

# NEUTERED ACTIVISM: TATTERED FUTURE



DEFENDERS  
COALITION

REPRESSIVE DISCIPLINARY AND CRIMINAL PROCESSES  
AGAINST VOCAL STUDENTS AT KENYA'S  
PUBLIC UNIVERSITIES

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# ACKNOWLEDGEMENTS

The subject of academic freedom as a facet of freedom of expression is an interesting subject in the context of student experience in the public universities in Kenya today. This is what has provided the Defenders Coalition the impetus to review the experience of vocal students at Kenyan universities.

Globally, students are encouraged to be critical, outspoken or get involved in other related extra curriculum activities as they pursue academic excellence at the university. It is curious that in the Kenyan context, students that dare question or challenge the administration or are perceived to be politically active are dreaded by the university administration and target for repressive acts. This means that it is probable that the interest of the university administration sometimes runs counter to the activities of the student activists (and other ordinary students) in the extensive academic and learning environment at the university.

The consequences of some of these conflicts have been drastic, particularly where they have resulted in disciplinary measures against the students. Lately, the trend is that the universities turn in perceived student dissenters to the criminal process for all kind of alleged offences.

In this report, Defenders Coalition has delved into some of the common patterns and features of student disciplinary processes in the universities and how they affect the human rights of the students. Despite the constitutional guarantee to the right to education, and freedoms (including academic freedoms) as also backed by various regional and international instruments, the expulsion record of Kenyan public universities calls for a more intensive look. The trend is destroying many victims.

This volume is only a beginning. The study examines the far-reaching threats to human rights that emerge from the disciplinary processes and how they are symptomatic of a broader problem of intolerance and arbitrariness in the universities. It is arguable that discipline must be achieved but surely the approach must not oust the constitutional rights and promise that the country holds for its future generation.

While this report focuses on the experience of the Student activists and Human Rights Defenders and the repercussions of disciplinary measures taken against some of them by the university authorities, the continuing reluctance of these institutions to align their disciplinary approaches with the constitutional threshold and international human rights laws invites a thorough examination and conversation by all. Examined deeply, there is sufficient evidence that the university authorities are opposed to critical thinking and intellectualism. This is dangerous because universities are first and foremost a space dedicated to these values. This report is a call to action for the government, the university leadership and public at large to not only curb human rights violations and abuses but also engender and promote a human rights culture in the universities.

I wish to sincerely thank the program team of Defenders Coalition, our funding partners and consultants without whom this report would not have been accomplished.

Last but not least all student leaders and other students that took part in the study who openly shared with us their experiences. Their endurance and triumph continues to inspire.

**Kamau Ngugi**  
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# 1. BACKGROUND

Academic institutions are the hub for nurturing and sustaining the right to education. Whilst it is to be expected that universities will always stand for the right to education, including free thought and scientific research, that aspirational role of universities is not being realized considering the worrying pattern of students' expulsions and suspensions by Kenya's public universities, mostly on non-academic grounds. The systemic trends eschew the democratic vision of education and rely on the precarious despotic administration model which increases vulnerability of the academic community to recurrent human rights abuse and violations.

Universities Act of 2012 is the legal-policy framework that guide operations of universities in Kenya. According to sections 19 and 20 of the Act, a University Charter is the instrument that establishes and gives legal status and authority to a University to inter alia undertake its academic programmes. The Commission for University Education in Kenya grants the charter to qualified institutions to offer university education and monitors the institutions to ensure compliance with provisions of the Act. The governance of a university is set out in section 35 of the Universities Act and includes a Council, Senate and Management Board. The Vice Chancellor of a University is an ex officio member of a University Council, and is the academic and administrative head of the institution. He/she also has the overall responsibility for the direction, organization, administration and programmes of the University.

Before 2012, the Vice Chancellors of public Universities were solely appointed by the president of the country. This left their tenure of office at the pleasure and mercy of the president. As a result, Vice Chancellors were seen to play partisan roles, predictably siding with the government, often at the expense of the students' welfare. Although the law changed, and a Vice Chancellor is today appointed by the University Council, questions have remained concerning the independence of the office and the decision making of the university administration particularly around issues touching on management of student affairs and collective political culture.

Kenya's university students have a rich history of organizing and political mobilization. And as such, especially during the Moi era, 1978-1990s, university students were seen as the unofficial political opposition in the country. As a result, in the 1980s, the government started the wave of arrest of students and their leaders. In fact, several student leaders from the University of Nairobi were arrested and subsequently jailed for their suspected role in the abortive coup in 1982. One of the students detained at the time was the then Chairman of the Students Union of University of Nairobi (SONU), Titus Adungosi who later died in prison. Later, left leaning politician and former legislator, Mwandawiro Mgagha was among the students arrested in 1985 following student clashes with the police at the University of Nairobi. He was subsequently charged with attending an illegal meeting and sent to jail<sup>1</sup>.

A record number of expulsions of university students was recorded in the country in 1987 amidst the purge against the Mwakenya<sup>2</sup> movement when the University of Nairobi expelled 47 students on various non-academic grounds. Among the students expelled that year was the Chairman of the student body at the University, Wafula Buke, who was later jailed for sedition. In later years, particularly after the introduction of multiparty democracy in 1992, some of the expellees were readmitted to complete their studies.

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1 See <https://www.standardmedia.co.ke/article/2000099311/how-students-led-protest-for-the-second-liberation> - how students led protest for the second liberation

2 The Mwakenya movement, consisting of so called dissident politicians, university lecturers and students marked Kenya's early agitation, after the abortive coup de tat in 1982, for political pluralism and tolerance for divergent views. The ruling party KANU instead took a strong position against the activists sending most of them to detention and exile.

Between the late 1980s-1990s, little changed in the way the university administrations dealt with university students suspected of taking part in protests.

Moi era aside, the rate of university students expulsions and criminalization in recent years has been mind boggling. In 2016, for example, the University of Nairobi reportedly expelled 33 students and suspended 25 others for two years following student's protests over the results of student's union elections<sup>3</sup>.

In August 2019, the media published an interview with some of the former university students and victims of the suspensions. The students bemoaned the fact that some of their former colleagues were not certain if they would ever resume their studies<sup>4</sup>. The extent of student intimidation in the colleges has been far reaching. According to the report, extreme disciplinary measures such as suspensions and expulsions are routinely used by university administrations to silence student dissent or fair articulation of their grievances<sup>5</sup>. Common student grievances have included issues such as lack of adequate student accommodation, poor living conditions, insecurity within campuses, lack of student bursaries and missing marks in student examinations.

At the same time, the University Amendment Act, 2016 restructured student's elections, giving more say to the university administration on the running of student election affairs. According to Section 18 of the amendment Act, elections of the student leaders in the universities are managed by the respective administrations. Student stakeholders have blamed the dearth of effective representation of their affairs on this law because it gives the university administration disproportionate powers in the elections. According to the students, the law took away their right to directly elect their leaders and gave authority to the university administration to create pliable students leadership. The university administrations reportedly vet and approve aspirants for the students leadership positions; carry out the nomination processes and finally, conduct the elections<sup>6</sup>.

This has been a source of tensions between the students and the administration of the universities during student elections. For some of the students, the student unions today can no longer support free student engagements and the pursuit of liberal scholarship in the universities. Rather, the student associations kowtow the administration on the general student issues. The control of the union fees is feared to be another source of the uncanny interests in the students' leadership. Yet, other than long held student debates on the improvement of the quality of their academic training, students participation in decisions that affect them constitutes another area of lingering misunderstandings between students and the university administration.

As a result, student unrests have become common during the period of student elections. In fact, the election environment is a much-nuanced period for the students as some of them soon appear before the hastily convened disciplinary proceedings that routinely expel or suspend suspected trouble shooters in the aftermath of the elections. What is unfortunate is that the sword normally falls on the outspoken students who may have come into the radar of the administration for totally different reasons. The internal private security providers in the universities have also been known to be involved in giving surveillance and unworthy witness reports on some of the marked students who become easy disciplinary targets wherever the universities clean house after the unrests.

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3 <https://www.youtube.com/watch?v=TDM9XJ0IXqc>

4 Saturday Nation 10th August 2019, page <https://www.nation.co.ke/news/education/University-students-life-of-misery/2643604-5230168-oktn0o/index.html>

5 The report notes that even with cases where basic university facilities such as toilets and clinics are in pathetic state, no one can dare raise the issue. The moment a student does, he/she becomes marked and his/her days in the institution may be numbered

6 Views of the National Students Working Committee (NSWC) Convened by the Defenders Coalition, MAY 13-16, 2019, Kudu Hills Nature Park. Kajjado

Contrary to the constitutional guarantees to fair hearing, the victims are typically not allowed legal representation whenever they face indictments by administrations or the university disciplinary organs. The charges and counts preferred against them are sometimes only consisting of general youth misbehaviors rather than regulatory offences. But the disciplinary process once put in motion is high handed and ruthless - a show of supervisory powers of the administrators so that the victims serve as examples. The process ends up serving interests other than that of fairness and justice. In order to be safe, the students are better off keeping away from activities that would bring them to controversies of this nature which essentially means that the universities are slowly becoming the sinking ground for critical thinking, far away from the nurseries of vibrant debates and knowledge that the society had come to expect of them.

## 1.2 Methodology

In the aftermath of the 2017 general elections, several public universities got inundated with court cases as a result of arbitrary expulsion of students. It since stuck many observers that the trend revealed a pattern in which many university students faced similar punitive cases each time the country went through the general elections or the universities undertake internal student elections. As is often the case, vocal students who speak to authorities on wide ranging subjects have fallen victim to such disciplinary processes more regularly than others. Some of the victims visited human rights and democracy sector organizations to seek legal assistance regarding the state of play on student's freedom and human rights in campus. This is what informed the study.

This study was compiled in 2019. The report provides a window into the way universities handle students who come into conflict with the laid down rules and regulations. The report findings are based on data gathered from secondary literature particularly reports of court proceedings of some of the students' cases as some of them ended up in court for arbitration. For additional data, the study also conducted primary interviews with an array of students caught up in the university disciplinary procedures. The draft report was thereafter discussed and validated by a cross section of university students during a workshop in Nairobi in November 2019.

Nonetheless, this report is not meant to be an exhaustive review on the issues it raises, and no scientific parameters are intended in testing its findings. By all means, this was not its intention. Rather, as a scoping effort, it recorded findings that should stir public interest and discussions on the issue of rising student expulsions and suspensions in Kenya in ways that should be disturbing to all those people who are concerned with the issues of academic freedom and human rights in the universities.

## 2. RECOMMENDATIONS

### **The Government should;**

- i. Promote dialogue with students' associations to minimize opportunities for criminalization of students who fall foul with the general university administration or perceived to be errant
- ii. Create the office of a National Students and Youths Ombudsman to oversee student justice processes and protect student victims from unlawful or excessive administrative actions/ ensure disciplinary procedures and applications affirm constitutional rights and fairness
- iii. Establish a National University Student Disciplinary Tribunal with the mandate to train and advise the disciplinary hearing bodies on student discipline, maintain all student records handled through disciplinary processes, strengthen university procedures for conflict resolution including student (mis) conduct proceedings and hearings etc.

### **To the university administration;**

- i. Establish student judicial advisors for review, advise and resolution of reported student violations of disciplinary nature
- ii. Enhance avenues of student freedom of expression in the context of preservation of academic integrity and student learning
- iii. Review the framework for student counseling services in the universities
- iv. Review university elections process to minimize politicization and victimization
- v. Develop and implement strategies to address the socioeconomic disadvantages of the students, with intervention programs to address distress faced by the particular students.
- vi. Discourage the use of criminal prosecution of students in disciplinary cases and focus on corrective approaches that preserves the human integrity of victims

### **To the Defenders Coalition and other Stakeholders**

- i. Enhance legal aid for student victims of college expulsions/suspensions
- ii. Work with the universities to promote a human rights approaches in student administration and welfare
- iii. Work with the students university student community to promote responsible behavior and citizenship



### 3. ACADEMIC FREEDOM: CONCEPT AND PRACTICES

**"If a society ceases to value freedom of speech it will cease to value the university and academic freedom. It is the collapse in support for free speech that has led to the lack of confidence of academics in academic freedom..." Dennis Hayes, Towards a philosophy of academic freedom, pg 75**

**Academic freedom "implies not just freedom from constraint but also freedom for faculty and students to work within a scholarly community to develop the intellectual and personal qualities required of citizens in a vibrant democracy and participants in a vigorous economy. Academic freedom is protected by society so that faculty and students can use that freedom to promote the larger good".**

This report restricts itself to the rights of university students within an institutional disciplinary process exercised in the context of academic freedom. In that regard, students' academic freedom is seen as part and parcel of the university expressive culture and tradition of questioning reality. This should be seen in the light of students developing an inquisitive mind as they experience new knowledge; the very essence of higher learning. The report further considers how courts of law have provided reprieve to some of the students who have sought the support of the courts in the subject. It is useful to point out that the courts have over the time, where they agree with the students, advised the respective institutions to improve their disciplinary procedures.

This report does not pass judgment on powers of the universities to supervise or even discipline its staff and students. However, the university's disciplinary decisions must be balanced against the general public's expectations of the universities as citadel of knowledge, fairness and other tenets of tolerance in a society. Besides, universities are obligated to follow the law. In meting out their duties, universities administrators may discipline students, as they must when they break the rules and regulations of the University, but in doing so, they must abide by the law. As the report shows, this is not always what goes on when a university punishes its students for alleged infringement of the Rules and Regulations.

While currently it is not the center of national debate, academic freedom is the pinnacle of intellectual expression and productivity of any country. It is in recognition of this that the 2010 constitution elevated academic freedom as part of the corpus of rights guaranteed under the freedom of expression. According to article 33 of the constitution, the right to freedom of association includes "academic freedom and freedom of scientific research" as well as artistic creativity. Guarantee for academic freedom spurs the vibrancy of faculty members and training of students to be an all-round citizen that the country can depend on in the future. Academic freedom is therefore part of the elements necessary for the realization of multiple constitutional rights and freedoms in a country.

In United States, the Association of American Colleges and Universities (AAC&U), in concert with the American Association of University Professors, established certain principles of academic freedom. These are the conditions that are essential to the University's successful accomplishment of its educational mission<sup>7</sup>. The elements are that Teachers are entitled to full freedom in research and publication and that they are free

<sup>7</sup> Also known as the 1940 statement on academic freedom

to select their students without interference and enjoy freedom in the classroom in discussing their subjects. It should be recognized, however, that college and university teachers are first and foremost citizens, and when they speak or write as citizens, they should be free from institutional censorship or discipline. However, their special position in the community imposes special obligations upon them so as to promote responsible utterances and observations of the academic objectivity.

While there is no agreed exact definition of academic freedom, the concept invites both interpretations to favor sustenance of academic enterprise with least interference from the state or other ecclesiastical sources (the refraining nature of the freedom) as well as increasingly, the responsibility of the academic community to do more in the progress of the society. In this way, academic freedom is a means to an end, not an end in itself. It preserves the urge for a academic integrity and the responsibility of the academic community to drive up values for academic independence of thought, non interference and vibrant tussle of differing views.

In the view of one of the scholars who support the perspective emphasizing academic integrity;

**Academic freedom refers to the freedom of individuals to study, teach, research and publish without being subject to, or causing undue interference. Academic freedom is granted in the belief that it enhances the pursuit and application of knowledge, and as such is supported by society through the funding of academics and their institutions. Academic freedom embodies an acceptance by academics of the need to encourage openness and flexibility in academic work, and of their accountability to each other and to society in general (Tight, 1988b, p. 132).**

The interplay of rights and responsibilities presented in this description has been taken further by some scholars such as Turner (1988), who emphasizes the obligations above rights in the distinction he draws between freedom of speech and academic freedom. He argues that, unlike the general public, academics have no “right to silence.” The academic community plays a symbolic role, and that may involve strong opposition to the autocratic tendencies of a government. This should be a natural response of academic enlightenment. This is the liberal view of academic freedom. In Kenya, the positive role played by former students and academics in shaping the debate on political pluralism between 1970s – 1990s is well documented.<sup>8</sup>

This liberal view of academic freedom views academics as persons who must not keep silent when things go wrong in the society because of their position of privilege conferred by virtue of knowledge. According to this view, academics have no right of silence unlike the general members of the public who are less exposed or informed, CIVITAS (2016). In contrast, others argue, academics lack the requisite legitimacy to debate society issues, but rather argue that accountability issues in society are better served by the democratic institutions in the society. The view supports the traditional contention that academic freedom should be confined to purity of academic thought and scientific advancements.

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8 Donald C. Savage and Cameron Taylor, Academic Freedom in Kenya, Canadian Journal of African Studies / Revue Canadienne des Études Africaines, Vol. 25, No. 2 (1991), pp. 308-321 (14 pages) Also read Adar, Korwa (1999) Human Rights Quarterly Volume 21, Number 1, February 1999 pp. 179-206

Although traditional definition of academic freedom has seemed to emphasize the freedom of teaching institutions to employ its own staff, and in turn the freedom of the teaching professionals to conduct classes and do research without external interference, modern understanding of the concept combines these elements with a more liberal appreciation of the concept that underscore the position of the academic community in leading community thought and interactions necessary to build a just and democratic society. This role is ordained for the university by its mere standing as a domain of knowledge and intellectual enquiry giving it the advantage to guide society to a better future.

Whatever it is, academic freedom comprises both the rights of the teachers in teaching and of the student to freedom in learning and pursuing truth and excellence in the society. As such, it carries with it duties correlative with rights. At the end of the day, the paucity of these definitions must appreciate that in a developing democracy, academics are expected to play a consistent role in growing the democratic process. In this vein, the university engagements with societal issues are an intractable phenomenon in the subject of academic freedom

The mission of colleges and universities is not just to disseminate information but to develop critical thinking skills and new ideas through a wide exposure of students to various ideas. This makes students the second limb to the existence of academic freedom, and it is important that learning conditions promotes education that can inculcate fundamental values necessary for the maintenance of a democratic political system. To do otherwise would be to simply undermine the student's democratic participation and reduce them to objects of academic regurgitations.

This reasoning of student academic freedom recognizes that at their age, maturity, and sophistication levels, university students require better reasoned judgments and not restrictions based on pedagogical concerns. This is necessary to understand why for example student unions may be vocal against societal ills or why activist students' engagements should be encouraged as legitimate aspects of learning. The only difference is that the considerations of student beliefs and positions should take into account their emotional maturity and sensitivities.

Although not new given the constant friction between student's academic freedom and rights and the roles of college administrators, because of the finality of such a measure, expulsions of students should be an exception rather than a norm. It can be argued that these extreme punitive orders should be left to dire circumstances in which it is no longer tenable to keep the students in class. However, students perceived to be activists or anti-government have often suffered the wrath of expulsions and other high-handed punitive measures for their involvements in public issues or activities seen as critical of the university administration.

## 4. REPRESSION PRACTICES AND PATTERNS IN STUDENT DISCIPLINE

### 4.1 Disciplinary issues related to student participation in elections

According to the Commission for University Education, Kenya has 31 public universities and 23 private universities and constituent colleges with the accreditation to offer university education in the country<sup>9</sup>. The universities are managed in accordance with the Universities Act, 2012, Laws of Kenya. Section 3(2) mandates the university institution to uphold the national values and principles, affirming a declaration of a democratic governance of the institutions.

The section provides that in the discharge of its functions and the exercise of its powers, a university shall be guided by the national values and principles of governance set out under Article 10 of the Constitution, and shall in that regard promote quality and relevance of its programmes; enhance equity and accessibility of its services; promote inclusive, efficient, effective and transparent governance systems and practices and maintenance of public trust and ensure sustainability and adoption of best practices in management and institutionalization of system of checks and balances. As well, the universities are required to promote private-public partnership in university education and development; and institutionalize non-discriminatory practices.

The universities are the fulcrum of intellectual training and are required by the law to demonstrate democratic tenets and openness in their management. More so, through production of well qualified and knowledgeable citizens, universities play a central role in driving the state bureaucracy and ensuring an informed leadership for the country's future. It appears that the law took cognizance of these functions of the institutions in encouraging the institutions to observe the constitutional values shown here. The law also demands that each university should have a students' association so as to ensure that student views are part and parcel of the decision making of the administration.

According to the Universities (Amendment) Act No. 48 of 2016, a students' association is governed by the students' council comprising of Chairperson; a Vice Chairperson (who shall be of opposite gender with the Chairperson); a Treasurer, a Secretary-General and three other members to represent special interests of students. The latter is also the secretary to the Students Council. These are the core elective positions in the student associations although the Council may within their constitutions create other positions if deemed necessary. The amendment law also provided that membership in the students' council should reflect national diversity and the constitutional one third gender rule. It also introduced electoral colleges for purposes of conducting the elections. The students' associations are required, in consultation with the Universities, to formulate and enact rules governing elections including regulation of campaigns, election financing, offences and penalties

With each university having its respective students association, there are multiple student bodies in the country. In the past, some of the student leaders have attempted to form a national student representative union but this has been undermined by many challenges<sup>10</sup>. Chiefly, the students lack financing for their activities and are constantly exposed to manipulative political dynamics in the country. Furthermore, students who agitate for such organizations often face sanctions from their colleges.

9 Data as at 2017 - [http://www.cue.or.ke/images/phocadownload/Accredited\\_Universities\\_in\\_Kenya\\_November\\_2017.pdf](http://www.cue.or.ke/images/phocadownload/Accredited_Universities_in_Kenya_November_2017.pdf)

10 Read literature on the attempt to form National Union of Students of Kenya (NUSKE) in the 1990s. Also read Crisis and Student Protest in Universities in Kenya: Examining the Role of Students in National Leadership and the Democratization Process Maurice N. Amutabi African Studies Review, Vol. 45, No. 2, Special Issue: African Universities in Crisis and the Promotion of a Democratic Culture (Sep., 2002), pp. 157-177

2.University Crisis, Student Activism, and the Contemporary Struggle for Democracy in Kenya. Jacqueline M. Klopp, Janai R. Orina. African Studies Review, Vol. 45, No. 1 (Apr., 2002), pp. 43-76.



The main student organizations include the University of Nairobi Students Association (UNSA) – formerly SONU, Kenyatta University Students Association (KUSA), Moi University Students Organization (MUSO), Jomo Kenyatta University Students Association (JKUSA) and Daystar University Students Association etc.

According to the respondents in the study, university administration allegedly interferes with the student elections. Contested elections results are often followed by protest and inevitably disciplinary consequences for some students. This has made student election a source of recurring conflicts between the students and the university administration with outspoken and activist students falling the victim. Yet every so often, students go through the elections to elect leaders to represent their interests. The requirement for diversity in the elections has tended to have indirect effect of promoting ethnic alliances that mirrors the national political campaigns, and political fallout. This has sometimes affected relationships within the university campuses.

Concerning participation of students in campaigns for national elections, there is an unwritten ban for any student involvements. This may be for good reasons as electoral interests can easily spill into university campuses and interfere with academic programs. As a policy, the universities require students to avoid national politics at all costs. Nonetheless, there are no guidelines and standards on the policy, and in practice, it doesn't seem to be applied across the student community uniformly. At times, university administrators have themselves been accused of playing partisan roles in the national election campaigns.

Often, students, especially the outspoken ones live in the apprehension of being expelled or suspended based on non-academic considerations. Even without any civic agitations, some of them have ended up with disciplinary cases. There were also fears that some of them may also be maliciously under marked in the examinations. The nature of such arbitrary punishments has put many students in perpetual fear, an oxymoron for institutions of higher learning which in the first place should be in the forefront of growing divergence of opinions and debates.

Whatever the elections, both the general elections and internal student elections, civil and political engagements within the student associations are virtually impossible because the elections are perceived to increase vulnerability to disciplinary summons. As such, for the sake of self-preservation, a majority of the students take to silence. Some of the universities consistently target select student leaders to force them to toe the line or risk their studies. The result is that several students have been suspended or expelled by the university administration without a good cause. It is feared that perceived political affiliations have been used in determining some of the decisions. Sometimes students are reportedly set up by the security officials of the university with dire consequences unless they comply with the choices of the administration.

The decision to expel anybody from a place of learning has dire consequences for victims. On the face of it, only in exceptional circumstances should an institution find it necessary to punish students and take them away from the academic path. Where the line is crossed, the administrative actions should be rational, fair and well within the law as implied from the values and principles governing the regulation of university education in the country.

Below are instances where universities have been caught in the web of callous and arbitrary expulsions of students suspected of various breaches of the student's code of conduct, or still, vocal students who have clashed with the authorities. The examples only explore the main patterns in the student disciplinary experience and not a chronicle of the cases in this area.

In 2013, **Kenyatta University** suspended four students that in their court fillings, they branded as partisan activists. The 2013 general elections was the first election after the promulgation of the new constitution but it still suffered from the polarizations inherited from the political events in the preceding, viciously disputed presidential elections. **In the case, Oluoch Dan Owino & 3 others v Kenyatta University [2014] eKLR**, the

expelled students narrated that they were victims of partisan lynching associated with the general elections and that they were victims of the administration witch-hunt after students disruption of the Independent Electoral and Boundaries Commission (IEBC) preparations to undertake the national elections within the university.

The IEBC had been using the university as a training centre for electoral officials and other personnel involved in the 2017 elections when days to the elections, a group of students engaged in public demonstrations at the University confronted them and damaged property belonging to the IEBC. This was a mob activity, and a number of students were initially questioned about the incident. Four students (including the petitioners in the case) were taken before the University's student disciplinary committee and later expelled for ostensibly taking part in the misconducts said to be in breach of Sections **3 (b), (d), (g), 3 (i), i (ii), j (i), (ii)** of the Kenyatta University Regulations.

The expelled students maintained their innocence and claimed they were victimized for their perceived association with Coalition for Reforms and Democracy (CORD), the opposition party in the elections. They later appealed against their expulsions but the Student Disciplinary Appeals Committee turned them down.

**Kenyatta University again** expelled scores of student leaders in December 2017 after yet another student's disturbance. The events of the student disturbances reportedly followed gross interference by the administration of the University in the Kenyatta University Students' Association (KUSA) elections held in the month of November 2017. In the elections, a section of students were barred from running in the polls. Following tensions, the university expelled the students. The affected students were basically seen to belong to a student leadership camp which had fallen out of favor with the administration. After the expulsions, the students were subsequently also arrested and taken through criminal prosecution on further penal complaints by the university.

At the **University of Nairobi**, the SONU elections held in April 2016 led to the expulsions of almost an entire rival team in the elections. Mike Jacobs as a candidate for SONU Chairmanship together with his allies, among them, Harold Mugozi who competed for the position of Secretary General were notified to appear before the College Disciplinary Committee on charges of incitements of students. The university maintained they led a student protest against the elections outcome which ended with destruction of the university's property. During the hearings, the accused were never informed of the right to representation or to call witness. Later, the High Court rescinded the suspensions and asked the university to readmit them.

In *Onjira John Anyul v University of Nairobi* [2019] eKLR, the student was an aspirant for the position of Campus Representative, College of Health Sciences in the SONU (Student Organization of Nairobi University) elections that were slated for 1st April 2016. He was a Bachelor of Medicine and Surgery (MBCh.B) student at the university in his fifth year of study.

On 18th March 2016, Onjira addressed a group of supporters at an event organized by the University's School of Nursing at the Medical School and soon after he left the venue, violence broke out between rival supporters. The University summoned him and accused him of engaging in conduct unbecoming of his stature, and as well bringing the name of the university into disrepute. At the hearing, he was not allowed any legal representation, and the university did not produce any witness against him. The alleged students who fought never faced any disciplinary proceedings but he was found guilty of the alleged offences and expelled on 18th May 2016. On appeal, the punishment was converted to a 3 year suspension.

On 1st September 2017, the student filed a constitutional petition against the University for Violation of his rights. He claimed that the hearings against him were discriminatory in nature as the students who had fought were let to go while only he, having only addressed a rally which later turned chaotic was being held responsible for the rowdy student behavior. He also explained what he believed was the lack of fair hearing



during the disciplinary hearing and asked the court to find that his right to education had been violated. The petition succeeded in part and he got reinstated back to college.

In another case, Peter Mungai (not his real name) was until his suspension a third-year student at the University of Nairobi, Kikuyu Campus, faculty of education with only a year to the completion of his study. In 2016, he took part in the SONU elections competing for a student representative position, which he lost. He complained about irregularities in the election results to the student election commission. In 2017, another student protest occurred in the Campus and he was incriminated in the chaos, alongside other five students. Subsequently, a section of the students faced a disciplinary procedure in which they were charged with causing damage to university property and interrupting class sessions.

All of them were denied legal representation. They were neither confronted with any witness nor clear evidence on the charges against him. In the end of it, he was expelled from the halls of residence and asked to pay Kshs 86,050 in fine. In addition to the fine, and expulsion from the halls of residence, Peter was suspended from college for a year.

To date, he has maintained that no valuation report of the alleged damages was ever brought in the proceedings before him although alongside his two of his colleagues, they were slapped with the exorbitant fine. As at the time of this report, being unable to raise the penalty, he has not paid the same. His former classmates have since graduated while for Peter, he is still trying to find his way back to the lecture halls.

## **4.2 Use of Criminal justice system in students' discipline**

In recent years, the universities have resorted to an aggressive use of the criminal justice system to rein in on students with discipline cases, probably as inexpensive strong arm tactic to force student compliance. The approach may look effective because harsh sentences await those who are found guilty after prosecution and ensure that students conform to the university rules and regulations. Typically, the universities turn in the students to the criminal justice system after they have gone through the internal disciplinary process. The main objective is to silence dissent and demonstrate to other students the high cost of non-compliance.

The policy has been profoundly helped by the fact that the universities have today become highly securitized. This has not been for lack of good reasons; especially given past security threats associated with fears of terrorist attacks against the institutions. However, according to many students who took part in the study, the privatization of the security functions at the university have posed new problems for both students and lecturers alike as the securitization of access to the university institutions becomes more prioritized. This has partly contributed to opportunities to undermine academic freedom and student operations in the universities.

The study heard of accounts whereby members of private security firms in the universities offer surveillance on students perceived to be troublemakers or errant. The security staff also commonly took part in criminal prosecution against some of the students wherever the disciplinary matters evolved to criminal proceedings. It was also claimed that the private security officers sometimes arranged for police arrests of specific students, made criminal complainants against them and on several occasions, were prosecution witnesses.

Given the lack of relevant professional training for the private security providers and their insubordinate relationship with their university employers, the role they play in the management of student discipline have come under scrutiny as their position do not serve the cause of justice. Where the university administrations have chosen to put students through the criminal justice process rather than pursue the internal remedies,

the tendency has shifted towards arbitrariness and increased a feeling of powerlessness among the students. This reflects a value consensus whereby University administrations seem to abandon the role of the institutions in shaping students character but rather engage with errant students as criminals. The approach seem to ignore the fact that students are in their youthful age bracket, and their personality are still forming, and that there are diverse options such as dialogue and counseling that can still help to get the students on more positive trajectories in life rather than their criminalization.

Some of student respondents for this study also alleged the existence of informal security hirelings in some of the universities who go about assaulting targeted students or break up unwanted student gatherings within campus. The following are some of the case studies of the use of criminal prosecution propelled by the universities against student activists.

## Republic vs Maxwell Magawi

One of the students whose story drives home the point of the characteristic hurt that an administration is likely to visit upon a student who has become unpopular with it is that of Maxwell Magawi Odhiambo, a finalist law student at the University of Nairobi. In April 2016, following a botched-up student elections, in which himself, then a second year student in the college run as the Law campus representative, students from the faculty rejected the results of the elections and demanded that the Dean of Students address the fallout. The Dean calmed down the students, but the college later accused him of organizing the protests and he was arbitrarily expelled from the institution.

Following the expulsion, the university witnessed further students' demonstrations that demanded his re-admission among others. He was tricked by the security operatives at the university who called him purportedly to get his letter of reinstatement only to get arrested by police officers from the Central Police Station which is stationed next to the university. In all, seven students were later arrested and charged in court with offences of creating disturbance and disobeying lawful orders of the police. The Criminal Case No 1251/2017 R vs Maxwell Magawi & 5 others is still pending at the Milimani Law Courts, Nairobi.

In March 2018, the student was re-admitted to the university following a court order in Republic v University of Nairobi Ex-Parte Lazarus Wakoli Kunani, Maxwell Magawi and another [2017] eKLR At paragraph 101 of that judgment, Justice Odunga G.V. observed as follows;

**" In meting out punishment the Respondent was expected to exercise its discretion reasonably and not arbitrarily and capriciously or in bad faith. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, those in authority should give reasons and if they give none the court may infer that they had no good reasons. Similarly where the reason given is not one of the reasons upon which they are legally entitled to act, the Court is entitled to intervene since their actions would then be based an irrelevant matter.**

The court warned that even if the students were to be found guilty of the offenses alleged before the College Disciplinary Committee, where the administrative body opts for penalty (such as the expulsion of a student as was in the case) it ought to give reasons for the same if it is to escape the accusation of arbitrariness. Also, the decision to find such students guilty or not should be based on some measure of evidence, or as well the finding may be taken to be so outrageous as to 'amount to gross unreasonableness'.

In the instant case, the court granted two substantive orders as follows;

- (i) An order of certiorari to removing into this Court for the purposes of being quashed and quashing the decision of the Disciplinary Committee and by extension to the Senate bodies of the Respondent to suspend and or expel the Applicants herein.
- (ii) An order of mandamus compelling the Respondent to take the necessary steps to facilitate the Applicants to access and continue with their education unless and until their education at the Respondent University is otherwise lawfully terminated or suspended

Magawi got his reprieve but not for long. He was again suspended towards the end of the same year. According to the letter of suspension, University reference "Ref: G34/3297/2014" dated 19th December 2018, the student was among twenty others found wearing a red beret within the halls of residence and with intention to make similar orderly procession across all the campuses. The letter notified him that he will be invited to appear before the disciplinary committee at a date and venue to be communicated to him. He was in the meantime strongly advised to keep off the University precincts including lecture halls and activities of the University unless expressly authorized in writing by the Vice Chancellor or until such a time as the investigations/disciplinary process are finalized.

For the second time, he took the University to court. In agreeing with his position that he had been suspended without being accorded a chance to state his case and/or defend himself as regards the accusations made against him, the court observed that these are constitutional requirements under the Bill of Rights and are also in accordance with the fair administrative action under Article 47 of the same<sup>11</sup>. Twice lucky, he got his reprieve and resumed classes. The court described the actions of the university as illegal, ultra vires and procedurally unfair,

Sometimes around 23/8/2019, Magawi visited his college accompanied by a student friend. On arrival at the gate of his Parklands Law School campus, his friend was refused entry. He attempted to explain that the friend is a student from Chiromo Campus and he often visits him but the security officers called in reinforcements of other people who arrived and assaulted them. They were subsequently bundled into a pickup and driven to Kileleshwa Police Station.

According to Magawi, the people who arrested and detained them are part of the university security team who work with the police to 'contain' targeted students. The security men thoroughly beat him and injured him to his head. He was later treated at the student Clinic and briefly detained again at the Kileleshwa Police

<sup>11</sup> Republic v University Of Nairobi Ex Parte Maxwell Magawi Odhiambo [2019] eKLR

Station. At the intervention of the Defenders Coalition who visited him at the station later in the same day, he was released without charge. At the time of compiling this report, the student maintained that university still intended to charge him with an imaginary offence to keep him out of the institution.

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Another former student of the University of Nairobi who is still on suspension, fell out with the university authorities because of his association with a student leader who was seen as troublemaker. He subsequently earned himself a suspension from the college and still faces three separate criminal prosecutions in court as a result. The student protest the outcome of the SONU student elections in 2013 that many students felt was rigged. Shortly afterwards, the campus security arrested him and booked him at the Springs Valley Police Station. He was taken to the Chief Magistrate's Court at Kibera and charged with malicious damage to property as well as breaking and stealing contrary to the penal code. The matter ended without the prosecution proving its case against him and he was acquitted.

A year later in 2014, he was again arrested within the campus hostel and briefly detained at Central Police station. He admits having been in company of intoxicated friends at the time of the arrest, having spent the night in different clubs around the city, but after threats to charge him with robbery, the security officers decided to have him charged with rape. The matter is still ongoing as Criminal Case No. 1115/2014 at the City Court, Nairobi.

In 2016, the same student (on suspension) was arrested within the precincts of the University and booked at Central Police Station. The following day, he was charged in with trespass and creating a disturbance. It appears that the initial charges were dropped or rather substituted with the charge of arson, allegedly traceable to a previous incident in which the student canteen at the university had been set on fire. The case, Criminal Case No. 1980/2017 is pending in court.

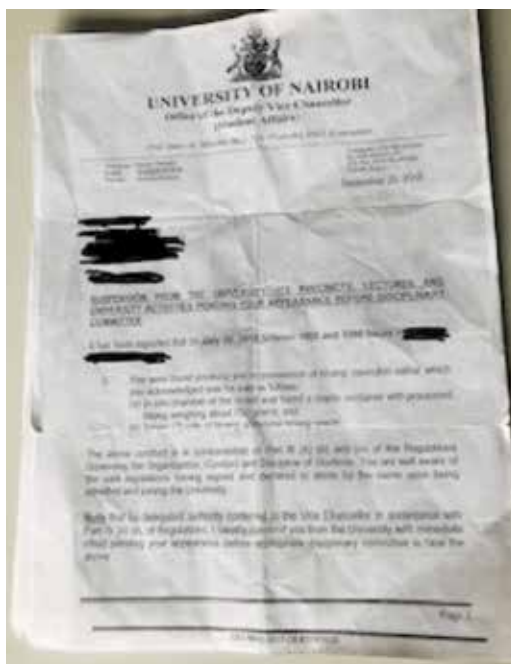
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In another case, Milimani Criminal Case No 1251/2017, R vs Ronnie Otieno & 5 others, a student had been attacked by criminals at night near the Globe Round about as he made his way to the University of Nairobi. The first responders took the injured student to Kenyatta National Hospital for treatment but the students who followed him violently demanded for his immediate attention as he was reportedly bleeding from the wound. The students were about fifty (50) in numbers. Soon, the KNH security accompanied by the police arrived and arrested some of them. In particular, six students were taken to the Milimani Criminal Court, among them Ronnie, where they were charged with creating disturbance and incitement to violence. The case is also still pending.

## **The case of Republic v Billy Graham Mokenye**

In a more recent ominous example of some of the same experience, a second-year student at the University of Nairobi on suspension, Billy Mokenye, was reportedly walking in the company of some of his friends along the State House Road when he was suddenly frisked away by a group of Lavington Security officers. He was taken to Central Police Station. The arresting members of Lavington Security reportedly attempted to get someone else to write a complaint of robbery against the student but the person declined. Nevertheless, the student was still arraigned at the Kibera Chief Magistrate's Court (2019) and accused of robbery with violence, a capital offence. The prosecution papers indicated that the accused robbed another person of a mobile phone. The case is pending in Kibera Chief Magistrate's Court.





In the interview for this report, he claimed that he was one of the students behind a previous student *Kamukunji*<sup>12</sup> that protested against the mass suspension and expulsions of students in 2016 and that is why he was facing prosecution. The event increased surveillance on students' life in the campus. It was further claimed that the security would inspect student rooms, picking up electrical appliances and cooking apparatus to enforce the ban on cooking in the hostels while general student welfare grievances were still generally ignored. Following new agitation, further student demonstrations were held and the administration did not take it kindly. Then, several students including Billy Graham faced charges of incitements before the internal disciplinary committee and were suspended from college.

In 2018, the university expelled among others two law students, Emma Wahito and Joku Okumu, apparently for donning red berets, and asked them to keep away from its precincts, lectures and activities for or rather, the university claimed. The suspension letters issued to both of them read as follows:

12 Student public meeting

**“.....SUSPENSION FROM THE UNIVERSITY, ITS PRECINCTS, LECTURES AND UNIVERSITY ACTIVITIES PENDING YOUR APPEARANCE BEFORE DISCIPLINARY COMMITTEE**

It has been reported that on Friday December 7, 2018, at around 1430 hours you were among a group of 20 students who went to SWA Main Halls of Residence outside Hall 9 wearing red berets. The group had alleged to have given notice to management on a peaceful orderly procession across all campuses. It is further reported that the group also went to Lower Kabete Campus on Saturday December 8, 2018 and also forced themselves into Kikuyu Campus by jumping over the gate on Sunday December 9, 2018.

This conduct is in contravention of Part IV (b) (ii) (i) of the Regulations Governing the Organization, Conduct and Discipline of Students.

You are well aware of the said regulations having signed and declared to abide by the same upon being admitted to and joining the university.

NOTE: that by delegated authority to the Vice Chancellor in accordance with Part IV a) (ii) of the Regulations, I hereby suspend you from the University with immediate effect pending your appearance before appropriate disciplinary committee to face the above charges.

You will be invited to appear before the disciplinary committee at a date and venue to be communicated to you when your attendance shall be required without fail.

In the meantime, you are required and strongly advised to keep off from University precincts including lecture halls and activities of the University unless expressly authorized in writing by the Vice Chancellor or until such a time as the investigations/disciplinary process shall be finalized.

You are further advised that this administrative suspension does not bar relevant state agencies and the university from instituting appropriate criminal charges against yourself.

Yours sincerely,

**ISAAC M. MBECHÉ**

**DEPUTY VICE CHANCELLOR (STUDENT AFFAIRS)**

**AND PROFESSOR OF MANAGEMENT SCIENCE “**

In the run up to the 2017 elections, the National Super Alliance (NASA) campaigners, the main opposition coalition comprising legislators in parties allied to the Coalition as well as some of their supporters adorned the red berets as part of their political uniforms. The berets became associated with NASA's National Resistance Movement (NRM), formed after the elections to protest the election results which had returned the incumbent government back to power. As such, the university administration may have been unsettled by the appearance of the students in campus dressed in similar paraphernalia. The administration ordered the arrests of the suspects and characteristically suspended them. However, the students contested the suspension at the High Court and were allowed to resume studies.

## **The Suspension of Tevin Ochieng**

Tevin Ochieng, an Economics student at the University of Nairobi since 2014 was suspended just before his expected graduation in 2016 with only a couple of units to go. He became distressed and helpless as suddenly, the University accused him of using cannabis and put him out of college. Tevin joined the University of Nairobi on 6th January 2014 having qualified from Maseno National School with 'A' grade in his KCSE examinations. The University selected him to join the Faculty of Arts, School of Economics to do Economics and Statistics.

In his fourth year, 2<sup>nd</sup> Semester having just completed his exams, he was abruptly suspended from campus. According to him, in his entire four academic years at the University of Nairobi, he had observed the rules of etiquette and discipline at the university. He considered himself a hardworking, morally upright and disciplined student and looked forward to a rewarding professional life after graduation slated for December 2018. He had taken 56 units in the Economics and Statistics and passed most of them except six (6) that he still needed to make re-sits before the graduation. Then all of a sudden, he now had to deal with the painful circumstances of an expulsion based on allegation of drug abuse, which he denied.

According to Tevin, he was one of the vocal students who lodged and pursued demands for improvements in the quality of student accommodation around 2016. In the same year, a student disturbance in the university had led to sanctions on the student leadership and activities of the student union were temporarily banned. There was therefore no viable channels of communication of student grievances to the administration yet informers of the administration still peddled false information about him. In his view, this only happened because he had become targeted because of his agitation and he had not even been living within campus in the first case having not been allocated accommodation within the university.

Tevin was served with a letter dated 25<sup>th</sup> September 2018 from the Deputy Vice Chancellor at the University, Student Affairs suspending him from his studies purportedly for having been in possession of bhang of about ¾ Kg at his hall of residence. The letter also claimed that he intended to sell the same drugs. The letter advised him that the suspension was effective immediately pending hearing before an unspecified disciplinary committee on a day and venue to be communicated later when his appearance would be required. For the magnitude of the offence, there was no police report, no witnesses and no due process!

While serving the arbitrary suspension, he received another letter from the manager, Mamlaka Strategic Management Unit informing him to attend a Halls Disciplinary Hearing. The letter indicated no charges at all. In the hearing that followed, he neither had the opportunity to confront any evidence of the bhang or meet any witness of the possession. He was told to wait for the verdict of the hearing before the due graduation date of 21st December 2018 but nothing followed.

After a series of painstaking follow up, he eventually resumed school in 2019 but until today he views the

process as having been arbitrary and a sham. As a result of the disciplinary issues, his completion of studies was delayed by more than a year.

## Republic v Kebaso Morara and six others

Sometimes around 16<sup>th</sup> November 2017, there was a student unrest at the Kenyatta University that allegedly led to a partial burning of one of the administration blocks. Days earlier, the students had conducted the union elections amidst allegations that the administration interfered with the elections, and as such they were fraught with numerous irregularities. A section of the candidates largely deemed to be leaning to the national opposition parties were barred from contesting for various positions. This may have been part of the issues around the student protest in which anti-riot police seriously beat up students and injured many others.

A month later, some of the students that had been barred from the polls were summoned to appear before the Students' Disciplinary Committee of the university to answer to charges inter alia of planning and mobilizing the students to destroy university property. Overall, the charges against the students facing the disciplinary committee were more or less identical<sup>13</sup>. They included;

- a. Gross violation of KU social media policy by posting insulting, false threatening, disrespectful and demeaning messages against university officers
- b. Abuse of Kenyatta University media policy to misinform and incite students to riot and destroy university property
- c. Inciting and mobilising students and other persons to destroy university property
- d. Organising demonstrations that led to the destruction of university property
- e. Threatening life and limb of students, staff and members of the public
- f. Insubordination, disrespect and disregard for unlawful authority

The committee found the students guilty and expelled all of them. Later when they appealed the decision to expel them, the university invited all of them to pick their letters for the appeal hearings only to be apprehended by the university security officers and handed over to the police. Subsequently they were charged with the serious offence of arson contrary to section 332 of the penal code, allegedly for setting on fire the old administration block of the university. The other charges were incitement to violence contrary to section 96 of the penal code as well as malicious damage to property. With the ongoing prosecution, the students were literally thrown out of class

The eight students were George Kebaso Morara (School of law), George Nyamweya (School of Applied Human Science Foods, Nutrition and Dietetics), Dominic Mboya (School of Education), Eric Masila (School of Education), David Amisi (School of Education), Trevor Agoi (School of Humanities and Social Sciences), Dominic Ochieng Orwa (School of Business) and Victor Nangacho (School of Pure and Applied Science). Most of the students were either in 3rd or 4th year of college close to finalising their studies.

<sup>13</sup> For more details, read the proceedings and documents, particularly the bundle of Kenyatta University Replying Affidavit in the Judicial Review Application No. 201/2018, Milimani Law Courts, Nairobi

Throughout the internal disciplinary process, as well as the criminal justice proceedings, the students denied any wrong-doing. The students maintained that they were victims of a foul national political culture and a society deeply divided along political and ethnic lines by the general elections that year and that they were only being sacrificed at the altar of political expediencies since they were from the particular ethnic communities associated with leanings of the political opposition. In one of the cases, Dominic Mboya Austine was expelled without ever appearing the Student Disciplinary Committee!

Briefly, the Student Disciplinary Committee reportedly queued up the students for questioning before handing down the expulsions, which appeared to be pre-determined. Inherently, the process did not consider the consequences of the punishment for the victims although it is clear that it would put to waste the academic struggles of the young students who would very well be future professionals in the country. This is a most disconcerting aspect of the crisis of the expulsions in the universities today.

The criminal prosecution against the students proceeded in Kiambu for well over one year. A majority of the witnesses against the students were in fact staff of the private security company employed by the university! However, in mid 2019 in the middle of the hearings, the university management entered into an agreement with the students to withdraw the complaint and settle the matter.

## Republic v Mark Oroko & 6 Others

Towards the semester exams in July 2018, the management of the Technical University of Kenya (TUK) issued a circular to students to complete their fee payments before sitting the scheduled examinations. As expected, the announcement was met with student displeasure, particularly from the Student Council of Student Association of Technical University of Kenya (SATUK), some of who reportedly had taken in part in the dialogue with the administration to resolve the matter.

In the middle of the semester examinations, student protests led to clashes with the police. The university closed temporarily and within weeks, the student leaders were summoned for disciplinary cases. The charges, which were all similar, were that ***‘on the 31st July 2018, with others, they contrived, organized, participated and caused disquiet in the institution that resulted in the interruption of the examinations slated for even date 31st July 2018 at the university’***. As with similar trends, all of them were suspended from college and later turned over to the police to face criminal prosecution.

In the case, R vs Oroko and 6 others – CMCC 1452/18 – the students were accused of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the penal code and malicious damage to property. The particulars of the latter were that the accused damaged exam questions papers and answer sheets booklets worth Kshs. 21,000. In court, the university almost completely relied on its private security employees to give evidence against the students!! Eventually, the court acquitted all the students for lack of incriminating evidence against them<sup>14</sup>. The university on the other hand in turn embarked on further disciplinary measures for the students totally eclipsing them from immediate resumption of studies.

It is worth noting that the youth need guidance to lead productive life in society and contribute to nation building. The record that may come with criminal prosecution can potentially destroy the best of students who get caught in the criminal system. As students at the highest level of learning, the institutions ought to go out of the way to demonstrate good efforts in taking its academic learners through the educational system rather than let them slip off because of disciplinary issues. As seen from the study, students who for one reason or another fall out with the university system and go through the disciplinary procedure risks dire reprisals, which without rehabilitative approaches can only make matters worse for them.

<sup>14</sup> <https://citizentv.co.ke/news/court-acquits-7-students-of-technical-university-charged-with-creating-disturbance-259401/>

## 5. EMERGING LESSONS FROM THE COURTS

Access to justice in Kenya is a challenge for many but there are several cases whereby students have referred their issues to courts for legal determination and the courts have agreed with them.

The procedure of university discipline of students that it intends to punish for one reason or the other have been at the center of most disputes coming to court. The criticism that universities meet is about the procedural unfairness, bias and arbitrariness of some of the process. On the other hand, courts will always be very careful to disturb the decisions of universities regarding domestic disciplinary decisions on students (or staff) of the institutions. This is the way it is as courts must protect the authority of administrative bodies to manage their own affairs. Luckily, the courts do step in and remind the institutions to observe the rule of law especially the procedures relating to the fairness of administrative actions. In this regard, the constitutional court has on several occasions upheld the appeal of expelled students to complete their studies.

### **Courts do not sanction non adherence to due process**

It has been observed that; “Courts in Kenya have no desire to run Universities or indeed any other bodies” **Nyongesa & 4 others vs Egerton University College**<sup>15</sup>. Nevertheless, it is also settled that the courts will not sit back and watch administrative bodies abuse their powers when such concerns are brought before them, the courts will intervene and overturn decisions that fail the test of administrative fairness.

### **Universities should temper its justice with mercy**

In the *Oluoch Dan Owino & 3 Others vs Kenyatta University [2014] eKLR*<sup>16</sup>, the High Court directed that that the composition of the Committee that heard the student appeals was improperly constituted. This is because the hearing of the petitioners’ appeals before the Appeals Committee comprised persons who had sat in the Students Disciplinary Committee in violation of his rights to fair hearing.

The court ordered that the institution reconstitute the Students Disciplinary Committee, as soon as is reasonably possible but within ninety days (90) from the date of this judgment, to accord the students an opportunity to appeal before an independent committee which does not include any of the persons involved in the previous Students’ Disciplinary Committee. Further, the court observed that the university should bear in mind the dire consequences that its actions may have repercussions on the future prospects of the students and as such should temper its justice with mercy.

### **Universities must not unjustifiably limit students rights under the constitution**

In a judgment compelling Machakos University to re-admit the expelled student in the University’s Bachelor of Education year III, Justice Odunga G.V. also gave orders that;

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<sup>15</sup> <http://kenyalaw.org/caselaw/cases/view/7707/>

<sup>16</sup> <http://kenyalaw.org/caselaw/cases/view/105003>

- a. A declaration that the Respondent's Regulations 10 (2) (d) to the extent that it unreservedly outlaws picketing, 11 (6) (c) to the extent that it does not allow for legal representation and 11 (7) (b) to the extent that it does not allow for a hearing; of Rules and Regulations Governing the Conduct and Discipline of Students of the University unjustifiably limit the Petitioner's rights under the Constitution and are therefore unconstitutional, null and void.
- b. A declaration that the suspension and expulsion of the Petitioner from the Respondent University was null and void ab initio for having violated the Petitioner's constitutional rights under the Constitution.

The Odunga decision also found that Regulation 11(7) (b) of the Machakos University Student Disciplinary Handbook, to the extent that it gives the university management the right to suspend or expel a student without reference to him or her pending appearance before the Students Disciplinary Committee or conclusion of investigations is contrary to Articles 47 and 50 of the Constitution. Under Regulation 11(6) (c), in proceedings of the Students Disciplinary Committee, a student is not entitled to legal representation. The court observed that such a regulation is not being compliant with fair administrative action.

Section 4(3) and (4) of the Fair Administrative Action Act No. 4 of 2015 as follows:

***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***

- a. Prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. An opportunity to be heard and to make representations in that regard;
- b. Notice of a right to a review or internal appeal against an administrative decision, where applicable;
- c. A statement of reasons pursuant to section 6 of the Act;
- d. Notice of the right to legal representation, where applicable;
- e. Notice of the right to cross-examine or where applicable; or
- f. Information, materials and evidence to be relied upon in making the decision or taking the administrative action."

The same issues have been a recurring area of disagreements despite the available precedence. In the *R vs Kenyatta University Ex parte Morara & 6 others*, for example, the same issues of procedural bias and unfairness were discussed. The Students Disciplinary Committee summoned and heard the indicted students on a wide array of charges and convicted them. They were instantly expelled from college. In a totally baffling procedure, the college administration later re-admitted some of the students but chose to leave out others even after reaching consent in court to withdraw the criminal case and re-admit the students to resume classes.

In *Onjira John Anyul v University of Nairobi* (discussed above), the court dismissed the arguments advanced by the University for its action and directed that the student is readmitted to college from where he had reached before his said suspension/expulsion so as to complete his studies. In maintaining that his rights under articles 27, 47 and 50 of the Constitution were violated, he was also awarded sum of kshs 1,000,000/- in compensation.

Nonetheless, the recent orbiter statement in the judgment of Justice Mativo in the sterile case of *Republic v University of Nairobi Ex parte Jackan Mwanyika Mwasi* [2018] eKLR probably remains to be the strongest indictment of the ongoing at the universities in as far as the issues of discipline are concerned. In his introductory observation in the judgment, he stated as follows;

**"A university is not just a corporate body created by operation of law. It is also a community of people associated in activities related to thought, truth, and understanding. It must therefore be a place where the broadest possible latitude is accorded to innovative ideas and experiments, where independence of thought and expression are not merely tolerated but actively encouraged. Because thought and understanding flourish in a climate of intellectual freedom; because the pursuit of truth is primarily a personal enterprise, a Code of Discipline must be strongly anchored on principles of intellectual freedom and personal autonomy. The code should be interpreted and applied with these principles firmly in mind"**

## **Expulsions do not violate the right to education**

The court has also observed that expulsions from the university do not constitute a violation of the right to education. This view may require further interrogation. In the matter of *Dan Owino* case (above) the court held that the right to education is not violated merely as a result of a university expelling a student. In finding that no violation of the right to education had occurred in the indicated case, Justice Mumbi Ngugi noted that;

**"The right to education does not denote the right to undergo a course of education in a particular institution on one's terms. It is my view that an educational institution has the right to set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an education institution voluntarily; well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions. I can therefore find no violation of the right to education in respect to the petitioners."**

## Non-compliance with court orders still persists

Students who get court reprieve sometimes find it difficult to regain admittance to school. The security bureaucracy sometimes stands in the way of compliance using administrative procedures to delay it. Sometimes, students miss out on the time to resume school. In some of the few instances that the victims have brought contempt proceedings against university officials blocked them from accessing the campus grounds, and the legal procedural challenges have not been easy to wade through.

In *Republic v University of Nairobi & 2 others Ex Parte Mwangi Emma Wahito & another* [2019] eKLR<sup>17</sup>, the applicants returned to court seeking orders that the senior Legal Officer of Nairobi University, being in contempt of the court's order be jailed for six months and or fined such sum of money as the court may deem for the refusal of the university security officers to allow them back to college despite a previous court order.

According to the court papers, one of the students was forcefully removed from class by the head of campus security despite court directive to keep him in class. When he followed up with university Security Director, he argued he could not issue instructions to security officers at the campus because he had not received information from the legal office. Similarly, another student was denied entry to sit a Continuous Assessment Test (CAT) on the grounds that the security officers had not received communication from the Chief Security Officer.

The students failed to get contempt orders against the legal officer but the court upheld its earlier orders for status quo to remain on the student status, meaning the student could still remain in the institution undisturbed by the threat of disciplinary summons. The two were pre-finalist law degree students, earlier suspended for an indefinite period until they 'would be advised as to when they would be called upon for the disciplinary hearing'.

Some others have not been as lucky: Despite orders by Justice Mumbi Ngugi in the Kenyatta University case of *Dan Owino Oluoch and 3 others vs Kenyatta University*; the institution shunted aside the court orders. It simply ignored the judgment and neither re-admitted the students nor invited them for a fresh appeal hearing. As no contempt proceedings ever followed, the victims were simply left to their own accord. Years later, some of them found their ways to other colleges to complete their education while for some; they served their full suspension years and got back to the university. At least some dropped out of college studies, never to be known how they went through life again.

In the case pitting Kenyatta University against its student leaders *R vs Kebaso Morara and 6 others* in the criminal case, the proceedings were terminated after the university withdrew the complaint following an agreement with the students. Nevertheless, in the final end, it seemed to renege on the smooth re-admission of the students, placing some of them to further punitive suspensions and limbo completely against the spirit of the court agreement.

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<sup>17</sup> <http://kenyalaw.org/caselaw/cases/view/177305>

## 6. IMPACTS OF EXPULSIONS/SUSPENSIONS ON THE STUDENT VICTIMS

Student life is expressly a difficult period for the young men and women, and in particular university life in Kenya has been seen as a depressing period to students. According to a study conducted in part at the University of Nairobi and published in the Journal of Affective Disorders<sup>18</sup>, depression prevalence was found to be at 35% among university students. The fear of expulsions, suspensions and other punitive measures upon university students contribute to depression and other mental disorders that the students suffer.

The study concluded that depressive illness was significantly high among first year students, those who were married, those who were economically disadvantaged and students living off campus. Indeed according to the study, depression was a leading cause of suicide amongst some of the university students who despite the burden placed upon them by the academic pressure and other demands of campus life fear any institutional protection such as counseling as the very bureaucracy has been quick to punish them even for the slightest of mistakes. This is a living reality for students who find themselves in the eye of social pressure and capricious disciplinary procedures in the universities.

Disciplinary actions of this nature end up with negative effects on the victims even though there are many examples of former student expellees who proceeded to complete their university education in other institutions. For a long time, the students may feel excluded, alienated and deterred from personal achievements. For many victims of such disciplinary processes, life becomes reserved and isolated away from the university and community of primary friends.

The former students are also likely to be shunned by their own parents and relatives. As it were, student expulsions or suspensions are often accompanied by strict warnings not to be seen within the university premises for whatever reason, and characteristically, university security staff is often asked to train their eyes against any visits by such students. In the end, the students no longer feel welcomed to be part of the academic family of any institution, and the very university to which they are likely to seek readmission (say after serving their punishment) are usually the first to make them pariahs.

The suspensions/expulsions have the effect of sending academic dreams of the victims into a spin, and often relatives who may not understand what is happening to them tend to taunt them or shun or talk behind them with negative insinuations and conjectures. These lead to insurmountable levels of personal torture and psychological discomfort of the victims.

College expulsions entrenches economic and social disadvantages of the victim, and can reduce a young person's future employment prospects, which may also increase their risks of reoffending or being involved in unlawful practices. Such punishments ought to be used as a last resort by the academic institutions, and in fact only where rehabilitative options that can still foster the development of the student are not available.

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<sup>18</sup> See <https://www.standardmedia.co.ke/videos/view/2000170743/gone-too-soon-the-rate-at-which-kenya-university-students-commit-suicide-is-on-the-rise>; also <https://www.sde.co.ke/thenairobian/article/2001299303/campus-suicides-over-20-students-have-ended-their-lives-most-due-to-love> and <https://www.standardmedia.co.ke/article/2001341350/depression-in-universities-rising-fast>

The effect of student expulsion is also that it drastically interferes with academic performance of the victim. There are many opportunity costs as the expelled students seek new admissions because of the expulsion. The students are thus likely to use a lot of time in pursuit of other schooling opportunities, lose of funds already invested in the expelling school or simply the loss of further time to complete a course. The expellees may also drop out without graduating in which case their life opportunities may be cut off, effectively disadvantaging him or her early in life.

In terms of direct economic waste of the public funds invested in the students' education, the loss can even be more astounding. University education in Kenya, for basic undergraduate courses is roughly estimated at US \$ 5000 per academic year depending with the degree course and the college. The loss of public funds is very obvious for students in the public financing or bursary scheme, who after years of educational life are expelled. The sum total amounts to waste of public funds.

Certainly such measures are the ultimate punishments in the life of a student and should be exercised cautiously. The punishment can particularly make the victims susceptible to medical, social and psychological problems which can be seriously exacerbated by the possible stigma and isolation of the victims during the extended periods of suspension or expulsion from college. The isolation achieved by student expulsions/suspensions can negatively affect young people's mental health, and lead to further mental health conditions. This would further affect the behavioral, social, and emotional development and functioning of such young people out of school and colleges. Such measures cannot be for the "best interests" of the students or the academic community as it serves no re-integrative or rehabilitative objective at all.

Finally, early school leavers, for whatever reason, can become more vulnerable to becoming involved with social ills such as drug abuse and other unlawful practices in order to cope up with their disrupted education or disengagements. Initiatives that help vulnerable young people to maintain or reengage with education and training, being lacking in the country, victims of such harsh school punishments are likely to develop anti-social behavior and set themselves up for a more negative involvements including becoming radicalized.

The other point worth noting is that victims of suspensions and expulsions from colleges choose to hustle through life with all manner of economic activities to eke out a living. Sometimes the displacement tends to take them away from mainstream economic activities for a very long time especially if they never get to graduate in their areas of study.

In conclusion, developing strategies to reduce the criminalization of students in the public universities should be supported to accommodate a culture of tolerance and diversity of opinions as would be expected for the higher institutions of learning. This can be part of the youth justice reform process for the better engagements of the nation's youths in their institutions of learning as well as the future stability of the country. Otherwise, the pattern of student expulsions and suspensions in the universities is a growing to become a perverse abuse of the right to education of the victims, and consistently destroying the future of many promising youths, one at a time.



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