



**AA (A minor suing through the father and next friend AEM ) v Board of Governors, M Academy (Civil Case 391 of 2012) [2016] KEHC 3641 (KLR) (21 July 2016) (Judgment)**

*AA (a minor suing through the father and next friend AEM v Board of Governors, M Academy [2016] eKLR*

Neutral citation: [2016] KEHC 3641 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 391 OF 2012**

**JN MULWA, J  
JULY 21, 2016**

**BETWEEN**

**AA (A MINOR SUING THROUGH THE FATHER AND NEXT FRIEND  
AEM ) ..... PLAINTIFF**

**AND**

**BOARD OF GOVERNORS, M ACADEMY ..... DEFENDANT**

**Expulsion of a child from school for failure to obey and abide by the disciplinary school rules does not amount to violation of that student’s constitutional rights**

*The case concerned a child who was expelled from school for engaging in sodomy. The main issue before the court was whether the child's constitutional rights were violated. The court held that the matter revolved around student discipline which by all standards was a big challenge to both parents and academic institutions, and the teachers at large. Further, a student was obligated to obey and abide by the disciplinary school rules as laid down by the school administration and once broken or not complied with, unless they were found to be unreasonable and not for the enhancement of the child's academic, social and mental growth, consequences ought to ensue, as choices had consequences. Thus the child's constitutional rights were not violated by the expulsion.*

Reported by Nelson Tunoi & Silas Kandie

**Constitutional Law** - Bill of Rights - rights of children - right of a child to know their parents and be entitled to parental care and protection - whether the rights of a child who was expelled from the school for engaging in sodomy prevail over the right to have his privacy and dignity protected - Constitution of Kenya 2010, articles 53 (1) (e), 53 (2).

**Brief facts**

The plaintiff AA (a minor suing through his father and next friend AEM) was a student at the material time and was allegedly expelled from school on May 30, 2012 without any reasonable cause, and that he was maliciously condemned unheard by the School’s Board of Governors. He claimed that the wrongful and illegal expulsion



had caused him psychological, social, economic and physical torture and as a result, his moral stature in society and his academic performance had been lowered and affected negatively. He had itemised particulars of malice and sought for an order for damages.

### **Issues**

- i. Whether the plaintiff's constitutional right to freedom from discrimination was infringed by the defendants when he was expelled from the school unheard.
- ii. Whether the plaintiff's right to be treated with dignity was violated by the defendants when they expelled him from school without affording him an opportunity to be heard.

### **Relevant provisions of the Law**

#### ***Constitution of Kenya, 2010***

##### ***Article 28***

*"Every person has inherent dignity and the right to have that dignity respected and protected".*

##### ***Article 53 (1) (e)***

*"Every child has the right-*

*(e) To parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not,"*

##### ***Children Act, 2001 section 4 (2) and (3),***

*4 (2) 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.*

*(3) 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—*

- a. safeguard and promote the rights and welfare of the child;*
- b. conserve and promote the welfare of the child;*
- c. Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.*

### **Held**

1. A child's best interests were of paramount importance in every sphere of the child's life as provided in section 4(2) of the Children Act, including learning in both private and public schools. The matter was all about student discipline, which by all standards was a big challenge to both parents and academic institutions, and the teachers at large. A parent was under an obligation to nurture a child by providing an enabling environment where his potential could be realized for growth to adulthood, and to a responsible citizen. The Constitution of Kenya, 2010, recognized those paramount considerations in article 53.
2. Education was a fundamental right of a child. The Disciplinary Committee had given the student and his parents an option to seek audience with the school principal if they were not satisfied. They opted for a transfer upon which a very favourable recommendation was given for the student.
3. The school resorted to suspension of a student only where serious disciplinary questions arose concerning the student. The school acted appropriately when serious allegations of sodomy were reported, and took into account that within a span of a few months, the student had been sent home on disciplinary issues against him. There was no malice in the action the school took in the circumstances. The plaintiff was accorded an opportunity to answer to the allegations but he failed to utilize the chance by becoming unruly.
4. The school administration and the Disciplinary Committee were commended for not forwarding the complaint to the law enforcement agencies, the Kenya Police Service, for further investigations that



- would no doubt had exposed the student to serious psychological social and mental torture as it would have led to criminal charges being preferred against him if proved to have been committed.
5. The plaintiff was not expelled from school for reasons stated but the parents opted to transfer him, to enable him continue with his education in a different environment. There was no violation of the student's constitutional rights. The student was obligated to obey and abide by the disciplinary school rules as laid down by the school administration and once broken or not complied with, unless they were found to be unreasonable and not for the enhancement of the child's academic, social and mental growth, consequences ought to ensue, as choices had consequences.
  6. The defendant did not require that the plaintiff through his father obtain a medical report. He did that to prove his health status, which was commendable. The school could not be ordered to refund that expense. Ordinarily the unutilized school fees of Kshs.15,683/30 ought not be refunded to the student as he opted to transfer to another school. However, in the circumstances of the case, it would be in order and reasonable that the sum of Kshs.15, 683/30 without interest be refunded to the plaintiff by the school's Board of Governors.

*Petition partly allowed.*

#### **Orders**

1. *The sum of Kshs 15, 683/30 without interest be refunded to the plaintiff by the school's Board of Governors.*
2. *Each party shall bear its own costs of the suit.*

#### **Citations**

##### **Statutes**

1. Children Act (cap 141) — section 4(2) — Interpreted
2. Constitution of Kenya, 2010 (Const2010) — article 19, 20,25(a); 27; 28; 47; 48; 53 — Interpreted

##### **Advocates**

None mentioned

## **JUDGMENT**

1. The plaintiff AA (a minor suing through his father and next friend AEM) was at all material times a student at [particulars withheld] Academy. He alleges to have been expelled from the said school on the May 30, 2012 without any reasonable cause, and that he was maliciously condemned unheard by the school board of governors.

He claims that the wrongful and illegal expulsion has caused him psychological, social, economic and physical torture and as a result, this moral stature in society and his academic performance have been lowered and affected negatively. He has itemised particulars of malice.

2. It is his contention that the defendant violated his constitutional rights enshrined in articles 19, 20,25(a) 27, 28, 47, 48 and 53 of the Constitution and seeks compensation in damages from the defendant together with refund of the unused school fees for the term, and costs of the suit.

The defendant in its defence dated November 27, 2013 denies the plaintiff's claim. Particulars of malice are also denied. It states that the claim is bad in law and incurably defective.

3. The plaintiff's case was urged through three witnesses. PW1 A EM is the father of the student. He recorded his statement on the October 10, 2012. He sought to rely on it as well as oral evidence. It was his evidence that his son was sent home with an exit chit to bring his parents to school. That he had paid the whole terms school fees and that when he and the mother of the student went to school, the



son was given a form to fill and one of the questions was “name five students whom you would like to be chased like you,” to which he wrote “ I do not to know.” He testified that the peputy principal attended to them and told them that “Let your child not be burnt here take him away,” and that the matter was with the police. In brief, the principal told them that their was involved in sodomy.

4. It is the plaintiff’s evidence that the student was not given an opportunity to defend himself against the said accusation. It was further testified that the student was kicked out of the school by the security officer on instructions of the deputy principal where, upon being accused of sodomy he fell down, became hysterical and started abusing the teachers. This the plaintiff states was torture and humiliation of this son in the presence of this parents.

The plaintiff testified that thereafter he took the student to hospital and upon tests being conducted, he was cleared of having been involved in sodomy. The medical certificate from the Nakuru Provincial Hospital was given to the school. He later transferred the student to another school.

5. PW1 has too recorded her statement. She is the mother of the minor student. She reiterated the story as narrated by PW1. She stated that upon consultation with the District Education Officer, she was advised to look for another school for the student.
6. On his part, the student AA testified that he was not involved in any antisocial behaviour or sodomy with any of the students, and that he was not given a chance to explain himself or against the accusations, and face his alleged accusers, one FM and IK. He testified that prior to this incident, he had an argument with the said F M but did not fight and that the school did not punish him but F and other students were punished. It is then that F told him that he would reiterate. He further stated that FM and IK were friends. He denied ever being involved in sodomy or any antisocial behaviour while at the school.
7. The defendant’s evidence was urged by the then Deputy Principal Ms NMK. She too had recorded a statement that was filed on the February 7, 2014. She testified that the student was sent home on November 18, 2011 to bring his parents to discuss his misconduct, but the matter was resolved and the student was allowed to resume classes. Then on the May 29, 2012 he was sent home to bring his parents for reasons of engaging in sodomy, that the Disciplinary Committee deliberated on the issue on the June 5, 2012 in the presence of the students parents. She testified that the student denied the allegations and became hysterical, banged the table and shouted to the teachers.

The committee ordered him out and talked to the parents. According to her statement, the parents were requested to transfer the student to another school, and the reasons for the recommendation listed as:

- (a) the boy was very unpopular with his peers hence will not be in a good environment to continue with his education.
  - (b) To avoid the boy being stigmatised for his gay tendencies
  - (c) To further his education peacefully.
  - (d) Adow was not expelled. The decision to transfer him was made by the parents.
8. In her testimony, the deputy principal reiterated the contents of her statement, that in May 2012, the student was found to be engaging in sodomy with another student, IK and the parents were explained why he was sent home – due to the antisocial behaviour, and that the entire school and students were not happy with him, and that they advised a transfer from the school. It was her evidence that the disciplinary committee did not expel him as it had no power to do so. It was her further testimony that it is the students’ parents who requested for his transfer from the school after the disciplinary committee



recommendations. The disciplinary committee meeting minutes dated January 9, 2012 were produced as DExt 3 with recommendations of a transfer, for reasons stated earlier.

9. Upon cross examination, the deputy principal stated that the antisocial acts of sodomy were reported by other students and the plaintiff's partner IK through notes that the student had been caught sleeping in the same bed with IK who was sick and who made the complaint and upon further investigations by the class teacher, it was confirmed that he was practicing sodomy, and asking other students for sexual favours. She reiterated that the students was not expelled but the father removed him from the school voluntarily upon recommendations by the disciplinary committee.

10. The court has considered the plaintiff's and defence evidence and the pleadings, together with submissions.

The defendants submissions are that upon recommendations by the disciplinary committee the parents of the student opted to transfer their son for reasons stated in the recommendations. It is further submitted that the accusations against the student were not only criminal in nature but also antisocial and frowned upon, and the school could not guarantee his security.

That the suit was brought as an afterthought and is made up of fabrications that the plaintiff was unable to substantiate and to prove hence ought to be dismissed with costs.

11. The plaintiff submissions are that the school board expelled the student illegally and without any cogent reasons and thereby violated his constitutional rights. It is submitted that it is the defendant who made the recommendation for a transfer yet it had no such authority that the allegations had not been proved, as he was not accorded a hearing in the manner befitting the rights and best interest of the minor student.

For the plaintiff, it is further submitted that he was subjected to torture and in human degrading treatment and his dignity and respect were not protected pursuant to article 25 and 28 of the Constitution.

Finally, it is submitted that the student was maliciously expelled from the school and therefore entitled to the damages sought.

12. The court has considered the above and all the circumstances leading to the alleged expulsion or transfer of the student from the defendant school. It is trite that a child's best interests are of paramount importance in every sphere about the child as provided in section 4(2) of the Children Act, including learning in both private and public schools. This matter as I see it is all about student discipline, which by all standards is a big challenge to both parents and academic institutions, and the teachers at large.

A parent is under an obligation to nurture a child by providing an enabling environment where his potential can be realised for growth to adulthood, and to a responsible citizen. The Constitution recognises these paramount considerations in article 53.

13. The evidence tendered by all the parties points to a student who had disciplinary issues for the two years he was in the defendant school. He had been sent home for an alleged fight in school prior to the present incident. That was resolved. Soon thereafter, he was alleged to have been engaged in sodomy with other students. His parents when summoned appeared before the schools disciplinary committee together with the student. The minutes (DExt.3) show that the complaint was discussed in the presence of the student and his parent, and how the complaint reached the teachers. The school board of management recommended a transfer of the student and his as the school could not guarantee his safety. The parents were advised that if not satisfied, they could seek audience with the school principal, which they did not.



14. There is no dispute that the allegations of sodomy in any school smacks lack of discipline by the student. It was stated that the other students were not happy about that behavior, and could harm him. It is the same students who raised the complaint through the teachers. What then was the best action for the school to take to protect the student's interest, dignity and respect?

The student and his parents were given an opportunity to appear before the disciplinary committee, which they did.

Unfortunately, the minutes of the committee sitting were not provided save the recommendations. It is not easy to make a finding whether or not the student was given a hearing to explain himself and answer to the allegations without the proceedings. None of the parties provided them. From both parties, it appears that all were in agreement, that when the complaints were stated to them, the student failed to answer, started crying, became hysterical and banging tables and abusing the teachers. With this behaviour, the proceedings were terminated and the disciplinary committee deliberated and came up with the recommendations.

15. Education is a fundamental right of a child. The defendant gave its reasons why even after the complaints prior to the present complaint, it made good recommendations for the student to be able to continue with his education. Indeed when he testified before me on the November 17, 2014, he informed the court that he had cleared school which was a good step.
16. The disciplinary committee had given the student and his parents an option to seek audience with the school principal if they were not satisfied. They opted for a transfer upon which a very favourable recommendation was given for the student.
17. A school results to suspension of a student only upon serious disciplinary questions arise concerning the student. I find that the school acted appropriately when serious allegations of sodomy were reported, and taking into account that within a span of a few months, the student had been sent home also on disciplinary issues against him.

I find no malice at all in the action the school took in the circumstances. The court is also satisfied that the plaintiff was accorded an opportunity to answer to the allegations but he failed to utilise the chance by becoming unruly. I comment the school administration and the disciplinary committee for not forwarding the complaint to the law enforcement agencies, the Kenya Police Service, for further investigations that would no doubt have exposed the student to serious psychological social and mental torture as it would have led to criminal charges being preferred against him if proved to have been committed. Given the circumstances and evidence tendered, the court holds the view that the plaintiff was not expelled from school for reasons I have stated but the parents opted to transfer him, to enable him continue with his education in a different environment.

As as a whole the court finds no violation of the students constitutional rights.

18. A student is obligated to obey and abide by the disciplinary school rules as laid down by the school administration and once broken or not complied with, unless they are found to be unreasonable and not for the enhancement of the child's academic, social and mental growth, consequences ought to ensure, as choices have consequences.
19. The plaintiff's father spent a sum of Kshs 1,200/= to obtain a medical report on his son's health status. He claims a refund of that sum. He further claims a sum of Kshs 15,683/30 being utilised school fees for the second term 2012, the student having stayed in school for only one month, out of the three months.



The defendant did not require that the plaintiff through his father obtain a medical report. He did that to prove his health status, which is commendable. The school cannot be ordered to refund that expense. Ordinarily the unutilised school fees of Kshs 15,683/30 ought not be refunded to the student as he opted to transfer to another school. However, in view of the circumstances of the case, it would be in order and reasonable that the sum of Kshs 15,683/30 without interest be refunded to the plaintiff by the school's Board of governors. It is so ordered.

20. For the reasons stated above, the court finds that the plaintiff's suit lacks merit, and the allegations levelled against the defendant not proved to the required standard, on a balance of probability.

The reliefs sought by the plaintiff are found to be unmerited. The court declines to issue the declaration that the constitutional rights of the plaintiff were violated by the defendant and therefore the plaintiff is not entitled to compensation by way of either general or exemplary damages. Save for the order of refund of the sum of Kshs. 15,683/30 to the plaintiff by the defendant, the rest of the prayers are dismissed.

Each party shall bear its own costs of the suit.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF JULY 2016**

**JANET MULWA**

**JUDGE**

