



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E13 OF 2021

IN THE MATTER OF

ARTICLES 19, 20, 21, 22, 258 AND 259(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER

ARTICLES 28, 29(c) – (f) AND 53(1) (D) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

THE CHILDREN’S ACT NO. 8 OF 2001, LAWS OF KENYA

AND

IN THE MATTER OF

THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

AND

IN THE MATTER OF

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

BETWEEN

DWK (Suing as mother and next

friend to Minor EJK [EJK]1ST PETITIONER

IWK (Suing as grandmother and

next friend to Minor EJK).....2ND PETITIONER

VERSUS

BOARD OF MANAGEMENT AJ

PRIMARY SCHOOL.....1ST RESPONDENT

FRANK ONDIMU MURUNGA.....2ND RESPONDENT

NEVIL ASENEKA.....3RD RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioners through their Petition dated 29th March 2021 seek the following reliefs:-

a) A declaration that the actions and omissions of the 1st, 2nd and 3rd Respondents jointly and severally in relation to the punishment meted on the Minor EJK on 10th March 2021 at [Particulars Withheld] Primary School violate the fundamental rights and freedoms of the Minor and their families under Articles 28, 29 (c), (d), (e) and f) and 53(1) (d).

b) A permanent order restraining the 1st, 2nd and 3rd Respondents jointly and severally from interfering with, insulting, intimidating, harassing, threatening, verbally and physically abusing the petitioners, the minor namely EJK and all minors within and without the premises of [Particulars Withheld] Primary School.

c) An award of damages do issue, directing that the 1st, 2nd and 3rd Respondents compensate the petitioners as shall submit to the Respondents their losses and quantifiable damages within 30 days of the making of this order for the losses incurred by them from March 10th 2021.

d) The 1st Petitioner's child subject of these proceedings EJK be compensated by way of damages for the physical and psychological suffering inflicted on him on 10th March 2021, in breach of his rights against such physical and psychological torture as enshrined in the Constitution of Kenya and the international legal instruments that Kenya ratified in furtherance of the right to be protected from abuse, neglect, all forms of violence, inhuman treatment and punishment of the said minor, and Kenya's school –enrolled children in general.

e) This Honourable Court be pleased to issue such further or other order(s) as it may deem just and expedient for the ends of justice.

THE PETITIONERS' CASE

2. The 1st and 2nd Petitioners are mother and grandmother of the minor EJK who have brought this suit on his behalf and the members of the public. Their case as presented in the Petition, supporting affidavits sworn on 29th March 2021, and supplementary affidavits sworn 16th July on 2021 and 5th August 2021 is that, on or before 10th March 2021 the 2nd and 3rd Respondents administered inhumane corporal punishment on the minor EJK through caning him mercilessly and ruthlessly while discharging their official duties for and within the premises of the 1st Respondent causing him serious injuries and psychological torture contrary to **Articles 28, 29 (c), (d), (e), (f) and 53 (1) (d) of the Constitution of Kenya.**

3. Despite the matter being reported to Soweto Police Station the 2nd and 3rd Respondents were not charged with any criminal charges as the 1st Petitioner was lured into withdrawing the charges without the knowledge of the 2nd Petitioner.

4. In their further affidavits, they aver that the 2nd Respondent has not shown he has the authority to act on behalf of the 1st and 3rd Respondent. They further aver that the minor has always been in the custody of the 2nd Petitioner and therefore she has the moral authority to be part of his well-being.

5. The Petitioners contend that the constitutional violations are of a continuous nature as the minor has not been able to go back to school on account of the fear that he will be killed by the 1st and 3rd Respondents. The minor is said to have been experiencing nightmares mentioning words to the effect "Teacher Frank nisamehe" and "Teacher Frank usiniue" which necessitated a visit to Shalom Hospital on 12th April, 2021 where the doctor referred the minor for C.T. scan and psychological counselling.

6. Further, the minor has not been able to secure another school as a result of the clearance letter issued by the 1st Respondent hence denying him his right to education contrary to **Article 43 of the Constitution.**

RESPONDENTS' CASE

7. The Respondents filed replying affidavits sworn by Franklin Ondimu Murunga on 13th May 2021 and 3rd July 2021. He deposes that this court lacks jurisdiction as the 1st Petitioner withdrew the complaint from Kayole Soweto Police Station in OB No.xxxxx. He further contended, as such, the case has collapsed for want of cause and that Alternative Dispute Resolution was pursued and it did achieve its desired end.

8. It also Respondents contention that they acted fairly with the consent of the 1st Petitioner and that the violations raised are not justified.

SUBMISSIONS

9. The Petitioners filed submissions dated 12th August 2021.

10. The Respondents elected to rely on paragraphs 3, 4 & 5 of the replying affidavit sworn on 13th May 2021 and the response to the Petition dated 3rd July 2021. The response to the petition is however not on record and despite requests from Court on 25th November 2021 via phone call from the Court Assistant one Lovendar and email from the Deputy Registrar, Hon Njeri Thuku, the same was not availed.

ANALYSIS AND DETERMINATION

11. Having carefully considered the petition, the Respondents' response, and parties' submissions and from the same, I find that the following issues arise for determination: -

a) Whether this Court has the jurisdiction to hear and determine this Petition.

b) Whether the Petitioners rights were violated.

A. WHETHER THIS COURT HAS THE JURISDICTION TO HEAR AND DETERMINE THIS PETITION.

12. The Respondents challenges the jurisdiction of this court on the ground that the criminal charges against them were withdrawn by the 1st Petitioner and therefore the case should collapse for want of cause. They further argue that they had employed alternative dispute resolution which had achieved its purposes.

13. The Petitioners seek reliance on various Articles of the Constitution and urge that by virtue of **Articles 165 (1), (3) (b), 23 and 50 of the Constitution** this Court has jurisdiction to hear and determine this Petition. They seek that the allegation by the respondents that the matter was solved through Alternative Dispute Resolution be dismissed. Reliance is placed on **MAA v ABS [2018] eKLR; KKPM vs SWW [2019] eKLR; and MJC v LAC & another [2020] eKLR**. The Petitioners additionally argue that this was not in the best interest of the minor as envisaged under **Article 53 (2) of the Constitution** and echoed in **Sections 4 (2), (3) and (4) of the Children's Act**. Further, relying on **W.J & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR** and **HOO (a child suing through his father and next friend) POO v Board of Management N School & 2 others [2018] eKLR**. It is Petitioners averment that criminal proceedings or any other proceeding cannot deter the Petitioners from approaching the Constitutional Court seeking appropriate reliefs.

14. Looking at the provisions of **Article 22 (2) (a) of the Constitution** it is clear that it entitles a person acting on behalf of another person who cannot act in their own name to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. **Article 23 (1)** provides that the High Court has jurisdiction in accordance with **Article 165 (3) (b) of the Constitution** to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights **Article 165(3)(b)** provides that:-

“165 (3) Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;”

15. Although the 1st Respondent has attached a letter showing that the charges were withdrawn by the 1st Petitioner, they have not adduced evidence to the effect that the Petitioners are estopped from instituting a suit against them in this court either by consent or an arbitral award or by virtue of the doctrine of *res judicata*. Further the provisions of **Article 53(2) of the Constitution** and whose sentiments are echoed in **Section 4 (2), (3) and (4) of the Children's Act** provides that a child's best interest is of paramount importance in every matter concerning the child. The withdrawing of the charges by the 1st Petitioner in an intended criminal charge does not in any way affect the rights of the minor and was not in his best interest. This Court's jurisdiction is clearly provided for in the Constitution as indicated herein above and cannot be withdrawn by virtue of the withdrawal of the intended criminal prosecution of the Respondents in a Police Station. I find that this Court's authority to uphold and enforce the Bill of Rights is not subject to any other provisions other than the clear provisions as provided in the Constitution. In view of provision of **Article 22, 23, and 165 of the Constitution** I am satisfied that this Court has jurisdiction to hear and determine the instant Petition. I decline to accept the Respondents contention that this Court lacks jurisdiction in this matter.

B. WHETHER THE PETITIONERS' RIGHTS WERE VIOLATED

16. The Petitioners contend that the act of mercilessly and ruthlessly caning the minor by the 2nd and 3rd Respondents coupled with threats, intimidation and malicious letter written by the 1st respondent to the 2nd petitioner was a clear demonstration of violence, torture, corporal punishment, cruel, inhuman, or degrading manner.

17. The Petitioners in support placed reliance in **Articles 2 (1), 2(4), 3, 29, 53 of the Constitution; pg. 11 of the committee on the Rights of the Child issued in its 42nd session, (General Comment No. 8 (2006); Black's Law Dictionary, 10th edition; Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment; Greek Case 1969 Y. B. Eur. Conv. On H.R. 186 (Eur. Comm'n on HR' the case of Suresh vs Canada (Minister of Citizenship and Immigration 2002 SCC1; and Michael Maina Kamami & another v Attorney General [2019] eKLR**.

18. It is argued by Petitioners that the well-being of the minor was not protected and the Respondents in their actions and omission failed to uphold, respect, and defend the Constitution. Reliance is placed in *JWI v Standard Group Limited & Another [2013] eKLR* on human dignity and, *H.W. Karunapala and Others v J.P.K Siriwardhana and Others (SC/ FR/97/2017)*, on Corporal punishment where the court discussed international conventions and treaties; **Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee on the Rights of the Child, Articles, 19, 28(2) and 37 United Nations Convention on the Rights of the Child (UNCRC)**. They also relied on **Sections 4, 18(1) and 22 of the Children's Act No. 8 of 2001**.

19. It is further argued that Respondents violated **Circular No. 6/2017 on Safety of Learners in Learning Institutions, Section 36(1) of the Basic Education Act 2013, Section 4 of the Teachers Service Act 2012, Code of Regulations for Teachers (2015)** and the **Teachers Service Commissions Code of Conduct and Ethics (2015)**.

20. The Respondents on their part contended that they have always acted fairly with the consent of the 1st Petitioner and that the violations raised are not proved.

21. **Article 29 (c), (d), (e), and (f) of the Constitution** provides that every person has inherent dignity and the right to freedom and security of the person, which means the right not to be subjected to any form of violence from either public or private sources; subjected to torture in any manner, whether physical or psychological; subjected to corporal punishment; or treated or punished in a cruel, inhuman or degrading manner. **Article 53 (1) (d) of the Constitution** provides for the right for every child to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment, punishment, and hazardous or exploitative labour.

22. **Section 4 (3) of the Children's Act** obligates all judicial and administrative institutions, and all persons acting in the name of these institutions wherever exercising their mandate to treat the interests of the child as first and paramount consideration to the extent, that is consistent with adopting a course and action calculated to safeguard and promote the rights and welfare of the child. **Section 18 (1) of the Act** prohibits subjecting a child to torture, cruel punishment or treatment.

23. **Section 4 (p) of the Basic Education Act** provides for elimination of gender discrimination, corporal punishment or any form of cruel and inhuman treatment or torture as one of the values and principle guiding basic education. **Section 36 (1)** of the said Act prohibits subjecting any pupil to torture and cruel, inhuman or degrading treatment or punishment, in any manner, whether physical or psychological. **Sub-section (2)** makes it an offence to contravene the provisions of **Subsection (1)** and whose punishment is a fine not exceeding one hundred thousand shillings or imprisonment not exceeding six months or both.

24. It is clear that by dint of **Article 2(5) of the Constitution** the general rules of international law form part of the laws of Kenya. **Article 3 on the United Nations Convention on The Rights of a Child** provides for the protection and safeguards of the children's rights by states. **Articles 19 (1), 28(2) and 37 of the said convention** obligates all state parties to *take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child; to take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention; and to ensure that, no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.*

25. **Article 7 of the International Covenant on Civil and Political Rights (ICCPR)** provides that no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.

26. **Article 13(1) of the International Convention on Economic, Social and Cultural Rights (ICESCR)** provides that states parties to the said convention are bound to *recognize the right of everyone to education and they agree that it shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. In its general comment adopted by the committee on Economic, Social and Cultural Rights General Comment No. 13 on Article 13*, the committee states that *"Corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the preamble to the declaration of Human Rights and both Covenants, the dignity of the individual"* (para. 41)

27. **Article 5 of the Universal Declaration of Human Rights, 1949** prohibits subjecting anyone to torture or to cruel, inhuman or degrading treatment or punishment.

28. **Article 16 of the African Charter on the Rights and Welfare of the Child (ACRWC)** obligates states to ensure that children are protected from all forms of torture and inhuman or degrading treatment by parents and others caring for the child and that parents and other persons responsible for child rearing must ensure discipline and respect the child's dignity.

29. **The African Charter on Human and People's Rights (ACHPR)** requires states which have ratified it to ensure equal protection of the law (**Article 3**), respect for persona integrity (**Article 4**), respect of human dignity (**Article 5**) and protection from torture and cruel, inhuman or degrading punishment and treatment (**Article 5**) for all people.

30. In the case of *Sri Lanka in Case No. SC/FR/97/2017* at the **Supreme Court of Sri Lanka**, while concluding that the use of corporal punishment violated **Article 11 of the Constitution** which prohibits torture, cruel inhuman or degrading treatment or punishment, the Judges stated (page 21- 22):-

"...while Corporal Punishment does not amount to torture in itself in the instant case, the practice of infliction of physical or mental punishment which disregards the inherent dignity of a child amounts to inhuman or degrading punishment...Children are entitled to their own sense of self and dignity being separate beings. It is unacceptable to consider that a child assaulted may

not be entitled to remedy while an adult in the same circumstances would be entitled to such relief, for the reason of being a minor. In any case, minors as vulnerable and impressionable members of society must be entitled to a higher degree of protection”

31. In *India 2000 Delhi Supreme Court Judgment, Parents Forum for Meaningful Education vs Union of India and Another*, the Court in its judgment while concluding that corporal punishment violated the Constitutional right to life (paras. 13 -15 and 21) stated:-

“seems to us that imposition of corporal punishment on the child is not in consonance with his right to life guaranteed by Article 21 of the Constitution. Right to life has been construed by the courts widely. On a larger canvass right to life includes all that which gives meaning to life and makes it wholesome and worth living. It means something more than survival or animal existence. Right to life enshrined in Article 21 also embraces any aspect of life which makes it dignified.”

“Article 21 in its expanded horizon confers medley of rights on the person including the following rights:-

(1) A life of dignity.

(2) A life which ensures freedom from arbitrary and despotic control, torture and terror.

(3) Life protected against cruelty, physical or mental violence, injury or abuse, exploitation including sexual abuse.

All these rights are available to the child and he cannot be deprived of the same just because he is small. Being small does not make him a less human being than a grown up....

“It also appears to us that corporal punishment is not keeping with child’s dignity. Besides, it is cruel to subject the child to physical violence in school in the name of discipline or education.

“Child being a precious national resource is to be nurtured and attended with tenderness and care and not with cruelty. Subjecting the child to corporal punishment for reforming him cannot be part of education. As noted above, it causes incalculable harm to him, in his body and mind...”

32. In *Christian Education South Africa v Minister of Education, Constitutional Court CCT4/00* the Constitutional Court in considering the question of whether the enactment of legislation prohibiting corporal punishment in schools violated the rights of parents of children in independent schools who, in line with their religious convictions, had consented to its use. It concluded that it was reasonable and justifiable that the prohibition stands in all schools, including those with a Christian ethos, and dismissed the application for exemption from the prohibition (para. 51) as follows:-

“I do not wish to be understood as underestimating in any way the very special meaning that corporal correction in school has for the self-definition and ethos of the religious community in question. Yet their schools of necessity function in the public domain so as to prepare their learners for life in the broader society. Just as it is not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they are obliged to respect national examination standards, so it is not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline. The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfil what they regard as their conscientious and biblically ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant’s schools are not prevented from maintaining their specific Christian ethos.”

33. On issue of torture, Visram J. (as he then was) in *Samuel Rukenya Mburu vs Castle Breweries Nairobi HCCC 1119 of 2003* defined torture as:-

“Prohibition against torture, cruel or inhuman and degrading treatment implies that an “action is barbarous, brutal or cruel” while degrading punishment is “that which brings a person dishonour or contempt.”

34. The Petitioners herein contend that there was violation of constitutional rights of the minor. That he was subjected to corporal punishment, tortured, treated in an inhuman manner, and sustained injuries. The Petitioners are obligated to prove the nature of the injury suffered as a resultant of torture as was held in *Charles Martin Macharia vs Standard Group & 4 others (2017) eKLR*.

35. The Petitioners in support of the alleged violation have attached medical evidence and photographs as to the injuries sustained by the minor. The 2nd Petitioner has also adduced evidence to the fact that the minor is unable to sleep well at night as a result of the incident. That because of the nightmares, the 2nd Petitioner took the minor to Shalom Medical centre where the doctor recommended a medical CT scan and psychological counselling. Based on the letter attached dated 3rd August 2021, the 1st Respondent has given degrading statements about the minor. Consequently the child has not been able to secure a school. The Respondents on the other hand, have not denied causing him serious injuries. The Respondents have also not denied issuing a letter that negatively impacts on the minor’s reputation and as a result of which he has been unable to find another school jeopardizing his right to education. In my view, based on the cited laws and the evidence adduced by the Petitioners, I find that there is no doubt that the Respondents violated the minor’s rights as alluded to in the Petitioners pleadings.

36. On damages and costs of this petition, the Petitioners argued that by dint of **Article 23(3) of the Constitution**, they are entitled to the damages. Reliance is placed in the South Africa case, in **Fose vs Minister of Safety and Security [1997] and Kenya Hotel Properties Limited vs Attorney General and 5 others (2018) eKLR**.

37. On implementation of Court Orders reliance is placed in **Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme and 3 others** for the argument that this Court should monitor the implementation of the prayers sought to protect the minor and learners in school. They also relying on **Tinyefuza v Attorney General of Uganda [1997] UGCC3** urging the court to grant the Petition. On global damages they urged the court to award Kshs, 10,000,000/- and relied on **Lucy Wanjiku Mukaru (suing as the legal representative of Mukaru Ng'ang'a – Deceased) v Attorney General [2018]eKLR , W.J & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR, Musa Mbwagwa Mwanasi & 9 others v Chief of Kenya Defence Forces & another [2021] eKLR, Charles Mwenda v Inspector General of Police, National Police Service & 2 Others; Law Society of Kenya Interested Party and 3 others (Interested Parties) [2021] eKLR**.

38. Upon consideration of the pleadings, submissions and relevant laws, and exhibits produced in support of the Petition and noting the injuries suffered by the minor, I am satisfied that the Petitioners have demonstrated and proved the minor's rights were violated by the Respondents. The Petitioner is entitled to award of damages of Kshs.4,000,000/=. In arriving at the figure I am guided by the decision in the case of **Silla Muhia Kinyanjui & 2 others vs. Attorney General (2020) eKLR**, and also the torture the minor underwent and its continuous effect on the minor.

39. **The upshot is that the Petitioners Petition is meritorious. I therefore proceed to grant the following reliefs:-**

a) A declaration be and is hereby issued that the actions and omissions of the 1st, 2nd and 3rd Respondents jointly and severally in relation to the punishment meted on the Minor EJK on 10th March 2021 at [Particulars Withheld] Primary School violated the fundamental rights and freedoms of the Minor and their families under Articles 28, 29 (c), (d), (e) and f) and 53(1) (d).

b) A permanent order restraining the 1st, 2nd and 3rd Respondents jointly and severally be and is hereby issued restraining them from interfering with, insulting, intimidating, harassing, threatening, verbally and physically abusing the petitioners, the minor namely EJK and all minors within and without the premises of [Particulars Withheld] Primary School.

c) The Petitioners are awarded General Damages of Kshs.200,000/= for violation of their rights to be paid by the Respondents jointly and respectively.

d) The 1st Petitioner's child subject of these proceedings, EJK is awarded General damages of Kshs.4,000,000/= for physical and psychological suffering inflicted on him on 10th March 2021 , in breach of his rights against such physical and psychological torture as enshrined in the Constitution of Kenya and the international legal instruments that Kenya ratified in furtherance of the right to be protected from abuse, neglect, all forms of violence, inhuman treatment and punishment of the said minor, the award to be borne jointly and severally by the Respondents.

e) Costs of the Petition to the Petitioners.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF DECEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA