



**RCK (A Child suing through her mother and next friend KRC) v KSI (Petition 84 of 2014) [2014] KEHC 7489 (KLR) (Constitutional and Human Rights) (4 March 2014) (Judgment)**

*RCK (a child suing through her mother and next friend KRC) v KSI [2014] eKLR*

Neutral citation: [2014] KEHC 7489 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 84 OF 2014**

**DAS MAJANJA, J**

**MARCH 4, 2014**

**BETWEEN**

**RCK (A CHILD SUING THROUGH HER MOTHER AND NEXT FRIEND KRC) ..... PETITIONER**

**AND**

**KSI ..... RESPONDENT**

**Factors to be considered by a school’s disciplinary panel dealing with children’s matters**

*The matter concerned a child (the petitioner) who was expelled from school after consuming drugs (marijuana). The court held that a school disciplinary panel dealing with children’s matters must have the necessary flexibility, having regard to the school environment and the child’s rights, to deal with student discipline provided that the process was fair; that the child who was subject to the proceedings was given a hearing and an opportunity to defend himself and herself. The court found that failure to subject the petitioner to the disciplinary process, as had been done, would have been a violation by the school of its duty under section 16 of the Children Act which required it to have an exhaustive policy on substance abuse. The court finally held that suspending the petitioner from school was an appropriate punishment for a serious violation of the school policy.*

Reported by Kakai Toili

**Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - children’s rights – where a child had been expelled from school for consuming drugs (marijuana) in school against the school’s policy – where the matter was brought before the school’s disciplinary panel - factors to be considered by a school disciplinary panel dealing with children’s matters - where reasons for expulsion had been given by the school in a statement similar to a judgment and the child had been subjected to a disciplinary process - whether failure to give the reasons for the expulsion of a child from school would have amounted to a violation of the child’s rights - whether failure to subject the child to a disciplinary process, would have been a violation of section 16 of the Children Act which required the school to have an exhaustive policy on substance abuse - whether suspension



*of the child from school was an appropriate punishment – of Kenya, 2010, article 53(2); Children Act, Cap 14, section 4(2) and 16.*

### **Brief facts**

The matter concerned a child aged 17 years (the petitioner) who was expelled from the respondent school (the school). The petitioner sought among other orders; a permanent injunction restraining the school from writing any letter or communicating in any manner whatsoever to any university chosen by the petitioner or to any other third party regarding her expulsion; an order of *mandamus* reinstating and re-admitting the petitioner to the school; and a declaration that the petitioner's rights to education and right to fair administrative action were infringed by the school and that the expulsion was an infringement of her fundamental right to education.

On the morning of January 27, 2014, the petitioner proceeded to the washroom with her friend. In the washroom, her classmate informed her that the brownie contained *marijuana* (also referred to as weed) and the petitioner took a bite of the biscuit. After they left the washroom, they were confronted by a teacher who was in the washroom at the material time when she overheard and recognized the petitioner and her classmate's voices when they were talking about the brownie. Soon thereafter the petitioner and her friend were searched and requested to make a statement on the events. The petitioner made two statements in which she admitted that she ate a crumb from the empty pack. The statements did not refer to the brownie as being weed laced.

The petitioner was suspended from school for two weeks together with 8 other students. The school subsequently sent out a general email on February 13, 2014 to all parents informing them about the expulsion of the 9 students. An appeal was lodged against the decision to expel the petitioner. The Director rejected the appeal on the ground that the violation of the School Substance Abuse Policy (the policy) that involved illegal drugs met the criteria of most serious offences and therefore warranted expulsion. The school's policies and disciplinary procedures were contained in a Handbook (the Handbook) which was available to all parents and students which the parents and students agreed to be bound by upon admission. Aggrieved, the petitioner filed the instant petition.

### **Issues**

- i. What were the factors to be considered by a school disciplinary panel dealing with children's matters?
- ii. Whether failure to subject a child who consumed drugs in school against the school's policy, to a disciplinary process was a violation of section 16 of the Children Act which required the school to have an exhaustive policy on substance abuse.
- iii. Whether failure to give the reasons for the expulsion of a child from school in a statement akin to a court judgment amounted to a violation of the child's rights.
- iv. Whether suspension of a child from school was an appropriate punishment where the child had consumed drugs in school.

### **Held**

1. Article 53(2) of the of Kenya, 2010 provided that a child's best interests were of paramount importance in every matter concerning the child. That provision was also given effect by section 4(2) of the Children's Act. The ability of the school to take disciplinary action against delinquent students had not been impugned by the petitioner. Indeed, the School had elaborate procedures contained in the Handbook which the petitioner and her parents agreed to be bound by when petitioner was admitted to the school.
2. What constituted a fair process was dependent on the facts and circumstances of each case. Implicit in the concept of fairness was flexibility. A school disciplinary panel dealing with children's matters must have the necessary flexibility, having regard to the school environment and the child's rights, to deal with student discipline provided that the process was fair; that the child who was subject to the proceedings was given a hearing and an opportunity to defend himself and herself.



3. The procedure adopted by the school was fair taking into account all the circumstances. The Handbook laid down the specific procedures which were available to petitioner and her parents beforehand. The petitioner admitted that she was aware of the policies and procedure contained in the Handbook. On the whole, the petitioner was subjected to a process that was fair in the circumstances.
4. It was not necessary that a drug test was done for two reasons; first, a clear reading of the Handbook did not make such a test mandatory. Second, the issue whether the petitioner was involved in the January 27 incidence was a question of evaluating the evidence by drawing inferences and conclusions just as was done in any forensic inquiry. The drug test was not a mandatory requirement to vitiate the disciplinary process. The petitioner's right to due process was not prejudiced in the absence of a drug test.
5. The assertion that the petitioner was coerced into making incriminating statements was not supported by the evidence. While the petitioner was giving evidence, she appeared confident and capable of understanding the nature of her act. She readily admitted in cross-examination that she knew that the brownie contained weed. She also admitted that she was not forced into writing the initial statement which in fact did not contain an admission of taking a weed laced brownie. Her own statement dated January 30, 2014 to the Disciplinary Panel, showed that she knew the brownie was laced with weed arising from the events that had transpired over the weekend. The petitioner or her parents were not prejudiced by the failure to furnish the petitioner's handwritten statements to them before the Panel hearing.
6. The school complied with its obligation under section 16 of the Children Act by having an exhaustive policy on substance abuse in its Handbook. Given that the petitioner had admitted to previously consuming weed, it was difficult to see how the petitioner could have been protected other than by exposing her to the disciplinary process. Failure to subject the petitioner to the disciplinary process would have been a violation by the school of its duty under the section. Furthermore, the protection and obligation under section 16 was intended, not for one child, but also the collectivity of children in a school environment.
7. The reasons for the decision were communicated in the letter February 13, 2014. Though the reasons were perfunctory and were not contained in a statement akin to a court judgment, the petitioner's rights were not violated in the circumstances. The decision was followed by an appeal contained in the letter dated February 17, 2014 which was clear that the petitioner was appealing against the expulsion as a penalty. The letter rejecting the appeal dated February 21, 2014 contained the reasons for her expulsion.
8. The school was rightly concerned with its ability to maintain a drugfree environment and therefore the interests of all the other children in its charge. The rights of the petitioner must be considered alongside the rights of other students in the school. The school had an obligation to all its students, and failing to discipline students who broke the rules would set a bad precedent and affect students and parents who were willing to abide by the school regulations.
9. Reinstatement of the petitioner was not feasible in view of the school policy. Suspension was an appropriate punishment provided for in the Handbook. The petitioner was about to complete her schooling and she was being offered an opportunity do so without a blemish on her record. Although she was a child under the law, if the same incident had occurred after she reached 18 years she would have faced the full consequences of the criminal law under , 1994. That would include trial in the ordinary courts and the possibility of a 20-year jail term.
10. The petitioner admitted in her testimony that she had weed once before. In her statement dated January 30, 2013, the petitioner expressed remorse for her act. Unlike her friend who had actually carried the weed laced biscuit to school, the petitioner deserved leniency in the circumstances. Suspending her from school was an appropriate punishment for a serious violation of the school policy. The school offer to enable the petitioner complete her studies was appropriate in the circumstances as it comported with her best interests.



11. It was in the best of interests of the petitioner to be excluded from the school until she completed her examinations and earned her High School Diploma. As a person proceeding to adulthood, the petitioner must realise that certain acts, whether made at the spur of the moment or after deliberate contemplation, had grave consequences and those consequences were made very clear in the Handbook. Consequences were a part of life and as a person on the twilight of childhood, she must now live with the consequences of her act as a reminder that drugs were illegal and one slip up in the future may cost her life. It was the court's hope that the petitioner would take that opportunity to reflect on her life, chart a new course and make the necessary changes in her life. The court gave her that opportunity.

*Petition dismissed; no order as to costs.*

### **Orders**

- i. *The order of expulsion was set aside and substituted with a suspension on terms set out thereunder.*
- ii. *The petitioner shall remain officially enrolled at the school but shall remain suspended for the remainder of the school year. All official documents from the school shall not refer to the petitioner's expulsion nor shall such expulsion be communicated to any third party.*
- iii. *The school shall ensure that the petitioner completes her High School Diploma on terms to be agreed upon by the parties.*
- iv. *The school shall ensure that the petitioner completes and undertakes the International Baccalaureate (IB) examination in a manner agreed upon by the parties.*
- v. *Either party shall be at liberty to apply for further and other orders.*

### **Citations**

#### **Citations**

#### **Cases**

#### **Kenya**

1. *Commissioner General, Kenya Revenue Authority through Republic v Silvano Onema Owaki t/a Marenga Filling Station* Civil Appeal 45 of 2000; [2001] KECA 34 (KLR) - (Explained)
2. *DKC v Flourspar Company Limited* Civil Case No 140 of 2004; [2008] eKLR - (Explained)
3. *FMA & another v Principal, Kianda School* Petition No 281 of 2012; [2012] eKLR - (Followed)
4. *Kenya National Examination Council v Republic ex parte Njoroge & 9 others* Civil Appeal No 266 of 1996; [1997] KLR 480 - (Mentioned)
5. *Ndanu, Mutambuki & 119 others v Minister for Education & 12 others* Petition Case 407 of 2007; [2007] KEHC 32 (KLR) - (Explained)
6. *Nyongesa & others v Egerton University College* [1990] KLR 692 - (Followed)
7. *Republic v Commission for Higher Education ex-parte Peter Sbitanda* Miscellaneous Civil Application 30 of 2013; [2013] KEHC 3358 (KLR) - (Explained)
8. *RWT (suing as next friend of BGN - a minor) v SNS School* Petition 290 of 2012; [2012] KEHC 5408 (KLR) - (Explained)

#### **South Africa**

1. *Noka-Nts'o Primary School and others v Khaboliso and another* [1999] LSHC 154 - (Explained)

#### **United Kingdom**

1. *Pearlberg v Varty (Inspector of Taxes)* [1972] I WLR 534 - (Mentioned)

#### **Statutes**

1. Basic Education Act (cap 211) In general - Cited
2. Children Act (cap 141) sections 4(2); 16 - Interpreted
3. Constitution of Kenya articles 20, 47, 53(2) - Interpreted
4. Narcotic Drugs And Psychotropic Substances (Control) Act (cap 245) In general - Cited



## Advocates

1. Mr Gichuhi instructed by Wamae and Allen Advocates for the Petitioner
2. Mr Kimani and Ms Kashindi instructed by Hamilton, Harrison and Mathews Advocates for the Respondent

## JUDGMENT

### Introduction

1. This matter concerns RCK, a child aged 17 years who was expelled from the respondent school (“the School”). The School offers both the North American High School Diploma as well as the International Baccalaureate (IB) Diploma courses. RCK joined the School on August 6, 2008. She is currently in Grade 12 which is her final year of high school. She is expected complete her education in May 2014 and thereafter proceed to university.
2. The petitioner in the petition dated February 25, 2014 seeks the following orders;
  - A. A permanent injunction do issue restraining the respondent whether by its employees, servants or agents or any of them or otherwise howsoever from writing any letter or communicating in any manner whatsoever to any university chosen by the petitioner or to any other third party regarding her expulsion from the respondent.
  - B. An order of certiorari do issue removing to this honourable court for the purposes of quashing the respondent’s letter of February 13, 2014.
  - C. An order of mandamus do issue reinstating and re-admitting the petitioner to KSI which should avail time and resources to allow the petitioner to catch up with her few lost lessons.
  - D. A declaration be issued that the petitioner’s rights to education and right to fair administrative action were infringed by the respondent and that the expulsion was an infringement of her fundamental right to education.
  - E. An order of *mandamus* do issue directing the respondent to enact rules and regulations establishing a dispute resolution mechanism to accord with the right to fair administrative action under article 47 of the Constitution and the Education Act.
  - F. An order do issue directing the respondent whether by its employees, servants or agents or any of them or otherwise howsoever from discriminating or victimizing the petitioner in any manner whatsoever following her reinstatement and re-admission to school.
  - G. Exemplary damages and costs of and incidental to this suit.

### The Facts

3. The parties relied on depositions filed by the petitioner and the School’s director. I conducted a *viva-voce* hearing in which the RCK, her mother, KRC and the School Director, RJ all testified. The facts that emerged from the testimony are largely common ground and are as follows.
4. On the morning of January 27, 2014, RCK was dropped at the School by her father in readiness for a school trip. As she was getting ready, she proceeded to the washroom with her friend. In the bathroom, her classmate informed her that the brownie contained *marijuana* (also referred to as “weed”). RCK took a bite of the biscuit. Her classmate consumed the greater part of the biscuit. After they left the



washroom, they were soon confronted by a teacher SR. SR was in the washroom at the material time when she overheard and recognized their voices when they were talking about the brownie.

5. Soon there after RCK and her friend were escorted to the offices where they were searched and requested to make a statement on the events. RCK made two statements in which she admitted that she ate a “crumb from the empty pack.” The statements did not refer to the brownie as being weed laced.
6. On January 27, 2014, the School sent a general email to all parents regarding a report concerning some students who were not allowed to proceed on the school trip because they were found in possession of substances in violation of the school's policy. RCK was not allowed to go on the school trip and was suspended from school for two weeks together with 8 other students.
7. On January 29, 2014, the School wrote to RCK’s parents on the following terms;

January 29, 2014

Dear Parents of RCK,

As you are aware from the meeting held at the School on Monday, January 27th, 2014 involving KRC, RCK, and myself, RCK has been temporarily suspended from school based on a preliminary investigation into her involvement in a substance abuse incident on school grounds on January 27th, 2014.

The temporary suspension was imposed given that the information gathered on January 27th showed that RCK’s behaviours were a serious violation of the school's policy for student conduct, and specifically a violation of the school's substance abuse policy. As explained, this at-home suspension is considered indefinite pending completion of our investigation into the incident.

Given the potentially significant consequences that could be imposed upon conclusion of the school's investigation - as explained in the High School Parent & Student Handbook and possibly including a recommendation to the Director of expulsion from school - I am writing to remind you that RCK can submit additional information or present additional witnesses at this time. RCK should submit any additional information directly to me in writing, and preferably here on campus in the company of a parent. RCK must submit any additional information by 9:00 am Friday January 31st should she choose to do so.

After RCK has a chance to submit additional information, a panel will be formed to review all the evidence collected and assist in my deliberations. The panel will likely include the Assistant Principal, the CAS/Service Learning/Trip Coordinator, the IB Coordinator, two-three teachers (typically one of these would be student-nominated), and myself. Should she wish to do so, RCK is welcome to identify three or four teachers that she would like to see on the panel and send these names to me also by 9:00 am this Friday. The school will try (but cannot guarantee) to include at least one of RCK’s teacher requests on the panel.

Once the panel is formed, you will hear from me with more information about the process, including specifics about the panel hearing that will take place next week. I am requesting that all communications between RCK or your family and the school be directed to me until our investigation is concluded, though as explained you are welcome to make an appointment to see a school counsellor should you wish to do so. Thank you.

If you have any questions, please feel free to contact me.

Thank you.



High School Principal

8. On February 3, 2014, the school followed up with another letter on the following terms; February 3, 2014

Dear Parents,

I am writing to follow-up on my previous communications with you about the ongoing investigation into RCK's involvement in the incident on school grounds on January 27th, and specifically to further clarify in writing the arrangements for this week's panel hearing.

Thank you for sending in the names of possible teachers that RCK would like to see included on the panel. The panel has now been formed, and the hearing is scheduled for Wednesday, February 5th at 4:00 pm in the high school office. The panel will include the assistant principal, I coordinator, CAS/Service Learning/ Trip Coordinator, two teachers, and myself. As stated in my previous letter, the panel's role will be to review all the evidence collected and assist in my deliberations.

As you will be aware from our discussion and the High School Parent & Student Handbook, RCK's behavior potentially constitutes grounds for a recommendation of expulsion to the Director of the school. The hearing will be an opportunity for RCK to present a final statement to the school, explaining why she should not be considered for expulsion and offering any reflective comments about the incident. RCK can either speak freely or write a statement in advance and read it out. One of you must be present, and as parents you are also welcome to make comments. RCK should also be prepared to answer a few questions.

Given that a decision about consequences will not occur until after the hearing has concluded and deliberations have occurred, it is unlikely that the Director or I will be able to inform you and Cheryl of the school's final decision until some time during the week of February 10th.

As regards RCK's schoolwork while she serves the current indefinite suspension pending the conclusion of the case, the school is arranging for RCK to be able to continue her learning via our Moodle online learning platform. RCK is therefore allowed and encouraged to be in direct email communication with her teachers about instructional matters relating to his current coursework.

Please be reminded that RCK should not enter school grounds until the conclusion of the investigation. However, she is allowed on campus in the company of a parent if she has an appointment with a school counsellor or myself. Kindly confirm receipt of this letter.

Please share the contents of the letter with RCK, and feel free to let me know if you have any questions about the process. Thank you.

High School Principal

9. On February 5, 2014, the duly constituted disciplinary panel heard the case against RCK. RCK and KRC gave their statement. The panel deliberated and recommended the expulsion of the RCK in line with the School's Substance Abuse Policy. The expulsion was communicated to KRC by the letter dated February 13, 2014 which stated as follows;

February 13, 2014

Dear Parents,



I am writing to inform you that your daughter, RCK, is required to withdraw from the School for a clear and significant violation of the school's policies on student conduct and substance abuse. This decision is the result of an extensive investigation and a transparent process that provided you and RCK with an opportunity to make a case for not being expelled, as well as for the High School Principal to deliberate on appropriate consequences with informed input from a panel of five senior teachers.

In all disciplinary cases, one aim is to help students learn from the incident. However, in the most serious cases, that aim may be superseded by the need to ensure a safe and drug-free campus for all students, and theneed to ensure that similar incidents do not recur. For the individual student the learning in such a case is a real-life lesson in responsibility for one's actions: the most serious violations of any community's "codes of conduct" do lead to the most serious consequences. The School will...maintain and uphold school rules that provide serious sanctions, up to and including explosion, for students consuming, possessing or selling alcohol, tobacco, or illegal or potentially harmful substance at any school -related activity.

RCK will not receive a School Diploma and has forfeited the privilege of graduating from the School. Regarding next steps, I fully understand that RCK's expulsion will not be easy for her or your family. Our high school leadership team and counsellors will provide you and RCK with support in her next steps, whether that is enrolment in another school to repeat 12th grade, gaining high school equivalency through the GED program, researching, "transition year" programs at universities, or on-line learning for the remainder of the year. Our counsellors are well-equipped to assist your family in making such choices. If you or RCK are interested in taking advantage of this support, please make an appointment with a high school counsellor.

This is an opportunity for RCK to learn from her experience, but we strongly advise that she receives counselling-not just for decisions about drug use, but also to help her find meaning in these events and move forward with a positive frame of mind and determination to make changes in her life.

This is an unfortunate end to RCK's time at the School, but may be the beginning of a new, healthier more positive phase of her life.

Sincerely,

Director

10. The school then sent out a general email on February 13, 2014 to all parents informing them about the expulsion of the 9 students.
11. On February 17, 2014, KRC lodged a written appeal and pointed out that the RCK had not been found with any banned substance in her possession. KRC also argued that the RCK's action did not call for expulsion as she had good record throughout the time at the School and that she had not been subjected to any disciplinary process since she joined the School.
12. On February 21, 2014, the Director rejected the appeal on the ground that, "the violation of the School Substance Abuse Policy that involves illegal drugs meets the criteria of "most serious offenses" and therefore warrants expulsion." The Director was also convinced that RCK's involvement was not innocent of taking the illegal substance with the intention of getting high on the trip.



13. It is not disputed that the Schools policies and disciplinary procedures are contained in a Handbook which is available to all parent and students which the parents and students agree to be bound by upon admission. The Handbook is also available online.

### **Petitioner's Case**

14. The petitioner submits that her right to dignity protected by article 20 of the Constitution was violated. She testified that RCK's suspension and eventual expulsion affected her psychologically. Her mother testified that she lost her self-confidence and esteem. That she had lost weight, hair and the stress caused her to get facial pimples/acne. That her legitimate expectation to complete her education, with only 3 months to go was shattered and that her reputation was destroyed as the school would permanently have a record of her expulsion and in turn notify the universities she had applied to join.
15. The petitioner's case is that the rights of RCK were violated by the manner in which the disciplinary process was conducted. The petitioner contends that RCK's legitimate expectation to natural justice, due process and a fair treatment was infringed by the School. She urges the court to declare that the decision to expel RCK from the School unconstitutional, null and void as it violated article 47 of the Constitution as no written reasons were given for the decision. 16. Counsel for the petitioner, Mr Gichuhi, submitted that the disciplinary hearing was not carried out in accordance with the Handbook particularly the importance of the provisions dealing with 'Substance Abuse' which states, '[t]he administration may require the student to be tested for illegal drug use. Parents will be informed in advance that their son or daughter has been asked to take a test for illegal drug use. A positive test result from school-ordered drug testing is considered a violation of the policy. Refusal to be tested will also be considered a violation of policy.'
17. The petitioner submits that she never tested for any drugs as required by the Handbook taking into account that no *marijuana* laced brownie was found in her possession. She further submits that the time she wrote the handwritten note on January 27, 2014 she did not admit that she had eaten a weed laced brownie. This required the School to ask for a blood test which was not sought and obtained.
18. The petitioner maintains that no evidence whatsoever was adduced to sustain the allegation of substance abuse and that the School failed to adduce any evidence to assist the court in proving that the brownies contained *marijuana*. In the circumstances the petitioner submits that the entire disciplinary process was conducted in breach of article 47 of the Constitution.
19. Mr Gichuhi cited several cases in support of the petitioner; RWT (suing as next friend and grandmother of BGN) v SNS School Nairobi Petition No 290 of 2013 [2012] eKLR, where the court re-admitted a student to school who had served his suspension in the best interests of the child and where the respondent had not demonstrated that it had given the child a fair hearing. The judge held that the child is also entitled to human rights and fundamental freedoms. The case of DKC v Flourspar Company Limited Eldoret HCCC No 140 of 2004 [2008] eKLR was cited as supporting the petitioner's argument that expulsion in the circumstances was a drastic, unreasonable and unlawful and the court ought to order reinstatement.
20. Counsel further cited the case of Noka-Nts'o Primary School and others v Khaboliso and another [1999] LSHC 154 where the Court of Appeal of Lesotho in dealing with an appeal concerning the right to fairness in the school disciplinary process, upheld the paramount appeal to feelings of fairness before expelling a student from school. The court found the decision to expel as arbitrary and sudden and there was no record to indicate how it was arrived. Finally, counsel cited the case of R v Commission for Higher Education ex-parte Peter Shitanda [2013] eKLR to elucidate the elements of procedural fairness.



## Respondent's Case

21. The school opposes the petition. It relies on its policy on substance abuse which is informed by the stringent penalties set out in the applicable law including the *Narcotic Drugs and Psychotropic Substances (Control) Act*, 1994. The School policy is to take seriously any matter concerning drugs in view of the gravity and the potential consequences and as such the school has an elaborate policy on substance abuse contained in the Handbook.
22. The School submits that it duly followed the procedure set out in the Handbook relating to substance abuse which the petitioner and RCK were aware of. It further submits that due process was followed throughout the entire disciplinary and appeal process and that its procedures and processes were clearly set out in the letters sent to RCK and her parents in addition to being available in the Handbook. The School asserts that it gave RCK and her parent sample opportunity to show cause why RCK should not be expelled from School.
23. The School's position is that its decision to expel the RCK was informed by several considerations, among them the following;
  - a. The gravity of the matter including the fact that circumstances were such that an offence may have been committed under the *Narcotic Drugs and Psychotropic Substances (Control) Act*, 1994.
  - b. The School's policy to maintain a drug free campus.
  - c. The apprehension of the possible ramifications from the School community comprising of over 800 students, close to 1,500 parents, teachers and other staff. Some teachers threatened to quit and some parents threatened to withdraw their children from the School if stern measures are not taken against RCK and the other 8 students who were involved in the violation of the Substance Abuse Policy.
24. Mr Kimani assisted by Ms Kashindi, for the school, submit that the RCK's constitutional rights must be weighed against those of the school and the rest of the school population including students and teachers. They further submit that individual rights under Bill of Rights are subject to rights of others and that of the public. Counsel cited the case of *Ndanu Mutambuki & 119 others v Minister for Education & 12 others* [2007] to support this proposition.

## Determination

25. The determination of this matter is guided by article 53(2) of the *Constitution* which provides that, "A child's best interests are of paramount importance in every matter concerning the child." This provision is also given effect by section 4(2) of the *Children's Act* which provides that, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration." In *DKC v Flourspar Company Limited* (supra), the court held that, "[E]ven a "private school" is bound by law to protect the best interests of the child while carrying out its functions."
26. The petitioner's case concerns discipline in school. In *RWT (suing through next friend and grandmother BGN) v SNS School* (supra) I observed follows
  - "[5] I am aware that discipline in school is a delicate and sensitive matter both for the parents and the school authority. Both institutions, the parents and school, bear special responsibility to nurture the child by providing an environment where his potential can be realized so that he becomes a responsible citizen.



- [6] Article 53 of our Constitution now recognizes the general principle that the best interests of the children is the paramount consideration in any matter concerning children. ....  
[I]n a school environment, it is the welfare of all the children that must be taken into account rather than one deviant child who has a disciplinary problem. But there is also a responsibility to be borne in respect of that one child, one that flows from the human rights and fundamental freedoms of each individual. These cannot be subordinated to others merely because the interests of the other children are greater. There must be a good reason to do so consistent with the values and principles of the Constitution.
- [7] I am also alive to the fact that this court is not a disciplinary institution for children. The role of the court when moved under the provisions of article 22 is to enforce fundamental rights and freedoms provided in the Bill of Rights. In taking this responsibility I must weigh all these facts and circumstances and consider what is in the best interest of the child.”
27. The issue raised by the petitioner is one about due process and whether the RCK’s rights were thereby violated. The ability of the School to take disciplinary action against delinquent students has not been impugned by the petitioner. Indeed the School has elaborate procedures contained in the Handbook which the RCK and her parents agreed to be bound by when RCK was admitted to the school.
28. The question for consideration is whether RCK was subjected to due process. I must emphasise that such an inquiry does not involve the court substituting itself for the School but satisfying itself that the procedure adopted met the threshold of what constitutes a fair process. The applicable principle was laid down by Nyarangi JA, in *Nyongesa and others v Egerton University College* [1990] KLR 692 where he stated as follows, “Having thus stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.” This state applies with equal force to a school environment.
29. What constitutes a fair process is dependent on the facts and circumstances of each case. Implicit in the concept of fairness is flexibility. A school disciplinary panel dealing with children’s matters must have the necessary flexibility, having regard to the school environment and the child’s rights, to deal with student discipline provided that the process is fair; that the child who is subject to the proceedings is given a hearing and an opportunity to defend himself and herself (See *Pearlberg v Varty (Inspector of Taxes)* [1972] 1 WLR 534, *Commissioner General, Kenya Revenue Authority v Vano Onema Omwaki t/a Marenga Filling Station* Kisumu Civil Appeal No 45 of 2000 (Unreported) and *Kenya National Examination Council v Republic exp. Geoffrey Njoroge & others* Nairobi Civil Appeal No 266 of 1996 (Unreported)).
30. I have examined the procedure adopted by the School and I am satisfied that the process undertaken by the School was fair taking into account all the circumstances. The Handbook lays down the specific procedures which were available to RCK and her parents beforehand. RCK admitted that she was aware of the policies and procedure contained in the Handbook. My conclusion is buttressed by the two letters dated January 29, 2014 and February 3, 2014 in which the School Principal went to great lengths to explain the accusations levelled against RCK, the nature of the process and investigation and the rights of RCK and her parents to participate in the process and the possibility of expulsion. The letters also point to meetings between the Headmaster, RCK and her mother where the issues surrounding the investigation and disciplinary process were explained in detail. I find that on the whole, RCK was



subjected to a process that was fair in the circumstances. I now turn to the specific issues raised by the petitioner regarding the entire process.

31. The petitioner has complained that a drug test was not done to ascertain whether RCK actually took drugs. In my view, this was not necessary for two reasons. First, a clear reading of the Handbook quoted at paragraph 15 above, does not make such a test mandatory. Second, the issue whether RCK was involved in the 27th January incidence is a question of evaluating the evidence by drawing inferences and conclusions just as is done in any forensic inquiry. I therefore find and hold that a drug test was not a mandatory requirement to vitiate the disciplinary process nor do I find that RCK's right to due process was prejudiced in the absence of a drug test.
32. The petitioner's case is that RCK was coerced into making incriminating statements. This assertion is not supported by the evidence. The statements made by RCK did not refer to a weed laced brownie. Her statement on the events of the morning of the incident were more a summary of the events. I listened to RCK giving evidence. She appeared confident and capable of understanding the nature of her act. She readily admitted in cross-examination that she knew that the brownie contained weed. She also admitted that she was not forced into writing the initial statement which in fact did not contain an admission of taking a weed laced brownie. Her own statement dated January 30, 2014 to the Disciplinary Panel, which must have been written upon reflection and in the absence of the conditions obtaining on January 27, 2014, clearly shows that she knew the brownie was laced with weed arising from the events that had transpired over the weekend. In light of these facts, I do not think that RCK or her parents were prejudiced by the failure to furnish the RCK's handwritten statements to them before the Panel hearing. I therefore dismiss this argument.
33. Counsel for the petitioner argued that the School abdicated its responsibility by failing to uphold section 16 of the Children's Act which provides that, "Every child shall be entitled to protection from the use of hallucinogens, narcotics, alcohol, tobacco products or psychotropic drugs and any other drugs that may be declared harmful by the Minister responsible for health and from being involved in their production, trafficking or distribution." Counsel submitted that SR ought to have intervened to protect RCK from being given the weed laced brownie while in the washroom.
34. I think the petitioner's argument in this case is simplistic. The School, in my view, complied with its obligation under section 16 of the *Children's Act* by having an exhaustive policy on substance abuse in its Handbook. Given that RCK had admitted to previously consuming weed, it is difficult to see how RCK could have been protected other than by exposing her to the disciplinary process. Failure to subject RCK to the disciplinary process would have been a violation by the School of its duty under section 16 of the Act. Furthermore, the protection and obligation under section 16 of the Act is intended, not for one child, but also the collectivity of children in a school environment.
35. The petitioner has also complained that no written reasons for the decisions were furnished. I must point out that the reasons for the decision were communicated in the letter of February 13, 2014. Though the reasons were perfunctory and were not contained in a statement akin to a court judgment, I nevertheless find that RCK's rights were not violated in the circumstances. The decision was followed by an appeal contained in the letter dated February 17, 2014 which was clear that RCK was appealing against the expulsion as a penalty. The letter rejecting the appeal dated February 21, 2014 contained the reasons for her expulsion.
36. I now turn to the penalty imposed by the School. According to the Handbook, a student found guilty of infraction of the School policies may be suspended or expelled. The Handbook states as follows;

#### Suspension



A suspension is a serious disciplinary consequence involving the temporary or long-term removal of a student from the classroom learning environment. Possible student actions/behaviours that may lead the principal to suspend a student include but are not limited to: Posing an immediate or continuing threat to the safety of others, including any incidents of fighting, regardless of who initiates the conflict. Demonstrating a conscious failure to abide by the School behavioural expectations. Deliberately, significantly or consistently disrupting and impeding the learning of others. Repeatedly engaging in behaviours considered to be minor violations of the school rules.

While serving a suspension, the student loses the privilege to interact within the community as normal. There are two main types of suspension: in-school and at-home. An in-school suspension involves the loss of all free time (activity/tutorial, lunch and independent learning time) and the privilege to attend classes. The student will remain in the high School office all day to complete work missed in classes. An at-home suspension normally results from particularly serious violation of school rules or policies, involving the student staying at home and losing the privilege to attend school. The length of an at-home suspension is determined by the severity of the incident and the circumstances, as determined by the principal. Students suspended from school are not allowed to attend any school event during the duration of the suspension – this includes but is not limited to overnight or field trips, outdoor education or intercultural trips, and sporting events. Assignments will be provided as necessary and as far as possible, as the suspended student is expected and required to complete all work as assigned.

#### Expulsion (Enrolment Status Review)

Expulsions are considered only when other methods of discipline have been attempted and such intervention has failed or when the most serious school policies have been violated. In such cases, permanent expulsion will be recommended by the high school principal to the Director of the school. An expulsion is included in a student's permanent record.

37. The petitioner's case is that RCK has only three months to finalise her entire High School education and then proceed to University. The penalty of expulsion imposed is blight on her record and may affect her future prospects. In the course of the hearing RJ expressed willingness to resile from the expulsion and assist RCK complete her High School Diploma and sit for her final exams.
38. The School is rightly concerned with its ability to maintain a drug-free environment and therefore the interests of all the other children in its charge. In this respect I adopt the sentiments expressed by Mumbi Ngugi J, in *FM v The Principal, Kianda School* Nairobi Petition No 281 of 2012 (Unreported) where she stated that, “[27] Further, as the respondent correctly argues, the rights of the petitioner's daughter must be considered alongside the rights of other students in the school. The school has an obligation to all its students, and as the respondent submits, failing to discipline students who break the rules would set a bad precedent and affect students and parents who are willing to abide by the school regulations.”
39. In my view, reinstatement of RCK is not feasible in view of the School policy. Suspension is an appropriate punishment provided for in the Handbook. RCK is about to complete her school and she is being offered an opportunity to do so without a blemish on her record. Although she is a child under our law, if the same incident had occurred after she reached 18 years she would have faced the full consequences of the criminal law under *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994*. This would include trial in the ordinary courts and the possibility of a 20 year jail term.



40. The petitioner admitted in her testimony that she had weed once before. In her statement dated January 30, 2013, the petitioner expressed remorse for her act. Unlike her friend who had actually carried the weed laced biscuit to school, the petitioner deserves leniency in the circumstances. I find that suspending her from school is an appropriate punishment for a serious violation of the school policy. The School offer to enable RCK complete her studies appropriate in the circumstances as it comports with her best interests.
41. On the whole, I find and hold that it is in the best of interests of RCK to be excluded from the School until she completes her examinations and earns her High School Diploma. As a person proceeding to adulthood, RCK must realise that certain acts, whether made at the spur of the moment or after deliberate contemplation, have grave consequences and these consequences were made very clear in the Handbook. Consequences are a part of life and as a person on the twilight of childhood, she must now live with consequences of her act as a reminder that drugs are illegal and one slip up in the future may cost her life. It is my hope that the RCK will take this opportunity to reflect on her life, chart a new course and make the necessary changes in her life. The court gives her this opportunity.

### **Disposition**

42. Taking all the circumstances, I decline to grant the petitioner's prayers in the petition. In view of the what the School has stated that it is able to consider, I make the following orders;
- (a) I set aside the order of expulsion and substitute it with a suspension on terms set out hereunder.
  - (b) RCK shall remain officially enrolled at the School but shall remain suspended for the remainder of the school year. All official documents from the School shall not refer to the RCK's expulsion nor shall such expulsion be communicated to any third party.
  - (c) The School shall ensure that RCK completes her High School Diploma on terms to be agreed upon by the parties.
  - (d) The School shall ensure that RCK completes and undertakes the International Baccalaureate (IB) examination in a manner agreed upon by the parties.
  - (e) Either party shall be at liberty to apply for further and other orders.
  - (f) There shall be no order as to costs.
43. I am grateful to the advocates who were able to prosecute and defend this matter in a manner consistent with the best interests of the child.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> MARCH 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Gichuhi instructed by Wamae and Allen Advocates for the Petitioner.

Mr Kimani and Ms Kashindi instructed by Hamilton, Harrison and Mathews Advocates for the Respondents.

