



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTION AND HUMAN RIGHTS DIVISION
PETITION NO. 210 OF 2014

H O O (A child suing through his father and next friend) P O O.....PETITIONER

-VERSUS -

THE BOARD OF MANAGEMENT N SCHOOL.....1ST RESPONDENT

NAIROBI COUNTY EDUCATION BOARD.....2ND RESPONDENT

NAIROBI COUNTY DIRECTOR OF EDUCATION.....3RD RESPONDENT

JUDGMENT

BACKGROUND

1. On 31st May 2018 the petitioner herein H O O filed this petition through his father P O O seeking the following reliefs.

- a) A declaration that the respondent has violated the petitioners rights under articles 28, 29(f), 34(1) (f), 47, 50 and 53 of the constitution.
- b) An order for unconditional reinstatement/readmission of the petitioner to his school till completion of his studies.
- c) Costs of this petition.
- d) Any other or further relief that this Honourable court consider appropriate and or just to grant.

Concurrently with the petition, the petitioner also filed an application under certificate of urgency seeking for following orders:

1. That the application herein be certified urgent and heard expeditiously on priority basis and service of the same be dispensed with in the first instance.
2. That the applicant minor be and is hereby re-admitted to N SCHOOL pending the hearing and determination of this application.
3. That a temporary order of injunction be and is hereby issued restraining the respondents from suspending or expelling the minor applicant on the grounds forming the basis of the suspension dated 7th of February 2018 pending the hearing and final determination of this application.
4. That the applicant minor be and is hereby re-admitted to N SCHOOL pending the hearing and final determination of the main petition.
5. That a temporary order of injunction be and is hereby issued restraining the respondents from suspending or expelling the minor applicant on the grounds forming the basis of the suspension dated 7th of February 2018 pending the hearing and final determination of this petition.

6. The cost of this application be provided for.

2. The interim orders sought in the application were not granted and when the matter came up for mention on 12th July 2018, the court directed that owing to the nature and urgency of the case, it would be prudent for the parties to canvas the main petition by way of written submissions so as to fast track the matter.

The petition was supported by the affidavit of P O O sworn on 30th May 2018.

3. The brief facts of the case are that the petitioner (minor) was a form 4 student having been admitted to the 1st respondent's school in form 1 in February, 2015.

4. The petitioner was suspended from the 1st respondent school on 7th of February 2018 following claims of indiscipline and involvement in drugs and substance abuse. On 21st February 2018 the minor faced the 1st respondent's disciplinary committee (hereinafter "**the committee**") for the hearing of his

5. case and upon deliberating on the case, the committee found him culpable and recommended his exclusion from the school but with a rider that he could return to the school, albeit conditionally, only for the purpose of sitting for his Kenya Certificate of Secondary Education (KCSE) Examination at the end of the year, 2018.

6. The 1st respondent's decision was communicated and referred to the 2nd respondent who recommended that the minor be relocated to another school.

PETITIONER CASE

7. The petitioner's complaint is that both the verdict of the committee and the recommendation of the 2nd respondent were never relayed to him, in time or at all, thereby prompting him to file the instant petition he continues to remain in the dark and to languish at home as he awaits to know his fate. The petitioner emphasized that he is a candidate due to sit for the Kenya Certificate of Secondary Education examination towards the end of this year and that his continued stay out of school would negatively impact on his academic performance.

8. The petitioner faulted the respondents for taking action against him which actions, he alleged, were not in line with the principles of the best interest of the child as envisaged under the Constitution and the Children Act. He stated that Article 47 of the Constitution on the right to fair administrative action was violated by the respondents during the disciplinary proceedings and that the respondent violated Regulations 39 and 40 of the Basic Education Regulations. He further stated that Articles 43 (1) (f) and Article 53(2) of the Constitution which guarantees the right to education and the best interest of the child respectively, were violated by the respondents.

9. **Mr. Onsongo** Learned Counsel for the petitioner, submitted that even though the petitioner had admitted the charges/accusations that were levelled against him by the 1st respondent, he was remorseful, had undergone counseling, was not a delinquent and therefore deserved be readmitted to the 1st respondent school. Counsel submitted that failure to readmit the petitioner to the school or to relocate him to another school violated his right to education as envisaged under Article 43 of the Constitution.

The 1st respondent's case

10. The 1st respondent opposed both the petition and application through the replying affidavit of **Caspal Maina Momanyi**, the Principal of the 1st respondent's school, sworn on 28th June 2018 and a further affidavit sworn on 17th July 2018. In the said affidavits, the 1st respondent's deponent confirms that the minor was admitted to the 1st respondent's school in February 2015 and that at the time of the said admission, the minor undertook, in writing, to comply with all the school rules and regulations. He attached a copy of a duly executed school rules and declaration form as annexure "**CCM-1**" to the replying affidavit.

11. He further averred that the petitioner reneged on his said undertaking on numerous occasions for which he was severally reprimanded but that the final straw that broke the proverbial camel's back were the events of 13th and 19th January 2018 when the petitioner mobilized other students to contribute money that he used to purchase alcohol which they consumed contrary to rule 6 of the school Rules. He further stated that after consuming the alcohol, the petitioner together with seven (7) other students became rowdy, disorderly and unmanageable thereby prompting the 1st respondent to initiate disciplinary proceedings against the petitioner and his 7 accomplices when, during the investigations, the petitioner admitted his indiscretions in writing.

12. He further averred that following the breach of the school rules, the petitioner appeared before the committee on 21st February 2018 where he presented his case as shown in the minutes attached to the replying affidavit as annexure "**CMM5**". He stated that at the close of the case, the committee recommended the exclusion of the petitioner from the school but allowed him to sit for the Kenya Certificate of Secondary Education with conditions as shown in the copy of the recommendations which were attached to the replying affidavit as annexure "**CMM-6**".

13. The 1st respondent's case was that the petitioner was subjected to the due process during the disciplinary proceedings and that the issue of the violation of the rules of natural justice or his constitutional rights did not arise. The 1st respondent's principal further averred that upon making the recommendations, the 2nd and 3rd respondents' moved in to relocate the petitioner and the 7 affected students to day schools near their homes to enable them continue with studies as shown in the annexure marked "**CMM8**".

14. At the hearing of the petition **Mr. Munywa**, learned counsel for the 1st respondent submitted the minor was subjected to the correct disciplinary process and urged this court not to interfere with the administrative disciplinary measures taken by the 1st respondent. Counsel relied on the decisions in **J.K.(suing on behalf of CK) & Another [2014] e KLR and Fredrick Majimbo & Another V Principal, Kianda School, Secondary Section H.C. Petition No. 281 of 2012** wherein it was held that courts should be reluctant to interfere with the decisions of learning institutions.

15. Counsel also submitted that none of the petitioner's fundamental rights were violated by the 1st respondent and added that even though the Constitution and the Children Act emphasize on the best interests of the child being paramount, the petitioner was not the only child in the 1st respondents school which has more than 1500 students whose rights and safety ought to be considered. Reliance was placed in the decision in the case **FM vs Principal Kianda School Petition No. 281 of 2012** (unreported) wherein it was held that the best interest of other children also matters. Counsel added that the minors right to education is not absolute but could, under Article 24 of the Constitution, be limited. He reiterated the action taken by the 1st respondent was lawful and that it was upon the petitioner's parents/guardian to secure an alternative school for the purposes of relocating his son.

2nd and 3rd Respondent's Case

16. The 2nd and 3rd respondents opposed the petition through the replying affidavit of **John Olottuaa**, the Regional Coordinator of Education Nairobi Region who stated that his office received the 1st respondents disciplinary committees recommendations against the minor and that under Regulation 40 of the Basic Education Regulations, the 2nd and 3rd respondents replied the said recommendations and decided that the minor be relocated/transferred to an alternative day/school. He averred that it was the petitioner's parent's responsibility to secure his admission to an alternative school after which the Ministry of Education facilitates the transfer since under Regulation 43 of the Basic Education Regulations 2015, a student could only be transferred by the County Director of Education on request in writing by the parent or guardian; on medical grounds or as a result of insecurity or natural calamity.

17. He further averred that one **Mr. Kimando Mburu**, the sub County Education Officer Westlands attended the disciplinary proceedings in compliance with Regulation 39 of the Regulations contrary to the petitioners claim that the disciplinary proceedings were conducted by a committee that was not properly constituted. He also stated that it would not be in the best interest of the minor to be readmitted to the 1st respondent's school owing to his past indiscipline record.

18. During the hearing of the petition, **Miss Robi**, learned counsel for the 2nd and 3rd respondent submitted that the petitioner had not demonstrated how his rights of the minor were violated. She maintained that the minor was not expelled from the 1st respondents school but was excluded following the findings made against him by the disciplinary committee. She maintained that the 1st respondents complied with all the laws and regulations governing the discipline of students in schools.

ANALYSIS AND DETERMINATION

19. After careful consideration of the pleadings filed herein, the submissions made by the parties' respective advocates and the authorities that they cited, I note that the issues for determination are as follows:

- a) Whether the petitioner's fundamental rights under the Constitution were violated by the respondents.
- b) Whether the petitioner is entitled to the orders sought in the petition.

20. On the first issue, it was not disputed that the petitioner was a student at the 1st respondent's school and that he was accused of disobeying school rules after which he was suspended from the school and later invited for the hearing his case. It was also not disputed that the petitioner was accorded a hearing before the committee where he admitted his faults and tendered an apology. It was also in the affidavit evidence presented before this court that the petitioner's parent was present during the hearing before the committee which committee made its decision to exclude the petitioner from the 1st respondent school and that the findings were upheld by the 2nd and 3rd respondents who then directed that the petitioner be relocated to another school.

21. The petitioner however claimed that his rights under Articles 27, 29(f) 43(1) (f), 47(1), 50 and 53(1) (b) of the Constitution were violated. It is now trite law that in order to obtain the intervention of the court, the party who alleges that his rights have been violated or threatened with violation must with, reasonable precision state the Articles of the Constitution alleged to have been violated or threatened with violation and the manner in which they were violated. In the case of **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others Petition 229 of 2012** it was held that; *"This harkens to the rule of law enunciated in the famous case of Anarita Karimi Njeru v The Republic (1976-1980) 1 KLR 1272 and its progeny to the effect that a constitutional petition must state, with reasonable precision, the provisions of the Constitution which are alleged to have been contravened and the manner in which they are infringed. In that case, Justices Trevelyan and Hancox stated that: 'We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed', and the manner in which they are alleged to be infringed."*

Article 27 of the constitution

Article 27 of the Constitution embodies the principle of equality and non-discrimination thus:

- (1) *Every person is equal before the Law and has the right to equal protection and equal benefit of the Law.*

(2) *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

(3) *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

(4) *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

(5) *A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).*

(6) *To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*

(7) *Any measure taken under Clause (6) shall adequately provide for any benefits to be on the basis of genuine need.*

(8) *In addition to the measures contemplated in Clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.*

22. In the case of Andrews v Law Society of British Columbia [1989] 1 SCR 321, Wilson J. defined discrimination as a “*distinction which whether intentional or not but based on grounds relating to personal characteristics of individual or group [which] has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of Society.*”

23. For the purpose of this case, discrimination refers to any distinction, exclusion, limitation or preference based on the grounds enumerated which has the purpose of nullifying or impairing equality of treatment in education. According to **Article 1** of the **1960 UNESCO Convention against Discrimination in Education** such distinction, exclusion, limitation or preference may be manifested in depriving any person or group of persons of access to education of any type or at any level; of limiting any person or group of persons to education of inferior standard; or of establishing or maintaining separate education systems or institutions for persons or groups of persons.

24. In this case, the petitioner claimed that his suspension and subsequent exclusion from the 1st respondent school amounted to discrimination. He did not however explain the personal characteristics that made him susceptible to the alleged discrimination. My finding is that the claim on discrimination was not proved to the required standards or at all because the petitioner’s exclusion from the school did not come out of the blue, so to speak, but was as a consequence of his own failure to adhere to the school rules which applied equally to all the students in the 1st respondent school. In order to prove discrimination, the petitioner needed to establish that all the other students who had been similarly found guilty of disobeying school rules were allowed back to school except him. The undisputed evidence presented by the respondents in this case was that all the other seven (7) students, who were found to be at fault in circumstances similar to that of the petitioner, were excluded from the school and relocated to other schools except 2 who opted to take private tuition from home.

Article 29 of the Constitution

25. Article 29 of the Constitution relates to freedom and security of the person and includes the right not to be deprived of freedom, not to be detained without trial, not to be subjected to any form of violence, torture, corporal punishment or cruel, degrading treatment.

26. In the instant case, I find that no material was placed before me to prove that any of the petitioner’s rights under Article 29 were violated.

Article 43 and 53 of the Constitution

27. The Constitution of Kenya 2010 expressly recognizes education as a right for all. Article 43(1)(f) provides that every person has the right to education while Article 53 provides for a wide array of rights of the children including the right to free and compulsory education and further, that a child’s best interests are of paramount importance in every matter concerning the child. Article 53(1) (b) stipulates that “**Every child has the right to free and compulsory basic education.**”

28. 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.

29. 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.

30. I have perused the 1st respondent’s summary of guidelines and expected behavior as contained in the 1st respondent’s annexure “**CMM-1**” that was executed by the petitioner and his parent upon admission to the school and I note that at paragraph 8 it is stated:

“Smoking, tattooing, ear piercing, drinking alcohol or being involved in drug abuse will lead to immediate automatic expulsion from school. Being involved in acts of lawlessness or rudeness to authority will lead to immediate and/or automatic

expulsion. Satanism, homosexuality, rape and any other infamous conduct will also lead to automatic expulsion.”

31. Having regard to the above school rule, I am satisfied that in suspending the petitioner and calling upon him to answer charge of drug and substance abuse, and thereafter reaching the verdict of guilt after the petitioner admitted the charge, the 1st respondent acted within its mandate and rules in recommending the exclusion of the petitioner from the school. It is therefore my finding that the disciplinary process did not amount to an infringement of the petitioner’s constitutional right to education. I am guided by the finding in the Indian case of **Maharashtra State Board -VS- Kurmarsheth & Others, (1985)CLR 1083** where it was stated that:-

“So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations.....”

In the above case, the same court emphasized the need:-

“.....to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them.”

32. Taking into consideration the dictum in the above cited case, I find that the 1st respondent was justified and had a moral obligation to uphold the law regarding the disciplinary procedures within its institution in order to ensure compliance with the regulations governing the discipline of students its students. I further find that having found that the petitioner was guilty of breach of the school rules, the 1st respondent was justified in excluding him from studying in its school and exclusion, under such circumstances cannot be said to be a denial of right of education considering the fact that the petitioner was given the option of relocating to another school of his choice.

Article 47(1) of the Constitution

33. The petitioner claimed that his right to fair administrative action in terms of Article 47 of the Constitution was violated. As was aptly stated by Chacha Mwita J. in the case of **Geoffrey Oduor Sijeny v Kenyatta University [2018] eKLR**, the right to fair administrative action is not only an integral part of the Bill of Rights but also an essential feature of our Constitution and the soul of a democratic society without which democracy and the rule of law cannot be maintained. This right is now firmly entrenched in our Constitution as a way of ensuring that administrative actions meet the standards set by the Constitution.

Article 47 of the Constitution provides as follows;

(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. From the above provision, it is clear that the Constitution now imposes a control on administrative bodies by requiring them to employ constitutional standards of legality, reasonableness and procedural fairness in any administrative actions. Under the said standards, the administrative bodies are also required to accord the person to be affected by such actions a hearing before taking the action. Where the actions would have adverse effects on the persons’ right(s), the administrative body is required to give the persons written reasons for its actions. The right to fair administrative action is a right that must not be abrogated or compromised.

35. It is now trite law that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

36. The importance of fair administrative action as a Constitutional right was stated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, at paragraphs135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common

law principles developed over decades...

37. Section 4 of the Fair Administrative Action Act, 2015 reiterates the importance of this right by amplifying the prominence of Article 47 and the process to be followed in conducting administrative actions. A party coming to this Court on the basis that his or her right to fair administrative action was violated, must show that the standards enumerated in Article 47(1) as amplified by section 4 of the Fair Administrative Act were nonexistent in that administrative action and or that they were violated, and only then should the Court summon its jurisdiction under Article 165 (3) (b) of the Constitution **to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.**

38. The question which then arises in the instant petition is whether the committee complied with the constitutional requirements of fair administrative action. From the evidence presented by both parties, it was not disputed that the petitioner was notified of the allegations made against him and thereafter invited to attend the disciplinary proceedings where he made his presentations. The Disciplinary Committee considered the case before it and recommended the exclusion of the petitioner from the school which recommendation was communicated to the petitioner and the 2nd respondent.

39. My finding, therefore, is that the 1st respondent fulfilled the requirements of fair administrative action as envisaged by the Constitution by informing the petitioner, in advance and in writing, of the charges made against him, and by granting him an opportunity to defend himself at a hearing before making its recommendations.

Article 50 of the Constitution.

Article 50(1) of the Constitution provides that ***“every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”***

40. In the present case, I do not find that the petitioner rights to fair hearing was violated having found that his disciplinary case was heard before a properly constituted committee that arrived at its determination after according him an opportunity to present his case.

The prayers sought

41. The petitioner’s main prayer was for orders that he be readmitted to the 1st respondent school so that he can continue with his studies. My take, however, is that readmission to the same school where he had already been excluded following the disciplinary process, would not only be untenable but also not in the interest of the petitioner and the 1st respondent student fraternity at large. This court notes that the 1st respondent is a national school hosting more than a thousand students from all over the country who are equally entitled to their right to protection from the negative influence or behavior that may arise from readmitting students who had already exhibited deviant behavior. My humble view is that, in the circumstances of this case, readmitting the petitioner to the same school will send a negative message to the rest of the students that disobeying school rules attracts no consequences, a scenario that may result the 1st respondent becoming an institution that has students whose behavior is ungovernable. Needless to say the readmission of the petitioner may not be in his best interest bearing in mind the stigma that he may suffer as a result of his past record.

42. This court further takes judicial notice of the fact that learning institutions have in the recent past faced numerous and worrying cases of indiscipline among students that has led to wanton destruction of property, serious injuries and in some cases, even loss of lives. Under these circumstances schools’ administration are expected to be extra vigilant and to take all the necessary precautions in order to protect the lives and property within their institutions and these measures include the exclusion of students who have, after going through the due process, been found culpable of the charges made against them.

43. The upshot of my decision is that, the petitioner was taken through the due process as provided for by the statutes governing the discipline of students in schools and this court cannot therefore interfere with the administrative decision of the school and its discipline process. In sum, I find that none of the petitioner’s rights, under the constitution, were violated and that the committee arrived at a decision that was in the best interest of the minor, considering the magnitude of the charges that were levelled against him, by excluding him from the school at the same time according him an opportunity to continue his education in another institution.

44. In view of my analysis of the facts and my conclusions herein above, I decline to grant the reliefs sought in this petition. Accordingly, I dismiss the petition with no orders as to costs.

Orders accordingly.

Dated, delivered and signed in open court at Nairobi this 10th day of August 2018.

W. A. OKWANY

JUDGE

In the presence of

Miss Chibole for Mr Munywa and Miss Robi for the 1st and 2nd and 3rd respondent respectively