



**LNM (A minor suing through mother and next friend SWK) v Winpride Girls Secondary School
(Constitutional Petition E001 of 2022) [2023] KEHC 21043 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E001 OF 2022**

LM NJUGUNA, J

JULY 26, 2023

**IN THE MATTER ARTICLES 2(1), 3(1), 19, 21(1), 25(A), 28, 29,
43(2), AND 53 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE PREAMBLE AND ARTICLES 7, 9, 10, 16, 17,
INTERNATIONAL COVENANTS ON CIVIL AND POLITICAL RIGHTS**

AND

**IN THE MATTER OF THE PREAMBLE, ARTICLE 1, 2, 3, 4, 5, 6,
7 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

AND

**IN THE MATTER OF NEGLIGENCE AND CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS**

BETWEEN

**LNM (A MINOR SUING THROUGH MOTHER AND NEXT FRIEND
SWK) PETITIONER**

AND

WINPRIDE GIRLS SECONDARY SCHOOL RESPONDENT

JUDGMENT

1. The petitioner who is a minor suing through her mother and next friend filed petition dated 03rd March 2022 on the grounds set out on the face of it, seeking for the following orders:
 - a. That a declaration be issued that the respondent’s actions are in violation of Articles 28,29,43(1)(a), 43(2), 53(1)(c)(d)(e) and 53(2) of *the Constitution*,



by callously detaining and depriving emergency medical treatment to the petitioner while resorting to brutal and unprofessional medical procedures;

- b. That special damages for costs of medical treatment incurred and those accruing into the future be awarded;
 - c. That general damages be awarded;
 - d. That exemplary/ vindictory, aggrieved and/or punitive damages for arbitrary, highhanded and oppressive conduct of the respondent be awarded;
 - e. That the court grant interest on all monetary awards from the date of the judgment; and
 - f. Any other order that the court deem fit.
2. The petitioner was a student at the respondent school since 11th January 2019. It was her case that on 22nd May 2021 she was assaulted with hot water by a fellow student leading her to suffer burns on her right leg. That in the absence of a dispenser within the school premises, the petitioner was held in a dormitory where the school matron attended to the burn by pouring maize flour on it severally.
 3. She stated that it was not until 28th May 2021 when she was taken to a medical facility for proper medical attention and only after her fellow students had intervened in her plea for help. That she was attended to at Muthithi Health Center and at New Degree Hospital where she was diagnosed with cellulitis infection and treated, although she was forbidden by the respondent to reach out to her parent. She averred that the mishandling of treatment of the burn led to sepsis and cellulitis and that this is the respondent's fault. She further claimed medical expenses at Kshs. 300,000/=.
 4. The respondent filed a replying affidavit stating that the incident which happened on 22nd May 2021 involving the petitioner was purely accidental and that as soon as it occurred, the matron of the respondent who is well trained administered first aid, to the petitioner. It is the respondent's case that the petitioner was promptly taken to Muthithi Health Center and not New Degree Hospital as alleged. That as soon as the petitioner had been treated, the respondent reached out to the petitioner's mother and informed her of the incident who went to the school and collected the petitioner from there. That when the mother of the petitioner went to pick her up from the school, she (the petitioner) resisted and wanted to stay and complete her examinations.
 5. The respondent denies that the petitioner was locked up in a dormitory all by herself after the injury and avers that the respondent did not do anything to her that would amount to infringement of her constitutional rights. That allegations that the petitioner suffered cellulitis infections are an exaggeration of the truth because the petitioner left the school when the burn wounds were already healing. It was their response that the petitioner's parent was not denied information but that the respondent relayed the information at the right time. The respondent took issue with the P3 form which was obtained at a private hospital terming the details therein as exaggerated. That the special damages claim by the petitioner have not been proved.
 6. The court directed that the matter be disposed of by way of written submissions and both parties complied.
 7. In the petitioner's submissions, she alleged negligence on the part of the respondent in denying her emergency medical treatment hence infringing on her constitutional right. She argued that if the matron at the respondent school is well trained in first aid as they have alleged, then she was expected to exercise a greater duty of care than what was exhibited. On this argument, she relied on the case of



- Pope John Paul Hospital & Another Baby Kasozi* (1974) EA 22. In support of the petitioner's case for compensation she relied on the case of *Dendy Vs. University of Witwatersrand, Johannesburg & Others* (2016) 1LRC 291 and *Peters Vs. Marksman & Another* (2001) 1 LRC citing *Fuller Vs. AG of Jamaica* (civil appeal 91/1995). The petitioner further reiterated that her rights under Articles 2(1), 3(1), 19, 21(1), 25(a), 28, 29, 43(2), and 53 of the Constitution of Kenya, 2010 were violated and that punitive damages of Kshs. 22,000,000/= would suffice.
8. The respondent in its submissions stated that the petitioner has failed to prove any of the violations alleged as required by section 107 of the Evidence Act. It further argues that the supporting affidavit to the petition was sworn by the mother of the petitioner who was not present when the incident happened and therefore amounts to hearsay. In support of this argument they relied on the case of CNK (suing on behalf of PKN (minor)) Vs. Emily Kulola & 4 Others (2022) eKLR and further stated that the petitioner was not a child of tender years and she was well able to file a statement. It is its averment that the petitioner claimed lapse in time between when the incident happened and when medical attention was sought, but the same was never proved in evidence. That the medical report given at the point of generating the P3 form and the one from the hospital that attended to the petitioner at first, shows inconsistencies. It is its argument that the petitioner has exaggerated the facts of the case by stating that the burn was worse than it actually was according to the last medical report done at Kenyatta National Hospital dated 2nd March 2023. On the issue of negligence, the respondent maintained that the matron at the school is well trained in first aid.
 9. The respondent further stated that the petitioner does not deserve the damages claimed as the same were not proven. On this they relied on the cases of Peter Ndegwa Kiai T/A Pema Wines & Spirits Vs. Attorney General & 2 others (civil Appeal 243 of 2017) (2021) KECA 328 (KLR) and Peter M Kariuki v. Attorney General (2014) eKLR. In response to the petitioner's claim for aggravated damages, they cited Standard Newspapers Limited & Another Vs. Attorney General & 4 Others (2013) eKLR and Abdulhamid Ebrahim Ahmed Vs. Municipal Council of Mombasa (2004) eKLR where the court held that such damages can only be awarded where the damages are at large or cannot be limited to pecuniary loss.
 10. From the foregoing arguments and submissions presented, there is no doubt that the petitioner indeed suffered a burn on the right leg. However, this court is left with the question as to whether the issues raised herein can be addressed through a constitutional petition.
 11. The matter at hand is a tortuous claim of negligence which ought to be heard as a civil case instituted by way of a plaint, following which the evidence adduced would be considered. A civil case would also provide room for application of the necessary quantum, thereby putting this matter to rest once and for all. In filing this case as a constitutional petition, it seems as though the petitioner demands this court to sit as a trial court of first instance and interrogate the evidence. This would be inappropriate given that a petition is limited to breach of constitutional rights. In my view, the claim should have been commenced under Civil Procedure Act by way of a plaint.
 12. Article 50(1) states:

“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.”
 13. This article does not intend to be interpreted to mean that claimants can approach any court with any claim in disregard of statutory provisions and guidelines. In a similar matter, the court in the case of



Stephen Saitoti Kapaiku Vs Cocacola Sabco Nairobi Bottlers Limited & another Petition 338 of 2012
the court held:

“.....His principal claim is really a tortious claim for damages, and ultimately, the court will be called upon to decide, on the basis of the evidence tendered before it, whether there is a legitimate claim for damages against the respondents. It may well be that there was a failure by the respondents to take adequate care to protect the constitutional rights of consumers by ensuring that their products did not contain impurities, but that, in my view, is a secondary issue which a civil court, in determining the principal issue, also has jurisdiction to determine.....”

14. In my view the petition is wrongly before this court. The same is struck out with costs to the respondent.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

