



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

PETITION NO. 15 OF 2015

H O (Suing Through Next Friend P O (A MINOR).....PETITIONER

VERSUS

PETER OBWOGO O. THE SECRETARY BOARD OF MANAGEMENT

ST JOSEPH'S BOYS HIGH SCHOOL.....1STRESPONDENT

ST JOSEPH BOYS HIGH SCHOOL.....2ND RESPONDENT

THE BOARD OF MANAGEMENT

ST JOSEPH BOYS HISGH SCHOOL.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

J U D G M E N T

By its petition dated 30th July 2016 the petition prays for the following reliefs ;

- i) A declaration that the actions of the Respondents are unconstitutional for violating the rights of the Minor under articles 27, 28, 43(1) (f) 53(1) (b) and (2) of the constitution.**
- ii) A declaration that the 1st respondent (Peter Obwogo O.) who occupies Public Office contravened articles 27, 28, 43 (1) (f) 53(1) (b) and (2) of the constitutional of Kenya hence unfit to hold a Public Office in Kenya.**
- iii) A declaration that the Minor herein has been discriminated upon.**
- iv) General and exemplary damages.**

The same is supported by the affidavit of H Owino sworn on the same date. Briefly the facts herein are clear and straight forward . The minor who was a form III student at the 2nd Respondent school sneaked out of school compound on 13/10/2014. On 28/10/2014 he went to face the 2nd respondent who deliberated and referred the matter to the 3rd respondent who recommended that he be relocated to another school. Pursuant to the persistence of the petitioner the County Education Board recommended that the petitioner do review the issue with a view to readmitting him back so as to continue with his education.

The petitioner's basic complaint therefore is that all these communication were not transmitted to him by the respondents which necessitated him to get the minor to another school known as Kamusinde Secondary school which according to him is a village school. That had he minor been admitted back he would have definitely done well in the final year exams considering that the school performed very well by being the 5th overall in the national exams.

He further contented that the 1st respondent had already predetermined that the minor leaves the school taking into consideration the fact that he was not doing well in school.

On its part the 1st respondent averred vide the replying affidavit of Peter Obwogo dated 11th November 2015 that all it did was overboard. He reiterated that the petitioner did not turn up for the meeting which had been called in line with the directive of the County Education Board and thus the matter was put to rest.

The parties have filed strong submissions in support and in opposition to the petitioner which the court has had the advantage to peruse the same together with the respondent list of authorities.

The substantive issue herein is whether in light of the above facts one can argue that the petitioners constitutional rights were breached and or violated thus he ought to be compensated.

Secondly, was there an alternative remedy for the petitioner other than filing this petition.

The petitioner has cited several Articles of the constitution in his petition. The substantive one is that his child was discriminated against by the respondents. I have read the annexures to both affidavits that is the petitioner as well as the 1st respondent. There is no doubt that the minor sneaked out of the school compound as evidence by his own admission. He was not alone but was together with some other students.

In the meeting of 30/10/2014 several punishments were meted against the students which included expulsion as well as relocating them to other schools.

When the matter reached the County Education office it wrote the letter dated 10/11/14 to the school and among other issues stated as follows:

“1) That the current school rules do not reflect the letter spirit and conformity to the Education Act (2014) and the constitution (2010) failing to be accommodative and correctional in nature.

2) That it was not in order that a section or a few students be readmitted back to school based on the advocate's notices to the school, a fact that discriminates learners rights and social status.

3) That the Board of Managements and school administration did not consider the cases on merit and without reference to the records on past correctional effects.

4) That students mass action should not be allowed and given precedence in the critical decision of the future lives of individual learners.”

On that basis the school advised that they be readmitted for conditional admission.

The letter went on to state

“They have already lost and suffered temporary exclusion for over three weeks and be subjected to professional counselling in school where parents/guardians should be involved after readmission at appropriate time to parents and school.”

From the record, there is no indication that the petitioner sought to admit back the child. He instead on January 26th 2015 admitted his son to Kamusinde Boys High school.

Apparently it appears at least from the 1st respondent that pursuant to the above decision by the county Education Board the petitioner was invited for a meeting but he did not turn up on 28/1/2015. He instead sent someone who left without before being called for the meeting.

Taking totality of the above evidence can one concluded that there was an alleged discrimination against the petitioner and his child ?? I do not think so.

My above conclusion is buttressed by the fact like all the other students expelled on that particular day by the respondent the County Education Board eventually ordered that they be readmitted. According to the 1st respondent, the petitioner did not attend the meeting which had been called but instead sent someone else who apparently did not wait to be called in but instead left. Further the minor did not turn up for the meeting either.

That assertion has not been strongly controverted by the petitioner. Although he was summoned through an SMS the action of sending representative strongly suggest that he was privy to the meeting.

Neither is there any evidence to suggest that he requested for a second meeting where the advice from the County Education Board would be considered in respect to his child.

I respectively do not find this discriminative since it applied to all the students who had been disciplined. The letter and directions from the Education Board clearly was blanket and did not discriminate more so against the petitioner.

Of great significance is whether the issue raised herein clearly shows that there were fundamental breach of the constitution.

One ought to clearly show which articles of the constitution have been breached. A general citation of the Articles prima facie does not indicate breach. In my view the petitioner ought to have approached the court through a judicial review forum. All that he complained against the response are administrative acts of the school and by extension the board in exercise of their delegated authority. Disciplinary action by the schools and the relevant boards are powers donated to it by the relevant statutes which draw their authority from the constitution. If they act ultra vires then its the province of Judicial review to be invoked.

The court in *Xpedia Management Limited and 4 others Vs Attorney General & 5 others (2016) eKLR cited with approval Kemrajn Harrikissoon Vs Attorney General of Trinidad and Tobago (1979) 3WLR 63* when it stated that!

“The notion that whenever there is a failure by an organ of government or a public authority or Public officer to comply with the Law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by chapter 1 of the constitution is fallacious.

The right to apply to the High Court under section 6 of the constitution for regress than any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action The mere allegation of a human right or fundamental freedom of the applicant has been is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the sub section if it is apparent that the allegation is frivolous or vexations or an abuse of the process of the court as being solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate fundamental remedy for unlawful administrative action which involves no contravention of any human right or fundamental

freedom.”

I hold the above view. The issues raised in this petition ought to have been raised through a judicial review application. As stated earlier save that the County Education Board reprimanded the 2nd respondent, there is nothing to show that it breached any constitutional rights of the petitioner. He was granted an opportunity to challenge the decision but he failed to do so. In fact by the time the petitioner was required to appear before the respondent he had relocated the minor to another school.

Neither is there evidence to suggest that the other pupils were not readmitted to the school?

Consequently I do not find that there was any substantive breach of the several quoted Articles of the constitution including the principles espoused in the Children Act. Had this petition been a judicial review application then I would have had much to say especially the action by the school.

For now I do not find the petition meritorious . The same is disallowed.

Owing to the nature of the litigation herein and that it was all to do with the best interest of the child i shall order that each party meets its own costs.

Delivered this 5th day of October 2016

H.K. CHEMITEI

JUDGE