REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 262 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

BY E T N (suing as the next friend of E T K (Minor

AND

IN THE MATTER OF THE DECISION BY THE EXECUTIVE BOARD OF MANAGEMENT OF A GIRLS HIGH SCHOOL

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 LAWS OF KENYA

IN THE MATTER OF THE EDUCATION ACT CAP 211 LAWS OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA THE CIVIL PROCEDURE ACT AND THE CIVIL PROCEDURE RULES CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF THE EDUCATION (SCHOOL DISCIPLINE) REGULATIONS LEGAL NOTICE 40 OF 1972 AND LEGAL NOTICE 56 OF 2001

JUDGEMENT

Introduction

1. By a Notice of Motion dated 9th July, 2014, the applicant herein **E T N** who instituted these proceedings on behalf of **E T K** (a hereinafter referred to as Minor), seeks the following orders:

1. **THAT pending the hearing and determination of this application, an order of CERTIORARI to remove in this Honourable and quash the decision of the 1st Respondent and 2nd Respondent conveyed by one D K (Mrs) on behalf of the 1st Respondent dated 09.06.2014 purporting to expel suspend the minor (sic) A Girls High School indefinitely.**
2. **THAT pending the hearing and determination of this application, an order of MANDAMUS**

to remove in this Honourable Court to compel the 1st and 2nd Respondents to re-admit the minor to A Girls High School.

3. **THAT an order to PROHIBITION to remove in this Honourable Court prohibiting the 1st and 2nd Respondents from suspending the minor from school.**
4. **Costs of and incidental to the application be provided for.**

***Ex Parte* Applicant's Case**

2. The Motion is supported by Statement filed by the Applicant on 3rd July, 2014.

3. According to the applicant, the said minor was admitted to A girls High School (hereinafter referred to as the School) in the year 2012 and was sponsored by the Jomo Kenyatta Foundation. She is currently a form 3 student thereat.

4. Sometime on the 29th of May 2014, the minor was sent home with a letter from the school addressed to the Applicant indicating that she had been sent home for a number of reasons which included; participating in lighting a fire in the hostel and being dishonest and using the school's name to participate in indiscipline during holidays. The letter further indicated that the minor was to report back to school on the 9th of June 2014 accompanied by her parent(s).

5. On the 9th day of June, the Applicant's wife, **E N T** accompanied the minor to the school where she was required to appear before the Executive Board of Management and respond to the offences levied against her as the applicant was away on official duties. The same day, after the session with the Executive Board of Management, the minor was issued with another letter which was to the effect that she had failed to respond to the allegations levied against her and was therefore sent home until "she is ready to speak the truth". The same day the minor wrote to the 2nd Respondent a letter in which she expressed remorse for her conduct and intimated her willingness to reform and put more effort in her School studies. However, the said letter did not elicit any response from the School.

6. According to the Applicant, the actions of the 1st and 2nd Respondents with regards to addressing the issues raised in the letter by the minor are contrary to the provisions of Article 47 of the Constitution of Kenya, 2010 with regards to the issue of fair administrative action and the persistence of the state of events is and continues to jeopardize the minor's right to education as provided for in Article 43 (1) (f) of the Constitution of Kenya 2010. It was contended that the school's inaction with regards to the contents of the minor's letter dated 10th June 2014 is likely to jeopardize her scholarship and in effect her education.

7. It was deposed by the Applicant that the minor is currently a Form 3 student and given the fact that the said suspension was given indefinitely, she is yet to report to school and this has an continues to put her at a disadvantage as she is losing out on the things the other students are being taught while she remains at home.

8. To the Applicant, the said decision of the respondents, to the extent that they have refused to address the issues raised in the minor's letter dated 10th June 2014 with regards to her suspension in is breach of the said 2nd applicant's right to be heard and thus a violation of the rules of natural justice and cannot therefore stand.

Respondents' Case

9. In response to the application, the Respondents filed a replying affidavit sworn by **D K**, the 2nd Respondent herein in her capacity as the School's Principal and the Secretary to the 2nd Respondent.

10. According to her, the minor was admitted to the School in the year 2012 as a form 1 student and continued to be a student of the School and she is currently on suspension. The reasons leading to her

suspension were that on 23rd May, 2014, the minor together with other students lit a fire in a cubicle which is housed in a hostel that accommodates about 334 other students. The said incident was reported to the House Keeper by some students sharing the same hostel who were exposed to danger and grave harm by the fire lit by the Applicant. On inspection, the House Keeper found that indeed there was a fire lit and further some remains of what appeared to be cigarette butts were found in the Applicant's/Student's locker. Afterwards the School conducted its independent investigations and it came to its attention that the minor together with some of her colleagues were smoking an unidentified stimulant which is against the school rules and regulations.

11. The deponent then called the minor together with her accomplices and asked them to explain the cause of the fire in the cubicle and in her own admission and in the minor's letter to the deponent dated 26th May, 2014, the minor claimed that there were some ants in her locker which she had sought assistance of her colleagues to exterminate and to facilitate this they had stolen 2 matchboxes from the Chemistry Laboratory and they had used tissue papers to light the fire. On further investigations, the deponent averred that there were no ants in the Applicant's/Student's locker and that the 2 matchboxes from the Chemistry Laboratory had been stolen earlier by the Student to use in lighting the illicit substances they had been smoking.

12. The deponent averred that she had informed the Applicant/Student of the School's finding and gave her an opportunity to own up and confess and she denied that she was together with her colleagues smoking and/or using any drugs the night of the fire incident. It was further deposed that prior to the fire incident the Minor had during the school holidays in the month of April 2014 together with others written and forged a letter in the name of and using the letter head to the School purporting the letter to have been issued by the School to the effect of falsely obtaining money from their parents to attend a social event. The said letter claimed that the School had organized a computer workshop during the holidays and the students were required by the school to pay Kshs. 1,500.00 to attend the event. As a result, the Minor together with her friends who are fellow students had falsely obtained the money from their parents and attended an event unrelated to the school which event was held at the Mamba Village, at Karen in Nairobi unsupervised. This incident, it was contended came to the attention of the School and on inquiry from the Minor and her colleagues she lied about it at first but later she claimed that they had attended her friend's birthday party using the money obtained falsely in the name of the School. However, one of her accomplices also a student in the School informed the 1st Respondent on 9th June, 2014 that they had attended a social even organized at the Mamba Village, Karen in Nairobi.

13. It was therefore the deponent's position that based on the findings of investigations on both incidents which are offences subject to disciplinary action by the School, the Minor was sent home on suspension requiring her to report back to School on 9th June, 2014 accompanied by her parent(s). Pursuant thereto, on 9th June, 2014 the Minor accompanied by her mother met the 1st Respondent and she was given an opportunity to address the School's Board on the indiscipline issues/reasons for her suspension but was not cooperative and refused to explain and address the Board on the said indiscipline reasons as a result of which the Board made a decision to suspend her until she was ready to speak the truth. The deponent however denied receipt of any letter or communication from the Minor addressing and giving an explanation on the disciplinary issues that led to her suspension.

14. The deponent asserted that the Minor was accorded a fair and just administrative process, in accordance with Article 47 of the Constitution of Kenya 2010 and the decision to suspend her from the School is as provided for in administrative processes as set out under the ***Education Act***. It was her view that in as much as the Minor has a right to education in terms of Article 43(f) of the Constitution of Kenya 2010, this right should not be exercised in a manner that risks the right to life of other students and as such that right cannot be exercised arbitrarily and it has a limitation. She further averred that the acts of indiscipline leveled against the Applicant/Student are grave taking into account that the Student started a fire at night in a hostel that houses 334 other students; some of the students were asleep thus putting their lives in great danger; the School has a mechanism for reporting of incidence where an incident comes to the attention of the students; there is a house prefect, a house mistress, matron, House Keeper and a teacher on duty that any student can report such an incident to. The Student in alleging that there were

ants in her locker she did not notify the House Keeper who would have facilitated fumigation; the School is placed with a responsibility to ensure that students of the school are in a safe environment, which is conducive for studies, free of any risks; the School therefore acted well within its mandate and in protecting the rights of the other students; and it is to the best interest of the other students that the Student stays out of the School until such a time she has received counseling and she is willing to adhere to the rules and regulations of the School.

15. The deponent added that during the 3 years the Minor has been at the school she has been involved in several cases of indiscipline and on 2 separate occasions she has been sent home of indiscipline related cases. She contended that the Student's academic performance in school has dropped considerably and it is to her best interest that she is afforded assistance and counseling to enable her realize her potential and appreciate the opportunity she has at the School rather than continue jeopardizing her future due to the indiscipline.

16. The deponent asserted that academic sponsorships and or scholarships by Jomo Kenyatta Foundation are accorded and awarded to needy, deserving, orphaned and destitute students and the School is aware that both parents of the Minor are engaged in gainful employment and both hold senior positions in their respective places of work and therefore the Minor is not at any risk of missing out on a chance to study on account of funding. She therefore was of the view that it would not be in the best interest of the school and the other 1435 students of the school who are ready and willing to learn to be effected by the indiscipline, dangerous and reckless actions of the Minor for the suspension of the Minor to be quashed and the Respondents compelled to re-admit her as such action would be enabling indiscipline in the School and setting a permissive precedent in the education system that punishment commensurate with an offence committed cannot be sustained.

17. To the deponent, the 1st Respondent and the 2nd Respondent have jurisdiction to determine cases of indiscipline in the School and prescribe the appropriate punishment.

18. The deponent concluded that the reliefs and orders sought by the Applicant are premature as the final decision of the Board of governors on the offences committed by the Student has not been made and the same will be made on 29th July, 2014.

Applicant's Submissions

19. On behalf of the Applicant, it was submitted by **Mr Omari**, learned counsel for the applicant that under rule 2 the ***Education (School Discipline) Rules***, the head teacher or any other teacher can only suspend since a suspension can only be valid for 14 days pending the deliberations before a full Board in which the student is to be afforded an opportunity to defend herself.

20. In the present case, there is no record that the Board ever convened. Instead, an Executive Board of Management sat and decided on the fate of the student.

21. It was further submitted that under Regulation 4(2) the recommendations of the Board are supposed to be placed before the Director of Education through the Provincial Director of Education but the same has not been done todate. Under Regulation 5 the said Director can confirm the suspension then order for expulsion and that is the only time the student cannot step in the school. The Director can also terminate the suspension. However, in this case, the proceedings have not been presented to the Director.

22. Learned counsel submitted that a school board is bound by Article 47 of the Constitution with respect to fair administrative action. However the Board has created its own punishment which is unknown to the law by using the words "until she speaks the truth" which is an indication of biased since the Board has already determined what the truth is.

23. It was also submitted that under section 4 of the ***Children's Act*** as read with Article 53 of the Constitution any administrative organ deciding on a matter of children is enjoined to consider the best interest of the child. In this case, however, the Board did not consider this since the ***Education Act***

provides for counselling as a mode of punishment which option was not considered.

Respondents' Submissions

24. On behalf of the Respondents it was submitted based on **Captain Geoffrey Kujoga Murungi vs. Attorney General Misc. Application No. 293 of 1993**, that certiorari deals with decisions already made and can only issue in cases where the decision is reached without or in excess of jurisdiction or in breach of the rules of natural justice. According to the Respondents the order was made within jurisdiction and the rules of natural justice were not contravened.

25. It was submitted that the ***Education (School Discipline) Regulations, 1972*** (hereinafter referred to s the Regulations) as amended by Legal Notice No. 56 of 2001 authorises a head teacher or other teacher to suspend a pupil and that it has been shown that the Minor's conduct warranted such a decision. According to the Respondents Regulation 3(1) states that the suspended student shall not be allowed to attend classes until she is informed of the outcome of the case. It was therefore submitted that due process was followed in the decision. Since the suspension is not indefinite and the matter is due for deliberations on 29th July 2014, this application is premature and based on **F M vs. The Principal Kianda School Nairobi No. 281 of 2012**, it was submitted that the Minor's right to education must be considered alongside those of other students. Since the respondents having acted within the law, it was submitted that the orders sought ought not to be granted.

Determinations

26. I have considered the application herein. It is clear that the manner in which the Motion was drafted was not appropriate for the kinds of orders being sought in the Motion. The language of the prayers show that the reliefs were sought temporarily "pending the hearing and determination of this application". However that slip ought not to be considered fatal to the application since the parties herein understood what was coming before the Court and it does not go to the jurisdiction. The Court is however entitled to take that error into account on the issue of costs.

27. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

28. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

29. It therefore follows that in these proceedings, this Court is not concerned with the merits of the Respondent's decision and whether or not the Minor committed the acts which she is alleged to have committed. The Court is only concerned with a determination as to whether the process which was followed by the Respondents in arriving at their decision was proper in the sense that it was fair and

lawful.

30. The Court would therefore be concerned with the grounds upon which judicial review orders are to be granted and this was dealt with in case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

31. Regulation 2 of the said Regulations provides:

A pupil may be suspended from attendance at a school by the Head Teacher of the school or a teacher acting in that capacity, if his language or behaviour is habitually or continually such as to endanger the maintenance of a proper standard of moral and social conduct in the school, or if any single act or series of acts subversive of discipline is committed.

32. Accordingly, the question whether the 1st Respondent had the powers to suspend the Minor does not arise. Jurisdiction however is twofold. It may arise at inception in that the Tribunal concerned is barred from entertaining the dispute *ab initio* or it may be lost in the course of the proceedings. As was held by **Ochieng, J** in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003,** a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Where, however, the Tribunal lacks jurisdiction the moment it dawns on it that the jurisdiction does not exist, it ought to down its tools before taking one more step as was held in **Owners of The Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1**.

33. An issue of jurisdiction may therefore arise in one of two instances or both. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC No. 1546 of 1971 (HCK) [1972] EA 525** where he held:

"Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make…….The phrase "to make such order thereon as it deemed fit" giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication."

34. Similarly, in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR**

1 it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics and that if the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction.

35. Therefore whereas I have found that the Respondents' jurisdiction in the first context cannot be faulted, their jurisdiction in the second context is still open to challenge. Whereas under Regulation 3(1) a pupil who has been suspended by the Head Teacher or teacher acting in that capacity shall not be allowed to attend classes and is required to be physically away from the school precincts until he is informed of the outcome of his case by the Head Teacher or teacher acting in that capacity, the said teacher is obliged under Regulation 3(3) to report the suspension to the Board of Governors of the school within 14 days of the said decision which Board is then expected to consider the said report and recommend to the Director of Education through the Provincial Director of Education responsible for the area in which the school is situated, punishment other than corporal punishment which in the opinion of the board is commensurate with the offence committed. The Director is then expected to consider the said report and hold such inquiries (if any) as he deems fit and then take any of the following steps:

(a) confirm the suspension and order the expulsion of the pupil, in which case the pupil shall not be readmitted to a maintained or assisted school without the special sanction of the Director of Education; or
(b) confirm the suspension and determine the conditions on which the pupil may be readmitted to the same school or to any other school; or
(c) terminate the suspension.

36. Although the Regulations do not provide the timelines within which the Board of Governors is to consider the teacher's report, Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Apart from that Article 53(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Article 43(1)(f) on the other hand provides for the right to education. Taking all these provisions together, it is therefore important that the Board convenes a meeting as soon as the report of the teacher is received so that the interest of the child with respect to education is not jeopardized.

37. In this case by her letter dated 9th June, 2014, the Respondent, the Head Teacher of the school informed the School that the executive Board of Management had resolved that the Minor goes home with the parent "until when she is ready to speak the truth". Obviously this is not the kind of action contemplated under Regulations 2 and 3.

38. Apart from that the applicant contends that the Board of Governors has never met. The Respondents have not exhibited any evidence that a report was made to the Board within the period stipulated in the Regulations in order for the Board to consider the same. The word "consider" was defined in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

"To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."

39. It was also contended that by resolving that the Minor would not be admitted to the school until she was ready to tell the truth, the Board had already made up its mind and was therefore bias. From the tone of the said letter it would seem that the said Board of Management had decided on what exactly they wanted to hear from the Minor. What was expected of the Respondents was to consider the accusations

made against the Minor as well as the Minor's version and report its decision to the Director of Education who would similarly consider the same, conduct any necessary inquiries and arrive at a decision. In **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another *Ex parte* Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400,** it was held that in considering the merits of the test to be applied in a case where there is allegation of bias, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality.

40. Similarly, in In **Republic vs. Attorney General & Another *Ex parte* Waswa & 2 Others [2005] 1 KLR 280**, the Court held that bias and unreasonableness have been recognised as grounds which stand alone in assisting the Courts to deal with the challenged decisions. The de-registration of the applicants in that case and the registration of main rivals within two days was held to be indicative of both bias and unreasonableness on the part of the decision maker and that the failure to give reasons for what was patently lack of even-handedness on the part of the decision maker did constitute procedural impropriety. In addition where there is certainly evidence of bad faith on the part of the decision maker the Court would not in cases where bad faith is proven to exist in influencing a decision, hesitate to take up this as a valid ground of argument.

41. The same issue was dealt with by the Court of Appeal **Peter Okech Kadamas vs. Municipal Council of Kisumu** (supra) in which **Nyarangi, JA** expressed himself as follows:

"The rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgement to decide in that particular case, either his own case, or in any other case where he brings forward the accusation or complaint on which the order is made."

42. A hearing cannot be said to be fair where a complainant also sits as a judge in the same proceedings.

43. It was further contended that the Respondents ought to have opted for other corrective measures provided for in law such ac counselling. Whereas it is correct as was held in **Nyongesa and Others vs. Egerton University Colege [1990] KLR 692**, Courts in Kenya have no desire to run universities or indeed any other bodies, I agree with the position taken by **Majanja, J** in **RCK (a child suing through her mother and next friend TRC) vs. KSI [2014] eKLR** that a School disciplinary panel dealing with children's matters must have the necessary flexibility, having regard to the school environment and the child's rights, to deal with student indiscipline provided the process is fair; that the child who is subject to the proceedings is given a hearing and an opportunity to defend himself and herself. It must be appreciated that the grounds for grant of judicial review orders keep expanding to meet the changing circumstances of the society. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before

them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

44. It is therefore my view that the nature of the punishment to be meted must be commensurate with the act of indiscipline with which the student is charged. Where the punishment is so grossly disproportionate to the act in question, the same may well be questioned on the ground of unreasonableness. However, in light of the decision I have come to in this matter it is unnecessary for me to make a determination on this matter one way or the other.

45. Having considered the application herein I am satisfied that the decision taken by the said executive Board Management on 9th June, 2014 was not supported by the Regulations. The said Board accordingly exceeded its jurisdiction by sending the Minor home till she was ready to speak the truth. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield vs. Minister of Agriculture and Fisheries [1968] HL.**

46. As was held in **Kamani vs. Kenya Anti-Corruption Commission [2007] 1 EA 112:**

"The mandate of the Court is to ascertain if the implied duty to act fairly has not been discharged and if the implied duty to act fairly has not been discharged the court would have the power to quash the decision so that KACC can make it again in accordance with the law. The Court cannot, however substitute its own decision and impose its own conditions, as this would be a usurpation by the Court of the power clearly vested in KACC. Similarly, KACC's decision an conditions can be attacked on being unreasonable or that irrelevant considerations taken into account or relevant considerations having been ignored."

47. The Applicant has however sought an order prohibiting the Respondents from suspending the Minor from the School. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court of Appeal expressed itself as follows:

"The learned judge had jurisdiction to quash the University decision but whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court's consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law…..Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari,* prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable."

48. To grant the order of prohibition in the manner sought herein would have the effect of straying into the issue whether or nor the suspension of the Minor was merited and that is not the role of a judicial review Court. For this Court to grant the said order the Court would be guilty of condoning what may

well amount to serious allegations and concerns of indiscipline. As was held by **Mumbi, J** in **F M vs. The Principal Kianda School** (supra):

> **"...the rights of the petitioner's daughter must be considered alongside the rights of other students in the school. The School has an obligation to all its students, and as the respondent submits, failing to discipline students who break the rules would set a bad precedent and affect students and parents who are willing to abide by the school regulations."**

ORDER

49. In the result the order that commends itself to me is that the Respondents' decision made on 9th June 2014 sending the Minor home until she is ready to speak the truth is removed into this Court and by an order of certiorari the same is hereby quashed. The Minor is at liberty to return to the School unless otherwise lawfully suspended.

50. In light of what I have stated elsewhere in this judgement with respect to the manner in which the application is drafted, there will be no order as to costs.

Dated at Nairobi this day 23rd of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Chege for Respondent

Cc Kevin