



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION NO. 45 OF 200

REPUBLIC ::: APPELLANT

VERSUS

1. BONIFACE MUTHENGI, HEADMASTER KITUI HIGH SCHOOL :::::::::::::::::::::::1ST RESPONDENT

2. THE BOARD OF GOVERNORS:::::::::: 2ND RESPONDENT

AND

THE ATTORNEY GENERAL ::::::::::::::: INTERESTED PARTY

R U L I N G

The proceedings herein relate to 3 persons described as minors and who have brought the application through their parents or next of kin. They are Fredrick Gichee through Elizabeth, Newton Njuita through Bonface Njuita M'munyi and Mathew Munyithya through Daniel Muthui counsel appearing on their behalf sought and was granted leave to seek orders of judicial review. The application is by way of notice of motion dated 2nd April 2002. It seeks four prayers which are that this honourable court be pleased to issue orders of certiorari and mandamus in exercise of its powers of judicial review directing that the decision of Board of Governors Kitui High School reached by the meeting held at the school on 9.3.02 and conveyed to the parents vide letters dated 12.3.02 be declared null and void and be removed and brought forth for purposes of being quashed. Prayer 2 related to an order of mandamus which has been abandoned as it was overtaken by events. Prayer 3 related to compelling the board to furnish the minutes of its deliberation of 9.3,02 which has been overtaken by events by the respondents annexing the minutes to their replying affidavit while prayer 4 seeks an order that costs be provided for.

The application is cemented on the statement of facts, supporting affidavit, annexures, oral submissions in court and extracts from legal texts on administrative law.

The common ground in this matter is that the first respondent is the current principal of Kitui High School, as at the time of the incident leading to these proceedings he had just reported to the school on new posting, that the applicants were students at the said school in form 4 as at 21.2.02, they have been registered for their examinations, that on 21.2.02 there was a riot in the school whereby a mob of students went and removed a fuse from the transformer plunging the whole school into darkness, then the students demanded that the Headmaster addresses them in darkness which he refused as he feared being stoned. It is deponed the students were throwing stones. It appears there were no damages. The situation continued upto 22.2.02 forcing the principal to call in the District Education Officer, the Deputy District Education

Officer, the District officer control the Chief Township and police and the named persons together with the teachers held a meeting whereby it was decided that form 3 and form 4 students be sent home. The form 3's were to return to the school on 28.2.02 with their parents and or guardians while the form 4 students were to report back on 1.3.02 with their parents and or guardians. The report of this meeting is contained in the Board of Governors minutes of the meeting held on 9.3.02 as item No.2 vide minute No. 2/2002 on the subject of suspended students. This item forms part of the grievances herein as it is alleged that under the relevant regulations the decision to suspend students and send them home in the event of a case of indiscipline arising is vested with the headmaster alone. He takes a sole decision to send home the students and then call in the Board of Governors and by inviting other persons to assist him in the decision making, he violated the rules. The decision is ultra vires and the same cannot stand.

The applicants being form 4's were required to report back to school with their parents on 1.3.02 and they did report as required. This is the time the screening started. The screening method was that the students were given a proformer to fill certain information and it also contained the offences alleged to have been committed by each of the applicant. These are annexed to the respondents affidavit as annexure. K.H.S. 4 a, b, c and d. 4(a) is a sample, 4(b) relates to applicant Mathew Muniyithya the items relevant to this application is item 3 which is past indiscipline record and there is listed one offence of possessing bhang being one roll which offence occurred on 3.2.02 which was prior to the events leading to this application. Item 6 required information as to why he did not take supper on 21.2.02 and the replies were that this particular applicant took supper. Item seven inquired about knowledge of the inciters and the person who pulled down the transformer. The answer this applicant gave is that he does not know. Item 8 of that form contains the assessment/recommendation by the committee. The recommendation is that this applicant should be suspended

2. That he incited Form 4 E by writing a letter which went round them.

3. And that he should meet the Board. It is obvious that this form does not disclose the source of the information in item 8. It does not also indicate whether this information was put to the student to defend himself on it or not.

Exhibit 4(c) relates to Newton Njuita. The offences in item 3 of the format are:-

- (1) Refusing to go home
- (2) Failing to attend classes
- (3) Wearing non school uniform
- (4) Cheating in exam 3rd term 2001 – history.

This particular applicant gave no reasons for refusing to take supper on 21/2/02 and also did not give names of the inciters and the person who removed the fuse from the transformer. Under item 8 there is a note that he is referred to the office for a suspension letter. Once again the names of the persons forming the committee are not given or the name of the person who wrote the contents of items 8. Secondly there is no indication that any of these charges were put to the student in question whether he was given an opportunity to be heard on the same and what his responses were if any.

Annexure 4(d) relates to Fredrick Gichee. The offences listed under item 3 is that he was caught playing pool at parkside on 10.11.01 at night. It does not state by whom he was caught. The reason for refusing to take supper on 21.2.02 and the explanation given is that there were some students who were turning away others from going to the Dining hall and he feared being stoned and so he did not go. He named one of the inciters but did not name the person who removed the fuse from the transformer.

There is nothing written under item 8 of the form. In the appendix there is listed a best friend and drug peddlers. Once again the names of the persons who were carrying out the screening were not given.

After the screening the 3 applicants and others had their cases deliberated upon by the Board of Governors. The minutes of the Board is contained in annexure 5(b) Newton Njuita is listed in No.12 under item IV 5 previous crimes are listed

1. He made noise in class He was rude to the class monitor and the punishment given was counseling and he wrote a letter of apology on 6.11.99.
2. 31,10.00 he denied others food and he was given 4 strokes of the cane.
3. While in form 3 he cheated his father that there was no tuition and so he stayed away and he never attended classes. He was counseled and he wrote a long letter of apology.
4. He was suspended from 15.11.01 to beginning of term 1 2002 for cheating in term 3 history and government examination.
5. He was suspended from 21.2.02 to 28.2.02 for refusing to attend classes and for wearing non school uniform.

Items 5 deals with specific crimes committed during the strike:-

1. He pulled off the transformer on 21.2.02.
2. He pulled off the transformer fuse on 23.2.02.
3. He stole mattresses and blankets from forms 1 and 2 students on 23.2.02.

Items 6 is the recommendation of the Board of Governors to the effect that the board recommends to the Director of Education that he be excluded from Kitui school.

Fredrick Gichee is listed as No.16. The previous crimes listed under item V are that

1. He does not sleep in school
2. He plays pool at Parkside Restaurant
3. Does not attend classes.

The punishment he had been given is counseling; under items 5 the specific crimes committed during the strike is one and that is that he incited students to refuse supper. Under item 6 the Board of Governors recommended that he be excluded from Kitui school.

Mathew Munyithya is listed as No.22. Under item 4 the previous crimes are listed as

1. He was suspended from 6.2.02 to 13.2.02 for being in possession of one roll of bhang. His father claimed his son was given the roll of bhang to sell it by another student by name Tilus Kimanzi form 3 student under item 5 the specific crimes committed during the strike are stated as he incited students not to take supper by writing a letter which went round form 4 E classroom telling them not to take supper. Under item6 the board noted that selling bhang in school is a criminal offence. They recommended to Director of Education that the boy be excluded from Kitui school

The courts observation of the Board of Governors proceedings is that there are certain common characteristics in respect to all the 3 cases and they are

1. There is no mention that the accused students and their parents ever appeared before the board.
2. There is no mention that the charges were brought to the attention of the applicants to give them an

opportunity to accept or refute the same.

3. The source of information on the crimes committed during the strike was not disclosed.
4. It is also plainly clear that the schools' principal who was the key complainant did not exclude himself from the proceedings. He took part in the deliberations and also in the decision making.
5. It is noted further that all that the board recommended is that it be recommended to the Director of Education that the boys be excluded from Kitui school. The effective date of such exclusion is missing from the recommendation.

After the said meeting the school principal who is the secretary to the board wrote two sets of letters. The first set is dated 12.3.02. The contents are similar and these are "In a full Board of Governors meeting held here in school on Saturday 9th March 2002 which you attended with your son the board recommended to the Director of Education that your son (name) Admission No.(given) Form 4 (stream given) be excluded from learning at Kitui School with effect from 09.03.02"

The contents of the letter dated 15.3.02 are "In a full board of Governors meeting held in school on Saturday 9th March 2002 which you attended with you son the board recommended to the Director of Education that your son (name) form (given) be excluded from learning at Kitui school with effect from 09.03.2002. iYour son will therefore remain on suspension awaiting the Directors decision.

A look at the two correspondences which were similar in nature shows that the contents are contrary to the proceedings before the Board of Governors and these are the reason

1. They tend to show that the parents and their sons appeared before the Board and they were heard. There is nothing in the minutes to show that the parents and sons appeared before the board.
2. They give an impression that the Board gave authority for the boys to remain suspended from the school which is not the case. The Boards recommendations were that they recommend to the Director of Education that the boys be excluded.
3. It tends to give an expression that the board stated the date of exclusion as being 9.3.20. There is no date mentioned in the recommendations as being the date of exclusion.

It is against the foregoing background information that the parents on behalf of their sons came to this court by way of judicial review. The list of grievances are set out in the document relied upon and oral submissions in court and the major ones are that

1. The schools principal violated the rules when he invited others to assist him make a decision to send the students home after the riot. As noted earlier on in the minutes of the board item No. 2 of minute 2/2002 the decision to send the students home was arrived at after holding a meeting with the person named therein. Regulation 6 of the discipline Regulations states "In cases of mass indiscipline involving the whole or part of the students body the head teacher or teacher acting in that capacity may declare the school closed and the students suspended." I therefore agree with that suggestion that this regulation was not followed to the letter.
2. The second complaint by the applicants was that they were not given a hearing. It is correct that the action complained of were purely administrative. However it is clear that the moment the authorities started inquiring into offences committed by the applicants they turned themselves into a quasi judicial body or tribunal especially the screening committees who were carrying out the screening and making recommendations to the board as well as the Board of Governors itself. The moment they assumed the role of a quasi judicial body they automatically triggered or invoked the application of the principles of natural justice. These principles required the screening committee first of all to identify themselves.

(b) After identifying themselves frame the charges and put to the applicants so that they could defend

themselves.

(c) They were also required to declare the source of the accusations.

Turning to the Board of Governors they too were required to do the following

(a) Note the presence of the applicants and their parents in the minutes

(b) Note in the minutes that the accusations were brought to the attention of the applicants and that they have been given an opportunity to be heard on those accusation.

(c) Note the responses of each applicant in the minutes separately to each of the accusation.

(d) Indicate whether the past offences were also taken into account when making a final decision or recommendation.

3. The 3rd complainant was that the Board of Governors acted Ultra vires the regulations firstly by incorporating busy bodies in their composition and then allowing them to participate in the decision making. The Board of Governors is established under the Education (Board of Governors) order at Page 29 of the Act. The composition is specified in regulation 4 of the said order and it is

(1) Chairman appointed by the Minister

(2) Three persons representing the community served by the school appointed by the minister.

(3) Four persons appointed by the Minister representing bodies or organization that in the opinion of the Minister should be represented on the board

. (4) Not more than three other persons appointed by the Minister such as the Minister may consider necessary after consultation with the board having regard to any special circumstances applicable to the school.

(5) Not more than three persons co-opted by the board. The busy bodies complained are number 11, 12 and 13. Whether these persons are busy bodies or not this can only be determined after looking at the list of eligible and duly appointed members of Kitui school. Since there is provision of the Board co-opting other persons it is only after the list is disclosed that this court can rule whether the persons complained of are busy bodies or not.

The second complaint about the board is that it acted Ultra vires when it ordered the exclusion of the applicants from the school.

Regulation 4(2) of the school discipline regulations page (72 of the Act) empowers the Board to recommend the punishment through the Provincial Director of Education of the area Regulation 8 of the same regulation empowers the Director of Education to do three things

(a) To confirm or terminate the suspension

(b) Determine the condition on which all or any of the pupils are to be readmitted.

(c) Order the expulsion of any pupil from the school.

Applying the foregoing regulations and bearing in mind the recommendations made I find that herein the minutes show that the applicants be excluded from the school. The resolution stopped at that. It did not even state that the students were to remain on suspension pending the decision of the Director on the matter.

The person who acted Ultra vires the regulations and the Boards resolution is the person who authored the letters dated 12.5.02 and 15.2.02. The effect of those correspondences is that the applicants were excluded from the school immediately.

The state put in grounds of opposition to the effect that no principal of natural justice was violated the application is misconceived and that the action of the respondents were justified by the provisions of the discipline rules framed under the Education Act.

In his oral submissions counsel for the State reiterate the grounds and echoed the regulations. The summary of his arguments is that all that the principal and the Board did was within the law.

The findings of the court as set out above go to show that the board acted within the regulations but breached rules of natural justice. Whereas the principal acted ultra vires the regulations. The screening committee also acted contrary to the rules of natural justice.

In the final analysis I make a finding that the decision of the screening committee, decision of the Board of Governors Kitui School made on 9.3.02 together with all the consequential correspondences emanating therefrom dated 12.3.02 and 15.3.02 are called into this court and quashed and set aside

2. Costs of the application to the applicants

3. The applicants are ordered to be readmitted back to school

4. A copy of the ruling is ordered to be served upon the Chairman of the Board for onward circulation to the other members as a future reference when a similar situation arises.

Dated, Read and delivered at Machakos this..... day

of 2002.

R. NAMBUYE

JUDGE