Case Number:	Civil Appeal 90 of 1989
Date Delivered:	17 Dec 1990
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Joseph Raymond Otieno Masime, John Mwangi Gachuhi, James Onyiego Nyarangi
Citation:	Nyongesa & 4 others v Egerton University College [1990] eKLR
Advocates:	Mr Ochieng for the Appellants, Mr Sheth for the Respondent
Case Summary:	**Nyongesa & 4 others *v* Egerton University College** Court of Appeal, at Nairobi December 17, 1990 Nyarangi, Gachuhi & Masime JJ A Civil Appeal No 90 of 1989 (Appeal from the Ruling and Order of the High Court at Nakuru (Tunoi J) dated 12th April 1989 in High Court Misc Civil Application No 10 of 1987) ***Judicial review*** *– displinary action against University students – University Board acting without giving students opportunity to be heard – whether disciplinary action can stand - whether University Board and Senate bound by rules of natural justice - whether rules of natural justice breached - reluctance of courts to interfere with decisions of domestic bodies.* ***Natural Justice*** *- right not to be condemned*

unheard – University disciplinary body decidng to expel students - students not given notice of the proceedings or opportunity to be heard - whether disciplinary proceedings proper - whether proceedings conducted in breach of natural justice.

The appellants, who were students of the respondent University, appealed against the High Court's decision refusing to issue an order of mandamus against the University to command it to release the results of the appellants for diploma examinations which they had set and to award the relevant certificates to those appellants who may have passed their respective examinations.

The University justified the disciplinary action against the appellants contending that they were lawfully expelled before the end of the academic year and were thus not entitled to results or the award of certificates.

The Academic Registrar of the University deponed that the appellants undermined the authority of the institution by staging an unlawful strike which led to postponement of terminal examinations for first and second year students.

The Registrar further stated that he wrote to each appellant to inform each of them of the alleged misconduct and to convey the decision of the displinary committee and of the Board that the appellants had been expelled from the college. No notice of the charges or the meeting in which the decision of the disciplinary committee was reached had been given to any of the appellants.

It was however contended on behalf of the University that the appellants were not heard because they had by their conduct waived that right

Held:

1. The Board, the Senate and the Disciplinary Committee of the University were not judges in the proper sense of the word. However each was required to give each applicant an opportunity of being heard before it and stating his case and view.

2. There was a failure of natural justice. It was necessary for each applicant to be served with a notice that he was being proceeded against and each organ which dealt with the applicants was required to act honestly and fairly.

3. In the absence of specific provisions or rules as to how the Board, Senate and the Disciplinary Committee of the University were to proceed to decide the matter the law of Kenya will imply no more than that the substantial requirements of the law shall not be violated.

4. Courts are loath to interfere with decisions of domestic bodies and tribunals including college bodies. However, the courts will interfere to quash decisions of any bodies when moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.

5. (Per Masime JA) The proceedings of the discilinary bodies of the respondent college were in breach of the rules of natural justice and were consequently null, void and of no effect.

Appeal allowed.

Cases

No cases referred to.

Texts

Simonds, Lord *et al* (Eds) (1953) *Halsbury's Laws of England* London:

Butterworths 3rd Edn Vol II p 65 para 122

Statutes

1. Civil Procedure Rules (cap 21 Sub Leg) order LIII rule 3

2. Egerton University College Act, Act No 15 of 1986 section 14(1)

Advocates

Mr Ochieng for the Appellants

	Mr Sheth for the Respondent
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, GACHUHI & MASIME JJ A)

CIVIL APPEAL NO 90 OF 1989

NYONGESA & 4 OTHERS…….…… APPELLANTS

VERSUS

EGERTON UNIVERSITY COLLEGE…..…… RESPONDENT

(Appeal from the Ruling and Order of the High Court at Nakuru (Tunoi J) dated 12th April 1989 in High Court Misc Civil Application No 10 of 1987)

JUDGMENTS

Nyarangi JA. This is an appeal from a ruling given on April 12, 1989 by Tunoi J whereby he refused the appellants' application for orders of *mandamus* against Egerton University College (the College). The history of the matter is as follows: On April 5, 1988, the applicants who were then students at the respondent college moved the High Court Nakuru by a notice of motion under order 53 rule 3 of the Civil Procedure Rules for orders that *mandamus* be issued firstly to command and/or compel the vice-chancellor of the respondent college, the Senate and the Council of the college and any person or body concerned in the matter to release the results of the applicants of the Diploma examination for which the applicants sat in July, 1986, and secondly to award the relevant certificates to those of the applicants who may have passed their respective examinations.

In a supporting affidavit, it was deponed on behalf of the applicants that in the year 1986, each applicant was a final year student at the respondent college. During July, 1986, the applicants sat for the final Diploma examination of the college in the courses each had been prepared for. The results were released in early August, 1986, but none of the applicants received his results. Upon checking for the results at the college, the deponent, Joseph Onoo, one of the applicants, was arrested and charged with trespass at the District Magistrate's Court Nakuru on the order of the College Principal. None of the applicants had received his result.

Now I need to refer to the affidavits which were sworn on behalf of the college. On January 11, 1989, the College Registrar swore an affidavit in answer to the notice of motion. In his affidavit, the Registrar says the academic year of the college for the applicants commenced in August, 1985 and ended on July 31, 1986. The applicants did not complete an academic year as they were lawfully expelled from the college on July 17, 1986 and are therefore not entitled to the results. Further, that on July 17, 1986 the applicants undermined the college authority and thus violated the basic condition of admission. It is deponed that the applicants staged a strike in the college, incited other students to join the unlawful strike and so undermined the college authority. It is claimed that the applicants entered the classrooms and forced the first and second year students to abandon and boycott their examinations. Also that the disciplinary committee and the Board of Governors discussed the matter and decided that the applicants were guilty of misconduct and could be expelled. That as a result, the examination results were issued after the expulsion, and the applicants lost the right of the results and award of certificates.

The Academic Registrar states in his affidavit that the applicants were lawfully expelled before the end of the academic year 1985/86 and are therefore not entitled to the results or the award of certificates. The deponent adds that on July 17, 1986, the applicants with others prevented the first and second year students from entering examination halls and physically chased the two groups who had already taken their seats in the halls. And that on the same date, the applicants staged an unlawful strike and that as a result the terminal examinations for the first and second year students had to be postponed. So, the applicants were expelled from the college which decision the Board approved. The deponent goes on to state that on July 28, 1986, he wrote to each applicant to inform each of the claimed misconduct and to convey the decision of the disciplinary committee and of the Board that the applicants had been expelled with effect from July 17, 1986.

A security guard at the college deponed in his affidavit that on July 17, 1986 he saw the applicants going round the college premises carrying pieces of timber and chasing the students who had gathered in the classrooms to write their examinations. Before that, Richard Maskini had addressed a gathering of students and exhorted them to boycott the examinations and that the students who did not heed the call would be dealt with ruthlessly.

Then there is a short affidavit of the vice-chancellor in which he states that he verily believes that the applicants were properly and lawfully expelled after full consideration by the disciplinary committee and the Board by reasons of their criminal acts, misconduct and breach of college regulation. I conclude this part of the judgment by referring to the further affidavit of Onoo, one of the applicants. He said it was untrue that he and the others were lawfully expelled from the college. He contended that for third year students, the academic year ended on July 11, 1986 as is shown on the University Identity Card and therefore they could not be expelled on July 17, 1986.

At the hearing of the appeal, Mr Ochieng for the appellants contended that, whatever the established procedure was, the appellants should have been heard. Counsel emphasised that there was a failure of natural justice and that the appeal ought to succeed on that ground.

Ultimately, Mr Sheth found himself constrained to admit that the appellants were not heard but that they had waived that right. I wish to rest my decision on the ground that the appellants were not heard. There is no doubt that there was a failure of natural justice. The Board, the Senate and the disciplinary committee were not judges in the proper sense of the word. However, each was required to give each applicant an opportunity of being heard before it and stating his case and view. It was necessary for each applicant to be served with a notice that he was being proceeded against. Each organ which dealt with the applicants was required to act honestly and fairly. In the absence of specific provisions or rules as to how the Board, Senate and the disciplinary committee were to proceed to decide the matter, the law of Kenya will imply no more than that the substantial requirements of the law shall not be violated.

Up and down our country, disputes of all types and magnitude are heard and settled by elders under traditional procedures. It is axiomatic at every seating or hearing that each party to the particular dispute will have been notified to attend, to prepare to be heard and to have ready his witnesses. It is unthinkable for elders to proceed to hear only one side to a boundary dispute and make a decision on that material alone. That is the application of natural justice. There is nothing alien in it. It is part of the Kenya culture pertaining to settlement of controversies.

I must say I was unfavourably impressed by the procedure of the college authorities who handled the matter affecting the applicants as if the applicants were outside the jurisdiction, were unrepresented and had been served with the relevant process but failed to appear. Every college authority or body must be taken to be cognisant of the requirements of natural justice.

Mr Sheth answers the failure of natural justice not by any denial but by a submission that the applicants had waived their right to be heard. It seems clear from the affidavits and from the short facts that at no time did any of the applicants do any acts or conduct himself in a manner which could reasonably be construed as waiving his right to be afforded an opportunity of being heard. In my judgment, the legal basis of the college's claim of waiver is fundamentally misconceived. The fact that *mandamus* is neither a writ of course nor a writ of right but a matter of the discretion of court does not mean that natural justice may be breached. A court exercises its discretion judicially, after hearing the relevant admissible evidence and deciding on merits.

One of the purposes of an order of *mandamus* is to issue to the end that justice may be done.

Further, the college authorities are in *loco parentis* in relation to its students. Every student who is expelled from a college shall be required by his parents or guardians to report on the expulsion and to give his version. A student who informs his parents or guardian that he has no clue as to why he was sent down and that the decision was reached without him being heard would cause the parent or guardian real unease.

College authorities could not afford to overlook their very special position in relation to students under their care.

In my view, the college should have notified the applicants of the allegations against each by serving a copy of the notice and requiring each to acknowledge receipt by signing a copy thereof. The notice ought to inform the student concerned that he is at liberty to submit a written defence for consideration by the Board or Senate or by indicating that he wishes to be present. Each affected student would later be notified of the date when to appear before the Board or Senate to defend himself. The secretary to the body hearing a student should make a full note of the representations of the particular student. A summary of what the student states should be read back to him and a note made to that effect.

I respectfully think that the particular body hearing a student on an allegation, should demonstrate by apt procedure or appropriate language that the representations and evidence of the student has been fairly considered before a decision is reached. Rules of natural justice apply because any decision would affect the rights and legitimate expectations of those concerned.

Having thus stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side. It does not assist for anyone to question or criticise the particular posture of courts. It is the duty of courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or enquiry are of an internal disciplinary character.

I take it to be clear that the college was established by the Egerton University College Act, 1986, Act No 15 of 1986 (The Act). The Board which considered the allegations against the students is provided for under section 14(1) of the Act.

As a matter of justice, I consider that the college stand was wrong and cannot be vindicated by this court. I would allow the appeal, set aside the ruling and order of the High Court and order Egerton

University to release to the appellants the results of the Diploma examination for which the appellants sat in July, 1986 and to award the relevant certificates to those of the appellants who may have passed their respective examinations. I would award the costs of the appeal to the appellants.

As Gachuhi and Masime JJ A agree, it is so ordered.

Masime JA. I have had the advantage of reading in draft the judgment of Nyarangi JA and agree that this appeal must be allowed. In view of the importance of this matter however, I wish to add the following. The facts of this matter as so clearly set out in the judgment of Nyarangi JA establish that the appellants' claim to be entitled to the award of a Diploma of the College having undergone the set course and to have attained the prescribed standard of proficiency or to be otherwise fit for that award. In their suit in the superior court the appellants alleged that the board instituted proceedings without any notice to them whereby their right to the award of the Diploma was taken away without their having an opportunity to defend themselves against the allegations which formed the basis of the Board's decision.

The affidavits filed in response to the appellants' claim in the superior court alleged, *inter alia*, that the appellants did not complete the requisite academic year; that they had undermined the college authority thereby violating the basic condition of admission; that they had staged a strike in the college, incited other students to join an unlawful strike; that they had entered classrooms and forced first and second year students to abandon or boycott examinations. It was further deponed that the disciplinary committee and the Board of Governors had discussed the matter, found the appellants guilty of misconduct and ordered their expulsion with the consequence that the appellants lost their right to the results and award of their diplomas. These were very serious allegations and the result of their determination would have the serious consequence of the deprivation to the appellants of their entitlement or right to the award of their diplomas. In my respectful view a student who has studied to the completion of a university course and who claims to be entitled to the award of a degree, diploma, certificate or other award should not suffer the penalty of deprivation of such award without notice of a hearing. That must be so since such a penalty would clearly take away his "prize" and future source of academic standing and livelihood and all that appertains to it. Prior notice of the proposal to impose such a penalty and of proceedings therefore must in my view be given to persons liable to be directly affected so that they are able to:

(i) make representations on their own behalf if they wish;

(ii) appear at the hearing if one is to be held; and

(iii) effectively prepare their own case and answer the allegations which they have to meet.

It is only then that the Academic Board of the respondent college established under section 14(1) of the Act with powers and duties, *inter alia*:

"(d) to decide which persons have attained the prescribed standard of proficiency and are otherwise fit to be granted a degree, diploma, certificate or other award of the University College and to report its decision thereon to the Senate" can fairly decide the matter.

Did the adjudicating authority in this matter exercise its power and duty fairly as the rules of natural justice require" The evidence adduced before the superior court is that the Academic Registrar, the Registrar and a security guard had information which was placed before the Academic Board and on which it acted. It was conceded that the appellants were never notified of the allegations against them nor called upon to answer the allegations. That, in my respectful view, was not dealing with the matter

fairly. I, therefore, hold that the proceedings of the disciplinary bodies of the respondent college in so far as they concern the matters complained of by these appellants were in breach of the rules of natural justice and are consequently null, void and of no effect. It is for the above reasons and those stated by Nyarangi JA with whose judgment and proposed orders I concur, that I am of the view that this appeal must be allowed.

Gachuhi JA. The compliance with the rules of natural justice is emphasised in *Halsbury's Laws of England*, Third Edition Volume II para 122 at page 65 that:

"An order of prohibition may be granted to restrain, and an order of *certiorari* may be granted to bring up and quash the decision of, a person or body exercising judicial or quasi-judicial functions if he or it fails in its duty to act in good faith, and to listen fairly to both sides, and to give fair opportunity to the parties in the controversy adequately to present their case and to correct or contradict any relevant statement prejudicial to their view."

The Board which considered the allegations against the four students acted unilaterally contrary to the rule of natural justice in that the four students were not given a chance to air their views on the allegations made against them in defence prior to the decision that was made had been reached. It is on this concept that I am in whole agreement with the judgments prepared by my Lords Nyarangi and Masime JJ A that this appeal must be allowed and support the consequential orders that Nyarangi JA proposes that this court should make.

Dated and Delivered at Nairobi this 17th Day of December, 1990

J.O.NYARANGI

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

J.R.O. MASIME

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JUDGE OF APPEAL