IN THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISC. CAUSE NO. 169 OF 2019

KISAKYAMUKAMA RICHARD……APPLICANT

VERSUS

MAKERERE UNIVERSITY……. RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The application is brought for judicial review under rules 3 (1) (a) and 3 (2), 6 (1), (2) of the (judicial review) rules SI no.11 of 2009 and the following reliefs;

1. A declaration that the respondent's decision to disqualify the applicant from the government admission for mature age for bachelors of medicine and surgery by the respondent was arbitrary, irrational and illegal.

2. An order of *Certiorari* quashing the said decision.

3. An order of prohibition direction the respondent to desist from exercising powers in an unfair, unjust and or irrational manner and to prohibit the respondent from acting upon to disqualify the applicant from government admission for mature age for bachelors of medicine and surgery.

4. An order for permanent injunction restraining the respondent from enforcing the decision to disqualify the applicant from government admission for mature age foe bachelors of medicine and surgery.

5. An order of mandamus compelling the respondent the respondent to reinstate back the applicant on the government sponsorship admission list

for bachelor of medicine and surgery and also be admitted in academic year 2019.

6. General damages for illegal, unlawful decision

7. Any other reliefs that court shall deem fit.

The application was supported by an affidavit of Kisakyamukama Richard, the applicant whose grounds were briefly that,

1. That the applicant is a male adult Ugandan citizen of sound mind who applied for mature age entry scheme examinations of Makerere university which were held on Saturday 15th December 2018.

2. That the applicant qualified to sit the said mature age entry examinations. And the results were released on the 29th April 2019, in which the applicant was shortlisted with a final mark of 72% emerging No.2 on government sponsorship admission list for Bachelor of Medicine and Surgery.

3. That on 29th April 2019, a new government sponsorship admission list was released where the applicant's name was missing, and the government admission list currently on the notice board bears 3 (three) students yet 4 (four) slots were advertised and the applicant having got 72%, he would stand admitted than the last 2 (two) who got 71% and 70%.

4. That on the 30th of April 2019, I appealed to the Academic Registrar Makerere University for the revision of the said list or else gets information relating to the above incident and explanation why my name was removed or disqualified from the admission list.

5. That the applicant was treated unfairly and unconstitutionally when i was disqualified from the government admission list for mature age for bachelors of medicine and surgery without being given a fair hearing that is, being clearly informed of the charges against him, so as to adequately prepare his defense.

6. The applicant was ordered to appear before the committee and when he appeared before the disciplinary hearing, he was not given adequate notice of the date of appearing before the hearing to enable me prepare my defense neither was, I duly informed of the charges and allegations against me.

7. That the applicant was only informed by the respondent that I was involved in examination malpractice and that is why name was missing on the new government sponsorship list.

8. That the respondent did not present facts or particulars constituting the alleged malpractices against me to or in the presence of the committee and myself so the decision reached by the respondent was irrational, illegal and unfair and not based on any fair, just, efficient and lawful investigations process.

9. That the evidence produced by the respondent is merely hearsay evidence is not founded on any basis and the respondent could have arrived at the decision that the applicant was involved in examination malpractice whereas the applicant has never been involved in such malpractice.

10. That the applicant was not accorded a fair hearing at all, as he was never informed of the particulars or details of the charges me and the resultant decision was arbitrary and harsh, irrational and unlawful.

11. That there is no lawful reason whatsoever as to why the applicant's name was omitted from the government admission list for mature age for bachelors of medicine and surgery and he was never accorded any fair or just treatment before, during and after making the decision.

12. That 1st semester for newly admitted Bachelors of Medicine and Surgery degree programs is scheduled to begin 3rd August 2019 and still have not gotten any explanation to why he was disqualified from government sponsorship admission for mature age for bachelors of medicine and surgery.

In reply the respondent filed an affidavit by Bataamye Herbert Kyobe c/o Directorate of legal services in opposing the application, he states;

1) That after the student applicants sat for the mature age entry exams, and results released, the University received information from a whistleblower sitting that the number of applicants had cheated in the exams by accessing the exams through the staff the printery that the respondents used to print the exam. The exams were printed the night before the date of sitting the exam.

2) That the informant implicated the applicant as the ring leader in the orchestration and execution of this exam fraud. The chair of the university admissions committee of the respondent was called and notified about of this development.

3) That the chair of the meeting immediately convened a meeting of the committee which directed those preliminary investigations commence in this matter, that in the interim the name of the applicant be removed from the mature age government sponsorship list and the scripts of the affected course be re-marked.

4) That when the scripts were marked, it was found that the best candidate among the students had scored a 70% but had been given a mark of 35% thus failing to qualify for admission.

5) That these preliminary findings corroborated the complaints of the information received from the whistleblower and the committee immediately launched an investigation into the matter.

6) In further reply to paragraph 14, the respondent is bound by law to protect the informant for purposes of safeguarding the evidence until investigations are completed.

7) The committee invited the applicant who appeared and was informed of the developments, the interim decision to withhold his results and remove

him from the mature age sponsorship list for academic year 2019/2020 based on the preliminary information received pending a full investigation into the matter.

8) The respondent states that in a bid to safe guard the applicant's right to education, he was provisionally admitted by the respondent pending investigations and the decision of the respondent in the matter is copied as admission and notice of ongoing investigations marked as annexure 'A' and 'B' respectively.

9) The respondent further states that the development above does not absolve the applicant of any wrong doing as he is still under investigations by the respondent for examination fraud.

The applicant was represented by *Counsel Wycliffe Birungi* and the respondent was represented by *Counsel Ether Kabinga* and *Counsel Hudson Musoke*.

Written submissions for both parties have been filed by the respective counsel and have been considered by this court in arriving at the decision.

The issues for determination are;

1. *Whether the Respondent acted in breach of the principles of natural justice in not according the applicant a hearing to answer any accusations made against him?*

2. *Whether in coming to the decision to disqualify the applicant, the respondent acted irrationally, illegality and or with bias?*

3. *Whether the applicant is entitled to the remedies sought?*

Determination

Whether the Respondent acted in breach of the principles of natural justice in not according the applicant a hearing to answer any accusations made against him?

Counsel for the applicant submitted that the applicant was ordered to appear before a committee and when he appeared, he was not given time to prepare for his presentation since he was not given time to prepare his defense as he was served with the notice to appear before the committee at 2:30 pm when the committee was to sit in just three days and neither was he duly informed of the charges and allegations against him.

He was only informed that he was involved in examination malpractice and that is why his name was missing, that the respondent did not present facts/ or practices that constituting the alleged malpractices against him in the committee and himself.

The applicant's counsel submitted that no evidence of such people that led to the commission of the examination fraud were produced during the hearing and the name of the whistleblower was never disclosed. The applicant was never notified of the interim decision to remove his name from the Mature age entry Government Sponsorship List and therefore.

It was the submission of counsel that the respondent acted in breach of the principles of natural justice in not according the applicant a hearing to answer any accusations made against him prior to being disqualified.

In the submissions for counsel for the respondent submitted that the respondent followed the principles of natural justice and its policies and regulations in handling the applicant's matter. He continues to submit that the admissions committee of the senate took a decision to release the applicant's mature age certificate to enable him commence studies for the course of Bachelors of Medicine and Surgery such as to secure his constitutional right to education incase to education in case the investigations clear him to continue with his course.

Analysis

The applicant's contention is that he was not given a hearing when an interim decision to remove his name from the Mature Age Government Sponsorship list was made.

The requirement of fair hearing or right to be heard under natural justice will not apply in all situations of perceived or actual detriment. There are clearly some

situations where the interest affected will be too insignificant, or to speculative, or too remote to qualify for a fair hearing. Whether this is so will depend on all the circumstances surrounding the particular case. Special circumstances may create an exception which vitiates the inference of a duty to act fairly. The applicant was under investigation by the University for examination malpractice, this would not require a hearing until the investigations in such matters had been conclusively been dealt with.

The applicant prematurely made an application before any final decision had been made against him since he acknowledges it was an interim decision as investigations were being done.

Whether fairness or the right to be heard is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue of whether a person can be heard may also be one for the discretion of the decision-maker. The test is whether no reasonable body would have thought it proper to dispense with a fair hearing. The court is final arbiter of what is fair. However, in limited circumstances the court may give great weight to the decision-makers view of what is fair. See ***R v Panel on Takeovers and Mergers Ex p. Guinness [1990] QB 146. R v Monopolies and Mergers Commission Ex p. Mathew Brown Plc [1987] 1 WLR 1235.***

What is required in any particular case is incapable of definition in abstract terms. As Lord Bridge has put it;

> *" the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body , domestic, administrative or judicial, has to make a decision will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."*

See ***Lloyd v Mc Mahon [1987]AC 625 at 702***

The requirement fairness and to follow rules of natural justice must be tailored in a manner that has regard to all circumstances of each case or particular circumstances and varies according to the context. Therefore, what fairness requires is "essentially an intuitive judgment". In order to ascertain what must be done to comply with the principles of natural justice in a particular case, the

starting point is the statute creating the power. See ***Kioa v Minister if Immigration and Ethnic Affairs (1985) 65 ALR 231. Sheridan v Stanley Cole (Wainfleet) Ltd [2003] EWCA Civ 1046 [2003] 4 All ER 1181; Principal Reporter v K [2011] 1 WLR 18; R (on application of Shoesmith) v Ofsted [2011] EWCA Civ 642; R v Secretary of State for Home Department, ex parte Doody [1993] 3 All ER 92.***

In this case the University obtained information about some examination malpractice during the Mature Age Entry Examination and swiftly acted and at this stage it had to carry out enquiries. No hearing could be envisaged at this stage but rather it expects an investigation into the matter and they come to a decision. What the applicants are demanding from the respondent i.e to follow rules of nature justice has to be appreciated in the circumstances of the case and the nature of the decision that was made. In the celebrated case of ***Maneka Gandhi v Union of India [1978] 1 SCC 248*** court noted;

> *"The rules of natural justice are not embodied rules. What particular rules of natural justice should apply to a given case must depend to a greater extent on the facts and circumstances of that case, framework of the law under which the enquiry is held and constitution of the tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice has been contravened the Court must decide whether the observance of that rule was necessary for a just decision on the facts of the case."*

This court accepts that fairness is variable concept and fairness is not something that can be reduced to a one-size-fit all formula. The circumstances of the present case did not require the applicant being given a hearing as noted earlier since the regulator has a wider duty to protect the University image in respect of control of examination malpractices. This was a temporary corrective action as the investigations were being concluded and evidence was being collected by the University. Therefore, no hearing would have been expected in such circumstances before the conclusion of the investigations. See ***Stephen Mukweli & 4 Others v Bank of Uganda & Another HCMC No. 210 of 2019***

Indeed, the respondent after the applicant appeared took a decision to release the applicant's mature age certificate to enable him commence studies for the course of Bachelors of Medicine and Surgery such as to secure his constitutional

right to education incase to education in case the investigations clear him to continue with his course.

In addition, the applicant contends that the applicant was not given adequate notice and he was not given the source of information or details of the allegation or that the whistleblower was not mentioned. The applicant would be demanding so much from the respondent and indeed he never sought what he now demands to or expected to have been offered at the hearing.

In the case of ***Kenya Revenue Authority vs Menginya Salim Murgani Civil Appeal No. 108 of 2009***. The Court of Appeal delivered itself 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*".

In working out what amounts to 'justly and fairly' treatment, the courts are wary of over-judicialising administrative process. They recognise that administrative decision-makers are not courts of law, and that they should not have to adopt the strict procedures of like a court or tribunal. The manner in which the proceedings were conducted was procedurally sufficient to constitute an opportunity to be heard or a hearing of the applicant fairly and justly in the circumstances of the present case.

The applicant did not act in breach of the principles of natural justice since the applicant duly accorded a hearing when the matter was heard and was allowed to continue as investigations into the alleged examination malpractice continue.

This disposes off the entire application and the subsequent issues are not fit for determination due to the circumstances surrounding the present case.

This application is accordingly dismissed with no order as to costs.

I so Order

Ssekaana Musa
Judge
2nd September 2022.