

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 198 OF 2017

**IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLES 27, 35, 50 OF THE
CONSTITUTION AND IN THE MATTER OF J N N (A MINOR)**

BETWEEN

J N N, (A MINOR)

M N M, suing as next friend.....PETITIONER

versus

NAISULA HOLDINGS LIMITED

T/A N SCHOOL.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, a minor, brings this petition through his next of friend **M N M** against the Respondent herein a Private School.
2. It is not disputed that the minor enrolled at the School on **18th** January 2017 and paid **Ksh. 305,500/=** being the fees for the whole term. It's also common ground that ten days later, or thereabouts, the minor was expelled from school on allegations of bringing bhang to the school. The Petitioner avers that despite contesting the expulsion, the school stood its ground and refused to refund the fees paid.

The Contested facts

3. The Petitioner avers that the expulsion offends Articles **47 & 50** of the Constitution. He also cites breach of fair trial rights and contends that the minor was deceived to admit the allegations upon being promised a favourable decision.
4. The Petitioner further also cites breach of Article **27** of the Constitution arguing that other students in similar circumstances were treated differently. Also, the Petitioner states that the minor was not provided with written reasons prior to the expulsion. He also alleges breach of rights under Article **35** of the Constitution.
5. As a consequence the Petitioner avers that he suffered financial loss, ridicule and public embarrassment and emotional distress and seeks orders retracting the expulsion and a refund of the School fees amounting to **Ksh. 305,500/=** plus general damages for breach of rights and costs of the Petition.

Respondents' Response

6. **George Jagongo**, the Deputy Principal of the School, in his Replying affidavit avers that prior to admission to the school, the Parents signed application forms containing terms and conditions which stipulate that the fees once paid is non-refundable in the event of absence on account of illness, leave, suspension, expulsion or any calamity. He avers that the form had a declaration which the father signed binding himself to the terms and conditions of admission to the School.
7. He further avers that the student was given a copy of the schools handbook which contains the Students' Code of Conduct. Further, he adds, the code of conduct was signed by the student and the parent, binding the student to adhere to the school rules. He adds that the handbook stipulated that drug abuse would attract a two week suspension or a permanent expulsion and that the School would co-operate with law enforcement agencies in the event of criminal investigations. Also, he averred that by signing the above declaration, the student and the father acknowledged that they understood the foregoing.
8. He also states that it is an established practice of the school to release students in the company of parents to go home, mainly from Friday to Sunday. He adds that on **27th** January 2017, the minor was released to his parents, and he resumed on **29th** January 2017. He also states that the school usually conducts a "spot check" aiming at seizing any snacks, and or illegal substances the students may bring to school from home.

9. He gave a detailed account of what transpired before bhang was recovered and how the minor herein was implicated leading to his expulsion from the school. Further, he avers, the expulsion letter giving reasons for the expulsion was given to his mother and prior to the expulsion, the minor was accorded an opportunity to be heard.

10. Lastly, the principal avers that on 3rd February 2017, the minor and his mother visited the school seeking to appeal against the expulsion and/or have the decision reviewed. He states they minor gave him a letter in which the minor admitted that he brought the bhang to the school. Upon re-evaluating the case, and in the interests of the other students, the school upheld the expulsion. As for the refund, he states that the only amount that was refundable was caution money and pocket money, which was refunded promptly.

Issues for determination

11. From the facts summarized herein above, I find that three issues distil themselves for determination. These are:- **(a) whether the minors' rights under Articles 50 (1), 47 and 27 of the constitution were violated;** **(b) whether the minors' right access to information were violated;** **(e) whether the Petitioner is entitled to a refund of the school fees paid.**

12. Counsels for both parties filed detailed written submissions in support of their respective cases. I will consider the submissions as I address the above issues.

Whether the minor's rights to fair hearing under Article 50 (1), 47 and 27 were violated

13. The Petitioners counsel submitted that the minor's Rights under Article 50 (1) of the Constitution were violated^[1] and that there must be good reason consistent with the values in the constitution to subordinate the rights of other children over the rights of one child.^[2] Further, other students facing similar allegations were not expelled, hence the expulsion was discriminatory, arbitrary and a violation of Article 27 of the Constitution.

14. The Respondents' counsel submitted that the petitioner has wrongfully invoked the provisions of Article 50, and that the Petitioner was subjected to an administrative process that does not fall within the ambit of Article 50 of the Constitution. He cited *Alnshir Popat & 8 Others vs Capital Markets Authority*^[3] where the court held that the provisions of Article 50 do not apply to an administrative process and that Article 47 and 50 (1) protect two distinct rights which should not be conflated.^[4] Further, he submitted, the school upheld the basic tenets of Article 47 (1) and that decision making bodies other than courts and bodies whose functions are laid down by statute are masters of their own procedures, provided they achieve the degrees of fairness appropriate to their task it is for them to decide how they will proceed.^[5]

15. He also argued that the minor was given time to address the issues raised and that the requirements of natural justice must depend on circumstances of each case, the nature of the inquiry, rules under which the tribunals' acting, the subject matter etc.^[6]

16. On the alleged violation to from freedom from discrimination, counsel submitted that for a party to claim discrimination, he must demonstrate by evidence or argument how he has been discriminated^[7] and argued that the school has an objective and a reasonable justification in expelling the minor and suspending the others. The offence committed by the minor herein was more grave.

Determination

17. On the alleged violation of fair trial rights, I am clear in my mind that the argument propounded by the Respondents counsel represents the correct legal position. I find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*^[8] which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50 (1) of the Constitution.

18. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.^[9] Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.

19. A similar finding was arrived at by Majanja J in *Dry Associates Limited vs CMA & Another*^[10] cited by the Respondents counsel where the leaned judge held that Article 50 applies to a court, impartial tribunal or a body established to resolve a dispute while article 47 applies to administrative action generally.

20. *Whereas* Article 47 codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair^[11] and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action,^[12] the question that begs for answers is whether during the disciplinary proceedings the Respondent acted in a manner that constituted a breach of Article 47.

21. As I resolve this question, I must point out that administrative, statutory bodies, schools or academic institutions are created for a variety of reasons to meet a variety of needs and in some instances, some functions are a necessary element to fulfilling their mandate. For example, it is a function of the school authorities to ensure discipline is maintained in the school and also to instill discipline to the students. Provided that the decision-maker is not acting outside its authority such functions may stand court scrutiny.

22. The function under consideration here is whether the entire process up to the expulsion, the school violated the minor's rights in any manner. The implicated students were interviewed separately. The evidence gathered implicated the minor herein. It is not disputed that the school rules provide for expulsion for possession of bhang in the School. There is nothing to show that the minor was not given the

opportunity to explain his case. The school was persuaded that the evidence against the minor was credible.

23. It's on record days after the expulsion, the minor and his mother visited the school seeking to have the expulsion reversed/reviewed. The minor even admitted in writing that he brought bhang to the school. Upon further consideration, the school upheld the expulsion.

24. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is constitutionally fragile and unsustainable. If the decision is legal and lawful, the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the *Wednesbury* principles of '*illegality*', '*irrationality*' and '*impropriety*', if the decision can get over the first test, it may withstand the other two tests, unless it is shockingly unreasonable, perverse or improper.

25. The test of reasonableness is not applied in a vacuum but in the context of life's realities. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to those formulated by educational institutions or professional bodies possessing the expertise and experience of actual day to day working of their institutions. At stake is discipline, wellbeing and future of the minor and other students in the school.

26. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to a problem of this nature, isolated from the actual realities and grass root problems involved in managing discipline in schools and unmindful of the consequences which would emanate if cases of indiscipline are to be allowed to be tolerated in school.

27. The term "best interests" broadly describes the well-being of a child and the disciplinary action taken should be viewed in this regard. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences, behaviour in school and attitude towards other children. Also relevant is the gravity of the accusation facing the child. It's true, the child is entitled to protection. It is equally true that the other pupils at the school are also entitled to protection. It is a question of maintaining the essential balance taking into account the interests and wellbeing of the child on one hand and wellbeing of the other pupils at the school on the other hand.

28. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list, but without losing sight of the ultimate values to be protected, that is the value of instilling discipline in children. "Best interests" can in appropriate circumstances include disciplining children.

29. To sum up limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in the limitation, taking into account the availability of less restrictive means to achieve the purpose. Expulsion under the present circumstances is in my view justifiable and proportionate to the offence.

30. Close attention to the facts of each individual case is required in order to decide on what is required to meet the need for vindication of the constitutional right which is at stake. The Respondent is vested with powers to ensure discipline is maintained in the school. The school has an obligation to ensure the school code of conduct is adhered to.

31. The decision in question can only be challenged on grounds of ***illegality, irrationality and procedural impropriety***. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be *illegal* or *ultra vires* and outside the functions of the Respondent.

32. Section 7 (2) of the Fair Administrative Action Act[13] provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. None of these has been proved in this case.

33. What constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of the particular case. The circumstances of this case are clear. All the implicated students were interrogated and granted the opportunity to respond to the allegations and the decision made was communicated promptly.

34. In my view, the authority of schools and their administrators to impose sanctions, including expulsion, as disciplinary action against erring students is consistent with their duty and statutory mandate to "teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop moral character and personal discipline of the students. Schools and school administrators have the authority and responsibility to maintain school discipline and the right to impose appropriate and reasonable disciplinary measures. Students have the duty and the responsibility to promote and maintain discipline and tranquility of the school by observing the rules of discipline.

35. In view of my analysis herein above, I find and hold that the minors' rights under Articles 50 (1), 47, and 53 were not violated in the circumstances of this case.

Whether the minor's rights under Article 35 were violated

36. Counsel for the Petitioner submitted that failure to supply information to the Petitioner was a violation of Article 35. The Respondents' counsel submitted that the reasons were communicated in writing and even the minor admitted in writing that he brought bhang to the school as demonstrated by the annexure to the Replying Affidavit.

37. Section 6 of the Fair Administrative Action[14] entitled Request for reasons for administrative action provides that "*Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to*

facilitate his or her application for an appeal or review in accordance with [section 5](#)."

38. Sub-section 2 of Section 6 of *Fair Administrative Action Act*[\[15\]](#) provides that the information referred to in subsection (1), may include the reasons for which the action was taken, and any relevant documents relating to the matter.

39. Though the short title to Section 6 is entitled "*Request for reasons for administrative action*", the subject of the section is really access to information on administrative action. To this end, the section entitles persons affected by any administrative action to be supplied with information necessary to facilitate their application for appeal or review.[\[16\]](#) The information, which must be supplied in writing within three months, may include reasons for the administrative action and any relevant documents relating to the matter.[\[17\]](#) Where an administrator does not give an applicant reasons for an administrative decision, there is a rebuttable presumption that the action was taken without good reason.[\[18\]](#)

40. However, the Act provides that an administrator may be permitted to depart from the requirement to furnish adequate reasons if such departure is reasonable and justifiable in the circumstances.[\[19\]](#) The administrator must inform the person of such departure.[\[20\]](#) The implication of this provision is that the section allows a limitation of the right to information under Article 35 and the right to fair administrative action under Article 47.

41. The Petitioner was given the letter of expulsion which stated the reasons for the decision. There is uncontroverted evidence that the minor in the company of the mother visited the school after the expulsion seeking to persuade the school to reverse the decision. It is during this visit that the minor handed in a written document admitting the offence. The foregoing leaves no doubt that the minor was supplied with the reasons for the decision. In my view, no evidence was tendered to establish violation of Section 6 of the Fair Administrative Action Act[\[21\]](#) or Article 35 of the Constitution.

42. Guidance can be obtained from the approach taken to judicial review by Australian Courts which reflects an awareness of the boundaries of judicial review.[\[22\]](#) In *Minister for Immigration and Ethnic Affairs vs Wu Shan Liang*[\[23\]](#) Brennan CJ, Toohey, McHugh and Gummow JJ said:-

"... the reasons of an administrative decision maker are meant to inform and not be scrutinized upon by over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."

43. Various cases provide some guidance as to the content of reasons.[\[24\]](#) It may not be an error for the decision-maker to fail to discuss why contrary evidence was not accepted or to fail to discuss every conflict in the evidence in its reasons[\[25\]](#).

44. I find that no contravention of constitutional right to information has been proved at all. The evidence tendered on behalf the petitioner in my view does not demonstrate the alleged violation

Whether or not the Petitioner is entitled to a refund of the school fees paid

45. It is not disputed that there exists a binding contract signed by the school, the minor and the parent. The terms are clear. The fees paid is not refundable upon expulsion as in this case. I agree with the Respondents counsel that a court of law cannot purport to re-write a contract voluntarily executed by parties. It **cannot** be denied that relationship between the parties in this case is governed by the contract in question. The petitioner is now inviting this court to **rewrite** the **contract** in question.

46. In exercise of jurisdiction under the Constitution, this Court cannot rewrite binding contracts voluntarily entered into between parties. The court cannot rewrite the contract by converting the unutilised portion of the fees into a debt due and payable by the Respondent. There is a *bona fide* defence raised by the Respondent which has not been rebutted.

47. Its trite law that "the courts do not make contracts for the contracting parties. No. It is a matter purely between them *sese ipse*".[\[26\]](#) This position is informed by the concept of freedom of contract. Contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the Court does not have the right nor ability to substitute its judgment for that of the parties. When a contract is clear and ambiguous, a Court's role is to apply the parties' contract as written and not rewrite the contract. I find and hold that the plea for the refund of **Ksh. 305,500/=** is misguided and has no basis in law.

Conclusion

48. To sum up limitations on constitutional rights can pass constitutional muster if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in the limitation, taking into account the availability of less restrictive means to achieve the purpose. I find that no contravention of constitutional rights has been proved at all. The evidence tendered on behalf the petitioner in my view does not demonstrate the alleged violations.

49. The authority of schools and their administrators to impose sanctions, including expulsion, as disciplinary action against erring students is consistent to their duty and statutory mandate to "teach the students the rights and duties of citizenship, strengthen ethical and spiritual values among the students and develop moral character and personal discipline of the students. Schools and school administrators have the authority and responsibility to maintain school discipline and the right to impose appropriate and reasonable disciplinary measures. Students have the duty and the responsibility to promote and maintain the peace and tranquility of the school by observing the rules of discipline.

50. In view of my analysis of the facts of this case and the law as shown above, I find that the petitioner has failed to prove his case against the Respondent to the required standard. The upshot is that this petition fails. Accordingly, I dismiss this petition with no orders as costs.

Orders accordingly.

Signed, Dated and Delivered at Nairobi this 7th day of March, 2018

John M. Mativo

Judge

[1] Counsel cited David Kipruto Cheruiyot vs Fluorspar Company Ltd {2008}eKLR

[2] Counsel cited RCK (a child suing through her mother and next friend KRC) vs KSI {2014}eKLR

[3] Pet No. 245 of 2016 {2016}eKLR

[4] Dry Associates Limited vs CapitalMarkets Authority & Another

[5] Counsel cited the Court of Appeal in Kenya Revenue Authority vs Menginya Salim Murgani, Civil Appeal No.108 of 2009, cited in Republic vs National Police Service Commission Ex-parte Daniel Chacha JR 36 OF 2016 {2016}eKLR

[6] Russel vs Duke of Norfolk {1949}1AllER at 118 cited

[7] Counsel cited Peter K. Waweru vs R {2006} eKLR and Rose Wangui Mambo & 2 Others vs Limuru Country Club & 17 Others {2014} on the definition of discrimination

[8] {2015}eKLR

[9] Ibid

[10]{2012}eKLR

[11] Article 47(1) of the Constitution of Kenya, 2010

[12] Article 47(2) of the Constitution of Kenya, 2010

[13] Act No. 4 of 2015

[14] Ibid

[15] Ibid

[16] Section 6(1)

[17] Section 6(2)

[18] Section 6(4)

[19] Section 6(4)

[20] Ibid

[21] Supra

[22] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-41 per Mason J

[23] (1996) 185 CLR 186 at 272

[24]*Military Rehabilitation and Compensation Commission v SRGGG* (2005) 215 ALR 459. *Comcare vs Forbutt* [2000] FCA 837 These decisions have since been cited with approval in the Full Federal Court decision of *McGuire v Military Rehabilitation and Compensation Commission* [2005] FCAFC 52 at [33]

[25] 215 ALR 459 at 480 [96]. See also *Commonwealth v Angela* (1992) 34 FCR 313

