



REPUBLIC OF KENYA



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KO (Suing on behalf of OKJ) v Supreme Council of Kenya t/a Kenya Muslim Academy (Petition 511 of 2014) [2024] KEHC 1672 (KLR) (Constitutional and Human Rights) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1672 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 511 OF 2014
LN MUGAMBI, J
FEBRUARY 23, 2024

BETWEEN

KO (SUING ON BEHALF OF OKJ) PETITIONER

AND

SUPREME COUNCIL OF KENYA T/A KENYA MUSLIM ACADEMY RESPONDENT

JUDGMENT

Introduction

1. The instant petition is dated 14th October 2014 and prays for the following reliefs:
 - i. A declaration that the respondent's actions in suspending KO , the petitioner's son, is illegal as it is discriminatory and against the petitioner's son constitutional rights.
 - ii. Damages.
 - iii. Costs.

The Petitioner's Case

2. The Petitioner, KO swore the supporting affidavit to the Petition also dated 14th October, 2014. In addition, four witnesses were called to testify in support of the Petition. The four witnesses were: OK (PW1), then a minor, testified on 13/8/2015. He produced the school suspension letter dated 21/9/2014- P. Exhibit 1; Stephen Matinde Joel (PW2) an Assistant Government Chemist testified on 17/9/2015. He produced the Government Analyst Report- P. Exhibit 2. The Petitioner KO(PW3) who instituted this Petition was the father to (PW1). He gave evidence on 17/9/2015. The MSA



- (PW4) was the mother to OK (PW1) the subject around whom this Petition revolves. She testified on 18/5/2016.
3. Brief the facts are that OK was a form 2 student at Kenya Muslim Academy owned by the Supreme Council of Kenya Muslims having enrolled in the school in 2013.
 4. On 21st September 2014, the respondent through the School Principal issued a letter to deliver to his parents. The letter indicated that the son had been suspended from the school indefinitely. This was based on an allegation that the son had been using illegal drugs in the school. In the testimony of PW1, he stated that the Principal had accused him of using Miraa and bhang, an allegation which PW1 disputed then and before the court as a false accusation. PW1, PW3 and PW4 were categorical the respondent did not call or inform PW3 (the father) or PW4 (the mother) before issuing PW1 with the letter of indefinite suspension from the school.
 5. No medical examination had been carried out on PW1 either. PW3 (the mother) accompanied her son (PW1) to the school the following day but she received a hostile reception from the School Principal who asked her to leave with her son's box, she declined. The mother decided to take the son (PW1) for a drug examination and the report turned out negative a fact confirmed by PW2- the Government Analyst who produced P. exhibit 2.
 6. It was thus the Petitioner's contention that the respondent's actions were illegal, discriminatory and malicious. As a consequence, he contended that his son's rights under Article 27(4) & (5) and 43 of *the Constitution* were contravened. The mother, PW3 stated that the actions by the Respondent affected her son mentally when efforts to give his side story did not succeed to the extent that she contemplated suicide and even he refused to go to any other school until six months later. She testified:

 "...My son refused to go back to school and wanted to commit suicide. We raised my son very well as well as were siblings. He refused to go to school for six months but later went to another school. He does not concentrate at the school at all. I was never shown any miraa that my son had or was found with..."
 7. Mr. Stephen Matinde (PW2) was the Government Chemist who confirmed that on 24th September 2014, he tested the urine of the petitioner's son to confirm the presence drugs but the results were negative for cannabinoid (bhang) and miraa. He added that the urine sample is effective within a duration of 36 hours. He stated that any trace of the drug is sufficient to give a test result. For instance, he informed that a puff of bhang can be detected by testing.

The Respondent's Case

8. In response, the respondent filed a replying affidavit by Michael Ochieng' Ouma, the Principal sworn on 24th November 2014 which the Respondent only relied on in these proceedings. He claimed that the petition was made up of falsehoods.
9. He asserted that the petitioner's son (PW1) was an indisciplined student with unbecoming conduct and unsatisfactory academic grades. In particular, he referred to an incident where the petitioner's son sneaked out of school through the fence. As a consequence, he was sent home and returned with his mother to school on 4th November 2013. When probed, the petitioner's son admitted to breaking the school rules, a fact that was recorded in the school black book. Upon complying with his punishment, he was allowed back in school.
10. In regard to the incident on 20th September 2014, (which is the subject matter of this Petition), his account of the event was that during the Saturday School entertainment session, the petitioner's son



(PW1) summoned a student to take miraa with him but the particular student declined and instead reported the incident to the school administrator.

11. The Teacher on duty, Mr. Mohamed Nur, tried in vain to look for the petitioner's son that night but did not find either in the Hall or the dormitory. When he resurfaced, he denied the allegations. The respondent suspended him on 21st September 2014 pending further investigation. The petitioner's son (PW1) accompanied by his mother went back to the school on 22nd September 2014.
12. When the incident was explained and the Petitioner's mother reached the petitioner (PW3) on phone to appraise him, the Petitioner (PW3) demanded that his son be re-admitted to the school. The respondent refused to re-admit PW1 until the drug abuse allegations were addressed. Thereafter the petitioner on 29th October 2014 came to School and collected all of his son's belongings.
13. The respondent insisted that its action was reasonable and justified since a school must consider the students' rights and also uphold the school rules. He added that the respondent in keeping with Article 47 of *the Constitution* wrote to the parents informing them why the son had been suspended.
14. He likewise contended that the petitioner had failed to demonstrate how Article 27 (4) and (5) of *the Constitution* had been violated. Equally he asserted that the right to education under Article 43 of *the Constitution* had not been violated. He stated that the rights of the Petitioner's son under Article 47 were observed only for the petitioner to interfere with an ongoing disciplinary process by removing his son from the school.

Parties' Submissions

Petitioner's Submissions

15. Munyalo Muli and Company Advocates filed submissions and a list of authorities dated 1st October 2020 on behalf of the Petitioner.
16. Counsel submitted that the Government medical examination report (P. Exhibit 2) was carried out within 3 days and showed negative results the respondent refused to lift the petitioner's son indefinite suspension by re-admitting him. He submitted that the fact that the petitioner's son was sent away without subjecting him to any medical examination or an opportunity to defend himself violated his right to natural justice.
17. Counsel cited Section 4(2) of the Children's Act which requires that in all actions concerning a child, the best interests should be the primary consideration. He relied on *R.W.T. v N.S. School* (2012) eKLR where it was held thus:

“... In a school environment, it is the welfare of all the children that must be considered rather than that of a deviant child who has a disciplinary problem. But there is also a responsibility to be borne in respect of a child, one that flows from the human rights and fundamental freedoms of each individual. These cannot be subscribed 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*...”
18. He similarly relied on: *E.K. and 5 others v the Registered Trustees of S.H.S* (2015) eKLR; *Nyongesa and 4 others v Egerton University College* (1990) eKLR; *G.N. v Chumani Secondary School Board of Management* (2014)eKLR; *Republic v Kenyatta University Ex parte Njoroge Humprey Mbuthi*(2015)eKLR and *Onjira John Anyul v University of Nairobi*(2019)eKLR.



19. Counsel in view of this authorities noted that although a school is entitled to uphold the discipline of the students, the decision to expel a student must be in tandem with procedural fairness. Being that this was not upheld in the petitioner's son's case, Counsel submitted that he was entitled to an award of Ksh.250,000/- as compensation. In this regard reliance was placed in E.K. and 5 others (supra) where the petitioner was awarded a sum of Ksh.150,000/- for a similar violation.

Respondent's Submissions

20. On 24th January 2021, Wafula, Washika and Associates Advocates filed submissions and a list of authorities for the respondent.
21. Counsel for the Respondent challenged the petition on grounds that it does not meet the legal threshold of precision required in constitutional Petitions as laid down in the case of Anarita Karimi Njeru v Republic (1979) eKLR and reaffirmed in Civil Appeal No 290 Of 2012, Mumo Matemu v Trusted Society Of Human Rights Alliance. In Counsel's view the petition provides no particulars in regard to the claim made on the violation of Article 27 of *the Constitution*. Counsel argued that it was incumbent on the Petitioner to demonstrate the manner in which the Respondent discriminated against his son and caused him harm or injury. He questioned how the respondent's action of suspending the petitioner's son alone can by itself be termed discriminatory. Citing Section 107 of the *Evidence Act*, he contended that evidence of discrimination ought to have been adduced to support the allegation as was held in Alfred N. Mutua v Ethics & Anticorruption Commission (EACC) & 4 others (2016)eKLR where the Court stated:

“We find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of *the constitution*. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.”

22. Counsel submitted that fundamental rights and freedoms of an individual can be limited in order to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; in this case, it was the rights of the other students.
23. Counsel further asserted that although the petitioner had relied on the Government Chemist's laboratory results, the Petitioner did not involve the Respondent when those samples were being taken. Further, the confirmation of the donor could not be guaranteed under the circumstances. According to Counsel, the results were only disclosed during these proceedings hence was thus a well calculated plan by the petitioner to preempt this Petition.
24. On costs, Counsel submitted under Section 27 of the *Civil Procedure Act*, costs follow the event. He relied on Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-Operative Society Ltd Judicial Review Application No 6 of 2004 where it was held that:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event....It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

25. He similarly relied on Cecilia Karuru Ngayu V Barclays Bank Of Kenya & Another (2016) eKLR.



Analysis and Determination

26. In my view this Petition raises the following issue for determination:

- i. Whether the petitioner's rights under Articles 27 (4) & (5), 43(1) (f), 47 of *the Constitution* were violated; and
- ii. Whether the petitioner is entitled to the reliefs sought.

(a) Whether the petitioner's rights under Articles 27 (4) & (5) were violated

27. The petitioner's main contention was that the action taken against his son by the Respondent was discriminatory. In the Petition dated 14th October, 2014 under the sub-heading 'violation Of Fundamental Rights And Freedoms' the Petitioner states in paragraph 10 and 11 as follows:

“10. Article 27 (4) and (5) of *the Constitution* provides that no person should discriminate directly or indirectly against another person on any of the grounds of their race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The Prisoner has kept the prisoner out of school on framed up charges of drug abuse.”

11. The Petitioner's son is currently not attending classes while the other students in his class have resumed their studies and Article 43 of *the Constitution* gives the Petitioner's son the right to an education, which the Respondent is trying to inhibit for suspending him...”

28. The Respondent's response to discrimination claim made by the Petitioner is contained in paragraph 38 of the replying affidavit; which states:

“That the Petitioner has not demonstrated discrimination on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth as stated in Article 27 (4) and (5) of *the Constitution* and is merely regurgitating articles of *the Constitution* on fishing expedition...”

29. The right to equality and freedom from discrimination is provided for under Article 27 of *the Constitution*. It states:

27. Equality and freedom from discrimination

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (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.



- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender

30. The meaning of discrimination was judicially considered by the Supreme Court in the case *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) where in adopting the decision of the High Court in *Peter K Waweru v Republic* [2006] eKLR the Court held as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification...”

31. In drawing constitutional Petitions, the necessity to plead petitions with reasonable degree of specificity is emphasized. In *Mumo Matemu v Trusted Society of Human Rights*, the Court of Appeal upheld the principle of reasonable degree of precision in drawing Constitutional Petitions by stating thus:

“...We cannot but emphasize the importance of precise claims in due process, substantive justice and exercise of jurisdiction are function of precise legal and factual claims... Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The Principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle...”

32. Having regard to the above principles, the duty of this Court is therefore examine and determine if the claim put forward by the Petitioner concerning discrimination met the legal threshold; firstly, in terms particulars relied upon in respect of the alleged discrimination and, secondly, in terms of proof.



33. In the instant Petition, the Petitioner cites Article 27 (4) and (5) and alleges the son was discriminated when he was chased away from school on allegations that he was found abusing drugs. Discrimination as already explained is treating people in similar circumstances or category differently either on account of prohibited grounds such as age, sex, religion or without any reasonable justification for the distinction that results in favouring one category against the other.
34. In the present Petition, the Petitioner does not say that there were students in similar circumstances as the Petitioner is accused of who were favoured or treated differently. He does not allege the purported discrimination was based on any of the prohibited grounds specified in *the Constitution*. The Petitioner having failed to state any ground that is a manifestation of different treatment afforded to him as opposed to any other person in similar a situation or category cannot talk of far discrimination under Article 27 (4) and (5) of *the Constitution*. That component of the Petition is misconceived and must inevitably flop.

(b) Whether Petitioner’ right to Education under Article 43 (1) (f) was violated.

Another aspect of the Petitioner’s claim was based on the right to education. The Petitioner claimed that by its actions, the Respondent violated his son’s right to education. The right to education is part of economic and social rights under Article 43 of *the Constitution*. The provision provides as follows:

43. Economic and social rights
1. Every person has the right—
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.
 2. A person shall not be denied emergency medical treatment. (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

35. The application of Article 43(1) (f) of *the Constitution* has been extensively considered by Courts. Education for children is jealously protected by *the Constitution*. Nevertheless, discipline in education institutions is equally an important factor in any learning environment. Learners are required to comply with the set standards and defiance attract sanctions that are usually prescribed in those rules.



In HOO (a child suing through his father and next friend) POO v Board of Management N. School & 2 others (2018) eKLR the court stated:

“... it is also trite law that the right to education is not absolute, but is subject to the rules and regulations governing studies/education in a given institution. In the instant case, the respondent case was that it had rules which every student had to comply with as a condition for their studies in the said school. I therefore find that having found the Petitioner was guilty of breach of school rules after subjecting him to the requisite disciplinary process, the 1st Respondent was justified in excluding him from staying in its school and that such exclusion, cannot be said to amount to denial of right to education...”

36. Nevertheless, implementation of these rules must be in conformity with due process requirements. The question therefore becomes, was due process followed by the Respondent in taking the action against the Petitioner’s son? This is what leads to the next issue, namely:

(c) Whether the Respondent complied with the Constitutional Principles on the fair administrative action under Article 47 of the Constitution.

37. The School rules attached to Respondent Replying Affidavit- annexure 4 clearly specified at Rule 9 that drug abuse was not tolerated in the school and any student found culpable was to get instant expulsion. It stated:

“9. Drug abuse- You are expected to resist any intoxicating stuffs and smoking. Failure to observe this rule will lead to instant expulsion.”

38. The Petitioner does not contest the existence of these rules or the applicable sanction. His main grievance was that the son was not accorded a hearing prior to the decision that prematurely terminated his studies at the Respondent’s school. In the supporting affidavit to the Petition, he complains at paragraph 5 thus:

“That on or about 21st September, 2014; without any warning and lawful justification, the respondent vide its letter of that date indefinitely suspended my son on alleged grounds of abusing drugs in school.”

39. The suspension letter issued to the Petitioner’s son by Respondent reads:

“Re: Suspension From School

Name: OK (the Court has hidden his identity)

ADM: (Particulars withheld)

Form 2

The above-named boy has been suspended for the following reason (s);

- i. Abusing drugs in school

He is therefore suspended indefinitely.”

40. The main grievance by the Petitioner was about the unfairness of the decision. He contended it was made without any evidence to support the allegation. That even after his wife (PW4) went to school to find out what had happened, the School Principal treated her with hostility and told her to pick



her son's box and leave the Institution. The petitioner is aggrieved that the decision made by the respondent was arbitrary and contrary to the rules of natural justice.

41. On the contrary, the respondent disputed the Petitioner's contention and asserted it upheld the principles under Article 47 of *the Constitution* by giving the son a letter to take to the Petitioner with written reasons indicating why he had been suspended indefinitely. The respondent insisted that the suspension was done to allow investigation but the Petitioner was insisting on his son being readmitted without completing the investigations.
42. The concept of natural justice is the solid rock upon which justice rests. It simply means you cannot condemn a man unheard. In the Indian case of *C. Pitchiah v Andhra University* - 1961 ALT. 317, AIR 1961 AP 465 the Court stated as follows regarding the concept of natural justice:

“The expression 'Natural Justice' conveys the notion that the result of the process should be just. There are two concepts underlying this doctrine, namely, the authority deciding the dispute should be impartial and the party to be affected should be given full and fair opportunity of being heard.”

43. The Supreme Court of Canada in the case of *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 expressed this fundamental principle as follows:

“...The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions...”

44. Our own Constitution at Article 47(1) guarantees every person a right to a fair administrative action by stating thus:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.”

45. This is further cemented by the *Fair Administrative Action Act*, 2015 in Section 4 which reads as spelt out above in Section 4(1) & (2) provides in sub-section 3 & 4 that:

- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to Section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or



- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
- a. attend proceedings, in person or in the company of an expert of his choice;
 - b. be heard;
 - c. cross-examine persons who give adverse evidence against him; and
 - d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
46. The centrality of fair administrative action as a constitutional right was underscored in the South African Constitutional Court in the case of *President of the Republic of South Africa and others v South African Rugby Football Union and others (CCT16/98) 2000 (1) SA 1*, where the Court explaining the significance of Section 33 which is worded similarly as our Article 47 stated:
- “... Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of Section 33, but also its content. The principal function of Section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”
47. In our own context, the Court of Appeal in *Judicial Service Commission v Mbalu Mutava & Anor (2015) eKLR* held:
- “...Article 47 (1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of State Organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights...The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47 (1) to the principle of constitutionality rather than the doctrine of ultra vires from which administrative law under the common law was developed...”
48. It is thus imperative that I undertake a procedural review of the respondent’s action and weigh it against the settled principles on administrative justice to determine if the same measured up to those standards.
49. The Respondent through its principal, Michael Ochieng swore a replying affidavit to this Petition that on or about 20th September, 2014, during School Saturday entertainment, the Petitioner’s son approached a fellow form 2 student and asked the form 2 student to join him in chewing miraa. The form 2 student refused and reported the matter to the administrator that very night. The teacher on duty, Mr. Mohamed Nur proceeded to look for the Petitioner’s son in the entertainment Hall and the dormitory but did not find him. The Petitioner’s son resurfaced later and feigned knowledge of the



incident and having already disposed off miraa. On 21st, September; he was issued a suspension letter informing his parents the reason for suspension was the use of drugs in school. The Principal insisted that the suspension was intended to facilitate the school conduct of investigations and call the student and his parents after the said investigations had been completed.

50. In this case, an allegation was made against the Petitioner's son through a complaint report by an unnamed classmate to the Teacher on duty, a Mr. Mohamed Nur. The Principal acted on the information to instantly suspend the Petitioner's son the following day for unspecified duration.
51. The parents promptly proceeded to the school to know what had transpired. The mother says she was treated an unkind manner by the Principal and was told to cart her son's box from the school. Six months lapsed without the Petitioner' son getting a hearing from the school. He eventually looked for an alternative school to enroll his son.
52. Although the Respondent stated that the suspension was meant to allow the school conduct investigations, the allegation is my view not genuine having regard to the totality of the facts of this case. The Petitioner waited for six months without any word from the school. That is when he decided to enroll the son to another school. Can it be considered reasonable for the respondent keep a child (a form 2 student) waiting at home for six months under the guise of conducting investigations? Article 47 states that a person has a right to administrative action that is expeditious, I do not think that sending a Secondary student away for such a long period of time under pretext of conducting investigation is by any stretch of imagination expeditious or reasonable. In any event, there is no evidence by the Respondent that it ever reached out to Petitioner at all for purposes of concluding this disciplinary matter. Consequently, despite the protestations of innocence by the Petitioner's son, he was never given a chance for a disciplinary hearing to counter the accusations levelled against him. I am convinced that going by this turn of events, the wording of the letter 'indefinite suspension' was in effect a ploy to constructively expel from the Institution.
53. This was blatant violation of Constitutional and Statutory principles on the right to fair administrative action. The parents and the child were not treated fairly by the Respondent. A Court of law cannot condone indiscipline in schools and uphold decisions of school management where due process is demonstrated to have been followed before the punitive action is taken. However, where such decisions are made devoid of any fairness, Courts must intervene to ensure sanity and protection of the learners. This position resonates well with the words of Nyarangi J in *Nyongesa & others v Egerton University* [1990] KLR 692 where he stated:

“...I shall now state that courts are very loathe 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...”
54. Having regard to the foregoing, it is my finding that the rights of the Petitioner's son to fair administrative action under Article 47 of *the Constitution* were violated by the Respondent's agent, the School Principal in the manner he dealt with this young boy.

(d) Whether the petitioner is entitled to the reliefs sought

55. It is the petitioner's claim that he is entitled to a compensation of Ksh.250,000 for the alleged violation. On the contrary the respondent opposed the claim noting that the petitioner had not established any violation.



56. I have found as a fact that the right of the Petitioner to fair administrative action was violated. The Petitioner claims compensation.
57. Article 23 (3) recognizes compensation as one of the reliefs a Court may grant for violation of a constitutional right.
58. The Court of Appeal addressed the manner of computing damages in of constitutional cases in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR by stating as follows:
- “...the South African Case of *Dendy v University of Witwatersrand, Johannesburg & others* - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:
- “...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.
- “...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”
59. Similarly in the case of *Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another* (2019) eKLR said:
- “96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion... Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.”
60. In the present case, I note that the Respondent's arbitrary decision caused the Petitioner's son right to be heard after serious allegations were made against him. He was out of school for six months waiting to be accorded that opportunity but none was granted. The truth about those allegations will thus never be known and the young man will live with this scar without side of the story being told.
61. This decision of this Court will in a one way or another serve to vindicate him for the injustice meted on him at the hands of the Respondent. I believe reasonable compensation will suffice to vindicate his rights. The Respondent did not propose any quantum for purposes of compensation. However, the Petitioner's counsel cited the case of *Onjira v University of Nairobi* (2019) eKLR in which the Court



awarded Kshs. 1,000,000 compensation and the case of E.K. & 5 others v Registered Trustees of S.H.S (2015) eKLR where the Court awarded compensation of Kshs. 150,00/-.

62. The Petitioner proposed an award of Kshs. 250,0000/- as fair and adequate compensation. I find that an award of Kshs. 230,000/- in the circumstances of this case to be fair and reasonable. I also award him costs of this Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23ND DAY OF FEBRUARY, 2024.

L N MUGAMBI

JUDGE

