which was not the case, and, that the process was unfair.

Respondent's Replying Affidavit.

12. **Prof. Henry W. Mutoro**, the Deputy Vice Chancellor, Academic Affairs swore the Replying Affidavit dated **4th** June 2018. He averred that he was informed by a one **Prof. G. O. Rading**, the Chief Invigilator and examiner for the examinations in question that he reminded the candidates about the rules and regulations governing University Examinations, specifically, regarding cheating in examinations and warned them against bringing mobile phones and similar electronic devices into the exam room. Further, he averred that **Prof. Rading** informed him that he severally requested the candidates to check themselves for any unauthorized material and invited them to deposit the same at a designated place for safe custody before the examination began.

13. Further, he averred that **Prof. Rading** informed him that at around **3.30pm** he noticed the *ex parte* applicant scrolling through a devise in his hand, which he held as a calculator, but was betrayed by the swiping, and, that the *ex parte* Applicant unsuccessfully tried to hide it. He added that **Prof. Rading** demanded the device which turned out to be a smart phone, and, that, he confiscated it and isolated the *ex parte* applicant's script from the rest, and handed it to the Department Secretary **M/s Patricia Munene** for safe custody in the presence of the *ex parte* applicant.

14. **Prof. G. O. Mutero** also averred that the *ex parte* applicant wrote to the Respondent requesting for a review of his discontinued status, but, through an internal memo, the Dean advised that the *ex parte* applicant to be put on his defence. Further, he averred that the *ex parte* applicant handed in a written report for consideration by the Respondent, and, through an internal memo, the Academic Registrar was notified to initiate the disciplinary process against the *ex parte* applicant. Also, he averred that the *ex parte* applicant was suspended from the University pending investigations, and, he was notified of the meeting to be held by the College Disciplinary Committee scheduled for **2nd** May 2017. Additionally, he averred that the *ex parte* applicant was informed of the particulars of the offence, and, that, he was accorded due process. He also averred that vide a letter dated **2nd** June 2017, the Respondent wrote to the *ex parte* applicant informing him that the Senate Examination Disciplinary Committee had resolved to expel him based on the *ex parte* applicant's behaviour which was in contravention of the Rules governing the Conduct of Discipline of Students.

15. **Prof. Mutoro** further averred that the *ex parte* applicant appealed in writing and his appeal was considered and the decision by the Senate Disciplinary Committee was upheld. He also averred that the Senate Examinations Appeals Committee exhaustively considered the *ex parte* applicant's appeal but upheld the expulsion. Lastly, he averred that upon admission to the University, the *ex parte* applicant bound himself to the terms and conditions of the Respondent.

***Ex parte* Applicant's Supplementary Affidavit.**

16. The *ex parte* applicant filed the supplementary affidavit dated **18th** June 2018. He averred that vide a letter dated **2nd** June 2017, the Senate Examination Disciplinary Committee acknowledged that it was the Senate Examination Disciplinary Committee that sat on **2nd** May 2017, yet, the Regulations provide that the College Disciplinary Committee shall be the disciplinary forum of first instance and should it decide to expel a student, the recommendation must be approved by the Senate Disciplinary Committee. Additionally, he averred that the Senate Examination Disciplinary Committee did not base its decision on any recommendation of the College Disciplinary Committee, but, it instead sat as a disciplinary forum of first instance contrary to the rules and regulations. Lastly, he averred that the Senate Examination Appeals/Disciplinary Committee never convened to hear the appeal.

The issues

17. I find that the following issues distil themselves for determination:-

a. Whether the decision was tainted by gross procedural impropriety.

b. Whether the decision is irrational and unreasonable.

c. Whether the ex parte applicant has established any grounds to warrant the Judicial Review Remedies sought.

a. Whether the decision was tainted by gross procedural impropriety.

18. The *ex parte* applicant's counsel cited *Pastoli vs Kabale District Local Government Council & Others*[2] in support of his proposition that the impugned decision was tainted with gross procedural impropriety. He argued that it was contrary to the Rules and Regulations Governing the Organization, Conduct and Discipline of Students. In particular, he argued that the Senate Examination Disciplinary Committee sat as a forum of first instance contrary to Part **IV(c) (2) (ii)** of the Rules which provides that "all disciplinary offences at the college level and essentially of academic nature shall be transmitted to the appropriate College Disciplinary Committee." He argued that Part **IV (c) (iv)** provides that "all appeals from the decision of Halls and College Disciplinary Committees in respect of matters falling within their respective jurisdiction shall lie with the Senate Disciplinary Committee."

19. He further argued that the College Disciplinary Committee has never rendered its decision and or communicated its findings to the *ex parte* applicant. He also submitted that the rules envisage a procedure whereby the disciplinary forum of first instance is the College Disciplinary Committee which has to notify the Senate Disciplinary Committee before expelling a student from the University. To buttress his argument, he cited Part **IV(c)(2)(vi)(e)(ii)** which provides that "No student may be expelled from the University, and any penalty imposed by a Disciplinary Committee in accordance with sub-close **(1)-(5)** herein shall not take effect without the approval of the Senate Disciplinary Committee." To support this proposition counsel cited *R v University of Nairobi ex parte Michael Jacobs Odhiambo & 7 Others*.[3]

20. Counsel also argued that the Respondent's Disciplinary Committee was not properly constituted and that no minutes were exhibited to ascertain the true composition of the committee. He argued that a tribunal must adhere to its rules.[4] He also argued that the *ex parte* applicant was found guilty of an offence other than the one he was charged with, and that, the charges do not amount to disciplinary offences. Counsel also argued that the vice chancellor acted *ultra vires* his mandate by unilaterally deciding the appeal. He also questioned his authority to hear the appeal.

21. Lastly, the *ex parte* applicant's counsel also argued that the Respondent did not accord the applicant a hearing during his appeal, in violation of the rules of natural justice[5] and Article **47** of the Constitution.

22. The Respondent's counsel's submission on this issue was that there is no basis for the court to the court to interfere with the impugned decision[6] and that the *ex parte* applicant has failed to establish that his rights to a fair administrative action were violated.[7] Further, he argued that the *ex parte* applicant was afforded an opportunity to present his case as demonstrated by the proceedings. He also argued that the *ex parte* applicant admitted being in possession of a mobile phone, which is an irregularity under the Regulations.

23. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not been followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

24. There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. In the first place, legislation or another legal instrument which gives a decision making power may impose a duty to follow specific procedures. The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision.

25. *Second,* no-one may be the judge in his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter of it. In this context, justice should not only be done, but should be seen to be done. Consequently, appearance of bias may be as relevant as actual bias (as well as being more common)

26. *Third,* no person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case. What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work.

27. *Fourth,* statutes often require that decisions made under them to be supported by reasons.

28. It is common ground that a failure on the part of a public authority to act in accordance with the requirements of procedural fairness and in compliance with the common-law rules of natural justice is a ground for Judicial Review. The term *procedural impropriety* was used by Lord Diplock in the House of Lords decision of *Council of Civil Service Unions v. Minister for the Civil Service*[8] to explain that a public authority could be acting *ultra vires* (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of Judicial Review, the other two being illegality and irrationality.[9] Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.[10] L**ord Diplock** noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.[11]

29. The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or *nemo judex in causa sua* – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or *audi alteram partem* – "hear the other side"). The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect to procedural legitimate expectations. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken.

30. Our Constitution, just like the common law imposes minimum standards of procedural fairness. This concept is founded upon the principle of natural justice. The "twin pillars" of procedural impropriety have been described as "the rule against bias" and "the right to be heard."[24] The right to be given reasons for a decision is also an integral element of procedural fairness.

31. Procedural impropriety refers to the application of the rules of natural justice. Those rules are procedural in nature designed to ensure procedural fairness in administrative action.[12] These include the right to be heard or to make representations before or after the taking of adverse administrative action, the right to be given reasons for such action and the right to appeal or to have such adverse action reviewed by an independent tribunal.

32. It is useful to refer the words of Lord Bridge in *Lloyd v McMahon*,[13] who emphasised that:-

"The so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of questions it has to make and statutory or other framework in which it operates. It is well-recognized that any or all of these rights may be limited or removed altogether by specific and unambiguous statutory provisions..."

33. The *ex parte* applicant's assault on the decision on the issue under consideration is premised on several grounds. *First,* it is argued that the letter dated **26th** April 2017 is referenced "College Disciplinary Committee" hence the committee that sat on **2nd** May was not the Senate Examination Committee. This argument falls for the simple reason that the letter may be so referenced, but the letter communicating the decision clearly refers to the "Senate Examination Disciplinary Committee" as the Committee that sat on **2nd** May 2017. This effectively extinguishes the said argument.

34. *Second,* the *ex parte* applicant in his appeal against the decision dated **16th** June 2017 at the opening paragraph states *"...I was*

*subjected to Senate Disciplinary Committee on **2nd** May 2017 in a decision was reached I should be expelled."* This admission flies on the face of his argument. In all fairness, the *ex parte* applicant cannot state the body that heard his case in the first instance was "an appellate body" and proceed to conveniently state it was " the appellate body." Such an argument exhibits dishonesty on his part.

35. *Third,* flowing from the above, the argument that the Senate Examination Appeals/Disciplinary Committee heard his case in the first instance falls. In fact, among the *ex parte* applicant's documents is a letter dated **24th** August 2017 requesting him to appear before the Senate Examination Appeal/Disciplinary Committee. The appeal Committee considered his appeal and upheld the earlier decision.

36. *Fifth,* contrary to the *ex parte* applicant's assertion that the appellate committee sat as a forum of first instance and as an appellate forum, in his grounds in support of his application, the *ex parte* applicant states that on **2nd** May 2017, he appeared before the Respondent's "College Disciplinary Committee for a disciplinary hearing to answer the charge of being in possession of a mobile phone while sitting for a university examination, but, to date, the Disciplinary Committee has failed to render a decision or communicate its findings." The foregoing contradicts his subsequent argument that the appellate body sat in both forums.

37. *Sixth,* the annextures to the Respondent's Replying affidavit are also telling. They show that the case was properly heard by the Disciplinary Committee and he filed an appeal against the decision. One wonders why and how he could appeal in the "same forum." Additionally, it is common ground that the *ex parte* applicant was caught with a mobile phone during the examination in contravention of the Regulations governing examinations. The irregularity is clearly detailed in the report written by Prof. Rading. In fact, in his letter dated **12th** January 2017, the *ex parte* applicant admitted entering the exam room with a phone.

38. It is also clear that the *ex parte* applicant was not only notified of the charges against him, but the charge sheet was also given to him. In fact he exhibited the charge sheet in his documents. He was afforded an opportunity to present his case including filing an appeal. There is nothing to show that the Respondent violated the rules of Natural Justice. I find that the *ex parte* applicant has failed to establish any procedural impropriety as alleged.

b. Whether the decision is irrational and unreasonable.

39. The *ex parte* applicant's counsel argued that the impugned decision is irrational and unreasonable in that it violated Part **IV(c)** of the Regulations. As stated above, he argued that the Senate Disciplinary Committee sat as a disciplinary forum of first instance and also at the appellate committee. I have already dismissed this argument above.

40. The Respondent's counsel's did not specifically address the question of irrationality and reasonableness of the decision.

41. Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others***[14]** explained the test of irrationality as follows:-

"*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

42. In the applying the above test, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.[15]

43. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[16] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

44. Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd***[17]** observed that the simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by

Lord Diplock[18] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt. Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.

45. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it***[19]** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[20] This above stringent test has been applied in Australia. In *Prasad v Minister for Immigration*,[21] the Federal Court of Australia held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them."

46. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:-

i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;

ii. This ground of review will be made out when the court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;

iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;

47. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

48. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[22]

49. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

50. I have carefully examined the impugned decision and the punishment meted out. There is nothing to show that a reasonable Tribunal, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, applying the above tests of unreasonableness and irrationality, I find that the *ex parte* applicant has not demonstrated that the decision is tainted with unreasonableness or irrationality.

51. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had

failed to apply his mind to the matter.

52. Perhaps I should add that a functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.

53. The law places the onus on the *ex parte* applicant to demonstrate that the decision was absurd that no sensible person could ever dream that it lays within the powers of the Respondent.[23]The *ex parte* applicant has failed to discharge this burden. The *ex parte* applicant was under a duty to provide evidence to prove its allegations. Section **107 (1)** of the Evidence Act[24]provides that *"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."* Sub-section (2) provides that *"when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*

54. I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** once remarked:-[25]

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

55. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd:*-[26]

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

56. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. As was held in ***Republic vs. Kenya Power & Lighting Company Limited & Another[27]*** thus:-

"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."

57. Once it has been established that a functionary made its decision within its jurisdiction following all the statutory procedures, unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision. Besides, the purpose of Judicial Review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial Review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.[28]

c. Whether the ex parte applicant has established any grounds to warrant the Judicial Review Remedies sought.

58. The Respondent's counsel *cited R v Cabinet Secretary Internal Security ex parte Gragory Oriaro Nyauchi & 4 Others*[29], *Shah v AG (No.3)*[30]and *Mureithi & 2 Others v AG & 4 Others*[31] argued that the application does not satisfy the threshold for grant of Judicial Review orders of Mandamus. Further, citing *R v Kenya Revenue Authority ex parte Yaya Towers Limited*[32]counsel argued that Judicial Review is concerned with reviewing not merits of a decision and that it is not an appeal.[33] He also argued that the Respondent has powers and jurisdiction to discipline students including the power to mete out punishments.

59. Citing *R v Judicial Service Commission ex parte Pareno*[34] counsel also argued that Judicial Review orders are discretionary and may be refused even where the circumstances warrant the orders since the court has to weigh one thing against another. He also argued that certiorari issues to quash a decision that is *ultra vires*.[35]

60. Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted

only for compelling reasons. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[36] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[37]

61. Mandamus is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[38]

62. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

63. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or perform its duties, or where the judge considers that an alternative remedy could have been pursued.

64. It is common ground that the respondent has a statutory and moral duty to uphold Discipline at the University. It would in general be wrong to whittle away the obligation of the Respondent as a public body to uphold Discipline within the University and enforce compliance with law and Regulations to ensure efficient learning and credibility of the examinations. A lenient approach could be an open invitation to the Respondent to act against its legal mandate.

65. Equally important is the fact that the court should as far as possible, avoid any decision or interpretation which would bring about the result of rendering the system of managing Discipline in Universities unworkable in practice or compromise the credibility or quality of examination standards and results or create a situation that will go against clear provisions of the law and Regulation governing the conduct of university examinations. In this case, the law and the Regulations aim at the good of the society by maintaining discipline in Universities and credibility of university examinations. In this regard, the decision meets the proportionality test.

66. The following observation by Charles Goredema may be relevant:-

"The relationship between a university student and the university appears at first sight to be entirely contractual. It may appear that the student's position is analogous to that of a party to a contract which makes certain demands on him and offers him reciprocal benefits. On enrolling the student, the university under takes to provide tutorship, facilities and a learning environment that is conducive to the pursuit of knowledge. The student in turn undertakes to pay the fees which will make it possible for the university to provide these services. He also undertakes to commit himself to the process of learning. The relationship does, however, have a disciplinary dimension to it. In so far as the university commits itself to creating and maintaining an environment that is conducive to learning, it assumes a position of authority in relation to the student. In turn the student undertakes to accept that authoritative status.

*A relationship of authority is by definition hierarchical. It is a relationship in which the student is in a subordinate position and the university is in a superior, super ordinate, position. The relationship is also administrative. An administrative relationship is characterized by the unequal distribution of power between the subordinate and the super ordinate. The attribute by which the latter is easily identifiable is the vesting of power in it, power which it is in a position to enforce. The power is usually derived from statute, and normally the same statute will define the subsidiary position of the subordinate. A common formula is to provide that every registered student shall be subject to the disciplinary authority of the university council. As an administrative relationship, the student/university relationship is regulated by administrative law. Apart from creating and recognizing certain rights, administrative law also serves to prevent the wrongful encroachment upon or violation of those rights."***[39]**

67. Additionally, it is well known that examinations are always considered as one of the major means to assess and evaluate candidate's skills and knowledge be it a school test, university examination, professional examination. Hence, the credibility of examinations offered at the university is of paramount importance.

68. Universities can function properly only if its members adhere to clearly established goals and values. Essential to the fundamental purpose of the learning institutions is the commitment to the principles of truth and academic honesty. The provisions of the governing law and the disciplinary process are designed to ensure that the principle of academic honesty is upheld. While all members in learning institutions share this responsibility, such strict regulations are designed so that special responsibility for upholding the principle of academic honesty lies with the students and teachers so as to avoid academic dishonesty and safe guard integrity of academic programs.

69. Academic dishonesty is a corrosive force in the academic life of learning institutions and is an evil that must be fought zealously. It jeopardizes the quality of education and depreciates the genuine achievements of others. It is, without reservation, a responsibility of all members of the learning institutions to actively deter it.

70. Where there are allegations and evidence that a student entered the examination room with unauthorized material or was caught cheating, this court takes the view that any reliable information suggesting the occurrence of such malpractice in the examination is sufficient to authorize the examining body to take action because examining bodies are "responsible for their standards and the conduct of examinations" and "the essence of the examination is that the worth of every person is appraised without any assistance from an outside source." It is such considerations as discussed herein that would disentitle an applicant the a lenient exercise of courts discretion even where grounds for granting Judicial Review orders are proved.

71. It is important to point out that an exam is a test at which a student demonstrates his or her individual qualifications and skills within the framework and on the conditions laid down by the University for the relevant exam. If a student intentionally or unintentionally acts in such a way as to improve his or her own exam conditions compared to what was intended, then the student is cheating to obtain an incorrect assessment.

72. Perhaps I should add that "Academic Misconduct" is normally an attempt to gain unfair advantage by e.g. fabricating data, passing off work as the student's own or repeated poor academic practice. Academic misconduct includes, but is not limited to:- *Plagiarism; Collusion; Falsification or fabrication of results, data or references; Duplication. Cheating in an invigilated examination; Impersonation;(*Where a student copies from unauthorised material or from another student's script within an examination room, communicates with another person during an examination, consults information or individuals while absent from the examination room, or attempts to gain a higher grade by fraudulent means); *Ghosting* and *Unethical behaviour*. This list is in exhaustive.

73. In view of my conclusions discussed herein above, the conclusion becomes irresistible that the *ex parte* applicant is not entitled to the orders sought. The upshot is that the *ex parte* applicant's application dated **21st** February 2018 is hereby dismissed with costs to the Respondent.

Orders accordingly.

Signed, Dated at Nairobi this 27th day of December 2018.

John M. Mativo

Judge

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[1] Act No. 42 of 2012.

[2] {2008}2 EA 300.

[3] {2006}eKLR.

[4] Citing *R v Chuka University ex parte Kennedy Omondi Waringa & 16 Others* {2016}eKLR, *R v University of Nairobi ex part Michael Jacobs Od & Others* {2016} eKLR; *Gathigia v Kenyatta University,* Nairobi HCMA No. 1029/2007 {2008}KLR 587, *R v Kirinyaga University College & 2 Others ex parte Isaya Kamau Kagwima* [2015}eKLR and *R v The Communications Appeal Tribunal & Others* [2011}eKLR.

[5] Counsel cited a passage from *Halsbury's Laws of England Judicial Review* (Volume 61 (2010), 5th Edition Para 639.

[6] *R v Egerton University ex parte Robert Kipkemoi Koskey* {2006}eKLR.

[7] Citing *Moses Nandalwe Wanjala v Kenyata University* {2015}eKLR.

[8] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords(UK).

[9] Ibid p. 40

[10] Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: *Oxford University Press*, pp. 342–360 at 331, *ISBN 978-0-19-921776-2*.

[11] Supra page 411.

[12] See De Smith, Woolf and Jowell: Judicial Review of Administrative Action (5th ed) at p 377 et seq

[13] {1987} 1 All ER 1118 (CA & HL) at p 1161.

[14] 2000 (4) SA 674 *(CC)* at page 708; paragraph 86.

[15] Trinity Broadcasting (Ciskei) v ICA of SA 2004(3) SA 346 (SCA) at 354H- 355A, Howie P.

[16] Act No. 4 of 2015.

[17] {1995} 1 All ER 129 (HL) at 157.

[18] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[19] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[20] Puhlhofer v Hillingdon London Borough Council [1986] 1 AC 484.

[21] {1985} 6 FCR 155.

[22] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[23] Counsel cited *R vs. Kenya Power & Lighting Co Ltd & Another* {2013}eKLR.

[24] Cap 80, Laws of Kenya

[25]In *Rhesa Shipping Co SA vs Edmunds* {1955} 1 WLR 948 at 955

[26]{2007} 4 SLR (R} 855 at 59

[27]{2013} eKLR.

[28] See **Githua J** in ***Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited*** **Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR.**

[29] {2017}eKLR.

[30] Kampala HCMC No. 31 of 1969 {1970}EA 543.

[31] {2006}1KLR (E&L) 707.

[32] {2008}eKLR.

[33] Citing *Albert Mandela Ogendi v University of Nairobi* {2016}eKLR.

[34] {2004}1 KLR 203-209.

[35] Citing *Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others* {2011} eKLR.

[36] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[37]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[38] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[39]Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa, Charles Goredema Lecturer, Department of Public Law, University of the Western Cape, Zimbambwe Law Review, Vol 13, 1996.