IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 8 OF 2017

BETWEEN

HO (SUING AS NEXT FRIEND OF PO (MINOR).....APPELLANT

PETER OBWOGO.....1ST RESPONDENT

THE SECRETARY, BOARD OF MANAGEMENT

ST [PARTICULARS WITHHELD] HIGH SCHOOL.....2ND RESPONDENT

ST [PARTICULARS WITHHELD] HIGH SCHOOL

BOARD OF MANAGEMENT.....3RD RESPONDENT

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

(An appeal from the Judgment of the High Court of Kenya at Kitale

***(Chemitei, J.)** dated 5th October 2016*

In

High Court Petition No 15 of 2015)

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JUDGMENT OF J. MOHAMMED JA

BACKGROUND

1) On 13th October 2014, **PO** (P), the minor son of **HO**, who is the appellant herein, was suspended from St. **[PARTICULARS WITHHELD]** Boys High School (the School) which he had been attending as a Form Three student. According to the suspension letter, P was suspended for the offence of leaving the school compound without permission. He was to report back to the school on 28th October 2014 in the company of a parent. The appellant attended the school with his son on that date and he was informed that the issue had been referred to the 3rd respondent which is the school's Board of Management, for deliberation. It turned out that the 3rd respondent was scheduled to sit the following day, on 29th October 2014; and on that day, the School's Board of Management handled various cases of indiscipline, including that of P. Thereafter, the appellant was asked to return home with P and await communication of the 3rd respondent's decision.

2) It was the appellant's claim that no information was forthcoming from either the 1st, 2nd or 3rd respondents and this prompted him to write to the 1st respondent on 6th November 2014 requesting information on the decision reached by the 3rd respondent. It was the appellant's contention that this letter went unanswered, and he continued to try and follow up on P's suspension from the 1st respondent without success. He therefore wrote a letter dated 6th November 2014 to the County Director of Education, Trans Nzoia County and another letter dated 15th January, 2015 to the then Minister for Education, Professor Jacob Kaimenyi complaining about the respondents and how they had handled

P's suspension.

3) Receiving no response to his letters, the appellant made a written complaint to the Commission on Administrative Justice as well as to the Kenya National Commission on Human Rights complaining of P's unprocedural suspension and expulsion. By a letter dated 23rd July, 2015, the Kenya National Commission on Human Rights advised the appellant that they had closed their file on the matter and advised him to consider instituting a Constitutional petition for the court to determine if any rights were violated by P's expulsion from the School and give appropriate orders.

4) The appellant filed a Constitutional petition dated 30th July 2015, suing on behalf of his minor son, P, alleging that due to the negligence and inaction of the 1st, 2nd and 3rd respondents, P had been forced to join a village school which crippled his academic opportunities and led to financial loss to the appellant. In this petition, the appellant contended that P's suspension was unprocedural and without basis, as the decision from the 3rd respondent was not communicated to the appellant when he requested for it. In the appellant's view, this failure to communicate the decision was evidence that P's suspension and subsequent expulsion was mischievous, and in support of this claim, he referred to a report card issued to P by the 2nd respondent in which the 1st respondent warned that P risked losing his place in the School due to poor performance. For this reason, the appellant claimed that the 1st respondent had abdicated his duties in upholding the national values spelt out in **Article 10** of the **Constitution.**

5) The appellant further claimed that the actions of the School led to a violation of P's rights under **Article 27** of the **Constitution** as he was discriminated against and denied an equal opportunity to return to school like the other students, as well as a violation of Article 53(1)(b) of the Constitution which guarantees every child the right to a basic education. The appellant claimed that as a result of these violations and the impunity and arrogance demonstrated by the respondents, P had suffered trauma, anguish and financial loss; and that P had ended up joining a village school, having to repeat his form three education as he was denied an opportunity to sit his final examinations.

6) The appellant sought the following orders:

> ***1) A declaration that the actions of the respondent are unconstitutional for violating the rights of the minor under articles 27,28,43(1)(f),35(1)(b) and (2) of the Constitution;***
>
> ***2) A declaration that the 1st respondent who occupies public office contravened articles 27,28,43(1)(f) and 53(1) and (2) of the Constitution and is therefore unfit to hold public office in Kenya;***
>
> ***3) A declaration that the minor was discriminated upon; and***
>
> ***4) General and exemplary damages.***

7) The petition was opposed by way of a replying affidavit sworn by the 1st respondent. The first challenge against the petition was that it was vague and did not contain any particulars of material facts on the alleged violations, or the persons involved and the connection of such persons with the appellant and did not therefore meet the threshold test of constitutional proof.

8) The 1st respondent conceded that P was admitted as a student of the School on 1st February 2012. He averred that upon admission, P was required to strictly observe the school rules and regulations and to maintain school discipline in line with the 2nd respondent's motto; that on 13th October 2014, P sneaked out of school, and this led to his suspension; that on 28th October 2014, the appellant and P attended the School and the issue of P's misconduct was discussed by the 2nd respondent's Disciplinary Committee which resolved that the matter be referred to the 3rd respondent for resolution; that the 3rd respondent met on 30th October 2014 and deliberated on the issue, and made the recommendation that P be relocated to a different school based on the fact that he admitted that he had sneaked out of school; and that the decision of the 3rd respondent was communicated to the appellant which prompted him to complain to the Commission on Administrative Justice as well as the Kenya National Commission on Human Rights.

9) The 1st respondent further averred that after it communicated its decision, the County Education Board advised that the 3rd respondent reviews its decision to expel several students, and that pursuant to this, it called for a meeting with the appellant and P; that the appellant and P did not attend the meeting and instead sent someone in his stead; and that in the circumstances, the 3rd respondent opted to rest the matter at that and decided to uphold P's expulsion. For these reasons, the respondents maintained that there were no constitutional rights violated, that the actions they undertook were in compliance with the law and urged the court to dismiss the petition with costs.

10) Upon considering the evidence before it and hearing the parties, the trial court outlined two issues for its determination: whether or not the appellant had proved that there was a violation of either his or P's constitutional rights. The court held that there was no evidence that the appellant or P had any of their rights violated. In particular, it held that there was no evidence that P had been particularly discriminated against when his punishment was compared to the punishment that other students received. The court also found that the respondents had acted in accordance with the recommendation of the County Education Board, but the appellant and P failed to appear for the meeting. The court concluded that there was no fundamental breach of the Constitution and that the appellant ought to have approached the court by way of Judicial Review. On this the court observed that:

> ***"In my view the petitioner ought to have approached the court through judicial review forum. All that he complained against the respondence (sic) 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 (sic) the province of Judicial review to be invoked.***

…

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.

…

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." (sic)

Thus, the petition was disallowed with an order that each party bears its own costs.

11) The appellant was aggrieved by this decision and filed this appeal raising 38 grounds of appeal which are, *inter alia*, that the trial court erred: in finding that there were no constitutional matters for determination in the petition; in finding that there were no breaches of Articles 27, 28, 43(f), 53 (1)(b) and 2 of the Constitution; in failing to find that the appellant was denied a right to a hearing; and by finding that the matter before him lay solely within the province of Judicial Review.

12) The appellant sought orders that:

a) This appeal be allowed;

b) The judgment and order of Chemitei, J made on 5th October 2016 be set aside;

c) There be a declaration that the respondents violated the rights of the minor under Article 27, 28, 43(1)(f), 53(1)(b) and (2) of the Constitution of Kenya 2010;

d) There be a declaration the 1st respondent Peter Obwogo O contravened Articles 27, 28, 43(1)(f), 53(1)(b) and (2) of the Constitution and is unfit to hold a public office;

e) A declaration that the minor was discriminated against;

f) General and exemplary damages; and

g) Costs.

SUBMISSIONS

13) These grounds of appeal were expounded by the appellant in person during hearing of this appeal. The first submission was that the learned Judge erred in holding that the appellant should have filed a Judicial Review application yet this would not have been possible due to the fact that the appellant did not have the decisions of the 3rd respondent and as such, he could not have asked the court to review the impugned actions. In addition, he submitted that the availability of another cause of action through Judicial Review ought not to have been a bar to granting him the appropriate relief where there had been evidence that P's rights had been violated.

14) The appellant further argued that the learned Judge erroneously held that he had an opportunity to challenge the 3rd respondent's decision but failed to do so. He argued that he appealed against the 3rd respondent's decision to the County Executive Board which found that the School rules were unconstitutional and discriminatory, and recommended that P be re-admitted to the School as he had been in the School for three years without committing any other infraction. It was the appellant's further submission that he was never invited to the meeting by the Deputy Principal as had been claimed, and as such, due to the lack of response by the respondents to his queries, he enrolled P in another school.

15) The appellant contended that the decision to expel P was malicious and unconstitutional; that while the 2nd respondent was ordered to re-admit all the students who were first time offenders, P was not admitted, and the appellant maintained that the respondents had a motive to expel P as could be seen from the comments made on the report forms issued to him warning him that he would lose his position in the School if he did not improve his grades. All of these actions, according to the appellant, were a violation of the Constitution as they led to P having to lose a year in school and further to the appellant having to pay school fees for an extra year. For these reasons, the appellant urged me to allow the appeal and enter judgment in his favour as prayed in the petition.

16) The respondents opposed the appeal through learned counsel, Mr. Onalo. Relying on his brief written submissions, counsel submitted that the trial court properly addressed its mind to the facts and correctly held that the petition had no merit.

DETERMINATION

17) I have considered the entire record, the submissions by the rival parties, the authorities cited and the law. I have done so in a bid to do our

duty as a first appellate court of rehearing the petition and making my own independent conclusions and giving our own reasons. See ***James Kanyiita Nderitu v Attorney General & another [2019] eKLR (Civil Appeal No. 96 Of 2013)***

18) In this appeal the appellant alleges the violation of various constitutional rights both his and P's. I remind myself of the importance of fundamental rights and freedoms as enshrined in the Constitution of Kenya, 2010. In ***Attorney General vs Kituo Cha Sheria & 7 others [2017] eKLR (Civil Appeal No. 108 Of 2014)*** this Court expressed itself as follows:

> ***"The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey."***

19) The responsibility of Courts to protect and enforce the provisions contained in the Bill of Rights is contained in Article 23 of the Constitution which gives the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of a right or fundamental freedom contained in the Bill of Rights. In particular, under Article 23 of the Constitution, the court is given the jurisdiction to grant appropriate relief including:

> ***(a) a declaration of rights;***
>
> ***(b) an injunction;***
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> ***(c) a conservatory order;***
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> ***(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***
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> ***(e) an order for compensation; and***
>
> ***(f) an order of judicial review.***

20) These constitutional provisions are clear that where there has been a breach of a constitutional right, then a party may apply to the High Court for protection and enforcement of its constitutional rights and the court may make various orders, including an order of judicial review.

21) I now turn to consider whether or not the appellant laid out a case showing that there had been a violation of his or P's constitutional rights. The main thrust of the appellant's petition as well as this appeal was that P was manifestly discriminated against by the actions of the 3rd respondent to expel him. Article (27) of the Constitution provides for equality and freedom from discrimination. Sub-article (4) of that Article provides, as follows:

> ***"27 (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."***

22) The appellant contends that P was discriminated against by the decision of the 3rd respondent to expel him as other students who were similarly situated were allowed to return to school. Article 27 of the Constitution prohibits discrimination on any ground and guarantees equal protection under the law. As was stated by this Court in ***Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019] eKLR (Civil Appeal No. 145 of 2015)***

> ***"A purposive interpretation of the grounds listed in Article 27(4) is to the effect that they are not exhaustive. The Court will therefore have to determine on a case to case basis other grounds that may form part of Article 27(4) whenever called upon to.***

23) As such, a litigant would have to demonstrate to the court that there has been some differential treatment on the basis of some ground, in addition to those spelt out in **Article 27(4)** of the Constitution upon which his rights have been violated. Applying this principle to the instant appeal, and having evaluated the evidence tendered by the parties, it is clear that P was expelled together with other students who sneaked out of school. The chronology was that the issue was discussed at a disciplinary committee which recommended that the issue be deliberated upon by the 3rd respondent. Upon these deliberations being completed, the 3rd respondent recommended that P, together with other students who had admitted to sneaking out of school, all be relocated to other schools. This was documented in the records of proceedings that were annexed to the 1st respondent's affidavit that was sworn in response to the petition.

24) From the record, it is clear that P was subjected to the same disciplinary process as all the other students who were caught sneaking out of school. In the absence of any cogent grounds upon which the appellant alleges that P was discriminated against, or was subjected to different treatment from the other students, I am unable to differ with the trial court that P was not discriminated against.

25) The appellant's position was that the 2nd and 3rd respondents had already made the decision to expel P due to the fact that he had been getting poor grades. In support of this proposition, the appellant had asked the court to note that some of P's report cards had remarks from the teachers and the principal to the effect that P's grades were unacceptable and that he risked losing his position in the School. I am not persuaded that this is the position. From the documentation availed to the Court it is clear that the only issue that was deliberated upon by the 2nd and 3rd respondents with respect to P was with regard to disciplinary issues and not his academic performance.

26) The appellant urged the Court to disregard the minutes of the Disciplinary Committee as they were unsigned, undated and unstamped, and that there was no way to authenticate these and ascertain if they had indeed been the true record of proceedings of the 2nd and 3rd respondents. The appellant took issue particularly with the fact that the minutes of the 3rd respondent were indicated to have been confirmed by the Chairperson on 28th January 2014 while the meeting took place on 30th October, 2014 which the appellant claimed was deliberate and showed that the minutes had been doctored in order to subject P to an unlawful and unfair expulsion.

27) I have perused the documents referred to and have noted that indeed, the minutes by the 3rd respondent's Chairperson were indicated to have been confirmed on 28th January 2014. These minutes refer to earlier proceedings taken in October 2014 when P's conduct, together with that of other students, was the subject of discussion. The minutes of the 3rd respondent also indicate that its board of management met on 30th October 2014. It therefore seems that the date of confirmation was probably an error. Nonetheless, the minutes do not prove that there was a sustained campaign to rid P of his admission in the school.

28) Even if we were to disregard the minutes of the 3rd respondent, we have noted the appellant's submission that once the County Education Board considered the suspensions, it directed the 2nd respondent to readmit those students who had only one infraction. This is true, but it is not the complete picture. In the letter dated 10th November 2014, from the County Education Board to the 1st respondent, the 2nd respondent directed the 1st respondent to recall some students, among them P, for conditional re-admission to the School. The 1st respondent averred that it was pursuant to this direction that the appellant and P were invited to attend a meeting of the 3rd respondent; a meeting that the appellant did not attend, but instead sent someone to represent him, who left before the meeting was called to order. This assertion was not controverted by the appellant; instead the appellant denied at the appellate stage that he had received a text message to this effect.

29) Article 53(1)(b) provides that each child has the right to free and basic education, while Article 53(2) requires that ***"A child's best interests are of paramount importance in every matter concerning the child."*** These constitutional principles are reiterated in the Basic Education Act (the Act) which operationalises that Article as well as sets up the various institutions that provide basic education. Section 59 of the Act gives power to boards of management of basic education institutions, such as the 3rd respondent herein, to determine cases on the discipline of students and report their decisions to the County Education Board. From the facts before us, it is apparent that this was what happened when the 3rd respondent determined that P and a number of other students should be disciplined by expulsion.

30) This decision was in line with section 35 of the Act which stipulates that one of the disciplinary measures that may be undertaken against a child is expulsion, as long as that expulsion is undertaken in a manner that does not violate the rights of the child. It appears to us that the County Education Board had this in mind when it asked the 3rd respondent to reconsider its position and conditionally re-admit P at an appropriate time. The expulsion of a student is not of itself a bar to the student's right to basic education. In the instant appeal, it is apparent that P was admitted to a different learning institution. This much was confirmed by the County Education Board when determining the question of settling P. From the 1st respondent's account which was not denied by the appellant, it was the appellant's choice not to attend the meeting that had been called by the 2nd respondent where P's conditional re-admission was to be discussed. We find that in the circumstances of this case, the appellant cannot now claim P's right of access to basic education was interfered with.

31) In the end, on my re-evaluation of the evidence, I find that the appellant's petition lacked merit and was properly dismissed. Accordingly, I find no merit in this appeal and would dismiss it with an order that each party bears his/its own costs. It is so ordered.

Dated and delivered at Kisumu this 30th day of December, 2019

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF H. OKWENGU, JA.

I have read the draft Judgment of my sister Mohammed, JA. The facts relating to this appeal are well captured in the Judgment. I fully concur with the reasoning of my sister Judge. The Learned Judge of the High Court properly considered the issues and came to the correct decision. In the circumstances, the orders of the Court shall be as proposed by Mohammed, JA.

This Judgment has been delivered in accordance with Rule 32(3) of the Court of Appeal Rules Githinji, JA having ceased to hold office by virtue of retirement from service.

Dated and delivered at Kisumu this 30th day of December, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR