



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**PETITION NO. 33 OF 2018**

**S.W.M. suing as the guardian and next friend of**

**G.W. W. (MINOR).....APPLICANT**

**VERSUS**

**GITURA SECONDARY SCHOOL.....1<sup>ST</sup> RESPONDENT**

**ANGELINA NDUNGE MAVEKE.....2<sup>ND</sup> RESPONDENT**

**JULIUS GIKONYO GATERU.....3<sup>RD</sup> RESPONDENT**

**BOARD OF MANAGEMENT, GITURA SEC. SCH.....4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY FOR EDUCATION.....5<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....6<sup>TH</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....7<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant is the father and guardian of *G.W.W. [name withheld]* and hereafter *the minor*. The minor is a *form four* student at Gitura Secondary School (the 1<sup>st</sup> respondent and hereafter *the school*).
2. By a letter dated 5<sup>th</sup> February 2018 the 2<sup>nd</sup> respondent *suspended* the minor from the school for *gross misconduct*. The minor was found in possession of a small container of paraffin or petrol in her locker. The guardian and minor were invited for the Board of Management meeting on 19<sup>th</sup> February 2018.
3. The school's position is that there was a looming *strike*; and, the inflammable substance was to be used to torch school buildings.
4. Being aggrieved by the decision, the applicant brought proceedings to have the student re-admitted. Contemporaneously with the petition, the applicant filed a notice of motion dated 13<sup>th</sup> April 2018. It is four-pronged: Firstly for an order to *compel* the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to *unconditionally readmit* the student. Secondly, and in the alternative, that the Cabinet Secretary for Education (5<sup>th</sup> respondent) secures *placement* for the minor in a school with similar or better standards than Gitura. Thirdly, for an order to *stay* the proceedings in Chief Magistrates Criminal Case Number 191 of 2018 *Republic v G.W. [name withheld]*. Fourthly, the applicant craves an order to compel the school to release reading materials and other items belonging to the minor. There is also a prayer for costs.
5. The application is predicated upon the affidavits of the applicant sworn on 13<sup>th</sup> April 2018 and 20<sup>th</sup> July 2018. He avers that the minor was suspended without an opportunity to defend herself. He contends that the actions by the school were discriminatory and violated her constitutional rights. For instance, the school made a complaint to the police which led to incarceration of the minor at Kahuro Police Station in pathetic or unsanitary conditions.
6. In the material paragraphs of the petition, he deposes as follows:

7. "That on the morning of 2<sup>nd</sup> February 2018, the minor while dispensing her leadership duties as a prefect in the 1<sup>st</sup> respondent's dormitory area, a student reported to the minor that she (student) had smelt paraffin near her assigned place of duty. The minor advised the said student to proceed with her duty as they were running late for class.

8. That still while inspecting the compound, the same student reported the same issue to the minor again. The minor out of sheer curiosity went to inspect the reported area and confirmed that there was smell of paraffin. She inspected the place and found a small container with a liquid that smelt like paraffin which she confiscated with the sole intention of reporting the same to the 3<sup>rd</sup> respondent.

9. That before she could report to the 3<sup>rd</sup> respondent, the bell rang and the minor in a state of confusion and fearing that she would be punished (by whipping) by the 3<sup>rd</sup> respondent for being late locked the small container inside her box with the intent to hand it over to the 3<sup>rd</sup> respondent after classes.

10. That the 3<sup>rd</sup> Respondent at the material time was whipping students for being late for classes.

11. That before the appointed time when the minor intended to report the morning incident to the 3<sup>rd</sup> respondent, she was accosted by the 3<sup>rd</sup> respondent who asked the minor to go and show him where she kept the container with paraffin.

12. That the minor complied by taking the 3<sup>rd</sup> respondent to the dormitory and surrendered the container thereof to the 3<sup>rd</sup> respondent.

13. That the 2<sup>nd</sup> and 3<sup>rd</sup> respondent made the minor to kneel down for some hours and tried to intimidate the minor into admitting that she had brought the petrol to school in preparation to lead a strike and burn the school.

14. That without seeking any explanation or being given any chance of being heard, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents took the minor to Kahuro Police Station where she was detained."

7. The applicant contends that the minor is *traumatized* by the criminal process. She did not secure police bail until the following day. The cells were cold and the food was insufficient. The minor was not allowed to keep her inhaler yet she is asthmatic. The applicant avers that the conduct was a violation of Article 53(c)(d)(e) of the Constitution.

8. The applicant also referred to a statement made by a witness, *Jean Ndida*, to the Police. The prosecution witness stated that she saw the small container of petrol hidden in a fence next to the dormitory and handed it over to the minor. The minor was the *compound prefect*.

9. When the applicant sought clarification from the school, his efforts were rebuffed. Through the intervention by the sub-county director of education, the headmistress agreed to finally see him. He was then issued with the letter of suspension I mentioned earlier. The letter invited him to appear before the school's board of management on 19<sup>th</sup> February 2018.

10. The response from the school is that the minor was only *suspended*; and, that the board followed *due process*. There is a replying affidavit of the headmistress *Angelina Ndunge Maveke* sworn on 14<sup>th</sup> May 2018. She avers that the student was suspended for "*gross misconduct and [being] a potential threat to the other students in the school*". The deponent was emphatic that the minor was not discriminated because "*several other students found in similar or related circumstances were meted [sic] with the same punishment*".

11. The deponent avers further that notwithstanding the suspension, the minor was registered for the Kenya Certificate of Secondary School Examination in the school.

12. The headmistress expressed fears that the student was planning to set the school *ablaze*. At paragraph 7 of the affidavit, she deposes that she had to "*take into account the rights of one student versus the constitutional rights of all the other student community*".

13. Lastly, she averred that the board gave all the suspended students a hearing on 19<sup>th</sup> December 2018. The deponent states that she attended the hearing. Her view is reinforced by the replying affidavit of *George Kamau*. He is the Chairman of the Board. At paragraphs 5 to 7 he deposes that:

*"Every student affected or mentioned in the strike was afforded an opportunity to meet the board of management and air his/her point of view.....in particular the plaintiff was heard before us but did not comment on the issue or give any reasons or satisfactory reasons thereafter"*

14. The 5<sup>th</sup> respondent did not enter an appearance. The learned counsel for the 6<sup>th</sup> and 7<sup>th</sup> respondents intimated to the court that he would rely on the depositions sworn by the 1<sup>st</sup> to 4<sup>th</sup> respondents.

15. Learned counsel for the applicant; and, learned counsel for the 1<sup>st</sup> to 4<sup>th</sup> respondents filed written submissions. On 25<sup>th</sup> July 2018, I heard brief submissions from the learned counsel for the applicant; learned counsel for the 1<sup>st</sup> to 4<sup>th</sup> respondents; and, learned State Counsel for the 6<sup>th</sup> and 7<sup>th</sup> respondents. I have considered the notice of motion, the annexed documents, precedents, depositions and the rival submissions.

16. In matters of this nature, the court has to carefully weigh the interests of the applicant against those of other students and the entire school

community. It is a very *delicate* balance.

17. Article 53 of the Constitution and the Children Act enjoin the court to act in the *best interest* of the child. See *G.N. v Chumani Secondary School Board of Management* Mombasa High Court, Civil Suit 95 of 2014 [2014] eKLR. However, the court must also take into account the interests of *other* students against that of *one* deviant minor. The principle 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.*”

18. I accept that there is a *legal* distinction between *suspension* and *expulsion* of a student. The former is meant to be *transient*. But in practical terms, it is mere tautology. The truth is that the suspension from 5<sup>th</sup> February 2018 has grown *indefinite*. For the student, the suspension has no foreseeable closure. I take *judicial notice* that the final examinations are just round the corner.

19. I am satisfied that the disciplinary proceedings against the student constituted an administrative action. The term *administrative action* is wider than the final decision. See *Orion East Africa Ltd v The PS Ministry of Agriculture & another*, Nairobi High Court 100 of 2012 [2012] eKLR. Accordingly, the Board of Management of Gitura Secondary School (4<sup>th</sup> respondent) was enjoined by the Constitution to employ fair and lawful procedures.

20. 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.*

(3) *.....*”

21. The gravamen of the motion is that the student was condemned unheard; that no reasons were given; and, that the student will suffer prejudice in the forthcoming national examinations.

22. From the materials before me, it appears there was a *hearing* before the school board. The minutes of the meeting referred to were *not* annexed. To be fair to the respondents, the minutes were later filed as documents in the main petition. I say that very carefully and without making a final *finding*. I am alive that the main petition remains unheard.

23. I am fortified because the applicant concedes at paragraph 15 of the further affidavit sworn on 20<sup>th</sup> July 2018 as follows-

“*Indeed, it was the 2<sup>nd</sup> respondent who during the disciplinary hearing told the minor that she was concealing some information which is an indication that the alleged hearing was merely a fishing expedition aimed at obtaining evidence to incriminate the minor*”[*underlining added*]

24. I think it would be overreaching for the court to design the disciplinary organs of the school or to dictate how they are to conduct their proceedings. What is required is for the administrative tribunals to achieve a *reasonable* degree of *fairness* throughout their investigations, proceedings and final decision.

25. The key question is whether the applicant’s daughter received a *fair* hearing. That will be a matter to be determined finally at the hearing of the main *petition*. The student was in police custody. The guardian *received* a suspension letter on 5<sup>th</sup> February 2018 to appear before the board on 19<sup>th</sup> February 2018. There were some disciplinary proceedings on that date. It will be the true province of the trial judge to determine whether the notice was *sufficient* or whether the proceedings afforded the minor a *fair hearing*.

26. The allegations made against the student were *grave*. Having paraffin or petrol in her locker at the school *would* pose danger to the school community. There was a looming unrest by the students. The fears expressed by the headmistress were not unfounded. The minor’s explanation is that she was a prefect; that she had recovered the substance from another party; and, that she intended to report the matter. Learned counsel for the 6<sup>th</sup> and 7<sup>th</sup> respondents asked me to take *judicial notice* of the widespread torching of schools across the nation.

27. I *cannot* then say at this stage that there were *no* reasons for suspension or that the minor was condemned *unheard*. I also note that in the best interests of the student, the school allowed the student to register as a candidate for final examinations. I will make appropriate orders to ensure that the school allows the minor to sit for the examinations in October 2018.

28. I will now turn to the criminal proceedings in Murang’a Chief Magistrates Criminal Case Number 191 of 2018 *Republic v G.W.* [name

*withheld*]. The applicant craves an order to stop those proceedings. Article 157 of the Constitution grants the office of the Director of Public Prosecution the mandate to prosecute criminal matters.

29. The minor is deemed *innocent* until proved otherwise. She is entitled to equal protection of the law. She is a child with further rights under the Children Act. Whether her rights have been violated will await the final hearing of this *petition*. But whether or not the *criminal charge* will hold is the true province of the *criminal court* upon tested evidence. I thus decline to stop the criminal proceedings.

30. From my analysis up to this point, I find that there is *no* basis to grant an *unconditional* order for re-admission. It would equally be *unreasonable* to compel the Cabinet Secretary for Education to get fresh placement days to the final examination. But I find no rational basis for the school to withhold the minor's personal items, books or materials.

31. As I stated at the beginning, the court has to strike a very *delicate* balance between the interests of the applicant, those of other students and those of the entire school community. At this stage, I am not persuaded that the interests of this *one* student *outweigh* those of his fellow students or the student community.

32. But considering that she is a candidate, I am prepared to grant a *conditional order*: The minor may be re-admitted for the remainder of the third term only on *week days* as a *day scholar*. She will be *uniformed* and must submit to a *search* upon entry and exit from the school. The daily schedules shall be determined by the school. As a further condition, she must not venture into the boarding areas of the school. Furthermore, she will remain subject to the school regulations, discipline and code of conduct. Lastly, her guardian must meet the school fees for third term *less* boarding fees.

33. The upshot is that applicant's notice of motion dated 13<sup>th</sup> April 2018 *partially* succeeds. I make the following *final orders*:

i) The prayer to *compel* the Cabinet Secretary for Education (5<sup>th</sup> respondent) to get the minor a *placement* in another school is *dismissed*.

ii) The prayer to *compel* the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to *unconditionally* re-admit the student is *dismissed*.

iii) The prayer for an order to *stay* the prosecution of the minor in Murang'a Chief Magistrates Criminal Case Number 191 of 2018 *Republic v G.W. [name withheld]* is *disallowed*.

iv) The minor shall however be re-admitted to Gitura Secondary School for the remainder of the third term only on *week days* as a *day scholar*. She will be *uniformed* and must submit to a *search* upon entry and exit from the school. The daily reporting and departure hours shall be determined by the school. As a further condition, the minor *shall not* venture into the boarding areas or school dormitories.

v) The 1<sup>st</sup> to 4<sup>th</sup> respondents shall ensure that the minor is granted an opportunity to sit for her final year national examinations at the school in October 2018.

vi) The school shall release all personal items, materials and books to the minor.

vii) The minor will remain subject to the school regulations, discipline and code of conduct.

viii) The applicant (guardian) shall pay the school fees for third term *less* boarding fees.

ix) The remainder of the *petition* shall be allocated a hearing date on *priority*.

x) In the interests of justice I make no order on costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 10<sup>th</sup> day of August 2018.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:-**

Mr. Ngugi holding brief for Mr. Sunkuli for the applicant instructed by Sunkuli & Company Advocates.

Mr. Mbuthia holding brief for Mr. Kimwere for the 1<sup>st</sup> to 4<sup>th</sup> respondents instructed by Kimwere Josphat & Company Advocates.

Ms. Robi for the 5<sup>th</sup> respondent instructed by the Hon. Attorney General.

Mr. Mwangi holding brief for Mr. Mutinda for the 6<sup>th</sup> and 7<sup>th</sup> respondents instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas, Court Clerk.