

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[CIVIL DIVISION]**

**MISCELLANEOUS CAUSE NO. 184 OF 2021**

**DR. JAMES OCITA ===== APPLICANT**

**VERSUS**

**MAKERERE UNIVERSITY=====RESPONDENT**

**BEFORE: HON. JUSTICE EMMANUEL BAGUMA**

**RULING**

**Background.**

The Respondent's Appointment Board charged the Applicant with two counts that is CT 1, willful insubordination or disobedience and refusal to take lawful orders, CT 11, slander, use of abusive or insulting language or behavior and after a disciplinary hearing dismissed him. The Applicant appealed against the decision to the Staff Appeals Tribunal which upheld the conviction but varied the sentence. The Applicant being dissatisfied with the decision of the Tribunal filed this application challenging the decision.

**The application.**

This Application is brought under Article 42 of the 1995 Constitution (as amended), Section 33 of the Judicature Act Cap 13; Section 98 of the Civil Procedure Act Cap 71, Rules 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009, Sections 56 and 57 of the Universities and Other Tertiary Institutions Act, 2006 (as amended) seeking several declarations among which include; -

1. A declaration that the Applicant's trial before the Respondent's Appointment Board was tainted with procedural irregularities and violated his right to a fair trial.

2. A declaration that the Applicant's dismissal from employment was an arbitrary, utterly irrational and unreasonable decision.
3. An order that the Respondent's Staff Appeals Tribunal erred in law and fact when it upheld the decision of the Appointments Board that was reached at without minutes, record of proceedings and the required rulings.
4. A declaration that the Respondent's Staff Appeals Tribunal erred in a law when it ruled that the Applicant can be reinstated or re-employed after 6 months upon undergoing psychological rehabilitation.
5. An order that Costs of this Application be provided for.

The application is supported by the affidavit of **Dr. James Ocita** the applicant whose details are on record but briefly states that; -

1. I am a lecturer in the department of literature at the Respondent's school of languages, literature and communication in the college of Humanities and Social Sciences.
2. On 13<sup>th</sup> November 2018, I was served with a charge sheet with two counts that is willful insubordination or disobedience and refusal to take lawful orders contrary the Respondent's HR manual together with summons to file a defence and appear before the Respondent's Appointment Board by 15<sup>th</sup> November 2018.
3. Given the unrealistic timelines within which to file a defence, I reached an agreement with the Respondent's Human Resource Directorate which allowed me to file my defence at 10:00am on 29<sup>th</sup> November 2018 the morning of the hearing.
4. The committee rejected my defence and proceeded without reading my defence.
5. At the hearing, the committee was not properly constituted, it lacked quorum and the members were biased.
6. In the defence I raised several preliminary objections highlighting procedural irregularities, infringement of my right to a fair trial which were all ignored and never resolved them.
7. The committee heard my case on 19<sup>th</sup> and 21<sup>st</sup> November 2018 and issued a ruling on 29<sup>th</sup> November 2018 dismissing me from employment.
8. The committee refused to give me a written ruling.

9. The committee failed in its procedure as it acted without first carrying out investigations and did not issue me with a written ruling as required in the HR manual.
10. The charge sheet was poorly drafted, too scanty and it did not contain evidence against me and the documentary evidence used at trial was not availed to me.
11. The committee acted as the complainant, prosecutor and adjudicator thereby violating the principles of natural justice.
12. The emails complained of were never availed to me and their details.
13. When I lodged the appeal with the staff tribunal, the committee refused to forward the proceedings and ruling and the tribunal decided the appeal without proceedings.
14. The ruling of the tribunal was signed by only 5 members instead of 7 members without an explanation as to why the rest of the members didn't sign.
15. The tribunal erroneously issued an order that I undergo psychological rehabilitation through counselling yet this was not an issue before the tribunal.
16. The tribunal ordered for re-employment effective 15<sup>th</sup> July 2020 instead of 29<sup>th</sup> November 2018 when the interim order was issued which is unfair as it assumes that I was no longer an employee.
17. The Respondent's malicious prosecution have caused me great suffering, stress, damage to reputation and liabilities since I had a bank loan with Housing Finance Bank which facility has attracted a lot of interest hence justifying the demand for general damages.

In reply, the Respondent in an affidavit sworn by **Mr. Yusuf Kiranda** the University Secretary and the accounting officer of the Respondent opposed the application and briefly stated that; -

1. The applicant's trial before the Appointment Board was based on a presumption of innocence. The applicant took plea where he denied the charges and witnesses were produced to prove the charges against him.
2. The applicant assumed that he had power to choose his own disciplinary panel and decide on who should testify against him which is wrong.
3. The applicant's preliminary objections were heard and determined by the board.
4. Since the University Appointment Board is constituted of 9 members, its quorum for business is constituted of a simple majority.

5. The applicant's trial before the appointment board observed the principles of natural justice and fair hearing. He was served with an elaborate charge sheet and summons to file a defence, given ample time to file a defence which he filed through his lawyers and all through the trial he was legally represented, prosecution disclosed all the evidence to use against him and his lawyer cross examined the witnesses. The applicant gave his evidence and he was cross examined. The Applicant was also given time to produce witnesses and timelines within which to file written submissions.
6. The Appointments Board reached a decision to dismiss the applicant from the University basing on the prosecution evidence and the said decision was communicated to the Applicant.
7. The applicant appealed against the decision to the staff appeals tribunal which also upraised the evidence on appeal and upheld the decision of the Appointment Board stating that the Board accorded him a fair trial and the emails authored by the Applicant against Prof. Mahmood Mamdhan were slanderous and lowering the reputation of Professor in the academia and general public.
8. The vice chancellor directed the Applicant to desist from publishing the slanderous emails, the Applicant disregarded the directive and continued authoring and circulating articles and emails bearing these false accusations and at time the applicant failed to adduce evidence to substantiate his false allegations yet he admitted authoring the offensive emails.
9. The Respondent's Staff appeals tribunal in its discretion found that the sentence imposed by the Appointment Board was excessive and accordingly set it aside. It ordered the applicant to be reinstated into full service subject to fulfilling certain conditions.
10. Since the staff appeals tribunal is constituted of 8 members, its quorum for business is a simple majority.

11. This application is not amenable for judicial review since it seeks to enforce prayer which are not in this court's ambit while exercising its prerogative powers.

In rejoinder, the Applicant reiterated his averments in the affidavit in support.

### **Representation.**

Mr. Okong Donman Innocent represented the Applicant while Ms Esther Kabinga represented the Respondent.

At the hearing of this application, both counsel agreed to file written submissions. No counsel intimated that they will raise preliminary objections. I have considered the objections raised by the applicant's counsel and the same do not go to the root of this application, for the interest of justice, I will proceed with the merits of the case.

### **Submissions by Counsel for the Applicant.**

The applicant's counsel raised two issues for court's determination in his written submissions.

- 1. Whether the application is a proper case for a judicial review.*
- 2. Whether the Applicant is entitled to any remedies.*

### **Issue No. 1**

#### ***Whether the application is a proper case for a judicial review.***

Counsel submitted that the disciplinary action was vindictively initiated by officials who did not have direct supervisory responsibility over the Applicant. The Respondent erred in failing to give the applicant prior notice in writing through his supervisor of the grounds of the intended disciplinary action and according him an opportunity to respond to the charges.

Counsel submitted that the Applicant raised a point of law but the same was ignored by both the Board and the Tribunal. That the disciplinary action against him violated **section 62 (5) of the Employment Act** which states that;-

***“Except in exceptional circumstances an employer who fails to impose disciplinary penalty within fifteen days from the time he or she becomes aware of the occurrence giving rise to disciplinary action, shall be deemed to have waived the right to do so”.***

Counsel submitted that the Respondent’s Board waited until the very end of its term to conduct the sham and retaliatory disciplinary action that the Respondent had legally waived the right to carry out the illegal and unfair decision.

Counsel submitted that the disciplinary committee violated section 59 and 50 of the Employment act and Article 28, 42, 44 and 29 of the 1995 Constitution.

Counsel submitted that the decision of the Respondent was irrational. He referred to the case of **Associated Provincial Picture Houses Ltd Vs Wednesbury [1947] ALL ER 680** where court **held** that; -

***“an unreasonable decision is one that a reasonable body could not have come to”.***

Counsel submitted that the Appointment Board acted irrationally when it dismissed the applicant and made the dismissal effective on the same date, 29<sup>th</sup> November 2018 contrary to section F-R (10) of the Public service standing orders.

Counsel submitted that the first communication was sent through a general email circulated on the Respondent’s academic and general staff mailing lists on 22<sup>nd</sup> December 2018. The second notification was via the dismissal letter dated 7<sup>th</sup> January 2019 but served to the Appellant on 17<sup>th</sup> January 2019, which stated that the dismissal takes effect from 29<sup>th</sup> November 2018.

Counsel referred to article 42 of the Constitution of Uganda which provides that; -

***“Any person appearing before any administrative official or body has a right to be treated justly and fairly”.***

The right to a fair hearing under article 28 (1) and article 44 of the constitution is none derogable.

Counsel submitted that the disciplinary action against the applicant was marred by procedural irregularities and blatant disregard for due process and the law. The Appointments Board lacked gouram as it had only 4 members. The Board subjected the applicant to unfair trial when it refused to dispose of the preliminary objections and points of law before embarking on the main trial which resulted into unfair trial contrary to Article 42 of the 1995 constitution. There was failure to issue warnings,

did not conduct pre-trial investigations, failed to make the applicant fully aware of the charges and the evidence against him which all worked against the applicant having a fair trial.

Counsel submitted that the Respondent's Board abused due process when it prosecuted the applicant on mere allegations since no witnesses were presented to testify against the applicant at the hearing.

## **Issue 2**

### **Whether the applicant is entitled to the remedies?**

Counsel for the applicant prayed that the decision of the Appointments Board and staff appeals tribunal be quashed and the applicant re-instated on his employment.

## **Submissions by Counsel for the Respondent.**

### **Issue 1.**

#### **Whether the Application is a proper case for judicial review.**

Counsel for the Respondent submitted that illegality arises when the decision – making authority commits an error of law in the process of taking the decision or making the act which is the subject of the complaint. In essence, the decision making authority must have acted without jurisdiction or contrary to the provisions of the law or its principles. Counsel referred to the case of **Ignatius Loyola Malungu Vs Inspector General of Government HCMC No. 059 of 2016** where court observed that;

*“illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of the law or its principles are instances of illegality”.*

Counsel referred to section 59 of the University and other tertiary institutions Act (as amended ) 2001 which establishes the Appointment Board with a composition of 9 members and the same shall be responsible for appointment, promotion, removal from service and discipline of all officers and staff of the academic and administrative service of the University, as maybe determined by the University Council.

Counsel submitted that section 5.9 of the Makerere University Human Resource Manual 2009 (as amended) provides for the four forms of disciplinary measures namely; warning, suspension, termination and dismissal depending on the gravity of the offence. And that the appointing authority shall exercise its discretion to impose disciplinary measures upon an employee for misconduct as it may consider appropriate.

Counsel submitted that the charges against the applicant were lawful and the procedure adopted is legal.

Counsel for the Respondent submitted that proper procedures and practices were strictly adhered to while conducting the disciplinary hearing of the applicant.

Counsel referred to the case of **Nazarali Punjwani Vs Kampala District Land Board (supra)**, where Court observed that;-

*“procedural impropriety is when the rules and principles of natural justice and or failure to act with procedural fairness, are not observed by the decision-maker to the prejudice of the one affected by the decision”.*

Counsel submitted that the right to a fair hearing is constitutional and enshrined in Article 28(1) of the Constitution (supra). The right to a fair and just treatment by the administrative body is also enshrined under Article 42 of the Constitution. The rules of natural justice enjoin a body that intends to make a decision that affects another to ensure that the other party ought not to be condemned unheard.

Counsel stated that the applicant brought this application in a bid to control the conduct of the business of the Respondent’s organs. The allegations of delay to hear the applicant’s appeal were not occasioned by the Respondent’s organs as the factors causing the delays were factors beyond the Respondent’s control as highlighted in paragraph 29 of the affidavit in reply.

Counsel referred to the case of **Grace Matovu VS UMEME LTD. LDC NO. 004/2014**, which was cited with approval by the Industrial Court in **Labour Dispute Claim No. 018 Of 2016 Ogwiko Deogratiuous Vs Britania Allied Industries**, and **held** that; -

*“ a fair hearing simply put means that an employee is informed of the infractions he allegedly committed, he or she is given time to prepare for a response, he or*



*she is given time to physically appear before an impartial tribunal to present his or her response if any, he or she is given time to adduce any other evidence, if any and the Tribunal finally makes a decision. The Disciplinary Committee need not conform strictly to matters of procedure as if it were a Court of Law”*

Counsel referred to the case of **Nazarali Punjwani Vs Kampala District Land Board (supra)**, where Court held at page 18 that; -

*“irrationality is when the decision made is so outrageous in its defiance of logic or acceptable moral standards that no person could have arrived at that decision”.*

Counsel submitted that the Applicant admitted to authoring numerous emails using the Respondent’s intra-net and other media that imputed crime to Prof. Mahmood Mamdani, a Director in one of the Academic Units in the Respondent. At the hearings of his matter, both in the Appointments Board and the Staff Tribunal, the Applicant failed to justify the content of the emails by proving the truthfulness of his allegations.

That the Appointments Board and the Staff Tribunal later found that the effect of the words would naturally tend to lower the internationally acclaimed Professor’s reputation and tarnish his name in academia as well as the general public. When the Respondent’s Chief Executive Officer, the Vice-Chancellor directed the Applicant to desist from publishing the slanderous emails, the Applicant disregarded the directive and continued authoring and circulating articles and emails bearing further false accusations. Other emails are referred to in the Tribunal’s Ruling and sentencing orders.

That at all material times, the Applicant did not and or failed to give any evidence to substantiate his false allegations even when Complaints were raised against him for his conduct.

Counsel further submitted that the Staff Appeals Tribunal rightly found that the Applicant continued, recklessly and without a duty of care, to colleagues and the Respondent, to engage and promote slander even after the Respondent's Vice-Chancellor issued several warnings and a restraining order to desist from the same.

## **Issue No. 2**

### **Whether the applicant is entitled to the relief sought?**

Counsel for the Respondent submitted that the application is not amenable by judicial review because it seeks to enforce prayers that are not in this court's ambit of the exercise of prerogative supervisory powers over the decision-making process of the Respondent.

### **Analysis of court.**

## **Issue No. 1**

### **Whether the application is a proper case for judicial review?**

Judicial Review is concerned **with the decision making process to assess the manner in which the decision was made.** See the case of **Chief Constable of North Wales Police - v- Evans [1982] 3 ALL E.R. 141** where court stated that: -

**"It is trite law that judicial review is concerned not with the decision in issue per se, but with the decision making process. Essentially, judicial review involves the assessment of the manner in which the decision is made!, it is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality."**

Also in the case of **Kenya Revenue Authority vs Menginya Salim Murgani Civil Appeal No. 108 of 2009.** Court held that;

*“There is ample authority that the decision-making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed”.*

In this instant case, basing on paragraph 8 of the affidavit in reply, the tribunal was fully constituted with quorum of simple majority.

The applicant was served with a charge sheet and summons to file a defence. He was allowed ample time to file his defence which he did. All through the trial he was represented by an advocate of his choice and allowed to cross examine and adduce evidence in defence. At the end of the trial, a decision was reached and the same was communicated to him. Being dissatisfied with the decision of the Appointment Board he appealed to the Staff Appeals Tribunal.

The allegation that the charge sheet was not accompanied by evidence and documents to be used in evidence also does not hold as the applicant pleaded not guilty to the charges and evidence was lead both documentary and oral and the applicant was given an opportunity to cross examine on the same which he did.

I find that the decisions of both the Appointments Board and the Staff Appeals Tribunal were legal, regular and rational and there is no ground for judicial review in this matter.

Issue No. 1 is answered in the negative.

## **Issue No. 2**

### **Whether the applicant is entitled to the remedies sought?**

Having found that there are no grounds for judicial review, the applicant is not entitled to the remedies sought.

**Conclusion.**

In the final result, court makes the following orders; -

1. This application is hereby dismissed
2. The decision of the staff appeals tribunal is upheld.
3. Basing on the nature and circumstances of this judicial review, court makes no order as to costs.

Dated, signed, sealed and delivered by email at Kampala this **15<sup>th</sup>** day of **February 2023**

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**Emmanuel Baguma**

**Judge.**