



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**MILIMANI LAW COURTS**  
**PETITION NO 180 OF 2015**

**D. R. M (A child suing through his mother and next friend Q L D) .....1<sup>ST</sup> PETITIONER**

**P. C. M (A child suing through his mother and next friend Q L D) .....2<sup>ND</sup> PETITIONER**

**A.X. M.B (A child suing through his mother and next friend Q L D) ....3<sup>RD</sup> PETITIONER**

**VERSUS**

**BOARD OF DIRECTORS D SCHOOL OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**NAIROBI D SCHOOL (NAIROBI).....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. At the time of filing this petition, the three petitioners, who are siblings suing through their mother, had been expelled from the respondent school. They therefore lodged the present petition alleging violation of their right to education and sought the following orders:

1. *An order of Certiorari do issue removing to this Honourable Court for the purposes of quashing the respondent's letter of 11<sup>th</sup> March 2015*
2. *An order of mandamus do issue reinstating and re-admitting the petitioners to D School Nairobi which should avail time and resources to allow the petitioners to catch up with their few lost lessons.*
3. *A declaration be issued that the petitioners rights to education and right to fair administrative action were infringed by the respondents and that the expulsion was an infringement of their fundamental right to education.*
4. *An order do issue directing the respondents whether by its employees, servants or agents or any of them or otherwise howsoever from discriminating or victimizing the petitioners in any manner whatsoever following their reinstatement and re-admission to school.*

5. *Exemplary damages and costs of and incidental to this suit.*

2. They also sought interim orders to compel the respondents to re-admit them to school pending the hearing and determination of the petition. I declined to grant the conservatory orders but directed that the parties proceed with the hearing of the petition as a matter of urgency. The petition was heard before me on 11<sup>th</sup> of May 2015.
3. After hearing the submissions of the parties on their respective cases and taking into account the fact that the matter involved children whose best interests, in accordance with Article 53(2) of the Constitution and the Children Act, should be the paramount consideration, I directed that a Children Officer investigates the matter and submits a report to the Court. In particular, I directed that the officer visits the school and interviews both the school administration, the parents of the minor petitioners and the minors themselves to ascertain whether an amicable resolution of the matter can be reached, and if so, the terms thereof. A report dated 20<sup>th</sup> May 2015 was duly submitted to the Court.
4. In the said report, the Children Officer noted that the children had already been transferred to another school, namely [Particulars Withheld] School. They had indicated to the Children Officer that they were happy there, and would not like to go back to the respondent school. The Children Officer also recommended that in view of the circumstances under which the petitioners had left the respondent school, it was not in their interests that they should go back.
5. While this appeared to settle the dispute, and the respondents were satisfied with the recommendations of the Children Officer, the petitioners' mother insisted on the Court considering the issues raised in the petition and the orders sought therein. This decision therefore pertains to the respective cases of the parties.

### **The Submissions**

6. In her submissions on behalf of the petitioners, Ms Kirui relied on the petition dated 4<sup>th</sup> May 2015, and supported by an affidavit of the same date sworn by the petitioners' mother, Q L D, as well as her further affidavit sworn on 11<sup>th</sup> May 2015.
7. Their case was that they were minors aged 10, 7 and 6 who were expelled on 11<sup>th</sup> March 2015 by a letter of the same date by the 2<sup>nd</sup> respondent. The petitioners had moved to Kenya from Frankfurt Germany in September 2014. They had been living in Germany and only understand German. Consequently, they were enrolled in the German School in August 2014. They state that the petitioners' parents had met the teachers at the respondent school and explained to them that they had recently moved from Germany and requested them to support and assist the children to adapt to the new environment.
8. The mother of the petitioners alleges that during this time, the children's care taker came home and informed her that one of the teachers at the school had hugged the 2<sup>nd</sup> petitioner and whispered something in her ear, as a result of which the 2<sup>nd</sup> petitioner started crying loudly.
9. She avers, further, that on a second occasion, the children's father had gone to the school to pick up the children and had found the 2<sup>nd</sup> petitioner with her teacher. Ms. SS, holding hands, and the teacher had refused to let go of the 2<sup>nd</sup> petitioner's hand. It was only after the father pleaded with the teacher that she let go of the 2<sup>nd</sup> petitioner's hand.
10. The petitioners also allege that the said teacher was treating the 2<sup>nd</sup> petitioner more warmly than she treated other children in the school. The petitioners allege that as a result, the petitioners' mother wrote to the school asking that the physical contact between the teacher and the 2<sup>nd</sup> petitioner should be kept to the required minimum. It was following this letter and the subsequent acrimonious exchange of correspondence that the school decided to expel the petitioners.

11. The petitioners allege violation of their rights under Article 47 on fair administrative action. It was submitted on their behalf that Article 47 places a duty on a party before making a decision. They submit that the petitioners' mother was only given a letter prior to the expulsion of the children, and their right to a hearing was also violated as they were not heard prior to the expulsion without just cause, and they were also subjected to stigmatization in violation of Article 53(1).
12. The petitioners also allege violation of their right to education under Article 43. It was submitted on their behalf that the respondent school is the only institution in Kenya that teaches all subjects in German, and for children who do not understand any other language it would be difficult for them to attend any other school. The petitioners denied that the children spoke or understood English. They also denied the respondents' allegation that the children had been neglected.
13. The 2<sup>nd</sup> respondent is a school managed by the 1<sup>st</sup> respondent. Established in 1969, its mission is to provide a German school education system for German and foreign-speaking children in Kenya. In their response to the petition, the respondents allege in an affidavit sworn by the Director of the School that it is not in the best interest of the children to be re-admitted to the school due to the broken trust and confidence between the parents and teachers.
14. According to the respondents, the school felt that the petitioners were being neglected by the parents; that this would be exhibited when the children would be reluctant to leave the school premises; and that they would be collected from school by strangers whose identity had not been given to the school as required by the school's regulations. The respondents submit that they had discussed this with the parents; that the petitioners' mother had indicated that the children would be collected by her nephew but that on various days their mother had sent other people, a fact, according to the respondents, confirmed by the petitioners' mother when she refers in her affidavit to a care taker or nanny.
15. The respondents submit that the school had noted and was trying to deal with the emotional deficit exhibited by the petitioners, particularly the 2<sup>nd</sup> petitioner, in relation to her teacher.
16. The respondents submit that the petitioners' mother did not understand what the school was trying to do in relation to the children, and she makes serious allegations in her letter dated 22<sup>nd</sup> February 2015.
17. The respondents submit that the Court is not being asked to investigate whether the allegations against the school are true or not. However, in their view, the trust between the school and the parents is broken. Since the parent – teacher collaboration is key to ensure that children's educational needs are met in the best way possible, and the collaboration can only be merited where there is trust and confidence between the teachers and parents, it would be in the best interests of the petitioners if the school was not required to re-admit them.
18. Their case is, in short, that they have not violated the rights of the petitioners under any of the Articles cited, and they ask that the petition be dismissed.

## **Determination**

19. A consideration of the report by the Children's Officer indicates that the petitioners have now been placed in a different school, where they report that they are happy and would not wish to go back to the respondent school. The petitioners' prayers are therefore spent, with the exception of prayers 3 and 5 in which the petitioners seek declarations that their rights were violated, and damages for such violation.
20. I have considered the pleadings of the parties and their respective submissions. The core issue in dispute, the expulsion of the petitioners from the respondent school has been resolved by their being taken to another school where they are reported to be happy and with no desire to return to

the respondent school.

21. The remaining issues, whether there was a violation of the petitioners' constitutional rights, and whether they are entitled to an award in damages, are dependent on the court making a finding of culpability on the part of the respondents.
22. This, regrettably, is not something that the Court is in a position to do. As is evident from the pleadings and submissions of the parties set out above, the parties make accusations and counter accusation against each other, the veracity of which the Court is not in a position to establish on the material before it.
23. The petitioners' mother accuses the respondents of racism and inappropriate sexual conduct. The respondents deny this. They in turn accuse the petitioners' mother of neglect, and explain the conduct of the 2<sup>nd</sup> petitioner's teacher on the basis that she was seeking to fill an emotional deficit that resulted from the neglect of the children by their parents.
24. In my view, in the absence of concrete evidence to support the allegations of the parties against each other, some of which, if true, would give rise to criminal culpability, it is not for this court to make findings in respect thereto.
25. In the circumstances, I decline to make any findings in respect of the allegations by the petitioners' mother. The petitioners' mother had the option of reporting such allegations for investigation by the appropriate authorities, which she did not. Judging from the averments of the parties and the email correspondence exchanged, they both seem to have lost sight of the primary consideration in matters such as this: the best interests of the children. The petitioners' mother may have acted rashly in accusing the school teacher of inappropriate conduct in respect of the 2<sup>nd</sup> petitioner, which she avers made the 2<sup>nd</sup> petitioner consider herself 'special' and prone to tantrums.
26. The school, on its part, does seem to have acted rashly, and certainly not in the best interests of the children, in expelling the children because it was unhappy with their mother's conduct. Ultimately, however, a scenario in which the teachers and parents of young children are at loggerheads and are not in agreement on the best way of dealing with such children is not in the best interests of the children. In my view, the best interests of the petitioners demand that this matter be laid to rest.
27. I therefore make no orders with regard to the subsisting prayers sought by the petitioners, and direct the parties to bear their respective costs of the petition.

**Dated, Delivered and Signed at Nairobi this 30<sup>th</sup> day of July 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr. Kirui instructed by the firm of Rachier & Amollo & Co. Advocates for the petitioners.**

**Mrs. Kashindi instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for the respondent.**