



RM (Suing Through his Mother and Next Friend JCM) v Jackson & another (Constitutional Petition 367 of 2018) [2023] KEHC 20823 (KLR) (Constitutional and Human Rights) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20823 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 367 OF 2018

LN MUGAMBI, J

JULY 28, 2023

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTIONS OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(1), 3(1), 10(2), 19(2), 20(1) & (2), 22(1), (2) (A), 23(1), 27(1) & (2), 28, 47(1) & (2), 53(1) & (2)

AND

IN THE MATTER OF: THE BREACH OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF: THE BASIC EDUCATION ACT NO. 13 OF 2013 SECTIONS 35 (2) & (3)

AND

IN THE MATTER OF: THE BASIC EDUCATION REGULATIONS 2015, REGULATION 38

BETWEEN

RM (SUING THROUGH HIS MOTHER AND NEXT FRIEND JCM) PETITIONER

AND

ROB JACKSON 1ST RESPONDENT
THE BOARD OF MANAGEMENT: BRAEBURN GARDEN ESTATE PRIMARY SCHOOL 2ND RESPONDENT



JUDGMENT

1. This suit was initiated through a petition dated 17th October, 2018. Subsequently, two amendments were made to the Petition on the 20th of March 2019 and the 28th February 2020.

The Petitioner's Case

2. The main grievance that led to the institution of this Petition was the expulsion/exclusion from Braeburn Garden Estate Primary School of the minor Petitioner on the 9th of May, 2017 for allegedly engaging in fist fight with a student at the school.
3. Through the affidavit of the Petitioner's next friend sworn on 28th February, 2020 in support of the Petition; She swore that the Petitioner was expelled from the School without convening a meeting with her or with the Petitioner hence her letter to dated 17th June, 2017 to the Respondent seeking an explanation for the unprocedural expulsion but was not favoured with any response.
4. As a result of the expulsion she had to hire a private tutor for the Petitioner before enrolling him at Braeburn Imani International School in Thika. She incurred expenses for the Petitioner's admission into the new school which included daily fuel costs of taking him to and from school and buying him a new school uniform. Her estimate on fuel cost for five weeks came to KShs. 115,000/- and new uniform expenses was KShs. 15,100.
5. Through an email dated 4th July, 2017; the Head Teacher of the new School, Mrs. Carmel O'Dalan informed the Petitioner's next friend about a bullying incident in which the Petitioner was implicated only to turn out later that it was a false accusation. The deponent blamed the false accusation on the 1st Respondent negative report of the Petitioner to the new School.
6. This necessitated another transfer of the Petitioner to Brookhouse School Runda due to discrimination faced at Braeburn Imani International School Thika and transport challenges. This further ruined her financially in form of additional school fees and new uniform.
7. The Petitioner alleged that the action of the 1st Respondent to declare him persona non grata at the school violated his right to human dignity. Further, that his right to compulsory basic education was also violated. That deciding against him without affording him an opportunity to defend himself was a violation of his right to fair administrative action by the 1st Respondent which was also contrary to Regulation 38 of the Basic Education Regulations 2015 that provides for mandatory suspension and expulsion procedure in schools.

The Petitioner thus prayed for the following reliefs:

- a. A declaration that his right to dignity of the person has been infringed;
- b. A declaration that his right to fair administrative action has been infringed;
- c. A declaration that his right to compulsory basic education has been infringed;
- d. An order for compensation and damages;
- e. An order directing the Respondents to compensate the Petitioner KShs. 115, 520/= being the daily cost of fuel from Braeburn Imani International School in Thika at the rate of KShs. 64 per kilometre as per the AA Mileage Rate Card 2018.



- f. An order directing the Respondents to compensate the Petitioner KShs. 15,100/= and KShs. 39,075/= being the cost of new school uniforms for Braeburn Imani International and Brookhouse School Runda respectively;
- g. An order directing the Respondents to compensate the Petitioner KShs. 732,500/= being the additional school fees paid to Brookhouse School Runda for the past 5 terms;
- h. An order directing the Respondents to compensate the Petitioner KShs. 2,051,000/= being the cost of future additional school fees to be paid to Brookhouse School Runda;
- i. costs of the amended Petition;
- j. interests at court rates on (d-i) above; and
- k. any other relief this Honourable Court may deem fit and just to grant the Petitioner.

The Respondents' Case

- 8. The Respondents filed a joint Replying Affidavit dated 12th November 2018 deposed by Mr. Andrew David Hill and Mr. Robert Andrew Jackson, who are the Managing Director and Headteacher of Braeburn Schools Limited, respectively.
- 9. They swore that the Petitioner was enrolled in their school in the academic year 2015/2016 and schooled until 9th May 2017. They stated that the Petitioner's behaviour at the school towards teachers and fellow students had on various occasions made orderly teaching impossible. That they kept the Petitioner posted of all these instances hence fair administrative action was taken in line with his best interests.
- 10. The Respondents denied that they expelled the Petitioner. They explained that they placed him in an alternative school, Braeburn Imani International School Thika as one of the ways of resolving the Petitioner's conduct. In an effort to assist the Petitioner they had put him on behavior change support to guide him improve as evidenced by a several emails sent from 1st November 2016 to 12th January 2017. That despite all these efforts, the Petitioner's conduct did not change. They asserted that the Petitioner and his mother were present following the incident that resulted in the Petitioner being internally suspended; that the mother was aware of his conduct and had in fact acknowledged that it was unacceptable.
- 11. The Respondents deposed further that through an email dated 22nd February 2017, they informed the Petitioner's mother that they had given him a final chance to improve on his behavior and class work. On 16th March, 2017; they signed the Individual Behavior Agreement between the school, Petitioner and his mother. The agreement incorporated the school rules, targets, expectations as well as sanctions ranging from suspension to exclusion from the school in the event of a breach of the agreement.
- 12. The Petitioner engaged in a fistfight with another student despite several warnings and being put on behavioral change support hence the decision to exclude him from the school pursuant to the letter of 9th May 2017.
- 13. That after receiving the demand letters from the Petitioner's advocates the parties exchanged several correspondences in an attempt to reach a final decision on the status of the Petitioner with respect to the school but they were unable to resolve.
- 14. In a Supplementary Affidavit dated 6th August 2019 was sworn by Mafrick Munene the Group Legal manager of the Braeburn Schools Limited, the Respondents deposed that although Braeburn



Garden Estate School and Braeburn Imani International School have common ownership, they are two separate institutions operating as separate businesses.

15. The Respondents prayed that this Petition be dismissed with costs.

Submissions

Petitioner's Submissions

16. The Petitioner's written submissions dated 29th March 2019 and 14th February 2021 raise the following issues for determination:
- Whether the Respondents breached the Petitioner's rights;
 - Whether the limitations of the Petitioner's rights were justifiable; and
 - What remedies the court can grant to the Petitioner.
17. While submitting on his first issue, the Petitioner relied on the case of *Rose Wangui Mambo & 2 others vs. Limuru Country Club & 14 others* [2014] eKLR, where the court emphasized that private institutions are not excluded from the constitutional duty to respect and uphold fundamental rights and freedoms. The Petitioner submitted that the Respondents had violated his right to basic education in his best interests as contemplated in Article 53(1) and (2) of *the Constitution* of Kenya. He relied on Section 7 of the *Children Act* and Article 28 of the United Nations Convention on the Rights of the Child as well and proceeded to submit that in line with the provisions of section 35 of the *Basic Education Act*, expulsion or exclusion results in depriving a child of his right to education. That the same was not an absolute right and there is a well-set out procedure on when it can be justifiably limited and relied on the cases of *G.N. vs. Chumani Secondary School Board of Management* [2014] eKLR and *E.K & 5 Others vs. The Registered Trustees of S.H.S* [2015] eKLR, where the courts stated that suspension or expulsion of a student may not breach his right to education if exercised in the manner prescribed by the *Basic Education Act*.
18. That even though the two aforementioned cases were decided before the enactment of the Basic Education Regulations, 2015, the Courts still alluded to a form of procedure to be taken by an educator to safeguard learners from arbitrary deprivation of their right to education. That Regulations 38, 39 and 40 of the Basic Education Regulations, 2015 clearly outline the procedure to be taken when expelling or excluding a student where emphasis is on affording an opportunity to the student to be heard and the decision to expel or exclude a learner solely lies on the County Education Board.
19. On violation of his right to dignity, the Petitioner submitted that the same was violated when he was falsely accused of being involved in a bullying incident at the school at Thika without conducting a proper investigation and that by the time the school realized that it was a mistake, the damage had already been done. The Petitioner blamed the negative attitude to the report shared by the 1st Respondent to their sister school. He contended that the two institutions are using different business names but in reality they were not legally separate entities as the Certificate of Incorporation is for Braeburn Schools Limited. He made reference to Order 30 Rule 9 of the Civil Procedure Rules 2010 on suits by or against firms and persons carrying on business in names other than their own and proceeded to rely on the case of *Juliana Akinyi Owino vs. Kiarie Show Stores* [2014] eKLR, where the court noted that a mere name registered under Chapter 489 of the Laws of Kenya does not clothe it with requisite juristic personality in the absence of the name of the owners...that the business name cannot sue or be sued in the absence of the proprietor.



20. The Petitioner submitted further that every person has a right to fair administrative action that is expeditious, lawful and procedurally fair as envisioned under Article 47 of *the Constitution* of Kenya, 2010. That Section 4(3) of the *Fair Administrative Action Act*, 2015 requires that where an administrative decision may affect the rights and fundamental freedoms of a person, the administrator should inform the person by giving adequate notice of the nature and reasons for the proposed administrative action. The person should also be afforded an opportunity to be heard. The Petitioner submitted that the letter dated 9th May 2017 neither met the requirements of this Act nor the Regulations of the *Basic Education Act*.
21. That the 1st Respondent acted un-procedurally, unilaterally and ultra vires to his authority and his actions were inconsistent with the rules of natural justice as clarified by the House of Lords in *Ridge vs. Baldwin* [1964] AC 40. He quoted the Court of Appeal decision of *Judicial Service Commission vs. Mbalu Mutawa & Another* [2015] eKLR where the court emphasized the importance of fair administrative action.
22. On whether the limitation of Petitioner’s right was justifiable, he submitted that the test for a justifiable limitation of rights and fundamental freedom is as set out by Article 24 of *the Constitution* of Kenya which provides that fundamental rights and freedoms can only be limited by law, to an extent that limitation is justifiable in an open democratic society based on human dignity, equality and freedom considering the nature of the right limited and the purpose of limitation. That the *Basic Education Act* 2015 and the Regulations thereunder require mandatory involvement of the State in expulsion or transfer of students. He urged the court to be guided by the words of Mativo J (as he then was) in the case of *R.W.T vs. N.S School* [2012] eKLR where he stated that;
- “... In a school environment, it is the welfare of all the children that must be taken into account rather than one deviant child who has a disciplinary problem. But there is also a responsibility to be borne in respect of that one child. one that flows from the human rights and fundamental freedoms of each individual. These cannot be subordinated to others merely because the interests of the other children are greater. There must be a good reason to do so consistent with the values and principles of *the Constitution*.”
23. On the remedies that can be granted by the court, the Petitioner submitted that Article 23 of *the Constitution* of Kenya empowers the Court to enforce fundamental rights and freedoms and grant appropriate reliefs including a declaration of right and damages. That the principles applicable to award of damages for constitutional violations under *the Constitution* were explained exhaustively by the Privy Council in the case of *Siewchand Ramanoop vs. The AG of T & T, PC Appeal No 13 of 2004* which was quoted with approval by the Court of Appeal in *Moses Onchiri vs. Kenya Ports Authority & 4 others* [2017] eKLR where the court held that:
- “...An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may need to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches...”



24. That further in the case of Douglas Moturi Nyairo vs. University of Nairobi (2018) eKLR, the Court awarded damages for the Respondent's violation of his right to information and that to fair administrative action. The Court held that:

“...award of damages for constitutional violations of an individual's right are reliefs under public law remedies lies within the discretion of a trial court and that such discretion is limited by what is 'appropriate and just' based on the facts and circumstances of each case...”

25. That the Petitioner is a minor and at the time of his expulsion he had only twelve years old and the Respondents' actions to expel him disrupted his education and caused him untold distress because he had to leave his friends behind during the transfers. The Respondents' averments that their relationship was contractual is not accurate. The Petitioner opines that the present suit raises constitutional issues on the right to basic education, right to human dignity and right to fair administrative action which cannot be dealt with in a normal suit. That remedies to a breach of contract do not cover compensation for violation of rights and fundamental freedoms.

26. The Petitioner submits that he has extensively demonstrated the costs incurred as a consequence of the actions by the Respondents and prayed that he receives a refund of the same. They include:

- a. Fuel costs of K.Shs. 115, 520;
- b. Uniform costs for Braeburn Imani at K.Shs. 15,100;
- c. Uniform costs for Brookhouse Runda at K.Shs. 39,075;
- d. School fees for 5 terms at Brookhouse Runda at K.Shs. 735,500; and
- e. School fees for 14 terms being the duration the Petitioner with at Brookhouse Runda at K.Shs. 2,051,000.

27. The Petitioner also proposed that an award of K.Shs. 6,000,000 would suffice as general damages to vindicate the Petitioner's violated rights and to also send a resounding message to private bodies that they are under a duty to uphold fundamental right and freedoms. He relied on the case of Eliud Wefwafwa Luucho & 3 Others vs. Attorney General (2017) eKLR where Mativo J (as he then was) stated that:

“The end does not justify the means. No matter how noble and worthy admiration the purpose of an act, but if the means to be employed in accomplishing it is simply irreconcilable with constitutional parameter, then it cannot still be allowed. The Court cannot just turn a blind eye and simply let it pass. It will continue to uphold *the Constitution* and its enshrined principles.”

28. The Petitioner urged this Court to grant the remedies sought in his Petition.

The Respondents' Submissions

29. The Respondents' submissions are dated 26th March 2021. The Respondent submit that the Petitioner was involved in a fight with a fellow student leading to his exclusion from Braeburn Garden Estate Primary School. That the exclusion was warranted because the Petition was the aggressor. The Respondents state that the decision to immediately exclude the Petitioner was in the interests of the safety of the entire student body given that the petitioner's aggression had place in peril, the peaceful and safe environment necessary and conducive to educational institutions. That the exclusion became a necessary step in the exercise of their statutory obligations to provide premises that meet occupational



health and safety regulations to ensure the safety of the pupils and to uphold the constitutional right of each of the children within the student body to be protected from all forms of violence.

30. They submitted that Regulations 39,40 and 41 of the Basic Education Regulations 2015 do not apply as Braeburn Garden Estate Primary School falls within the meaning of a private school as per section 2 of the [Basic Education Act](#) 2015. That the school is established under the Act as a private school thereby the 2nd Respondent does not qualify as a statutory board of management as established by the subsidiary regulations to the Act. Therefore, they urged the court to find that the regulations relied upon by the Petitioner had no application in the instant case.
31. Further, that section 51 of the [Basic Education Act](#) points out that receiving education in a private institution is a discretionary right exercised by the prospective parents or guardians of a student seeking education. Further it was their submission that through the common ownership structure with Braeburn Imani International School, they were able to mitigate any disruption to the Petitioner's right to education after the decision to exclude him was made. Through their offer of an alternative school, they averred that the Petitioner continued to exercise his right to basic education.
32. With regards to the allegations of the Respondents sharing information with the alternative school, the Respondents submitted that they were independent institutions acting and managed separately as sworn by Mafrick Munene in his affidavit in reply dated 9th October 2020. Further, they submitted that the two institutions had distinct business registration certificates although with a common owner. In view of this, they averred that they could not respond to the incident that took place in July 2017 at Braeburn Imani International school where the Petitioner was falsely accused as alleged by the Petitioner's mother.
33. With respect to the damages and reliefs sought by the petitioner, it was their submission that a clear distinction needs to be made between compensatory damages for violation of the petitioner's constitutional rights to fair administrative action and to basic education arising from the exclusion decision on the one part; and the claim by the petitioner's mother for special damages for expenses she incurred, for private tuition, transport mileage costs and tuition fees and uniform costs for two different institutions Braeburn Imani International School and Brookhouse School, on the other part. That these were personal expenses and the Respondents cannot be subjected to cater for the same. They relied on the case of *Edward Akong'o Chugi & 2 others vs. Attorney General* [2019] eKLR where Mativo J while commenting on the question of awarding damages for constitutional violations held thus:

“Arriving at the award of damages is not an exact science. I am aware that no monetary sum can really erase the scarring 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...”

34. That in another case of *John Muruge Mbogo vs. Chief of the Kenya Defence Forces & another* [2018] eKLR, Mwira J. stated thus:

“When the court is called upon to consider the issue reliefs to grant in cases of violation is actually proved, it can only award compensation. However, it is always important to bear in mind that human rights are invaluable, are for enjoyment and not violation. It is also true that there can be no sufficient redress for violation of human rights and fundamental freedoms through monetary compensation. This is because Courts cannot



place a commercial value on violated human rights. They merely impose some monetary compensation as a consequence of infringement of human rights and fundamental freedoms which is intended to deter future violations, but not repair the already violated rights and fundamental freedom. Through the act of compensation, Courts send a message to the would-be violators of human rights that Courts will not let go of such violations without some form of reparation.”

35. The Respondents submit that if the petitioner’s parents wished to claim for lost expenses, they ought to do so in a separate suit based on a contractual relationship between the parties because the right to enroll a student at a private institution was discretionary. The Respondents made reference to Paragraph 11 of the affidavit in support of the amended Petition sworn on 20th March 2019, where the Petitioner’s mother acknowledged that Brookhouse International School was ‘beyond her budget for school’ and stated that this could not form a basis for compensation for violation of the Petitioner’s right to basic education.
36. The Respondent urged this Court not to award any damages but submitted that in the event the court found that there was a breach of right to fair administrative action, then it should be guided by the principles set out in the case of *John Wairimu Mathenge (Petitioning on behalf of the Estate of Adam Mathenge Wangombe) vs. Attorney_ General* [2017] eKLR where the Court held that:
- “An award for compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice...”
37. The Respondent submitted that given the circumstances of the instant case, an award of K.Shs. 100,000 would be adequate recompense to the Petitioner and relied on the case of *Kimunai Ole Kimeywa & 5 others vs. Joseph Motari Mosigisi (the then District Commissioner, Rongai District) & 3 others*.

Analysis and Determination

38. Keeping in mind the foregoing, and having reviewed the parties’ pleadings and respective written submissions, the following issues arise for determination:
- a. Whether the 2nd Respondent as a private education institution is governed by the [*Basic Education Act*](#);
 - b. Whether the Petitioner’s right to a fair administrative action was violated by the Respondents;
 - c. Whether the Petitioner’s right to education was violated by the Respondents;
 - d. Whether the Petitioner is entitled to the damages sought; and
 - e. Who bears the costs of this petition?
39. The Respondent submitted that the provisions of the Regulations 39, 40 and 41 of the Basic Education Regulations, 2015 do not apply to them for the reason that the 2nd Respondent is a private school within the meaning of the [*Basic Education Act*](#). That it has no Statutory Board of Management as contemplated by the Act. They contended that the Act applies to public basic education institutions that have statutory boards and it is to them that the Regulations apply.



40. The Petitioner submits however that the 2nd Respondent, like any other basic education institution is regulated by the [Basic Education Act](#) and the resultant Regulations and it cannot therefore purport to exclude itself from the application of those Regulations.
41. The Section 2 of the Act defines “institution of basic education and training” as:
- “a public or private institution or facility used wholly or partly, regularly or periodically for conducting basic education and training and includes a school, a tuition facility, an educational centre, an academy, a research institution, a school correctional facility or a borstal institution”
42. From the above definition, it is crystal clear that both private and public institutions fall under the purview of the [Basic Education Act](#).
43. Further, the preamble of the [Basic Education Act](#), No. 14 of 2013 states that, it is:
- “An act of Parliament to give effect to Article 53 of [the Constitution](#) and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes.”
44. Part VII of the Act is titled: Private Educational Institutions and at sections 49 to 52 provides for the establishment and registration of private schools, the rights for the private schools and the duties of the schools.
45. There is no provision either in the Act or the regulations to the Act that exempts private schools from the applications of both the Act and the Regulations.
46. Concerning whether the Petitioner’s right to fair administrative action was violated; Article 47 of [the Constitution](#) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 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.
47. This Article is amplified by the [Fair Administrative Action Act](#), 2015. Section 3 of the [Fair Administrative Action Act](#), 2015 states that the Act applies to all state and non-state agencies, including any person exercising administrative authority; performing a judicial or quasi-judicial function under [the Constitution](#) or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.
48. The importance of fair administrative action was discussed in the case *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1, at paragraphs 135 -136 where interpreting a similar provision in section 33 of the South African Constitution, the Court held:
- “... 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...”

49. The Petitioner’s case was that he was not accorded a fair process when he was discontinued from the 2nd Respondent school. He submitted that the 1st Respondent did not exhaust all the reasonable and procedurally fair corrective measures to address the Petitioner’s behavior before writing the suspension letter that terminated his studies at the school. The right of a person to be heard was discussed in the case of *Judicial Service Commission vs. Mbalu Mutava & Another* [2015] eKLR, Civil Appeal 52 of 2014, where the Court of Appeal held 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.”

50. The Respondents denied the allegations and asserted that the Petitioner was accorded several opportunities where the issues were discussed and even chances offered to assist him mend his ways and only when it became clear that there was no positive change that the Petitioner was excluded from the institution.

51. From the Respondents’ replying affidavit, there are documented instances that I consider germane in this inquiry. On the 1st of November, 2016 the Respondents’ Simon Moffet invited the Petitioner’s mother to the school to discuss the Petitioner’s actions and unwillingness to change. The other emails that follow confirm that a meeting was held between the Petitioner’s mother and the Respondents on the 2nd of November, 2016. According to the email sent to the Petitioner’s mother on the 3rd of November, 2016 whose contents she confirmed, the meeting produced positive results and targets were set for the Petitioner, which targets the Petitioner’s mother undertook to see to it that they were achieved.

52. An email sent to the Petitioner’s teachers from the Respondents on 12th of January, 2017, the Respondents advised the teachers to focus on his positives and support him in order to help him achieve his targets. All issues the Petitioner faced were to be reported to the said Simon Moffet and not on the behaviour log.

53. On the 26th of January, 2017 the Petitioner was involved in an incident at the school and his mother was informed of the same and a meeting arranged to discuss the same. As a result, the parties agreed to internally suspend the Petitioner for a day.



54. On the 21st of February, 2017, the Petitioner’s mother reported his absence to the Respondents and urged them to take steps to be firm with him. A section of the email reads thus:

“This may not be school policy or maybe the school adhering to ‘rights’ and all. But I have given you permission for... We cannot afford to be lenient with him.”

55. The Respondents acknowledged the email from the Petitioner’s mother via return e-mail on the 22nd of February, 2017 and outlined the issues they had discussed with the Petitioner on behalf of his mother. On the 16th of March, 2017, the Respondents informed the Petitioner’s parents of a new behavioural intervention for some of the pupils and encouraged them to sign the same together with Petitioner and they signed on the same day. The signed Individual Behaviour Agreement is part of the Respondents’ documents.

56. The Petitioner was excluded from the school on the 9th March, 2017 and in the letter of even date, the explanation for his exclusion was given to his parents. The Respondents attached several handwritten excerpts from other pupils detailing the incident that the Petitioner was involved in. The Respondents aver that this was a disciplinary case and the Petitioner had been in several incidents.

57. In the case of R.W.T (suing as next friend and grandmother of BGN) vs. S.N.S School Nairobi Petition No. 290 of 2013 [2012] eKLR, the Court observed as follows:

“I am aware that discipline in school is a delicate and sensitive matter both for the parents and the school authority. Both institutions, the parents and school, bear special responsibility to nurture the child by providing an environment where his potential can be realized so that he becomes a responsible citizen. Article 53 of our Constitution now recognizes the general principle that the best interests of the children is the paramount consideration in any matter concerning children...[I]n a school environment, it is the welfare of all the children that must be taken into account rather than one deviant child who has a disciplinary problem. But there is also a responsibility to be borne in respect of that one child, one that flows from the human rights and fundamental freedoms of each individual. These cannot be subordinated to others merely because the interests of the other children are greater. There must be a good reason to do so consistent with the values and principles of *the Constitution*. I am also alive to the fact that this court is not a disciplinary institution for children. The role of the court when moved under the provisions of Article 22 is to enforce fundamental rights and freedoms provided in the Bill of Rights. In taking this responsibility I must weigh all these facts and circumstances and consider what is in the best interest of the child.”

58. Nyarangi J.A., in *Nyongesa and Others v Egerton University College* [1990] KLR 692 where he stated that:

“Having thus stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath 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.”

59. Going by the evidence I have reviewed above; it is crystal clear to me that the Respondents complied with the Constitutional requirements of fair administrative action. The Petitioner and his parents were continuously posted of all accusations levelled against the Petitioner and opportunity was always



granted to discuss and explore a joint solution between the school, the Petitioner and his mother but all these efforts did not bear any tangible progress in correcting the conduct of the Petitioner hence the decision to expel him from the school.

60. *The Constitution* of Kenya, at Article 43 (1) (f) provides that every person has a right to education and Article 53 (1) (b) provides that every child has a right to free and compulsory basic education, which is the third issue for deliberation herein. Various international instruments including: The Universal Declaration on Human Rights (UDHR), UN Convention on the Rights of the Child (UNCRC), African Charter on Human and People’s Rights (ACHPR) and the African Charter on Rights and Welfare of the Child (ACRWC) embrace education as a basic human right and advocate for protecting the right to education. By virtue of Article 2(6) of *the Constitution*, these instruments now constitute part of the laws of Kenya.

61. Nevertheless, the right to education is not absolute and learners are subject to the rules and regulations of education institutions they attend. The Petitioner was obligated to comply with the rules and regulations of the 2nd Respondent and any other education institution that he is likely to attend. The Court in the case of H O O (a child suing through his father and next friend) P O O vs. Board of Management N. School & 2 others [2018] eKLR held that:

“It is also trite law that the right to education is not absolute, but is subject to the rules and regulations governing studies/education in a given institution.

In the instant case, the 1st respondent’s case was that it had rules which every student had to comply with as a condition for their studies in the said school. I therefore find that having found that the petitioner was guilty of breach of the school rules after subjecting him to the requisite disciplinary process, the 1st respondent was justified in excluding him from studying in its school and that such exclusion, cannot be said to amount to denial of right of education.”

62. Regulation 32 of the Basic Education Regulations, 2015 outlines incidents when a learner can be considered indisciplined. It provides thus:

A learner shall be deemed to be individually indisciplined if involved in:

- a. physical fights;
- b. bullying of other learners;
- c. stealing;
- d. playing truancy;
- e. cheating in examinations;
- f. abusing teachers or other persons in authority;
- g. defiance of lawful instructions;
- h. drug trafficking or substance abuse; or
- i. any other conduct categorized as indiscipline by the Board of Management.

63. The Petitioner breached the 2nd Respondent’s regulations on various occasions; his mother was always brought to speed about the various infractions he was involved in. As a consequence, he even signed



a contract committing to act in accordance with the school rules and with ultimate sanction being clearly defined to him, that he will be liable for expulsion from the school if he failed to abide.

64. I am persuaded that the Petitioner was treated fairly in every respect.
65. The Petitioner claims damages. The same cannot issue as the rights of the Petitioner were not violated and the school was within its rights to discontinue his studies on account of indiscipline that had become impossible to control. Moreover, Section 51 of the *Basic Education Act* provides that any person who requires basic education may attend a private school. It is thus optional to attend a private school. The Petitioner's parents opted to enroll him in a private school after his exclusion from the 2nd Respondent. They cannot therefore seek compensation for exercising that option.
66. The Petitioner also levelled allegations against Braeburn Imani International School which school he attended after leaving the 2nd Respondent. He did not join them in his Petition but alleged that the management of the 2nd Respondent and that of Braeburn Imani International School was one. The Respondents contested that assertion and insisted that each school is registered differently and has distinct management. The Respondents produced the certificates of registration for the two institutions. My view is that they are different legal persons. They cannot be held jointly and severally liable for actions of any one of them.
67. I thus find that Amended Petition lacks merit and is hereby dismissed.
68. Each party shall bear their own costs of the petition.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 28TH DAY OF JULY, 2023

L.N MUGAMBI

JUDGE

