REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 55 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHT AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 20 (1), 22 (1), 27, 47, 50(2) & 53 OF THE CONSTITUTION OF KENYA

BETWEEN

A M (SUING THROUGH HER FATHER

AND NEXT FRIEND PROF. DR. A M.....PETITIONER

VERSUS

PREMIER ACADEMY…….....RESPONDENT

JUDGEMENT

Introduction

The Petitioner brings this petition as the next of friend to A M-Minor who is a pupil at the Respondents School since 2009 and is currently in year **9.1** and on suspension.

The petitioners case

It is averred that vide a letter dated 16th February 2017 addressed to the petitioners father, the Respondent directed the petitioner to stay away from school on allegations of bullying without according the petitioner a right to defend herself against any allegations.

It is alleged that the petitioner has on numerous occasions been subjected to cruel treatment, various forms of punishment as well as psychological abuse by the Respondent without any justifiable cause and without due regard to her health and well being. It is also alleged that the Respondent has on numerous occasions coerced the petitioner into making concessions and signing statements without their free will

with the aim of using the same against the petitioner in instances where several allegations have been levelled against the petitioner. It is also alleged that the Respondent violated the petitioners rights under article 47, 53 (2) & 31 (d) of the constitution.

Respondents Response to the petition

George Isaboke Macheneri, Director of Studies at Premier Academy, in an affidavit filed on 3rd March 2017 averred that the petitioner bound herself to comply with the School Rules and Regulations, that the petitioner was always treated respectively and allegations against her were always properly investigated, and that the petitioner was always kept aware of the challenges faced by the petitioner and efforts made to correct her and that the petitioners father has been uncooperative when reached out in efforts to correct the child. It is also alleged that the school received complaints from other students and parents on posts emanating from the petitioner and that the petitioner scribbled messages and drawings in a note book belonging to another student and bullied other students listed in paragraph 17 of the affidavit. The petitioner was asked to keep off from school pending disciplinary procedure and that the parent was called to school on 21st February 2017 but he failed to attend. A second invitation was made for 28th February 2017, but again the petitioner and her parents failed to appear. A third attempt was scheduled for 8th March 2017, again the parents failed to attend.

It is also averred that the demand notice was served upon the Respondent on 20th February 2017 giving the petitioner one day to comply and this petition was filed the same day. Also, some parents had made complaints in writing against the petitioner. Several annetures to the affidavit do show numerous cases of indiscipline reported against the petitioner. Annexed to the Replying affidavit are affidavits of Alfred L. Gidali, Mitesh Mehta and Harriet Kaur.

Alfred L. Gidali is a counsellor who has outlined efforts made to counsel the petitioner states that the school has over 1000 pupils all of whom are entitled to a safe and secure learning environment while the other two deponents are parents at the school who are complaining against bullying of their children by the petitioner who posted offensive messages on their group forum.

Petitioners supplementary affidavit

In a supplementary affidavit filed on 14th March 2017, the petitioners father admits the petitioners obligations to abide by the school rules but avers that the petitioner is entitled to a fair hearing, that the school has a practice of forcing the petitioner to sign admissions on allegations of misconduct. He also disputed disciplinary proceedings shown in some of the exhibits and that he was apprehensive that the petitioner will not get a fair trial, and alleges that the Respondent acted in a manner which was not to the best interest of the child, and that the petitioner is entitled to a fair administrative action.

Further Replying affidavit

Alfred Lumire Gidali, a Pastoral Coordinator at the Secondary School section of Premier Academy averred that the petitioner was notified of accusations against her, that the petitioners father was present and participated in the proceedings, and prevailed upon the petitioner to sign the statement appearing at pages 37 and 38 of the Replying Affidavit, that the petitioner faced various accusations among them bullying, repeated use of vulgar language and being disrespectful to prefects, that the charges were known to her and were disclosed to her parent during the meeting held on 16th February 2016. He reiterated that the parent participated in the deliberations as evidenced in the annexed documents, that the petitioner was not expelled but was asked to stay away from school pending disciplinary committee meeting that would hear the charges against her where she would be afforded an opportunity to respond and rebut the allegations and that the committee has not yet sat because the petitioner has not honoured invitations, that the petitioner has not exhausted the available remedies, that the orders sought would not be in the best interests of the child and that the petition does not take into consideration the interests of other children.

Further Supplementary affidavit

In response to the above affidavit, the petitioner filed a further supplementary affidavit denying the contents of the above affidavits and stating that the affidavits in question are meant to portray the petitioner in a negatively, that the petitioner was invited to school after filing this suit, and that the schools disciplinary procedures are unconstitutional.

Petitioners advocates submissions

Counsel for the petitioner submitted that the Respondents actions without following due process violates the petitioners rights to fair administrative action,[1] that the best interests of the child must be considered,[2] and cited constitutional protection against abuse of power and unreasonableness.

Respondents submissions

Counsel urged the court to dismiss the petition on grounds that the Respondent acted in conformity with its rules and regulations and the law,[3] and submitted that the petitioners right to education and privacy had not been violated.

Petitioners further submissions

Counsel submitted that the Respondent was a judge in its own cause, that the investigations were actuated by malice, abuse of authority and are oppressive and illegal.

Whether this petition was filed pre-maturely

It is not disputed that the petitioner bound herself to comply with the School Rules and Regulations. The documents annexed to the affidavits discloses numerous acts of indiscipline attributed to the petitioner. They are all well documented and confirm that the parent was aware at all material times and even attended previous disciplinary proceedings. It is also clear that the school received complaints from other students and parents touching on the conduct of the petitioner such as scribbled messages and evidently obscene drawing(s) in a note book belonging to another student. There are also allegations of bullying other students which actions prompted the school to suspend the petitioner pending disciplinary procedure.

It is clear that the parent was called to school on 21st February 2017 but he failed to attend, a second invitation was sent for 28th February 2017, again the petitioner and her parent(s) failed to appear, a third invitation was scheduled for 8th March 2017, again the parents failed to attend.

This petition was filed on 20th February 2017, just four days after the letter suspending the pupil was written and four days before the date scheduled for disciplinary hearing which the petitioner declined to attend.

I find that the petitioner moved to court "too early' to stop the process and as at the time of filing this petition, there was nothing to show that the suspension was unfounded. A final decision on the fate of the petitioner was to be arrived at after hearing the disciplinary proceedings and at this point in time I find that since no decision had been made to expel the student, these proceedings are aimed at stopping lawful process or blocking the school from investigating the allegations against the petitioner.

The petitioner fears that the Respondent will not be fair in the disciplinary process. This raises the question reasonable apprehension of bias. Reasonable apprehension of bias is a legal standard for disqualifying decision-makers for bias. Bias of the decision-maker can be real or merely perceived. The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. [The] test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude.[4] A reasonable apprehension of bias may be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than

not that the decision maker would unconsciously or consciously decide the issue unfairly. In my opinion the simple question which requires an answer in each case is this: Is there a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the decision-maker might well be prone to bias? No tangible material was placed before the court to support reasonable fear of bias to justify the petitioners refusal to appear before the schools disciplinary committee.

Suspension is a form of school discipline where the student is temporarily removed from school. Furthermore, suspension can only be imposed when all other means of correction fail to bring about proper conduct, or if the student presents a danger to people and property, and/or disrupts the educational process for the other students.

Best interests of the child

The children's Act contains provisions for the protection and privacy of the children. But I must hasten to point out that the said provisions must be appreciated in light of the constitutional rights such as the limitations provided under article 24 of the constitution. Section **4(2)(3)** of the Children's Act states the principle that ought to guide the courts in determining matters where the welfare of children is concerned. The said provision states as follows:-

> *(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
>
> *(2) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to*

Courts make a variety of decisions that affect children, including placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights and school discipline cases. Whenever a court makes such a determination, it must weigh whether its decision will be in the "best interests" of the child.

Although there is no standard definition of "best interests of the child," the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child (as well as who is best suited to take care of a child). "Best interests" determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances or school's circumstances, with the child's ultimate safety and well-being the paramount concern and in a school environment the safety and well-being of other pupils.

A "best interests determination" describes the formal process with strict procedural safeguards designed to determine the child's best interests for particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option. The best option in a school environment must as of necessity consider the welfare and safety of other pupils and the behaviour of the child in school and the efforts and ability by the teachers to contain the behaviour of the child in school and above all the conduct and attitude of the parents to the school. If the parent, as in this case ignores pleas by the school to attend issues touching on the discipline of the child, then that becomes a relevant factor.

The term "best interests" broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences, behaviour in school and attitude towards other children. The child is entitled to protection. Equally, other pupils are entitled to protection also.

Whether the suspension was justifiable

The annextures to the Respondents Replying affidavit and the averments clearly show numerous acts of indiscipline on the part of the petitioner. The letter suspending the petitioner also cited the reasons for the suspension. Among the reasons cited are instances of bullying. The best interests of the other children alleged to have been bullied has to be considered.

Cyber bullying has also been cited. A U.S. federal appeals court recently upheld the school discipline of a student who allegedly bullied a classmate with an Internet page describing her as a "slut" with herpes. The court stated:-

> *"Such harassment and bullying is inappropriate and hurtful and ... it must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment," **[5]***

Alleged breach of constitutional rights

It is alleged that the petitioners rights under Article **47** and Fair Administrative Action Act have been violated. As observed above, this petition was filed prematurely, four days after the pupil was suspended from school and the parent refused to avail himself and the child for a disciplinary process. No final decision had been arrived at, hence the alleged violation of the right to fair hearing and a fair administrative action cannot arise at the stage. There is no decision for this court to quash or declare unconstitutional. It was totally ill advise for the petitioner to rush to court without first going through the laid down disciplinary process.

The alleged violation of right to privacy is in my view totally unfounded. The messages were disclosed by other parents who swore affidavits explaining that the offensive messages were posted to their children by the petitioner. These are not private communications at all. They were posted to a group. There is no privacy infringed at all.

In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected, that is the value of instilling discipline in children.

Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness.

To sum up limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.

Close attention to the facts of each individual case is required in order to decide on what is required to meet the need for vindication of the constitutional right which is at stake. I find guidance in the following words expressed in *Romauld James v The Attorney General of Trinidad and Tobago**[6]*** where citing previous decisions it was held:-

> *"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. compensation……."*

I find that no contravention of constitutional rights has been proved at all. The evidence tendered on behalf the petitioner in my view does not demonstrate the alleged violation. Courts have over the years

established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement[7]and the nature and extent of the injury suffered (if any).

I am fully aware that it is self evident that proving an injury or loss, which is neither physical nor financial, presents special problems for the witnesses and the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof. But my fear is that there was no attempt at all to plead or prove any of the above.

I am also alive to the fact that although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, but I am constrained by lack of sufficient evidence to enable me to justify or explain a violation of rights with the some kind of solid evidential foundation and persuasive practical reasoning. In *Ministry of Defence v Cannock**[8]* the court stated: -

> *"Compensation for injury to feelings is not automatic. Injury must be proved. It will often be easy to prove, in the sense that no tribunal will take much persuasion that the anger, distress and affront caused by the act of discrimination has injured the applicant's feelings. But it is not invariably so."*

In my view the petitioner has failed to discharge the burden of prove to the required standard. To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*[9] remarked:-

> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[10] **:-**

> *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

With the above observation in mind, the starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side.* The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,[11]**Lord Denning** said the following about the standard of proof in civil cases:-

> *'The …{standard of proof}…is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'*

Determination

In my view, the authority of schools and their administrators to impose sanctions, including expulsion, as disciplinary action against erring students is consistent to their duty and statutory mandate to "teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop moral character and personal discipline of the students. Schools and school administrators have the authority and responsibility to maintain school discipline and the right to impose appropriate and reasonable disciplinary measures. Students have the duty and the responsibility to promote and maintain the peace and tranquility of the school by observing the rules of discipline.

I also find that the petitioner and her parents should have waited for the action of the disciplinary committee before resorting to judicial action, hence this petition was filed pre-maturely. I find that the Petitioner has failed to prove her case to the required standard.

In conclusion, in view of my analysis of the facts of this case and the law as shown above, I find that the petitioner has failed to prove her case against the Respondent to the required standard. The up short is that this petition fails. Accordingly, I dismiss this petition with costs to the Respondent.

Orders accordingly.

Signed, Dated at Nairobi this 25th day of April 2017

JOHN M. MATIVO

JUDGE

Delivered at Nairobi this 25th day of April 2017

E. C. MWITA

JUDGE

---

[1]Counsel cited The Management Committee of Makondo Pr. Ach & Ano vs Uganda National Ex Board, Hc Civ Misc App No. 18 of 2010

[2] Counsel cited RCK vs KSI {2014}eKLR and DKC vs Flourspar Co. Ltd {2008}eKLR

[3] Counsel cited JK vs Board of Directors & Another {2014}eKLR & Fredrick Majumbo & Another vs The Principal Kianda Sch , Pet No 281 of 2012

[4]The test was first stated in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at page 394

[5] *Kowalski* v. *Berkeley County Schools*, the 4th Circuit, unanimous opinion by a three-judge panel of the U.S. Court of Appeals for the 4th Circuit, in Richmond, Va.

[6] {2010} UKPC 23

[7] See John Kimanu vs Town Clerk, Kangema NBI Pet. No. 1030 OF 2007

[8] {1994|} ICR 918, 954

[9]{1955} 1 WLR 948 at 955

[10]{2007} 4 SLR (R} 855 at 59

[11] {1947} 2ALL ER 372