



**SWM (Suing as a Guardian Ad Litem and Friend of GWW (Minor)
v Gatura Secondary School & 6 others (Constitutional Petition
33 of 2018) [2023] KEHC 25857 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CONSTITUTIONAL PETITION 33 OF 2018
J WAKIAGA, J
NOVEMBER 30, 2023**

BETWEEN

**SWM (SUING AS A GUARDIAN AD LITEM AND FRIEND OF GWW
(MINOR) PETITIONER**

AND

**GATURA SECONDARY SCHOOL 1ST RESPONDENT
ANGELINA NDUNGE MAVEKE 2ND RESPONDENT
JULIUS GIKONYO GATERU 3RD RESPONDENT
BOARD OF MANAGEMENT GITURA SEC. SCHOOL 4TH RESPONDENT
THE CABINET SECRETARY IN CHARGE OF EDUCATION ... 5TH
RESPONDENT
THE INSPECTOR GENERAL OF POLICE 6TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 7TH RESPONDENT**

JUDGMENT

Introduction

1. By a petition dated 13th April 2018, the Petitioner stated that she was enrolled in the 1st Respondent’s school in January 2015 in form one to undertake her Secondary Education and in 2018 she was enrolled for her KCSE as a finalist student at a time when she had been appointed as the compound prefect in charge of the dormitory.
2. On the morning of 2nd February 2018, while she was dispensing her leadership as class prefect a student reported to her that she had smelt paraffin near her assigned area of duty and when she inspected the



- said area, she found a small container with liquid which smelt like paraffin, which she confiscated with the intention of reporting to the 3rd Respondent after class but before doing so locked the said container inside her box. Before the appointed time, the 3rd Respondent accosted her and asked to be shown where the container was which she complied with.
3. The 2nd and the 3rd Respondents made the Petitioner to kneel down for some hours while intimidating her into admitting that she had brought the petrol to school in preparation to leading a strike and to burn the school and without seeking any explanation or allowing her to be heard took her to Kahuro Police Station where she was detained in a cell without blanket or mattress or warm clothing and or sanitary towels and her inhaler noting that she was asthmatic.
 4. She was denied bail for two days without her parents being called and or notified and or taking into account her best interest. On 2nd February her father went to school and was denied the right to speak to her on the ground that the minor was in the hands of the police who he should now deal with. Upon the intervention of the Sub-County Director of Education, the 2nd Respondent admitted that she had not accorded the minor the right to be heard and issued her with a letter of suspension and invitation to appear before the disciplinary committee of the board on the 19th of February.
 5. It was contended that the minor was not supplied with the any evidence and did not disclose the particulars of misconduct. The minor was further prosecuted at the Magistrate's Court in Muranga being Criminal Case No 191 of 2018 arising from the same facts and was therefore treated in a discriminatory manner.
 6. Upon the disciplinary hearing, the minor was expelled from the school, having been forced to either admit being the ring leader of the botched strike or be expelled. The said hearing was not free and fair as the minor was not informed of the allegations against her and or afforded the right to cross examine the witnesses who were relied upon to reach the verdict.
 7. As a result of the actions of the 3rd Respondent the minor was subjected to emotional breakdown, mental and psychological torture, loss of time, loss of friends and disrepute.
 8. The Petitioner sought the following orders:
 - a. Unconditional readmission.
 - b. Replacement and immediate admission to another school of the same or better standards.
 - c. Quashing of the criminal proceedings in Criminal Case No 191 of 2018.
 - d. Release of reading and personal items belonging to the minor in the custody of the Respondents.
 - e. Order restraining the Respondents from any acts of intimidation harassing or instilling physical or psychological harm on the minor.
 - f. An order for compensation to the minor for violation of her fundamental human rights and for injuries sustained.
 9. The petition was supported by an affidavit sworn by the Petitioner in which he deposed that the Respondents were negligent in executing their statutory mandate by failing to supervise and take care of the children to ensure that they don't bring countermands to school. It was contended that the Respondents inflicted physical pain to the minor and expelled her from school despite the fact that she was not a repeat offender and had never had any incidence of indiscipline in school and without exploring other correctional procedures.



10. It was deposed that the Respondents were negligent in the way they handled the whole issue.
11. Contemporaneous with the petition, the Petitioner also took out a notice of motion under certificate of urgency wherein she sought the interim Orders.
12. In response to the petition and the Notice of Motion, the 1st Respondent filed a replying affidavit through the Chair of the Board of Management in which it was deposed that they called for a meeting on 19th February 2018 where each of the affected students were afforded an opportunity in accordance to Section 14 of the Education Act.
13. On 23rd July 2018, the 1st, 2nd, 3rd and 4th Respondents filed reply to the petition in which it was stated that the minor was not expelled but suspended having given no satisfactory explanation on being found with paraffin in her box in the midst of an impending strike alert and that in consultation with the County Director of Education, they were advised to hand over the matter to the police, upon which they had no control on how the matter was handled thereafter.
14. By a Ruling thereon dated 10th day of August 2018 the Court made the following orders:
 - i) The prayer to compel the Cabinet Secretary for Education (5th Respondent) to get the minor a placement in another school is dismissed.
 - ii) The prayer to compel the 2nd, 3rd and 4th Respondents to unconditionally re-admit the student is dismissed.
 - iii) The prayer for an order to stay the prosecution of the minor in Murang'a Chief Magistrate's Criminal Case Number 191 of 2018 Republic Vs Grace Wairimu is disallowed.
 - iv) The minor shall however be re-admitted to Gitura Secondary School for the remainder of the third term only on week days as a day scholar. She will be uniformed and must submit to a search upon entry and exit from the school. As a further condition, the minor shall not venture in the boarding areas or school dormitories.
 - v) The 1st to 4th Respondents shall ensure that the minor is granted an opportunity to sit for her final year national examinations at the school in October 2018.
 - vi) The school shall release all personal items, materials and books to the minor.
 - vii) The minor will remain subject to the school regulations, discipline and code of conduct.
 - viii) The Applicant (guardian) shall pay the school fees for third term less boarding fees.
 - ix) The remainder of the petition shall be allocated a hearing date on priority
 - x) In the interests of justice I make no order on costs.

Directions

15. On the 27th March 2019, the Court (Kimondo J) made the following orders as regards the hearing of this petition.
 - a. The petition against the 7th Respondent (The DPP) is marked as withdrawn with no order as to cost.
 - b. The parties shall file and exchange brief skeleton submissions on the petition.



Submissions

16. On behalf of the Petitioner it was submitted that the minor was not accorded right to fair administrative action as provided for under Article 47 of *the Constitution* and that the process by which the Respondents expelled the minor from the school were not expeditious, efficient lawful reasonable and procedurally fair as her input in the case to decide on her culpability in the strike were never taken into consideration and neither did the procedure under regulation 37 to 39 of the Basic Education regulation 2015 complied with.
17. It was submitted that the board created its own punishment which was unknown to law by failing to hear the same on the grounds that they were waiting for the decision on the criminal matter and further failed to refer the matter to the County Director of Education as required under the regulations and that the suspension or expulsion of a minor student could not interfere with or breach right to education as was stated in the case of In the matter of ETN (suing as the next of friend of ETK (minor) [2014] eKLR .
18. It was contended that the minors' right to basic education in addition to the rights under Article 53 (b) of *the Constitution* and Section 4 of the Education Act which provides for counselling as a mode of punishment were violated as the Respondents failed to consider the best interest of the minor in support of which reference was made to the cases of RWT v N S School [2012] eKLR where the Court held that there is a responsibility that flows from the human rights of each individual which cannot be subordinated merely because the interest of other children are greater.
19. It was contended that the minor herein was a candidate with only few months remaining to the national examination, was arrested and detained for two days without being provided with extra sanitary towels or other feminine hygiene products, denied bail, study materials, prevented from conducting her science practical, denied access to school, causing her to relocate further subjecting her to undue hardship thereby violating her rights to education.
20. The Petitioner therefore sought for damages for infringements of her rights and it was proposed that a global sum of Kshs.4,000,000 would be reasonable together with cost.
21. On behalf of the 1st, 2nd, 3rd and 4th Respondents, it was submitted that the minor was accorded the right to fair and just administrative process as set out under the Education Act, was given a chance to state her case on 19th February 2018 and that her right to education in terms of Article 43(f) should not be exercised in a manner that risk the right to life to the other students and must be exercised with limitations.
22. It was contended that the school was placed with the responsibility to ensuring that the students were in a safe environment and that the Respondent acted fairly and followed the procedure so the Petitioner could not claim that her rights had been violated, having not explained the circumstance under which she was found with petrol in school. As was stated in Kimengich Arap Namba v The Principal Sacho High School in Misc. App No 502 of 2008 where the Court stated that once a person had been accorded fair hearing and principles of natural justice followed, there cannot be a breach of the law. This it was contended was followed in Fredrick Majimbo & Another v Principal Kianda School [2014] eKLR

Analysis And Determination.

23. For record purposes, the directions on the disposal of this petition by way of written submission were not issued by this Court. It is also clear that all the other prayers were granted by Kimondo J, who heard



- the interlocutory application and granted the Orders stated herein above and that the only prayer that remained to be determined is whether the minor was accorded fair hearing and if the notice given was sufficient and if her rights were violated, is she entitled to an award of damages and if so how much.
24. The first point of call in this petition would be for the Court to determine the legal principles for proof of violation of rights and the assessment of damages. Put differently is whether the Court can determine the issues of violation and damages arising therefrom by way of written submission's on contested facts.
 25. It is not in dispute that the facts forming the grave man of this petition were disputed and contested by way of affidavits, which were not tested before the Court by way of cross examination and as it stands there remains a doubt in the mind of the Court whether or not the Petitioner was accorded the right to fair hearing. The Court at the end of the day was not told what became of the Criminal Court the outcome of which should have had a bearing to this petition.
 26. The legal principles for the determination of the violation of rights were set out by the Court in Calvin Oune Magare & 18 others v DPP & 4 Others [2022] eKLR the effect that the parties must lead oral evidence to prove their case and as regards award of damages, the party claiming must formally prove the claim as was stated in Dickson Ambunye Chebuye v NPS & Another [2020] eKLR to the extent that calling an action a constitutional suit did not provide the parties with a short cut in the cases of this nature and that the burden of proving breach and damages payable for the same is always with the Petitioner.
 27. The Petitioner was under evidentiary burden to prove the violation of the alleged constitutional rights and upon prove thereof the damages suffered so as to be entitled to an award. In this case, the Petitioner offered no evidence in support of her claim for four million as was stated in the case of Mbutia Macharia v Annah Mutua Ndwiga [2017] eKLR.
 28. The conduct of constitutional petitions as was stated in Kweri v Beehive Media Limited [2023] KEHC 2684(KLR) is governed by various laws including the *evidence Act* and at Section 107 thereof, whoever desires a Court to give judgement as to any legal right or liability must prove those facts. From the contested materials placed before the Court, I am afraid the Petitioner failed to prove her case. In this holding I find support in the decision of this Court in Rao V Boared Of Mangement St. Charles Lwanga High School Kandara & Another. Muranga High Court constituted Petition No.1A of 2022 where the Court said that the issue of compensation is a matter of evidence which cannot be determined by way of written submissions or contested affidavits.
 29. The only logical conclusion is to dismiss the Petition for want of proof which I hereby do.
 30. Cost is at the discretion of the Court and having noted that this claim was in respect of allegation of violation of fundamental rights, each party shall bear their own cost. And it is ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 30th*DAY OF NOVEMBER 2023.

J. WAKIAGA

JUDGE

