



**JMOO v Board of Governors of St M's School, Nairobi (Petition 542 of 2014)
[2015] KEHC 3036 (KLR) (Constitutional and Human Rights) (13 August 2015) (Judgment)**

J M O O v Board of Governors of St. M's School, Nairobi [2015] eKLR

Neutral citation: [2015] KEHC 3036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 542 OF 2014**

M NGUGI, J

AUGUST 13, 2015

BETWEEN

JMOO PETITIONER

AND

BOARD OF GOVERNORS OF ST. M'S SCHOOL, NAIROBI RESPONDENT

Expulsion of a student from school does not violate the right to compulsory basic education

The petitioner sought a declaration that his indefinite suspension from school was unlawful. The court held that the right to education did not denote the right to undergo a course of education in a particular institution on one's terms. The court further held that one entered an educational institution voluntarily, well aware of its rules and regulations, and in doing so committed himself or herself to abide by its rules. Unless such rules were unreasonable and unconstitutional, to hold otherwise would have been to invite chaos in educational institutions.

Reported by Teddy Musiga

Constitutional Law – fundamental rights and freedoms – children rights - right to compulsory basic education – whether the expulsion of a student from school violated the right to compulsory basic education – Constitution of Kenya, 2010 articles 43(1) (f) and 53(2).

Brief facts

The petitioner sought a declaration that his indefinite suspension from school was illegal, unlawful and in violation of his constitutional rights under articles 47, 50, 53(2) and 56 of the Constitution of Kenya, 2010.

Issues

- i. Whether the “expulsion” of a student from school violated that student's right to compulsory basic education.



Held

1. The Constitution guaranteed to children the right to education, it also required that in every matter concerning the child, the best interests of the child had to be the primary consideration. However, rights had their corresponding responsibilities and the responsibility of students in school was to abide by the school's regulations. It would certainly not be in the best interests of the petitioner or of the other students in the respondent school, were the respondent to ignore disruptive conduct on the part of the petitioner or of any other student.
2. There was no material placed before the court from which it could properly find any violation of the petitioner's rights under articles 43(1) (f) or 53(2) of the Constitution. The school had to be allowed to govern its student body on the basis of the provisions of the Education Act and its Code of Conduct and the court had to be very reluctant to interfere unless very strong and cogent reasons for interfering with its decisions were placed before it, which had not been done in the instant case.
3. The right to education did not denote the right to undergo a course of education in a particular institution on one's terms. Educational institutions had the right to set certain rules and regulations, and those who wished to study in that institution had to comply with such rules. One entered an educational institution voluntarily, well aware of its rules and regulations, and in doing so committed himself or herself to abide by its rules. Unless such rules were demonstrated to be unreasonable and unconstitutional, to hold otherwise would have been to invite chaos in educational institutions.

Petition dismissed.

Citations

Cases

Kenya

1. *Francis Majimbo & another v Principal, Kianda School Secondary Section* Petition No 281 of 2012; [2012] eKLR - (Explained)
2. *GN v Chumani Secondary School Board of Management* Civil Suit 95 of 2014; [2014] KEHC 2598 (KLR) - (Explained)
3. *Kenya Bus Services Ltd v Attorney General* Misc Civil suit No. 413 of 2005; [2005] eKLR - (Explained)
4. *Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); (1976-80) KLR - (Mentioned)
5. *Owino, Oluoch Dan v Kenyatta University* Petition No 54 of 2014; [2014] eKLR - (Explained)
6. *Republic v Head Teacher, Kenya High School & another; SMY (A Minor Suing Through her Mother and Next Friend AB) (Ex parte)* Judicial Review 318 of 2010; [2012] KEHC 2492 (KLR) - (Explained)
7. *RWT (suing as next friend of BGN - a minor) v SNS School* Petition 290 of 2012; [2012] KEHC 5408 (KLR) - (Explained)
8. *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* Petition 229 of 2012; [2012] KEHC 2480 (KLR) - (Mentioned)

Statutes

Kenya

1. Basic Education Act (cap 211) section 14 - (Interpreted)
2. Constitution of Kenya articles 19(3)(c); 24(1); 47; 50; 53; 56 - (Interpreted)
3. Evidence Act (cap 80) section 23 - (Interpreted)

Advocates

Mr Gakoi for the petitioner

Mrs Koeb for the respondent



JUDGMENT

Introduction

1. The petitioner is an adult who, at the time of filing this petition was a year 13 student at [particulars withheld] School. He had previously been a student at [particulars withheld] School run by the respondent (hereafter referred to as the respondent school).
2. The petitioner, who was then a minor, first approached the court through his father, Mr PMO, by way of a civil suit filed in the Civil Division of this court. In his plaint in High Court Civil Suit No 588 of 2010 dated November 25, 2010, the plaintiff sought a declaration that the defendant's purported indefinite suspension of the minor was illegal, unlawful, and of no effect, a declaration that the respondent acted in violation of the constitutional rights of the minor under articles 47, 50 and 56 of the *Constitution*, special, general and punitive damages, as well as the costs of the suit.
3. The defendant entered appearance but failed to file a defence as a result of which judgment as prayed in the plaint was entered for the plaintiff on June 3, 2011 and the matter set for formal proof. The judgment was, however, set aside upon application by counsel for the petitioner. The matter was thereafter transferred to the Constitutional and Human Rights Division on the basis that it touched on human rights.
4. When the parties appeared before me on November 27, 2014, I granted leave to the petitioner to amend his pleadings and gave directions with regard to the filing of responses and submissions. A petition was filed in the matter, dated December 17, 2014, and was heard on June 16, 2015.

The Petitioner's Case

5. The petitioner sets out his case in his petition dated December 17, 2014 and two affidavits which he swore on December 17, 2014 and May 7, 2015. His case is that by suspending him from school indefinitely, the respondent violated his right to compulsory basic education as guaranteed under article 53 of the *Constitution*. The suspension was effected by way of a letter dated May 25, 2010, and has not been lifted to date.
6. According to the petitioner, an indefinite suspension does not provide a time frame within which he would be reporting back to school, and the respondent knew beforehand that it would not be taking the petitioner back within its ranks. It, however, despite this knowledge, nonetheless took money from him in the form of fees while knowing that it would not be rendering commensurate services.
7. The petitioner states that his parents were fortunate enough to seek an alternative school, although an expensive one, but their financial ability does not negate the fact that the petitioner's right to education was violated by the respondent's indefinite suspension.
8. According to the petitioner, article 19(3)(c) as read with article 24(1) provides that rights and freedoms shall only be limited subject to the Constitution or any law that is reasonable and justifiable in an open and democratic society. It was his submission that the respondent has not indicated which law it relied on in effecting the indefinite suspension but has instead relied on school rules which mete out punishment at the whim of the school administration. The petitioner contends that the reliance by the respondent on the provisions of section 14 of the *Education Act* and the provisions of the Education Standards Regulations which govern the running of schools is of no assistance as the Act and the regulations do not govern the fundamental freedoms and rights of students, particularly the right to



compulsory basic education guaranteed by the Constitution. It was also his contention that there is in this country no law that has limited the right to compulsory basic education, and his suspension could not therefore be justified on the basis of any law.

9. The petitioner submits further that the school also violated its own regulations by imposing on him an indefinite punishment. In his view, under the respondent's rules, a student is subject to indefinite suspension if he has been suspended more than three times within the year, but the respondent had not shown that the petitioner had been suspended at least twice to warrant an indefinite suspension.
10. The petitioner is also aggrieved by the execution of his letter of suspension. He alleges that it was signed by the Head teacher, senior school, who was not mandated by the school's management body to sign the letter, which ought to have been signed by the school Principal.
11. Finally, it is the petitioner's case that he was not accorded a fair hearing. It was submitted on his behalf that the respondent has not shown that it conducted a hearing at which he was given a chance to be heard, a fact which the petitioner alleges is illustrated by the fact that the letter of suspension was written on the last day of the school term but was served on him on the first day of the next school term while it should have been served on the last day of the term.
12. The petitioner, who states that he was in the last year of school at the time of his suspension, urges the court to find that his indefinite suspension from the respondent was illegal, unlawful, unconstitutional and unprocedural. He also prays that should the court find that the respondent violated his rights, it should make an order for payment to him by the respondent of general and punitive damages, a refund of fees paid, and the costs of the petition. His contention was that as it was never stated that the petitioner had been expelled, he should be refunded the fees paid.
13. The petitioner asks the court to be guided by the decisions in High Court Petition No 290 of 2012 – *RWT (Suing as the next friend & grandmother of BG vs SNS School)* on the best interests of the child principle. He also relies on HCCC No 95/2014 - *CN vs Tumani Secondary School Board of Management* on the application of the article 53 principle to the effect that pupils should not be expelled from school.
14. The petitioner also asked the court to disregard certain documents annexed to the respondent's replying affidavit under section 23 of the *Evidence Act* as the parties had agreed that the evidence contained therein should not be produced in court.
15. He asks the court to grant the prayers sought in his petition as follows:

That a declaratory order do issue that it is a fundamental duty of the state and every state organ, the respondent in this instance to observe, respect, protect, promote and fulfill the rights and fundamental freedoms on the Bill of rights of the petitioner. That a declaratory order do issue that the indefinite suspension of the petitioner from the respondent school on 28th July 2010 was illegal, unlawful and unprocedural. That a declaratory order do issue that as a former student and as a citizen the petitioner is entitled while pursuing his studies at the said school to be treated with human dignity, equity, social justice, equality, non-discrimination, good governance, integrity, transparency, accountability, to be treated equally before the law, to have protection and equal enjoyment of all rights and fundamental freedoms, equal treatment, equal opportunities and be accorded the enjoyment of the human rights as enshrined in the constitution of Kenya, 2010. That the respondent's mode of administering a fair hearing ought to be and must be simple, accurate, verifiable, secure, accountable and transparent and inspires integrity and confidence in the whole process. That in the event the respondent is found to have infringed, violated and/



or tramped upon the fundamental Bill of Rights of the petitioner by meting an illegal and unlawful indefinite suspension, the respondent be and is hereby ordered to compensate the petitioner for punitive and general damages. That the respondent be and is hereby ordered to reimburse the petitioner the paid school fees, lunch, caution fees, transport etc amounting to Ksh67,000/-. That the respondent be and is hereby ordered to compensate the petitioner for special damages. That the respondent should comply with the orders issued at the earliest. Costs of the petition. Any other or further order that this honourable court may deem fit and necessary to grant. The respondent's case

16. In the affidavit filed in response to the petition sworn on April 17, 2015 by Father FM, as well as in its written submissions, the respondent denies violating the petitioner's constitutional rights.
17. The respondent concedes that the petitioner was a student at the school, and that he was indefinitely suspended. Its case is that such suspension was justified by the school's regulations and Education Act. The aim of the school rules is to regulate the conduct of students in order to create a conducive learning atmosphere.
18. The respondent avers that the petitioner became indisciplined over the span of a year or so. His conduct became unmanageable and went against the school rules and regulations. The petitioner's disciplinary issues included harassment of other students that bordered on sexual abuse and abuse of teachers, and did not change despite his being subjected to numerous Saturday corrections. It was its case therefore that a decision was made to suspend the petitioner indefinitely which, according to the respondent, means a student has been expelled from school.
19. The respondent argues that this decision was taken as it had attempted to have discussions with the parents of the petitioner but only one parent appeared, and the petitioner did not change his ways. It contends that it had a duty to take into account the interests of other students who were also in their final year and whose learning the petitioner's behaviour was disrupting. It was its submission therefore that its decision was lawful, taking into account the rights of the petitioner and those of other students.
20. The respondent relied on the decision in *Republic vs The Head teacher, Kenya High School ex parte SMY* Judicial 318 of Review Application No of 2010 for the principle that the enjoyment of rights and fundamental freedoms should not prejudice the rights of others and that there is a legitimate expectation from someone who is part of an institution to respect and follow the rules of that institution, as well as the principle enunciated by Nyamu J in *Kenya Bus Services Ltd v Attorney General* - Misc Civil suit No 413 of 2005 vs Attorney General with regard to the balance and limitation of those rights.
21. It was submitted on behalf of the respondent that article 53 also places a responsibility on the respondent to ensure that all students, not just the petitioner, are given the right to education, placing reliance in this regard on the decision in *Francis Majimbo & another v The Principal, Kianda School Secondary Section*, High Court Petition No 281 of 2012 in which the court noted that it would not be quick to interfere with decisions of educational institutions.
22. With respect to the authorities relied on by the petitioner, the respondent submitted that the principle that emerges therefrom is that the best interests of the child are paramount. Its submission was that the best interests of the child is what it took into account as it is an institution with many other students, and its decision was therefore in the best interests of the other students.
23. Finally, with regard to the petitioner's claim for a fee refund, its contention was that the petitioner is not entitled to a refund as the school rules provide that refunds are not payable because the fees may have gone to services.



Determination

24. I have read the parties pleadings and submissions, which I have set out in brief above. I note that in his affidavit in support of the petition, the petitioner was somewhat reticent on the facts giving rise to the petition. In the affidavit sworn on December 17, 2014, he sets out the fact that he was then an adult, born in 1996, and a student at [particulars withheld] School. He then sets out various matters of law relating to his entitlements under the Constitution, and the duty of the state and every state organ with respect to the observation and fulfillment of the rights set out in the Constitution. It is in his further affidavit sworn on May 7, 2015 in response to the replying affidavit by the respondent that he seeks, by way of reply, to deal with the factual situation relating to the alleged violation of his rights.
25. As is now fairly well established, a party who alleges violation of his constitutional rights has an obligation to show, with a reasonable degree of precision, which provisions of the Constitution have been violated, and the manner of violation with respect to him-see *Anarita Karimi Njeru vs Republic* (1976-80) KLR and *Trusted Society of Human Rights Alliance v Attorney General & others* High Court Petition No. 229 of 2012.
26. In its response to the petition, the respondent has averred that prior to enrollment, a student who has qualified and wishes to join the school is interviewed, together with his parents, and informed of the values and tenets of the school. They are also informed of the school's disciplinary procedures, and upon their agreement that their child will abide by such regulations, their child is admitted. This happened in the case of the petitioner, who was admitted to the school in 2002.
27. The respondent further avers that between 2002 and 2009, the petitioner was a hardworking and determined boy, and his conduct was also impressive. It states, however, that the petitioner had disciplinary problems, which heightened sometime in February 2010. The problems were discussed with his mother, and the petitioner apologized for his indiscipline and promised to change. He also signed an acceptance of school rules on May 22, 2010 promising to abide by the rules and recognizing that failure would result in appropriate action being taken against him.
28. He did not, however, change, but continued with misconduct, details of which are set out in the affidavit sworn by Father F M and included inappropriate sexual conduct which the respondent states was termed as 'rape' towards other boys; being subjected to various Saturday Corrections, and being inattentive and disruptive in class. It was as a consequence that the letter dated May 25, 2010 was written to him, suspending him from school for one week, with directions to report back to school with his parents on June 2, 2010. His indiscipline, according to the respondent, continued, and he was eventually issued with the letter of indefinite suspension on July 28, 2010.
29. The petitioner's response in his affidavit sworn on 7th of May 2015 is that the allegations made against him are unfounded and untrue, and are based on falsehoods. He alleges that his problems with the school administration were caused by the respondent's former Head teacher of the Senior School, who always found fault with him and swore at one time to make sure that the petitioner was expelled. He further reiterates his contention that the respondent violated his rights by sending him on indefinite suspension, and denies the contents of the documents annexed to the affidavit of FM, including the class information sheet.
30. As I observed earlier, the petitioner had not, in his affidavit in support of the petition, placed before the court any material on the basis of which it could be said that his rights had been violated by the respondent. His response to respondent's replying affidavit, regrettably, does not also help him much.



31. What the court discerns from the pleadings is that the petitioner was a student who initially did well at the respondent school, but subsequently developed disciplinary problems. He was given opportunities to reform, and did not. From the documents annexed to the affidavit sworn on behalf of the respondent, it is apparent that the petitioner was fully aware of the consequences of his actions; was warned in the presence of his mother, agreed to change, but did not. While the petitioner asks the court to strike out the documents relied on by the respondent, there is nothing before me that indicates that they were without prejudice communication, nor is their authenticity challenged in any material way. The documents consist, inter alia, of the school's rules and regulations, class information sheets signed by different teachers on different dates, and a letter from the petitioner in which he apologizes for his conduct and promises to reform. On the whole, the respondent presents a more credible record of events than the petitioner.
32. The one glaring weakness on the part of the respondent is its decision to indefinitely "suspend" the petitioner. If the respondent intended to expel the petitioner, as it conceded an indefinite suspension amounts to an expulsion, why not state so expressly? An indefinite suspension is similar to what the court (Majanja J) was dealing with in *RWT v SNS School* (*supra*) when he observed:
- "That letter in my view is lacking in several respects. Is it a suspension or expulsion letter? If it is a suspension, why is it stated "your child will be exempted from school until further notice" which implies that the student is expected back at some indeterminate date. A previous suspension letter dated March 10, 2011 provided a specific suspension period."
33. A suspension implies that a student can expect to return to school which was clearly not contemplated by the respondent in this case. This, however, does not advance the petitioner's case.
34. It is correct that the Constitution guarantees to children the right to education, and it also requires that in every matter concerning the child, the best interests of the child must be the primary consideration. However, it must be restated and re-emphasised that rights have their corresponding responsibilities, and the responsibility of students in school is to abide by the school's regulations. It would certainly not be in the best interests of the petitioner, or of the other students in the respondent school, were the respondent to ignore disruptive conduct on the part of the petitioner, or of any other student. As this court observed in the case of *Fredrick Majimbo & another v The Principal, Kianda School, Secondary Section* High Court Petition No 281 of 2012:
- [26.] In my view, the school, in suspending the petitioners' daughter, used the guidelines and processes set out in its Code of Conduct, and in accordance with the agreement reached between the school and the petitioners on April 4, 2012. From the evidence before me, the petitioners had accepted the school's regulations, as had their daughter, in gaining admission to the school. They had agreed on April 4, 2012, and they had confirmed this agreement on May 1, 2012, that in the event of one more transgression of the school's regulations by their daughter, she would be asked to leave the school. I can therefore find no basis for alleging violation of the rights of the petitioners' daughter. She does indeed have a right to education, and her best interests must be taken into account in any decision affecting her. The respondent has been, in my view, very accommodating of the petitioners' daughter in the face of frequent, and on the face of it, unapologetic infractions. To deal with the petitioners' daughter in a manner different from the way they have dealt with her would doubtless have been against her best interests as it would have been to condone indiscipline and misconduct, to the detriment of her long term interests.



[27.] Further, as the respondent correctly argues, the rights of the petitioners' daughter must be considered alongside the rights of the other students in the school. The school has an obligation to all its students, and as the respondent submits, failing to discipline the students who break rules would set a bad precedent and affect students and parents who are willing to abide by school regulations

[28.] There is no material placed before me from which I can properly find any violation of the petitioners' daughter's rights under articles 43(1)(f) or 53(2) The school must be allowed to govern its student body on the basis of the provisions of the Education Act and its Code of Conduct, and the court will be very reluctant to interfere unless very strong and cogent reasons for interfering with its decisions are placed before it, which has not been done in this case. I agree with the sentiments of Nyarangi, JA in *Nyongesa & 4 others v Egerton University College* (1990) KLR 692, which were cited with approval by Musinga J in *Republic v Egerton University ex parte Robert Kipkemoi Koskey* Nakuru Misc Civil Application No 712 of 2005 that:

“Having thus stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decision of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.”

35. Similarly, in the case of *Oluoch Dan Owino v Kenyatta University* High Court Petition No 54 of 2014, this court observed as follows:

[51.] “As I understand it, the right to education does not denote the right to undergo a course of education in a particular institution on one's terms. It is my view that an educational institution has the right to set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions.”

36. For the above reasons, I can find no merit in this petition, and it is therefore dismissed.

37. With regard to costs, which are in the court's discretion, I will spare the petitioner that burden. He has hopefully internalized the salutary lesson that his rights must of necessity end where those of his neighbours begin, and he cannot have his way in everything.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF AUGUST 2015

MUMBI NGUGI

JUDGE

Mr. Gakoi instructed by the firm of Gakoi & Co. Advocates for the petitioner.

Mrs. Koech instructed by the firm of Nyiha, Mukoma & Co. Advocates for the respondent.

