

## ***W.J. and Another v. Astarikoh Henry Amkoah and 9 Others***

**[2015] eKLR, Petition No. 331 of 2011**

**Kenya, High Court at Nairobi, Constitutional and Human Rights Division**

### **COURT HOLDING**

The High Court had jurisdiction to hear the matter because it raised issues of violations of constitutional rights. That there was a criminal matter pending against one of the respondents on the same facts, or that the petitioners could have sought redress in a civil court, did not exclude the jurisdiction of the Court.

The acts of sexual abuse perpetrated by the petitioners' teacher, 1<sup>st</sup> respondent, amounted to violations of constitutional rights of the petitioners, including the right to health, dignity, and education.

By virtue of the oversight responsibilities over the school and the conduct of teachers, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were liable for the acts of sexual abuse perpetrated by the 1<sup>st</sup> respondents.

The rights of the 1<sup>st</sup> respondent were not infringed upon as a result of the petition.

### **Summary of Facts**

The petitioners were two minors who at the time of filing the petition were aged 12 and 13 years, respectively. The 1<sup>st</sup> respondent was the petitioners' teacher (respondent teacher) at the school the petitioners attended. Their school was the 2<sup>nd</sup> respondent. The 3<sup>rd</sup> respondent was the Teachers Service Commission (the "TSC"), a public authority established under Article 327 of the Constitution of Kenya, 2010, whose responsibilities included registering, recruiting, employing, and exercising disciplinary control over teachers. The 4<sup>th</sup> respondent was the state in the person of the Attorney General.

The petitioners alleged that the respondent teacher had had sexual intercourse with them, and that disciplinary action was then taken against him by the TSC. The matter was reported to police and the respondent teacher was charged with defilement of the children contrary to Section 8(1) as read with Section 3 of the Sexual Offences Act No 3 of 2006.

The petitioners sought damages against the respondent teacher for the alleged sexual abuse. They also claimed damages against the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents jointly for their responsibility for the actions of the respondent teacher, and sued the Government of Kenya for failing to put in place measures to control sexual abuse of students in schools.

### **Issues**

The Court isolated four issues to determine:

1. Whether the Court had jurisdiction to entertain the petition and grant the orders sought.
2. Whether the petitioners had established violations of their constitutional rights by the respondents.

3. Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents were vicariously liable for the violation of the petitioners' rights by the 1<sup>st</sup> respondent.
4. What remedies (if any) to grant to the petitioners and/or 1<sup>st</sup> respondent.

### **Court's Analysis**

In its reading of Article 22(1) of the Constitution, which gives persons the right to seek courts' intervention in cases of rights violations, and Article 23(1) read together with Article 165, which provides for the jurisdiction of the High Court in enforcing constitutionally guaranteed rights, the Court agreed with the petitioners that it had jurisdiction over the matter. Its view was that the petition alleged violations of constitutional rights and there was nothing in the law prohibiting the Court from entertaining the matter. The Court therefore held that it had jurisdiction to hear the petition.

The Court went on to determine whether the respondent teacher violated the rights of the petitioners. It took note of two apparently conflicting facts: that the petitioner was acquitted of the criminal charge of sexual abuse, but on the other hand, that the TSC took disciplinary measures against him on the allegations. The Court referenced a decision in *Spadigam (J.) vs. State of Kerala*, (1970) ILLJ 718 Ker, where the Indian High Court observed that an acquittal did not mean a person could not be found culpable in a disciplinary proceeding. The Court therefore found, on a balance of probabilities, that the respondent teacher had committed the alleged acts.

The Court reconciled the fact that the events occurred when the repealed constitution was in force, which did not have provisions on the right to dignity, the right to health, and the right to education, though it contained provisions on non-discrimination and the right to freedom and security of the person. The Court followed the principle that the Constitution did not apply retrospectively so that acts done under the 1963 Constitution would not be determined by the new Constitution unless the nature of the violation was continuing. It found that the violations on the right to dignity, which included emotional and psychological trauma, were of a continuing nature, and therefore fell under the new Constitution.

The Court also observed that the rights guaranteed to children under the 2010 Constitution, specifically the right not to be subjected to any form of sexual or physical violence, and the rights to education, non-discrimination, and dignity, are guaranteed to children under the Children's Act, 2001 (the "Children's Act"). These rights are also guaranteed under the Convention on the Rights of the Child (CRC) which is domesticated by the Children's Act. The Court therefore included Article 19 of the CRC in its discussion because it provided for measures that state representatives ought to take to protect the child from all forms of abuse, including sexual abuse, and also to support the child in cases where violations have occurred.

As a result of its analysis, the Court held that the acts of the respondent teacher amounted to violation of the rights to dignity, education, and health of the petitioners. The Court also held the respondent teacher liable for damages.

The Court then turned to whether the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents had violated the petitioners' rights. It examined this issue from two perspectives: (1) the failure of the respondents to put in place

measures to protect the petitioners from sexual abuse; and (2) the responsibility of the respondents for the acts of the respondent teacher.

The Court inquired into the measures the respondent authorities had taken to protect school children from sexual abuse. It expressed the view that the good intentions of the Government and the TSC were limited, as there was not only insufficient enforcement of ethical standards, but they also were ineffectual. The Court drew attention to the fact that there was insufficient awareness raised among both students and teachers about the ethical standards that stipulated the professional boundaries of the teachers. Furthermore, the Court observed that the Government and respondent authorities appeared to have failed to take any measures to address the consequences that the sexual abuse perpetrated by teachers had on the survivors.

In determining whether the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents were liable, the Court was persuaded by the argument that these respondents owed a duty of care to the students, such that if they failed to safeguard the students from sexual abuse, they not only failed in their duty, but were also responsible for the conduct of teachers who sexually abused the children. The Court therefore held that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents were responsible and liable for the conduct of the respondent teacher.

The Court observed that the Government had not done enough to hold accountable those who abuse vulnerable constituents under their care, “or to place a duty of care on those who employ them, to diligently exercise their duty of care, first by ensuring that they do not employ persons with a history of abuse, and secondly, to ensure that they avoid instances of abuse in their institutions.” The Court expressed the opinion that it was not enough to prosecute sexual offenders. Rather, it was important to commit to ensuring that there is no room at all for abuse in institutions that care for vulnerable groups.

The Court then considered the respondent teacher’s argument that his rights were violated because the court proceedings were initiated when a criminal matter was pending, based on the same facts, which had in fact ended with an acquittal. From the evidence before it, the Court held that the rights of the respondent teacher had not been violated.

## **Conclusion**

The Court declared that the respondents’ actions and inactions violated the rights to health, education, and dignity of the petitioners. It also declared that all schools and school teachers are at all times under the legal status of a guardian and are under a duty to protect all students from sexual and gender-based violence or harm by teachers. It awarded damages amounting to 2 million Kenyan shillings (equivalent to 20,000 USD) to the first petitioner, and 3 million Kenyan shillings (equivalent to 30,000 USD) to the second petitioner.

## **Significance**

Many governments in Africa, like Kenya, have domesticated, or at least incorporated into their local laws, child rights recognised in international and regional treaties, especially the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC). These instruments create obligations on governments to respect, protect, and fulfil the rights of children, including the right to health, dignity, and freedom from harm, which are among the rights violated when a child is

sexually abused. This case highlights the importance of educational institutions taking measures to prevent and address child abuse.

The Court observed that the measures taken to protect school children and also to promote their sexual and reproductive health rights were woefully inadequate and ineffective. Indeed, intentionally or unintentionally, there appears to be lack of concerted effort to root out the problem. There are no effective preventive measures against threats, addressing potential threats, and taking definitive measures to deal with both the perpetrator teachers and the child survivors.

One of the important challenges about sexual abuse is that the stigma and shame associated with suffering sexual abuse prevents cases of abuse from surfacing. This creates challenges for addressing sexual abuse, and is devastating for survivors, who may have no support from their families, school authorities, or the government to address their predicament.

Perhaps the question here is how governments have understood their obligation to protect children from sexual abuse. Governments have tended to place too much trust in criminalisation-based protection regimes that are built around criminal justice and enforcement of sexual offence laws. Unfortunately, as the Court observed, this does not work very well.

One observation is that child protection approaches have emphasised “protecting” the child, based on the assumption that a child is helpless and totally dependent on adults for protection. While it is true that children are vulnerable and have a right to special measures of protection, to regard them as individuals who lack agency undermines the full realization of their human rights.

One effective preventive measure against child abuse is therefore to create an environment in which the children themselves can recognise threats, and initiate responses that are within their capacity. The role of governments is then to provide support for the child. Effective child protection regimes should comprise both the creation of an enabling environment, wherein there are laws, policies, and codes of conduct to protect children which are effectively enforced, and the empowerment of children, to enable them to recognise, prevent, and avert danger.

The Court’s decision makes it clear that it is important for governments to require all schools to have child protection and support policies that are simple and clear to everyone, including teachers, parents, and especially students themselves. In cases of sexual abuse, the policies must be clear on what support is provided to the students, including counselling. Policies must also spell out linkages to other supportive processes including the health and justice systems.