



REPUBLIC OF KENYA



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FW (Suing on behalf of AWW, a minor) v Board of Directors of St Hannah's Girls School & another (Petition E214 of 2023) [2024] KEHC 10048 (KLR) (12 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

PETITION E214 OF 2023

LN MUGAMBI, J

AUGUST 12, 2024

BETWEEN

FW (SUING ON BEHALF OF AWW, A MINOR) PETITIONER

AND

**BOARD OF DIRECTORS OF ST HANNAH'S GIRLS
SCHOOL 1ST RESPONDENT**

ST HANNAH'S GIRLS SCHOOL 2ND RESPONDENT

JUDGMENT

Introduction

1. The petition dated 26th June 2023 is supported by the petitioner's affidavit in support sworn on even date. The petitioner seeks the following relief against the respondents:
 - i. A declaration that the respondents wanton and egregious conduct was unconstitutional and infringed on the petitioners right to education, right to fair administrative action, right to equality and freedom from discrimination, right to fair hearing, right to freedom of expression among other fundamental rights and freedoms.
 - ii. A permanent injunction restraining the respondents whether by themselves, their employees, servants or agents or any of them or otherwise from discontinuing, suspending or however otherwise excluding the petitioner from the respondents school and school related programmes.
 - iii. An order of against the respondents directing them forthwith and unconditionally supply the petitioner with the documents requested in the letter dated 21st June 2023 in line with Article 35 of *the Constitution*.



- iv. An order of mandamus do issue, reinstating the petitioner to the respondents school which should avail time and resources meant to allow the petitioner to catch up with her lost lessons as she is a candidate awaiting exams.
- v. An order of mandamus directing the respondents to enact rules and Regulations establishing dispute resolution mechanisms in accordance with the Right to fair administrative action under Article 47 of *the Constitution* and the *Basic Education Act*.
- vi. An order do issue directing the respondents whether by themselves their employee, servants or agents or otherwise from discriminating or victimizing the petitioner in any manner whatsoever following the reinstatement in school.
- vii. Exemplary damages and costs of incidental to this suit.
- viii. Costs of this suit
- ix. Any further relief the Honourable Court may deem just to grant.

Petitioners' Case

2. The petitioner depones that her daughter herein referred to as AWW was suspended from school on 29th May 2023. She avers that the Principal in the phone call that notified her of the suspension, declined to state the reason. This was until the next day when she was picked up from school by her brother. The claim is that the petitioner was accused of engaging in the unorthodox act of lesbianism.
3. The petitioner asserts that despite numerous follow – ups on the matter, the respondents failed to engage the petitioner or make known when AWW would report back to School. On 5th June 2023, the respondents summoned the petitioner and AWW to school. It is in this meeting that the reasons for her suspension were disclosed. At the end of the meeting the respondents stated that they would give further communication by 7th June 2023.
4. Soon after on 12th June 2023, the Principal informed the petitioner through a phone call that AWW had been suspended indefinitely. The petitioner accompanied by a few women, on 16th June 2023, went to the School to plead AWW case while also seeking the documents pertaining to the case.
5. She avers that in that meeting, the Principal informed that the decision had been made by the 1st respondent. Further that the Principal intimated that the evidence relied upon had not been sufficient and that the punishment did not match the disciplinary issue. The Principal nevertheless averred that she would issue her plea letter for re – consideration to the 1st respondent.
6. She brings this petition against the respondents as no disciplinary committee was formed to hear AWW's case before she was suspended indefinitely in line with constitutional dictates. She is also aggrieved that throughout the process, no official communication or documentation was issued to her relating to AWW's case. She also contends that as a result of the respondents' act, AWW has suffered mental and psychological trauma. For this reason, she brings this petition against the respondents for the alleged violation of Articles 27, 33, 47, 50 and 53 of *the Constitution*.

The Respondents' Case

7. In response, the respondents filed a reply to the petition dated 20th July 2023 essentially denying the petitioner's averments. They also filed replying affidavits by the Director, Violet Ndehi and the School Principal, Rachael Njoki. Both affidavits are undated.



1st Respondent's Case

8. Violet Ndehi in her affidavit states that the 2nd respondent is a school founded on Christian values and that upon admission, students are required to abide by the School Rules and Regulations. This commitment is made in a Declaration signed by the student and parents.
9. She depones that when the 1st respondent was notified of AWW's case, she convened a meeting that was held on 5th June 2023. In the meeting, the Principal informed that AWW had been suspended because of the inappropriate act committed on 28th May 2023 with a fellow student identified as SN. Moreover, the implicated students' statements were tabled in the meeting and the two teachers who reported the incident summoned to testify. In the end, she directed the Principal to conduct further investigations.
10. She asserts that the evidence gathered revealed that, on the fateful day the two students were caught in bed together. Further that the two students had been in the inappropriate relationship for two years. The students who witnessed the incident indicated that the two were in bed together hugging that day. Equally that the two would kiss each other goodnight each night and sometimes in the morning. The students added that the two would sometimes wait for everyone to leave the dormitory before making out. The Board upon evaluating this evidence resolved to suspend the two students indefinitely.
11. She depones that contrary to the petitioner's allegation on a lack of communication, she throughout engaged the petitioner and answered all the questions raised with regard to AWW's case. She avers further that AWW indiscipline was not novel and in fact upon contacting the Principal of Pioneer Girls High School where AWW had transferred from, affirmed the same.
12. It is asserted that the school has a duty to uphold discipline in the school and that the students' rights are not absolute. She as well takes issue with the petitioner secretly recording the Principal without her knowledge which is illegal. For these reasons, she alleges that the petition ought to be dismissed as the respondents did not violate the cited provisions of the law.

2nd Respondent's Case

13. Rachael Njoki, depones that on 28th May 2023, she received the report on AWW and SN's case from Teacher Clare and Elizabeth. As a result, she called the two to her office and interrogated them. Thereafter she directed the two to write their statements on the matter. They both denied being in the inappropriate relationship as alleged.
14. She also informed the 1st respondent of the matter before suspending the two students. In response, the 1st respondent called the two students and their parents for the meeting held on 5th June 2023. The meeting was attended by the School Director, the petitioner and Robert Nyongesa, SN's uncle in place of her parent.
15. After the 1st respondent made its final decision, it is alleged that the petitioner alongside other women came to her office pestering her with questions. She informs that she was not aware of the secret recording that was made by the petitioner that day. She urges the Court to expunge this recording from the record as it was obtained illegally.
16. She postulates that the decision to suspend the two students indefinitely was made to protect the school and other students from their indiscipline. It is emphasized that the law requires the respondents to enforce discipline in students and ensure a conducive environment for all students.



Parties' Submissions

Petitioner's Submissions

17. The petitioner through Kimani and Komu Advocates filed submissions dated 28th August 2023. Counsel highlighted two issues for discussion. First, whether the respondents accorded the petitioner a fair hearing and whether the respondent infringed the petitioner's right to education.
18. Counsel on the first issue submitted that the petitioner was not accorded a fair administrative action as guaranteed under Article 47 of Constitution. Counsel relying on Section 4 of the Fair Administrative Act argued that the respondents were required to issue prior and adequate notice before the adverse decision was made. Further that the petitioner was not afforded an opportunity to be heard or to have legal representation in the matter. The petitioner as well was not given a chance to cross examine or question the accusers. Additionally, the evidence and documentation used to indict AWW was not submitted to the petitioner when sought. Moreover, the petitioner was not given an opportunity to appeal the 1st respondent's decision.
19. Counsel further noted that the 1st respondent did not adduce as evidence the minutes of the meeting or proceedings by the School Board that made the decision to suspend AWW indefinitely. Equally that there was no official communication on in written form citing the grounds for their decision. This is said to have been in breach of Regulation 38 of the Basic Education Regulations, 2014 which requires that parents or guardian be issued with a letter from the head of the institution citing the reason for the child's suspension.
20. In support reliance was placed in Judicial Service Commission vs Mbalu Mutava & another (2014) eKLR where it was emphasized that:

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”
21. Like dependence was placed in Egal Mohamed Osman vs. Inspector General of Police & 3 Others (2015) eKLR.
22. On the second issue, Counsel submitted that AWW's right to education had been infringed by the respondents by their decision to suspend her indefinitely. Counsel relied on Article 53(1)(a) and (b) of *the Constitution* which guarantees that every child has a right to free and compulsory education. The respondents' acts are said to have been in breach of the this right and also did not consider her best interest as protected under Article 53(2) of *the Constitution* and enforced under the *Basic Education Act*.



Respondents' Submissions

23. On 20th September 2023, M.D. Mwaura Advocates filed submissions on behalf of the respondents. Counsel on the allegation of breach of the petitioner's right to fair administrative action, reminded that the respondents have an obligation to uphold discipline in line with the School Rules and Regulations.
24. In this case, Counsel noted that AWW act of indiscipline is incorrigible and also recognized as a criminal offense under Section 162 as read with Section 165 of the Penal Code. Furthermore, Counsel stated that indefinite suspension is a form of punishment provided in the [Basic Education Act](#).
25. In support reliance was placed in JNN (a minor) MNM suing as next friend vs Naisula Holdings Limited (2018) eKLR, where it was observed that:

“The school has a duty to uphold discipline and cases of indiscipline in schools should not be tolerated since other students in school are also entitled to protection from indiscipline by a few students. The court must always consider the ultimate value of instilling discipline in students.”
26. On the right to basic education, Counsel relied in PP (A Minor suing through his next friend, FW) vs Board of Management of (Particulars withheld) School (2017) eKLR where it was stated that:

“The right to education is not absolute and must always be weighed against the right of the school, other students and the public interest – especially maintenance of discipline in schools to facilitate a conducive learning environment for others students.”
27. Counsel further highlighted that there is a legal lacuna in the Basic Education Regulations, 2015. This is because the Regulations do not state and differentiate provisions that apply to public schools and private Learning institutions. Case in point is the definition of ‘head of institution’ which is ‘a teacher, head teacher, or principal appointed by the Teachers’ Service Commission to head an institution and exercising delegated authority of the Cabinet Secretary, Ministry of Education as the Accounting Officer for the institution’.
28. Essentially, it is argued that the Act applies generally to public institutions. According to Counsel the Regulations need to be clear so as to establish its breach and proof where the same is disputed. Nonetheless, Counsel concluded that the petitioner had not proved her case against the respondents.

Analysis and Determination

29. Having regard to the pleading and the parties' submissions, I decipher the following to be the issues for determination in this Petition:
 - i. Whether the petitioner's rights under Article 27, 33, 47, 50 and 53 of [the Constitution](#) were violated by the respondents; and
 - ii. Whether the petitioner is entitled to the reliefs sought.
30. The threshold for a constitution petition is specificity and precision. The Petitioner must not only allege violation and cite the constitutional rights violated but must also plead the manner in which



those rights were violated. That was the principle established in the celebrated case of Anarita Karimi Njeru vs Republic (1979) KLR 154 in which the Court stated:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

Whether the petitioner’s right to equality and freedom from discrimination was violated

31. The Petitioner pleaded that her right and fundamental freedom under Article 27 (1) & (2) of *the Constitution* was violated by the actions of the respondents. Article 27 provides:

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

32. Discussing this right in *Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) the Supreme Court observed as follows:

“(48) Black’s Law Dictionary, 10th Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination. Learned author Robert K Fullinwider; in *The Reverse Discrimination Controversy* 11-12 (1980) states; “The dictionary sense of discrimination is neutral while the current political use of the term is frequently non-neutral, pejorative. With both a neutral and a non-neutral use of the word having currently, the opportunity for confusion in arguments about racial discrimination is enormously multiplied. For some, it may be enough that a practice is called discriminatory for them to judge it wrong. Others may be mystified that the first group condemns the practice without further argument or inquiry. Many may be led to the false sense that they have actually made a moral argument by showing that the practice discriminates (distinguishes in favor of or against). The temptation is to move from X distinguishes in favor of or against to X discriminates to X is wrong without being aware of the equivocation involved.”

(49) Discrimination is also defined in the International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (No 111) as follows: -“For the purpose of this convention the term discrimination includes –any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; such other distinction exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers’ and workers’ organizations where such exist, and with other appropriate bodies –Any distinction, exclusion or preference in respect of a particular



job based on the inherent requirements thereof shall not be deemed to be discrimination.”

[50] In equal measure, we adopt the definition of discrimination in the High Court case of Peter K Waweru v Republic [2006] eKLR as follows: “Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”

33. With due respect, the Petitioner did not prove how the right of equality and freedom from discrimination was violated.

Fair Administrative Action and Freedom of Expression

34. The Petitioner alleged that the respondents did not give AWW the opportunity to defend herself against the serious allegations that it levelled her against that ended up ruining her reputation with derogatory accusations and eventually terminating her studies by suspending her indefinitely from the school.

35. Article 47 of *the Constitution* provides:

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
 - a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration.

36. The *Fair Administrative Action Act*, 2015 under Section 4 reiterates the above provisions. Section 4(1) & (2) and sub-section 3 & 4 provide as follows:

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;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to Section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
- h. attend proceedings, in person or in the company of an expert of his choice;
 - i. be heard;
 - j. cross-examine persons who give adverse evidence against him; and
 - k. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

37. Additionally, in a fair administrative action, Section 6 of the Act provides that a person has the right to request for reasons for the administrative action. This Section provides:

- 1. Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with Section 5.
- 2. The information referred to in subsection (1), may include—
 - a. the reasons for which the action was taken; and
 - b. any relevant documents relating to the matter.
- 3. The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.
- 4. Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.
- 5. An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.



38. Section 7(2) of the Act, further provides for grounds of review by the Court where a person is aggrieved by an administrative action. This sub - Section provides as follows:

“ A court or tribunal under subsection (1) may review an administrative action or decision, if–

- a. the person who made the decision–
 - i. was not authorized to do so by the empowering provision;
 - (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - (iv) was biased or may reasonably be suspected of bias; or
 - (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
- b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- c. the action or decision was procedurally unfair;
- d. the action or decision was materially influenced by an error of law;
- e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
- f. the administrator failed to take into account relevant considerations;
- g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
- h. the administrative action or decision was made in bad faith;
- i. the administrative action or decision is not rationally connected to–
 - (i) the purpose for which it was taken;
 - (ii) the purpose of the empowering provision;
 - (iii) the information before the administrator; or
 - (iv) the reasons given for it by the administrator;
- j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- k. the administrative action or decision is unreasonable;
- (l) the administrative action or decision is not proportionate to the interests or rights affected;
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- (n) the administrative action or decision is unfair; or



(o) the administrative action or decision is taken or made in abuse of power.

39. The significance of fair administrative action as a constitutional right was underscored in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1 where the Court held as follows:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see Section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

40. In *Ramseth vs. Collector of Dharbang*, AIR 155 PAT 345 the Court held as follows:

“There must be ever present to the mind of men the fact that our laws of procedure are grounded on the principle of Natural Justice which require that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings which affect their lives and property should not continue in their absence and that they should not be precluded from participating in such proceedings.”

41. The above principle was echoed by the Supreme Court of Canada in the case of *Baker vs. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 rendered itself thus:

“...The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions...”

42. The Petitioner further alleged that AWW was denied the right to fair hearing. Article 50 of [*the Constitution*](#) on the right to a fair hearing which provides thus:

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
2. Every accused person has the right to a fair trial...

43. In the context of the facts of this case, violation of Article 50 cannot apply in view of the reasoning by the Court of Appeal in *Judicial Service Commission vs Mbalu Mutava & another* (supra) highlighted



the fundamental difference between the right to a fair administrative action and the right to a fair hearing in the context of Article 50 of *the Constitution*.

“Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.

It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.

It was inappropriate therefore, for the 1st respondent’s counsel to invoke article 50(1) in this appeal particularly article 50(2) (k) which refers to right of an accused person to adduce and challenge evidence. The right to fair hearing under article 50 does not apply to the decision of the JSC under appeal. Rather, it would apply to proceedings in the tribunal appointed by the President.

The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in *Ridge v Baldwin* (supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.

(23) Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with “acting fairly”. The term “procedurally fair” used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action. In construing the contents and scope of fair administrative action, the justice of the common law will greatly influence the future development of the administrative law under *the Constitution*.

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

44. Given the above elucidation, in the context of facts relied upon by the Petitioner, a claim founded under Article 50 cannot succeed.



45. Having so determined, it is now necessary that I evaluate the facts relied by both the Petitioner and considered by respondent to determine if the rights of the Petitioner under Article 47 were in fact violated as alleged.
46. From the affidavit evidence filed by the Petitioner's mother, her daughter was unceremoniously suspended from school through a casual phone call made to her on 29th May, 2023 that informed her to go and pick her the following day. When she inquired what the issue was, she was informed that the information would be revealed after AWW had been picked from school. The following day she called the principal but still no information was forthcoming. Since she was unavailable and the father had also travelled, she sent her son Calvin Gitahi to pick AWW. The principal disclosed the allegations against her daughter by word of mouth and did not write anything down. Efforts to find out when the daughter would be allowed back to school went unanswered. On 5th June, 2023 they were invited to the school and in the meeting the Principal and the School Director, where the principal simply narrated the events of what had led to the suspension. They were then dismissed and informed that they would be communicated to on 7th June, 2023. The communication came on 12th June, 2023 indicating that her daughter had been indefinitely suspended.
47. The School Principal, Racheal Njoki in her undated affidavit deposed that on 28th May, 2023 she received a report from two teachers Teacher Claire and Teacher Elizabeth concerning two students who had found in bed together against school regulations. She summoned both girls AWW and S and had their record statements and in their statements they denied allegations made against them of having engaged in inappropriate relationship. She proceeded to oppose some Board Members. She then decided that this amounted to major offence against the school rules and the students had to be suspended. She later that evening called the parents to pick their daughters from school. On 5th June, the parents were invited to a meeting whose attendees were the School Director Mrs. Violet Ndeti, Mrs. Felistas Ngatia (petitioner's guardian/parent), Robert Nyongesa (parent to S), and an uncle to Shirleen and herself as the School Principal. She explained how the situation unfolded and the reason for suspension which was because of inappropriate relationship considered a major misconduct according to the school rules.
48. Even without further examination, the School Principals sworn evidence vindicates the Petitioner's account and gravely implicates the Respondents for totally overlooking the principles of fair administrative action. At no point was there any written reasons for the accusation or opportunity granted to the two girls to face their accusers. Article 47 (2) is categorical that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. The right to the education under Article 43 (1) (f) was threatened by the immediate suspension from the school yet the School Principal and subsequently, the Director dealt with matter in absolute disregard of very clear Constitution requirement. It is also apparent that no meaningful effort was made to give the two minors an opportunity to explain themselves after recording the initial statements even after they had denied culpability from the word go. In my view, the manner in which the Respondent conducted itself in dealing with the two students was completely prejudicial and unfair.
49. This case is closer to what the Court of Appeal was faced with in Kori Erick Ng'anga vs University of Nairobi (2019) eKLR when it observed thus:
- “...It is common ground that the appellant was only informed about the hearing by way of a telephone call. That mode/method of communication is a manifest expression that the respoent did not give due weight to the nature and extent of the disciplinary matter which



had the potential of expelling the appellant from the university, which was a drastic and radical outcome.”

This is exactly what happened in the instant case.

50. This was blatant violation of Constitutional and Statutory principles on the right to fair administrative action. The parents and the child were not treated fairly by the Respondent. A Court of law cannot condone indiscipline in schools and would uphold decisions of school management where due process is demonstrated to have been followed before the punitive action is taken. However, where such decisions are made devoid of any fairness, Courts must intervene to ensure sanity and protection of the learners. This position resonates well with the words of Nyarangi J in *Nyongesa & Others v Eagerton University* [1990] KLR 692 where he stated:

“...I shall now state that courts are very loathe to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side...”

51. Having regard to the foregoing, it is my finding that the rights of the Petitioner’s daughter to fair administrative action under Article 47 of *the Constitution* were violated by the Respondent in the manner she was treated being accused of disgraceful conduct in school in which and was not given a chance to defend herself despite her protestation of innocence.

52. I agree with Counsel for the Respondents submission the school has a duty to uphold discipline as was held in *JNN (a minor) MMM suing as Next Friend v Naisula Holdings Ltd* but there can be no excuse for not following the due process in enforcing that discipline by School administration which is not immune from the binding effect of our Constitution when it comes to observance of our Bill of Rights. Article 20 (1) States that the Bill of Rights applies to all law and binds all State Organs and all persons. In addition, Article 3 of *the Constitution* provides that ‘Every person has an obligation to respect, uphold and defend *the Constitution*.’

53. The Court cannot excuse arbitrariness on the part of School Management as this runs afoul to our constitutional principles. I would readily uphold decisions of school management on discipline but only if the school abides by due process that is espoused by our Constitution. Where the decision smacks of unfairness, it is the responsibility of the Court to uphold and protect the constitutional rights of the learner to fair administrative action under Article 47. This position reverberates well with the words of Nyarangi J in *Nyongesa & Others v Eagerton University* [1990] KLR 692 where he held thus:

“...I shall now state that courts are very loathe to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side...”

54. This Petition turns on this sole ground alone. The Respondents violated the rights of the minor Petitioner by the failure to observe her rights under Article 47 of *the Constitution*. The petition thus succeeds.



Reliefs

55. I have closely examined the reliefs sought in the Petition. Some of the reliefs sought may have been overtaken by events such the one seeking an order to reinstate the Petitioner back to St. Hannah’s Girls School. In the course of perusing this file to write this Judgement, the Court came across the fact at 18/10/2023 , it dealt with an application where the Petitioner sought to have AWW sit KCSE in the Respondent’s School which possibly signifies she is no longer in High School and making the order would thus be in vain.

56. This thus takes me to the next level, what would be the appropriate order to make having found as a fact that the right of the Petitioner to fair administrative action was violated. The power to grant appropriate relief under *the Constitution* is provided under Article 23 (3). The Petitioner claims exemplary damages and costs at prayer (g) of the Petition among others. Nevertheless the nature of a remedy in Constitutional Petitions is not to penalize the wrongdoer as a form of punishment. As was held in Edward Akongo Oyugi & 2 others Vs AG (2019) eKLR:

”...The payment of compensation in such cases is not to be understood, as it is generally understood in civil action for damages under private law but in the broader sense of providing relief by an order of making ‘monetary amends’ under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights or subjecting the citizen to acts which amount to infringement of *the Constitution*.”

57. Under Article 23 (3) compensation is listed among the reliefs a Court may grant for violation of a constitutional right.

58. The Court of Appeal addressed the manner of quantifying compensation in of constitutional matters in the case of Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR by stating as follows:

“...the South African Case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

59. Similarly in the case of Peter Mauki Kaijenja & 9 others vs Chief of the Defence Forces & another (2019) eKLR said:

“96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion... Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction, the court is



concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.”

60. In the present case, the Respondent’s arbitrary action after making serious allegations against AWW and eventually expelling her without giving her an opportunity to defend against the grave allegations that touched on her dignity was outrightly unfair and because the truth may forever remain unknown. Though she may have finished school, she lives with that scar as she was denied the chance to tell her side of the story by the arbitrary action of the Respondents.
61. This decision of this Court’s decision serves as only source of vindication.
62. The Petitioner’s prayed for exemplary damages but made no proposal of the exact amount. The Respondent did not make any comment on this particular relief. In *Onjira v University of Nairobi* (2019) eKLR the Court awarded Kshs.1,000,000 compensation and the case of *E.K. & 5 others v Registered Trustees of S.H.S* (2015) eKLR where the Court awarded compensation of Kshs.150,000/-.
63. I find that an award of Kshs. 250,000/- is fair and reasonable.
64. I also award him costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF AUGUST 2024.

L N MUGAMBI

JUDGE

