REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL REFERENCE NO. 381 OF 2018

IN THE MATTER OF: ARTICLE 166(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 2(1), 2(4), 3(1), 10, 19(2), 20(1), 20(2), 21(1), 22, 23, 24,

25(c), 27(1), 27(2), 28, 43(1) (f), 47, 48, 50(1) & 55 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE SUSPENSION AND SUBSEQUENT DISCONTINUATION

FROM STUDIES OF WAWERU EDWIN THINI AT UNIVERSITY OF NAIROBI

BETWEEN

WAWERU EDWIN THINI.....PETITIONER

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

PETITIONER CASE

1. The Petitioner through a petition dated 5th November 2018 seek the following reliefs:

a) An Order for Declaration that the discontinuation of the Petitioner from the Respondent University pursuant to an allegation of examination irregularity constitutes a flagrant abuse of the Petitioner's right to fair hearing and fair administrative action.

b) An Order for Declaration that the proceedings carried out by the Respondent's College's Disciplinary Committee were, unfair, unprocedural and unconstitutional thus illegal and null and void.

c) An order of Declaration declaring the suspension letter dated 27th July 2016 and subsequent expulsion letter dated 22nd September 2016 or such letters and or decision or any related thereto by the Respondent or any person acting under its authority

be null and void ab initio and without any legal effect whatsoever and an order nullifying or setting the same aside.

d) An order compelling the Respondent to reinstate the petitioner back to his studies in the school of nursing in the fourth year of study and further compel the Respondent to administer all the examinations that the petitioner has missed out during the period of his suspension and discontinuation form his studies.

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

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

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

h) The Respondent be condemned to pay the costs of this Petition.

2. The Petitioner's case is that his discontinuation from the Respondent University pursuant to an allegation of examination irregularity constitutes a flagrant abuse of his right to fair hearing; and administrative action.

3.The Petitioner aver that at all material times relevant to the Petition herein, he was a student with the Respondent University pursuing his study in the college of Health Sciences for cause leading to a degree in Nursing. That he had missed to sit for his 2nd Semester examination in the 3rd year of study due to school fees arrears and as soon he had cleared the said school fees arrears he made arrangements to sit for the said examination during the special and supplementary examination sitting that was scheduled for the first week of the new semester as from 4th July 2016 to 8th July 2016.

4. That the Petitioner had prepared for the examination and after approximately five (5) minutes into the examination, the Petitioner was reaching into his pocket to remove his examination materials when an examiner one namely; Lilian Omondi, who was making random rounds in the examination room came to his desk and asked him to continue and remove everything from his pockets as she was sure that the Petitioner was reaching to "illegal material".

5. The said M/s Lilian Omondi purported to body search the petitioner and started shouting at the Petitioner alleging that she was sure the Petitioner was hiding something from her, thus drawing attention off the rest of the students and a lecturer one Dr. Kimani who came into the examination room and the two lecturers left the examination room in a heist ordering the Petitioner to remain standing.

6. The Petitioner urge that he did not sit for the said examination and was subsequently suspended from the university and eventually expelled from the University. The Petitioner contend that at the time of suspension and expulsion he was a student leader and was victimized because of his role as a student leader at the University.

7. The Petitioner avers that the decision to suspend and expel him were arrived at in blatant disregard to the rules of natural justice and it is on this basis that the Petition herein was filed seeking to set aside that said decision and have the Respondent compelled to re-admit the Petition herein to the University and be granted the reliefs sought in this Petition.

RESPONDENT'S CASE

8. The Respondent is a public University whose mandate includes advancement of knowledge through teaching scholarly research, scientific investigations and administering examinations to students to efficiently discharge the mandate aforesaid. The Respondent has pursuant to Section 29(1) (d) and (f) of the University of Nairobi Charter, 2013, made rules and regulations to, inter alia, govern the conduct and administration of examination to its students.

9. On 4th July 2016, students of the Respondent's school of Nursing including the Petitioner herein, sat for the supplementary / special examination 2015 / 2016 known as HNS 302, medical surgical Nursing II (hereinafter called "the Examination Paper").

Clauses 4 and 5 of the instructions on the examination paper to which the students were advised to carefully read and understood prior to writing the examination conspicuously provided in capital letters that "possession of mobile phone is not allowed" and "no cheating in examinations" respectively.

10. The Respondent further avers that prior to the commencement of the examinations, it had issued Rules and Regulations for the conduct of examinations under the title "**Instructions to candidates"** to all students. In Clause 3 (viii) thereof, the invigilator was required to reiterate the seriousness of cheating in the examination which included "trying to copy or marking reference to **unauthorised material in the examination room … or use of mobile phones and other electronic devices to answer questions etc".** It is common ground that the invigilator for the examination paper made the emphasis.

11. It is Respondents argument that further, clause 7 of the instructions to candidates warned that ***"No books, bags, notes, rough pages, mobile phones or other electronic devices and any other paraphernalia should be taken by candidates to the examination rooms"***.

12. The Respondent avers that as the examination were in progress, the Invigilator, one M/s Lilian Omondi, found the Petitioner scrolling through mobile phone under the cover of the examination paper. That pursuant to clause 8 of the instructions to candidates, that gave the invigilator the ***"power to confiscate any unauthorised material or / and brought to the examination room"*** M/s Lilian Omondi immediately took possession of the Petitioner's mobile phone. However it is contended that in an unprecedented retaliation to a member of staff the Petitioner fiercely seized, and with a violent twist of the invigilator's arm recovered the mobile phone which M/s Lillian Omondi let go in great pain. The Petitioner thereafter darted out of the examination room with repossessed phones, as M/s Lilian Omondi writhed in great pain.

13. It is Respondent's case that prior to M/s Lilian Omondi being attended to at the staff clinic, she brought the incidence to the attention of both the Examination officer and the Ag Director – School of Nursing, a Dr. Samuel Kimani.

14. The Respondent state that on 27th July 2016, it issued the Petitioner with a letter of even date informing him of the allegations levelled against him; pending investigations and further disciplinary action. The Petitioner was suspended until 24th August 2015 when he appeared before the College Examination Disciplinary Committee (hereinafter called "the committee") to answer to the particular charges against him. The Respondent aver that during the proceedings at the committee the petitioner attended together with three (3) of his friends and / or classmates (M/s Sarah Mumbo; Mr. Collins Kathuri and M/s Maureen A. Onyango) as witnesses. It is Respondent's contention that the Petitioner was not only accorded ample opportunity and time to present his defence, but his aforesaid witnesses were also allowed sufficient time to make representations.

15. It is further averred by the Respondent that upon consideration of the Petitioner's defence, the committee recommended that the Petitioner be expelled from the school of Nursing, a recommendation that was endorsed by the Respondent's Senat4e Examination Disciplinary Committee and approved by the Respondent's vice. Chancellor on behalf of the Senate as required by the Respondent's Rules and Regulations. The Petitioner being dissatisfied with the decision lodged an appeal against the decision on 26th October 2016, which Appeal is still pending.

16. It is stated by the Respondent that by a letter dated 19th June 2018 under the heading the law ***"Request for Forgiveness"*** and addressed to M/s Lilian Omondi, the Petitioner herein wrote inter alia; that **"on 4th July 2016, the most regrettable incident transpired in sons that lead to my suspension and a subsequent expulsion from the University. I tender my sincere apology for the indecent and unacceptable manner in which I reacted. Am very remorseful of my action and ask for forgiveness for the harm and shame that caused".**

17. The Petitioner on 6th November 2018 filed the instant Petition seeking to quash the decision of the Senate Examination Disciplinary Committee rendered on 22nd September 2016. He seeks specifically an order for mandamus to compel the Respondent to reinstate him to the university despite the examination irregularity.

ANALYSIS AND DETERMINATION

18. I have very carefully considered the Petitioner's Petition, affidavit in support and annextures thereto, the Respondents Replying Affidavit and annextures thereto. I have also considered counsel rival written submissions as well as the oral submissions and from the aforesaid the following issues arise for consideration:

a) Whether the Petitioners right to a fair hearing was violated"

b) Whether Petitioner was denied the right to appeal"

c) Whether the Respondents' action of suspending and eventually discontinuing the Petitioner from his studies was tainted with procedural impropriety, irregularity, illegality, unreasonableness and blatant violation of the petitioner's right to fair administrative action"

d) Whether the Petitioner has exhausted the remedy of the right of appeal prior to instituting court process"

e) Whether the Petitioner has made a case for grant of the orders sought"

A. WHETHER THE PETITIONERS RIGHT TO A FAIR HEARING WAS VIOLATED"

19. The Petitioner contention is that under ***Section 4(3) of the Fair Administrative Action Act*** requires procedural fairness. The aforesaid provision states thus:

"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; new regulations, expert evidence, …

b) Information, materials and evidence to be relied upon in making the decision or taking the administrative action"

20. It is Petitioner's contention that on 4th August 2016 he received an anonymous information advising him to immediately go and pick his letter from the offices of the Security for the Kenyatta National Hospital (KNH) Campus. He went and picked a suspension letter dated 27th July 2016 (WET 3). The ground for suspension were that he was purportedly caught scrolling through a mobile phone in the examination room and that the invigilator tried to take away the phone but he turned violent thereby twisting the lecturer's arm. That the Petitioner on 22nd August 2016 was further advised to collect a letter inviting him to disciplinary hearing. That he was denied access into the Respondents premises and that the office was closed as it was already past 5.00p.m. On 23rd August 2016 the Petitioner made further attempt to collect the letter inviting him for disciplinary hearing and was allowed but in the afternoon. That the hearing was scheduled for 24th August 2016.

21. The Respondent on the other hand aver that the Petitioner was on 27th July issued with a letter of even date in informing him of the allegation levelled against him pending investigation and further disciplinary action. That on 24th August 2016 Petitioner appeared before College Examination Disciplinary Committee. It is Respondents averment that during the proceedings at the committee the Petitioner attended with three witnesses and was accorded ample opportunity and time to present his defence and his witnesses were allowed sufficient time to make representations.

22. It is Petitioner's averment he was not given adequate notification to enable him prepare for the disciplinary hearing as he was notified of the hearing a day to the said hearing and as such he was not given ample time to prepare for the said hearing. It is therefore contended that the Respondent's action of not according the Petitioner adequate notification of the charges that he was to be charged with together with the evidence that was to be used against him clearly violated the provisions of ***Section 4(3) (f) of the Fair Administrative Action Act*** which requires the administrator to give to a person likely to be affected by its decision, information, materials and evidence to be relied upon in making the decision or taking administrative action (in the case ***Geothermal Development Company Limited v. Attorney General & 3 Others (2013) eKLR*** it was stated as follows:

"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 232enunciates 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 inTV3 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, 55and Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)."

23. It should be borne in mind that procedural fairness has embedded in it the age old natural justice requirements that no man is to be a judge in his own case, no man should be condemned unheard and that justice should not only be done but seen as done effectively, Procedural fairness requires that decision be made free from a reasonable apprehension of bias by an impartial decision maker.

24. There is no dispute in the instant Petition that the Petitioner herein received a letter inviting him for a disciplinary hearing on the eve of the day when the said disciplinary was stated to take place. The Petitioner was facing five (5) counts levelled against him with no particulars as the served counts which he was supposed to answer on the following day thus the 24th August 2018 at 9.00a.m.; some of which counts included;

i) Attempted assault

ii) acting in a strategy aimed at defeating student code of conduct and discipline

iii) engaging in exam irregularity amongst other counts.

25. The Respondent through its Replying Affidavit annexes the changes. The Petitioner herein was required to respond to at the disciplinary hearing. The charge sheet does not on its part disclose the witnesses intended to testify against the Petitioner. However the Respondent at the hearing relied on the incident report filed by the invigilator on 4th July 2016.

26. The Petitioner assert that at the hearing the panel was comprised of four (4) persons amongst them was his co-accuser Dr. Kimani and that he was directed to remain standing while facing disciplinary panel. That he was not given time to settle down and while in panic mood and without the panel introducing themselves they started hurling random questions with intention to pinning him down to submissions and accept he actually was guilty of the charge prepared against him. He contends that he was taken through a disciplinary hearing in which the persons sitting in the said disciplinary hearing were part of the persons who were accusing him of examination irregularity since Dr. Kimani was part of the examination supervisors during the very examination sitting, that is in question. In such a situation it is clear that there is no where that justice would be seen to be done. A charged person should always be placed before an independent and impartial decision maker. It is a general principle that, it is not permitted for members of an adjudicatory pane to also be involved in the investigatory stage of a proceeding, as it would give rise to a reasonable apprehension of bias and unfairness to the suspect.

27. The Respondent counters the Petitioner's submission by urging that his examination of 4th July 2016 were not the Petitioner's first at the Respondent. That he does not state anywhere in his pleading that he was ignorant of the Rules and Regulations and the disciplinary process pertaining to the examination irregularity. It is urged that at paragraph 1 of the letter dated 27th July 2016

"It has been reported to me that on 4th July 2016, while sitting a University examination…, you were caught scrolling through a mobile phone in the examination room. The Invigilator tried to take away the phone but you turned violent thereby twisting the lecturer's arm…"

28. It is further averred by the Respondent that the allegations are materially the same as the particulars in the charge. It is contended the Petitioner was in possession of fail facts that founded the basis of the charges against him as early as 27th July 2016. The service of the letter on 23rd August 2016 is not denied. The letter gave the Petitioner at least a day to the hearing which if it was not sufficient for him to prepare for his defence he should have sought an adjournment. That fact that the Petitioner appeared with witnesses goes against his averment that he had no sufficient time to prepare for his defence. There is reason why he did state so during the hearing and the failure to seek an adjournment is solely to blame on the Petitioner and having come with three witnesses to testify on his behalf meant he knew the charges he was facing and was ready with his defence. The Petition did not raise this issue of not being ready on the hearing date. He cannot claim that he had no sufficient time to progress of. The issue herein remains whether the Petitioner had fair trial in view of the delayed service, non-disclosure of the witnesses, and non-availability of witnesses statement. From the Respondents evidence the Petitioner knew the charges he was facing and the evidence against him. It is averred that the Petitioner did not seek adjournment but opted to proceed with the case without raising any issues. From the above I find the Petitioner on his own volition proceeded within the hearing and he had a fair trial.

29. Further, the complaint against the Petitioner was filed by the Invigilator, Ms. Lilian Omondi. As regards Dr. Samuel Kimani, he only became involved in the matter when a report was made to him in his capacity as the Ag. Director – School of Nursing. He was never a witness in the petitioner's disciplinary hearing, neither was any evidence led to the effect that he harboured any actual or likelihood of bias against the Petitioner. I therefore find that the Petitioner's right to a fair hearing was not violated by the Respondent.

B. WHETHER PETITIONER WAS DENIED THE RIGHT TO APPEAL"

30. Article 47 of the Constitution as read with ***Section 4, 5 and 7 of the Fair Administrative Action Act, 2015*** provides under ***Section 4 of Fair Administration Action Act*** as follows:-

"4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(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.

(4) 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; Administrative action to be taken expeditiously, efficiently, lawfully etc. No.4 44 Fair Administrative Action

(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.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 4l of the Constitution, the administrator may act in accordance with that different procedure."

31. The Petitioner avers the importance of expounding on the right of appeal and the need for any administrative body to communicate to any party affected by its decision of the said right of appeal if any and the avenue to pursue the same. It is further contended that it should be appreciated that the provisions of the Constitution should be read liberally, widely and purposefully so that justice is done. That technical construction of constitution should be avoided especially where fundamental rights are concerned and the right of appeal.

32. The Petitioner in the instant petition was expelled from the University by the Respondent. The proceedings (JO-7) are clear that the Petitioner was never notified of his right to appeal or any remedy that was available to him. However it is clear that the Petitioner did write to the Respondent herein through a letter dated 26th October 2016 imploring upon the Vice-Chancellor to consider his appeal. The letter did not elicit any feedback, however the Respondent has averred that the Petitioner's appeal was still under consideration, three (3) years after the Petitioner made an appeal against the impugned decision.

33. The Petitioner has already filed an appeal against the impugned decision. There is no evidence of the Petitioner having been denied the right to Appeal. That there is an appeal pending hearing, parties should fast track the hearing of the same.

C. WHETHER THE RESPONDENT'S ACTION OF SUSPENDING AND EVENTUALLY DISCONTINUING THE PETITIONER FROM HIS STUDIES WAS TAINTED WITH PROCEDURAL IMPROPRIETY, IRREGULARITY, ILLEGALITY, UNREASONABLENESS AND BLATANT VIOLATION OF THE PETITIONERS RIGHT TO FAIR ADMINISTRATIVE ACTION"

34. The Petitioner contend that the Respondent's action violates ***Article 47 of the Constitution*** in one or all the following basis, that the college Disciplinary Committee relied on evidence that was not furnished to the Petitioner before or at the time of the hearing of his disciplinary case, neither was the petitioner given chance to ask questions or cross-examine the persons who gave evidence against him.

35. The Petitioner sought to rely in the decision in ***re Pergamon Press Ltd. [1971] 1 Ch.388*** in which the directors of a company under investigation by Inspectors under the provisions of the English Companies Act, 1948, refused to answer questions insisting that the investigators who were performing an investigatory function, were required by rules of natural justice to give them transcripts of the witnesses who speak adversely against them and see any documents that may be adversely used against them and to allow them to cross-examine witnesses. The English Court of Appeal while holding that the inspectors had a duty to act fairly rejected their claims.

36. Further in **Lucy Wanjiku Gitumbi & another v Dedan Kimathi University of Technology [2016] eKLR** the Court while giving its Judgment, it opined that **In Kenya, the right to education is a fundamental right enshrined and guaranteed by Article 43(1) (f) of the Constitution. The court also notes that although the applicants were served with notice containing a statement of specific charges and grounds, it was not shown that the charges, if proven would justify the applicant's expulsion under the Regulations of the University. Therefore, whilst the court does respect academic freedom, the court exists to vindicate constitutional rights of students. There is absolutely no reason why the applicants students were never accorded an opportunity to cross examine their accusers which I consider was essential to due process as it is inevitably a factor which the court will consider in determining the overall fairness of an administrative proceeding, even though the hearing was not conducted by persons experienced in legal process.**

The Court went further to opine that ***"The vice- chancellor was not bound to treat the matter as a trial but could obtain information in any way he thought best, and it was open to him if he thought fit, to question witnesses without inviting the***

respondent to be present but a fair opportunity must have been given to him to correct or contradict any relevant statement to his prejudice"

37. The tenets of procedural fairness were restated in ***Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300*** that procedural impropriety is one of the grounds upon which a court of law would be entitled to grant judicial review orders. The court pronounced itself as follows:

"Procedural impropriety is when there is failure to act fairly on the part of the decision- making authority in the process of taking a decision. The unfairness may be in the process of taking a decision. The unfairness may be in the non- observance of the Rules of Natural Justice or to act with procedural fairness towards one affected d 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."

38. The Petitioner on issue of bringing a "mobile phone" to an examination is that it is a fabricated story and a malice on part of M/s Lilian Omondi and is intended to victimize him by virtue of his position as a student leader. The Petitioner gave oral evidence during the disciplinary hearing at the committee and he stated:-

"the invigilator came right to his desk and took the phone from his hands….. that he pleaded with the invigilator to give him back his phone so that he could switch off, but she declined. He therefore took it from her hands but to his bereavement, the invigilator started screaming and calling for help"

From the Petitioner's statement I find that this is unequivocal admission of a mobile phone in an examination room.

39. From the Disciplinary Committee Proceedings in cross-examination, the Petitioner conceded thus: **"the first time"** he was **"carrying an authorised material to the examination"** that his phone was **"on where the examination started"** and when asked why he did not let the invigilator have the phone, he replied **"because she said I was cheating."**

40. The four witnesses who testified at the disciplinary testified of hearing an exchange between the Petitioner and the invigilator regarding the Petitioner's mobile phone, that the invigilator took possession of the mobile phone at some point; that the petitioner violently repossessed the mobile phone prior to exiting the examination room. All the four witnesses were invited by the Petitioner. I find no reason why the Petitioner witnesses would testify against him unless they were telling the truth. The Petitioners affidavit sworn on 5th November 2018 is nothing but a creative master piece replete with falsehood.

41. As regards the minutes by the Respondent on what transpired during disciplinary hearing I find that the same has not been challenged. The Respondent referred to the case of ***Republic v Mount Kenya University & another [2017] eKLR*** where the court held thus: ***"In the absence of any credible objection to their authenticity, this Court has no option but to rely on the same as being a true reflection of what took place before the said committee."***

42. In the letter of acceptance to study at the Respondent University dated 16th May 2013, the Petitioner undertook to inter alia - abide by the Rules and Regulations governing the organization, conduct and Discipline of the students of the University of Nairobi in the declaration for Admission and Board of even date. The Petitioner duly acknowledged and duly submitted to the disciplinary authorities of the Respondent as defined in the aforesaid Rules and Regulations. He undertook to refrain from any activities that would erode the dignity and public confidence in the Respondent in a manner that would prejudice its interest. He acknowledged that should he be found in breach of the foregoing, he would be subject to disciplinary action prescribed by the Respondent. The Petitioner therefore by bringing a mobile phone in the examination room, he did not only breach the Rules and Regulations stipulated on the examination paper, but also the instructions to candidates that had been issued by the Academic Registrar in exercise of the powers conferred under ***Section 29(1) (d) (f) of the University of Nairobi Charter 2013***. The Petitioner was thus lawfully subjected to the Respondents disciplinary process.

43. In the case of ***Olouch Dan Omino Vs Kenyatta University High Court Petition No. 54 of 2014*** the High 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."

44. Further in the case of ***J M O O vs. Board of Governors of St. M's School, Nairobi [2015] eKLR***, the Court stated:

"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."***

45. The Respondents response to the Petitioner's contention in regard to his suspension and eventual discontinuing from the studies on alleged tainted with procedural impropriety, illegality, unreasonableness and alleged blatant violation of the Petitioners right to Fair Administrative action urges that the disciplinary processes leading to the Petitioner's expulsion was on all four within ***Article 47 of the Constitution*** as the Respondent in arriving at the decision to expel the Petitioner complied with the dictates of ***Article 47 of the Constitution***.

46. The Respondent referred to the case of ***J N N (a minor) M N M, suing as next friend –vs- Naisula Holdings Limited t/a N School [2008] eKLR*** in which a student had been expelled for being found with narcotics in school, this Court held that ***"the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50(1) of the Constitution".*** Highlighting the glaring distinction, this Court held that***;***

Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodes in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, through a fundamental right is contextual and flexible in its application and can be limited by law. Fair hearing under Article 50(1) applies in proceedings before a court of law or independent and impartial tribunals or bodies."

47. I find from the foregoing the Petitioner's attempt to intertwine the two distinct Articles is only intended to conjure the facts in issue.

48. It is Petitioner's contention he was not accorded sufficient time to prepare his defence, he was not granted an opportunity to cross examine his accusers and that the committee was not properly constituted. In the Petitioners affidavit in support he has not stated he was ignorant of the Rules and Regulations and the disciplinary process pertaining to the examination irregularity. In paragraph 1 of the letter dated 27/7/2016 the allegations were disclosed to the Petitioner as follows:

"It has been reported to me that on 4th July 2016, while sitting a University examination…, you were caught scrolling through a mobile phone in the examination room. The Invigilator tried to take away the phone but you turned violent thereby twisting the lecturer's arm…"

49. The allegations formed the basis of the charges against the Petitioner. He was possessed of the allegations which formed the basis of the charges against him before the hearing as per contents of the letter of 27th July 2016.

50. The Petitioner avers that he was served with hearing notice a day to the hearing thus 23rd August 2016 before the disciplinary committee. When he appeared before the committee he was ready for hearing with his three witnesses namely:- M/s Sarah Mumba, Mr. Collins Kathuri and M/s Mauren A. Onyango. He did not tell the committee he was served late and needed more time to prepare for hearing. He did not seek adjournment and the same was rejected. He was aware of the full facts which were in the letter dated 27th July 2016 which formed the basis of the charge and if he was not ready for hearing nothing stopped him from seeking an adjournment. His allegation that he was not ready for hearing as he had been served a day to the hearing is inconsistent with his conduct of attending hearing with three witnesses. He was in view of having taken his 3 witnesses with him ready with the hearing.

51. From the committee proceedings, there is nowhere, where the petitioner asked nor where he said he asked for time to enable him to adequately prepare for the hearing but was denied. According to the minutes annexed in the Respondents replying affidavit there is no evidence that the petitioner requested for adjournment as entitled to pursuant to ***Section 4(4) (d) of the Fair Administrative Action Act, 2015***.

52. On the other hand other than the Incident Report filed by the invigilator on 4th July 2016, the charge and the various Rules and Regulations were all within the Petitioners knowledge and possession. The Petitioner's insinuation that there were other documents relied upon by the committee is without basis. The Petitioner never provided evidence of the alleged other documents and / or their effect on impugned decision. The claim therefore under ***Article 35 of the Constitution*** must fall. On the issue of being denied an opportunity to cross-examine his accuser, the Petitioner was content to defend himself based on the invigilator's Incident Report. There is no evidence that the Petitioner sought for witnesses to be availed and was denied such a request.

53. The Petitioner filed an appeal dated 26th October 2016 which is pending and in which I need not comment on as it is supposed to be before another forum.

54. The complaint against the Petitioner was filed by invigilator M/s Lilian Omondi but Dr. Samuel Kimani was only involved in the matter when a report was made to him in his capacity of the Ag. Director School of Nursing. He was never a witness in the Petitioner's disciplinary hearing, neither was any evidence led to the effect that he harboured any actual or likelihood of bias against the Petitioner.

55. In the Instant Petition pursuant to the Vice-Chancellor's powers to take any other measures necessary for the proper operation of disciplinary procedure conferred by ***Part IV (a) (iii) of the Rules***, a committee was constituted to hear the Petitioner's disciplinary case. As the Ag. Director of the subject school of Nursing, Dr. Kimani was possessed with special knowledge of the Rules and Regulations applicable to the college; thus his membership to the committee. I find that in absence of evident that the committee was selectively constituted in the Petitioner's case, his allegations of discrimination are without foundation and I dismiss the same. I further find that mere receipt of the Incidence Report from the invigilator by Dr Kimani in his capacity as Director cannot be a basis to refer him as a co-accuser. I find that the Petitioner has no basis to impugn Dr. Kimani's seat at the committee.

56. The Respondent relied in the case of ***Nkatha Joy Faridah Mbaabu Vs. Kenya University [2016] eKLR*** where this Court held that Courts should exercise great restraint and even ***"loath"*** the invitation to ***"interfere with any decision"*** of an institution ***"unless it is evident that it was undertaken outside of legal provisions and contrary to constitutional provisions."***

57. This Court further added that an ***"Institution is enjoined to perform such disciplinary tasks through such bodies as are legally and properly constituted as dictated by such relevant laws as the Universities Act, No. 42 of 2012 and the institution's own statutes."*** Accordingly, the ***"appropriate forum"*** to resolve a dispute of examination irregularity ***"is ideally the concerned institution itself",*** which ***"ought to be in a position to determine cases of examination irregularity with little intervention externally".*** Where a Petitioner has failed to lay any basis for interference with the decision of an institution, ***"the Court ideally ought to let such processes run its course."***

58. The Respondent urge that the Petitioner has introduced factual matters by way of submissions. It is contended that the allegations raised in the Petitioners submissions at page 10 has the effect that only the University Council has the power or the right to expel a student and further that the college Examinations Disciplinary Committee lacked the requisite powers to make a recommendation for expulsion of the Petitioner was never deposed to in the petition nor in the Affidavit in support of the Petition, neither was documentary evidence tendered by the Petitioner to support the allegation. The Respondent in support of the above preposition referred to the case of ***Bake "N" Bite (Nrb) Limited vs. Daniel Mutisya Mwalonzi [2015] EKLR,*** factual evidence cannot be introduced by way of submissions. The court stated as follows:

"…submissions of counsel on factual issues are not evidence and the counsel for a party cannot be allowed to introduce factual evidence in his submissions, which facts were not deposed by his client. To do so would be allowing advocates to adduce evidence on behalf of their clients. And for reasons that the fact of the respondent's impecunity was only raised in the submissions, he could not have been expected to react to it in his replying affidavit."

59. It is clear from the pleadings and affidavit in support of the Petition that the petitioner did not depone to the factual matters set out at page 10 of his Counsel submissions. I find that in the absence of the averments having been made in the Petitioner's affidavit, the Respondent could not have had an opportunity to have addressed the aforesaid matters in its replying affidavit. A party in a

matter is bound by his pleadings and submissions cannot be based on non-pleaded mattes. Further no party or counsel can purport to respond on factual mattes by way of submissions, for if that is allowed, would cause chaos and confusion on the issues for determination.

60. From the aforesaid I find that the allegations raised at page 10 of the Petitioner's submissions cannot form the basis of challenging the committees decision. In any event, the college Examinations Disciplinary Committee did not expel the Petitioner from the Respondents University. It only made a recommendation which was subject to approval by the Senate Examination Disciplinary Committee. The recommendation was endorsed by the Respondent's Senate Examination Disciplinary Committee and approved by the Vice-Chancellor in accordance with the Respondent's Rules and Regulations.

61. In the instant Petition the Petitioner has made extensive reference to the alleged clauses in the Respondent's Rules and Regulations. However the Petitioner has not exhibited a copy of the alleged Rules and Regulations. In the case of ***Republic vs. Mount Kenya University & another*** *(supra*), this court further held that ***"in the absence of a copy of the said Handbook being exhibited which support the applicant's case, there is no basis upon which this Court can find in favour of the applicant."***

62. From the aforesaid I find that the Petitioner has failed to demonstrate that the Respondent's action of suspending and eventually discontinuing the Petitioner from his studies was tainted with procedural impropriety, illegality, unreasonableness and blatant violation of the Petitioner's right to fair administrative action.

D. WHETHER THE PETITIONER HAS EXHAUSTED THE REMEDY OF THE RIGHT OF APPEAL PRIOR TO INSTITUTING COURT PROCESS"

63. It is Respondent's averment that 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. The Petitioner has at page 8 of his submissions urged the Respondent's decision of the Disciplinary Committee is appealable to the Senate. Indeed the Petitioner filed his appeal which is still pending hearing and determination.

64. The Respondent contend that an appeal to the Senate Disciplinary Committee is the appropriate remedy. It is clear that the right to appeal subsists notwithstanding Senate approval of the Disciplinary Committee, decision on expulsion. In view of the Petitioner having not exhausted the alternative remedy provided under the law before commencement of this suit, I find that this suit is premature.

65. Under ***Section 9(2) of the Fair Administrative Action Act***, ***No. 4 of 2015*** it is provided:-

"The High Court or a subordinate Court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanism including internal mechanisms for appeal or review and all remedies available under any written law are first exhausted."

66. Section 4 of the Act gives 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, however the onus is upon the Applicant to satisfy the Court that he ought to be exempted from resorting to the available remedy. In the instant Petition the Petitioner has not shown nor demonstrated that the appeal mechanism would be less convenient or less appropriate remedy nor has it been shown that the exemption would be in the interest of justice.

67. In the case of ***Republic vs. Kenya Revenue Authority exparte Interactive Gaming & Lotteries Limited [2016] eKLR,*** the Court stated as follows;

"There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statue has provided a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute …. It is now therefore 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.

In Re Preston [1985] AC 835 at 825D Lord Scarman was of the view that a remedy by judicial review should not be made

available where an alternative remedy existed and should only be made as a last resort."

68. I therefore find that it is now a cardinal principle that except in the most exceptional circumstances, the judicial review jurisdiction would not be exercised in a matte similar to the instant one and court must not exercise its jurisdiction where there exists alternative remedy and should only be made as a last resort. In the instant matter there exists an alternative remedy in a form of an appeal and this court need not exercise the judicial review jurisdiction as an appeal before the Senate Disciplinary Committee is the appropriate remedy.

E. WHETHER THE PETITIONER HAS MADE A CASE FOR GRANT OF THE ORDERS SOUGHT"

69. The institution decision to expel a student can only be challenged on ground of illegality, irrationality and procedural impropriety. This proposition was followed in the case of ***J N N, (a Minor) case*** *(supra)* where Court stated that an institution's decision to expel a student could ***"only be challenged on grounds of illegality, irrationality and procedural impropriety".*** Pursuant to the holding in the case of ***Republic v Mount Kenya University & another*** *(supra),* ***"it does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case".***

70. The Petitioner herein has not demonstrated that the decision content in the Respondents letter dated 22nd September 2016 falls under any of the three categories aforesaid herein above.

71. Further the court in dismissing the Petitioners allegations that the rights under ***Article 35, 47 and 50 of the Constitution*** were violated by the expulsion, the court in ***J N N (a minor)*** over suspension stated as follows:

"…the authority of schools and their administrators to impose sanctions, including expulsion, as disciplinary action against erring students is consistent with their duty and statutory mandate to "teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop moral character and personal discipline of the students. Schools and school administrators have the authority and responsibility to maintain school discipline and the right to impose appropriate and reasonable disciplinary measures. Students have the duty and the responsibility to promote and maintain discipline and tranquillity of the school by observing he rules of discipline."

72. The Respondent in this matter is responsible for all student's affairs including that of disciplining students as are deserving of discipline and for good reason. In the case of ***Eliud Nyauma Omwoyo & 2 Others vs. Kenya University [2014] eKLR,*** the High Court cited with approval the decision in ***Republic vs. Kenya University and 2 others Ex Parte Jared Juma, HC Misc. Civil App No. 90 of 2009,*** where it was held as follows;

"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. Most bodies established under statue also establish disciplinary committees. Kenya 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."

73. I find that it would breed chaos and absurdity at educational institutions to expect that an external body would step in and take command of the institutional disciplinary mattes with regard to students. No doubt that unpunished instances of examination irregularity at the Respondent University would produce incompetent personnel, erode the integrity as its examinations and quality of its graduates to its great prejudice. It is therefore in the public interest that the quality of the Respondent's University graduates should be maintained at the highest attainable level and irregularity should always be rewarded with the highest punishment to discourage graduates from falling into temptation of cheating.

74. The upshot is that the Petition is without merit and I proceed to make the following orders:

a) The Petition is without merit and is premature for failure to comply with the doctrine of exhaustion by exhausting the alternative remedy available before commencing these proceedings.

b) The Petitioner do proceed to exhaust the alternate dispute Resolution mechanisms by prosecuting his pending appeal before the Senate Disciplinary committee.

c) Each party to bear its own Costs.

Dated, Signed and Delivered at Nairobi on this 4th day of June, 2020.

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J. A. MAKAU

JUDGE