



**AS (Minor, Suing thorough next Friend) LK v Principal, KHS & 2 others
(Constitutional Petition 360 of 2019) [2022] KEHC 15480 (KLR)
(Constitutional and Human Rights) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 360 OF 2019**

HI ONG'UDI, J

NOVEMBER 18, 2022

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 10, 22, 23, 24, 25,
35, 46, 47, 50, 53, 55, 165 AND 258 OF THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF LIMITATION OF RIGHTS OF A CHILD TO EDUCATION
AND TRAINING, INFORMATION, AND FAIR ADMINISTRATIVE ACTION**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF ACCESS TO INFORMATION ACT NO. 31 OF 2015

AND

IN THE MATTER OF BASIC EDUCATION ACT NO. 14 OF 2013

AND

**IN THE MATTER OF CHILDREN'S ACT NO. 8 OF 2001 AND IN
THE MATTER OF CONSUMER PROTECTION ACT 46 OF 2012**

BETWEEN

AS (MINOR, SUING THOROUGH NEXT FRIEND) LK PETITIONER

AND

PRINCIPAL, KHS 1ST RESPONDENT

BOARD OF GOVERNORS, KHS 2ND RESPONDENT

PERMANENT SECRETARY, MINISTRY OF EDUCATION .. 3RD RESPONDENT



JUDGMENT

1. The Petitioner who was then a minor filed this petition dated September 9, 2019 filed through her next friend. The petition was filed under Articles 10, 22, 23, 24, 25, 35, 46, 47, 50, 53, 55, 165 & 258 of the Constitution of Kenya, Fair Administrative Action Act No 4 of 2015, Access to Information Act No 31 of 2015, Basic Education Act No 14 of 2013, Children's Act No 8 of 2001 and Consumer Protection Act No 46 of 2012. She claims that as a child and duly registered as a candidate she was indefinitely suspended from KHS from May 28, 2019 to the date of the petition. That there was no cause of reason given despite various requests for such information.
2. She therefore vide this petition seeks the following prayers:
 - (i) A declaratory order that the actions of the respondents contravene the provisions of the Constitution under Articles 10, 22, 23, 24, 25, 35, 46, 47, 50, 53, 55, 232 and 258 and thus contravened the rights and freedoms of the petitioner.
 - (ii) A mandatory injunction directing the respondents to:
 - (a) Admit the petitioner to KHS and return her to the class that she was in prior to her arbitrary dismissal
 - (b) Conduct remedial sessions to bring her up to speed with classes and recovery of the syllabus that she missed; and
 - (c) Administer all continuous Assessment Tests and examinations to the petitioner that she missed.
 - (iii) A prohibitory injunction proscribing the 1st and 2nd respondents from:
 - (a) Suspending, ejecting, banishing or expelling the petitioner from KHS without proper administrative processes and a fair hearing; and
 - (b) Discriminating against the petitioner on any ground or reason, or treating her at any degree of disadvantage.
 - (iv) A mandatory injunction to compel the 3rd respondent to act firmly and decisively to commence discriminatory action against the 1st respondent for this gross violation of the petitioner's rights.
 - (v) An order of structural interdict, for this honourable Court to supervise the integration of the petitioner in the school, and compliance with its orders.
 - (vi) Any other relief the court deems fit to grant.
 - (vii) Costs of this application be borne by the respondents.

The petitioner's case

3. The petitioner's case is premised on the petition and the supporting affidavit of LK (next friend) sworn on September 9, 2019. She has averred that the petitioner was suspended indefinitely from KHS as already pleaded above. That the school only furnished them with a leave-out-chit (LK-A) with no other



form of communication explaining their action. She adds that no hearing was conducted to give the petitioner an opportunity to express herself on any issues.

4. She deponed that the respondents action was a violation of the 3rd respondent's guidelines on interruption of a student's studies in the middle of an academic year. It also went against the provisions of Articles 10, 24-25, 35, 46 – 47 & 50 of the Constitution. Further that despite correspondence (LK-B) to the respondents on the issue there was no response. She deponed that the respondents' actions amounted to a denial of the petitioner's right to education and an infringement on her constitutional rights.
5. She averred that she had been invited by the 1st respondent to take over the role of teachers by administering examinations, invigilating and marking for the petitioner at home. This to her is a violation of Article 46 on Consumer rights, as the teachers had absconded their duties.
6. She accuses the 3rd respondent of abdicating his role under Article 232 in regard to protecting learners and parents against losses and injury occasioned by the arbitrary actions of the 1st & 2nd respondents.
7. It's her contention that the actions by the respondents have diminished the petitioner's chances of succeeding in life. He deponed that the petitioner was actually chased from school hence violating her right to education.

The 1st & 2nd respondents' case

8. The 1st & 2nd respondents filed a replying affidavit by Mrs FM the principal of the 1st respondent and secretary to the 2nd respondent. She confirmed that the petitioner was admitted to KHS on February 12, 2016 (FM1) and she committed herself to abiding by the school rules and regulations (FM2). She denied that the petitioner was a candidate for the year 2019. A list of the registered candidates was availed (FM 3). That the school management decided to suspend the petitioner due to breach of the set out school rules and regulations.
9. She averred that the petitioner committed a lot of thefts from other students in the school. This ranged from theft of exercise books, school uniform, sweaters, perfumes, lotions etc. She admitted the said thefts in writing (FM 4 & 5). She was therefore in breach of Rule No 13 of the school rules and regulations.
10. She further averred that personal hygiene was not attended to by the petitioner which caused an inconvenience to her dormitory mates and class mates. Even washing her clothes was an issue. (See FM 6 & 7 for confirmation). This was breach of Rule 6 of the school rules. Her academic performance was also wanting and this could be seen from FM 8, 9, 10 – 11.
11. She deponed that several meetings were held between the parties to try and assist the petitioner to reform to no avail. She annexed a copy of minutes of one such meeting held on March 23, 2018 (FM 12). The victims of the petitioners actions were threatening to take unspecified actions against her since there had been no restitution of her actions, i.e material damage, theft by monetary and / or physical compensation. See FM 13. These threats were communicated to the petitioners parents / guardians to no avail (FM 14).
12. She was to report back to school on June 17, 2019 after the suspension. She however failed to report back when schools re-opened for the third term. It is her contention that the rights and interests of the petitioner are not absolute, and must be subject to rules and regulations. She denied any violation of the petitioner's rights, as alleged in the petition. That re-admission of the petitioner would not be the best way of addressing the underlying problem of lack of parental care and guidance that she is experiencing.



13. Her recommendation at the time was for the petitioner to be subjected to professional counseling and thereafter enrollment in a day school for her parents to be involved in her daily routine.
14. The 3rd respondent did not participate in these proceedings.

The petitioner's submissions.

15. The petitioner's submissions dated October 2, 2019 were filed by Akusala company advocates, in which he gave a brief history of the case. He contends that the petitioner was chased away from school by the 1st respondent and despite efforts by her mother LK to have her re-admitted she was not. Counsel submitted raising four (4) issues for determination namely:
 - (a) Whether the petitioner was suspended from the school;
 - (b) Whether the indefinite suspension was administratively competent;
 - (c) Whether the respondents violated the Constitution and the law as against the petitioner; and
 - (d) Whether the prayers sought in the petition can be granted.
16. Counsel submitted that the petitioner was suspended from May 28, 2019 – June 17, 2019. However after the June 17, 2019 she was not allowed back to the school's precincts, and she remained out of school for ninety (90) days. He refers to LK as the petitioner's mother, who is a single mother. She did all she could to have her re-admitted in school in vain. The same was only accomplished following a court order. He blames the 1st respondent for keeping the petitioner out of school and the 3rd respondent for condoning and perpetuating the violation to the petitioner's rights.
17. On specific violation of the petitioners rights he reiterated what is pleaded in the petition. He cited the preamble to the Constitution of Kenya and submitted that the enforcer of the law must follow the law while enforcing it. Further that state organs have a duty to adhere to the values enshrined in the Constitution. He referred to the case of *Crispus Karanja Njogu vs Attorney General HCC Criminal Appeal No 39 of 2000* where the Court stated:

' It is trite concept that the Constitution is the supreme law and its provisions ought to be interpreted broadly or liberally and not in a pedantic way i.e restrictive way – constitutional provisions must be read to give values and aspirations of the people and the Court must appreciate throughout that the Constitution, of necessity has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document.'
18. Its counsel's submission that the right to be heard before a contrary administrative action is performed is a non-derogable right, and reasons for the decision must also be given. He refers to section 12 of the Fair Administrative Actions Act, and contends that the failure to accord the petitioner a hearing and even reasons for their decision was a breach of this requirement.
19. It is counsel's submission that the respondents owed the petitioner a legitimate expectation, which was flouted. That the issue of provision of a paid counsellor was the duty of the school and not the parent. He reiterated that the petitioner had made out a case to deserve all the prayers sought.



The 1st & 2nd respondents' submissions

20. The said submissions dated May 18, 2020 were filed by Kiarie, Kariuki & Associates. Counsel set out a summary of the petitioner's case. He identified the following as the issues for determination.
- (a) Whether the 1st and 2nd respondents' violated the specific rights enumerated by the petitioner.
 - (b) Whether the petitioner is deserving of the orders sought.
21. It's counsel's submission that the decision to suspend the petitioner by the school management was well founded as explained by the 1st respondent. He referred to the cases of
- (i) *JK (suing on behalf of CK) & another [2014] eKLR* and
 - (ii) *Fredrick Majimbo & another v Principal, Kianda School Secondary Section HC Petition no 281 of 2012* where it was held that Courts should be reluctant in interfering with the decisions of learning institutions.
22. Counsel submitted that the reason for the suspension was indiscipline as shown in the 'Leave out Chit' dated May 28, 2019 with a return date of June 17, 2019. She did not appear before the Board of Management on June 17, 2019 but was eventually re-admitted on July 17, 2019. He argues that the petitioner was persistently stealing and defied lawful, instructions amounting to indiscipline. He cited Regulations 33 & 38 of the [Basic Education Act](#) Regulations L N No 39 of 2015 as his support for the decision taken. Her readmission was in less than 60 days after the suspension. He also relied on the case of *RCK (a child suing through her mother & next friend KRC) v KAL [2014] eKLR*, in support.
23. He submitted further that the petitioner's right to fair administrative action was not violated / infringed or denied. Same to the right to information & fair hearing both enumerated under Articles 35 & 50 of the [Constitution](#).
24. Counsel further submitted that there was no proof of any violation of Articles 43, 46 & 53 of the [Constitution](#), and there had been no attempt at all to prove any mental distress in respect of the petitioner. See *AM v Premier Academy [2017] eKLR*. It is counsel's argument that the right to education may be limited as provided for under Article 24 of the [Constitution](#) & Regulations 33 – 40 of the [Basic Education Act](#) Regulations 2015.
25. He relied on the case of *HOO (a child suing through his father and next friend) POO v Board of Management N School & 2 others [2018] eKLR* where the Court stated:
- ' 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.'
26. Counsel also argued that the petitioner's rights are as paramount as those of her fellow classmates, yet she infringed on them. Her behavior infringed on the rights of others, which should not be over looked.



27. On legitimate expectation it was counsel's submission that the Petitioner's legitimate expectation was that the right to education would be provided. It is her behavior that led to the disciplinary process that was conducted. Reliance was placed on *Keroche Breweries Limited & 6 others v Attorney General & 10 others [2016] eKLR*, in support of this argument. The process applied to her is the same as that applied to all other students who conducted themselves in such a manner. It is therefore counsel's submission that the petitioner is not entitled to reliefs sought.

Analysis & determination.

28. I have carefully considered the pleadings herein, parties' submissions, cited authorities and the law. I find the following to be the issues for determination:

- (i) Whether the petitioner has made out a case of violation of the various rights complained of.
- (ii) Whether the petitioner is entitled to the reliefs sought in the petition.

Issue No (i). Whether the petitioner has made out a case of violation of the various rights complained of.

29. There is no dispute that the petitioner at the time of filing this petition was a minor and a form three 3 student at KHS. The petition was filed at the registry on September 10, 2019. There is also no dispute that the petitioner was suspended and not expelled on May 27, 2019. She was to report back to school on June 17, 2019. According to the petitioner this was never the case and she was only readmitted after this court issued orders to that effect on September 13, 2019.

30. There is further no dispute that the Ministry of Education has put in place Rules & Regulations to govern the conduct of pupils / students & teachers in the schools. The *Basic Education Act* Regulations speak to all this. Regulations 33 provides:

' 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.'

31. Further Regulation 38 provides:

' If the head of institution is of the opinion that-

- (a) The acts of indiscipline have persisted in spite of the warnings or corrective measures taken under these regulations; and
- (b) If the act of indiscipline is likely to threaten the safety of the other learners in the institution, the head of the institution shall issue the learner, with a suspension letter addressed to the parent or guardian indicating the nature of the indiscipline and specifying the date the learner, accompanied by the parent or guardian is required to appear before the Board of management of the Institution.'

32. What is the purpose of the Rules and Regulations? They are to assist the teachers and students/ pupils in maintaining discipline, good conduct, moral behavior in the institution. In her replying affidavit



the 1st respondent laid out the reasons that led to the petitioner's suspension which was not indefinite. Annexure 'LKA' shows she was sent home for indiscipline on May 28, 2019 at 3.20p.m and was to come back on June 17, 2019. All the accusations levelled against the petitioner were supported by documentary evidence namely FM 4 – 11. The victims of the petitioner's misconduct were fellow students. The misconduct was confirmed by the class teacher (FM 9) and a house matron (FM 7). The reports range from 2016 – 2019. From the record the petitioner ought to have been in Form 4 in 2019 if not for her dismal academic performance. All these reports have not been challenged.

33. From the above it is a clear that the petitioner's was a real case of indiscipline. The issue is whether the 1st & 2nd respondents handled the matter according to the laid down process. In the supporting affidavit by LK sworn on September 9, 2019 at paragraph 3 the deponent states:

' That, the petitioner, a child and a duly registered candidate, has been indefinitely suspended from KHS form May 28, 2019 to date, without cause or reason, despite various requests for such information.'

34. It has been shown that the petitioner was not a registered candidate in 2019 (FM 3). Secondly as at the time of filing this suit on September 10, 2019 the petitioner was not out of school.

A document marked FM 14 dated July 17, 2019 addressed to the 1st respondent and signed by:

- (i) LPK ID No XXXX.
- (ii) JLK ID No XXXX and
- (iii) EK ID No XXXX

Confirms conditional readmission on the said date.

35. The 1st respondent in her replying affidavit at paragraph 22 averred that the petitioner did not report back to school as expected after the suspension on June 17, 2019. These averments have not been rebutted at all by the petitioner. Mr Akusala advocate in his submissions appeared to explain so much about the happenings which was in actual fact evidence. With all due respect to counsel that was not his duty, since such evidence should have come out through a supplementary or further affidavit by the petitioner's next friend which is not the case here.
36. Further in his submissions counsel states that the petitioner's rights were limited since she was forcefully arrested without any reasonable justification. Again there is no evidence to support this submission.
37. The petitioner had on March 23, 2018 (FM 12) gone through a disciplinary process and the issues of thefts and want of doing class work were the subject. She accepted her mistakes and apologized. The same was undertaken on July 17, 2019 (FM 14). The petitioner's mother and next friend cannot therefore claim that neither she nor the petitioner knew the reason for the suspension. They were well aware. Infact the petitioners parents having known the challenges the petitioner was going through ought to have worked hand in hand with the school administration to assist the petitioner and not to pamper her.
38. In line with the decision in Diana Kethi Kilonzo & another I wish to add that the KHS offered the petitioner what it could. The 1st respondent's teachers and the matron did what they could within their means. They could not study and perform academically on behalf of the petitioner. Secondly the habit of stealing other students items and being generally dirty was something the petitioner should have worked on. Being subjected to the disciplinary measures by the school did not seem to work and



the suspension should have given her parents an opportunity to seriously deal and address the issue. They seem not to have done so.

39. Upon serious scrutiny of the pleadings and submissions I am not satisfied that the petitioner has proved violation of any of the cited constitutional rights. The 1st and 2nd respondents had very good reasons to suspend her. They thereafter re-admitted her. Had the Court been told the truth it would not have issued the orders it did on September 13, 2019, since the petitioner had been readmitted on July 17, 2019.
40. It must also be noted that the petitioner was one of the students at the KHS and the school would not give her special treatment of pampering her in the face of all that she was doing. Doing so in the name of constitutional rights would have amounted to favouritism / discrimination which would clearly have affected the other students given what the petitioner had been doing to them. I therefore do not find any fault with the actions taken by the 1st and 2nd respondents against the petitioner.

Issue No (ii). Whether the petitioner is entitled to the orders sought in the petition.

41. The above being the position I do not find the petitioner deserving of any of the reliefs sought namely:
- (i) Declaratory orders: There was absolutely no violation of the petitioner's constitutional rights.
 - (ii) Mandatory injunction: Overtaken by events.
 - (iii) A prohibitory injunction: The suspension was only for a limited period and she was thereafter re-admitted. She was never expelled or discriminated against. The prohibitory injunction can't issue.
 - (iv) A mandatory injunction: No case was established for issuance of such an order.
 - (v) An order of structural interdict; This has been overtaken by events. The petitioner is no longer in the school.
42. The upshot is that the petition lacks merit and is dismissed. Having been a matter involving a minor and school child I order each party to bear its own costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF NOVEMBER, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

