



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 18 OF 2015

**IN THE MATTER OF ARTICLES 3(1), 22, 23(3), 43(F), 47(1) AND 53(2) OF THE
CONSTITUTION**

AND

IN THE MATTER OF SECTION 4(2) OF THE CHILDREN ACT

AND

IN THE MATTER OF SECTIONS 28 AND 35 OF THE BASIC EDUCATION ACT 2013

E.K. & 5 OTHERS.....PETITIONERS

-VERSUS-

THE REGISTERED TRUSTEES OF S.H.S.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioners are children aged between 16 and 17 years and have brought this Petition through their parents. They were all form four students at S.H.S., a private secondary school registered under the Basic Education Act until 31st March 2015 when they were expelled.
2. By their Petition dated 16th April 2015, the Petitioners have challenged this decision to expel them. The Petition has been brought under Articles 3 (1), 22(1) and (2) (a), 23 (3), 43 (1) (f), 47(1) and 53 of the Constitution; Section 7(1) of the Children Act, 2001 and Sections 28, 30(1) and 35 of the Basic Education Act, 2013. The Petitioners seek the following orders:

(a) a declaration that the decision by the Respondent school reached on 31st March 2015 to expel the Petitioners from the school was in breach of their constitutional right to fair administrative action and the right to basic education and is therefore unconstitutional and unlawful;

(b) an order for immediate re-admission of the Petitioners to the Respondent school to enable them attend and complete their secondary education at the Respondent's school without any hindrance whatsoever;

(c) an order for compensation to each Petitioner for the loss and damage occasioned to them and their parents as a result of the Respondent's actions; and

(d) costs of the Petition.

THE PETITIONERS' CASE

3. This Petition is supported by the Affidavit of E .K. K the 1st Respondent's father sworn on his own behalf and on behalf of the other Petitioners on 16th April 2015.
4. On 21st March 2015, the Petitioners were suspended from the Respondent's school for a period of ten days. There were various allegations made against them in the suspension letters addressed to their parents dated 21st March 2015. They were accused of four common offences which primarily were the reason for their expulsion:
 - (a) *being in tuition block at 3.30 am an intention of meeting a girl /boy*
 - (b) *engaging in unhealthy boy/girl relationship and planning to meet at 3.00 am contrary to the school's expectations*
 - (c) *disregarding the good counsel given to him or her by those in authority*
 - (d) *breaking the school rules and regulations.*
5. In the letters, the parents were asked to accompany their children to the school on 31st March 2015 when they were to appear before the school's disciplinary committee. When they appeared before the disciplinary committee, they did not receive a fair hearing. Instead, they were taken through “an opaque process which was merely a one sided discourse on the subject of discipline”. Afterwards, each child was called into the meeting and forced to confess to the accusations.
6. The Petitioners and their parents remained in school until 9.45 pm when finally they were informed verbally that they had been expelled from the Respondent's school. However, the Respondent agreed to register the Petitioners at the school for purposes of undertaking their Kenya Certificate of Secondary Education.
7. The Petitioners allege that the decision to expel the Petitioners was contrary to their expectations. The misconduct was not provided for in the school regulations that being in class did not constitute an offence under the School's regulations. The offences were ambiguous and it could not be construed that being in the tuition block at that hour necessary implied engaging in an unhealthy relationship.

THE RESPONDENT'S CASE

8. The Respondent has opposed the Petition by a Replying Affidavit sworn by the Chief Principal of the school on 20th April 2015. He admitted that the Petitioners were students of the school. They were therefore bound by the rules and regulation and the penal code. (RMC 1 and 2).
9. On 21/03/2015 at 5.00 am, he was informed by the Deputy Principal that the Petitioners had been caught engaging in unhealthy boy/girl relationships. He went to the school and found the Petitioners writing statement. He was informed of what had transpired by Security Lady Supervisor, Security Supervisor and the Deputy Principal Administration who deposed the Affidavits annexed to the Replying Affidavit and marked “RMC 3a, b and c”.
10. The Security Lady Supervisor deposed that while on patrol on the material day, she encountered four girls going to class at three am in the morning. She informed the security supervisor to confirm if they had infact gone to class. The Security Guard was suspicious when after receiving this information, he did not see lights on in any classroom. He decided to carry out a search and ended up in one of the Form two classes where he saw a boy and a girl engaging in sexual relations. He was able to detain the girl but the boy managed to get away. He immediately called the Deputy Principal Girls Management and the Deputy Principal Administration. The two were later identified as the 6th Petitioner and the 2nd Petitioner.
11. The security guard also found the 5th Petitioner in one of the classes sleeping and the 3rd Petitioner was found in another class hiding by the Deputy Principal Administration. The three confessed

- and revealed the other Petitioners' involvement in the issue.
12. After deliberating it was agreed that the Petitioners would be suspended effective from that date until 31st March 2015 when they would return with their parents for a disciplinary meeting. On this day, the Petitioners were given a fair hearing and they admitted to have committed the offence.
 13. The Petitioners and their parents were heard individually before a decision to expel them was made by the disciplinary committee. This decision was communicated to the Petitioners and their parents. They were however informed that they would be registered by the school to do their exams there if they had not found alternative examination centres by 10th April 2015.
 14. The Respondent argued that its school is founded on Christian values. Therefore, admitting the Petitioners back will set a bad precedence to the other students. They urged the court to dismiss the Petition with costs.

THE PETITIONER'S SUBMISSIONS

15. That the actions they were accused of committing were not offences listed in the school regulations or rules. The Petitioners and their parents were ambushed. They were not informed that expulsion of the students would be considered or that it was a possible outcome of the meeting. The Petitioners' Counsel also submitted that there was no evidence on how the decision to expel the Petitioners was made. They were not informed of the reasons for their expulsion.
16. The decision to expel them was made in contravention of the right to education under Section 35 of the Education Act, 2013. This Section has expressly outlawed expulsion save for a delinquent child for whom all other corrective measures have failed. There were no disciplinary issues against the Petitioners prior to the incident that led to their expulsion. Further there were no other corrective measures undertaken by the Respondent.
17. According to Counsel merely allowing the children to do exams was not sufficient in this case. They are undertaking technical subjects for which practical projects must be undertaken before the final exam. It is essential that they be allowed to revise with the other students and have access to their teachers. In this case, expelling the children was not in their best interest and was therefore a contravention of Article 53 (2) of the Constitution.
18. In support of his case, Counsel relied on the following cases: **G.N. V. Chumani Secondary School Board Of Management** [2014] eKLR, **R.W.T V. Ssn School**, [2012] eKLR, **Erick Kimani Muiruri V. The Chief Principal Upper Hill School** [2007] eKLR, **Republic V. Kenya Training College [2004] eKLR** and **David Kipruto Cheruiyot V. Kenya Flourspar Company Limited eKLR**, [2008] eKLR.

THE RESPONDENT'S SUBMISSIONS

19. Mr. Morintat for the Respondent submitted that this case concerned the right to fair administrative action. His submission was that the Respondent acted fairly and followed the procedure. The Petitioners were found to have engaged in immoral activities on 21st March 2015 contrary to the school's penal code and rules.
20. Counsel pointed out that the Petitioners could not claim that their rights had been contravened whereas they had admitted voluntarily that they had contravened the school rules and that they had been doing so for some time. They cannot be allowed to continue with their education in this school. It was however willing to accommodate them to do their exams.
21. In response to the argument that the Petitioners' best interest under Article 53 (2) of the Constitution had been infringed, Counsel submitted that that interest must be considered against that of the entire student body. It was not in the interest of the rest of the students for the Petitioners to be allowed back in the school despite having committed the immoral acts. This would set a bad precedent to the rest.
22. In support of his case, Counsel relied in two cases: **R V. Egerton University ex-parte Robert Kipkemoi Koske**, [2006] eKLR and **Misc Application No. 502 of 2008 Kimengich Arap Namba V. The Principal Sacho High School [U/R]**. The gist of both decisions is that once a

- person has been accorded a fair hearing and the principles of natural justice have been followed by the body making the decision, there cannot be a breach or violation of the law.
23. Similarly, in this case, the court has no reason to interfere with the Respondent's decision which was made in lawfully. Further having found that there was no violations against the Petitioners, damages will not accrue. In any event the same have not been quantified and could therefore not be awarded.
24. Finally Counsel pointed out that the 5th Petitioner's case should not be considered because she had already asked for and been granted leave to transfer to another school.

REJOINDER

25. The Petitioners' Counsel submitted that the 5th Petitioner was a proper party to the suit as she was also unlawfully expelled from the school. The fact that her parent was forced to look for another school does not bar from seeking readmission to the school.
26. On the alleged confessions Counsel submitted that they were coerced. They were taken from the students on the day they were suspended. They were pleas for forgiveness. Counsel also submitted that the effect of the Petitioners' readmission on the other students is not relevant.
27. Counsel reiterated his submission that the Respondent's decision was unlawful and unconstitutional and it must therefore be set aside.
28. For the Respondent, Mr. Morintat submitted that the issues as framed were in regard to fair administrative action. He regarded the Petition as not merited. The Petitioners were found to have engaged in some immoral activities on 21st March 2015 contrary to the school's penal code and rules.
29. There are three affidavits from eye witnesses who unearthed the activities of the Petitioners. (See RCM 3A, B and C). There are also annexed statements from the Petitioners who have admitted the activities. One confesses to have been engaging in those activities for prior three weeks.
30. Each of the Petitioner and his/her parent met with the disciplinary committee. Thereafter, they were informed of the finding of the committee and the penalty meted out. They cannot argue that their rights were contravened.
31. Responding to the contention that the Petitioners' best interest under Article 53 had not been regarded, Counsel argued that the provision does not mean the best interest of the petitioners but also of the entire student body of the Respondent's school. It is not in the best interest of the Petitioners to be in the same school where their actions is in the knowledge of the other students.
32. Counsel submitted that the Respondent was willing to accommodate them to do the exams but not to study in the school.
33. For his case, Counsel relied on two cases: **R. V. Egerton University ex-parte Robert Kipkemoi Koske**, [2006] eKLR and **Misc Application No. 502 of 2008 Kimengich Arap Namba V. The Principal Sacho High School [U/R]**. The gist of both decisions was that once somebody has been accorded a fair hearing and the principles of natural justice have been followed, there is no breach and no violation. This is the case herein. No breach. No violation. They confessed to have committed the offences and that they had been doing so for some time. It is not safe for them to be readmitted to the same school.
34. Having found that the violations did not take place, damages will not accrue. In any event, the same has not been quantified.
35. He also pointed out that the 5th Petitioner was no longer a party to these proceedings as she had already asked and been allowed to transfer to another school.
36. In rejoinder, the Petitioners' counsel submitted that the 5th Petitioner was a proper party to the suit as she was also unlawfully expelled from the school. The fact that the parent was forced to look for another school does not bar her right to seek readmission to her rightful school. Remedial measure by the parent cannot bar him from coming to the court. Authority to institute the case, all the parents including the 5th Petitioners have sworn verifying affidavits.

37. That the alleged confessions, they are nothing but pleadings by the Petitioners to be forgiven. They were taken from the students on the same day they were suspended. They were coerced confessions. None confesses to any crime. They say that they went to class for group discussions. The security was aware so it appears to have been a practice.
38. Further, the effect of the the readmission of the Petitioners on the other students is not relevant. The Petitioners were expelled on the basis of their alleged misconduct. Their opinion cannot be allowed to affect the Petitioners' rights to education. Ultimately Counsel argued that under Article 47(2) of the Constitution, the Respondent's decision is unlawful. The Petitioners were entitled to be given written reasons for the decision.

ISSUES FOR DETERMINATION

39. The Petitioner framed two issues for determination in this petition:

- (a) the primary issue is whether the expulsion of the Petitioners from the Respondent School was unconstitutional in view of the provisions of Articles 3(1), 43(1) (f), 47 and 53(2) of the Constitution;
- (b) whether the Petitions are entitled to the orders of readmission to the Respondent's school;
- (c) whether the Petitioners are entitled to damages; and
- (d) who will bear the costs of the petition.

ANALYSIS

40. Notwithstanding that the Respondent is a private school, it is subject to the laws of the land. In the first instance, it is bound by the constitution, the supreme law of the land and which provides at Article 2(1) that its provisions bind all persons and state organs. Secondly, being an institution that provides basic education, it is subject to the Basic Education Act, 2013. Thirdly, as the Petitioners are children below the age of 18 years, the Respondents were bound to adhere to the provisions of the Children Act when dealing with any matters pertaining to them.

41. Therefore, although it is beyond the powers of this court to determine disciplinary issues, it has a duty to enforce the law. The scope of its determination will be whether the Respondent's actions were in tandem with the law.

42. The Respondent's school had a set of school regulations and rules and a penal code. The penal code provided for the offence of being involved in sexual activity with another student within and outside the school which attracted one penalty, exclusion with immediate effect.

43. This penalty contravenes the provisions of Section 35 (2) and (3) of the Basic Education Act. Subsection (2) provides that:

(2) no pupil admitted in a school, subject to sub-section (3) shall be held back or expelled from school.

(3) subject to subsection (1) the Cabinet Secretary may make regulations to prescribe the expulsion or the discipline of a delinquent pupil for whom all other corrective measures have been exhausted and only after such child and parent or guardian have been afforded an opportunity to be heard:

Provided that such a child shall be admitted to an institution that focuses on correction in the context of education.

44. Therefore the Respondent may set up its own rules setting out what constitutes indiscipline and prescribe the punishment. However, subsections (2) and (3) prohibit expulsion save for delinquents for whom all other corrective measures have failed. Although operating rules have not

- been enacted by the Cabinet Minister, the underlying principle from the provision is that expulsion which is an extreme punishment can only be resorted to as measure of last resort.
45. In addition, although it is alleged in the Replying Affidavit that the Petitioners admitted to engaging in unhealthy relationships, which was the main reason for their expulsion, the Petitioners' statements do not contain this admission. They agree that they were out of the dormitories at that hour but do not admit that they engaged in the prohibited act. The disciplinary committee made a similar finding in its Report dated 1st April 2015 that the admission of the Petitioners was ***“planning to meet in the wee hours of the morning and leaving their dormitories to accomplish their mission.”*** It made no specific finding on whether the accusations of engaging in unhealthy relationships had been proved.
46. Nonetheless, the committee proceeded to expel the Petitioners without considering whether they were delinquents or that other methods of discipline had failed. In the report the decision of the committee to ask the parents to withdraw the children was informed by the gravity of the offence.
47. There was no evidence of other disciplinary infractions that made the Petitioners unsuitable to continue being in the school. Similarly there was no evidence of other reform measures undertaken which had failed. Therefore in so far as expulsion was the punishment meted out at the first instance and without any justification as provided for under subsection (3), it was unlawful.
48. The Petitioners also complained that their right to fair administrative action

as provided for under Article 47 of the Constitution was contravened. This Article provides:

“47. (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.”

49. The Petitioners' right to basic education under Article 53 of the Constitution was adversely affected by the Respondent's decision to expel them. Therefore, under sub article (2) they ought to have been informed, in writing, of the reasons for the action.
50. The uncontroverted evidence was that the Petitioners' parents were verbally informed that their students would no longer be allowed to undertake their studies at the school after the disciplinary hearing. The disciplinary report noting this fact was compiled the following day.
51. This report did not indicate the evidence against each Petitioner and the findings of the Committee on each accusation. The Petitioners were not informed of the exact actions that they were found to have committed which contravened the school's regulations. Each Petitioner was not informed of the reasons of his/her expulsion.
52. This was a serious omission on the part of the Respondent considering the gravity of the penalty and the fact that the disciplinary committee appears to have relied heavily on the Petitioners' statements. The Respondent alleges that in those statements, the Petitioners admitted to the offences.
53. The evidence suggests that those statements were made under duress. It is noteworthy that the Petitioners' parents had been advised to counsel their children to open up during at the disciplinary meeting so that they could reach an amicable solution. These statements were an attempt to exonerate themselves and at the same time, appease the disciplinary committee into allowing them back into the school.
54. It was therefore pertinent for the Respondent to inform the Petitioners of the overall evidence against them and how it had been weighed against their defences. Failure to do so demonstrated that the process was neither lawful nor procedurally fair as required by Article 47 of the Constitution.
55. In addition there is no evidence that the parents of the Petitioners were heard at any time during the disciplinary proceedings. There was a meeting with the parents but it is alleged that in that meeting, the parents were not given a chance to state their case. There are no minutes of the meeting to disprove this allegation. In addition in the Report, the disciplinary committee does not indicate having had regard to the parents' statements.

56. This was in contravention of Section 35 (3) of the Basic Education Act which mandates that a parent or guardian be heard before a child is expelled.
57. From the evidence, it appears that the Respondent's primary concern was not the interests of the Petitioners but upholding its moral values and using the Petitioners as an example to the rest of the students of the consequences of the misconduct. This concern regarding the negative precedent that would be set if the Petitioners are allowed back to the school was raised by Counsel. He argued that the Petitioners' best interest under Article 53 of the Constitution must be weighed against that of the other children. He also argued that the Respondent adheres to Christian morals which it wished to uphold.
58. However I agree with the decision of **G.N. V. Chumbani Secondary School** (*supra*) that the Respondent's need to discipline the child did not override his right to education. Similarly in **R.W.T vs S.N.S School** (*supra*) faced with a similar issue the court held that there is a responsibility that flows from the human rights of each individual which cannot be subordinated merely because the interests of other children are greater.
59. In the instant case, the Petitioners are four children and are only months away from sitting for the national examinations. At this point, asking them to relocate would cause them undue hardship. Further being required to stay away from the school would prevent them from conducting their practicals and having access to their teachers.
60. Their right to complete their secondary school education far outweighs the need to teach the other students of the consequences of misconduct and the need of the Respondent to enforce its rules.
61. Finally the Petitioners asked for damages for the infringement of their rights. Article 23(3) grants this court discretion to determine the appropriate relief to a party who has successfully proved that his rights have been violated. In this case, I find that the readmission of the 1st, 2nd, 3rd, 4th and 6th Petitioners by the Respondent is adequate compensation and will not make an additional award for damages.
62. With regard to the 5th Respondent, the evidence put forward was that she had already transferred to another school as at the time the Petition was filed. Therefore ordering her readmission to the school will only disrupt her as she has already settled in another school. The appropriate remedy is one for compensation. I however note that she did not offer any evidence

regarding the expenses she incurred during her transfer. Nonetheless, I find that a sum of Kshs. 150,000/= is adequate compensation for her troubles.

DETERMINATION

63. The Petition is hereby allowed and the declaration order sought in terms of prayer (1) hereon is hereby granted.
64. The Petitioners Nos.1 (EKK), No.2 (EMS), No.3(RP), No.4 (NCT) and No.6 (AWM) be and are hereby re-admitted to the Respondent school forthwith.
65. The Petitioner No.5 (LKC) be and is hereby awarded compensation in the sum of Kshs.150,000/= as she was already been enrolled and registered for her exams in another school.
66. Each party shall bear its/their own costs.
67. Parties at liberty to apply to court for further orders.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 15th day of May, 2015.

A. MSHILA

JUDGE