IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(MAIN REGISTRY)

MISC. CIVIL APPLICATION NO. 1 OF 2018

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORAI AND MANDAMUS AND PROHIBITION

BETWEEN

HILALIUS ANATORY.....1ST APPLICANT

SOSPITER M. MAHUMBI.....2ND APPLICANT

VERSUS

THE HUBERT KAIRUKI MEMORIAL

UNIVERSITY (HKMU).....RESPONDENT

JUDGMENT

23/04--22/05/2018

Khaday, J.

The applicants are seeking for an order of Certiorari to quash the decision of the respondent dated 14/7/2017 that led to the discontinuation of the applicants from the respondent's University College. The duo is also seeking for an order of Prohibition to prohibit the said respondent from deregistering the applicants from the students' register.

The application has been brought to court by way of chamber summons; pursuant to Section 2 (1&3) of the Judicature and Application of Laws Act, Cap 358 [RE: 2002], Section 19 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 [RE: 2002], Rule 8 (1) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 and Section 95 of the Civil Procedure Code, Cap 33 [R.E 2002].

The application is being accompanied by the respective affidavits sworn by the applicants. Their common complaint is that after being accused of committing examination irregularities, they were condemned unheard and finally discontinued from the studies, hence infringement of their basic or fundamental rights.

The respondent opposed the application. In a counter affidavit sworn by the respondent's corporate counsel; one Sima Kairuki, it was stated that the respondent properly handled the issue of the applicants as per the prospectus, policies and regulations of the college. He denied contravening any principle of natural justice in this matter.

With the leave of court, hearing of the application was conducted through written submissions. Mr. Joseph Rutabingwa learned counsel represented the applicants. He submitted that the applicants were enrolled by the respondent in 2014 as students pursuing doctor of medicine studies. That on 14/3/2017 while sitting for a pediatrics examination, the invigilator accused the applicants of committing an examination irregularity. He expounded that having finished answering questions, the 1st applicant's answer sheet dropped on the floor near the 2nd applicant who picked it up and handled the same to the 1st applicant. That however, in the course of handling the said answer sheet, the invigilator saw the act and speedily took measures against the applicants, accusing them of violation of examination rules. The applicants were taken to the office of the Dean of the faculty, questioned and asked to write their respective letters or statements regarding the tale. At the end, the applicants were informed that the University Senate has approved discontinuation of the applicants from studies after satisfaction that the later committed an examination irregularity.

The learned advocate for the applicants submitted that the applicants were discontinued by the Senate without being heard by the Faculty Board. He further submitted that the applicants were dissatisfied hence lodged an appeal before Examination Appeals Committee, challenging the decision of the Senate on grounds of irregularities so alleged and matters which were not considered by the Senate. That the Committee summoned the applicants to explain the grounds of appeal, but the decision of the Senate was upheld.

The learned advocate was of the view that the Senate did not give the applicants a chance to be heard. He maintained that there is no document to confirm that the applicants were heard, and further that the procedures applicable to the respondent do not suggest that an aggrieved party has to submit a letter. He argued that the right to be heard is a fundamental principles of natural justice, which require that that no one shall be condemned unheard. To emphasis his point, he referred the court to the decision of the Court of Appeal in John Morris Mpaki vs NBC & Another, Civil Appeal No. 95 of 2013 (unreported). The learned advocate further argued that the provision of Rule 16.6.8 of the respondent's Prospectus describes various

incidences amounting to examination irregularities, but that the applicants were not formally charged so that they would know which particular irregularity they were required to respond to. He said the letters written by the applicants were a mere explanation of what transpired in the examination room and that the same do not amount to admissions or otherwise.

The respondent's submission was prepared and filed by Mr. Mohamed Tibanyendera learned advocate. In support of the action taken against the applicants, learned counsel made reference to clause 2 (b) (i) of Annexture HKMU 2 to the counter affidavit. This is an agreement document between the applicants and the respondent's college. The counsel argued that the provision so cited requires the applicants upon admission into the university college to adhere to the university charter, rules, policies and procedures. He added that Article 16.6.8 of the same Prospectus clearly provides for punishment for examination irregularities to be summary dismissal from studies.

Regarding right to be heard, learned advocate submitted that the applicants were given freedom of expression in the language of their choice. That what they stated before the committee is the same

as what they stated in their respective letters to the Dean of the Faculty.

Mr. Tibanyendera further submitted that the allegation that the applicants were not heard is misconceived. He added that the overwhelming proof from the applicants' own statement is to the effect that they were directed to write a formal letter to explain what had transpired in the examination room that led them to be taken to the office of the Dean of Faculty. He maintained that the applicants had an opportunity of being heard orally by the Dean and later on, they were asked to put it in writing, formal explanation over the matter. That the applicants in their statements offered an apology to what has transpired in the examination room and that they did promise to conduct no more irregularities. Lastly, the learned advocate prayed the court to dismiss the application with cost for lack of merit.

There was no rejoinder from the applicants, thus the end of the arguments.

Going by the prayers of the applicants and the submissions by the parties, the issue for determination should be whether the

applicants were afforded an opportunity to be heard before the adverse decision was made against their interest.

In other words, and as far as the application for prerogative orders is concerned, it is whether the respondent had committed any procedural irregularity when handling the matter, thus justifying intervention of this court through judicial review.

To have clear picture of the chronology of the events and the corresponding procedure opted by the respondent, let me revisit albeit in brief, undisputed historical background of the matter.

On 14/3/2017, when the applicants were in examination room doing examination, an answering sheet that belonged to the 1st respondent dropped down and the 2nd respondent picked it up with an intention to give it back the 1st applicant. That however, when in the process, the invigilator appeared, intercepted and confiscated the document. That the duo was taken to the office of the Dean of the Faculty. They were then questioned and further instructed to reduce their respective statements into writing. This they did. The faculty Board found them guilty of examination irregularity and were subsequently dismissed from the college. Dissatisfied, the applicants

appealed to the Senate whereby the matter was considered but was again decided against the said applicants.

Undaunted, the applicants appealed to the Examination Appeal Committee. Significantly, the applicants had audience with the Examination Appeal Committee whereat they were afforded an opportunity to have oral explanations of what had transpired on the material day. In so doing, the applicants had also an opportunity to clarify some issues upon being asked or examined.

Going by the decision of the Examination Appeal Committee, it seems that the Committee was not convinced that the applicants were denied right to be heard by the lower tribunals. Consequently, it dismissed the appeal by the applicants and upheld the decision of the Senate. It is this decision of the said Examination Appeal Committee dated 14/7/2017 that is sought to be quashed by this court through the order of Certiorari.

Like when before the Examination Appeal Committee, the applicants have the similar complaint to make before this court. In that, they said that they were not afforded an opportunity to be heard over their case before the Faculty Board and before the appellate

Senate. They also complained that they were not properly presented by the students' representative when their case was being discussed in their absence.

The Examination Appeal Committee considered all this, but found the complaints with no substance. It was held that the matter was properly handled, that the applicants were adequately heard and that according to their Prospectus, physical appearance of the applicants before the Senate was not mandatory. It was further held that the student's representatives were there in attendance during discussions. The students' representatives were named as Mr. John Nelson Obondo and Mr. George Msengi who were HKMUSA's President and Minister for Education respectively.

Apart from procedural matters, the Examination Appeal Committee revisited evidence that formed basis of the relevant decisions made by the Faculty Board and the Senate. It also gave another chance to the applicant to express the basis of their appeal.

With all this in mind, a pertinent question remains as to whether the matter at hand is a fit case for judicial review.

With due respect to the applicants, upon scrutiny of the entire chronological events in respect of the matter at hand, this court is satisfied that the applicants' complaints lack substance. The applicants were duly heard of their defence, only that they failed to convince the respondent that they were sincere and were mere victims of the circumstances.

The applicants appeared before the Dean of Faculty and had their case orally heard before being directed to put it in writing. Indeed, it is apparent that the applicants did not appear in person before the appellate Senate. However, as rightly said by the Examination Appeal Committee, there is no rule or regulation of the respondent college that makes the appearance mandatory. I may add here that in principle, fair hearing is not limited to oral submission or hearing. Instead, correspondences like the one done by the applicants do suffice the purpose. See also N.I.N. Munuo Nguni vs Judge in Charge & Attorney General (1995) TLR 464.

In our case, the applicants were adequately heard by the Examination Appeal Committee. One may appreciate the fact that apart from its appellate duties, the Committee also did what might

have been done by the Senate. It afforded the applicants an oral hearing.

The court further finds and held that the applicants were adequately represented by their colleagues as stated above. In that, two leaders from the students' government were there to safeguard the interests of the applicants. The complaint is therefore found lacking basis.

In the course of his submission in support of the application, Mr. Rutabingwa said that the applicants were not provided with a clear charge to be responded to by the applicants. The court finds this equally wrong. The letters or statements which the applicants availed to the respondent indicate that the applicants knew the nature of the offence to which they stood charged with. The title of the letter by the 1st applicant reads:- DOUBT OF CHEATING PEDIATRICS EXAMINATION, and that of the 2nd applicant says:-TO BE FOUND WITH AN ANSWER SHEET WHICH IS NOT MINE IN THE EXAMINATION.

and the examiner saw him trying to give it to me...

*...**I apologize for being dishonest** since **I had to call permission** pick the exam myself..."* (Bolding supplied)

The 2nd applicant's letter has this to say:-

*"... On 14th March...**I was sent out of the examination room because of being found having an answer sheet of my fellow** student which I picked it from down in an attempt to return it we were caught by the examiner...*

***This is the letter convey my apology to you**... for the incidence that happened... I assure you it won't happen again"* (Bolding supplied)

The above correspondences connote that the applicants knew the charge they were facing and that they knew their acts were contrary to the university rules/regulations.

The essence of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large as held in Republic vs Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of the President & 2 others [2006] eKLR. Orders for Certiorari and Mandamus can only be issued where it has been shown that the authority in question has acted without, or in excess of its jurisdiction, or where such authority is shown to have acted with bias, or where there is an error on the face of the record, or where on the totality of the fact and circumstances discloses, the authority in question did not act legally or judicially. See also George Lugga Maliyamkono vs Principal Secretary of the Ministry of Science, Technology and High Education & 2 Others (2000) TLR 44.

In our case at hand, the court finds no fault that has been committed by the respondent upon which to exercise its judicial review powers.

The application for judicial review therefore fails for the reasons stated above.

I however make no order as to costs. Each party to bear its own costs.

It is so order.

P. B. Kahaday

Judge

22/5/2018

Delivered at Dar Es Salaam this.....Day of May 2018.

Deputy Registrar

High Court, Main Registry