THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 34 OF 2020

(Arising from Makerere University Business School Staff Tribunal Appeal No. 1of 2019)

(Arising from Appointments Board of Makerere University Disciplinary Action No. 11 of 2018)

DR. ARTHUR AHIMBISIBWE :: APPLICANT

VERSUS

THE APPOINTMENTS BOARD OF

MAKERERE UNIVERSITY BUSSINESS SCHOOL :::::::::::::::::::: RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application under Article 50 and 40 of the Constitution of Uganda, section 33 and 36 of the Judicature Act, Rule 3(1), 5, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 and Regulation 31 (1) of the MUBS (Staff Tribunal) (Procedure) Regulations for orders that;

1. The Respondent's decision to dismiss the Applicant's appeal was illegal, unjust, discriminatory and against the principles of natural justice
2. An order of certiorari quashing the decision of the Appointments Board of Makerere University Business School.

3. An order prohibiting the Respondent, its agents/ services and/or officials from imposing illegal and unreasonable decisions onto the applicant in future.
4. An order directing the Respondent to pay the Applicant all the accumulated salary and allowances due to him effective from the date of his unlawful dismissal, an order that the Respondent pays the Applicant compensation for the said actions, embarrassment, stigma, anxiety and inconvenience occasioned.
5. Costs of the application and any other consequential relief as court may deem necessary.

The applicant is a former employee of the respondent and alleges that the decision that led to his dismissal was arrived at unfairly following an impugned hearing by the Respondent's subcommittee on allegations of staff misconduct and sexual harassment. Being dissatisfied with the findings of the sub-committee, the applicant filed an appeal in the Makerere University Business School Staff Tribunal. Pursuant to Regulations 31 (1) of the MUBS (Staff Tribunal) (Procedure) Regulations the application was heard and dismissed with no order as to costs. The Applicant being dissatisfied with the findings of the Staff Tribunal preferred this Application.

The Respondent opposed this Application by filing an affidavit in reply sworn by Franscis Yosa-School Secretary/Secretary to Council of Makerere University Business School. It was stated that the Respondent's Staff Appeals Tribunal lawfully upheld the Applicant's dismissal from employment having found that he was accorded a fair disciplinary hearing. That on 7th day of November, 2017,

the applicant was invited to appear before the sub-committee of Makerere University Business School Appointments Board to answer allegations made against him and the allegations of misconduct were duly communicated to him. Considering the nature of allegations level against the applicant (sexual harassment), the Sub Committee of the Appointments board was duly constituted, comprising of several external (non-staff) members to ensure impartiality. The Appointment's Board heard the applicant and made a decision to have the applicant dismissed. The applicant dissatisfied with the decision appealed to the Staff Appeals Tribunal which heard confirmed the respondent's decision of dismissing the applicant. The Respondent therefore prayed that this Application be dismissed with costs against the Applicant.

The Applicant was represented by *Mr. Muhangi George* whereas the Respondent was represented by *Mr. Lutalo Andreas*.

The applicant raised several grounds for determination by this court which are that;

i) Whether the Applicant was granted a fair hearing.

ii) *What remedies are available to the parties.*

The parties were directed to file written submissions; the parties accordingly filed the same. This court has considered the said submissions.

The respondent's counsel raised a preliminary objection on failure to serve summons within a stipulated time.

I have not found any merit in the said preliminary objection since it is baseless and a wastage of court's valuable time.

Whether the applicant was granted a fair hearing?

The applicant's counsel submitted that the respondent's Staff Appeals Tribunal erred in law and fact when it held that failure to afford the applicant the opportunity for cross-examination is not a failure to follow rules of natural justice. According to counsel this in itself amounted to procedural impropriety and an abuse of the principle of fair hearing.

The applicant's counsel contended that the sub-committee failed to act fairly in the process of making a decision against the applicant, as he was never given the opportunity to exhaustively enjoy his right to a fair hearing as he was never afforded the opportunity to cross examine the respective witnesses that appeared before an already biased committee.

The applicant's counsel further submitted that he was not afforded a fair hearing since some of the members that were involved in hearing proceedings right from the institution of the committee had conflict of interest and were thus biased and this led to denial of a fair hearing. The members of the committee who believed that they had conflict of interest recused themselves and opted not to participate in the proceedings though they remained physically present in the room where the proceedings went on. Therefore, the applicant's counsel argued that this in itself was sufficient to show that bias and conflict of interest kept hovering over the entire hearing proceedings.

The respondent's counsel submitted that the sub-committee heard both oral and written testimonies from a number of witnesses including the applicant. There is

nothing in the respondent's decision that would render the decision substantively unfair for this Honorable court to interfere.

The respondent's counsel argued that a right to fair hearing should not be over stretched by aggrieved parties to the detriment of the decision makers. It is on record that the applicant interfaced with all witnesses during investigation and had a chance to cross examine but decided not to.

The respondent's counsel submitted that there was no bias actual or constructive as alleged. The alleged constructive bias is mere speculation by the appellant as there is no evidence to prove any mentioned members (Professor Baryamureeba and Ms Shifra Lukwago) had an ill motive against the appellant. The committee was legally constituted and any members with conflict of interest duly recused themselves. Ms Shifra Lukwago recused herself from the hearing the allegations against the applicant as she declared a conflict of interest and only remained a member of the subcommittee for the hearing of allegations against other staff members. She left the room and did not take part in any deliberations involving the applicant. There is no evidence whatsoever that any said members of the subcommittee remained in the 'room' during deliberations.

Analysis

The applicant is basically challenging the decision of the Staff Appeals Tribunal for mainly two reasons premised on fair hearing ie. Failure to cross examine the witnesses and bias.

The principles of fairness and natural justice require that the procedure adopted by the administrative body must be just and fair. The principle of *audi alteram*

partem simply implies that a person is given an opportunity to defend himself. This principle is a sine qua non of every civilized society. This is rule is derived from the expression *qui aliquid statuerit, parte inaudita altera aeuquum licet dixerit, haud aequum facerit* (he who shall decide anything without the other side having been heard although he may have said what is right will not have done what is right).

Administrative agencies in Uganda are not bound by the technical rules of procedure of law courts: this accentuates the need to follow the minimum procedure of fair hearing. The courts have allowed minimum standards applicable to every administrative bodies in a pragmatically flexible manner. The courts tend to look at the effect of violation of fair hearing from the standpoint of prejudice, in other words the court or tribunal has to see whether in totality of circumstances the person has suffered a prejudice. The sole purpose of the rule of fair hearing is to avoid failure of justice. It is this purpose which should be a guide in applying the rule of fair hearing in varying situations that may arise.

In the case of ***Kenya Revenue Authority v Menginya Salim Murgani Court of Appeal Civil Appeal No. 108 of 2009***. The Court of Appeal noted as follows;

> "*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*".

Cross-examination is a most powerful weapon to elicit and establish the truth and it is an ingredient fair hearing. However, courts do not insist on cross-examination in administrative adjudication unless the circumstances are such that in the absence of it a person cannot put up an effective defence.

However, where a *'judicialised'* procedure has been adopted and witnesses are called to give evidence, the courts will be very ready in absence of strong reasons to the contrary to find unfairness where the decision-maker declines to allow the evidence of those witnesses to be tested in cross–examination, and indeed it may unfair for the decision-maker to decline cross-examination. ***R v Criminal Injuries Compensation Board Ex. p Cobb [1995] C.O.D 126***

This court would not agree with the applicant's contention that there was breach of fair hearing because he was not able to cross examine the witnesses. The applicant has not shown anywhere that he sought to cross examine the witnesses and was denied that right. It is not in every matter as noted earlier that parties are allowed to cross-examine in administrative processes and adjudication. Fairness must be decided on the exigencies of the circumstances or circumstances of each case. This court would not be presumptuous to impose its own methods on administrative bodies.

The main consideration for determining whether the failure to cross-examine violated the rules of fairness, can only arise where there is a refusal to permit cross-examination especially if a witness has testified orally and a party requests leave to confront and cross-examine him or if the evidence is fundamental or highly contested. ***Loutfi v General Medical Council [2010] EWHC 1762(Admin): Knowsley [2006] EWHC 26: R. (on the application of Sim) v Parole Board [EWCA] Civ 1845 [2004]Q.B 1288***

The applicant was duly given and accorded every opportunity to exercise his right to a fair hearing and the allegation of denial of the right to cross-examine

the witnesses is an afterthought and it was never sought at the hearing as he wants court to find.

Secondly, the applicant is also challenging the decision for being tainted with bias since some of the members who recused themselves allegedly remained in the room after recusing themselves.

Procedural fairness requires that the decision maker should not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the arguments advanced by the parties. The principle of bias is expressed in the maxim *nemo judex in sua causa* (no one should be a judge in his own cause) which means that no one shall adjudicate in his own cause or no one should adjudicate in a matter in which he has a conflicting interest.

Bias in decision making imputes that a decision maker is influenced by private interests or personal predilections and he will not follow, or may be tempted not to follow, the required standards and considerations which ought to guide the decision. An accurate decision is more likely to be achieved by a decision-maker who is in fact impartial or disinterested in the outcome of the decision and who puts aside any personal prejudices. Secondly, the requirement for public confidence in the decision making process. Even though the decision-maker may in fact be scrupulously impartial, the appearance of bias can itself call into question the legitimacy of the courts and other decision-making bodies. In the case of ***Belilos v Switzerland (1998) 10 E.H.R.R 466*** at [67] European Court of Human Rights noted that the rule against bias is intended for "*the confidence which must be inspired by the courts in a democratic society*".

A decision may always be invalidated if actual bias on the part of the decision-maker is proved. However, the courts will often not be concerned to investigate evidence of actual bias. It is no desirable that all adjudicators, should be above suspicion, but it would not be desirable to inquire into the mental state of the decision-maker. The courts will look at the circumstances of the particular case to see if there is an appearance of bias. Therefore, what the courts see is whether there is reasonable ground for believing that the decision-maker was likely to have been biased.

The applicant in this case has alleged bias premised on the he preconceived perception of bias allegedly arising out of the some members of the committee who recused themselves remaining in the room after recusal. This fact has been denied categorically by the respondent and there is no evidence of the two members (Prof Baryamureba and Ms Shiffra Lukwago) ever remaining in the room after recusal. Even if the two members had remained in the room it would not have been a justifiable reason to infer bias on the entire committee members who took a decision since they are presumed to have been independent and impartial unless there was any evidence to the contrary.

The applicant as a person who was likely to be affected by the decision or the alleged bias should have raised his concerns about the discomfort of the two members remaining in the room after their recusal instead of waiting for the proceedings to end and then allege bias. There is no evidence that the applicant ever raised the issue before the committee and trying to raise it at a later stage if at all it was true becomes an afterthought.

Since the two committee members recused themselves from the proceedings involving the applicant which was adequate and they cannot be blamed on baseless allegations that they influenced the rest of the committee.

The applicant was granted a fair hearing and the Staff Appeals Tribunal decision upholding the decision of Makerere University Business School Appointments Board shall not be disturbed.

This application is dismissed with costs.

I so Order.

SSEKAANA MUSA
JUDGE
21st June 2021