



MWN (A Minor suing through her Father FN) & another v Board of Management Senior Chief Koinange Girls High School & 2 others; National Gay and Lesbian Human Rights Commission (Interested Party) (Constitutional Petition E004 of 2022) [2023] KEHC 22316 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E004 OF 2022**

**PM MULWA, J
SEPTEMBER 21, 2023**

BETWEEN

**MWN (A MINOR SUING THROUGH HER FATHER FN) 1ST PETITIONER
LEGAL RESOURCE FOUNDATION 2ND PETITIONER**

AND

**BOARD OF MANAGEMENT SENIOR CHIEF KOINANGE GIRLS HIGH SCHOOL 1ST RESPONDENT
THE PRINCIPAL SENIOR CHIEF KOINANGE GIRLS HIGH SCHOOL 2ND RESPONDENT
THE HON ATTORNEY GENERAL 3RD RESPONDENT**

AND

NATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION INTERESTED PARTY

JUDGMENT

1. The Petitioner, a minor brings this petition through her father and next friend against the Respondents. The Petitioner avers she was enrolled at the school and was in Form 4 when on 5th November 2021 she was issued with a leave form and sent out of school at midnight on the allegations of lesbianism with no communication to the parent, and the subsequent expulsion on 9th November 2021. That out of concern of being a candidate the Petitioner wrote an apology letter but was denied entry into the school to deliver the same and was not accorded a fair hearing at the Board Meeting



held on 20th December 2021. That the decision of the board meeting was not communicated to the Petitioner in time. It was averred that the Petitioner's constitutional right to education was violated.

2. In the petition dated 27th January 2022, the Petitioner seeks the following orders:
 - a. A declaration that the Respondent is in violation of Articles 3, 10, 20, 43(f), 47, 50 (1) and 53 of *the Constitution* of Kenya 2010.
 - b. Compensation for breach of *the constitution*.
 - c. A declaration that the actions by the Respondent jointly and severally are not in the best interest of the minor.
 - d. An order of certiorari quashing the decisions of the Respondents to permanently remove the minor from the school.
 - e. An order of mandamus compelling the Respondents to readmit the minor as a [particulars withheld] Girls High School student.
 - f. A mandatory injunction restraining the Respondents jointly and severally from interfering with the minor's studies at [particulars withheld] Girls High School,
 - g. Costs of the petition and
 - h. Any other orders that the Honourable Court may deem just and fit to grant.
3. In response to the Petition the 1st and 2nd Respondents filed their replying affidavit sworn on 11th February 2022, wherein it was deponed that the minor was expelled following the graffiti on the toilet walls threatening to burn the school, the writing caused tension in the school. It was averred the parents of the minor were informed of the reasons for sending the minor home and through the assistance of police officers from Ikinu Police Station. A disciplinary committee was convened on 20th December 2021 in the presence of the minor and a decision was reached that in the best interest of other students, it was better the minor remain at home but would be allowed to sit for the exams. The decision was communicated to the minor's parents on 21st December 2021.
4. The court directed that the petition be canvassed by way of written submission. All parties filed written submissions.

Petitioner's submissions

5. By the submissions dated 21st February 2023, it was submitted by counsel for the Petitioner that the 1st and 2nd Respondent failed to conduct a fair and procedural administrative process in reaching a decision to expel the Petitioner from school. Counsel submitted the Respondents gave varying reasons for dismissing the Petitioner: - the leave form stated creating tension, the letter dated 9th November 2021 stated gross indiscipline as the reason for the suspension on the conduct of being a lesbian and writing threats to the administration in the toilet, while the reasons tabled at the board meeting were not similar. It was submitted the minor was not given a fair hearing, she was not given time to respond to the allegations raised at the board meeting.
6. Counsel submitted that the minor's right to education as enshrined under Article 43(1) of *the Constitution* was violated. And further argued that the action of the school expelling the minor for 3 months was not in the best interest of the minor as she was a candidate who was to take her final exams. The school failed to ensure that the minor's right to education was protected.



7. In conclusion counsel submitted that some reliefs sought have been spent but urged the court to award the most effective and appropriate remedies in light of the circumstances. The court was urged to grant monetary compensation for the violation of fundamental rights. Counsel referred to the case of *N W R & Anor vs Green Sports Africa Ltd & 4 others* (2017) eKLR where the court held “...it is well settled that award of compensation, is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case. On the quantum of damages, award of damages entails the exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not caprice or personal opinion.”

1st and 2nd Respondents’ submissions

8. It was submitted by counsel for the Respondents that when the minor was admitted to the school on 11th January 2018, she was handed the school handbook on rules and regulations. That during her tenure preceding her expulsion the minor violated the school rules and regulations and warnings were issued but she failed to change. In an attempt to assist the minor, the school involved the services of a counsellor and no improvement was noted.
9. Counsel argued that at the time the minor issued a threat to burn the school other institutions country-wide were being burned and there was a stern warning by the Ministry of Education on how institutions were to deal with such threats. Counsel further argued on the issue of lesbianism, that was against the school policies and guidelines and was also one among the many indiscipline cases by the minor.
10. Counsel argued that the minor attended the disciplinary committee which she was represented by her father and a legal representative of the 2nd Petitioner. That the presence of a disciplinary committee is a clear indication that the minor was given a fair hearing before the decision to expel her was reached. It was counsel’s argument that due procedure was followed during the disciplinary proceedings and there was no violation of the rules of natural justice.
11. The right to education, it was contended by counsel, is not absolute as enshrined under Article 24 of *the Constitution*. The right to education can be limited to protect the right of others. The school was right in expelling the minor as it housed a total of 1585 children who enjoyed the right to education. That the 1st petitioner faced the consequences of her indiscipline.
12. Counsel urged the court to find that there was no breach of the fundamental rights under *the constitution* and find the petitioners are not entitled to the reliefs sought.

3rd Respondent’s submissions

13. Counsel for the 3rd Respondent submitted that the right of the petitioner ought to be balanced with the rights of other children in school. The Petitioner had a duty to observe and adhere to the school rules as set out while the 1st and 2nd Respondent had a duty to enforce the school rules.
14. Counsel argued that the decision to expel the minor was made in her best interest as well as the interest of the other students. In conclusion, counsel urged the court to find that the petition is misconceived and lacks merit since the minor’s fundamental freedoms were not been breached. He pleaded with the court to dismiss the petition with costs.



Interested party's submissions

15. Counsel submitted that Section 35(3) of the [Basic Education Act](#) provides that expulsion is the last resort after all corrective measures have been put into place. He argues that the 1st Petitioner was not accorded an opportunity to be heard and nor were the deliberations of the board meeting disclosed to the 1st Petitioner. Counsel argues that the fact that the 1st Petitioner signed the school rules does not mean the same could not be challenged for inconsistencies.
16. According to counsel rule 19 of the 1st and 2nd Respondents' school is unconstitutional as it punishes students of a certain orientation. Counsel submitted the school failed to prove the 1st Petitioner either committed, influenced, recruited or coerced others into lesbianism. The Respondents were liable for direct discrimination against the 1st Petitioner.
17. Counsel argued that the decision compelling the minor to attend another school was ultra vires, unlawful and unconstitutional. That due process was not adhered to in accordance with Article 47 of [the Constitution](#). The expulsion of the minor affected her performance in the final examination.
18. Counsel submitted that the 1st and 2nd Respondents failed to consider that the best interest of the minor was paramount. The punishment of expulsion was not proportional to the offence committed.
19. In conclusion counsel urged the court to find that the Respondents, in material, were in non-compliance with Articles 24, 31, 43, 47, and 53 of [the Constitution](#). He pleaded with the court to uphold the petition and grant the reliefs sought.

Analysis and determination

20. I have considered the petition, the responses and the submissions as filed by all parties. The issues for determination are:
 - a. Whether the minor's rights to education as enshrined in [the Constitution](#) 2010 were infringed.
 - b. What reliefs if any are available for the Petitioner?Were the minor's rights to education infringed?
21. It is trite law that a person alleging violation of [the constitution](#), must with reasonable precision cite the provisions of [the constitution](#) violated (Anarita Karimi Njeru vs Republic (1976-1980)1 KLR 1272).
22. The petitioners submitted that the minor's rights to education were infringed -Articles 43(1)(f), 53(1)(b) and 55 of [the Constitution](#). That the Respondents failed to ensure affirmative action to ensure the minor had access to relevant education, training and employment. It was the Petitioner's assertion that she was not given a fair hearing before the decision to suspend the minor was reached.
23. On the other hand, the school submits that the right to education is not absolute as the same can be limited to protect the interest of other students in the institution.
24. It is not disputed that the minor was a student at the 1st Respondent's school. The school management indicates the minor was involved in many indiscipline cases where she was given several warnings and the school organized counselling lessons but her behaviour worsened. The management also avers the minor's parents were also instructed to take the minor for counselling which they did but the minor's behaviour did not change. The parent of the minor confirms the minor had several indiscipline issues in the school in his apology letter dated 12th November 2021.



25. The Petitioners submit the decision to expel the minor from school was not communicated and that the same was done in violation of Articles 43 and 47 of *the Constitution*. From the evidence adduced before this court, the reasons for expelling the minor were first communicated to the parent through a letter dated 12th December 2021 where the parent offered to respond through an apology letter. Furthermore, a disciplinary meeting was convened to which the petitioners were invited and they attended. The decision of the committee was thereafter communicated to the Ministry of Education and the minor was only allowed into the school during the exam period as a day scholar.
26. Learning institutions, in instilling discipline will have to balance between the right of protection of an undisciplined learner and the right to education of other students. It is not controverted that the issue of threatening to burn the school by the minor herein caused tension in the school and the institution was obligated to do what was best to protect the best interests of other students in school.
27. From the foregoing, it is clear that the minor was given a chance to present her case, and the reasons for the expulsion were addressed in the letter. This court will therefore not interfere with the administrative decision of the school as it was bound to protect other students, and in arriving at its decision to expel the minor followed the laid down school rules and regulations.
28. A school results in the suspension of a student only upon serious disciplinary questions concerning the student. I find that the school acted appropriately when serious threats of burning the school arose. This court also takes note that the threat was issued at a period when most schools had been burnt. The Respondents had a duty to do its best to protect the institution and its learners.
29. In the circumstances, I find no malice in the actions taken by the school to address the possible unrest. All students are expected to obey the school rules and regulations. Failure to abide by such attracts consequences to be meted by the school.
30. In my view, therefore, there was no proof that the rights to fair administrative action and the right to education were violated.

What reliefs if any are available for the Petitioner?
31. The authority of schools and their administration in imposing sanctions against defying students is consistent with their duties and is meant to maintain discipline and keep students in check. This court finds that the petitioner has failed to prove the contravention of the constitutional rights.
32. Therefore, this court finds the Petitioner has failed to prove her case to the required standard. The relief sought by the Petitioner are not available in the circumstances.

Final Orders

- i. The petition dated 27th January 2022 lacks merit and is dismissed.
- ii. No orders as to costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU

THIS 21ST DAY OF SEPTEMBER 2023.

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P.M. MULWA

JUDGE



In the presence of:

Kinyua/Duale – Court Assistants

Mr. Kanyonge - for the Petitioner

Ms. Wambui h/b for Mrs. Maina - for the Respondents

Mr. Mitullah - for the Interested Party

