



**JO (A Minor Suing Through her Mother and Next Friend LO) v Bunyore Girls High School & 2 others (Constitutional Petition 1 of 2022) [2023] KEHC 20374 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20374 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CONSTITUTIONAL PETITION 1 OF 2022**

**WM MUSYOKA, J**

**JULY 21, 2023**

**BETWEEN**

**JO (A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND  
LO) ..... PETITIONER**

**AND**

**BOARD OF MANAGEMENT BUNYORE GIRLS HIGH  
SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**MARY AKUNYA ..... 2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS .... 3<sup>RD</sup>  
RESPONDENT**

**JUDGMENT**

1. The petition herein highlights the tension, and the need to strike a delicate balance, between the public duty on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, to protect and secure the interests of the majority of the hundreds of students placed under their care, as against the individual rights of each of those students, and the duty of the respondents to ensure discipline and defend public order against the acts of individual students.
2. The petitioner was a student in a public school, [particulars withheld] Girls High School, the School, managed by the 1<sup>st</sup> respondent, and headed by the 2<sup>nd</sup> respondent, at the material time. There was an incident at the School on December 14, 2021, an alleged arson attempt, at midnight, affecting the dormitory where the petitioner was resident, and in particular a cube she shared with another student. Investigations were done internally, which pointed towards complicity on the part of the petitioner and another student. The matter was referred to the police, who visited the School, and arrested the 2 students, and subsequently charged them in Vihiga PMCCRC No XXXX of 2021, without the parents of the 2 being informed. The 2<sup>nd</sup> respondent also caused the 2 students to vacate the School.



It is averred that in the course of it, the 2<sup>nd</sup> respondent slapped the petitioner, which amounted to subjecting her to corporal punishment.

3. The complaint is that the acts of the 2<sup>nd</sup> respondent, of slapping the petitioner, suspending her without reference to the 1<sup>st</sup> respondent, refusing to issue her with a transfer letter, and involving the police in the matter without reference to the 1<sup>st</sup> respondent and the parents, violated the provisions of the [Basic Education Act](#) and the Rules and Regulations made under it, as well as various provisions of the Constitution of Kenya, relating to access to education, the best interests of the child, and denial of a fair hearing.
4. The orders sought are a declaration that the decision by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to expel the petitioner was unlawful and unconstitutional, for breaching the right to fair administrative action and the right to basic education; compensation in damages for unlawful arrest and detention and deprivation of constitutional right to freedom of movement and liberty; a declaration that the decision to charge the petitioner with arson was unconstitutional and null and void as no proper investigations had been conducted; a permanent order directed at the 3<sup>rd</sup> respondent to withdraw the charges in Vihiga PMCCRC No XXXX of 2021; a mandamus order directing the respondents to enact rules and regulations on dispute resolution mechanisms with respect to right to fair administrative action under Article 47 of the [Constitution](#) and the [Education Act](#); and an order directing the respondents not to discriminate against the petitioner or victimizing her in the event of her re-admission to the School.
5. The 1<sup>st</sup> respondent, through Mrs. CC, the Chief Principal, and Secretary to the 1<sup>st</sup> respondent, avers that under the [Basic Education Act](#), the 1<sup>st</sup> respondent had no power to issue a letter for transfer of a student from one school to another. She states that the 3<sup>rd</sup> respondent was an independent body, with power to decide on who ought to be prosecuted. She avers that the school did not investigate nor recommend the prosecution of the petitioner. She avers that the School had been closed in November 2021, by the 1<sup>st</sup> respondent, on credible information of threats by some students to burn the School. The students were later that month recalled, and in early December 2021, attempts were made to set the School on fire, and preliminary investigations implicated the petitioner and other students, whereupon the police were invited to investigate. Eventually the police and the 3<sup>rd</sup> respondent decided to charge the petitioner and another student. It is averred that no search was done on the boxes of the petitioner and other students in their absence. It is averred that the petitioner was not framed up, nor assaulted by the 2<sup>nd</sup> respondent. It is averred that the fire on December 7, 2021 caused damage, hence the need to call the police, as the lives of 1,750 students were at stake. She avers that the 1<sup>st</sup> respondent had not expelled the petitioner, nor undertaken any disciplinary process against her. The reasons given for that include the arraignment of the petitioner in December 2021, and the December holiday School break, and the request by the mother of the petitioner for transfer letter. She avers that the decision to transfer the petitioner to another school was in her best interest as she could not have a conducive environment in the School. She states that the petition was premature. She invites the court to take judicial notice of outbreaks of incidents of school unrests in 2021, and the need to secure the students in the School in the circumstances.
6. The 2<sup>nd</sup> respondent was the Principal of the School at the material time. she denies slapping the petitioner. She avers that she had a duty to take care of the over 1,700 students in the School then, and to ensure that they were in a safe environment, and not at risk from arson attacks instigated by fellow students. She states that she did not direct the police to arrest anyone, saying that the arrest of the petitioner and others was based on investigations that the police conducted, leading up to the decision to charge them in court. She states that the search in the box of the petitioner was conducted in her presence, and no evidence was planted in her box. She denies forcing the petitioner out of the School, nor refusing to sign her transfer letter, as she has since retired. She states further that she did not expel



the petitioner from the School, and that she had no power to do so under the *Basic Education Act*. She states that the incident happened in December 2021, and there was no time to call a meeting of the 1<sup>st</sup> respondent for disciplinary proceedings, and that as from January 2022 she had exited as Principal and could not comment on what transpired after her retirement. She asserts that she has been wrongly brought to court, as she had not violated the rights of the petitioner.

7. In a rejoinder, the petitioner avers that the 2<sup>nd</sup> respondent refused to sign the transfer form, and the same was not signed until after a new Principal reported. She further avers that she was badly hurt from the assault to require that she be put on bed rest.
8. Directions were given for canvassing of the petition by way of written submissions. From the record before me, it would appear that only the petitioner filed written submissions, which I have read through and noted the arguments made.
9. The case by the petitioner hinges on action being taken against her without being given the benefit of a hearing. The action complained of is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents called in the police, without following procedure, and without first according to her a right to be heard, whereupon she was arrested and arraigned in court. I have closely gone through the papers filed herein, and I have difficulty in finding what was not procedural with what the 1<sup>st</sup> and 2<sup>nd</sup> respondents had done. I was not pointed to any statute or regulation which required that before the 1<sup>st</sup> and 2<sup>nd</sup> respondents reported suspected criminal activity to the police, they had to follow a certain procedure, to then demonstrate that that procedure was not followed. The offence that the 1<sup>st</sup> and 2<sup>nd</sup> respondents suspected had been committed was arson. Arson, defined in section 332 of the *Penal Code*, Cap 63, Laws of Kenya, is a felony which attracts a penalty of up to life in prison. A suspect of felony does not have a right to be heard first before the matter is reported to the police, or before the police arrest him. The right to be heard would be incorporated in the trial process. He would have an opportunity, during trial, to be heard or to present his case or side of the story. The foundation of the petition is, therefore, weak.
10. The matter in respect of which the petitioner raises the issue of procedure, perhaps, is the aspect of disciplinary proceedings. However, it has not been demonstrated that disciplinary proceedings were mandatory in a case where a student is suspected of having committed a felony. A felony is a serious offence, and it is dealt with by the State. It is not a matter for disciplinary proceedings in accordance with the *Basic Education Act* and the regulations made under it. It has not been demonstrated that students are exempt from prosecution for felonies committed within the school environment, and that disciplinary proceedings have to be conducted internally before the matter is escalated to the police. This was a case where the school had been closed in November 2021, following threats of arson attacks by students. School then resumed in December 2021, and shortly after that a fire was started in the same dormitory on 2 different dates. The circumstances did not require disciplinary proceedings, but immediate escalation to the authorities responsible for investigating serious crime, under which felony falls.
11. It was argued that the police did not investigate, and merely acted on what the 1<sup>st</sup> and 2<sup>nd</sup> respondents made available. The police were not made party to these proceedings, and, therefore, there was no opportunity for the police to state their case, in terms of the nature of the report that they got from the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and what they did thereafter with that information. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were entrusted with the care of the students in the School. Once something, such as what happened, occurred, there was bound to be some enquiries made, to establish what had transpired, to form a basis for reports to be made to other agencies. If what had happened pointed to criminality, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as responsible trustees that they were supposed to be, were bound to report to the police. They were also bound to report to their superiors, and they could only do so on an informed basis,



hence the enquiries that they made. It had not been demonstrated that it was wrong or out of order for the 2<sup>nd</sup> respondent and the School authorities to talk to the students, in an effort to understand what had transpired or gone wrong.

12. On the assault of the petitioner, no evidence has been placed on record. The affidavits, that mention the assault, are not by the petitioner herself, but by her next friend and mother. The deponent does not disclose the source of her information. She has not attached any medical records to support what she has deposed, as she says the petitioner had been put on bed rest, presumably by a doctor. The matter was allegedly reported to the police. The police process ought to be exhausted first, so that evidence can be gathered on the alleged assault.
13. The petitioner has submitted extensively on disciplinary proceedings, yet none were conducted. The 1<sup>st</sup> respondent states that none were initiated as the matter was under investigation by the police, who had decided to have the petitioner charged in court. My understanding of it is that the 1<sup>st</sup> respondent was not intent on conducting a process parallel to that in court, ostensibly to avoid coming to different outcomes. That appears to have been a proper approach to the matter. It is also explained that the incident was in mid-December 2021, and there was no time, to call a meeting of the 1<sup>st</sup> respondent during the holiday season. It is further stated that no disciplinary action had been taken against the petitioner, by way of expulsion, and it would appear that it was the petitioner herself who opted for transfer to another school, and the Principal who took over from the 2<sup>nd</sup> respondent signed the relevant forms. There would have been no need to conduct disciplinary proceedings after the petitioner had ceased to be a student at the School. The 2<sup>nd</sup> respondent is accused of not cooperating with regard to the matter of the transfer, however, it would appear that she was due to retire that December 2021, and another Principal was due to take over, who would then have handled the matter, as she eventually did.
14. Overall, I find and hold that a sufficient foundation has not been laid for grant of the orders sought. I agree with the 1<sup>st</sup> respondent, that the petition is premature. The same lacks merit, and I hereby dismiss it. There shall be no order on costs.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS  
21ST DAY OF JULY 2023**

**W. MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

**Ms. Auma, instructed by Auma & Company, Advocates for the petitioner.**

**Ms. Odeny, instructed by Olel Onyango Ingutiah Advocates LLP, Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.**

