



REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CONSTITUTIONAL PETITION NO. 56 OF 2018

IN THE MATTER OF: ARTICLES 22 & 23 OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 47, 49 & 53 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE BASIC EDUCATION ACT AND THE CHILDREN ACT

BETWEEN

O. N. (A MINOR SUING THROUGH HIS FATHER

AND NEXT FRIEND, W K).....1ST PETITIONER

L.K. (A MINOR SUING THROUGH HIS FATHER

AND NEXT FRIEND, W K).....2ND PETITIONER

AND

PRINCIPAL, K. HIGH SCHOOL.....1ST RESPONDENT

COUNTY DIRECTOR OF EDUCATION, MURANG'A.....2ND RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF EDUCATION.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The petitioners are the next friends of O.N. [particulars withheld] and L.K. [particulars withheld]. The two minors were in forms two and three respectively at K. High School [particulars withheld].
2. They were *suspended* from the school on 24th July 2018. They were accused of planning to torch the school dormitory. After full disciplinary proceedings, they were *excluded* from the school. They were later re-admitted as *day scholars*.
3. The petitioners are aggrieved. They crave *four* main reliefs: Firstly, that they be re-admitted *unconditionally*. Secondly, for a *declaration* that their lengthy exclusion from school violated their right to fair administrative action under **Article 47** of the **Constitution**; and, the right to free and compulsory basic education guaranteed by **Article 53**.
4. Thirdly, they pray for a *declaration* that their detention at Kangema Police Station and arraignment in court on trumped up charges breached **Articles 27, 49 and 50** of the **Constitution**. Fourthly, they pray for compensation or damages. Lastly, they seek costs.
5. The facts are set out at length in the affidavit of the 1st petitioner filed on 8th October 2018. He avers that on 17th July 2018 at around

11:00 p.m., the school principal rounded up twelve boys including the two petitioners. They were taken to his office and accused of attempted arson.

6. On the same night the principal reported the matter to the Administration Police. The two minors and their colleagues were “bundled into a police vehicle” and detained in a “cold cell” at Kangema Police Station. The petitioners’ case is that they were arrested on unfounded suspicions. The police nevertheless decided to prefer a charge of *preparation to commit a felony* contrary to section 308 of the **Penal Code**.

7. On 18th July 2018 the boys were arraigned before the Principal Magistrates Court at Kangema. The plea was not taken. Instead, they were ordered to be detained for a further seven days pending investigations. It was only at that point that their parents learnt of the matter.

8. On 24th July 2018 three of the pupils were formally charged. The charges against nine of the suspects, including the two petitioners, were terminated. A letter from the National Police Service addressed to the school principal stated that the nine “*were cleared and released by the court and are hereby handed over.....to you with no further police action.*”

9. However, the school declined to re-admit them. The school issued them the minors with letters of suspension pending disciplinary proceedings on 1st August 2018. The petitioners contend that this was double jeopardy. The proceedings did not take place until 24th August 2018.

10. The petitioners claim that the proceedings were hostile and unfair. The board seemed to have made up its mind to expel the students. The school did not notify the County Director of Education within two days as is required by Regulation 39 (5) of the **Basic Education Regulations**.

11. The petitioners have filed a further list of documents on 29th January 2019 comprising the *Investigation Report* by the Principal Secretary, Ministry of education dated 1st November 2018; and, the criminal proceedings at Kangema Law Courts.

12. By a letter dated the 3rd September 2018, the school informed the petitioners that they were “*excluded*” from the school because of the attempted arson. Their parents were advised to get them other schools near their homes “*to enable closer supervision*”. The petitioners contend that the action further breached Regulation 40 of the aforementioned Regulations.

13. The petitioners sought assistance from the County Director of Education, Murang’a (the 2nd respondent) to no avail. They subsequently made a complaint to the Principal Secretary, Ministry of Education (the 3rd respondent). The latter directed the 2nd respondent to investigate the matter and take remedial action.

14. On 1st October 2018 the 1st respondent agreed to *conditionally* readmit the petitioners: They were to be day scholars; undergo counseling; abide by school regulations; and, improve on their academic grades.

15. The petitioners aver that they live far from Kangema; and, it is not feasible to commute daily. They contend that the cost is prohibitive; and, that their academic performance will be compromised.

16. On 27th February 2019, the petitioners *withdrew* the petition against the original 4th respondent, Director of Public Prosecutions. The petition is contested by the remaining respondents.

17. There is filed a *replying affidavit* sworn on 6th February 2019 by Irungu Nduati, the principal of the school.

18. He avers that on 17th July 2018, he received a report that some students were planning to burn down a dormitory. He investigated the matter with the help of the police. The ring leader was C.M. [*particulars withheld*]. He stated that there was an elaborate scheme to torch the building. The 1st petitioner was given a *Rhino* matchbox by another student, K.M. [*particulars withheld*]. The latter informed him that it was to be used to burn the dormitory. The 1st petitioner then gave the matchbox to A.N. [*particulars withheld*].

19. The 2nd petitioner was asked by the ring leader on 12th July 2018 to give him some methylated spirit. According to the school, the spirit was to fuel the fire. It is averred that the 2nd petitioner never bothered to retrieve his methylated spirit until it was discovered in the hands of D.K., another student.

20. He avers that according to their records, the father of O.N. is listed as Boniface Njaramba and not W K. The legal guardian is E M. The school claims that E M and W K(L.K’s father) were informed of the incident on 18th July 2018. They both appeared at the school the same day and were re-directed to the police station.

21. He avers that despite the withdrawal of the charges in court, the board reasoned that the students had breached school regulations. A copy of the regulations is annexed. Disciplinary proceedings were initiated. Seven of the boys including the petitioners were then suspended.

22. On 24th August 2018, the 1st petitioner and his mother appeared before the board. He avers that the charges of possessing “*an illegal item [the matchbox] and being an accomplice*” were read and he was asked to defend himself. The board recommended to the County Education Board that he be excluded from the school. The minutes are annexed.

23. The 2nd petitioner also appeared with his legal guardian. The charges of possessing “*an illegal item [the methylated spirit]*” were read and he was asked to defend himself. The board recommended to the County Education Board that he also be excluded from the school.

24. The deponent avers that the County Education Board sent a panel to the school on 18th September 2018 to investigate the matter. The panel recommended that the two petitioners be re-admitted on the four conditions I highlighted earlier. The school board communicated the decision to the petitioners and their parents at a meeting held on 1st October 2018. The minutes are attached.

25. In the end the position of the all the respondents is that the petition has no merit. I was implored to dismiss it.

26. On 27th February 2019, I heard brief arguments from the parties. The petitioners relied on the decision of the High Court in *MWK & another v Attorney General & 3 others*, Nairobi, Pet. 347 of 2015 [2017] eKLR. The respondents relied on a list of authorities filed on 15th February 2019.

27. The guiding principles in a matter of this nature are well settled. See *Onyango Oloo v Attorney General* [1986-1989] EA 456, *Florence Moschion v Director of Public Prosecutions & 5 others* Nairobi High Court Petition 341 of 2012 [2013] eKLR, *Ezra Kaibuta v Attorney General*, Nairobi High Court petition 13 of 2013 [2013] eKLR.

28. All these authorities can be summarized as follows: That there are no hard and fast rules on the procedures to be adapted by various disciplinary bodies. However, the administrative tribunals must achieve a *reasonable* degree of *fairness* throughout their investigations, proceedings and final decision. Finally, the onus to *prove* the violation of any right rests squarely with the applicant.

29. The petitioners are secondary school students. It would be inappropriate for the court to design the disciplinary organs of the school or how they conduct their proceedings. The court must remain alive of the welfare of *other* students.

30. In *E.S. suing through K.S. v K. School*, Eldoret High Court, Pet. 7 of 2015 [2015] eKLR, I had this to say-

“In matters of this nature, the court has to weigh the interests of the applicant against those of other students and the entire school community. It is a very delicate balance.”

31. The court must however be guided by the *best interest* of the child. This was well articulated by Majanja J in *RWT v SNS School*, Nairobi, Petition 290 of 2012 [2012] eKLR-

“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 agree with Mr Kabaru, counsel for the respondent, 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 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.”

32. I am satisfied that the disciplinary proceedings of 24th August 2018 constituted an *administrative action*. The Board of Management of the school was thus enjoined by the **Constitution** to employ fair, efficient, lawful and expeditious procedures.

33. **Article 47 (1) and (2)** of the **Constitution** provides-

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) 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.”

34. The history of this complaint is material. The school authorities got wind of the plan to torch property on the night of 17th July 2018. The allegations were *very serious*. If true, they would constitute *criminal* conduct. I am unable to fault the administration for inviting the police to investigate the matter; or, from detaining the suspects that night.

35. I agree that these are young students. They had to endure difficult conditions in the police cells. The court proceedings (annexture *WK10*) shows they were presented to court on 19th July 2018. I cannot say that the police held them beyond the period allowed by the **Constitution**.

36. The prosecutor informed the court that the police were investigating the offence of *preparation to commit a felony*. There was a holding charge. The trial court authorized the detention of the petitioners until 24th July 2018. At page 2 of those proceedings, the minors told the court they had *“no problem or issue”*.

37. On 24th July 2018, the charge sheet was amended terminating the proceedings against the petitioners. As I will point out later, it was not an acquittal but a discharge under section 89 (5) of the **Criminal Procedure Code**.

38. The petitioners allege that the minors were held *“without the knowledge of their parents/guardians”*. That is partly true. But I am satisfied that the 1st petitioner’s legal guardian, E M; and, W K (2nd petitioner’s father) were informed of the incident on 18th July 2018. They both appeared at the school the same day and were re-directed to the police station.

39. The circumstances in this case are markedly different from those in *MWK & another v Attorney General & 3 others*, Nairobi, Pet. 347 of 2015 [2017] eKLR. There, the police violated the rights of an *underage* girl in the process of a *body search* and circulated her *nude* images.
40. The petitioners here have failed to *prove* that the investigations; the process of arrest; detention; and, prosecution of the minors was *unconstitutional* or violated the **Children Act**. It must follow that the declarations sought in prayers 1, 3, 4 and 7 of the petition are devoid of merit. They are *dismissed*.
41. I will now turn to the impugned disciplinary proceedings. The school regulations titled *School Legal Framework* (exhibit IN1) paragraph 21 prohibits “*involvement in criminal activity including arson, attempted arson or being caught with inflammable substances*”. The offender would be required to appear before the board accompanied by a parent. It would be open to the school to *recommend* to the County Education Board for *exclusion* of the student.
42. I thus agree with the petitioners that the board of management overreached. The board should have forwarded their *recommendation* for action by the County Education Board. Doubt is removed completely by the letter of 1st November 2018 from the Ministry of Education. But I also note in passing that a *Mr. Ochieng*, representing the County Director of Education, attended the meeting and was instructed to communicate the decision to the Director.
43. The *Regulations* under the **Education Act** required the board to make its recommendation to *exclude* the students to the County Director of Education. The latter would take action on the advice of the County Education Board. But I find that those were minor procedural missteps by the board that did *not* go into the *root* of the misconduct.
44. The key question is whether the petitioners were accorded a *fair hearing*.
45. From the letter dated 24th July 2018 the petitioners were *invited* to the school on 1st August 2018. The purpose was to notify them of the date for disciplinary proceedings. Like I stated, the parents or guardians were informed of the incident as early as 18th July 2018.
46. It was open to the school suspend the pupils pending the full Board of Management meeting. I find that in the circumstances, the petitioners had *sufficient notice* of the meeting that took place on 24th August 2018.
47. The 1st petitioner was accompanied by his mother at the meeting. Page 2 of the minutes marked IN2 show that the accusations were read. In defence, the minor stated that he was given the match box by K.M. who told him to give it to K.C. Fundamentally, “*he admitted that he had known about the burning and had been sent for the matchbox by V.C. from K.M.*”
48. Regarding the 2nd petitioner, the charges were read. His father chose to defend the son. He explained that his son always had the methylated spirit; an issue the school had never raised. The 2nd petitioner admitted he gave the spirit to C.M. and Oscar a week before the incident. But he was at a loss why he never retrieved it for a week.
49. Although the petitioners claim that the board was *hostile*, they have not elaborated. From the minutes of the panel there is no evidence that the board’s decision was *preordained*.
50. At the close of the proceedings, the board deliberated the matter. It considered the risks posed to other students and property; and, that the minors had threatened revenge on the informers. The board recommended the exclusion of the students from school.
51. By a letter dated the 3rd September 2018 (exhibit WK5), the school informed the petitioners that they were “*excluded*” from the school because of the attempted arson. Their parents were advised to get them other schools near their home “*to enable closer supervision*”.
52. It is true that the minors were facing the same charges preferred at the Kangema Law Courts. I have studied the proceedings marked WK10. The *withdrawal* of the criminal charges was not an *acquittal*. It was *not* a bar to the disciplinary proceedings of 24th August 2018.
53. From the materials before me the petitioners were *aware* of the charges before the board. The Board of Management meeting was a *disciplinary* organ. The parents and affected students were *summoned*. They were given an opportunity to *address* the board. The *final decision* was communicated to the guardians in terms of the letter of 3rd September 2018.
54. The petitioners lodged an appeal to the Principal Secretary Ministry of Education. On 11th September 2018, he directed the County Director of Education, Murang’a to investigate the matter and take corrective action. This was the genesis of an *Institutional Standards Report* (exhibit IN3a). The panel advised that the petitioners be readmitted on *four* conditions: They were to be *day scholars*; undergo counseling; commit in writing to abide by school regulations; and, improve on their academic grades.
55. The report was discussed and largely adopted by the school’s board. From the minutes of 1st October 2018, the parents or guardians of the petitioners were again invited and informed of the final decision. Formal letters containing the decision were also delivered.
56. I agree with the petitioners that the conditional re-admission to the school as day scholars may be inconvenient and costly. But I find that in all the circumstances of this case, it would be *imprudent* to re-admit the students to the boarding section.
57. Regarding the duty of the court to uphold the *best interests* of the minors, I am satisfied of two significant elements: First that the petitioners still have the option to *re-join* the school as *day scholars*. Secondly, their guardians confirmed in open court that they have

enrolled them for tuition in *other facilities*.

58. Lastly, I concur with Majanja J 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. RWT v SNS School* (supra).

59. In the end, I find that there was no *failure* of natural justice. As earlier stated, there is no evidential basis for compensation or damages. It must follow that the remaining prayers numbers 2, 5, 6, 8 and 9 are also *dismissed*.

60. The upshot is that the entire petition dated 8th October 2018 is *dismissed*. In the interests of justice; and, considering the plight of the petitioners, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 27th day of March 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Warutere Karoki, 1st petitioner (in person)

No appearance by the respondents.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.